



WRITTEN TESTIMONY OF THE IMMIGRANT LEGAL RESOURCE CENTER BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS

*HEARING ON COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT AND REDEMPTION AND THE EFFECT ON COMMUNITIES | MAY 19, 2017*

**SUBMITTED BY ROSE CAHN, CRIMINAL AND IMMIGRANT JUSTICE ATTORNEY; DIRECTOR, IMMIGRANT POST-CONVICTION RELIEF PROJECT, [RCAHN@ILRC.ORG](mailto:RCAHN@ILRC.ORG)**

## I. WHO WE ARE

Since 1979, the Immigrant Legal Resource Center has stood at the forefront of defending the rights of the immigrant community, regardless of legal status, prior contact with the criminal justice system, or income.

The ILRC believes all immigrants deserve a chance to remain in the country, regardless of conviction history. We pursue policy change and educate immigrants, community organizations, and the legal sector to implement those changes to better serve the most marginalized immigrant populations. We achieve our mission through civic engagement, technical assistance and training, and policy advocacy to improve social and economic stability and opportunities for immigrants. We strive to disrupt systems of inequality and punishment, and keep families together.

The ILRC has specialized expertise in the complex intersection of immigration and criminal law. We provide critical support to immigration attorneys and criminal defenders through case-specific legal consultation, trainings, and practice advisories about new developments in the law. Public defender offices throughout the country contract with the ILRC to strategize about immigration-safe dispositions for non-citizen clients. The ILRC has authored a number of publications specifically for defense attorneys and immigration practitioners working in this complex intersection.<sup>1</sup> The ILRC also produces a free “quick reference” chart that analyzes the immigration consequences of more than 200 convictions in California, and helped create similar charts and materials analyzing offenses in Arizona, Nevada, and Washington.<sup>2</sup>

The ILRC also operates one of the only pro bono immigrant post-conviction relief projects in the country. This effort is led by Rose Cahn, a national leader in immigrant post-conviction relief. With over 15 years of experience working in the field of immigrant rights, and a special focus on the intersection of criminal and immigration law, Rose has spent her career working to expand opportunities to protect the constitutional rights of immigrants with criminal convictions.

Rose is a frequent speaker and trainer on the subject of immigrant post-conviction relief and has co-authored several manuals including *California Post-Conviction Relief for Immigrants* (Tooby) and *Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options: A Guide for Legal Service Providers* (Californians for Safety and Justice). Rose spearheads federal, state, and local advocacy to help advance the rights of immigrants with criminal convictions and assist providers in understanding how to better serve this population. She serves on the Advisory Committee of the National Clean Slate Clearinghouse and is on the Steering Committee of the American Immigrant Representation Project.

## II. IMMIGRANT LIVES IMPACTED BY CRIMINAL CONVICTIONS

On May 19, 2003, Angel Ramirez was pulled over while driving home from work. A careful driver, Angel was sure he hadn't been speeding, but during this "routine stop," police asked for proof of citizenship. Having none, he was immediately arrested, transferred to immigration custody, and placed in removal proceedings. At the time of his arrest, Angel had lived in the United States for thirty years. He was a well-liked, civically engaged, small-business owner. He and his U.S.-citizen wife had four children together and a fifth on the way. But, due to a single marijuana conviction from 1999—when he was eighteen and represented by counsel who never told him the lasting immigration consequences of a plea—Angel faced losing his family, his business, and the only country he had ever called home. Barred by his conviction from lawful permanent residency and any opportunity for discretionary relief, he was deported to Mexico.

In August 2008, Maria Sanchez, a long time lawful permanent resident, was convicted of growing a marijuana plant in her back yard. Born in Mexico, Maria had lived in the United States for over three decades, raising her children and grandchildren here. Maria suffered from arthritis and turned to the same remedy her mother and grandmother had used: she grew a single marijuana plant, soaked it in rubbing alcohol, and rubbed the alcohol tincture on her painful joints. This was Maria's first and only arrest. Her public defender got a good deal from a criminal perspective: four months of house arrest. Unbeknownst to Maria, however, that plea was the functional equivalent of signing her own deportation order. Considered an aggravated felony under immigration law, the conviction subjected Maria to

mandatory deportation and mandatory imprisonment, with no opportunity for discretionary relief. She suddenly faced the real likelihood of being separated from her family forever.

Abigail had lived in the United States since she was a young girl. She graduated from high school in California and married her high school sweetheart. They were young when they had their first child together and felt an increased financial burden when, less than two years later, they had their second. Abigail had two shoplifting convictions in short succession: the first for stealing dog food and the second for stealing baby formula for her 8-month-old son. She pled quickly, hoping to complete her short 4-day jail sentence, and return home to care for her family. However, instead of getting released from jail, she was surprised to find herself transferred immediately to immigration custody where she discovered, for the first time, that her two convictions subjected her to mandatory deportation.

When he was 12 years old, Richard left his home country of Jamaica to join his parents in the United States as a lawful permanent resident. He loved this country and volunteered to serve in the U.S. Army during the Vietnam War. He had a tough time reintegrating after he returned from his tour of duty. He was convicted for a small-scale drug offense for which he served twenty-three days in county jail. Richard eventually sobered up, got his life back on track, and decided to apply for U.S. citizenship. Instead of receiving his citizenship, however, Richard was placed in removal proceedings, and threatened with deportation to a country he hadn't called home in over fifty years.

### **III. LEGAL FRAMEWORK THAT LEADS TO FAST-TRACK DISCRETIONLESS DEPORTATIONS OF PEOPLE WITH CRIMINAL CONVICTIONS**

For immigrants like Angel, Maria, Abigail, and Richard, the lasting consequences of a criminal conviction—causing permanent separation from family, lifetime banishment, and denial of any form of discretionary relief—are not “collateral” at all, but the direct and mandatory consequences of their criminal convictions.

As the U.S. Supreme Court has recognized, the immigration consequence of a conviction “is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.”<sup>3</sup>

This country's immigration system, which today is more focused than ever on swiftly deporting noncitizens who come into contact with law enforcement, is colliding with an epidemic of mass incarceration. An estimated 65 million people suffer the lifelong consequences of a prior conviction.<sup>4</sup> Increasing national attention has been paid to helping individuals overcome the barriers to employment, health care, and housing that confront people with criminal records. But immigrants, 90 percent of whom are people of color subjected to racially biased policing and prosecution, are all too often left out of this conversation.<sup>5</sup> Indeed, when

President Obama released 6,000 people convicted of nonviolent drug offenses, a third of those released were immediately sent to immigration detention facilities to await their deportation.<sup>6</sup> While people talk about the need for “second chances,” the unforgiving nature of federal immigration law makes that notion illusive for most immigrants.

Immigrants face all of the barriers to reentry that citizens face plus an additional, compounding horror: lifelong banishment and permanent separation from their families. While this threat is particularly acute under the current presidential administration, the legal framework dates back many decades.

The years 2008-2016 saw more people deported than any other in the course of our nation’s history. The 3 million people deported in the last eight years are more than the number of people deported from the United States between 1892 and 1997 combined.<sup>7</sup> Immigration and Customs Enforcement recently reported that a record-high 91% of interior deportations were of individuals who had criminal convictions.<sup>8</sup> This is consistent with a fifteen-year trajectory during which the number of removals of noncitizens convicted of, or even just charged with, any crime has increased by a staggering 317%.<sup>9</sup>

The federal immigration framework that makes this possible was laid out in two laws passed in 1996 that dramatically altered the U.S. immigration system: the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>10</sup> and the Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA).<sup>11</sup> The 1996 Laws make the immigration system so severe that a single marijuana conviction can lead to deportation for many greencard holders, regardless of their time in the country or ties to U.S. citizen family members.<sup>12</sup>

The 1996 Laws made three broad changes to the U.S. immigration system. First, they vastly expanded the criminal grounds of deportation.<sup>13</sup> Second, many of the newly deportable offenses trigger *mandatory* detention and deportation. This bars immigration judges from considering people’s life circumstances before ordering them to a foreign country.<sup>14</sup> This means that many noncitizens will never even see an immigration judge before they are deported. In addition, even if a noncitizen is lucky enough to see an immigration judge, the 1996 Laws severely restrict the relief that the judge can grant.<sup>15</sup> Finally, the 1996 Laws significantly reduced the power of the courts to ensure the laws are fairly enforced.<sup>16</sup> They make relief from deportation extremely difficult by creating fast-track deportation procedures that allow low-level Department of Homeland Security officers to bypass the immigration court system.<sup>17</sup>

The 1996 Laws act as one-strike laws. Noncitizens who commit certain crimes can be subject to mandatory deportation even when there is no jail sentence imposed.<sup>18</sup> In some cases, noncitizens can face mandatory deportation based on the maximum sentence that could be

imposed for their offense, rather than what was actually imposed.<sup>19</sup> The 1996 Laws also allow the federal government to ignore state expungement laws and treat suspended sentences as if they were served.<sup>20</sup>

The rate of removal for immigrants with criminal convictions will likely only increase under the current presidential administration, which has frequently reiterated its intent to expand the number of immigrants in removal proceedings.<sup>21</sup> The current president has said that anyone even accused of a criminal offense will be prioritized for deportation.<sup>22</sup> The 1996 laws give the administration the legal framework to execute on this promise.<sup>23</sup>

#### **IV. CRIMINAL RECORD REMEDIES CAN HELP IMMIGRANTS OVERCOME THE IMPACT OF CRIMINAL CONVICTIONS**

Criminal justice reform conversations often reiterate the importance of providing second chances to people with criminal convictions.<sup>24</sup> To aid this, state legislatures increasingly enact state record clearance remedies like expungement, sealing, or reduction provisions.<sup>25</sup> Though more attention has been paid to helping citizens overcome the employment, housing, and health care hurdles that criminal convictions can cause, relatively scant resources have been directed to helping immigrants overcome perhaps the biggest hurdle to reentry of all: the immigration detention and subsequent deportation that can follow even low-level offenses.

As the federal immigration system saps discretion from judges to consider whether immigrants with criminal convictions can remain in the United States, state criminal courts can breathe discretion back into the immigration system by providing people with prior contact with the criminal justice system the opportunity to erase the criminal conviction and eliminate its immigration consequences.

States like California have taken great strides in this area. In the past two years, California has passed six post-conviction relief laws that have particular significance for immigrants with criminal convictions.<sup>26</sup> These laws reduce felonies to misdemeanors; change the maximum sentence on misdemeanors retroactively to 364 days from 365 to avoid immigration consequences; require defense counsel to advise of immigrant defendants of the consequences of convictions and plea bargain to avoid them; require prosecutors to consider avoiding immigration consequences when plea bargaining; and erase the consequences of drug possession offenses sentenced to diversion. One of the most broadly applicable of these new laws, [California Penal Code 1473.7](#), provides noncitizens suffering from old convictions with a new legal vehicle to vacate convictions that were undermined by trial counsel's failure to advise about immigration consequences. Because criminal courts are increasingly the gateway to the immigration system and even low-level non-violent convictions trigger

mandatory detention and deportation, the constitutionality of the underlying convictions deserves heightened scrutiny.

As more states look to ways to ensure that convictions do not produce insurmountable hurdles to effective reentry, we encourage thinking broadly about how to tackle the full breadth of consequences of a conviction, including the devastating and debilitating immigration consequences of many convictions. We must bridge the gap between the clean slate services network and immigrant communities.



## End Notes

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<sup>1</sup> See, e.g., Katherine Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008, updated 2013); *California Criminal Defense – Procedure and Practice* (CEB 2016) (including chapter on defending non-citizens); *Criminal Defense of Immigrants* (CEB 2016).

<sup>2</sup> See, e.g., ILRC, Quick Reference Chart, [www.ilrc.org/chart](http://www.ilrc.org/chart) (last visited June 12, 2017).

<sup>3</sup> *Padilla v. Kentucky*, 559 U.S. 356, 363 (2010) (“Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable . . .”).

<sup>4</sup> Pew Center on the States, “One in 31: The Long Reach of American Corrections” (Washington, DC: The Pew Charitable Trusts, March 2009), p. 4; National Employment Law Project, “65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment,” March 2011, p. 1.

<sup>5</sup> See PPIC, “Immigrants in California” at [www.ppic.org/main/publication\\_show.asp?i=258](http://www.ppic.org/main/publication_show.asp?i=258).

<sup>6</sup> “US to release 6000 inmates under new sentencing guidelines,” Oct. 6, 2015, <https://www.nytimes.com/2015/10/07/us/us-to-release-6000-inmates-under-new-sentencing-guidelines.html>

<sup>7</sup> <http://www.nytimes.com/interactive/2013/02/22/us/politics/growth-in-deportations.html>.

<sup>8</sup> <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>, p.4.

<sup>9</sup> U.S. Immigration and Customs Enforcement, Removal Statistics - Criminal Aliens, <http://www.ice.gov/removalstatistics>.

<sup>10</sup> For more information about the 1996 laws, see *Dismantle Don’t Expand: The 1996 Immigration Laws*, Immigrant Justice Network (May 2017); Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of the U.S. Code).

<sup>11</sup> Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in various sections of the U.S. Code).

<sup>12</sup> See, e.g., 8 U.S.C. § 1101(a)(43)(B) (listing drug sale offenses as aggravated felonies); 8 U.S.C. § 1229b(a)(3) (barring individuals with aggravated felony convictions from cancellation of removal, which allows judges to consider immigrants’ equities before ordering them removed); see also 8 U.S.C. § 1229b(a)(1) (requiring seven years continued residence after lawful admission in the United States to receive cancellation of removal); § 1229b(d)(1) (stopping the calculation of an immigrant’s period of continued residence if they commit specified crimes, including marijuana offenses, thus making such individuals ineligible for cancellation of removal if their offense conduct occurred within seven years of continuous residence after their admission). Together, 8 U.S.C. § 1229b(a)(1) and § 1229b(d)(1) are known as the “clock stop rule,” because certain offenses, including many marijuana convictions, freeze the calculation of immigrants’ length of residency for immigration relief purposes, denying them the chance to argue their cases before an immigration judge.

<sup>13</sup> See *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, Human Rights Watch 18–24 (July 16, 2007), <http://hrw.org/reports/2007/us0707/us0707web.pdf> (hereinafter “Human Rights Watch”).

<sup>14</sup> 8 U.S.C. § 1226(c) (listing grounds for mandatory detention); 8 U.S.C. § 1229b(a)(3) (barring cancellation of removal, the main form of equitable relief from deportation, for green card holders who have aggravated felony convictions); § 1229b(b)(1)(C) (creating bars to cancellation of removal for other criminal offenses). See also Human Rights Watch, *supra* note 5 at 25-28 (discussing the impact of the 1996 Laws’ elimination of the § 212(c) waiver). See also *supra* note 4 (discussing the clock stop rule).

<sup>15</sup> See 8 U.S.C. § 1229b(a)-(b) (limiting individuals eligible for cancellation of removal). The 1996 laws also eliminated the former INA § 212(c) waiver, which gave immigration judges much more discretion to grant relief; See Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 181, 187 (codified at 8 U.S.C. § 1182(c) (repealed 1996)).

<sup>16</sup> See, e.g., 8 U.S.C. § 1252 (stripping federal courts of jurisdiction to review many immigration judge decisions).

<sup>17</sup> See 8 U.S.C. § 1225 (provision authorizing expedited removal for inadmissible immigrants); 8 U.S.C. § 1228 (provision authorizing administrative removal for people with aggravated felony convictions).

<sup>18</sup> 8 U.S.C. § 1101(a)(43) et seq. (listing aggravated felony offenses, many of which do not require any sentence to jail time), 8 U.S.C. § 1229b(a)(3) (barring individuals with aggravated felony convictions from cancellation of removal). Permanent residents with less than 7 years of residence prior to a crime may also face mandatory deportation for other offenses under the clock stop rule, see *supra* note 4.

<sup>19</sup> 8 U.S.C. § 1101(a)(48)(B) (defining an offense’s sentence as the length of incarceration ordered by a court, regardless of whether that sentence is suspended or actually served); see also 8 U.S.C. § 1227(a)(2)(A)(i)(II)

(classifying some crimes for which a sentence of a year or longer may be imposed as deportable offenses); 8 U.S.C. §§ 1229b(a)(1); 1229b(d)(1) (triggering the “clock stop rule,” see supra note 4, for immigrants who commit such offenses, thus preventing judges from calculating their length of residence in the U.S. past the time such an offense is committed, often making them ineligible for relief); see also 8 U.S.C. § 1101(a)(43)(J) (making any RICO offense for which a sentence of a year or longer may be imposed an aggravated felony); 8 U.S.C. § 1101(a)(43)(T) (making any offense relating to failure to appear before a court an aggravated felony if a sentence of two years or longer may be imposed); 8 U.S.C. § 1229b(a)(3) (barring individuals with aggravated felony convictions from cancellation of removal).

<sup>20</sup> 8 U.S.C. § 1101(a)(48). The statute makes no exception for expunged offenses and courts have consistently interpreted none to exist. See, e.g., *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001) (affirming the BIA’s position that “conviction” encompasses expunged offenses for immigration purposes).

<sup>21</sup> “When Trump says he wants to deport criminals, he means something starkly different than Obama,” <http://www.latimes.com/politics/la-na-pol-trump-immigration-criminals-20161114-story.html>; “Trump vows to start deportations of criminals 'within one hour' of becoming president” <http://www.dailymail.co.uk/news/article-3761998/Donald-Trump-says-immigration-policy-bad-guys-removed-lowa-speech.html>

<sup>22</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

<sup>23</sup> Marisa Franco and Carlos Garcia, “The Deportation Machine Built Obama Built for President Trump,” *The Nation*, June 27, 2016.

<sup>24</sup> See *No Second Chance: People with Criminal Records Frequently Denied Access to Public Housing*, Human Rights Watch (2004).

<sup>25</sup> Brian M. Murray, *A New Era for Expungement Law Reform?: Recent Developments at the State and Federal Levels*, *Harvard L. and Policy Review*, vol. 10 (2016), p. 362.

<sup>26</sup> Proposition 47, effective Nov. 8, 2014; Cal. Pen. C. 18.5, effective Jan. 1, 2015; Cal. Pen. C. 1016.2 and 1016.3; Cal Pen. C. 1203.43, effective Jan. 1, 2016; Cal. Pen. C. 1473.7, effective Jan. 1, 2017; Cal. Pen. C. 18.5(b), effective Jan. 1, 2017; Proposition 64, effective Nov. 8, 2016.





#### San Francisco

1663 Mission Street, Suite 602  
San Francisco, CA 94103  
t: 415.255.9499 f: 415.255.9792

[ilrc@ilrc.org](mailto:ilrc@ilrc.org) [www.ilrc.org](http://www.ilrc.org)

#### Washington D.C.

1016 16th Street, NW, Suite 100  
Washington, DC 20036  
t: 202.777.8999 f: 202.293.2849

#### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.