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A PRICE TOO HIGH

US Families Torn Apart by Deportations for Drug Offenses



A Price Too High

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A Price Too High

Detention and Deportation of Immigrants in the US for Minor Drug Offenses

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Summary

Finally Off Drugs But Facing Deportation and Family Separation

MARSHA AUSTIN is facing deportation for a 1995 conviction for attempted criminal sale of a controlled substance in the third degree, stemming from her long struggle with a dependency on crack cocaine. A 67-year-old great-grandmother, Austin came from Jamaica to New York as a lawful permanent resident in 1985. Other than two sons in Jamaica, her entire family—husband, seven children, grandchildren and great-grandchildren—lives in the United States. They are all US citizens or permanent residents.



Marsha Austin (second from right) with her US citizen husband and three of her daughters, all US citizens or lawful permanent residents. Austin, a lawful permanent resident from Jamaica, is currently fighting deportation as an “aggravated felon” because a 1995 conviction for attempted sale of a controlled substance stemming from a long struggle with dependency on crack cocaine. © 2014 Private

“I live in a drug-infested area,” Austin said, describing her neighborhood in the Bronx in New York City. According to Austin, she began using drugs when her mother was killed after being hit by a train. For eight days, her family did not know what had happened to her. Austin said she was devastated by her death and accepted a cigarette laced with crack cocaine at her funeral.

Austin said she managed to hide her dependency from her family for many years, but her drug dependency led to a lengthy record of minor convictions, mostly for simple possession. The 1995 conviction for attempted sale happened, Austin said, when an undercover police officer asked her to go to a roof and buy five units of crack cocaine for him, for which he gave her five dollars. She pled guilty to attempted sale. She said her criminal defense attorney failed to tell her the conviction could lead to deportation.

Austin’s convictions led to little or no jail time, but in 2010, Austin said her husband had a seizure, and she drank alcohol, a violation of probation, to calm herself. Her probation violation led to a 90-day sentence, at the end of which, immigration authorities arrested her. Austin eventually spent two-and-a-half years in immigration detention at a jail in Hudson County, New Jersey. ICE repeatedly opposed her release, asserting she was under mandatory detention for her drug crimes, but then unexpectedly released her in March 2013. Two days after her release, Austin was back in her treatment program. Austin proudly reports that she has been “clean as a whistle” for the past five years.

The US government continues to argue, however, that she is subject to deportation for the “aggravated felony” of her 1995 attempted sale conviction.

Austin is desperate to remain in the US. Her husband is in very bad health, as is her daughter who suffered a breakdown after her own daughter’s serious illness. Austin said, “My kids and grandkids, that’s what I’m living for now.”¹

¹ Human Rights Watch interview with Marsha Austin and Sonia Lin (Austin’s attorney), New York, New York, May 5, 2014. Human Rights Watch also reviewed documents provided by Austin’s attorney, including Austin’s affidavit in support of her request for prosecutorial discretion.

Detained and Denied the Chance to Say Goodbye to His Dying Father

According to **ARNOLD AGUAYO**, his parents brought him to the US from Mexico when he was less than a year old. He grew up in Compton, California, with parents and siblings who are all US citizens and permanent residents. Aguayo, now 38, is himself a permanent resident with five US-born children.

Aguayo said he was particularly close to his father growing up. “I was a daddy’s boy, I would follow him around.” Aguayo is a plumber, and he credits his father for having taught him how to fix anything, as well as “how to be humble with people, to basically be a good person.” His father suffered from gout and diabetes, and Aguayo reported he had been his caregiver: “I used to do everything for him.... I was always there making sure he took his medicine.”

Aguayo struggled with dependency on methamphetamine for many years. He tried to keep it “stable” and not to let it affect his family, but he ended up getting arrested several times. One time, the police pulled him over, he said, claiming his music was too loud, but he believed, “Out here, you look young, they’re just going to pull you over for the hell of it.” He ultimately got arrested in September 2011 for violating probation because he had not gone to treatment. Aguayo said he had already sobered up by then, motivated by his wife and children, but going to treatment required him to miss work. After he had served four months in LA County Jail for violating probation, immigration authorities picked him up and told him the US government wanted to deport him.



Arnold Aguayo, holding a photo of his father, Arnoldo Aguayo, for whom he is named. Aguayo, a lawful permanent resident who grew up in the US, was held in mandatory immigration detention for seven months in 2011 and 2012 while he fought deportation for drug convictions. During that time, his father, a US citizen, had two heart attacks and died. Aguayo requested but was denied a short leave from detention to say goodbye. © 2015 Timothy Wheeler for Human Rights Watch

Aguayo, as a permanent resident with possession convictions, was eligible to apply for a type of pardon, lawful permanent cancellation of removal, and fight deportation. But under US law, any drug conviction triggers mandatory immigration detention while proceedings are pending. If Aguayo had been arrested for a criminal offense, he would have had a right to a bail hearing. He had no such right to apply for an immigration bond.

Aguayo was ultimately in immigration detention for seven months. During that time, his father had two heart attacks and eventually died. His attorney and his family tried desperately to get him released so he could see his father one last time, but he said immigration authorities responded, “It’s not that important.” Aguayo even considered accepting deportation just so he could be released and see his father, but his family talked him out of it. “I still haven’t gotten over it,” he said.

Aguayo had been the primary breadwinner, and without him, his partner and children could no longer pay the rent on their home. His oldest son was diagnosed with depression. He says his detention put such a strain on his relationship that they broke up, and his partner, who is Mexican, went back to Mexico and took their two children with her. Aguayo said he now only sees them on holidays and during school vacations.

If he had never been detained, Aguayo believes, “I would still have a stable home, I’d still have my kids living with me....Whatever I had planned [for the future] was shattered.” He wanted to share his case with Human Rights Watch because, “I don’t want this to happen to anyone else.”²

There is growing consensus in the United States today that existing criminal drug laws and policies—defined by criminalization of drug use and possession, and disproportionately severe sentences for drug offenses overall—are not working and, in many respects, are doing more harm than good.

Legislators from both major political parties have called for reforms of harsh federal mandatory minimum sentencing laws. The US Department of Justice has announced new reforms and initiatives intended to address the fact that half of the more than 200,000

² Human Rights Watch interview with Arnold Aguayo, Los Angeles, California, May 19, 2014.

people in federal prisons are incarcerated for drug offenses. Dozens of states have enacted far-reaching reforms, from providing judges with more discretion in sentencing drug offenders to decriminalizing and even legalizing possession of marijuana. Many jurisdictions have created drug courts and other diversion programs to minimize the use of incarceration and criminal sanctions, reflecting the principle that the harms of drug dependency are often better treated as a public health issue, rather than a criminal justice matter.

Reformers are often motivated by concerns that harsh drug laws and enforcement policies are unjust, racially discriminatory, ineffective, and wasteful, and that mandatory minimum laws in particular unfairly apply a one-size-fits-all policy to people who deserve more individualized consideration. Although existing and proposed reforms could and should go further, the momentum toward reform is a welcome effort to remedy the many ways in which drug law enforcement has contributed to serious human rights violations in the US.

This careful reexamination of US drug policy, however, has stopped short of investigating and reforming US immigration laws that essentially mandate detention, deportation, and exile each year for tens of thousands of immigrants, including lawful permanent residents, convicted of drug offenses—sometimes for offenses so minor as to result in no criminal justice sentence of imprisonment.

Deportations for Drug Offenses

According to data released by the US Immigration and Customs Enforcement (ICE) in response to a Human Rights Watch Freedom of Information Act (FOIA) request, deportations of non-citizens whose most serious conviction was for a drug offense increased 22 percent from 2007 to 2012, totaling more than 260,000 deportations over the same period.

Deportations of non-citizens with convictions for drug possession increased 43 percent. ICE claims that it does not keep track of whether these individuals were lawful permanent residents or undocumented immigrants. But, as detailed in this report, the US is deporting a significant number of both permanent residents and undocumented individuals with strong family and community ties to the US, often for minor or old drug offenses.

US immigration law began to dictate severe immigration consequences for non-citizens with drug offenses in the 1980s and 1990s, often as part of legislation passed in support of the US “War on Drugs.”

Lawful permanent residents— that is, people with legal immigrant status in the US— can be deported for any drug offense, with the sole exception of a conviction for possession of 30 grams or less of marijuana. Many lawful permanent residents with convictions for simple possession are eligible to apply for and receive “cancellation of removal” to remain in the US, but they must often fight their cases while being detained without bond. If the offense is considered “drug trafficking,” even if it is a low-level sales offense involving small amounts of drugs—such as selling ten dollars-worth of cocaine—permanent residents face deportation as “aggravated felons,” and are disqualified from almost every defense to deportation. In such cases, immigration judges, like judges forced to impose mandatory minimum sentences in criminal cases, are barred from considering each case individually and taking into account such factors as the circumstances of the offense, rehabilitation, length of residence in the US, and ties to US family.

Unauthorized immigrants with any drug conviction, even a minor possession offense, face a lifetime bar from ever gaining legal status even if they have close US citizen relatives. US law imposes a bar to gaining legal status for other crimes as well, but while non-citizens with convictions for many other crimes, like assault or fraud, can apply for a “waiver” of the bar if they can show a US citizen or permanent resident family member would suffer extreme hardship, no such waiver exists for drug offenses (the sole exception is a single conviction for possession of 30 grams or less of marijuana).

Once deported, non-citizens are permanently barred by their drug offenses from returning to live with their families in the US. For many, as described by one immigration attorney, deportation can feel like a life sentence without the possibility of parole.

Non-citizens who fear persecution if returned to their countries are ineligible for asylum if they have a drug conviction that has any element of sale, because such offenses are all considered drug trafficking convictions and deemed “particularly serious crimes.”

US immigration law also mandates detention, with no opportunity to apply for bond, for anyone (including lawful permanent residents) with a conviction for a controlled substance offense. Thus, immigrants who received no sentence, or relatively short criminal sentences, for minor drug offenses can end up spending months or even years in immigration detention.

Immigrants who successfully complete drug diversion programs and have their convictions expunged can still end up deported and permanently separated from their families for these offenses. Even pardons do not eliminate the immigration consequences of a drug crime.

Criminal defense attorneys have an obligation, under the 2010 Supreme Court case *Padilla v. Kentucky* (involving a permanent resident who pled guilty to transporting marijuana) to advise their non-citizen clients about the immigration consequences of a guilty plea, and defense attorneys who are well-versed in immigration law are sometimes able to negotiate plea deals that allow their clients to avoid deportation. But numerous immigrants and immigration attorneys reported cases in which the criminal defense attorneys had failed to properly advise their clients. Indigent immigrants must rely on court-appointed counsel, whose access to immigration law expertise and other resources can vary widely from state to state and county to county. Furthermore, because minor drug offenses increasingly carry little jail time, criminal defense counsel may be particularly unaware that severe immigration consequences can follow a conviction or plea. In some jurisdictions, the drug offenses that trigger detention and deportation are so minor that individuals regularly plead guilty to these crimes without a lawyer.

The ability of defense counsel to negotiate “immigration-safe” pleas can also vary widely depending on the willingness of prosecutors in that jurisdiction to consider immigration collateral consequences. While some prosecutors have publicly spoken out against unfair immigration collateral consequences, others remain reluctant and sometimes actively hostile toward efforts by defense counsel to avoid such consequences. Immigrants who plead guilty without proper advice from their attorneys can sometimes vacate their pleas and avoid deportation, but the feasibility of post-conviction relief also varies significantly from jurisdiction to jurisdiction.

Among the cases reported to Human Rights Watch are the following:

- Raul Valdez, a permanent resident from Mexico who had grown up in the US from the age of one, was deported in 2014 because of a 2003 conviction for possession of cannabis with intent to deliver, for which he had been sentenced to 60 days in jail.

- Ricardo Fuenzalida, a permanent resident from Chile, spent three months in mandatory immigration detention in 2013 fighting deportation because of two marijuana possession convictions that occurred 13 years earlier.
- Abdulhakim Haji-Eda, a refugee from Ethiopia who came to the US at the age of 13, was ordered removed as a drug trafficker for a single conviction for selling a small quantity of cocaine at the age of 18. Now 26 years old, he has no other convictions and is married to a US citizen and has two US citizen children.
- Marion Scholz, a permanent resident from Germany who had lived in the US for over 45 years, was deported in 2014 because of two convictions for misdemeanor possession stemming from drug dependency, which she has since overcome.
- “Antonio S.,” who came to the US from Mexico when he was 12 and was eligible for a reprieve from deportation as a “DREAMer” under the executive program Deferred Action for Childhood Arrivals, was detained for over a year and deported after a conviction for possession of marijuana, a municipal violation to which he pleaded guilty without an attorney.
- “Alice M.,” a 41-year-old graphic designer and Canadian citizen, reported she is barred from living in the US with her US citizen fiancé because of a single 1992 conviction for cocaine possession she received in Canada in her last year of high school, a conviction that was pardoned long ago in Canada.
- “Mr. V.,” a refugee and permanent resident from Vietnam, was ordered deported in 2008 for a 1999 conviction for possession of crack cocaine. Although he has since been granted a full and unconditional pardon from the state of South Carolina, Mr. V. remains under a deportation order and remains in the US only because of restrictions on the repatriation of certain Vietnamese nationals.

Drug offenses are not the only types of crime that trigger such draconian immigration consequences. Human Rights Watch has long advocated for changes to the US immigration system that essentially mandate deportation, exile, and family separation for a wide range of offenses. But this report focuses on the impact drug convictions have had on immigrants because the categorical treatment of nearly all drug offenses as warranting detention and deportation, on top of any criminal justice sentence, is in such sharp contrast to the growing recognition that severely punitive sentences for drug offenses in the criminal justice system are unwarranted and ineffective.

Deportations under the Obama Administration

The impact of abusive immigration laws has been exacerbated by the Obama administration's pursuit of a deportation policy focused on immigrants with criminal convictions.

Despite the administration's claims that enforcement targets those who pose a threat to public safety, many of the cases reported to Human Rights Watch involve immigration arrests of people with convictions for drug offenses, many of them minor or committed many years earlier. Those arrested were often lawful permanent residents or unauthorized immigrants with US citizen family.

In announcing his executive action in November 2014, President Obama said “[O]ver the past six years, deportations of criminals are up 80 percent. And that's why we're going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids.” But the reforms, while a positive step in some respects, largely fail to address the dynamic of targeting immigrants who pose little to no threat to public safety.

At the same time, the executive actions hold out the possibility of a more nuanced approach. The eligibility requirements for its executive programs (Deferred Action for Childhood Arrivals, which began in June 2012, and the newer programs announced in 2014) do not automatically disqualify anyone with a misdemeanor conviction for simple possession, though they do disqualify anyone with a felony conviction. The most recent enforcement priorities memorandum issued by the US Department of Homeland Security (DHS), effective January 5, 2015, also states the administration would be willing to consider exercising prosecutorial discretion in favor of individuals with criminal convictions, including those that make them enforcement priorities, if they can show strong equities, such as length of time since the conviction, length of time in the US, and family or community ties to the US.

As of date of publication, DHS has not issued any data or other information regarding the implementation of the memorandum and the implementation of the newer executive actions has been delayed by an injunction granted in response to a federal lawsuit.

Drug Reform Should Include Immigration Reform

The Obama administration recognizes that the US criminal justice system can produce deeply unjust outcomes and can have a particularly devastating impact on communities of color. Attorney General Eric Holder, referring to “the destabilizing effect [of the federal criminal justice system] on particular communities, largely poor and of color,” specifically noted in a 2013 speech to the American Bar Association that “tens of thousands of statutes and regulations ... impose unwise and counterproductive collateral consequences,” and further stated his department’s intent “to consider whether any proposed regulation or guidance may impose unnecessary collateral consequences on those seeking to rejoin their communities.”³ Yet by doggedly pursuing the deportation of non-citizens with criminal convictions, without more nuanced acknowledgment that not all “criminal aliens” actually pose a threat to public safety or national security, the US government has exacerbated the consequences of harsh drug enforcement and barred hundreds of thousands of people with convictions for nonviolent drug offenses from rejoining their communities.

At the same time, the US Congress has shown no inclination to reform draconian laws that have denied lawful permanent residents and long-term unauthorized immigrants with criminal convictions the opportunity to have an individualized hearing before an immigration judge, the kind of discretion liberals and conservatives increasingly recognize is needed in the criminal justice system. Congress has sought instead to include more offenses in the category of “aggravated felonies” that require deportation of non-citizens with criminal convictions, regardless of how minor or old the offense and without any opportunity for the affected individual to get an individualized hearing before a judge. Hundreds of thousands of families have been separated due to such laws.

Under international human rights law, the US government has the right to regulate its borders, and states have a particular interest in restricting the entry of those who pose a threat to public safety. But current US immigration policies toward drug offenders violate several provisions and principles of international law, including that punishment be

³ US Department of Justice, “Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates,” August 12, 2013, <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> (accessed May 26, 2015).

proportional to the offense, the right to present defenses to deportation, the right to family unity, and the best interests of the child.

The president, Congress, and all who care about reforming US drug policy and reducing excessive punishment for drug offenses should extend their reform efforts to include US immigration law and policy. The US should restore immigration judges' discretion to consider cases involving drug offenses and other criminal convictions on a case-by-case basis, weighing such factors as the seriousness of the offense, evidence of rehabilitation, family ties, the best interests of any minor children, and other similar factors.

Congress should eliminate the permanent bar to entering the US for any drug offense, and at the very least, should create a waiver that provides those with strong family ties the opportunity to demonstrate they are not a threat to public safety. Congress should also eliminate mandatory detention and amend the overly broad definition of a conviction that can include expunged and pardoned drug offenses.

State and local governments and law enforcement agencies should help minimize the collateral consequences of nonviolent drug offenses by creating diversion programs that help non-citizens avoid a conviction, as defined by immigration law, and decriminalizing the personal use of drugs.

It is encouraging that many US legislators and policymakers are working to create a criminal justice system that treats drug offenders more fairly and humanely. We urge these legislators and policymakers not to ignore US families and communities being destroyed by detention, deportation, and family separation that can follow convictions for the same offenses.

Key Recommendations

To the United States Congress

- Eliminate deportation based on convictions for simple possession of drugs.
- Ensure that all non-citizens in deportation proceedings, including those with convictions for drug offenses, have access to an individualized hearing where the immigration judge can weigh evidence of rehabilitation, family ties, and other equities against a criminal conviction.
- Ensure that refugees and asylum seekers with convictions for sale, distribution, or production of drugs are only considered to have been convicted of a “particularly serious crime” through case-by-case determination that takes into account the seriousness of the crime and whether the non-citizen is a threat to public safety.
- Ensure that non-citizens who are barred from entering the US and/or gaining lawful resident status because of a criminal conviction, including for drug offenses, are eligible to apply for individualized consideration, i.e., a waiver of the bar, based on such factors as the above mentioned.
- Eliminate mandatory detention and ensure all non-citizens are given an opportunity for an individualized bond hearing.
- Redefine “conviction” in immigration law to exclude convictions that have been expunged, pardoned, vacated, or are otherwise not recognized by the jurisdiction in which the conviction occurred.
- Decriminalize the personal use of drugs, as well as possession of drugs for personal use.

To the Department of Homeland Security

- Provide clear guidance to immigration officials that a positive exercise of prosecutorial discretion may be appropriate even in cases involving non-citizens with criminal convictions, with particular consideration for lawful permanent residents and non-citizens whose most serious convictions are for nonviolent offenses, including drug convictions, that occurred five or more years ago.

- Provide all non-citizens who have been in detention for six months or more with a bond hearing.

To State and Local Governments

- Ensure drug courts and diversion programs do not require a guilty plea from defendants that would constitute a conviction that triggers deportation, mandatory detention, and other immigration consequences even upon successful completion of the program.
- Remove barriers to post-conviction relief for non-citizens convicted of nonviolent drug offenses through legal error, including through guilty pleas obtained without adequate advice from defense counsel on the potential immigration consequences of the plea.
- Decriminalize the personal use of drugs, as well as possession of drugs for personal use.

Methodology

This report is based primarily on interviews conducted between February 2014 and June 2015 and information obtained from a Freedom of Information Act (FOIA) request. It also relies on federal court decisions, news articles, and other publicly available sources.

Human Rights Watch conducted more than 132 interviews with non-citizens who had been arrested for or convicted of drug offenses, the vast majority of whom were placed into deportation proceedings; family members; immigration and criminal defense attorneys and paralegals; prosecutors; law enforcement officials; and drug policy and criminal justice reform advocates. We interviewed individuals, family members, and attorneys regarding a total of 71 cases and reviewed news articles and federal court decisions in several additional cases.

Criminal defense and immigration attorneys and local advocates referred us to individuals and families in many cases. In others, individuals contacted us directly to share their stories. The 70 cases we reviewed do not represent a random sample of non-citizens with drug convictions who were put into deportation proceedings, but they involve non-citizens from 17 different countries with convictions for possession, distribution, and production of a variety of drugs, obtained under drug laws in 16 states (California, Colorado, Florida, Illinois, Maryland, New York, New Jersey, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin), in the federal criminal justice system, and in other countries.

We also analyzed data received in response to a Freedom of Information Act request submitted to US Immigration and Customs Enforcement for individualized record data on non-citizens deported for criminal convictions. We examined publicly available data published by other organizations, such as the Transactional Records Access Clearinghouse, as well as US government agencies, such as the US Department of Homeland Security, US Immigration and Customs Enforcement, and the Bureau of Justice Statistics.

Interviews were conducted in person or by telephone, and in English, Spanish, Korean, and Cantonese, with an interpreter for the Spanish and Cantonese interviews. All participants were informed of the purpose of the interview and consented orally. No interviewee received compensation for providing information. Where appropriate, Human Rights Watch provided interviewees with contact information for individuals and organizations providing legal, counseling, or other supportive services at the conclusion of the interview. We have used pseudonyms to protect the privacy of certain individuals at their request.

I. Background

US Deportation Policy for Immigrants with Criminal Convictions

In 2007 and 2009, Human Rights Watch published reports documenting how hundreds of thousands of families had been forced apart by punitive and inflexible US deportation policies against non-citizens with criminal convictions, regardless of how minor or old the offense.⁴ We found that between 1997 and 2007, of the almost 900,000 non-citizens with criminal convictions who had been deported, 72 percent had been deported for nonviolent offenses. Twenty percent had been in the US legally, often for decades.

Since our reports, the Obama administration has pursued policies that have resulted in a record number of deportations: more than 2.3 million from fiscal years 2009 through 2014.⁵ The administration claims its focus is on serious criminals, particularly with regard to enforcement in the interior of the country.⁶ According to US government data, the proportion of deportations involving individuals with criminal convictions is at a record high. In fiscal year 2014, 56 percent of removals involved people who had previously been convicted of a crime.⁷

Yet the government's own numbers indicate that a significant majority of these deportations involve people with convictions for minor and nonviolent offenses. The Transactional Records Access Clearinghouse at Syracuse University found that in fiscal year 2013, only 12 percent of all deportees had committed an offense labeled a serious or "Level 1" offense, according to the Department of Homeland Security (DHS)

⁴ Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 2007, <http://www.hrw.org/reports/2007/07/16/forced-apart-o>; Human Rights Watch, *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses*, April 2009, <http://www.hrw.org/reports/2009/04/15/forced-apart-numbers-o>.

⁵ US Department of Homeland Security, *Yearbook of Immigration Statistics: 2012, Enforcement Actions: Table 39: Aliens Removed or Returned: Fiscal Years 1982 to 2012*, last published January 17, 2014, <http://www.dhs.gov/yearbook-immigration-statistics-2012-enforcement-actions> (accessed August 27, 2014); US Department of Homeland Security, US Immigration and Customs Enforcement, "FY 2014 ICE Immigration Removals," <https://www.ice.gov/removal-statistics/> (accessed April 16, 2015).

⁶ US Department of Homeland Security, US Immigration and Customs Enforcement, "FY 2014 ICE Immigration Removals," <http://www.ice.gov/removal-statistics> (accessed April 15, 2015).

⁷ Ibid.

definition.⁸ The most serious conviction held by half of those who were deported was an immigration or traffic violation.⁹

The increase in deportations, including of those with criminal convictions, was aided significantly by Secure Communities, a program that began in 2008 and was fully implemented throughout the US in 2013, that effectively linked the US immigration enforcement system with local law enforcement activities.¹⁰ In November 2013, DHS announced it was discontinuing the program, and would now request that local law enforcement agencies notify ICE of pending releases of non-citizens convicted of certain priority criminal offenses or believed to pose a danger to national security.¹¹ The impact of this change is still being evaluated.

Harsh US Drug Policies

Throughout the US, individuals are regularly convicted of possession, production, and distribution of drugs under stringent laws and as a result of aggressive policing and prosecution policies. In 2013, nearly half a million people in the US were in prisons and jails for drug offenses, a dramatic increase from 40,900 people in 1980.¹²

First-time offenders can end up with severe sentences under mandatory minimum sentencing laws for being found with a certain quantity of certain types of drugs, rather than because the evidence shows they played a significant role in drug trafficking.¹³ Thus, prosecutors can charge a low-level courier delivering drugs with the same crime as the

⁸ Transactional Records Access Clearinghouse, "Secure Communities: A Failed Program?," April 18, 2014, <http://trac.syr.edu/immigration/reports/349/> (accessed August 11, 2014).

⁹ Ibid. See also Ginger Thompson and Sarah Cohen, "More Deportations Follow Minor Crimes, Records Show," *New York Times*, April 6, 2014, <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html> (accessed August 11, 2014).

¹⁰ US Immigration and Customs Enforcement, "Secure Communities," <http://www.ice.gov/secure-communities> (accessed April 16, 2015).

¹¹ Memorandum of Jeh Johnson, US Department of Homeland Security Secretary, to Thomas S. Winkowski, US Immigration and Customs Enforcement Acting Director, et al., "Secure Communities," November 20, 2014, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (accessed April 16, 2015).

¹² The Sentencing Project, "Trends in US Corrections Fact Sheet," http://www.sentencingproject.org/detail/publication.cfm?publication_id=398 (accessed May 28, 2015).

¹³ Human Rights Watch, *Cruel and Unusual: Disproportionate Sentences for New York Drug Offenders*, March 1997, <http://www.hrw.org/reports/1997/usny/>.

drug boss who receives the package. The threat of long mandatory minimum sentences can also pressure defendants to plead guilty, rather than risk going to trial.¹⁴

Drug law enforcement, as documented in several Human Rights Watch reports, is also marked by severe and unjustifiable racial disparities.¹⁵

Recent Reforms in US Drug Policy

The US continues to spend billions of dollars on drug law enforcement each year, but there is a growing consensus among state and federal legislators and policymakers that harsh criminal sanctions for drug use and distribution may not be the most just, effective, or cost-efficient way to address the societal harms of such conduct.

On a federal level, Congress and the executive branch have enacted reforms that seek to reduce the severely punitive effects of mandatory minimum sentencing laws for drug crimes. In 2010, Congress passed the Fair Sentencing Act to reduce the massive disparity in the amounts of crack versus powder cocaine that triggered mandatory minimum sentences, a disparity that had had a disproportionate impact on African Americans.¹⁶

¹⁴ Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 5, 2013, <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse>.

¹⁵ According to 2012 surveys conducted by the federal Substance Abuse and Mental Health Services Administration (SAMHSA), rates of drug use do not vary significantly among ethnicities: 11.3 percent of African Americans and 8.3 percent of Hispanics report illicit drug use, compared to 9.2 percent among whites. But African Americans and Hispanics are significantly overrepresented among those serving prison sentences for drug offenses. In 2011, African Americans and Hispanics made up 24.3 and 25.5 percent of new admissions to state prison for drug offenses, despite making up only 13 and 17 percent of the US population in general. E. Ann Carson and Daniela Golinelli, "Prisoners in 2012," US Department of Justice, Bureau of Justice Statistics, December 2013, <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>, Table 8; US Census Bureau, "Quick Facts," <http://quickfacts.census.gov/qfd/states/00000.html> (accessed August 5, 2014). See also Californians for Safety and Justice, "Latino Voices: The Impacts of Crime and Criminal Justice Policies on Latinos," June 2014, <http://www.safeandjust.org/news-media/LatinoReportRelease> (accessed August 5, 2014). The Uniform Crime Reports issued by the Federal Bureau of Investigations does not keep track of arrest data by ethnicity, but in New York City, Latinos are arrested for marijuana possession at four times the rate of whites. See Lynda Garcia, "The War on Marijuana Has a Latino Data Problem," ACLU Blog of Rights, June 14, 2013, <https://www.aclu.org/blog/criminal-law-reform-racial-justice/war-marijuana-has-latino-data-problem> (accessed August 13, 2014); Christopher Mathias, "NYPD Still making Thousands of Marijuana Arrests, and One Lawmaker Has Had Enough," *Huffington Post*, May 28, 2014, http://www.huffingtonpost.com/2014/05/28/nypd-marijuana-hakeem-jeffries_n_5400453.html.

¹⁶ Human Rights Watch, "US: End in Sight for Infamous Crack Cocaine Laws: Legislation to Address Racial Disparity in Sentencing Heads to President Obama's Desk," July 28, 2010, <http://www.hrw.org/news/2010/07/28/us-end-sight-infamous-crack-cocaine-laws>. Although Congress did not eliminate the disparity altogether and refrained from making the change retroactive, so as to reduce sentences for people convicted before enactment of the new law, the US Sentencing Commission in 2011 voted unanimously to make the new federal crack cocaine sentencing guidelines retroactive. Human Rights Watch, "US: Crack Cocaine Ruling a Victory for Rights," July 1, 2011, <http://www.hrw.org/news/2011/07/01/us-crack-cocaine-ruling-victory-rights>.

Since then, federal lawmakers from both the Democratic and Republican parties have called for further reforms. Senator Rand Paul at a 2013 hearing before the Senate Judiciary Committee called federal mandatory minimums “a major culprit in our unbalanced and often unjust drug laws.”¹⁷ Attorney General Eric Holder and the US Department of Justice have made several efforts in recent years to minimize the effects of mandatory minimum sentences in the federal system, including instructions to US Attorneys to charge defendants in a way to avoid triggering mandatory minimum sentences and a clemency program for drug convicts serving longer sentences than they would have received under current law.¹⁸

On a state level, 29 state legislatures have rolled back state mandatory minimum sentencing laws since 2000, and most of them have addressed nonviolent drug-related offenses.¹⁹ Thus, although drug offenders continue to comprise a significant proportion of the US prison population, new commitments of individuals to state prisons for drug offenses decreased 22 percent between 2006 and 2011.²⁰

Numerous states, counties, and localities have also created drug courts and other types of diversion programs intended to provide defendants with drug dependency problems opportunities to seek treatment, avoid incarceration, and reduce drug use relapse and criminal recidivism. There are now more than 2,800 drug courts across the US.²¹ Some have criticized drug courts for continuing a punitive approach toward drug use²², but their

¹⁷ Statement of Rand Paul, “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences,” Hearing before the Senate Judiciary Committee, September 18, 2013. <http://www.randpaul2016.com/2013/09/senator-rand-pauls-testimony-senate-judiciary-committee-reevaluating-effectiveness-mandatory-minimum-sentences/> (accessed August 27, 2014).

¹⁸ Sari Horwitz, “Holder seeks to avert mandatory minimum sentences for some low-level drug offenders,” *Washington Post*, August 12, 2013, http://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html (accessed August 5, 2014); Josh Gerstein, “Obama drug clemency guidelines issued,” *Politico*, April 23, 2014, <http://www.politico.com/blogs/under-the-radar/2014/04/obama-drug-clemency-guidelines-issued-187266.html> (accessed August 5, 2014).

¹⁹ Ram Subramanian and Ruth Delaney, Vera Institute of Justice, “Playbook for Change?: States Reconsider Mandatory Sentences,” Policy Report, February 2014 (Updated April 4, 2014), <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf> (accessed August 5, 2014).

²⁰ Carson and Golinelli, “Prisoners in 2012,” <http://www.bjs.gov/content/pub/pdf/p12.pdf>, p. 2.

²¹ US Department of Justice, Office of Justice Programs, “Drug Courts,” May 2014, <https://ncjrs.gov/pdffiles1/nij/238527.pdf> (accessed August 5, 2014).

²² See, e.g., Drug Policy Alliance, “Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use,” March 2011, http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf (accessed August 5, 2014).

proliferation reflects some agreement that drug and drug-related offenses may stem from drug dependency requiring treatment as a public health issue, not a criminal one. A few jurisdictions, such as Seattle-King County, Washington, and Santa Fe, New Mexico, have begun to experiment with pre-arrest diversion, in which police have the option to offer community-based services to low-level offenders instead of jail and prosecution.²³

The changes have been most pronounced with respect to marijuana. Eighteen states have decriminalized possession of small amounts of marijuana, and Colorado, Washington, Alaska, Oregon, and the District of Columbia have legalized recreational use of marijuana altogether.²⁴ These changes reflect a major shift in US public opinion, with only 45 percent in 2014 opposing the legalization of marijuana, compared to 78 percent in 1991.²⁵

²³ Drug Policy Alliance, “Law Enforcement Assisted Diversion (LEAD): Reducing the Role of Criminalization in Local Drug Control,” February 2014, http://www.drugpolicy.org/sites/default/files/DPA_Fact_sheet_Law_Enforcement_Assisted_Diversion_LEAD_Feb2014.pdf (accessed August 5, 2014).

²⁴ NORML, “States that have decriminalized,” <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (accessed April 8, 2015). See also Drug Policy Alliance, “Marijuana Legalization and Regulation,” <http://www.drugpolicy.org/marijuana-legalization-and-regulation> (accessed April 6, 2015). Although Washington, DC, voters approved a bill legalizing the recreational use of marijuana, Congress has sought to block implementation of the law. William Cummings, “Pot now legal in D.C. despite threats from Congress,” *USA Today*, February 25, 2015, <http://www.usatoday.com/story/news/nation/2015/02/25/dc-marijuana-legalization/24033803/> (accessed April 6, 2015).

²⁵ Pew Research, Center for the People & the Press, “Majority Now Supports Legalizing Marijuana,” April 4, 2013, <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/> (accessed August 5, 2014).

II. Immigrants and the “War on Drugs”

Historical Link between US Immigration Policy and Drug Policy

Drug crimes have been deportable offenses since 1922,²⁶ but the harshest immigration consequences for drug crimes and other offenses came into effect in the 1980s and 1990s, when US legislators began to include immigration regulation as a major component of the so-called “War on Drugs.”

The Anti-Drug Abuse Act of 1986 enacted harsh mandatory minimum sentences for drug offenses, including severely disparate sentences for crack versus powder cocaine. The ADAA of 1986 also authorized the use of “detainers,” under a subsection titled the “Narcotics Traffickers Deportation Act,” by which immigration authorities could request that local law enforcement agencies hold people arrested for controlled substance offenses until they could be taken into immigration custody.²⁷ These detainers have since been interpreted by DHS to allow for immigration holds on people arrested for a much wider range of offenses, leading to considerable controversy and federal litigation in recent years.²⁸

Two years later, the Anti-Drug Abuse Act of 1988 sought to further address “an expansive drug syndicate established and managed by illegal aliens,” in the words of Florida senator Lawton Chiles.²⁹ The ADAA of 1988 created the concept of the “aggravated felony,” limited at that point to three crimes: murder, firearms trafficking, and drug trafficking. As one law professor put it, “Congress ... viewed these crimes as, if not analogous, at least worthy of mention in the same breath.”³⁰ Those convicted of aggravated felonies were now subject to mandatory detention and fewer procedural rights so as to expedite deportation.³¹

²⁶ Narcotic Drugs Import and Export Act of 1922. The Immigration and Nationality Act in 1952 codified exclusions and deportations of non-citizens who are “narcotic drug addicts” or convicted of a drug offense into the modern immigration system. Immigration and Nationality Act of 1952, 82 P.L. 414; 666 Stat. 163; 82 Cong. Ch. 477.

²⁷ Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207, § 1751 (1986). *See also* Cesar Cuauhtemoc Garcia Hernandez, “Immigration Detention as Punishment,” *UCLA Law Review*, Vol. 61, No. 5, June 2014, p. 1363.

²⁸ *See* Julia Preston, “Sheriffs Limit Detention of Immigrants,” *New York Times*, April 18, 2014, <http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html> (accessed April 15, 2015).

²⁹ Opening Statement of Senator Lawton Chiles, “Illegal Alien Felons: A Federal Responsibility,” Hearing before the Subcommittee on Federal Spending, Budget, and Accounting of the Committee on Governmental Affairs, 100th Cong. 1st session, March 12, 1987.

³⁰ Garcia Hernandez, “Immigration Detention as Punishment,” *UCLA Law Review*, p.1366.

³¹ Anti-Drug Abuse Act of 1988, Section 7343.

Soon afterward, then-President George H. W. Bush signed the Immigration Act of 1990 into law, declaring that it “meets several objectives of my Administration’s war on drugs and violent crime” and “improves this Administration’s ability to secure the U.S. border—the front lines of the war on drugs.”³² It eliminated the “Judicial Recommendations Against Deportation,” a provision that had previously allowed sentencing judges to make recommendations against deportation for non-citizens. The 1990 law also disqualified noncitizens with aggravated felony convictions who had served a term of imprisonment of at least five years from 212(c) relief, a now-defunct form of relief from deportation by which legal residents who were deportable for criminal convictions could present evidence of family ties, rehabilitation, and other positive factors to the immigration judge tasked with deciding whether to deport them.³³ The Immigration Act of 1990 also made certain criminal convictions, including those for controlled substance offenses, bars to entering the US.³⁴

In 1996, with the passage of the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, Congress substantially expanded its efforts to deport and bar non-citizens with criminal convictions. It dramatically broadened the definition of an “aggravated felony” to encompass a whole host of minor offenses—capturing offenses as minor as shoplifting and turnstile jumping—and completely eliminated eligibility for relief from deportation through an individualized hearing before an immigration judge for anyone convicted of an “aggravated felony,” regardless of the length of sentence imposed. Congress also significantly broadened the definition of a “conviction” to include dispositions that the criminal justice system does not consider a “conviction,” including convictions that have been expunged, such as those following diversion programs like those offered by drug courts. And it expanded grounds for mandatory detention to include any controlled substance offense (and other non-drug offenses) as well as drug trafficking offenses.³⁵

³² George H. W. Bush, “Statement on Signing the Immigration Act of 1990,” November 29, 1990, <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1OsUYZ1g> (accessed March 31, 2015). See also Garcia Hernandez, “Immigration Detention as Punishment,” *UCLA Law Review*, p. 1366.

³³ Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (November 29, 1990). See also Norton Tooby and Joseph Justin Rollin, “Evolution of the Definition of Aggravated Felony,” 2007, <http://nortontooby.com/pdf/FreeChecklists/EvoAggFelonyStatute.pdf> (accessed April 15, 2015).

³⁴ Nancy Morawetz, “Article: Rethinking Drug Inadmissibility,” *William and Mary Law Review*, vol. 50, October 2008, p. 174-175.

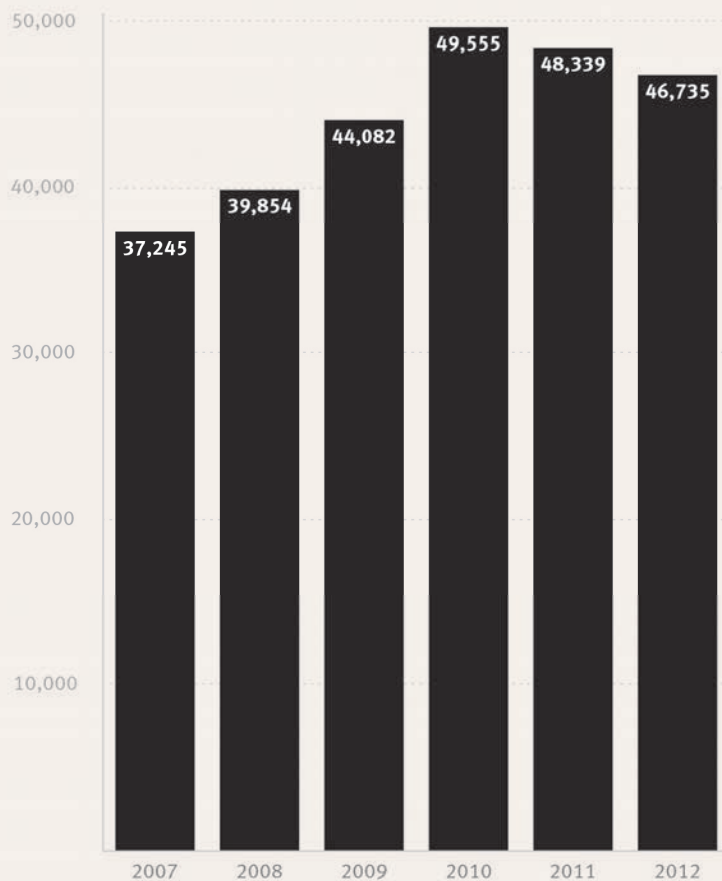
³⁵ The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 279 (April 24, 1996); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 100 Stat. 3009 (September 30, 1996).

Deportations of Non-Citizens with Drug Convictions

US deportation policy toward immigrants with criminal convictions was shaped initially by concerns about curtailing international drug trafficking. But as the US government's own numbers show, many of the hundreds of thousands of non-citizens who have been deported for drug offenses over the years have not been engaged in drug trafficking but

rather, engaged in more minor conduct.

FIGURE 1: DEPORTATION OF NON-CITIZENS WITH A DRUG CONVICTION
Number of non-citizens deported each fiscal year whose most serious conviction was for a drug offense.

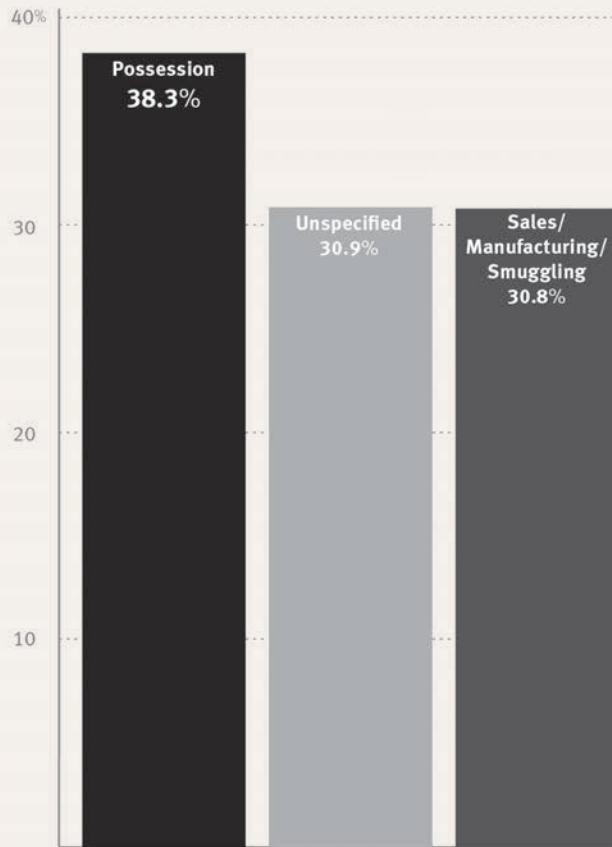


Source: ICE data provided to HRW through a Freedom of Information Act request. On file with Human Rights Watch.

According to data Human Rights Watch received from ICE in response to a request under the Freedom of Information Act, between 2007 and 2012 almost 266,000 deported non-citizens had a drug conviction as their most serious conviction. They constituted one out of every four removals of non-citizens with a criminal conviction.³⁶

³⁶ DHS's published numbers do not match the data provided to us by ICE, suggesting that the definition of removals used by ICE in response to our FOIA request differed from the definition used by DHS in its annual publications. However, DHS's data also reveals how common drug offenses are among deported non-citizens. Until 2012, "dangerous drugs—US immigration authorities' catch-all term for drug offenses—was consistently the most common category of crimes for which non-citizens had convictions before being deported. In 2013, immigrants with a drug conviction as their most serious conviction were only

FIGURE 2: TYPES OF CONDUCT IN DRUG CONVICTIONS, FY2007-2012
Percentage of drug convictions, by type of conduct, held by deported non-citizens whose most serious conviction was for a drug offense.



Source: ICE data provided to HRW through a Freedom of Information Act request. On file with Human Rights Watch.

The type of conduct was unspecified in 31 percent of cases, but possession convictions were most common (38 percent), with the remainder involving sale, smuggling, trafficking, and manufacturing.³⁷ It should be noted that convictions for sale can include low-level sales offenses that often result in little or no prison time in the criminal justice system.

outnumbered by those with convictions for immigration offenses. US Department of Homeland Security, “Immigration Enforcement Actions: 2013,” p. 7.

³⁷ The data Human Rights Watch received from ICE included crime codes from the National Crime Information Center (NCIC) Code Manual. The “unspecified” convictions in our dataset are offenses where the type of conduct or drug is not decipherable from the NCIC codes used.

FIGURE 3A:

Number of non-citizens deported each fiscal year by type of conduct.

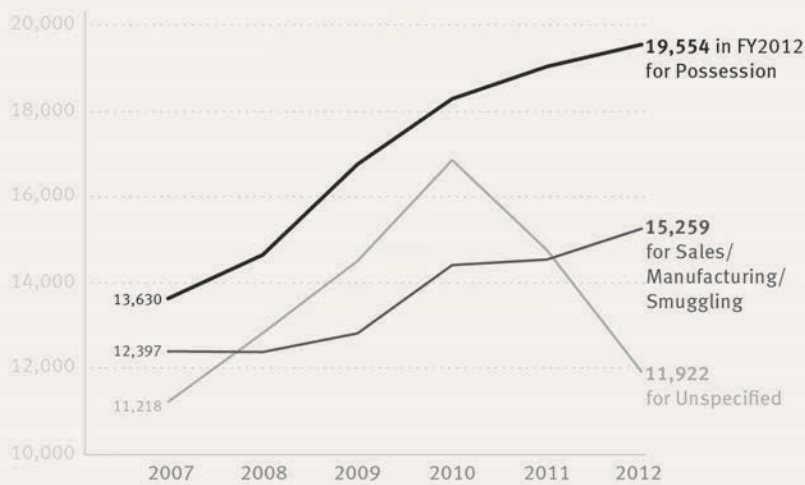
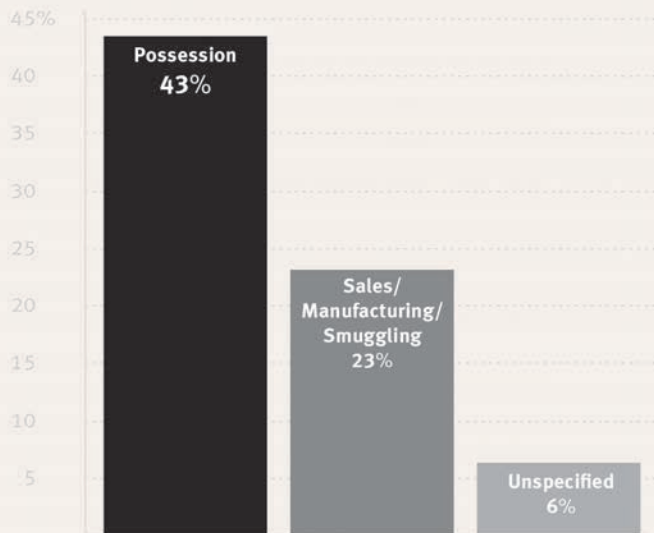


FIGURE 3B:

Percent change between 2007 – 2012 in number of annual deportations of non-citizens with drug convictions by type of conduct.

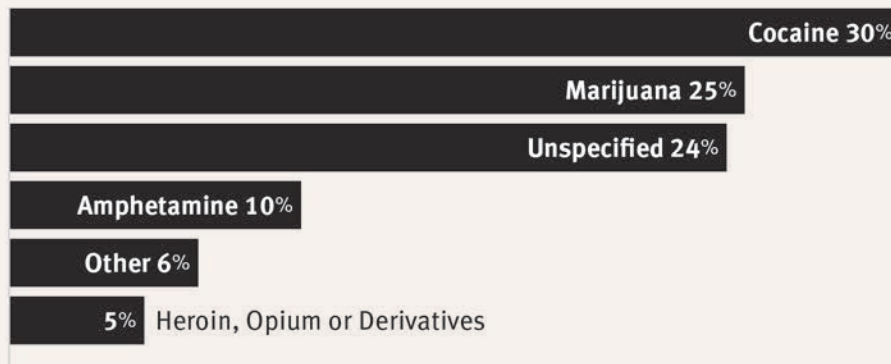


Source: ICE data provided to HRW through a Freedom of Information Act request. On file with Human Rights Watch.

Notably, deportations after drug convictions increased significantly from 2007 to 2012. In particular, deportations after convictions for drug possession increased 43 percent, while deportations after convictions for sales, smuggling, or manufacture increased 23 percent.

FIGURE 4: TYPES OF DRUGS INVOLVED IN DRUG CONVICTIONS, FY2007-2012

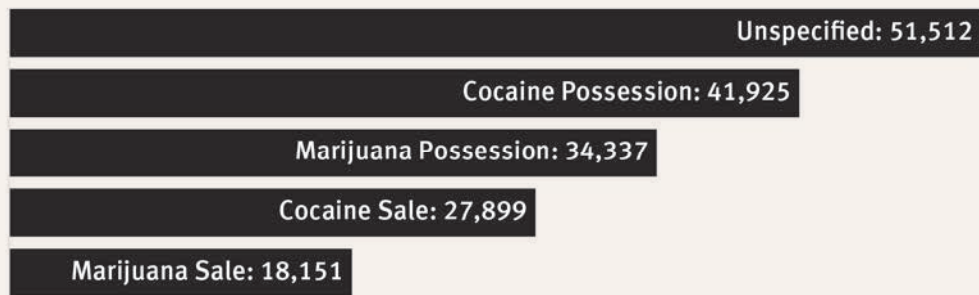
Percentage of convictions, by type of drug involved, held by deported non-citizens whose most serious conviction was for a drug offense.



Source: ICE data provided to HRW through a Freedom of Information Act request. On file with Human Rights Watch.

FIGURE 5: FIVE MOST FREQUENT DRUG OFFENSES, FY2007-2012

Number of non-citizens deported, by drug offense, whose most serious conviction was for a drug offense.



Source: ICE data provided to HRW through a Freedom of Information Act request. On file with Human Rights Watch.

In nearly 25 percent of these cases, the drug type was unspecified. Another quarter involved a conviction for marijuana. Over 34,000 deported non-citizens had a marijuana possession conviction as their most serious conviction.

Immigrants' Perceived Propensity to Commit Crime

Immigrants are sometimes perceived by legislators and the US public as having a greater propensity toward crime than native-born persons. Congressman Lawrence Smith of Florida stated during a 1989 hearing before the House Judiciary Committee that “aliens coming across the border seem to be prone to more violent kinds of crime, more drug-related types of crime,” and that by allowing them to remain in the US, “we are unleashing an army of criminal aliens on American citizens.”³⁸

Several studies have shown, however, that foreign-born persons are less likely to commit crimes and less likely to be imprisoned than native-born persons.³⁹ A 2007 study of California’s adult population in correctional institutions, focusing on males between 18 and 40, found native-born institutionalization rates to be 10 times that of foreign-born immigrants.⁴⁰ The same study found that on average, between 2000 and 2005, California cities with a higher share of recent immigrants saw their crime rates fall further than cities with a lower share, particularly with regard to violent crimes.⁴¹ The study concluded, “[s]pending additional dollars to reduce immigration or to increase enforcement against the foreign-born will not have a high return in terms of public safety.”⁴²

³⁸ Statement of Congressman Lawrence Smith, Texas, *Criminal Aliens: Hearing on H.R. 3333 before Sub. on Immigration, Refugees, and International Law of the House Judiciary Committee*, 100th Cong. 36 (November 1, 1989).

³⁹ Ruben G. Rumbaut, “Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities,” Invited Address to the “Immigration Enforcement and Civil Liberties: the Role of Local Police” National Conference, Police Foundation, Washington, DC, August 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877365 (accessed August 5, 2014); Kristin F. Butcher and Anne Morrison Plehl, “Why are Immigrants’ Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation,” 2005, National Bureau of Economic Research, NBER Working Paper 13229, July 2007, <http://www.nber.org/papers/w13229> (accessed April 15, 2015).

⁴⁰ Kristin F. Butcher, Anne Morrison Plehl, and Jay Liao, Public Policy Institute of California, *Crime, Corrections, and California: What Does Immigration Have to Do With It?*, February 2008, <http://www.ppic.org/main/publication.asp?i=776> (accessed April 2, 2015).

⁴¹ Ibid.

⁴² Ibid.

III. Lawful Permanent Residents Deported for Drug Offenses

There is no publicly available information on how many permanent residents are deported each year for drug offenses. ICE claimed, in response to a 2012 Freedom of Information Act request, not to keep information on the immigration status of those deported on criminal grounds. Numerous interviews with immigrants, their families, and attorneys, make clear, however, that lawful permanent residents are regularly put into deportation proceedings for offenses ranging from marijuana possession to trafficking in cocaine.

“Drug Trafficking” is a Deceptive Label

International human rights law does not preclude a government from deporting non-citizens convicted of serious offenses, such as drug trafficking, after weighing the totality of the circumstances. But US law considers drug offenses that have an element of sale or distribution, even of a small amount of drugs, to be drug trafficking offenses and “aggravated felonies,” triggering severe and permanent consequences.⁴³ Such convictions make non-citizens, including lawful permanent residents, ineligible for almost all forms of relief from deportation and result in mandatory detention, near-automatic deportation, and permanent exile.

Low-Level Offenses that Constitute Drug Trafficking

Several immigration and criminal defense attorneys told Human Rights Watch that many of their clients who are charged as deportable for drug trafficking had convictions for offenses that are quite minor. As one attorney put it, “I represent a lot of guys with drug trafficking convictions, but I’ve never represented a drug trafficker.”⁴⁴

The definition of “aggravated felony” is overly broad with regard to many offenses, as documented in several Human Rights Watch reports.⁴⁵ But while many crimes are

⁴³ The term “aggravated felony” includes “illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18).” 8 US Code Section 1227(a)(43)(B).

⁴⁴ Human Rights Watch telephone interview with Daniel Conklin, former staff attorney, Pennsylvania Immigrant Resource Center, April 17, 2014.

⁴⁵ Human Rights Watch, *Torn Apart: Families and US Immigration Reform*, August 5, 2014, http://www.hrw.org/sites/default/files/related_material/US_2014_Torn_Apart.pdf; Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by US Deportation Policy*, Volume 19, No. 3(G), July 2007, <http://www.hrw.org/reports/2007/07/16/forced-apart-o>.

considered “aggravated felonies” only if a sentence of one year or more is imposed⁴⁶ or other factors are present,⁴⁷ *all* crimes involving sale, distribution, or production of drugs are deemed “drug trafficking” and thus “aggravated felonies.”

Among non-citizens deported for an aggravated felony from 2007 to 2012 who had a drug conviction as their most serious crime, about a quarter (13,000) had a conviction for possession or use of a drug.⁴⁸ Although we cannot determine the underlying conduct in these cases, it is likely that many had committed offenses that fall short of what most people would consider drug trafficking.

Erika Pinheiro, a legal services attorney, said many of the immigrant detainees she meets end up with trafficking convictions even if they never sold drugs, because “addicts will buy multiple bags [of methamphetamine]” and then end up charged with possession with intent to sell.⁴⁹ And several of the cases reported to Human Rights Watch involved defendants who claimed that they had not known about the drugs they allegedly possessed.⁵⁰ Andrew Free, a private immigration attorney, described a case in which his client, a lawful permanent resident who lived near the Mexican border in Texas, was convicted of possession with intent to distribute because he was hired to drive a truck in which a large amount of marijuana was found. There was strong evidence to support his claim he did not know there were illicit drugs in the truck, but Free said, “You can still be convicted of possession with intent to distribute marijuana despite the fact that the government can’t prove you knew the type and amount of contraband in the vehicle you’re driving.”⁵¹

Robert Jaeggli, an attorney in Washington, reported that one of his clients had been prescribed pain medication, did not like it, and gave it away with no remuneration. But he was convicted of attempted delivery of a controlled substance. “When he was caught by the

⁴⁶ 8 US Code Section 1101(a)(43)(F) and (G).

⁴⁷ For example, an offense involving fraud or deceit is an aggravated felony only if it involves the loss to the victim exceeds \$10,000. 8 US Code Section 1101(a)(43)(M)(i).

⁴⁸ Possession with intent to distribute is commonly categorized as an aggravated felony.

⁴⁹ Human Rights Watch interview with Erika Pinheiro, February 6, 2014.

⁵⁰ Human Rights Watch telephone interview with Robert Jaeggli, immigration attorney, May 29, 2014; telephone interview with Diana Wride, March 25, 2014; interview with “Samuel D.,” Washington, June 11, 2014; telephone interview with Amanda Esquivel, June 4, 2014.

⁵¹ Human Rights Watch telephone interview with R. Andrew Free, immigration and criminal defense attorney, April 30, 2014. See also *United States v. Cruz-Velez*, United States Court of Appeals for the Fifth Circuit, case no. 09-40958, Unpublished Opinion, filed June 22, 2010.

police, he confessed to the activity because he had no idea he wasn't supposed to be doing that," Jaeggli said. His client was in his 60s, had lived in the US as a green card holder since the 1970s, had his entire family living in the US, and had no other criminal record. His client was able to withdraw his guilty plea and enter a new plea to solicitation, which does not constitute "drug trafficking," and Jaeggli is hoping on that basis to terminate deportation proceedings. But in the meantime, his client spent six months in immigration detention, during which time he lost his job, his apartment, and almost everything he owned.⁵²

In a case published in *Politico Magazine*, Howard Bailey, a veteran of the Persian Gulf War, claimed he had been convicted for possession of marijuana with intent to distribute after he accepted some packages in the mail for an acquaintance. Ten years later, in 2012, he was deported to Jamaica, while his US citizen wife and two US citizen children remain in the US.⁵³

In many of the cases reported to Human Rights Watch, permanent residents facing deportation for their drug trafficking conviction had convictions so minor, the judges in their criminal cases had sentenced them to little or no time in prison.

- Lundy Khoy, a refugee from Cambodia and a permanent resident, said she was convicted of possession with intent to distribute when, as a college student, she was arrested with ecstasy pills her boyfriend gave her. The criminal justice system imposed a punishment of three months' imprisonment and four years' probation, but because that conviction constituted "drug trafficking" and thus an "aggravated felony," she has been ordered deported. She remains in the US only because Cambodia has not issued a travel document for her.⁵⁴
- "Mario F.," a lawful permanent resident from Colombia, was stopped at the airport in February 2013 and put into removal proceedings for a single 10-year-old conviction for sale of methamphetamine for which he received only probation.⁵⁵

⁵² Human Rights Watch telephone interview with Robert Jaeggli, immigration and criminal defense attorney, May 29, 2014.

⁵³ Howard Bailey, "I Served My Country. Then It Kicked Me Out," *Politico Magazine*, April 10, 2014, http://www.politico.com/magazine/story/2014/04/howard-dean-bailey-deported-i-served-my-country-and-then-it-kicked-me-out-105606_Page2.html#.U86w9uNdV8E (accessed July 22, 2014).

⁵⁴ Human Rights Watch telephone interview with Lundy Khoy, March 18, 2014; Tara Bahrapour, "After run-in with law, Cambodian immigrant's permanent residency is at risk," *Washington Post*, October 3, 2012, http://www.washingtonpost.com/local/after-run-in-with-law-cambodian-immigrants-permanent-residency-is-at-risk/2012/10/03/3ecf7ad2-0cd7-11e2-bb5e-492cod30bff6_story.html (accessed July 10, 2014).

⁵⁵ Human Rights Watch interview with "Mario F." (pseudonym) and his attorney, Brooklyn, New York, April 27, 2014.

Deported for a Ten-Year-Old Cannabis Conviction

Raul Valdez, a 36-year-old lawful permanent resident, moved to the US when he was one year old and grew up in the suburbs of Chicago. His entire family lives in the US. They are US citizens and permanent residents. But in 2014, Valdez was deported for a 2003 conviction for unlawful possession of cannabis with intent to deliver.

Speaking by phone from Guadalajara, Mexico, Valdez told Human Rights Watch that he used to smoke marijuana, but said he had not been a dealer. However, when his brother's friend got in trouble, "he told on me, and they found the drugs in my house." His criminal defense attorney did not tell him he could get deported. After Valdez pled guilty, he was sentenced only to 60 days in prison and 2 years' probation.

Ten years later, however, immigration came and arrested Valdez. "They picked me up out of nowhere," he said. He said immigration agents told him, "We're deporting people with drug convictions." Valdez was placed in immigration detention, where he remained for over two years as he fought to stay in the country he considers home.

According to family members who submitted affidavits on his behalf, Valdez, who also had misdemeanor convictions from his teenage years, had turned his life around since his earlier brush with the law. Valdez had a union construction job that paid well, and his employer praised his work in a letter submitted to immigration authorities. He provided financial and emotional support to his elderly parents. He was engaged to a US citizen, who attested, "My children [from a previous marriage] see Raul as a father figure and know he is someone they can always count on."

But Valdez's conviction constituted drug trafficking and an "aggravated felony." As such, the immigration judge could not consider the minor nature of his conviction, evidence of his rehabilitation, and his strong ties to his family and the US, but instead had to order him removed. His pro bono attorney sought a grant of prosecutorial discretion, citing all the positive factors in his case and the fact that his last conviction was over 10 years old. The US government denied his request, and Valdez now lives in Mexico, a country he barely knows.⁵⁶

⁵⁶ Ibid.

Facing Deportation and Family Separation for a Teenage Drug Offense

Abdulahakim Haji-Eda was born in Ethiopia but grew up in a refugee camp in Kenya. When he was 13 years old, he and his family came to the US as refugees and settled in Seattle, Washington. He said he struggled academically, but he loved basketball and as a teenager, he and his friends set up a basketball league for local Muslim youth, with the goal of being mentors and helping them keep out of trouble.⁵⁷

When he was 15 years old, Haji-Eda's father kicked him out of their house because he had gone to Oregon for a basketball game without asking his father's permission. Haji-Eda went to live with a cousin, who told him, "I can't buy you food every day, go sell [drugs]." According to Haji-Eda, he tried hard to find another job and did stop selling drugs when he was briefly able to live with a girlfriend's family, but he



Abdulahakim Haji-Eda and his US citizen wife, Hani Hamza, and their two children, Haroun (left) and Nasreen, also US citizens. Haji-Eda, a refugee from Ethiopia, has been ordered deported as a drug trafficker for a single conviction for selling a small amount of cocaine at the age of 18. Now 26, he has no other convictions and is seeking a stay of removal to remain in the US with his family. © 2015 Private

⁵⁷ Human Rights Watch interview with Abdulhakim Haji-Eda, Hani Hamza (Haji-Eda's wife), and Lori Walls (Haji-Eda's attorney), Seattle, Washington, June 10, 2014.

eventually had to return to his cousin's home.

"It's not something that I chose," he said, "It's something that for me was to survive."

In 2006, days after he turned 18, Haji-Eda was arrested for selling a small quantity of cocaine at a bus stop in downtown Seattle. He was ultimately convicted of possession with intent to manufacture or deliver and sentenced to one year in prison, of which he served six months. Haji-Eda said his criminal defense attorney gave him no warning that pleading guilty could result in the loss of his legal status and permanent deportation. But at the end of his six-month sentence, immigration authorities arrested Haji-Eda. He was put into removal proceedings and charged with being deportable for the aggravated felony of drug trafficking.⁵⁸

Now a soft-spoken 26-year-old, Haji-Eda is married to Hani Hamza, a US citizen, and they have two US-born children, a three-year-old son and a two-year-old daughter. His parents are US citizens, as are all his brothers and sisters. Haji-Eda has worked steadily since his arrest, and he has no other criminal conviction. But because his conviction is considered an aggravated felony, the immigration judge could not consider these factors, and ultimately ordered him deported. Lori Walls, his current immigration attorney, pointed out, "The judge in his criminal case...sentenced him to the extreme low-end. The flexibility that's available in criminal court is not there in the immigration court."⁵⁹

Haji-Eda currently remains in the US only because the US government temporarily granted a stay of removal, but it expired in August 2014 and his status remains in limbo.

Hamza, Haji-Eda's wife, has heard President Obama claim he is focusing on deporting serious criminals. On paper, she understands that her husband would be seen as a drug trafficker and as one of these serious criminals. But if she could meet President Obama, she told us, she would say to him: "Are you sure you know what you're talking about? Why don't you sit down and talk to him? Why don't you meet him? Why don't you meet his family?"⁶⁰

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

Not every non-citizen with a conviction for “drug trafficking” receives an insignificant prison sentence. Human Rights Watch interviewed several people with more serious drug trafficking convictions, including people who had convictions for manufacturing methamphetamine, cultivating marijuana, and trafficking in crack cocaine, who had been sentenced to considerably more time. In some of these cases, however, the defendants were sentenced under the kind of disproportionately harsh mandatory minimum sentencing laws that are currently being reexamined at both the state and federal level. To immigrants who have served these long sentences, deportation only further compounds the harshness of the punishment.

The Difference an Individualized Hearing Can Make

Before the 1996 amendments to immigration law, lawful permanent residents convicted of aggravated felonies, including drug trafficking, were still able to get an individualized hearing before an immigration judge where they could present evidence of their family ties, residence in US, rehabilitation, and other factors in favor of their application to remain in the US. This relief, called “212(c)” for its provision number in the Immigration and Nationality Act, was available before 1990 to all permanent residents with any aggravated felony conviction, and before 1996, to all permanent residents with an aggravated felony conviction if they had received criminal sentences of five years or less.⁶¹ After protracted litigation around whether the 1996 amendments should be applied retroactively to those who were convicted before 1996, the Supreme Court ruled that certain lawful permanent residents who pled guilty before 1996 are still eligible for 212(c) relief.⁶² Almost 20 years after these amendments went into effect, there are still permanent residents who are eligible for 212(c) relief because they are still being arrested by immigration authorities for their pre-1996 convictions.

⁶¹ The Anti-Terrorism and Effective Death Penalty Act of 1996 eliminated 212(c) relief for anyone convicted of an aggravated felony, while the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 eliminated 212(c) relief altogether and replaced it with lawful permanent resident cancellation of removal. The five-year sentence limit on 212(c) relief was imposed by the Immigration Act of 1990. Before then, a lawful permanent resident convicted of an aggravated felony with any sentence of imprisonment was eligible to apply for 212(c) relief. See Norton Tooby and Joseph Justin Rollin, “Evolution of the Definition of Aggravated Felony.”

⁶² *INS v. St. Cyr*, 533 US 289 (2001).

The case of “Luis A.,” reported to Human Rights Watch by his son Jorge, illustrates how eligibility for such an individualized hearing, rather than the imposition of a one-size-fits-all policy, can make all the difference for a lawful permanent resident and his family.⁶³

Luis first came to the US in 1966, and eventually raised four children, all US citizens, with his wife, also a US citizen. He was a farmworker for many years in the Central Valley of California, and now runs a popular stand at a local farmers’ market.

But in 1989, Jorge said, his father was approached by an undercover police officer who told him he had a very ill father and needed to obtain drugs to try to make money to help his dad. “My dad had been working in [his town] since the 1960s, and he knew the good, the bad, and the ugly,” he said. He connected the undercover police officer to some of these contacts, and Luis was soon afterward arrested, convicted, and sentenced to one year in prison for possessing and transporting cocaine.

Although that year of imprisonment was hard on the entire family, they thought they had put this conviction behind them, as Luis never got in trouble again. Jorge said, “He never even got a parking ticket.” But in 2009, 20 years later, immigration authorities arrested his father and put him in immigration detention in Eloy, Arizona, and placed him in removal proceedings.

Because his father had been convicted in 1989 and released from his prison sentence before October 1998,⁶⁴ he was not subject to mandatory detention for his drug crime and he was still eligible for 212(c) relief, even though his conviction constitutes an “aggravated felony” under current law. The government did not contest it and the judge granted him relief immediately. Soon afterward, Luis applied for and was granted naturalization.

Luis is still scarred by his experience of six weeks in immigration detention. He developed a thyroid condition and high blood pressure in detention and suffered from depression. He is uncomfortable in crowds and he refuses to stay at parties or gatherings for more than an hour. But they know they were lucky that Jorge, who has a law degree, was able to obtain

⁶³ Human Rights Watch telephone interview with Jorge A. (last name withheld), July 7, 2014.

⁶⁴ A non-citizen is not subject to mandatory detention under if he or she was released from his or her custodial sentence on or before October 1998. *Matter of Adeniji*, 22 I & N Dec. 1102 (BIA 1999).

good counsel and navigate the complex immigration system to get his father released and eventually end his ordeal.⁶⁵

US Supreme Court Response to Unjust Interpretations of “Drug Trafficking”

Over the years, the very broad definition of “drug trafficking” used by the US government has led to protracted litigation, often involving long-term lawful permanent residents facing deportation for minor offenses. Although permanent residents with low-level offenses continue to be placed in proceedings as drug traffickers, Supreme Court decisions have placed some limits on the US government’s interpretation of drug trafficking.

In 2006, the Supreme Court heard a challenge by Jose Antonio Lopez, a permanent resident whom the US government sought to deport as a drug trafficker for a single conviction in South Dakota for aiding and abetting another person’s possession of cocaine. This offense would have been treated as a misdemeanor under federal law, but South Dakota, like many states, categorized this crime as a felony. The Court ruled that a state felony conviction for possession of a controlled substance is not a drug trafficking aggravated felony if the same offense would be punishable only as a misdemeanor under federal law.⁶⁶

Since then, the Supreme Court has further rejected the US government’s interpretation of “drug trafficking” to include a second or subsequent conviction for simple possession of a controlled substance (*Carachuri-Rosendo v. Holder*),⁶⁷ and ruled that a conviction for an offense that could include social sharing cannot be considered “drug trafficking” (*Moncrieffe v. Holder*).⁶⁸

These rulings have allowed some permanent residents in deportation proceedings to argue against deportation and apply for cancellation of removal, and thereby present

⁶⁵ Human Rights Watch telephone interview with Jorge A., July 7, 2014.

⁶⁶ *Lopez v. Gonzales*, 549 US 47 (2006).

⁶⁷ *Carachuri-Rosendo v. Holder*, 560 US 563 (2010). Jose Angel Carachuri-Rosendo, a permanent resident who had lived in the US since he was five years old, was nearly deported as a “drug trafficker” because he had a conviction for possession of a small amount of marijuana and a second conviction for possession of a single anti-anxiety tablet without a prescription.

⁶⁸ *Moncrieffe v. Holder*, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013). Moncrieffe, a lawful permanent resident from Jamaica, had been convicted in Georgia of possession with intent to distribute marijuana after police found 1.3 grams of marijuana in his car. The Court declared, “This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as ‘illicit trafficking in a controlled substance,’ and thus an ‘aggravated felony.’ Once again, we hold that the Government’s approach defies ‘the commonsense conception of these terms.’” 133 S. Ct. at 1694.

evidence of their strong ties to the US. Other Supreme Court decisions have also expanded options for some lawful permanent residents with old convictions.⁶⁹ But in the meantime, there are likely thousands of permanent residents, if not more, who have been deported as aggravated felons for offenses that are no longer considered “aggravated felonies,” or who have otherwise been deported under incorrect interpretations of US law.

Once deported, it is extremely difficult for such former residents to come back to the US legally. It is not enough for them to show that they were deported under incorrect interpretations of the law. They must meet strict time, number, and procedural requirements to reopen or reconsider their cases.⁷⁰ Once deported, US government regulations state that they can no longer file a motion to reopen or reconsider. Although some courts have found that these requirements and bars do not apply in certain situations,⁷¹ reopening a case is a complex procedure that is practically impossible for an immigrant who has been deported to navigate, particularly without an attorney. According to Jessica Chicco, staff attorney at the Post-Deportation Human Rights Project at Boston College, “[F]or many people, if they’re not in a position to file a motion to reopen in 90 days [of their removal order], they’ll have a very difficult time.”⁷²

For example, Marco Merino, a permanent resident who came to the US from Chile when he was five months old, was unable to reopen his case after being deported in 2007 for two possession convictions, one for a marijuana joint and one for LSD, convictions he received when he was 18. According to Merino, these convictions were so minor, “I never received

⁶⁹ For example, *INS v. St. Cyr*, 533 US 289 (2001) and subsequent rulings have ruled 212(c) relief from deportation is available for permanent residents convicted of crimes before 1996 that were retroactively defined as “aggravated felonies” by the 1996 amendments to US immigration law.

⁷⁰ A motion to reopen is a request to review a decision because of new evidence or changed circumstances. A motion to reconsider is a request to review a decision based on new or additional legal arguments. A person who has been deported can only file one motion to reconsider within 30 days of the final administrative order, and one motion to reopen within 90 days of the final order. 8 US Code Sections 1229a(c)(6) and 1229a(c)(7). *See also* Post-Deportation Human Rights Project, Center for Human Rights and International Justice, Boston College Law School, “Post-Departure Motions to Reopen or Reconsider,” March 2014, https://www.bc.edu/content/dam/files/centers/humanrights/doc/Post-Departure%20MTR%20Advisory%2012-2012_FINAL.pdf, accessed (April 15, 2015).

⁷¹ Post-Deportation Human Rights Project, Center for Human Rights and International Justice, Boston College Law School, “Post-Departure Motions to Reopen or Reconsider.”

⁷² Human Rights Watch telephone interview with Jessica Chicco, staff attorney, Post-Deportation Human Rights Project, Boston College Law School, March 5, 2014.

one day in jail.”⁷³ But over 10 years later, when he returned from traveling abroad, he was placed in immigration proceedings and eventually deported under the interpretation the Supreme Court later held was incorrect in *Lopez*.⁷⁴ The Post-Deportation Human Rights Project took Merino’s case after he was deported, but the Fifth Circuit US Court of Appeals ruled in 2012 that Merino did not meet the strict procedural requirements to reopen his case and seek a legal way to return.⁷⁵

Deportation for Simple Possession Offenses

Lawful permanent residents can be deported for any drug offense, including simple possession (other than a conviction for possession of a small amount of marijuana).⁷⁶ However, permanent residents with simple possession convictions can try to avoid deportation by applying for “lawful permanent resident cancellation of removal” if they meet certain requirements for length of residency and lawful status,⁷⁷ and get the kind of individualized hearing permanent residents with drug trafficking convictions are denied.

According to several dozen immigration lawyers interviewed by Human Rights Watch, many of their permanent resident clients who are put in deportation proceedings for simple possession offenses are able to win cancellation of removal. However, in the meantime, most are placed in mandatory detention while proceedings are pending, which can take months or even years, during which time many lose their jobs and their homes. They must navigate the complexities of a deportation proceeding in which they have no right to a court-appointed

⁷³ Human Rights Watch telephone interview with Marco Merino, May 6, 2014.

⁷⁴ Human Rights Watch telephone interview with Marco Merino, May 6, 2014; Human Rights Watch telephone interview with Jessica Chicco, March 5, 2014; email from Jessica Chicco to Human Rights Watch, August 29, 2014.

⁷⁵ *Merino-Fernandez v. Holder*, Docket No. 11-60010 (5th Cir. 2012).]

⁷⁶ Specifically, a noncitizen convicted of an offense “relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession of 30 grams or less of marijuana, is deportable.” 8 US Code Section 1227(a)(2)(B)(i). Some states regulate substances that are not federally prohibited, and if a non-citizen’s record of conviction does not indicate a controlled substance prohibited by federal law, making it unclear from the record whether a federally controlled substance was involved, that conviction is not a deportable offense. *Matter of Paulus*, 1 & N Dec. 274 (Board of Immigration Appeals 1965). This is a narrow exception that can sometimes help lawful permanent residents avoid deportation for a drug offense. See also the US Supreme Court decision *Mellouli v. Holder*, Docket No. 13-1034, June 1, 2015; and Immigrant Legal Resource Center, Controlled Substances, January 2013, http://www.ilrc.org/files/documents/n-8-controlled_substances.pdf (accessed April 15, 2015).

A lawful permanent resident can also be deported without a conviction if he or she, after gaining permanent resident status, is or ever was a “drug abuser or addict.” 8 US Code Section 127(a)(2)(B)(ii), but this ground of deportability is rarely charged.

⁷⁷ 8 US Code Section 1229b(a). The non-citizen must have been a lawful permanent resident for at least five years, have resided in the US for at least seven years in any legal status, and not been convicted of an aggravated felony.

lawyer if they cannot afford to pay for one themselves. (More information on the human rights impact of mandatory detention for drug offenses can be found in Section IV of this report.) Some permanent residents are not eligible for cancellation of removal because they do not meet the strict residency and status requirements, despite having lived in the US for many years and having strong family and community ties.

For example, Iris del Carmen Morales, a grandmother and a lawful permanent resident from Guatemala, told Human Rights Watch in 2014 while in immigration detention that she was ineligible for cancellation of removal, even though she has lived in the US since 1989, because her 2013 conviction for possession of methamphetamine occurred just three days before she would have accrued the required seven years of lawful status. Morales has five children, four of whom live in the US and are citizens or permanent residents. She became dependent on drugs, she said, after she lost her job and her home and began hanging out with “the wrong people.” Morales said the judge agreed to send her to a drug treatment program, but instead of starting the program after her six-month sentence, she was arrested by ICE and put into removal proceedings.⁷⁸

Eswin Figueroa Lemus, a lawful permanent resident from Guatemala who had lived in the US since 1990, told Human Rights Watch he was facing imminent deportation for being found with a very small amount of cocaine. Figueroa claimed he was not a drug user but had accepted the drug from an acquaintance. He had built a life with his wife and three US citizen children, working in construction and paying taxes for over 20 years. “I’m not a drug addict,” Figueroa said. “I don’t know why I took it, why I saved it....my mistake with the drug has cost me my family.”⁷⁹ Despite his 20-plus years in the US, Figueroa had only been a permanent resident since 2006, and his 2012 conviction cut off his eligibility for lawful permanent resident cancellation of removal.

Lawful permanent residents are also ineligible for cancellation of removal if they previously were granted cancellation of removal or 212(c) relief, a similar form of relief that existed before the 1996 amendments. Persons who struggle with drug dependency often

⁷⁸ Human Rights Watch interview with Iris del Carmen Morales, Santa Ana City Jail, April 1, 2014.

⁷⁹ Human Rights Watch interview with Eswin Figueroa Lemus, Denver Contract Detention Facility, Aurora, Colorado, May 23, 2014.

relapse after initial efforts at drug treatment. The consequences of such relapse for permanent residents are severe.⁸⁰

Marion Scholz, a lawful permanent resident from Germany who has lived in the US for almost 50 years, was deported in 2014 after two misdemeanor convictions for possession of methamphetamine. Scholz said she had struggled with dependency on methamphetamine for many years. She was first convicted of misdemeanor possession of a controlled substance in 1993. When the government sought to deport her in 1998, Scholz applied for and received a grant of cancellation of removal. She sought treatment and was off drugs for four months, but fell back into drug dependency and was convicted again in 2005 for possession, which led to new deportation proceedings.

After almost two years in immigration detention, ICE released Scholz in 2010 with an ankle monitor, and she immediately entered a drug treatment program. According to Scholz and her attorney, she turned her life around completely. She has been off drugs for over six years, and she was promoted at the job she had before getting deported. She repaired relationships with her family, including a son, all US citizens. But she was nevertheless deported to a country where she does not speak the language and knows no one. She is now living in a shelter. Scholz wishes the US government could “understand what addiction is,” and “look at what [people are] doing now to better themselves.”⁸¹

Immigration Arrests for Old Offenses

The US immigration law makes no distinction between drug offenses committed recently and drug offenses committed many years ago. Human Rights Watch documented numerous cases in which immigrants with old convictions for drug offenses were put into removal proceedings in recent years.⁸²

⁸⁰ Human Rights Watch interview with Nicolas Rios Garibay, Northwest Detention Center, Tacoma, Washington, June 11, 2014; interview with Niloufar Khonsari, executive director, Pangea Legal Services; Marie Vincent, co-director, Pangea Legal Services; Bianca Santos, director of international human rights program, Pangea Legal Services, San Francisco, California, June 26, 2014.

⁸¹ Human Rights Watch telephone interview with Marion Scholz, March 19, 2014; telephone interview with Raha Jorjani, Scholz’s attorney, March 17, 2014; telephone interview with Marion Scholz, June 3, 2015.

⁸² Several attorneys reported many of their cases involved old convictions, often from the 1990s. Human Rights Watch interview with Henry Cruz, immigration attorney, Seattle, Washington, June 10, 2014; interview with Elissa Steglich, May 6, 2014; telephone interview with R. Andrew Free, April 30, 2014; telephone interview with Holly Cooper, April 30, 2014.

In some cases, permanent residents traveled abroad and their convictions were flagged by US Customs and Border Protection upon their return, or they applied for naturalization or some other immigration benefit, not knowing their convictions could lead to their deportation. For example, “Mario F.,” a lawful permanent resident from Colombia, was put into removal proceedings in 2013, upon returning to the US from a trip abroad, for a 2003 conviction for sale of methamphetamine.⁸³ “Luis A.” (case described above) believed he was put into removal proceedings in 2009 for a 1988 conviction because he had applied to renew his green card.⁸⁴ Henry Cruz stated one client, a 63-year-old Korean woman with a ten-year-old conviction for using communication devices to assist in drug trafficking, was put into removal proceedings after she applied for naturalization.⁸⁵

Advocates reported some people are identified through traffic stops or more recent arrests, often for minor, non-deportable offenses.⁸⁶

Some immigrants and immigration advocates reported immigration authorities actively sought out individuals at their homes or at work, years after their criminal conviction. ICE officials came to Raul Valdez’s home almost 10 years after his 2003 conviction for possession of cannabis with intent to deliver, leading to his deportation in 2014.⁸⁷ Ricardo Fuenzalida reported that immigration authorities came to his home in 2013 to put him in detention and removal proceedings for two marijuana possession convictions 13 years earlier.⁸⁸ Talia Peleg and Ruben Loyo, immigration attorneys at Brooklyn Defender Services, described cases in which lawful permanent resident clients with possession convictions had been arrested at home years after their convictions.⁸⁹ Similarly, Erika Pinheiro at Esperanza Immigrant Rights Project in Los Angeles recounted

⁸³ Human Rights Watch interview with “Mario F.” (pseudonym) and Cristina Velez, staff attorney, HIV Law Project, Brooklyn, New York, April 17, 2014.

⁸⁴ Human Rights Watch telephone interview with Jorge A., July 7, 2014.

⁸⁵ Human Rights Watch interview with Henry Cruz, June 10, 2014.

⁸⁶ Ibid., Human Rights Watch telephone interview with Linus Chan, March 31, 2014; interview with Justin Valas, Colorado Immigrant Rights Coalition, Denver, Colorado, April 18, 2014.

⁸⁷ Human Rights Watch telephone interview with Raul Valdez, April 29, 2014.

⁸⁸ Human Rights Watch interview with Ricardo Fuenzalida, Union City, New Jersey, May 6, 2014.

⁸⁹ Human Rights Watch interview with Talia Peleg, staff attorney, Brooklyn Defender Services, Immigration Unit, Brooklyn, New York, May 7, 2014; interview with Ruben Loyo, staff attorney, Brooklyn Defender Services, Immigration Unit, Brooklyn, New York, May 7, 2014.

a case in which immigration authorities had shown up at her client's door years after his one 1998 conviction for sale of marijuana.⁹⁰

In *Preap v. Johnson*, three non-citizens in 2014 brought a federal habeas corpus class action lawsuit against DHS in California challenging their mandatory detention based on the fact that all three had been arrested by immigration officials five to ten years after their relevant convictions.⁹¹ All three plaintiffs have convictions for drug offenses, in addition to other offenses.⁹² Since the lawsuit was filed, the court has granted plaintiffs' motion for class certification and granted their motion for a preliminary injunction requiring the government to give them bond hearings.⁹³ Similar challenges have been brought and granted in several district courts across the country.⁹⁴

It should be noted that the most recent enforcement priorities memorandum issued by DHS Secretary Jeh Johnson states "extended length of time since the offense of conviction" will be considered, along with other factors, in determining whether prosecutorial discretion should be exercised even when the past criminal conviction makes the case an enforcement priority.⁹⁵

⁹⁰ Human Rights Watch interview with Erika Pinheiro, February 6, 2014.

⁹¹ *Preap v. Johnson*, 2014 WL 1995064 (N.D. Cal. 2014).

⁹² *Ibid.*

⁹³ American Civil Liberties Union of Northern California, "Judge Rules to Limit Mandatory Detention of Immigrants in California," May 15, 2014, <https://www.aclunc.org/news/judge-rules-limit-mandatory-detention-immigrants-california> (accessed April 15, 2015).

⁹⁴ *Castaneda v. Souza*, 952 F. Supp. 2d 307 (D. Mass. 2013); *Nimako v. Shanahan*, 2012 WL 4121102 (D.N.J. 2012); *Khoury v. Asher*, 2014 WL 954920 (W.D. Wash. 2014). Other courts have ruled non-citizens arrested years after their convictions remain subject to mandatory detention. *Sylvain v. Attorney Gen. of U.S.*, 714 F. 3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F. 3d 375 (4th Cir. 2012).

⁹⁵ Memorandum from Jeh Charles Johnson, US Department of Homeland Security Secretary, to Thomas S. Winkowski, Acting Director, US Immigration and Customs Enforcement, et al., "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants," November 20, 2014.

Fearing Deportation for Being in the Wrong Place at the Wrong Time 20 Years Ago

“Daniel P.,” now 42, is a social worker, husband, and father to three children. His wife, children, mother, and sister are all US citizens. Daniel is a lawful permanent resident who has lived in the US since he moved from the Dominican Republic at the age of seven. He has been at the same job for 14 years, as an employee of the City of New York.

Although Daniel is proud of his work and his family, he said, “Since 1996, my life has been a nightmare.” In 1996, when he was 23 years old, Daniel pled guilty to criminal sale of a controlled substance in the third degree, his sole conviction. Daniel claimed he “was in the wrong place at the wrong time.” He had stopped to say hello to some friends hanging out on the street, he said, on his way home from work. He did not know the police were watching his friends, who were selling drugs. They arrested everyone, and even though no drugs were found on him, Daniel was charged with conspiracy to sell drugs. His attorney told him that if he pleaded guilty, he would not get a prison sentence, and he was right. Daniel was sentenced to five years’ probation and a \$155 fine.

Daniel said he met all the terms of his probation. One of his probation officers noticed that he was always on time, and he recommended he apply for a certificate of relief from disabilities. In New York, such certificates are meant to “contribute to the complete rehabilitation of first offenders and their successful return to responsible lives in the community.”⁹⁶ Daniel received the certificate, went to college and graduate school, and continued with his life.

Soon afterward, though, Daniel heard news reports that permanent residents like him were being deported for criminal convictions. Since then, he has not traveled outside of the US for fear that he will be stopped at the airport and put into removal proceedings. When his father died in the Dominican Republic, he was unable to go to the funeral. He has not been able to visit his 87-year-old grandmother and 105-year-old great-grandmother for almost 20 years. Daniel said, “This type of law is breaking up families, destroying families.”⁹⁷

⁹⁶ New York State Division of Criminal Justice Services, “Certificates of Relief from Disabilities and Certificates of Good Conduct; Licensure and Employment of Offenders,” <http://dpca.state.ny.us/pdfs/certificatesofrelieffromforfeituresanddisabilitiesqanda.pdf> (accessed July 31, 2014).

⁹⁷ Human Rights Watch interview with “Daniel P.” (pseudonym), New York, New York, May 5, 2014.

Permanent Exile and Bars to Reentering the US

Those who are deported have no legal way to return, and no matter how many years have passed without a new arrest, they are forever barred from returning to live in the US with their families.

Carlos Guillen, a lawful permanent resident from Ecuador, was arrested in 1992 in Texas for possession of drugs with intent to distribute after police found a large amount of cocaine in his home. His brother has since admitted the drugs belonged to him, but Guillen went on to serve seven years in prison and was deported to Ecuador in 1999. After being separated from his US citizen wife and three US citizen children for 15 years, and suffering from serious medical conditions, his daughter Diana Wride reported that her father, now almost 70 and desperate, tried to reenter the US illegally. Because it had been over 20 years since the date of the offense, and it was Guillen's only conviction, his daughter applied for prosecutorial discretion so her father could spend his remaining years with his family. Their application was denied.⁹⁸

Many of those who do return illegally face criminal prosecution for the federal crime of "illegal reentry" and additional time in prison with sentences that are enhanced by their prior drug convictions. Among defendants convicted and sentenced for felony reentry or second or subsequent illegal entry in 2013, more than 3,000 or 17 percent had a prior conviction for a drug offense.⁹⁹

Jesus Octavio Perez Ochoa, according to federal court documents filed by his federal public defender, grew up in the US with his entire family. He was deported in 1993 after a conviction for distribution of cocaine, although he was using and sharing drugs, not selling them. He had pled guilty on the advice of his criminal defense attorney who assured him he would only receive a sentence of probation. Perez Ochoa returned illegally to the US and was living

⁹⁸ Human Rights Watch telephone interview with Diana Wride, March 25, 2014; email correspondence with Diana Wride, April 29, 2014.

⁹⁹ US Sentencing Commission, "Use of Guidelines and Specific Offense Characteristics, Offender Based, Fiscal Year 2013," p. 52-53, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2013/Use_of_Guidelines_and_Specific_Offense_Characteristics_Offender_Based_Revised.pdf (accessed August 13, 2014). Sentencing Guideline 2L1.2 applies different offense levels based on prior convictions. A prior drug trafficking offense that resulted in a sentence of more than 13 months results in an increase of 12 or 16 offense levels (which affects the final sentence); 11.3 percent had such prior convictions. A prior drug offense resulting in a sentence of less than 13 months can result in 8, 12, or 16 offense levels; 5.6 percent had such prior convictions.

quietly with his permanent resident wife and their US-born daughter when he was the victim of a hit-and-run accident and waited for the police to arrive. He was then arrested and transferred to immigration authorities.¹⁰⁰ Sixteen years after his drug conviction, Perez Ochoa was prosecuted for illegal reentry and sentenced to 13 months in prison.¹⁰¹

“This is All from One Mistake, One Poor Choice He Made.”

Francisco Equihua Lemus was first deported in 2001 after a conviction stemming from manufacture of methamphetamines. According to his US citizen daughters, Cecilia and Lili Equihua, Francisco first came to the US in 1967 and had been a lawful permanent resident.

Separated from their mother but devoted to his two young daughters in the US, Francisco came back illegally soon after his deportation. Cecilia and Lili, now 24 and 22 years old, said he lived a quiet life for nine years, dedicated to spending time and rebuilding his relationship with his daughters. The sisters remembered “Sunday was father day.” They lived with their mother in Las Vegas, Nevada, while their father lived in California. So every Sunday, he would leave California at 4 am to be in Las Vegas by 8 am. He would wake them up, take them to church, and then go to lunch or the movies. He would leave at 5 pm so he could be home in time to go to work early Monday morning. The sisters saw him sacrifice as much as possible for their sakes—their father lived for them. Even their mother came to respect and appreciate him because he provided as much financial support as he could.

In 2010, the Sundays came to an end. Cecilia remembered he had come to take them shopping for school. “We had such a good time, it was almost painful to see him leave.” He began driving back to California and two hours later, she called him, as she always did, but there was no answer. Cecilia stayed up all night calling him and heard nothing.

Two weeks later, they finally heard from their father. He had been stopped for a broken taillight, taken to immigration detention, and immediately deported. He was only able to get in touch with them once he was back in Mexico.

¹⁰⁰ *US v. Jesus Octavio Perez Ochoa*, United States District Court for the District of New Mexico, case no. 08-CR-381, Defendant’s Sentencing Memorandum, filed May 1, 2008, provided by Kari Converse, assistant federal public defender.

¹⁰¹ *US v. Jesus Octavio Perez Ochoa*, case no. 08-CR-381, Docket, 2008.

A week or so later, Francisco tried to enter the US illegally again. He was caught and prosecuted for felony illegal reentry and sentenced to two years in prison, which he served in New Mexico. In 2012, Francisco was deported again. His daughters worry for his safety in Mexico because of drug cartel violence, but they hope he will stay in Mexico and out of US prison.

Cecilia and Lili understand their father committed a serious crime, but they feel that their family is continuing to be punished for one poor decision he made years ago. They long for a way for their father to come back to the US legally, so he can be here for their graduations and other milestones. Lili said, “There are still so many things he could be a part of.”¹⁰²



Francisco Equihua Lemus, with his two US-citizen daughters, Lili (left) and Cecilia in 1993. Equihua was deported in 2001 after a conviction stemming from manufacture of methamphetamines. According to his daughters, he reentered illegally and lived without incident for nine years. When Equihua was stopped for a broken taillight in 2010, he was deported again.

¹⁰² Human Rights Watch interview with Cecilia and Lili Equihua, Los Angeles, California, March 21, 2014.

IV. Permanent Denial of Legal Resident Status

The “Controlled Substance” Bar

The US, like many countries around the world, bars non-citizens from gaining legal resident status if they have certain criminal convictions, including drug offenses. A state may legitimately consider the existence of convictions in determining who may or may not reside within its borders, particularly as a long-term immigrant. The draconian nature of the bar for any controlled substance offense, however, stands out because of the severe impact it has on the ability of affected immigrants to live with their US citizen families in the US. And given the changes in how the criminal justice system views drug offenses, the bar seems increasingly arbitrary.

Other bars based on criminal convictions require the conviction to be recent or significant. A “crime involving moral turpitude,” which can include such offenses as assault or fraud, will not necessarily bar a non-citizen from becoming a legal immigrant if it was a “petty offense,” defined as having a maximum sentence of less than one year and resulting in an actual sentence of six months or less. Juvenile offenses are also not a bar if the crime was committed more than five years before the date of application for the visa.¹⁰³ Even if a crime involving moral turpitude does result in a bar to gaining legal status, the non-citizen can apply to have that bar “waived” under Section 212(h) of the Immigration and Nationality Act, if he or she can show that a US citizen or permanent resident spouse, parent, or child would suffer “extreme hardship.”¹⁰⁴ Even an “aggravated felony” may be waived in some cases.¹⁰⁵ In this way, US immigration law recognizes at least in a limited

¹⁰³ A “petty offense” exception applies for a single conviction for a “crime involving moral turpitude,” such as fraud or assault, if the maximum penalty possible for the crime did not exceed one year of imprisonment, and if the non-citizen was sentenced to a term of imprisonment of six months or less. An exception is also made for juvenile convictions, when committed more than 5 years before the date of application for the visa. Neither exception applies to drug offenses. 8 US Code Section 1182(a)(2)(A)(II).

¹⁰⁴ To apply for a 212(h) waiver, the non-citizen applicant for permanent resident status must provide evidence that a US citizen or permanent resident spouse, parent, or child would suffer “extreme hardship” if the applicant were denied a green card. This waiver is available for non-citizens with multiple criminal convictions, as well as those who are barred because of involvement in prostitution or criminal activity for which they asserted immunity from prosecution. Immigration and Nationality Act Section 212(h), 8 US Code Section 1182(h).

¹⁰⁵ The US government, through the administrative court of the Board of Immigration Appeals, has held that all permanent residents with an aggravated felony conviction are barred from applying for 212(h) relief if they have an aggravated felony conviction. *Matter of Rodriguez*, 25 I & N Dec. 784 (BIA 212). Six US Courts of Appeal, however, have held the bar does not apply to permanent residents who adjusted status to permanent resident status in the US. In these jurisdictions, the BIA follows the reasoning of *Martinez v. Mukasey*, 519 F. 3d 532 (5th Cir. 2008). In other jurisdictions, the BIA continues to apply the rule in

way that a balancing test should be performed that takes into account the individual applicant and the needs of US citizen and permanent resident family members.

Drug offenses, however, are treated very differently. *Any* drug offense, from possession of marijuana to cocaine trafficking, results in a bar to gaining legal immigrant status.¹⁰⁶ There is no exception for minor offenses or even for juvenile offenses. The 212(h) waiver is unavailable for drug offenses (categorized with murder and torture), with the sole exception of a single conviction for possessing 30 grams or less of marijuana.¹⁰⁷ Even without a conviction, an admission of having committed a controlled substance offense can bar a non-citizen from gaining permanent resident status.¹⁰⁸

The controlled substance bar can have a devastating impact on those who want to immigrate and join loved ones in the US. “Alice M.,” a 41-year-old graphic designer and Canadian citizen, told Human Rights Watch that she is barred from living in the US with her US citizen fiancé because of a single 1992 conviction for cocaine possession she received in Canada when she was in her last year of high school. Alice said that her conviction, for which she received one year probation and no jail time, was pardoned long ago in Canada and the records are sealed. But 23 years later, Alice has been told she can never gain permanent resident status in the United States. Her fiancé has an established business in the US that he has run for 30 years and cannot start over in Canada. Her six-year-old daughter is very close to him and does not understand why they cannot all live together. “This is now a life sentence for two people who are innocent, who had nothing to do with it,” Alice said. “It’s a mistake that I made as a kid that has now impacted the two people I love the most.”¹⁰⁹

Rodriguez. See Katherine Brady, Immigrant Legal Resource Center, “Update: The LPR Bars to § 212(h) – To Whom Do They Apply,” 2014, http://www.ilrc.org/files/documents/212h_matter_of_rodriguez_update_2014.pdf (accessed August 11, 2014).

¹⁰⁶ Specifically, a non-citizen is “inadmissible” or ineligible to get a visa or gain lawful permanent resident status if he or she has a conviction for an offense “relating to a controlled substance (as defined in section 802 of title 21).” 8 US Code Section 1182(a)(2)(A)(i)(II).

¹⁰⁷ Immigration and Nationality Act Section 212(h), 8 US Code Section 1182(h).

¹⁰⁸ A non-citizen can be inadmissible for drug-related conduct even without a conviction. A non-citizen is inadmissible if he is a current drug addict or abuser. 8 US Code Section 1182(a)(1)(A)(iv). A non-citizen is inadmissible if he formally admits all of the elements of a controlled substance conviction, when that offense was not charged in criminal court. 8 US Code Section 1182(a)(2)(A)(i). A non-citizen is inadmissible if immigration authorities have “reason to believe” the person participated in drug trafficking, or is the spouse or child of a trafficker who benefited from trafficking within the last five years. 8 US Code Section 1182(a)(2)(C). See also Immigrant Legal Resource Center, Controlled Substances, January 2013, http://www.ilrc.org/files/documents/n.8-controlled_substances.pdf (accessed April 15, 2015).

¹⁰⁹ Human Rights Watch telephone interview with “Alice M.” (pseudonym), August 18, 2014.

The bar also means immigrants who have lived in the US for many years, with US citizen families and other longstanding ties to the US, can never gain legal resident status.

Many undocumented immigrants in the US have US citizen spouses or adult children, who under existing law could petition for them to gain legal status. Although they may face other barriers to gaining legal status, the controlled substance bar for those with drug convictions stands out because there is no waiver available. Elizabeth Cordoba, an immigration attorney in New Jersey, explained how this lack of a waiver for drug offenses affected her client, a 43-year-old man from Haiti who has been in the US for over 20 years. He applied for lawful permanent resident status through his US citizen wife, but was denied in 2012 because of a 1996 conviction for possession of marijuana that he received when he was a teenager. The government claimed the amount of marijuana involved was more than 30 grams. Because the conviction is almost 20 years old, Cordoba said it was difficult to get the transcripts of the guilty plea and determine the exact amount of marijuana. If her client were eligible for a waiver, he would be a strong candidate, she said, because he has three US citizen children, including a baby that was born premature and has significant health issues. But instead, he is now at risk of being put into proceedings and deported away from his family permanently.¹¹⁰

“Young K.,” a 58-year-old Korean woman who has lived in the US since 1981, when she entered with her then-spouse, a military serviceman, has been unable to gain lawful permanent resident status for the past 30-plus years because of a 1977 drug conviction in South Korea. According to Young, while she was still living in South Korea, some Americans she had met had asked her to find some marijuana, which led to her arrest and conviction. After she married in 1980, she entered the US with her then-husband on a visitor visa and they raised two children in Alabama. She also now has two US citizen grandchildren. Her husband applied for her to gain permanent resident status, but her conviction barred her. Young said her lack of legal status has had a devastating impact on her life. She could not travel out of the country or go to school. When their marriage ended, her husband took custody of their children. He threatened her with deportation if she fought the arrangement. She said, “When the children needed me, I couldn’t be there, that was the hardest.” Young was only able to reestablish a relationship with them after her

¹¹⁰ Human Rights Watch telephone interview with Elizabeth Cordoba, immigration attorney, April 11, 2014.

husband passed away.¹¹¹ Young is now married to another US citizen, but according to her attorney, she was ordered deported in 2009, and her appeal to the 11th Circuit was denied in 2011. Young remains in the US under a stay of the removal order. According to her attorney, under South Korean law, Young no longer even has a conviction, as convictions are effectively expunged after a certain period of time.¹¹² But US immigration law, with a limited exception, does not recognize expungements.¹¹³

No Individualized Assessment

A limited form of relief from deportation is available for immigrants who are put into deportation proceedings, called non-lawful permanent resident (non-LPR) cancellation of removal, which allows them to apply for legal status if they have lived in the US for many years, have good moral character, and can prove a US citizen or permanent resident child, spouse, or parent would suffer “exceptional and unusual hardship.”¹¹⁴ This is one of the few instances in which US immigration law recognizes the right to family unity for undocumented immigrants, albeit in an extremely limited way, as “exceptional and unusual” is a very high standard, met in such cases as when the qualifying relative has a serious medical condition that cannot be treated in the non-citizen’s native country.

A conviction for any controlled substance offense, however, eliminates eligibility for this form of relief. Non-citizens with one conviction for “a crime involving moral turpitude” are still eligible if the maximum possible sentence is less than one year and the sentence imposed was six months or less.¹¹⁵ But non-citizens with convictions for drug offenses, no matter how minor or how short the potential sentence, are ineligible.

“Samuel D.,” an undocumented immigrant from Mexico who has lived in the US for over 15 years, told Human Rights Watch he is ineligible for non-LPR cancellation because of minor

¹¹¹ Human Rights Watch telephone interview with “Young K.” (pseudonym), June 13, 2014.

¹¹² Human Rights Watch interview with Henry Cruz, June 10, 2014.

¹¹³ Immigration and Nationality Act 101(a)(43)(A) defines “conviction” as “a formal judgment of guilt of the alien entered by a court, or if adjudication of guilt has been withheld, where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” 8 US Code Section 1101(a)(43)(A). Subsequent state rehabilitative expungements still constitute convictions. *Murilla-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001). For more information, see Section V. below.

¹¹⁴ 8 US Code Section 1229b(b)(1).

¹¹⁵ *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010).

drug possession convictions from 2001. According to his attorney Bob Pauw, Samuel would have a strong application for cancellation of removal if not for these convictions. Two of Samuel's four children, all US-born, have learning disabilities that Pauw believes would result in "exceptional and unusual hardship" if they were forced to live in Mexico. When he first came to the United States, Samuel said he shared houses in California with many other immigrants. When drugs were found in these houses, he was convicted of drug possession, even though Samuel said he never used or sold drugs himself. Over 10 years later, after he had moved to Washington, started to raise a family, and built a steady work history, immigration authorities came to his home looking for someone else, but arrested Samuel.¹¹⁶ With no other options, Pauw is preparing an application for prosecutorial discretion.¹¹⁷

¹¹⁶ Human Rights Watch interview with "Samuel D." (pseudonym) and his wife, Washington, June 11, 2014; interview with Bob Pauw, immigration attorney, Seattle, Washington, June 10, 2014.

¹¹⁷ Ibid.

V. Drug Convictions as Bars to Asylum

The principle of non-*refoulement* places strict limits on a government's ability to return a person to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. There is a very limited exception to this principle if the asylum seeker "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."¹¹⁸

US law falls short of international standards requiring this exception to be applied narrowly and after individualized determination of whether the refugee has been convicted of a particularly serious crime and whether he or she constitutes a danger to the community. Instead, under US law, certain types of crimes are categorically deemed to be "particularly serious crimes" that bar eligibility for asylum and withholding of removal, forms of protection otherwise available for asylum-seekers and refugees.¹¹⁹

Drug trafficking offenses, in particular, are the subject of an interpretation issued by the US Attorney General, that asserts they are presumptively "particularly serious crimes." In

¹¹⁸ UN General Assembly, Convention relation to the Status of Refugees (Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, art. 33.

¹¹⁹ For non-citizens who fear returning to their home countries, US law provides several forms of protection: asylum, withholding of removal under the Immigration and Nationality Act (INA), and withholding of removal and deferral of removal under the Convention against Torture (commonly described as "CAT"). Asylum is available for an applicant who can establish past persecution or a "well-founded fear" of future persecution on account of a protected ground, race, religion, nationality, membership in a particular social group, or political opinion, and meets other eligibility requirements. In the US, a non-citizen granted asylum—an "asylee"—is granted significant benefits—he or she may remain indefinitely in the US, can apply for permanent resident status after one year and can apply for his or her spouse and children to gain derivative asylee status. A non-citizen who does not meet all the requirements for asylum, including procedures requiring that applications are filed within one year of arrival, may remain eligible for withholding of removal. Many of the benefits afforded to asylees are not afforded to those granted withholding of removal, and it requires the applicant to meet a higher burden of proof than for asylum, a greater than 50 percent chance of being persecuted. Protection under the Convention against Torture has the highest bar, as it requires a non-citizen to prove "it is more likely than not" that he or she would suffer the severe level of pain and suffering of being tortured if returned and must show that a state agent perpetrated or acquiesced in the torture; it does not, however, require the applicant to establish that the likelihood of being tortured would be on account of one of the five protected grounds for asylum or withholding of removal. Like withholding of removal, there are few other benefits that attach to a grant of relief in relation to torture other than the bar on return to the country of origin, and the person can still be removed to a country other than their home country. 8 Code of Federal Regulations Sections 208.18(a) and 1208.18(a).

A conviction for a "particularly serious crime" bars eligibility for asylum and withholding of removal under the INA and under CAT but not deferral of removal under CAT. Any "aggravated felony" conviction is a "particularly serious crime" barring eligibility for asylum; an "aggravated felony" conviction is presumptively a "particularly serious crime" barring eligibility for withholding of removal under the INA and under CAT. 8 US Code Sections 1158(b)(2)(B) and 1231(b)(3)(B), 8 Code of Federal Regulations 208.16(d)(3).

Matter of Y-L-, the US Attorney General overruled the US Board of Immigration Appeals, which had found in three separate cases that the applicants' convictions for cocaine-related trafficking offenses were not particularly serious crimes, emphasizing such factors as the applicants' cooperation with federal authorities, their limited criminal history records, and the fact they were sentenced at the low-end of the sentencing guidelines. In disagreeing, the US Attorney General's interpretation stated, "only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible."¹²⁰

In one attorney's experience, the Attorney General's decision in *Matter of Y-L-* makes possession of a controlled substance with intent to distribute one of "the worst crimes to have." Daniel Conklin, former staff attorney at the Pennsylvania Immigrant Resource Center, has found, "It's easier to argue that robbery or assault is not a particularly serious crime because there's no decision like *Matter of Y-L-*."¹²¹

Because of *Matter of Y-L-*, numerous federal courts have held that minor offenses involving small amounts of drugs that nonetheless fall within the broad US definition of "drug trafficking" crimes bar non-citizens who fear persecution in their native countries from applying for asylum or withholding of removal. In *Tunis v. Gonzales*, a lawful permanent resident fearing female genital mutilation in Sierra Leone had a conviction for selling less than one gram of cocaine, for which she served seven months in prison; this conviction made her ineligible for asylum or withholding of removal.¹²² Similarly, in *Diaz v. Holder*, the immigrant had been involved in a sale of 16 ecstasy pills for \$320, for which he had received a suspended sentence and three years' probation, while in *Hussein v. Attorney General*, the immigrant was convicted of possession with intent to deliver khat, a drug commonly used in Africa, for which he received one year probation.¹²³ Both were ruled ineligible for withholding of removal because of these "particularly serious crimes."

¹²⁰ *Matter of Y-L-*, 23 I & N Dec. 270 (AG 2002). The opinion further highlighted how rare it should be to find any drug trafficking crime not "particularly serious" by stating, "I emphasize here that such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation."

¹²¹ Human Rights Watch telephone interview with Daniel Conklin, former staff attorney, Pennsylvania Immigrant Resource Center, April 17, 2014.

¹²² *Tunis v. Gonzales*, 447 F.3d 547 (7th Cir. 2006).

¹²³ *Diaz v. Holder*, 2012 U.S. App. Lexis 22452 (10th Cir. 2012); *Hussein v. Attorney General*, 2008 U.S. App. Lexis 7553 (3rd Cir. 2008).

Non-citizens with drug trafficking convictions remain eligible for deferral of removal under the Convention against Torture (ratified by the US in 1994), but they must meet a much higher standard than for asylum or withholding of removal, and they are eligible for few benefits other than a guarantee that they will not be returned to their countries of origin.

Non-citizens with convictions for simple drug possession may still be eligible for asylum or withholding of removal, depending on such factors as the sentence and whether the drugs were for personal use, but such convictions still trigger mandatory detention, which can severely limit their ability to gather the evidence needed to support an asylum claim.¹²⁴

¹²⁴ Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 6, 2010, <https://www.hrw.org/reports/2010/05/06/costly-and-unfair-o>.

VI. Mandatory Detention

Policymakers and legislators who seek to reform US drug policy often cite the damaging and wasteful effects of prolonged incarceration for nonviolent drug offenses. Many states have accordingly sought to reduce the amount of time people spend in prison for drug offenses, and defendants with minor convictions often serve short sentences or no term of incarceration.

Yet under US immigration law, any controlled substance offense, along with a range of convictions for other criminal offenses, triggers mandatory detention in a setting similar, if not identical, to US jails and prisons.¹²⁵ The law makes no distinction between permanent residents and undocumented immigrants, or between minor and serious drug offenses.

Pre-Trial Detention in the Criminal Justice System versus Pre-Removal Detention in the Immigration Detention System

In the US criminal justice system, criminal defendants are generally presumed to be eligible to be released pending trial, after consideration of whether the defendant is a flight risk or a danger to the community.¹²⁶ In contrast, non-citizens who have committed a wide range of offenses, even minor ones, are subject to mandatory immigration detention pending their removal proceedings and are ineligible to apply for release on bond.¹²⁷

The vast majority of the individuals we interviewed and the cases we examined involved non-citizens, including many permanent residents, who had spent at least some time in immigration detention, ranging from a few days to over two years. Many reported that they spent more time in immigration detention than in jail or prison for their drug conviction, often because they sought relief from deportation.

¹²⁵ Immigration and Nationality Act Section 236(c), 8 US Code Section 1226(c). There is an exception for individuals who are released from their criminal sentences on or before October 1998, the expiration date of the Transition Period Custody Rules. *Matter of Adeniji*, 22 I & N Dec. 1102 (BIA 1999). See also US Department of Justice, Executive Office of Immigration Review, Immigration Judge Benchbook. <http://www.iustice.gov/eoir/vll/benchbook/> (accessed July 24, 2014).

¹²⁶ American Bar Association, *ABA Criminal Justice Standards: Pretrial Release*, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html (accessed August 28, 2014).

¹²⁷ 8 US Code 1226(c).

- The most time Marsha Austin, a permanent resident, had spent in jail had been 90 days for violating probation, and she had never served more than a day or two in jail for her drug convictions, but she was detained by immigration authorities for two-and-a-half years.¹²⁸
- Marco Merino, a permanent resident, reported he had never spent any time in jail for his convictions for possession of marijuana and LSD, but he spent six months in immigration detention before he was ultimately deported to Chile.¹²⁹
- Nazry Mustakim, a permanent resident from Singapore, said he had received only a sentence of probation for his conviction for possession of methamphetamine with intent to deliver, but was held in immigration detention for 10 months.¹³⁰
- Amanda Esquivel reported that her husband, Jesus, had been sentenced only to probation for his drug possession conviction, but had been in immigration detention for over six months by the time of her interview.¹³¹
- Marion Scholz spent 8 months in jail for violating her probation after a drug conviction; she spent almost two years in immigration detention afterward.¹³²
- Hans Meyer, an attorney in Colorado, reported that possession of marijuana paraphernalia, conduct which no longer even constitutes a crime in that state, led to mandatory detention of his client.¹³³

¹²⁸ Human Rights Watch interview with Marsha Austin and Sonia Lin (Austin's attorney), New York, New York, May 5, 2014.

¹²⁹ Human Rights Watch telephone interview with Marco Merino, May 6, 2014.

¹³⁰ Human Rights Watch telephone interview with Nazry and Hope Mustakim, June 3, 2014.

¹³¹ Human Rights Watch telephone interview with Amanda Esquivel, June 4, 2014.

¹³² Human Rights Watch telephone interview with Marion Scholz, March 19, 2014.

¹³³ Human Rights Watch interview with Hans Meyer, immigration and criminal defense attorney, and Julie Gonzalez, immigration advocate, Denver, Colorado, May 22, 2014.

Permanent Resident Detained in Immigrant Jail for Marijuana Possession

Ricardo Fuenzalida, now 34, said he came to the US from Chile when he was 11 years old. He became a permanent resident when he turned 18 and is now married to a US citizen and has twin 10-year-old daughters, born in the US.

When he was about 20 years old, Fuenzalida pled guilty on two occasions to misdemeanor possession of marijuana. He said his public defender never told him it could affect his immigration status, and he never spent a day in jail. As a family man who worked hard at his job in construction and spent most of his free time as his daughters' soccer coach, he thought these marijuana convictions would never affect his life.

But over 13 years later, on January 2, 2013, immigration authorities knocked on Fuenzalida's door. They took him into custody but did not tell him why he had been arrested. He said he did not see an immigration judge until three weeks later, which is when he found out the government wanted to deport him for his two marijuana misdemeanor convictions. "[The immigration judge] explained to me since my case is drug-related, I get no bail, I have to fight the case from the inside," Fuenzalida said.

Fuenzalida ultimately was able to avoid deportation by applying for "lawful permanent resident cancellation of removal," a defense to deportation in which permanent residents must show they deserve to be allowed to remain in the US. He had an excellent case, given his strong family ties, steady work history, and very minor criminal record. But his likelihood of success did not allow him to avoid mandatory detention.

"The worst was being far from my wife and kids," Fuenzalida remembered. He and his wife decided not to tell their daughters where he was because he knew they would want to visit. "It would be too much for them.... I didn't want to them to see me in the setting I was in," he said. But when he called his wife every night, she told him their daughters cried every night for their father. Even though Fuenzalida was not being charged with a crime, he still had to deal with the serious challenges of living in a jail-like setting, with bad food, harsh temperatures, and guards banging on their doors. He said he lost 12 pounds, and that "[e]verybody loses weight in there."

Despite having avoided deportation, Fuenzalida's life has not gone completely back to normal. Fuenzalida's wife had to drop out of school, where she was training to be a respiratory therapist, but they still have to pay back the student loans she had already taken out. They also owe his boss thousands of dollars, since he paid for Fuenzalida's immigration attorney. The strain of having the main breadwinner in detention "pulled [his] family apart" and the formerly warm relationship between his wife and mother deteriorated.¹³⁴

¹³⁴ Human Rights Watch interview with Ricardo Fuenzalida, Union City, New Jersey, May 6, 2014.

After 20 Years in Federal Prison, Fearing Persecution and Torture in Jamaica

Claudette Hubbard, a lawful permanent resident from Jamaica, was sentenced in 1992 to 30 years in federal prison for conspiracy with intent to possess and distribute crack cocaine, plus 5 years for a small gun that was found on her nightstand.

Hubbard told Human Rights Watch she first came to the US from Jamaica in the 1970s, when she was 17. She eventually had two US-born children. At the time she was sentenced, mandatory minimum sentences for crack cocaine were triggered by significantly smaller amounts of drugs than for powder cocaine, resulting in a “100-to-1” sentencing disparity that Human Rights Watch long criticized for its racially disproportionate impact on African Americans.¹³⁵ According to her current immigration attorney, Hubbard took advantage of every rehabilitative program available, earned a business degree, served as a mentor, and was a model prisoner. Hubbard credits the time she spent in prison as helping to make her a better person. Hubbard’s sentence was reduced in 2011 to reflect the Fair Sentencing Act, which reduced the crack cocaine-powder cocaine disparity, and she served less time because of her good behavior. Nevertheless, she spent almost 20 years in federal prison.¹³⁶

After she completed her criminal sentence, Hubbard was transferred to immigration detention, which she found much harder than federal prison. Hubbard said it was like going “from the palace to the dump.” Hubbard, a lesbian who had suffered severe abuse and persecution in Jamaica, applied for protection under the Convention against Torture (CAT) (her conviction disqualified her from asylum and withholding of removal), but the immigration judge and Board of Immigration Appeals denied her application, applying a legal standard for government acquiescence in torture that her attorney argued was incorrect. During her appeal, Hubbard was subject to mandatory immigration detention. Although her prison sentence had been long, Hubbard knew the exact date she would be released, whereas in administrative immigration detention, she didn’t know if she was going to be able to stay or get deported. Hubbard lost 27 pounds. She said, “I had to get psych meds, it was driving me up the wall. I couldn’t sleep, I couldn’t eat.... I couldn’t hold a conversation without tears.” Hubbard ended up spending two additional years in immigration detention before being released on \$7,500 bond, paid through contributions from a community of her supporters. After Hubbard appealed to the Ninth Circuit US Court of Appeals, the US government agreed to remand her case for full consideration of her claim.¹³⁷

¹³⁵ Human Rights Watch, “Cracked Justice: Addressing the Unfairness in Cocaine Sentencing,” Written Statement Submitted by Carol Chodroff, US Advocacy Director, to the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security, February 26, 2008, <http://www.hrw.org/news/2008/02/25/cracked-justice-addressing-unfairness-cocaine-sentencing>.

¹³⁶ Human Rights Watch interview with Claudette Hubbard and Toya Green (Hubbard’s daughter), Los Angeles, California, June 20, 2014; *US v. Hubbard*, United States District Court for the Middle District of Florida, case no. 6:11-cr-350-Orl-28DAB, Order, filed November 4, 2011.

¹³⁷ Human Rights Watch interview with Claudette Hubbard and Toya Green (Hubbard’s daughter), Los Angeles, California, June 20, 2014; telephone interview with Holly Cooper, clinical professor, University of California, Davis School of Law, April 30, 2014.

Imposing Barriers to Due Process, Severe Hardship to Families

As previous reports¹³⁸ by Human Rights Watch and others have demonstrated, detention impedes non-citizens from accessing attorneys, obtaining evidence in support of their claims, and staying in touch with their families and support systems, especially when they are transferred to immigration detention centers far from home.¹³⁹ It imposes severe hardships on families, including US citizens and permanent residents, particularly when the detained immigrant was the primary wage earner.

Many studies have found that criminal defendants held in pre-trial detention are more likely to plead guilty than those who are not.¹⁴⁰ Non-citizens in immigration detention similarly struggle to defend themselves and assert their rights to apply for forms of relief from deportation for which they are eligible. In the experience of Talia Peleg, an immigration attorney at Brooklyn Defenders, “Mandatory detention is absolutely damaging.... I’ve had numerous clients take removal orders when they were eligible for defenses simply because they would have to be detained during the pendency of their cases.”¹⁴¹

Unlike criminal defendants, immigrants in deportation proceedings who cannot afford an attorney are not entitled to court-appointed counsel. Detention can significantly impede an immigrant’s ability to find an attorney. Many detention centers are located in isolated, rural locations. Several North Carolina attorneys interviewed by Human Rights Watch said they did not represent individuals held in Stewart Detention Center in Lumpkin, Georgia, which detains non-citizens in the Southeast US. According to one attorney, Stewart Detention Center is a seven-hour drive from him and three hours from the closest airport, and it is “unfeasible” to provide effective representation to a client

¹³⁸ Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 6, 2010, <http://www.hrw.org/reports/2010/05/06/costly-and-unfair-o>.

¹³⁹ Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, December 2, 2009, <http://www.hrw.org/reports/2009/12/02/locked-far-away-o>; Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, June 14, 2011, <http://www.hrw.org/reports/2011/06/14/costly-move-o>.

¹⁴⁰ Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, December 3, 2010, <http://www.hrw.org/node/94581>.

¹⁴¹ Human Rights Watch interview with Talia Peleg, May 7, 2014.

in Stewart: “It’s a hellhole, it’s where cases go to die.”¹⁴² Griselda Barrera, a paralegal with a nonprofit organization that regularly visits the South Texas Detention Center, about an hour from San Antonio, Texas, reported that detained immigrants routinely find it difficult to find attorneys willing to represent them.¹⁴³ Natalia Drelichman described how in one case, she could not talk to her detained client on the phone because those calls were not confidential, but that to visit him, she had to make a five to six-hour round-trip drive from her office.¹⁴⁴

Detention can also impede an immigrant from obtaining the evidence necessary to apply for relief from deportation. A lawful permanent resident applying for cancellation of removal, for example, will need to provide court records for any conviction, evidence of lawful permanent or US citizen status for any qualifying relative, evidence of his or her good moral character such as letters of support from community members, evidence of rehabilitation, and evidence of any other positive factors supporting their application. Documents can be extremely difficult to obtain while detained, particularly if the immigrant is unable to obtain legal representation or is detained far from family and community. Unauthorized immigrants who came to the US as children may be eligible for a temporary reprieve from deportation under the executive program Deferred Action for Childhood Arrivals, but those who must enroll in a General Equivalency Degree program to meet the education requirement often cannot do so if detained because, as reported to Human Rights Watch, detention centers generally do not offer GED classes.

Evidence of rehabilitation or a strong intent to seek treatment for drug addiction can be particularly difficult to obtain when immigrants are held in detention centers where few programs are available. Two immigrants who had spent about 20 years each in federal prison separately reported that they found federal prison easier than immigration detention because there were programs available in federal prison.¹⁴⁵

¹⁴² Human Rights Watch telephone interview with Rob Herroy, immigration attorney, June 3, 2014. Immigration attorneys in Atlanta, Georgia, and Charlotte, North Carolina, concurred. Human Rights Watch telephone interview with Charles Kuck, June 4, 2014; telephone interview with Tin Nguyen, June 5, 2014.

¹⁴³ Human Rights Watch telephone interview with Griselda Barrera, accredited representative, Legal Orientation Program, American Gateways, June 18, 2014.

¹⁴⁴ Human Rights Watch telephone interview with Natalia Drelichman, staff attorney, American Gateways, June 6, 2014.

¹⁴⁵ Human Rights Watch interview with Courtney Fuller, June 11, 2014; interview with Claudette Hubbard, June 20, 2014.

Numerous immigrants reported that detention resulted in severe financial hardship, including loss of their homes and trauma to their children. While “Samuel D.” was in detention, he said his children did not want to go to school. One son continues to see a psychologist, and when the children are in the car with him and they see the police, they are afraid.¹⁴⁶ Amanda Esquivel, whose husband has been in mandatory detention for over six months for a drug possession conviction, said, “My 13 year-old and 10-year-old were crazy about daddy, they were with him all the time.... My daughter has to see a psychiatrist because she’s having serious issues.”¹⁴⁷

¹⁴⁶ Human Rights Watch interview with “Samuel D.” (pseudonym), Washington, June 11, 2014.

¹⁴⁷ Human Rights Watch telephone interview with Amanda Esquivel, June 4, 2014.

DREAMer Deported for Possession of Marijuana

“Antonio S.,” now in his early 20s, first came to the US from Mexico when he was 12 years old. According to his attorney, Violeta Chapin at the University of Colorado Law School Criminal and Immigration Defense Clinic, Antonio was arrested in Wyoming in December 2012 for possessing a small amount of marijuana. Antonio pled guilty without an attorney,¹⁴⁸ having no idea that this conviction for violating a municipal ordinance could change his life. After 11 days in jail for the marijuana conviction, immigration authorities arrested him and transferred him to a detention facility in Colorado, where he was held for over a year. Unable to afford an immigration attorney, he tried to apply for asylum on his own and was denied, at which point his mother, also undocumented, got in touch with the University of Colorado immigration law clinic.

Antonio’s sole conviction for possession of marijuana would not have disqualified him from Deferred Action for Childhood Arrivals (DACA), the administrative program created by the Obama administration for some immigrants who came to the US as children. But because of this conviction, he was also subject to mandatory detention. To be eligible for DACA, the applicant must have a high school diploma or GED, or be currently enrolled in school. Antonio had dropped out of high school to work, and would have been happy to go back to school, but because he was in detention and the facility had no GED programs, Antonio could not enroll. His attorney tried desperately to get him released on bond or on electronic monitoring, but she was told that because he had a drug conviction, he was under mandatory detention. She was working on vacating his Wyoming conviction, on the basis that he had been given no information on the immigration consequences of the guilty plea, but the US government deported him in the spring of 2014 before she could get the transcripts of his plea.

Chapin reports Antonio was bewildered and repeatedly asked her, “How could this possibly be happening to me?” Possession of small amounts of marijuana for personal use is now legal in Colorado, the state in which Antonio was detained. Chapin cannot believe how much the US government spent to detain and deport Antonio “for a tiny bag of weed.” “I’d like them to focus on their priorities, murderers and kidnappers,” she said, “and not municipal weed violators.”¹⁴⁹

¹⁴⁸ Defendants accused of misdemeanor municipal offenses regularly waive their right to an attorney, sometimes under pressure from judges. Robert C. Boruchowitz et al., National Association of Criminal Defense Lawyers, “Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts,” April 2009, <https://www.nacdl.org/reports/misdemeanor/> (accessed August 27, 2014).

¹⁴⁹ Human Rights Watch telephone interview with Violeta Raquel Chapin, assistant clinical professor of law, University of Colorado-Boulder School of Law, May 29, 2014.

Recent Legal Challenges to Mandatory Detention

The US Supreme Court in 2003 ruled that pre-removal mandatory detention under section 236(c) of the Immigration and Nationality Act (INA) is constitutional. The decision, *Demore v. Kim*, has been criticized for relying on misleading government statistics on the average length of detention, as the court found detention pending removal under 236(c) “lasts roughly a month and a half in the vast majority of cases—and about five months in the minority of cases in which the alien chooses to appeal.”¹⁵⁰

Since then, three appellate courts have found that *Demore* only applies where detention is brief and that 236(c) does not authorize detention without bond in cases where the duration of detention is not “reasonable.” The Ninth Circuit US Court of Appeals in *Rodriguez v. Robbins* created a bright-line six-month rule, holding that once detention becomes “prolonged”—when it exceeds six months—the detained individual is entitled to a bond hearing.¹⁵¹ The Third and Sixth Circuits have also recognized a need to limit the duration of detention under 236(c) but have settled on a “reasonableness” standard requiring case-by-case analysis.¹⁵² Some districts courts throughout the US have issued similar rulings.¹⁵³

As a result, some individuals subject to mandatory detention for controlled substance offenses have been released after six months. In several cases, particularly in the Ninth Circuit, attorneys and immigrants reported that release from detention made a significant difference in the ability of immigrants to pursue relief from deportation.¹⁵⁴ It allowed them to remain with their families, continue to support themselves and their families financially, and to participate in programs and activities that would help them build evidence of rehabilitation. But their cases also highlight how differently immigrants with similar drug convictions can be treated depending on the state or circuit in which they live.

¹⁵⁰ *Demore v. Kim*, 538 U.S. 510, 530 (2003).

¹⁵¹ *Rodriguez v. Robbins*, 715 F. 3d 1127, 1138 (9th Cir. 2013).

¹⁵² *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Diop v. ICE/Homeland Security*, 656 F. 3d 211 (3d Cir. 2011).

¹⁵³ See *Reid v. Donelan*, WL 2199780 (D. Mass. 2014); *Bracamontes v. Desanti*, WL 2942760 (E.D. Va. 2010).

¹⁵⁴ Human Rights Watch interview with Claudette Hubbard and Toya Greene, June 20, 2014; interview with “Samuel D,” June 11, 2014; interview with Bob Pauw, immigration attorney, Seattle, Washington, June 10, 2014; telephone interview with Marion Scholz, March 19, 2014. See also American Civil Liberties Union, “Restoring Due Process: How Bond Hearings Under *Rodriguez v. Robbins* Have Helped End Arbitrary Immigration Detention,” December 2014, <https://www.aclu.org/restoring-due-process-how-bond-hearings-under-rodriguez-v-robbins-have-helped-end-arbitrary> (accessed April 15, 2015).

Released to Son and Rehabilitative Program

“Maria S.,” now 29 years old, said she first came to the US from Mexico when she was 15, as a permanent resident through a petition filed by her US citizen stepfather. She said she did well in school, graduating from high school with a 3.8 GPA, and even got a scholarship to go to the University of Washington, but she did not go to college because she needed to work full time.

Maria met and married a US citizen, with whom she has a two-and-a-half-year-old son, but she said her husband became verbally abusive. She started using drugs and became dependent on painkillers. She was trying to get off the drugs when she got arrested with another woman for selling stolen property to buy drugs. She was convicted of possession of stolen property, possession of a controlled substance, and two charges of identity theft and sentenced in September 2013 to 30 days in jail, with restitution, drug and alcohol assessment, and one year probation.

After her time in jail, Maria was transferred to immigration detention in the Josephine County jail, eight hours from her family in Tacoma, Washington, and was told the US government wanted to take away her green card and deport her. There were no rehabilitative programs available. The facility was too far for her family to visit her, and she relied on daily phone calls with her mother to help her endure detention. “Without my family, I probably would have given up in there,” she said. As hard as it was, Maria felt, “In a way it was good. I was doing drugs, and that got me clean and sober and opened my eyes to an abusive relationship with my ex.”

After six months in immigration detention, Maria’s attorney, Karin Tolgu, was able to get a *Rodriguez* hearing for her and she was released on \$15,000 bond in May 2014. Since her release, Maria has signed up for a drug and alcohol treatment program. Maria is grateful to be able to fight her case without remaining in detention. Her ex-husband currently has custody of her son but she visits him regularly, and her hope is that once she has a job and is in a more stable situation, she will be able to share custody of her son. “[J]ust seeing his face and hugging him and kissing him was the best thing.” She knows she has to prove she has rehabilitated so she can stay in the US, and she believes that being free will enable her to prove she can.¹⁵⁵

¹⁵⁵ Human Rights Watch interview with “Maria S.” (pseudonym), Seattle, Washington, June 12, 2014.

VII. The Overly Broad Definition of “Conviction”

When Successful Completion of a Diversion Program Leads to Deportation

The 1996 amendments to US immigration law significantly broadened the definition of a “conviction” to include dispositions that would not be considered convictions by the criminal justice system.¹⁵⁶ If at any point, a non-citizen is found guilty, either by a judge or through a guilty plea, regardless of whether charges are later dismissed or the records expunged, that non-citizen’s conviction exists in perpetuity for immigration purposes.

This extremely broad definition affects immigrants with convictions for a wide range of minor offenses, but the effect is particularly pronounced with drug offenses, which the US criminal justice system increasingly addresses through drug courts and other diversion programs that often promise an expunged record for successful completion. Erika Pinheiro, an immigration attorney at Catholic Charities in Los Angeles stated, “I see so many people who are told by their public defender that they’ll be fine, there’s a diversion program.”¹⁵⁷

Diversion programs vary widely from state to state and county to county, but in general they follow one of two models: pre-plea or post-plea. In a pre-plea or deferred prosecution drug court, defendants are not required to plead guilty and those who successfully complete treatment are never prosecuted. Those who fail to complete the program, however, are then prosecuted. In a post-plea or deferred entry of judgment program, defendants must first plead guilty to their charges, but then have their sentences deferred or suspended during their participation in a treatment program. Those who successfully complete the program will have their sentence waived and sometimes, their conviction expunged, while those who fail will be sentenced on their guilty plea.¹⁵⁸

¹⁵⁶ Immigration and Nationality Act 101(a)(43)(A) defines “conviction” as “a formal judgment of guilt of the alien entered by a court, or if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”

¹⁵⁷ Human Rights Watch interview with Erika Pinheiro, February 6, 2014.

¹⁵⁸ Ryan King and Jill Pasquarella, Sentencing Project, “Drug Courts: A Review of the Evidence,” April 2009, http://www.sentencingproject.org/doc/dp_drugcourts.pdf (accessed August 5, 2014).

For immigration purposes, a pre-plea program will generally not result in a conviction that can lead to deportation.¹⁵⁹ But a post-plea program, even one where successful completion results in an expunged conviction, will result in a conviction that can lead to detention and deportation.¹⁶⁰ Malcolm Seawell, a criminal defense attorney in Colorado, explained, “[S]omeone who just wasn’t born here, who’s been here his whole life, who makes a small mistake ... [isn’t] given the same opportunities to put these cases behind them.”¹⁶¹

Human Rights Watch interviewed several individuals and attorneys who reported cases in which successful completion of diversion programs still resulted in a conviction that the US government used in deportation proceedings.

- Jose Francisco Gonzalez pled guilty to marijuana cultivation in 2001 to participate in a California diversion program and was told he no longer had a criminal record after successful completion, but 13 years later, ICE came to his home and arrested him.¹⁶²
- “Samuel D.” reported he had successfully completed diversion programs for possession of small amounts of marijuana and methamphetamine in California, but those convictions still made him ineligible for non-permanent resident cancellation of removal when he was put into deportation proceedings 10 years later.¹⁶³
- Malcolm Seawell reported that his client Josh Lee, who had been in the US since he was a child, had been arrested for possession of a very small quantity of cocaine in Colorado. Lee had pleaded guilty to participate in a diversion program, but immigration came and placed him in detention. Seawell had to withdraw the guilty

¹⁵⁹ To fully avoid immigration consequences, pre-plea diversion programs must also allow the non-citizen to avoid making any statements that would constitute an admission of guilt, as a conviction is not necessary for immigration consequences to be imposed.

¹⁶⁰ *In re Salazar-Regino*, 23 I & N Dec. 223 (BIA 2002). The Board of Immigration Appeals held in 2002 that a permanent resident who had lived in the US since 1977 was deportable as an “aggravated felon” for a first-time drug conviction for third degree felony possession of marijuana, for which she received a deferred adjudication of guilt and probation for 10 years. A very limited exception for expunged drug convictions exists for immigrants with certain drug convictions in western states bound by decisions of the US Court of Appeals for the Ninth Circuit. A first drug possession conviction occurring before July 14, 2011, is considered to be erased for immigrants in such states who are in deportation or other immigration proceedings. *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011).

¹⁶¹ Human Rights Watch telephone interview with Malcolm Seawell, criminal defense attorney, June 20, 2014. See also Kelsey Whipple, “Eldren’s Josh Lee: Musicians rally around violinist detained by ICE,” *Denver Westword Blogs*, June 22, 2012, http://blogs.westword.com/latestword/2012/06/eldren_josh_lee_immigration_detained_ice.php (accessed July 30, 2014).

¹⁶² Human Rights Watch interview with Jose Francisco Gonzalez and Pita Sanchez (Jose’s partner), Anaheim, California, April 30, 2015.

¹⁶³ Human Rights Watch interview with “Samuel D.,” June 11, 2014; interview with Bob Pauw, immigration attorney, Seattle, Washington, June 10, 2014.

plea and have him plead to a different offense to avoid the immigration consequences of a drug conviction.¹⁶⁴

- Helen Lawrence, an immigration attorney in Oakland, California, described a case in which her client had a single conviction for possession of ecstasy from a New Year's Eve celebration. Although he had participated in a diversion program, the program had required a guilty plea and he still had a conviction for immigration purposes. He had entered the US on a tourist visa at the age of seven and was now married to a US citizen. The conviction barred him from gaining lawful permanent resident status through his wife until Lawrence was able to vacate his conviction.¹⁶⁵
- A client of Michael Mehr, an attorney in Santa Cruz, California, was not so lucky. The client also had successfully completed a diversion program over 10 years ago for possession of a small amount of cocaine and had the charges dismissed, but was in removal proceedings because he had pleaded guilty and immigration still considered him to have a conviction. Mehr sought post-conviction relief, but the prosecutor opposed vacating the conviction because, under California law, the charges had already been dismissed. The prosecutor could not understand that the dismissed charges still constituted a conviction under US immigration law. As a result, he says his client was deported away from his wife and US citizen children.¹⁶⁶
- Tony Lococo, a permanent resident from Australia, was deported in 2013 as an "aggravated felon" after being arrested with three bags of crack cocaine. According to news reports, Lococo had been dependent on crack cocaine, but had pleaded guilty in Connecticut to sale of narcotics in order to enter a drug treatment program. Eight years later, he was put into removal proceedings and ultimately deported away from his US citizen wife, parents, and children, after having lived in the US since 1967.¹⁶⁷

¹⁶⁴ Human Rights Watch telephone interview with Malcolm Seawell, criminal defense attorney, June 20, 2014. See also Kelsey Whipple, "Eldren's Josh Lee: Musicians rally around violinist detained by ICE," *Denver Westword Blogs*, June 22, 2012, http://blogs.westword.com/latestword/2012/06/eldren_josh_lee_immigration_detained_ice.php (accessed July 30, 2014).

¹⁶⁵ Human Rights Watch interview with Helen Lawrence, immigration attorney, Oakland, California, June 26, 2014.

¹⁶⁶ Human Rights Watch interview with Michael Mehr, criminal and immigration attorney, Santa Cruz, California, June 27, 2014.

¹⁶⁷ Eric Parker, "Family fights to keep husband, father from being deported," *Eyewitness News WFSB*, February 25, 2013, updated March 25, 2013, <http://www.wfsb.com/story/21339142/family-fights-to-keep-husband-father-from-being-deported> (accessed July 30, 2014). Emails from Karen Lococo (Tony Lococo's wife) to Human Rights Watch.

Fearing Deportation as a “Drug Trafficker” after a Guilty Plea in a Diversion Program

“Miguel R.” came to the US from Ecuador in 1993, when he was in his early 20s. He is a lawful permanent resident; he said his wife, parents, brothers, and sisters are all US citizens. They all live near each other in the Bronx in New York City. According to Miguel, for many years, he was a truck driver and he drove all over the country with his wife and his dog.

Miguel was proud of his job and the good money he made, but for several years, he struggled with a dependency on heroin. Gregarious and open, Miguel said, “I used to weigh 200 pounds but I went down to 115.” He decided to get clean, he said, because, “I was dying. It was the worst thing I ever did in my life.”

Because of his dependency, Miguel was arrested several times but was charged mainly with disorderly conduct. But the conviction that makes Miguel automatically and permanently deportable as an “aggravated felon” happened in 2013, after Miguel had begun drug treatment at a methadone clinic.

Miguel said he went to the methadone clinic as he normally does each day, and someone approached him and asked, “You got methadone?” The stranger claimed his brother had not been able to come to his treatment program for three days and begged him to sell him some of his methadone for twenty dollars. When Miguel gave him the methadone, he was immediately arrested and charged with sale of a controlled substance.

Andrew Wachtenheim, Miguel’s lawyer at the Bronx Defenders, said cases in which an undercover officer will go to a methadone clinic, pretend he is in withdrawal, and persuade someone who is getting methadone for treatment to sell him some are quite common in the Bronx.

Miguel was offered a diversion program in which he would plead guilty, and then if he completed treatment, the charges would be dismissed. His attorneys explained that this still constitutes a conviction and that he could get deported. Miguel was shocked. “I didn’t rob or hurt somebody. I’m doing something bad but to myself getting into drugs.” But he was afraid to go to trial, with the possibility of receiving a prison sentence, and so he pleaded guilty. At the time of the interview he was complying with all the terms of his treatment program.

Miguel knows that if immigration authorities find out about his participation in this diversion program, they will view him as a “drug trafficker” and try to deport him for an aggravated felony.¹⁶⁸

¹⁶⁸ Human Rights Watch interview with “Miguel P.” and Andrew Wachtenheim, staff attorney, Bronx Defenders, New York, New York, April 19, 2014.

One promising new rehabilitative program based on pre-arrest diversion could help non-citizens avoid immigration consequences for minor drug offenses. LEAD, or Law Enforcement Assisted Diversion, was first piloted by the city of Seattle, Washington.¹⁶⁹ A collaboration involving several organizations, including local law enforcement and criminal justice reform advocates, LEAD is a pre-booking diversion program that allows people arrested for low-level drug and prostitution offenses to enter intensive, community-based social services, rather than the criminal justice system. It began in response to evidence of stark racial disparities in drug arrests in Seattle.¹⁷⁰ Santa Fe, New Mexico, has begun its own LEAD program, limited to those caught possessing or selling three grams or less of opioids, while other localities are considering their own pilot projects.¹⁷¹

The Limited Impact of Pardons

Immigrants facing deportation for criminal convictions, after having exhausted all other avenues, sometimes seek pardons to avoid deportation. Some states have even set up special panels to consider applications from immigrants who face deportation for their criminal convictions. Soon after the 1996 INA amendments, the Georgia Board of Pardons and Parole granted 138 pardons to permanent residents who had suddenly faced deportation retroactively for past convictions.¹⁷² In 2010, New York State created a special pardon panel to review applications from immigrants facing deportation for criminal convictions. When announcing which applications had been granted, Governor David Paterson justified these pardons by stating, “That our federal government does not credit rehabilitation, nor account for human suffering, is antithetical to the ideals this country represents.”¹⁷³

¹⁶⁹ Human Rights Watch interview with Kris Nyrop, LEAD Program Director, Racial Disparity Project, Public Defender Association, Seattle, Washington, June 12, 2014. See also “Law Enforcement Assisted Diversion,” <http://leadkingcounty.org/> (accessed August 13, 2014).

¹⁷⁰ Drug Policy Alliance, “Law Enforcement Assisted Diversion (LEAD): Reducing the Role of Criminalization in Local Drug Control,” February 2014, http://www.drugpolicy.org/sites/default/files/DPA_Fact_sheet_Law_Enforcement_Assisted_Diversion_LEAD_Feb2014.pdf (accessed August 13, 2014).

¹⁷¹ *Ibid.*

¹⁷² Danny Hakim and Nina Bernstein, “New Paterson Policy May Reduce Deportations,” *New York Times*, May 3, 2010.

¹⁷³ Press Release, New York State Governor’s Office, “Governor Paterson Announces Pardons,” December 24, 2010, <http://www.governor.ny.gov/archive/paterson/press/122410-GovPatersonAnnouncesPardons.html> (accessed July 31, 2014).

However, the power of pardons to eliminate the immigration consequences of drug convictions is not absolute. The INA states that certain criminal grounds of deportability—crimes of moral turpitude, multiple criminal convictions, aggravated felony, or high speed flight from an immigration checkpoint—will not apply if there is a “full and unconditional pardon by the President of the United States or by the Governor of any of the several states.”¹⁷⁴ (Pardons to avoid immigration consequences alone are insufficient to avoid deportation.) But the INA does not mention other criminal grounds of deportability, such as firearms offenses, domestic violence offenses, and controlled substance offenses. It also does not mention how pardons affect criminal grounds of inadmissibility, i.e., bars to entering the US.¹⁷⁵

The few administrative and court decisions that have addressed this issue have found that pardons do not eliminate deportability or inadmissibility for convictions that are not explicitly mentioned as being pardonable.¹⁷⁶

Tin Nguyen, an immigration attorney in North Carolina, described how the lack of clarity around pardons for drug convictions has affected his client, “Mr. V.” Mr. V. entered the US in 1994 as a refugee from Vietnam, and soon afterward became a lawful permanent resident. Mr. V.’s entire family is in the US; his parents and siblings are now US citizens. In 1999, Mr. V. pled guilty to possession of crack cocaine in South Carolina. His criminal defense attorney gave him no information as to how the conviction would affect his immigration status. He paid a fine and received a suspended sentence of five years and probation for two years. Five years later, Mr. V. was put into removal proceedings. The first two immigration attorneys he hired failed to represent him effectively—the first did not apply for lawful permanent resident cancellation of removal (for which Mr. V. was eligible), and the second failed to file briefs on his appeal and was eventually disciplined by the State of California. Mr. V. ended up with a final removal order in 2008.

¹⁷⁴ 8 US Code Section 1227(a)(2)(A)(vi).

¹⁷⁵ See Jason A. Cade, “Deporting the Pardoned,” *UC Davis Law Review*, Vol. 46, No. 2, December 2012.

¹⁷⁶ Ibid. In the administrative decision *Matter of Suh*, the Board of Immigration Appeals found that a full pardon from Georgia for sexual battery of a minor no longer made the immigrant deportable as an “aggravated felon,” but he did remain deportable on the ground of a conviction for a crime of domestic violence or child abuse. *Matter of Suh*, 23 I & N Dec. 626 (BIA 2003). The Ninth Circuit US Court of Appeals ruled in *Aguilero-Montero v. Mukasey* that a Mexican citizen who sought to adjust status through his US citizen wife was still inadmissible because of his conviction for possession of cocaine, even though the state of Washington had pardoned him. *Aguilero-Montero v. Mukasey*, 548 F.3d 1248 (9th Cir. 2008).

Mr. V., with the help of Nguyen, applied for and was granted a pardon from the South Carolina Parole Board in 2010. Nguyen stated that the South Carolina Parole Board found his application compelling: “They were so interested in his family history, his background, his dad’s service to the South Vietnamese government and what they’ve done for themselves since coming here.” But despite the pardon, the conviction still exists for immigration purposes, and Nguyen is now trying to vacate the already-pardoned conviction in South Carolina, although he says there is no clear procedure for it. Mr. V. has only avoided deportation thus far because the current repatriation agreement with Vietnam restricts deportations of Vietnamese nationals who entered the US before 1995. Should the repatriation agreement change, Mr. V. could find himself deported to Vietnam and away from his family for a one-time mistake he made over 15 years ago that South Carolina saw fit to pardon.¹⁷⁷

George Kidan also lives with the constant threat of deportation under a removal order based on a controlled substance conviction from 1987 for which he received a full pardon in 2006. Kidan came to the US legally as a student from Kuwait when he was 17 years old; he is now 51. As a college student, he was convicted of selling marijuana. He admitted he used marijuana himself, but he had gotten marijuana for a friend. He asserted he had never been a dealer. Kidan said the judge believed him and did not sentence him to prison. “I was able to go to school after that and finish my education and apply to work. And I thought it’s over, I don’t have to worry about it.” But in 1999, immigration authorities arrested and detained him. Kidan only avoided deportation then because he is stateless and no country is willing to accept him. Kidan eventually applied for and received a pardon from the governor of Ohio in 2006. Kidan is married to a US citizen, and would be eligible to gain permanent resident status but for his pardoned drug conviction. Kidan, who has an engineering degree, strong work history, and volunteers in his community, said, “I’m a very good person.... You shouldn’t be punished ... for the rest of your life.”¹⁷⁸

¹⁷⁷ Human Rights Watch telephone interview with Tin Nguyen, June 5, 2014; email from Tin Nguyen to Human Rights Watch, June 6, 2014.

¹⁷⁸ Human Rights Watch telephone interview with George Kidan, March 6, 2015.

VII. The Role of Criminal Defense Attorneys and Prosecutors

Numerous immigration attorneys and criminal defense attorneys told Human Rights Watch that the only way for their clients to avoid deportations for drug offenses was to avoid getting a conviction for a drug offense in the first place. In 2010, the Supreme Court in *Padilla v. Kentucky* ruled that criminal defense attorneys who do not adequately inform their clients of the immigration consequences of a guilty plea violate their obligation to provide effective assistance of counsel.¹⁷⁹ Some public defender offices and criminal defense attorneys have interpreted their *Padilla* obligations to include negotiating plea deals whenever possible to avoid deportation consequences, and several attorneys reported to Human Rights Watch that they have been able to work with prosecutors and agree to have their clients plead guilty to non-deportable offenses instead. The ability of defense counsel to avoid drug convictions varies significantly, however, from county to county.

For indigent immigrants, they must rely on court-appointed counsel, whose access to immigration law expertise and other resources can vary widely from state to state and county to county. And despite *Padilla*, many of the cases reported to Human Rights Watch involved plea deals in which the defense attorney had not properly advised his or her client of the immigration consequences.

Pleading Guilty with No Counsel

Human Rights Watch received reports of several indigent immigrants who pleaded guilty to drug offenses without legal representation. Many jurisdictions pressure indigent clients into waiving their right to appointed counsel for misdemeanor offenses.¹⁸⁰ In some jurisdictions, attorneys said their clients were not eligible for court-appointed counsel because the municipal drug charge they faced carried no potential sentence of

¹⁷⁹ *Padilla v. Kentucky*, 559 US 356, 130 S. Ct. 1473 (2010).

¹⁸⁰ Robert C. Boruchowitz et al., National Association of Criminal Defense Lawyers, “Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts,” April 2009, <https://www.nacdl.org/reports/misdemeanor/> (accessed August 27, 2014), citing courtroom observations in a number of jurisdictions where courts made clear to defendants that they must waive counsel to proceed.

incarceration.¹⁸¹ Yet guilty pleas entered without representation still constitute convictions for immigration purposes.

Linus Chan, a clinical professor at the University of Minnesota, has represented more than one client who pleaded guilty without an attorney. He stated that in many municipal courts, there is no right to an attorney, resulting in “an assembly-line situation” where people regularly plead guilty to minor charges, not knowing they can have serious immigration consequences.¹⁸² Hans Meyer concurred, saying the same happened in Colorado when he was a public defender: “Everybody just showed up in those municipal courtrooms, walked in and pleaded, slaughterhouse-style, \$100 fine, walk out.... These are the [pleas] that trigger mandatory detention, destroy cancellation of removal, trigger lifetime inadmissibility.”¹⁸³

Amanda Esquivel reported that her husband, Jesus Esquivel, pleaded guilty without an attorney to possession of cocaine in Kenosha, Wisconsin, in 2009, even though he was adamant the cocaine was not his. According to Amanda, Jesus is a permanent resident who has lived in the US since he was four or five years old. Amanda is a US citizen, as are their five children and two grandchildren. Amanda said Jesus explained to the judge he had grabbed his nephew’s jacket to go to work. When police had stopped and frisked him, they found cocaine that Jesus claimed he had known nothing about. Amanda said, “We had an amazing judge. He explained the whole thing to her, and she even gave him a lecture, ‘Don’t ever grab anybody’s jacket.’ We know she really believed us.” She sentenced him to probation, and Amanda said, “We thought it was over.” But several years later, an encounter with police at his sister’s home led to immigration authorities detaining Jesus and putting him into deportation proceedings.¹⁸⁴

¹⁸¹ The US Supreme Court ruled in *Alabama v. Shelton* that states do not need to provide appointed counsel for indigent defendants in criminal cases where there is no potential for imprisonment. *Alabama v. Shelton*, 535 US 654, 658 (2002). See Heidi Altman, “Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Non-Citizen Defendants,” *Georgetown Law Journal*, Vol. 101, No. 1, November 2012; Alice Clapman, “Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation,” *Cardozo Law Review*, Vol. 33, No. 2, December 2011.

¹⁸² Human Rights Watch telephone interview with Linus Chan, clinical professor, University of Minnesota, March 31, 2014.

¹⁸³ Human Rights Watch interview with Hans Meyer and Julie Gonzalez, May 22, 2014. See also Jason A. Cade, “The Plea Bargain Crisis for Noncitizens in Misdemeanor Court,” *Cardozo Law Review*, vol. 34, May 2013.

¹⁸⁴ Human Rights Watch telephone interview with Amanda Esquivel, June 4, 2014.

In another case already described above, Violeta Chapin, a clinical professor at the University of Denver, Colorado School of Law, reported a case in which her client had pled guilty to a municipal violation for possession of marijuana in Wyoming without the assistance of appointed counsel. He was ultimately detained for over a year and deported.¹⁸⁵

Law Enforcement Consideration of Immigration Consequences

Even when immigrants have criminal defense attorneys who are well-versed in immigration law, their ability to negotiate “immigration-safe” pleas depends heavily on the approaches of prosecutors’ offices and sometimes the attitudes of individual prosecutors assigned to their clients’ cases.

Some law enforcement officials are aware that some people in their communities may be facing more severe consequences than citizens for offenses they consider minor. George Gascon, district attorney in San Francisco and a former police chief, stated his office is willing to consider the immigration collateral consequences when negotiating plea deals because “we try to provide similar treatment to others who are not facing immigration consequences.”¹⁸⁶ Robert Johnson, a former Minnesota prosecutor and former president of the National District Attorneys Association, similarly stated in a 2013 op-ed addressing Congressional debate on immigration reform, “I have felt obligated to accept different pleas or amend the charges I brought against someone because I knew that mandatory detention and deportation would be unjust.... It is inappropriate and unjust for immigration penalties to far surpass the criminal sanctions for these offenses.”¹⁸⁷ Steven Jansen, vice-president of the Association of Prosecuting Attorneys, echoed these sentiments when he wrote in another op-ed, “[U]nder current immigration law] prosecutors and defense attorneys alike are concerned that they cannot ensure fair sentences.”¹⁸⁸

Some counties have issued policies explicitly outlining their criteria for considering immigration consequences. The policy of Alameda County, California, states that there is

¹⁸⁵ Human Rights Watch telephone interview with Violeta Raquel Chapin, May 29, 2014.

¹⁸⁶ Human Rights Watch telephone interview with George Gascon, district attorney of San Francisco, California, February 23, 2015.

¹⁸⁷ Robert Johnson, “Justice System Should Determine Which Immigrants are Public Safety Risk,” *Roll Call*, May 16, 2013, http://www.rollcall.com/news/justice_system_should_determine_which_immigrants_are_public_safety_risk-224879-1.html?zkPrintable=true (accessed August 7, 2014).

¹⁸⁸ Steve Jansen, “A prosecutor’s call: Justice for all,” *The Hill*, May 21, 2013, <http://thehill.com/blogs/congress-blog/judicial/300903-a-prosecutors-call-justice-for-all> (accessed August 7, 2014).

“no specific formula that can be applied in every case,” but that it is “generally considered appropriate to offer an accommodation if the collateral consequences are disproportionate to the crime and sentence being discussed.”¹⁸⁹ It further states, “consideration of collateral consequences is not typically appropriate in serious or violent felony cases.”¹⁹⁰ Santa Clara County has a similar policy based on the principle: “The highest duty of the prosecutor is to ensure that both the charges and ensuing punishment fit the crime...in those cases where the collateral consequences are significantly greater than the punishment for the crime itself, it is incumbent upon the prosecutor to consider, and if appropriate, take reasonable steps to mitigate those collateral consequences.”¹⁹¹ Like Santa Clara and Alameda counties, other counties with formal policies typically do not limit consideration to immigration consequences, but to all collateral consequences that could be suffered by citizens and non-citizens.

Such policies, however, are not widespread. One study by Ingrid Eagly at the University of California, Los Angeles, found that among 50 county-level prosecutor’s offices located in the five states with the highest levels of non-citizen prisoners, the majority did not have a written plea policy that mentions immigration status or immigration consequences.¹⁹² Two prosecutors’ offices, in Cochise County, Arizona, and San Mateo, California, had policies that explicitly prohibit prosecutors from considering immigration status or future deportation during the course of plea bargaining.¹⁹³

Harris County in Texas treats undocumented immigrant defendants punitively with regard to plea bargaining, as well as bail and sentencing. Undocumented defendants are not eligible to participate in drug courts or diversion programs for first-time offenders. Prosecutors are directed never to offer probation.¹⁹⁴ Maricopa County may go even further, as defense attorneys report that prosecutors seek convictions and records that will ensure deportation.¹⁹⁵

¹⁸⁹ Office of the District Attorney, Alameda County, “Guidelines Regarding the Consideration of Collateral Immigration Consequences During Plea Negotiations,” October 8, 2012, on file with Human Rights Watch.

¹⁹⁰ Ibid.

¹⁹¹ Memorandum from Jeff Rosen, District Attorney, Santa Clara County, to Fellow Prosecutors, “Collateral Consequences,” September 14, 2011, on file with Human Rights Watch.

¹⁹² Ingrid V. Eagly, “Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement,” *New York University Law Review*, Volume 88, No. 4, October 2013.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

Limited Post-Conviction Remedies

Despite the Supreme Court’s decision in *Padilla*, non-citizens still regularly plead guilty without having been provided adequate information on the immigration consequences of their pleas from their criminal defense attorneys. In such cases, immigrants are sometimes able to seek post-conviction relief and vacate their convictions for having been obtained through legal error.

Post-conviction remedies exist in all 50 states, as well as in federal law, but the requirements vary widely.¹⁹⁶ Some states have procedural requirements that can be challenging to meet. Some have statutes of limitations; some require that the applicant still be “in custody.”¹⁹⁷ For example, according to Ann Benson, supervising attorney for the Washington Defender Association Immigration Project, Washington has a “draconian” one-year deadline, “so if you don’t pursue [post-conviction relief] in one year, it’s super difficult to get your case procedurally heard.”¹⁹⁸ In California, Raha Jorjani, immigration attorney at the Office of the Alameda County Public Defender, noted that the “in custody” requirement for post-conviction relief is particularly onerous for non-citizens. “ICE can come after you 10 years later but you can’t fix your conviction 10 years later.”¹⁹⁹ In contrast, New York State does not impose such requirements on individuals seeking post-conviction relief. In “Mario F.’s” case, his attorney, Cristina Velez at the HIV Law Project, reported she was able to pursue post-conviction relief for his 10-year-old conviction for possession with intent to sell an eighth of an ounce of methamphetamine based on ineffective assistance of counsel. Because this conviction was vacated, Mario, a permanent resident, can now apply for cancellation of removal and has a good chance to avoid deportation.²⁰⁰ The availability of post-conviction relief also depends on how the convicting jurisdiction has interpreted the scope of defense

¹⁹⁶ Rachel Rosenbloom, “Will Padilla Reach Across the Border?,” *Northeastern University School of Law, Northeastern Public Law and Theory Faculty Working Papers Series No. 52-2011*, citing Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook: with Forms* (2009-2010 ed.); Larry W. Yackle, *Postconviction Remedies* (1981).

¹⁹⁷ *Ibid.*

¹⁹⁸ Human Rights Watch telephone interview with Ann Benson, supervising attorney, Washington Defenders Association Immigration Project, May 20, 2014.

¹⁹⁹ Human Rights Watch interview with Raha Jorjani, immigration attorney, Office of the Alameda County Public Defender, Oakland, California, June 27, 2014.

²⁰⁰ Human Rights Watch interview with “Mario F.” and Cristina Velez, staff attorney, HIV Law Project, Brooklyn, New York, April 17, 2014.

counsel's obligation under *Padilla* and whether the obligation is retroactive from the date of the Supreme Court's decision.²⁰¹

The process can also take a considerable amount of time. When Violeta Chapin wanted to pursue post-conviction relief for a young man who had waived his right to an attorney when he pled guilty to a marijuana possession ordinance, she reported, "We couldn't get the conviction vacated fast enough.... We got a call from the officer saying they were going to deport him."²⁰² Another attorney noted that when a client is detained—and anyone with a drug conviction is subject to mandatory detention—the case generally moves faster and some detained docket judges are not inclined to grant continuances so the individual can seek post-conviction relief. She was able to get post-conviction relief for a client who had already successfully completed a diversion program, but she did not think she would have been able to do so if her client had been detained.²⁰³ Conor Gleason, an attorney at Bronx Defenders, believed that in one case his client had a good chance to get his conviction vacated through post-conviction relief, but his client was in severe pain and was not receiving adequate treatment in the detention center; he decided to accept deportation away from his US citizen fiancée and daughter rather than fight his case.²⁰⁴

A recent report by the New York University School of Law Immigration Clinic and the advocacy organization Families for Freedom found that the ability of immigrants in New York to seek post-conviction relief is often blocked by ICE's refusal to bring detained applicants to their state post-conviction relief hearings and to stay removals while post-conviction applications are pending.²⁰⁵

²⁰¹ The Supreme Court in *Chaidez v. US*, 113 S. Ct. 1103 (2013), found that defense counsel's obligation under *Padilla* does not retroactively apply to convictions that became final before March 31, 2010, when *Padilla* was decided. Some states had ruled prior to *Padilla* that the obligation to provide advice on immigration consequences existed under state constitutional principles. See Immigrant Defense Project, "Seeking Post-Conviction Relief Under *Padilla v. Kentucky* After *Chaidez v. US*," February 28, 2013, <http://immigrantdefenseproject.org/wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf> (accessed May 12, 2015). There has also been litigation around the scope of defense counsel's obligation, such as whether it encompasses the duty to ask whether the defendant is a US citizen or whether it applies to immigration consequences other than deportation. See Immigrant Defense Project, "Padilla Post-Conviction Relief," <http://immigrantdefenseproject.org/criminal-defense/padilla-pcr> (accessed May 12, 2015).

²⁰² Human Rights Watch telephone interview with Violeta Chapin, May 29, 2014.

²⁰³ Human Rights Watch interview with Helen Lawrence, immigration attorney, Oakland, California, June 26, 2014.

²⁰⁴ Human Rights Watch interview with Conor Gleason and "David B.," Kearny, New Jersey, April 17, 2014.

²⁰⁵ NYU School of Law Immigrant Rights Clinic and Families for Freedom, "Immigration and Customs Enforcement Prevents Immigrants from Fighting Unlawful Criminal Convictions," July 2014, <http://familiesforfreedom.org/sites/default/files/resources/Justice%20Detained%2C%20Justice%20Denied->

Post-Conviction Relief as a “Miracle”



Nazry Mustakim with his US citizen wife, Hope, and their US citizen son, Ezra, in a photo announcing an expected baby. In 2011, Nazry Mustakim, a lawful permanent resident from Singapore, spent 10 months in mandatory detention fighting deportation for a college-age conviction for possession of methamphetamine with intent to distribute. At the time of his 2007 conviction, he had recovered from his own drug dependency and was counseling others. He was able to avoid deportation only because his conviction was vacated (voided) due to his defense attorney’s failure to advise him of the immigration consequences of the plea. ©2015 Private.

For Nazry Mustakim, a long-time permanent resident who was almost deported for a drug crime, and his US citizen wife Hope Mustakim, Nazry’s successful effort to get post-conviction relief meant he was able to avoid deportation as an “aggravated felon” and remain in the US with his family.

Nazry came to the US from Singapore when he was 13 years old and grew up in Texas. In 2005,

Nazry was arrested after being found with drugs. He admits he was using methamphetamine, but by the time he was convicted in 2007 of possession with intent to distribute, he had been free of drugs for a year, and the judge agreed to sentence him only to 10 years' probation. His attorney, he said, provided no information about the immigration consequences. Nazry went on to meet his wife Hope at a homeless shelter where they both worked.

One day in 2011, however, ICE came to the home he shared with Hope at 7 a.m. and put him in immigration detention, where he ultimately remained for 10 months. Hope was then a student at Baylor University studying social justice issues, and she became an activist fighting for her husband to remain in the US. She drove four hours each way every weekend to visit her husband and could only speak to him through a partition and a phone. The financial burden was immense, on top of the costs of Hope's schooling and their recent purchase of a house and two cars. With the phone bills for calling the detention center, the attorney fees, and the travel costs of visiting Nazry every weekend, Hope said she had to sell "T-shirts, bracelets, little pens" from their website calling for Nazry's release. "If it hadn't been for student loans, family, friends, strangers, people sending us money, I wouldn't have been able to do it," she said.

Nazry was ultimately able to win relief from deportation through post-conviction relief that vacated his felony drug conviction, based on ineffective assistance of counsel at the time of his guilty plea. Nazry and Hope said the prosecutor initially wanted him to re-plead to another charge, which would have carried a three-year minimum sentence. They were prepared for him to accept this deal in order to have a chance to fight deportation, but ultimately, the prosecutor dismissed the case because the evidence from the case was no longer available. "That was a miracle in and of itself," he said.

Nazry and Hope, who now have a young son, continue to share their story and are active in advocating for immigrant detainees because they know "millions of families are going through this, and they don't have the resources we had, the English, the finances." Nazry would like Congress to look at "criminal aliens" as individuals. "Give them another chance for the sake of their family members," he said. "Don't put them in a box as drug traffickers. There may have been a point in their lives where they made bad decisions, but this one chance may have been the only thing they needed, like me."²⁰⁶

²⁰⁶ Human Rights Watch telephone interview with Nazry and Hope Mustakim, June 3, 2014.

VIII. Drug Control, Immigration Control, and Human Rights

US Deportation Policy and Human Rights

Governments have the right to regulate their borders, including the right to set deportation criteria and procedures. But under international human rights law, governments do not have unfettered discretion to deport all non-citizens in all circumstances.²⁰⁷ The ways in which US immigration law treats immigrants who have committed drug offenses violates several important human rights.²⁰⁸

Proportionality and Discrimination

Deportation and related immigration detention are not considered punishment under US law, but they are severe penalties that often outweigh the criminal justice penalties that trigger them.²⁰⁹ International human rights law recognizes that persons within the territory of a state may have certain rights that may not be curtailed by deportation except where “necessary” and proportional. A person’s status as a non-citizen, his or her conviction of a crime, or the

²⁰⁷ UN Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994). (“It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”); Inter-American Commission on Human Rights – Report No. 49/99 Case 11.610, *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico*, April 13, 1999, section 30 (recognizing state authority to control immigration but stressing that this power is limited by the American Convention on Human Rights’ guarantees); Gerald P. Heckman, “Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?,” *International Journal of Refugee Law*, vol. 15, no. 2 (2003), p. 214 (“[o]nce widely accepted as a nearly unfettered discretion derived from state sovereignty, the power of states to control the entry and residence of aliens on their territories is increasingly understood to be circumscribed by domestic law and customary and conventional international law.”); *Boughanemi v. France* (App. 22070/93), Judgment of 24 April 1996 (recognizing that a state’s right to control immigration is “well-established international law,” but that it must be tempered by Article 8’s protection of family life). For a more extensive analysis of the human rights violated by US deportation policy, see the Human Rights Watch report, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 2007, <http://www.hrw.org/reports/2007/07/16/forced-apart-o>.

²⁰⁸ For a more detailed analysis of the human rights implicated by deportation policy for non-citizens with criminal convictions, see Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by US Deportation Policy*, July 17, 2007, sec. VI: , “US Deportation Policy Violates Human Rights,” <http://www.hrw.org/node/10856/section/8>.

²⁰⁹ See Bill Ong Hing, “Re-examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools,” *Harvard Law & Policy Review*, vol. 8, 141 (2014); Michael J. Wishnie, “Immigration Law and the Proportionality Requirement UC Irvine Law Review, vol. 2, 415 (2012).

combination of the two, does not extinguish his or her claim to just treatment at the hands of the government, nor does it free a government to ignore fundamental rights in its actions. International bodies enforcing international law, like the European Union, the United Nations Human Rights Committee, and the International Court of Justice, have applied proportionality when analyzing states' decisions that restrict important rights, including in the context of deportation.²¹⁰

US courts, however, do not consider deportation “punishment,” but a civil sanction that does not trigger the same due process protections as required for those who are charged with criminal offenses.²¹¹ At the same time, the US Supreme Court recognized in *Padilla v. Kentucky* that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on non-citizen defendants who plead guilty to specified crimes.”²¹² And practically speaking, for immigrants who find themselves in removal proceedings and immigration detention after a criminal conviction, deportation is indistinguishable from punishment.

Irrespective of whether deportation is considered a punishment under US law, it is a severe penalty that is disproportionate to the restrictions on freedom and family life that US citizens convicted of the same crimes incur, especially when mitigating and aggravating factors are not given individualized consideration. In general, states may not discriminate between aliens and citizens in the application of such basic rights as the right to be free

²¹⁰ Some of the rights that may be restricted by an order of deportation are the right to a family life and rights to be free from discrimination, torture, ill-treatment, and persecution. For example, the European Union has decided that before deporting a long-term resident alien, states must consider factors such as duration of residence, age, consequences for the deportee and his or her family, and links with the expelling and receiving country. Council of the European Union – Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, art. 12. The Human Rights Committee has explained that, in the context of the prohibition of arbitrary interference with family rights, “[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.” UN Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Thirty-second Session, 1988), adopted April 8, 1988, UN Doc. HRI/GEN/1/Rev.9 (1988).

²¹¹ Two 19th century United States Supreme Court decisions established that deportation is not “punishment” under the US Constitution and thus that constitutional protections afforded in criminal proceedings, as well as prohibitions on cruel and unusual punishment, ex post facto laws, and bills of attainder, are not applicable in deportation proceedings. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) and *Yue Ting v. United States*, 149 US 698 (1893).

²¹² *Padilla v. Kentucky*, 559 US 356, 364 (2010).

from arbitrary interference with their privacy, family, home, or correspondence.²¹³ The UN expert on the rights of non-citizens (the special rapporteur on the rights of non-citizens) has highlighted the importance of combatting arbitrary differences in how citizens and non-citizens are treated, and stated distinctions between citizens and non-citizens should serve a legitimate purpose and be proportional to that purpose. He has stated in particular, “[D]eportation is justified only if the interference with family life is not excessive compared to the public interest to be protected.”²¹⁴ The disproportional discrimination is increasingly obvious in the context of criminal convictions arising from drug offenses, some of which (personal use and possession) should not be criminalized at all, and many of which are increasingly treated by the criminal justice system as minor offenses, or as offenses that are better addressed through treatment rather than through criminal sanctions.

US laws that subject immigrants not only to criminal sanction, but also to permanent exile and family separation for drug offenses therefore raise particularly serious concerns with regard to proportionality and acceptability under international human rights standards.

The Right to Raise Defenses to Deportation

As described above, non-citizens are almost completely blocked from raising the closeness of their family relationships or other ties to the United States as well as the likelihood that they may be returned to persecution if they have drug convictions that would constitute drug trafficking aggravated felonies. Without an ability to raise these equities, deportation hearings provided for immigrants with such convictions are devoid of justice, and they violate international standards.

²¹³ UN Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

²¹⁴ David Weissbrodt, Special Rapporteur on the rights of non-citizens, “Final report on the rights of non-citizens,” UN Doc E/CN.4/Sub.2/2003/23 (2003). The Inter-American Court of Human Rights has also held that measures that discriminate against one group in favor of another must be bound by proportionality. Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants, 100. The use of proportionality is also widespread in the European Court of Justice, where the doctrine was invoked either by litigants or the court in over 500 cases between 1955 and 1994. Vicki C. Jackson, “Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on ‘Proportionality,’ Rights and Federalism,” *University of Pennsylvania Journal of Constitutional Law*, vol. 1 (1999), p. 604, n.81. The European Court of Human Rights has “consistently held that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interests of society.” Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Belgium: Intersentia, 2002), p. 14; Ian Brownlie, *Principles of Public International Law* (Oxford, UK: Oxford University Press 2003), p. 551.

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992,²¹⁵ states in article 13 (to which the United States has entered no reservations, understandings or declarations):

An Alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, *be allowed to submit the reasons against his expulsion* and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.²¹⁶

The UN Human Rights Committee, which monitors state compliance with the ICCPR, has interpreted the phrase “lawfully in the territory” to include non-citizens who wish to challenge the validity of the deportation order against them. In addition, the Human Rights Committee has made this clarifying statement: “if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 1.... An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.”²¹⁷

While the ability to raise defenses to deportation is provided for in these human rights treaties, not every possible argument against deportation is important enough to call into question the legitimacy of a hearing that denies such arguments' consideration. For example, a non-citizen who for reasons of personal predilection prefers the economic opportunities and climate in one country to another could not legitimately challenge his hearing under human rights law if he was prevented from making this argument as a defense to deportation.

²¹⁵ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed June 3, 2015).

²¹⁶ ICCPR, art. 13 (emphasis added).

²¹⁷ UN Human Rights Committee, General Comment 15, paras 9 and 10.

However, some defenses implicate very important and fundamental rights that non-citizens should be able to raise in their deportation hearings in the United States, including the rights to family unity, ties to a country, proportionality, and the likelihood of return to persecution upon return. Without a hearing that allows for the weighing of these concerns, the right to raise defenses to deportation is undermined.

Family Unity

The international human right to family unity finds articulation in numerous human rights treaties. The concept is also incorporated into US domestic law.²¹⁸

The Universal Declaration of Human Rights states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”²¹⁹ The International Covenant on Civil and Political Rights states in article 17(1) that no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” Article 23 states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state,” and that all men and women have the right “to marry and to found a family.” The right to found a family includes the right “to live together.”²²⁰

Various international bodies have interpreted the right to family unity as imposing limits on states’ power to deport.²²¹ In *Winata v. Australia*,²²² the Human Rights Committee found

²¹⁸ For example, in the context of custody rights for grandparents, the US Supreme Court has held that the “right to live together as a family” is an important right deserving constitutional protection, and an “enduring American tradition.” *Moore v. City of East Cleveland*, 431 U.S. 494, 500, 503, n.12 (1977) (plurality); Linda Kelly, “Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights,” *Villanova Law Review*, vol. 41 (1996), p. 729-730 (discussing various non-immigration areas of law in which the Supreme Court has stressed the importance of legal protections for family unity and family life); Nancy Morawetz, “Symposium: Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,” *Harvard Law Review*, vol. 113, p. 1950-1951 (2000) (discussing instances in which members of Congress and the INS emphasized the importance of family in the immigration context).

²¹⁹ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 78 (1948), art. 16(3). The Declaration also states, “Motherhood and childhood are entitled to special care and assistance.” UDHR, art. 25(2).

²²⁰ UN Human Rights Committee, General Comment 19, Article 23, Protection of the Family, the right to marriage and equality of the spouses (Thirty-ninth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 2

²²¹ UN Human Rights Committee, General Comment 15.

²²² *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

a violation where Australia sought to deport two Indonesian nationals whose 13-year-old son, Barry, had been born in, and had become a citizen of, Australia.²²³

Even in a case in which the governmental interest in deportation was strong because a non-citizen was found deportable due to prior criminal convictions, the Committee found a violation of the same rights in *Madafferri v. Australia*, involving an Italian national who had married an Australian national and had four Australian children, and who had been ruled deportable based on prior crimes in his native Italy.²²⁴

Case law from the European Court on Human Rights has provided additional guidance to member countries on respecting family unity during deportation on criminal grounds, finding that they should weigh several factors including: the nature and seriousness of the offense; the length of stay in the host country; rehabilitation; spousal relationships; the existence of children; and potential difficulties family members would face in relocating to the country of origin.²²⁵

The Inter-American Commission on Human Rights in *Wayne Smith and Hugo Armendáriz v. United States of America* held that the US did not follow international norms in denying petitioners Smith and Armendariz (both permanent residents with “aggravated felony” drug convictions) an opportunity to defend themselves from deportation.²²⁶

In light of these strong international standards, the United States has fallen far behind the practice of governments around the world in terms of providing protection for family unity in deportation proceedings.

²²³ Ibid.

²²⁴ *Madafferri v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

²²⁵ *Boultif v. Switzerland*, ECHR 5427/00 (2001). Recent cases grant relief from deportation to non-citizens with criminal convictions include *M.P.E.V. and Others v. Switzerland*, no. 3910/13, ERCH 8 July 2014 (finding deportation of an Ecuadorian national would be disproportionate in view of the moderate nature of his criminal record, his poor state of health, and his desire to stay in close contact with his daughter), and *Udeh v. Switzerland*, no. 12020/09, ERCH 16 April 2013 (holding that a Nigerian’s expulsion would violate his right to family life, after weighing the seriousness of his convictions for drug trafficking and drug possession, with his relationship with his two Swiss national children).

²²⁶ *Wayne Smith and Hugo Armendáriz v. United States of America*, Report No. 81/10, Case 12.562, Inter-American Commission on Human Rights, July 12, 2010. Human Rights Watch submitted an amicus brief in this case.

Children's Rights

Beyond family unity in general, the right of children to be raised by their parents is one of the strongest human rights counseling against the separation of families through deportation. Article 24 of the International Covenant on Civil and Political Rights, to which the United States is a party, entitles children “to such measures of protection as are required by [their] status as a minor, on the part of the family, society and the state.”

Article 9 of the Convention on the Rights of the Child (CRC), which the United States has signed but not ratified,²²⁷ requires that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child.”²²⁸ The Committee on the Rights of the Child has interpreted the CRC further, stating:

“States should refrain from detaining and/or deporting parents if their children are nationals of the destination country. Instead, their regularisation should be considered. Children should be granted the right to be heard in proceedings concerning their parents’ admission, residence, or expulsion, and have access to administrative and judicial remedies against their parents’ detention and/or deportation order, to ensure that decisions do not negate their best interests. Alternatives to detention and deportation in accordance with the child’s best interests, including regularisation, should be established by law and through practice.”²²⁹

Thus, the CRC weighs-in in favor of non-citizens’ rights not to be deported if it is contrary to the best interests of the child.²³⁰

²²⁷ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, signed by the United States on February 16, 1995, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed June 3, 2015).

²²⁸ CRC, art. 9(1).

²²⁹ Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, September 28, 2012, http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf (accessed June 3, 2015).

²³⁰ See, for example, Concluding Observations of the Committee on the Rights of the Child, Canada, U.N. Doc. CRC/C/15/Add.215 (2003). (“the Committee remains concerned that the principle that primary consideration should be given to the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as

Ties to the United States

The US Supreme Court stated in *Landon v. Plasencia* that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”²³¹ Despite this accepted constitutional maxim, a non-citizen’s ties to the United States, including length of residence, military service, and business, educational, and community ties that are separate from family relationships, are often not considered when he or she faces deportation because of a criminal conviction.

Under human rights law, the state power of deportation should be limited if it infringes upon an individual’s right to a private life, which includes his or her ties to the country of immigration apart from any family ties. Article 17 of the ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy ... home or correspondence Everyone has the right to the protection of the law against such interference or attacks.”²³² The European Court of Human Rights has weighed an individual’s ties to a country as part of his private life in deportation cases. In *C v. Belgium*, for example, the ECHR found that the petitioner’s private life included the petitioner’s “real social ties in Belgium,” and considered that he had lived in Belgium since he was 11 and had received his education there.²³³

As these decisions recognize, the right to private life is put at risk when non-citizens are ordered deported without first weighing the various ties and relationships they have developed with their host countries.

Non-Refoulement

The principle of non-refoulement in international refugee law imposes well-recognized limits on states’ powers to deport a refugee to places where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social

well as Aboriginal children”); and Concluding Observations of the Committee on the Rights of the Child, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/15/Add.188 (2002) (“the Committee is concerned that the principle of primary consideration for the best interests of the child is not consistently reflected in legislation and policies affecting children throughout the State party, notably in the juvenile justice system and immigration practices”).

²³¹ *Landon v. Plasencia*, 459 U.S. 21, 33 (1982).

²³² ICCPR, art. 17.

²³³ European Court of Human Rights, *C v. Belgium*, (App. 21794/93), Judgment of 7 August 1996, (paragraphs 32 and 33). The court ultimately found that the petitioner’s very serious crime outweighed countervailing factors, allowing him to be deported from Belgium, but only after a hearing that weighed his right to a private life against his crime.

group, or political opinion. Refugee law permits a very narrow exception to non-refoulement under article 33(2) of the Refugee Convention if the refugee “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”²³⁴

Human Rights Watch has previously raised concerns about the presumption in the United States that any aggravated felony is a “particularly serious crime.”²³⁵ The near-automatic bar to refugee protection for non-citizens with drug trafficking convictions in the US even more clearly violates the standards provided in international law. It fails to weigh individually the seriousness of the crime, and it fails to assess whether the potential deportee poses a risk of dangerousness to the community of the US.

International human rights law, particularly the Convention against Torture, provides additional and absolute bars to refoulement that make no exception for people who have committed crimes. Non-citizens who are ruled ineligible for asylum and withholding because of a drug trafficking conviction are still eligible for deferral of removal under the Convention against Torture. However, it is more difficult for an applicant to meet the treaty’s standard of a likelihood of being tortured than the asylum standard of a well-founded fear of being persecuted or the US law standard for withholding of removal (more likely than not facing a threat to life or freedom). By failing to protect refugees from return to persecution and to carefully and narrowly apply the exception to this standard, the US is regularly violating its obligations under international refugee law.

Lex Mitior

As noted above, the Supreme Court has issued several major decisions limiting the definition of the aggravated felony of drug trafficking, but many thousands of permanent residents have already been deported under the earlier, wrongful interpretations of law. The serious challenges former immigrants face to reopening these cases after deportation present concerns under the principle of *lex mitior*, which states that when a law is

²³⁴ Convention relating to the Status of Refugees (Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, art. 33.

²³⁵ Human Rights Watch, *Forced Apart*, July 16, 2007.

amended, the more lenient penalty should be applied to those convicted under the prior law, as captured in article 15(1) of the ICCPR.²³⁶

US Detention Policy and Human Rights

The United Nations Working Group on Arbitrary Detention recognizes “the sovereign right of states to regulate migration” and yet cautions, “if there has to be administrative detention, the principle of proportionality requires it to be a last resort.”²³⁷ This means that immigration detention should only be used in those cases in which legitimate government interests cannot be fulfilled through any other means.

While the United States has a legitimate interest in detaining some non-citizens to guarantee their appearance at hearings and to ensure the deportation of those judged to be removable, the power of immigration authorities to detain people is currently too broad, leading to unwieldy, unnecessary, and costly detention.

To remain true to human rights principles and standards of efficiency, the United States should detain only those immigrants who are dangerous or unlikely to appear for hearings unless they are locked up. But mandatory detention of those convicted of nonviolent controlled substance offenses denies those immigrants the opportunity for an individualized assessment of their circumstances. Mandatory detention often applies even when the offense was committed years ago, making the argument that they are a present danger to the community more tenuous. And where individuals, including lawful permanent residents, are eligible for relief from deportation and have a strong incentive to appear for their individual hearings, mandatory detention is particularly wasteful and unnecessary.

The fact that non-citizens can spend significantly longer periods of time in immigration detention than they did for their criminal offenses also raises serious proportionality concerns.

²³⁶ We recognize that the United States has entered a reservation to this article.

²³⁷ UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, para. 59.

Criminalization of Drug Use and Possession

Human Rights Watch opposes the criminalization of personal drug use or possession of drugs for personal use. Subjecting individuals to criminal sanctions for such acts restricts individuals' autonomy and right to privacy. Limitations on autonomy and privacy cannot be justified unless they meet the criteria of legitimate purpose, proportionality, necessity, and non-discrimination. Governments have many non-penal measures available to encourage people to make good choices around drugs and to protect drug users from harming their own health, including offering substance abuse treatment and social support. Arrest, incarceration, and a criminal record amount to an inherently disproportionate government response to someone who has done no more than use drugs.

As Human Rights Watch has explained elsewhere, criminal sanctions on the production and distribution of drugs have also contributed to serious human rights violations around the world.²³⁸ In the US, as detailed in Section I of this report, enforcement of criminal prohibitions on the production, distribution, and use of drugs has been frequently abusive or racially discriminatory.

The harm to the human rights of those who suffer criminal sanctions under US drug laws is amplified when they also result in harsh immigration consequences, including deportation, permanent exile, family separation, and mandatory detention.

²³⁸ Maria McFarland Sanchez-Moreno, "The Human Rights Case for Drug Reform," in Human Rights Watch, 2014 *World Report 2014*, January 2015, available at <http://www.hrw.org/world-report/2014/essays/human-rights-case-for-drug-reform>.

Recommendations

To the United States Congress

- Eliminate deportation based on convictions for simple possession of drugs.
- Ensure that all non-citizens in deportation proceedings, including those with convictions for drug offenses, have access to an individualized hearing before an impartial adjudicator in which the non-citizen's interest in remaining in the United States is weighed against the US interest in deporting the individual, through consideration of such factors as:
 - Family relationships in the US,
 - Hardship family members will experience as a result of deportation,
 - The best interests of any children in the family,
 - Legal presence in the US,
 - Length of time in the US,
 - Evidence of rehabilitation,
 - Contributions to community and the US, such as military service, business enterprises, property ownership, and/or tax payments,
 - Lack of connection to the country of origin.
- Ensure that refugees and asylum seekers with convictions for sale, distribution, or production of drugs are only considered to have been convicted of a "particularly serious crime" through case-by-case determination that takes into account the seriousness of the crime and whether the non-citizen is a threat to public safety.
- Amend the drug offense bars to entering the US and gaining lawful permanent resident status to
 - Eliminate the bar based on simple possession of drugs;
 - Ensure that non-citizens who are barred from entering the US and/or gaining lawful resident status because of a conviction for a drug offense
 - Are subject to the same exceptions available to those with convictions for "crimes involving moral turpitude," including the

“petty offense exception” and the exception for old and juvenile offenses;

- Are eligible for a waiver of the bar, based on consideration of such factors as the above;
 - Are barred for a set period of time rather than permanently barred.
- Amend immigration laws to eliminate mandatory detention and ensure all non-citizens are given an opportunity for an individualized bond hearing.
 - Amend immigration laws to redefine “conviction” so as to exclude convictions that have been expunged, pardoned, or vacated, or are otherwise not recognized by the jurisdiction in which the conviction occurred.
 - Amend immigration laws to implement a “statute of limitations” ensuring that convictions for nonviolent drug offenses that occurred a certain number of years ago do not trigger deportation or mandatory detention.
 - Amend immigration laws to restore the power of state and federal criminal judges to issue judicial recommendations against deportation when sentencing non-citizens convicted of crimes.
 - Decriminalize the personal use of drugs, as well as possession of drugs for personal use.

To the Department of Homeland Security

- Provide clear guidance to immigration officials that a positive exercise of prosecutorial discretion may be appropriate even in cases involving non-citizens with criminal convictions, with particular consideration for lawful permanent residents and non-citizens whose most serious convictions are for nonviolent offenses, including drug convictions, that occurred five or more years ago;
- Restrict the use of detainers to hold non-citizens with convictions for nonviolent offenses, including drug convictions, that occurred five or more years ago.
- Expand the use of alternatives to detention for non-citizens, including those subject to mandatory detention.
- Provide all non-citizens who have been in detention for six months or more with a bond hearing.

To the US Attorney General and the US Department of Justice

- Withdraw *Matter of Y-L-*, the Attorney General opinion finding that nearly all convictions for drug trafficking constitute a “particularly serious crime” barring eligibility for asylum and withholding of removal.

To State and Local Governments

- Amend statutes and processes to allow drug courts and diversion programs not to require guilty pleas from defendants that constitute convictions triggering deportation, mandatory detention, and other immigration consequences even when they successfully complete the programs;
- Amend remedies for post-conviction relief to remove barriers to relief for non-citizens convicted of nonviolent drug offenses through legal error, including the failure of defense counsel to adequately inform them of the potential immigration consequences of a guilty plea.
- Decriminalize the personal use and possession for personal use of drugs.

To Local Law Enforcement Agencies and Prosecutors

- Ensure collateral immigration consequences are given appropriate consideration in plea negotiations and applications for post-conviction relief.

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A PRICE TOO HIGH

US Families Torn Apart by Deportations for Drug Offenses

The United States is home to 13 million lawful permanent residents and 11 million unauthorized immigrants. Over two million immigrants have been deported by the Obama administration. While the government claims to focus on deporting serious, dangerous criminals, data obtained by Human Rights Watch shows that over a quarter of a million deportations from 2007 to 2012 involved non-citizens whose most serious conviction was for a drug offense. And, increasingly, individuals are being deported following convictions for drug possession. This trend contrasts sharply with the reforms many US states are undertaking to legalize, decriminalize, or offer drug treatment instead of prison for low-level drug offenders.

A Price Too High is based on interviews with over 130 affected individuals, family members, attorneys, advocates, and law enforcement officials, as well as previously unavailable government data obtained through a Freedom of Information Act request. The report documents the scope of the problem, including a 43 percent increase between 2007 and 2012 in the number of individuals deported following drug possession convictions. It shows how lawful permanent residents and unauthorized immigrants with strong ties to the US, including US citizen family members, regularly face mandatory detention without bond and deportation for offenses so minor they resulted little or no jail time under criminal law. Even expunged or pardoned convictions can trigger deportation. The consequences are devastating for immigrants, their families, and communities.

Human Rights Watch urges US lawmakers to reform immigration laws to eliminate deportation based on simple possession convictions alone, and to ensure that all non-citizens in deportation proceedings, including those with convictions for drug offenses, have access to an individualized hearing where the immigration judge can weigh evidence of family ties, rehabilitation, and other equities against a criminal conviction.



Melida Ruiz, a lawful permanent resident, pictured with her daughter, Mercedes Ruiz, and her grandson, Christopher Gonzalez. In 2011, Melida was held in immigration detention for seven months while she fought deportation based on a 2002 misdemeanor drug conviction, her sole conviction in more than 30 years in the United States.

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