



“Disrupt and Vilify”

The War on Immigrants Inside the US War on Drugs

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**DRUG
POLICY
ALLIANCE.**



“Disrupt and Vilify”

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Drug Policy Alliance is the leading organization in the US working to end the drug war, repair its harms, and build a non-punitive, equitable, and regulated drug market. We envision a world that embraces the full humanity of people, regardless of their relationship to drugs. We advocate that the regulation of drugs be grounded in evidence, health, equity, and human rights. In collaboration with other movements and at every policy level, we change laws, advance justice, and save lives.

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Summary

Nixon ... had two enemies: the antiwar left and Black people ... We knew we couldn't make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities ... [V]ilify them night after night on the evening news.

— John Ehrlichman, former White House counsel and assistant to the president for domestic affairs under President Richard Nixon, speaking to journalist Dan Baum about the origins of the “war on drugs,” 1994.

In August 2023, Natalie Burke, a Black immigrant from Jamaica, was pardoned by the governor of Arizona following a unanimous recommendation by the Board of Executive Clemency. It had been 20 years since she was convicted of a set of offenses relating to selling and transporting marijuana. But she cannot move on with her life because US immigration authorities are trying to deport her, even though marijuana is now legal in Arizona and she has a pardon.

Back in 2003, Natalie was trying to escape a severely abusive relationship that had involved her in selling marijuana. She was sentenced in Arizona state court to three years and 120 days of probation.

In an interview for this report, Natalie explained that one day in 2009, her probation officer asked her to come into the Tucson office to fill out some paperwork. Her son, who was in fifth grade at the time, waited for her outside in the parking lot. Natalie never came back to him that day. Immigration and Customs Enforcement (ICE) officers took her directly to an immigration detention center because her conviction made her deportable from the United States.

Initially, Natalie was released from immigration detention on bond pending a direct appeal of her conviction, but ICE rearrested her after the appeal was final and she spent one-and-a-half years in immigration detention.

As soon as Natalie was released the second time from immigration detention, she began pursuing a social work degree. But the constant worry of being taken away took its toll. She

told a researcher for this report, “Every time my classroom door would open at Arizona State, I had so much stress. I felt like they were coming to get me all the time.” Still, she earned her bachelor’s, master’s, and doctorate degrees. And she proudly sent her son off to college.

Even with her educational background, Natalie was afraid to start a career on an expired green card and a deportation order. She submitted an application to set aside the judgment in her criminal case and it was granted. But while post-conviction relief restored her rights under state law, she learned that US immigration agencies did not always interpret federal immigration law to recognize such state procedures. Natalie remained at risk. She worked delivery and ride share gigs to try to make ends meet and was denied apartments due to her past convictions. Finally, she applied for a pardon from the governor of Arizona in 2018. And even though Arizona legalized marijuana in 2020, her pardon was denied. In the midst of this stressful situation, Natalie had a stroke, but her immigration status prevented her from obtaining health insurance, so she had none to cover her medical costs.

However, Natalie reapplied for a pardon; and one year later, it was granted by a new governor. It was 20 years since her arrest, and 44 years since she came to the US from Jamaica when she was just 2 years old. “I never thought I would live this life. And it was never explained to me that you’re really not permanent here. That if you commit a crime, that they would get rid of you and discard you ASAP.”

Even with a hard-won gubernatorial pardon, and even in a state where marijuana is now legal, ICE is still trying to deport Natalie. She continues to fight back and is currently pursuing new legal arguments based on the pardon.

Natalie has summoned an uncommon level of resilience, and her story may sound unique. But the features of her case are routine—a longstanding US resident with a drug offense on their record subjected to years of litigation, prolonged detention, and the constant threat of deportation and a bar on ever returning to the US.

In 2015, Human Rights Watch published *A Price Too High*, documenting the unjust provisions of US immigration law that, in effect, doubly penalize immigrants by imposing civil penalties after they have served their sentences for drug convictions by subjecting them to often extended detention and ultimately deportation. Since then, there have been positive strides at the local, state, and even federal levels to reform drug laws to better align with the public's desire for evidence-based policies grounded in public health. But those reforms have not altered federal immigration law's draconian approach to drugs. State and federal drug policy is most often overridden by federal immigration law, depriving immigrants of reforms that only benefit citizens. Conviction of even the most minor drug offense—for example, possessing a small amount of a controlled substance, including marijuana, where that is illegal—carries devastating consequences that far outstrip the criminal sentence imposed. Not a single immigration consequence tied to drugs has been curtailed since they were expanded under the administration of US President Ronald Reagan in 1988.

The failure to reform federal immigration law means even more people have been deported. In 2015, we analyzed data from 2002 to 2012 and found 260,000 people deported whose most serious offense was drug-related, with drug use or possession offenses as the most common. This amounted to one of every four deportations of immigrants with a criminal conviction during that time period. In this report, Human Rights Watch and the Drug Policy Alliance analyze 17 years and four months of data (from 2002 to 2020) and find that between 2013 and 2020, an additional 240,000 people have been deported whose most serious offense was for drugs, amounting to about one of every five deportations of immigrants with a criminal conviction for the years 2013-2020. The total amount of people deported whose most serious offense was for drugs between 2002 and 2020 is approximately 500,000.

Drug reform policies are not inclusive and equitable unless they address the harms to immigrants, who remain in the crosshairs of what in many respects has seemed like a war on immigrants within the United States' so-called "war on drugs." This ongoing disregard for the human rights and dignity of immigrants forces thousands of people into battles that often never end. This is especially egregious considering the role that global drug prohibition—which the US has aggressively sought to enforce—has played in fueling organized crime and corruption in many Latin American countries, in turn contributing to the violence and social and political problems that often drive migration.

In Natalie’s case, the immigration and criminal systems have so far consumed 20 years of her life; in other cases, immigrants are quickly deported and commence an often futile and dangerous effort to return to the United States. Federal immigration law and punitive drug policies devastate families and communities, do not actually address problematic drug use by citizens or immigrants, subject people to racially discriminatory law enforcement practices, and use an approach to drug policy that is widely unpopular.

Drug Policy Evolves, Immigration Policy Stagnates

Since *A Price Too High* was published, public consensus that drug policy should be grounded in evidence, health, and equity—not punishment—has grown. A 2021 poll by BPI Media¹ showed that 66 percent of voters in the United States support “eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services.” Eighty-three percent of voters say the “war on drugs” has failed. The current contours of the drug overdose crisis have created a different level of urgency for public health interventions to prevent the unnecessary loss of life.

US drug policy has followed suit and started to chip away at the harms of the drug war. Decriminalization and legalization of marijuana is more popular than ever. Today, more than half of US residents live in a state where adult-use recreational marijuana is legal, and 74 percent live in a state where marijuana is legal for adult recreational or medical use.² States have implemented public health approaches to drugs, such as community-based distribution of the overdose-reversal drug naloxone, overdose prevention centers,³ and better access to voluntary treatment services. Despite not being implemented at the scale necessary, these strategies have still prevented overdoses and saved lives.⁴

¹ Danny Franklin, “Overwhelming Majority Say War on Drugs has Failed, Support New Approach,” *Bully Pulpit International, Memorandum*, June 9, 2021, <https://www.aclu.org/documents/poll-results-american-attitudes-toward-war-drugs> (accessed April 22, 2024).

² Athena Chapekis and Sono Shah, “Most Americans Now Live in a Legal Marijuana State – and Most Have at Least One Dispensary in Their County,” *Pew Research Center*, February 29, 2024, <https://www.pewresearch.org/short-reads/2024/02/29/most-americans-now-live-in-a-legal-marijuana-state-and-most-have-at-least-one-dispensary-in-their-county/> (accessed April 22, 2024).

³ Dr. Brent Gibson, PhD, et al., *Onpoint NYC: A Baseline Report on the Operation of the First Recognized Overdose Prevention Centers in the United States*, report, OnPoint NYC, https://onpointnyc.org/wp-content/uploads/2023/12/ONPOINTNYC_OPCREPORT_small-web1.pdf (accessed June 6, 2024).

⁴ FXB Center for Health and Human Rights at Harvard University, *From the War on Drugs to Harm Reduction: Imagining a Just Overdose Crisis Response*, report, December 2020, <https://www.hsph.harvard.edu/wp-content/uploads/sites/2464/2020/12/Opioid-Whitepaper-Final-12-2020.pdf#page=23> (accessed May 25, 2024).

Unfortunately, the pendulum is swinging back in the direction of criminalization in states like Oregon and cities like Seattle and San Francisco. This reversal can be politically expedient for policymakers who want to appear they are doing something to address crime, public drug use, and unhoused populations. However, a growing body of evidence suggests that an increased emphasis on criminalization drives increases in overdoses and can bar people from accessing housing, substance use disorder treatment, and mental health care, which can exacerbate, instead of reducing, social problems.⁵

At the same time, states have taken action to stem the myriad consequences that flow from past and present drug enforcement by allowing people to expunge, vacate, or apply for clemency for past drug convictions, including for marijuana-related conduct that is no longer illegal. Twelve states have passed “clean slate” laws, which automatically expunge and seal many drug convictions.⁶ Unfortunately, most of these laws do *not* help noncitizens because they are not given effect under federal immigration law.

Progress on the state level has limited impact for immigrants because of the federal government’s plenary authority over immigration law and the US Congress’ failure to enact immigration reform. Stuck in the 1980s, federal immigration law imposes deportation for a wide array of drug offenses after a person has served their time under state or federal law. Often, people are deported for convictions and arrests that date back to the start of the drug war because there is no statute of limitations for initiating deportation proceedings. For example, even in states where marijuana has been legal for years, immigration authorities can order people deported because marijuana is still a controlled substance at the federal level.

The few federal drug reforms introduced to date either do not address the immigration impact of drug convictions or explicitly exclude immigrants. The First Step Act of 2018 allowed people incarcerated under prior sentencing rules to apply for release, but immigration status disqualified many people from its programs. In fact, the non-citizens who successfully fought for release under the First Step Act were not released but

⁵ Ibid.

⁶ The Clean Slate Initiative, “Clean Slate in States,” <https://www.cleanslateinitiative.org/states#states> (accessed April 22, 2024).

immediately placed in deportation proceedings.⁷ Furthermore, US President Joe Biden pardoned federal simple marijuana possession convictions, however, the pardon only applies to citizens and certain green card holders, and it might not have immigration effect at all since pardons have been largely ineffective at removing past or future immigration consequences. Similarly, the White House’s Drug Enforcement Administration (DEA) decision in May 2024 to reschedule marijuana from Schedule I to Schedule III of the Controlled Substances Act (CSA) will have no immigration effect. It will maintain the federal marijuana prohibition and keep non-citizens vulnerable to harsh immigration consequences for marijuana activity, including automatic detention and deportation.

Millions of Immigrants Deported or at Risk of Deportation and Other Harms

The failure to enact reforms to federal immigration law informed by new approaches to drug policy affects countless people in the United States. According to US Census data there are at least 21.6 million non-citizens in both authorized and unauthorized status living in the US, accounting for 1 in every 15 people in the country. Nearly half of these non-citizens live in one of the four states featured in this report—California, New York, Illinois, and Texas. For this report, Human Rights Watch and the Drug Policy Alliance analyzed federal data between 2002 and 2020 and found:

- The US government deported a half million people whose most serious criminal conviction was a drug offense, more than 2,400 people per month on average.
- The US government deported at least 156,000 people whose most serious criminal offense was for drug use or possession, including over 47,000 for marijuana use or possession.
- The most common drugs involved were cocaine (40 percent) and marijuana (35 percent).
- Of all immigrants deported with criminal offenses, people with drug-related offenses had lived in the US for the longest periods of time. The mean length of time between entry to the US and deportation was over four years, driven up by deportations of long-term residents. The median length, possibly lower in part due to people who traveled abroad or attempted to re-enter the US after a prior deportation, was one year and four months.

⁷ Justin George, “First Step Offers Release for Some Prisoners—But Not Non-Citizens,” *The Marshall Project*, June 18, 2019, <https://www.themarshallproject.org/2019/06/18/first-step-offers-release-for-some-prisoners-but-not-non-citizens> (accessed April 22, 2024).

Within these statistics lie human stories. This report offers case studies of people harmed by federal immigration law in California, New York, Illinois, and Texas, including:

- Refugees and US military veterans separated from their homes and families due to deportations for drug offenses;
- Immigrants who have lived in the United States since childhood but have been deported for drug offenses, sometimes for marijuana offenses that today would not even be illegal in their states;
- Immigrant women who were sexually abused by corrections officers during their imprisonment for drug offenses, in part because perpetrators knew they would soon be deported;
- Legal permanent residents who are lawfully employed in a state’s legal marijuana industry but cannot become citizens—on the grounds that their employment shows they lack “good moral character”;
- People who have been detained by immigration authorities after the resolution of their criminal case for a drug offense and deported to danger in their countries of origin; and
- People who live under threat of deportation for drug offenses committed in the 1980s or 90s, before they were married, had children, or became grandparents.

The Way Forward: Rights-Respecting Drug and Immigration Policy

Some policymakers have used the current drug overdose crisis as an excuse to expand the punitive policies of criminalization and prosecution instead of investing in a rights-based public health response. One stark example of rights-abusive policies justified in part as a response to the drug overdose crisis is Operation Lone Star (OLS), a Texas state policy that invests billions of dollars into local law enforcement and military to block and arrest migrants and asylum seekers. High ranking politicians in Texas and beyond have weaponized false and dangerous rhetoric referring to people seeking to migrate across the Texas-Mexico border as an “invasion,” and manufactured fear “that a swell of drug cartel operatives, gang members or rapists are crossing the border into Texas.”⁸

This contemporary narrative could be pulled directly from US President Ronald Reagan’s drug war, which falsely tied increased drug trafficking to anti-immigrant sentiment. In fact,

⁸ Joseph Nevins, *Operation Gatekeeper: The Rise of the “Illegal Alien” and the Remaking of the U.S. – Mexico Boundary*, (New York, Routledge, 2002), p. 63.

86 percent of people convicted of trafficking fentanyl into the United States are US citizens driving cars and commercial vehicles through legal ports of entry, not migrants and asylum seekers carrying backpacks.⁹ Since 2015, as enforcement has continued to increase, according to the US Centers for Disease Control and Prevention, overdose deaths have more than doubled.¹⁰

Political leaders from both major parties, including members of Congress and the executive branch, as well as state and local officials, should reject the false conflation of immigrants and drugs. Instead, they should develop more humane policies on two fronts: assisting asylum-seekers and immigrants fleeing danger or seeking to join or return to US family members, homes, and communities in the US; and addressing the domestic drug overdose crisis.

One way to reduce the number of people swept into the criminal legal system or deported for drug law violations is to decriminalize drug use and possession. Decriminalization removes criminal sanctions for certain activities, including possession of drugs for personal use, often without altering the prohibition on a particular substance. Decriminalization of drugs reduces harm to people who use drugs.¹¹ Studies show no evidence that decriminalization leads to increases in overdose deaths.¹²

The public's desire to see drug policies that help and do not exacerbate social problems has allowed for some state and federal drug law reforms. Very rarely, such reforms are carefully calibrated to avoid triggering federal immigration law and ensure immigrants can benefit from them. For example, they can allow a person to receive treatment for substance use disorder without requiring them to admit to violating state criminal law—thereby avoiding application of federal immigration law—or impose sentences that do not require deportation, or allow pleas to offenses that do not trigger deportation. But more often state

⁹ The United States Sentencing Commission, “Quick Facts: Fentanyl Trafficking Offenses,” undated, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY21.pdf (accessed April 22, 2024).

¹⁰ Center for Disease Control and Prevention, “Provisional Drug Overdose Death Counts,” <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (accessed April 22, 2024).

¹¹ “Decriminalizing Drug Possession Not Linked to Higher Overdose Death Rates in Oregon or Washington,” press release, *NYU Langone*, September 27, 2023, <https://nyulangone.org/news/decriminalizing-drug-possession-not-linked-higher-overdose-death-rates-oregon-or-washington> (accessed April 22, 2024).

¹² Spruha Joshi, et al., “One-Year Association of Drug Possession Law Change With Fatal Drug Overdose in Oregon and Washington,” *JAMA Psychiatry*, September 27, 2023, accessed June 6, 2024, doi: 10.1001/jamapsychiatry.2023.3416.

policymakers pay little attention to immigrants, or their efforts are thwarted by federal law that supersedes their attempts at reform. Immigrants remain in the crosshairs of a federal war on immigrants within the “war on drugs.”

There is no need to maintain harsh federal immigration penalties for people whose behaviors are being addressed under state law. Thousands of people, many long-term residents of the United States, and the communities around them continue to be vilified under a cruel, unpopular, and ineffective regime. The impact on individual lives and communities, not the swirling, politicized rhetoric, should be the compass for policy change.

Methodology

For this report, Human Rights Watch and the Drug Policy Alliance consulted with or interviewed 42 immigration and drug policy experts, advocates, attorneys, and immigrants and their family members, including 14 directly impacted immigrants facing consequences under federal immigration law due to drug-related conduct. Interviewees were provided the opportunity to provide information anonymously or using a pseudonym. Interviewees were not compensated for providing information for this report.

The report also contains descriptive statistical analysis of data from several sources. Data on deportations, including the most serious criminal conviction on file, was provided to Human Rights Watch by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University at a time when Human Rights Watch staff acted as a TRAC Fellow of the Center. Additional demographic and criminal legal system data was downloaded from other open data sources, with specific sources cited throughout the report. All analysis code is on file with Human Rights Watch.

To identify directly affected individuals, Human Rights Watch and the Drug Policy Alliance relied on partner organizations, advocates, and attorneys working at the intersection of the criminal legal and immigration systems.

Key Terms and Concepts

Aggravated felony – An aggravated felony under US immigration law is a ground of deportability as well as a bar to almost all forms of relief from deportation such as asylum. The Immigration and Nationality Act (INA) § 101(a)(43)(B) defines a drug-related aggravated felony as “illicit trafficking in a controlled substance, including a drug trafficking crime” (internal citations omitted). Immigration authorities and courts interpret which offenses fit this definition.

Clemency – Pardons are a form of clemency. Clemency is understood as a power of the executive—in the US context, a state governor or the US president—to show leniency or mercy.

Controlled Substances Act – President Richard M. Nixon signed the Controlled Substances Act (CSA) into law in 1970 to regulate drug activity and establish criminal penalties, including mandatory minimums, for illicit activity. The CSA classifies drugs into five “schedules” rated by medical benefits and level of potential for abuse.

Crime involving moral turpitude – A term appearing in the INA. US immigration authorities and courts decide which state and federal crimes fit this definition. Non-citizens convicted of a “crime involving moral turpitude” are deportable depending on the timing of the offense and the length of the sentence imposed by the criminal court. They are prohibited from admission to the United States in the future. Courts have provided a series of vague definitions of the term; one recent example is as a “reprehensible act” with a mental state of recklessness.¹³ Drug-related offenses have been categorized as crimes involving moral turpitude.

Decriminalization of drugs – A federal or state process, generally involving changes to legislation and law enforcement practices, ensuring that people are no longer arrested or incarcerated for drug offenses. In the US, decriminalization is most common for offenses of possession of drugs for personal use.

¹³ *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

Expungement – The post-conviction process by which a record of criminal conviction is destroyed or sealed from state or federal records. An expungement order directs the court to treat the criminal conviction as if it never occurred, removing it from a defendant’s criminal record and, ideally, the public record. While state governors or the US president may issue pardons, expungements must be ordered by a judge, or court.

Immigration and Nationality Act (INA) – Adopted by the US Congress in 1952, the INA is the main and most important source of US federal immigration law.

International Convention on the Elimination of all forms of Racial Discrimination (ICERD) – An international human rights treaty that entered into force on January 4, 1969. It was ratified by the United States on November 20, 1994, making the US bound by its terms.

International Covenant on Civil and Political Rights (ICCPR) – An international human rights treaty that entered into force on March 23, 1976. It was ratified by the United States on June 8, 1992, making the US bound by its terms.

Judicial discretion – The power provided to judges in certain laws to make certain determinations based on their own assessment. This report discusses judicial discretion to impose a range of criminal sentences or immigration penalties for specific conduct or decline to impose such a sentence or civil penalty; in contrast to instances in which a criminal sentence or deportation is mandatory under law.

Mandatory minimums – Mandatory minimum sentences are legal provisions in each state and the federal government that require a specific minimum sentence for certain crimes, regardless of individual circumstances.

Overdose crisis – A current public health emergency in the United States characterized by waves of increased drug-related overdose. The first wave involved medical prescriptions of opioids, the second heroin, and the third and fourth synthetic opioids like fentanyl and its analogues. This crisis was spurred by increased criminal drug enforcement that led to an increasingly potent supply in the illegal drug market. Today, it highlights the dangers of the unregulated drug supply and systemic issues that exacerbate drug-related harms, including inadequate access to voluntary treatment, harm reduction services, and

comprehensive social supports. Addressing it requires the prioritization of public health and evidence-based solutions.

Pardon – A state or federal post-conviction procedure that acknowledges that a crime happened, the growth of the person who committed the offense, and restores legal rights—like the ability to serve on a jury or to obtain a professional license—lost due to the conviction. Pardons are often a necessary, but insufficient, step in the process to obtaining relief from deportation for non-citizens. In general, pardons in the United States are “presidential,” when provided by the US president and “gubernatorial,” when provided by a governor of a state.

Secure communities – State and local jails participating in the “secure communities” program submit the fingerprints of people arrested not only to criminal databases but to immigration databases as well, allowing Immigration and Customs Enforcement (ICE) access to information on individuals held in jails.

287(g) program – Named for Section 287(g) of the Immigration and Nationality Act (INA). Through the 287(g) program, state and local law enforcement officers collaborate with the federal government to enforce federal immigration laws. The 287(g) program has been costly for localities, has historically targeted individuals with little or no criminal history, and has harmed the relationship between police and local communities.

212(c) relief – A discretionary basis for allowing non-citizens to avoid deportation if their criminal convictions occurred prior to 1996 and meet other eligibility criteria.

Universal Declaration of Human Rights (UDHR) – An international human rights agreement, in the form of a UN General Assembly resolution, setting out for the first time fundamental human rights and widely recognized as paving the way for more than seventy international human rights treaties, including the ICCPR and the ICERD.

Vacatur – A post-conviction process by which a conviction is “vacated” or erased—meaning the offense is treated as if it never happened. All records of the conviction are destroyed, and the conviction is removed from a person’s record. It is an extraordinary remedy that is granted by state courts if “in the interests of justice,” which is a high standard. An example of a person who might receive a vacatur under state law is a victim

of human trafficking who was forced by their abuser to commit a crime. Vacatur means that there is no basis for deportation under federal law.

War on drugs – Term coined by US President Richard Nixon in the 1970s as part of an effort to impose a set of policies and initiatives to increase drug enforcement and penalties for drug offenses such as use, possession, and sales. The primary focus of the government led strategy was to criminalize and marginalize Black individuals and other communities that the government deemed a threat rather than addressing the root causes of substance use.

Background

Between 2002 and 2020, according to data analysis performed for this report by Human Rights Watch and the Drug Policy Alliance, the US government deported more than half a million people whose most serious conviction was a drug offense. While the public might attribute harsh policies to a particular US president or Congress, nearly every administration and Congress bears responsibility since the 1970s. Federal immigration policy has largely remained frozen while some state and federal drug policies have evolved.

Federal Immigration Law Contrasts with and Often Supersedes State Drug Reforms

State drug policy reforms, even those crafted to help immigrants, are often thwarted by federal immigration law. For this report, Human Rights Watch and Drug Policy Alliance analyzed recent drug policy reforms in several states with large immigrant populations, several of which have decided on new approaches. These policy shifts reflect a significant change in public sentiment and political will to reject the war on drugs' punitive approaches to problematic drug use; and they are significant changes since Human Rights Watch's 2015 report on this same topic, *A Price Too High*.

Throughout the United States, local organizations, advocates, people who use drugs, and their communities have fought to change the laws that stigmatize and criminalize people who use drugs. This report highlights drug law reforms in California, New York, Texas, and Illinois, states with some of the largest immigrant populations in the country.¹⁴ Reduced arrests, alternatives to the criminal legal system, and comprehensive post-conviction processes have been enacted at the state level and offer new ways to address drug use in the United States. Further state and federal law reform is necessary to truly address the continued impact of the drug war and the largely undiminished impact of the war on immigrants.¹⁵

¹⁴ Migration Policy Institute, "Immigration Population by State, 1990-Present," <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present?width=1000&height=850&iframe=true> (accessed April 22, 2024).

¹⁵ Drug Policy Alliance et al., *Best Practices: Protecting Immigrants When Decriminalizing or Legalizing Marijuana*, report, June 2020, https://www.ilrc.org/sites/default/files/resources/2020.08.28_mj_best_practices-final.pdf (accessed April 22, 2024).

The US federal government has thus far been unwilling to revise federal immigration law to match current public sentiment on drugs. Myriad harms result from this inaction. There is no statute of limitations in federal law on deportation after a criminal conviction. Many immigrants are still being deported for convictions from the late 1980s and early 1990s, sometimes for conduct that is no longer a crime under state law. Mandatory detention and deportation policies¹⁶ still apply to a broad range of drug convictions misleadingly categorized by US federal immigration law as “aggravated felonies,” despite including offenses that are categorized as misdemeanors in the criminal code.¹⁷

The Board of Immigration Appeals (BIA) and guidance issued by US attorneys general have made harsh decisions that allow immigration authorities to ignore judicial orders from state criminal court judges on state criminal matters, including when state law is reformed.¹⁸ Pardons of state or federal drug convictions can open up new pathways for individuals facing deportation or other immigration consequences.¹⁹ Still, the BIA and federal courts have rejected pardons in certain contexts, finding that pardons do not waive all grounds of deportation or do not apply to inadmissibility grounds—which can affect

¹⁶ Mandatory deportation refers to deportation where an immigration judge is statutorily prohibited from exercising discretion and a person is rendered ineligible for immigration relief that they are otherwise eligible for due to an “aggravated felony” conviction. Many drug offenses related to sale are considered “drug trafficking” aggravated felonies (see section of this report on “drug trafficking”). Mandatory detention refers to detention for the entire duration of immigration proceedings. Under 8 U.S.C. 1266(b)(2) and 8 U.S.C. 1266(c), individuals convicted of controlled substance offenses, “aggravated felonies,” and certain “crimes involving moral turpitude” are subject to mandatory detention. Most drug possession and sale convictions will trigger one or more of these categories.

¹⁷ Hon. Dana Leigh Marks and Hon. Denise Noonan Slavin, “A View Through the Looking Glass: How Crimes Appear from the Immigration Court,” *Fordham Urban Law Journal*, vol. 39 (2012), <https://ir.lawnet.fordham.edu/ulj/vol39/iss1/6/> (accessed April 22, 2024), p. 102.

¹⁸ In *Matter of Roldan*, the BIA held that the immigration definition of “conviction” included convictions expunged through “rehabilitative relief.” *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (en banc). Then the BIA went even further, holding that even vacated state convictions would meet the definition of “conviction” unless the vacatur was based on a “procedural or substantive defect,” not due to rehabilitation or to avoid immigration consequences. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). The BIA has continued to apply this standard in an inflexible and unworkable way, rejecting vacaturs sought based on a substantive defect but where the court does not explicitly lay out the basis for granting the motion (even if the only legal basis is the one presented in the vacatur motion). *Matter of Azrag*, 28 I&N Dec. 784, 787 (BIA 2024). Federal courts have all deferred to the Board on this standard and have even rejected state decriminalization as a valid basis. *Khan v AG of the United States*, 979 F3d 193, 196 (3d Cir. 2020).

¹⁹ See e.g., Marshall Project Staff, “Colin Absolam, an Immigrant Facing Deportation, Pardoned by Gov. Cuomo,” *The Marshall Project*, January 30, 2020, <https://www.themarshallproject.org/2020/01/30/colin-absolam-an-immigrant-facing-deportation-pardoned-by-gov-cuomo> (accessed April 28, 2024).

immigrants' ability to obtain visas, asylum, or other immigration benefits.²⁰ Pardons do, however, waive “aggravated felony” grounds, including drug trafficking.

The United States Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security (DHS), still routinely denies applications for asylum²¹ and visas because of drug-related conduct, even if the charges are dropped or the case is dismissed. Some people are eligible for green cards or citizenship, except that a deportable drug offense or drug-related conduct makes it too risky to apply for fear of deportation. These features of drug prohibition are governed by federal immigration law, not state criminal law. States have a vital role in blunting these outcomes because state criminal legal systems produce the majority of convictions that the immigration system relies upon. And for durable and comprehensive solutions, it is federal immigration law that needs to change.

Health Approaches to Drugs: Why Investing in Health Matters

Building health-centered alternatives is a necessary part of a rights-respecting public health approach to drugs. The prioritization of punitive responses to drugs over rights-respecting public health approaches has resulted in billions of dollars²² spent on over 1.5 million drug arrests each year, most of which are for drug possession only.²³ Yet, illegal drugs in the US are more potent, available, and cheaper than ever, and overdose deaths are at an all-time high.²⁴ Fear of law enforcement can drive people

²⁰ *Matter of Suh*, 23 I. & N. Dec. at 628. Federal courts have subsequently found that controlled substance offenses are not waived by a gubernatorial pardon. See e.g., *Aristy-Rosa v. Attorney General*, 994 F.3d 112, 115 (3d Cir. 2021); *Tetteh v. Garland*, 995 F.3d 361 (4th Cir. 2021). Other courts have found that pardons do not apply to inadmissibility grounds (grounds to deny visas, green cards, asylum, and other applications for immigration status). See *Balogun v. Att’y Gen.*, 425 F.3d 1356, 1362 (11th Cir. 2005); *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1251 (9th Cir. 2008).

²¹ Immigrant Defense Project and Harvard Immigration and Refugee Clinical Programs, “Particularly Serious Crime Bars on Asylum and Withholding of Removal: Legal Standards and Sample Case Law Determinations,” July 2018, https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Chart_FINAL.pdf (cataloging many cases in which applications for asylum have been denied due to drug-related conduct or offenses) (accessed April 22, 2024).

²² Marc Santora, “City’s Annual Cost Per Inmate Is \$168,000, Study Finds,” *New York Times*, August 24, 2013, <https://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html> (accessed June 24, 2024).

²³ Federal Bureau of Investigation, “Crime Data Explorer,” <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/home> (accessed June 24, 2024).

²⁴ National Center for Health Statistics, “Provisional Drug Overdose Death Counts,” <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (accessed June 24, 2024).

who use drugs underground, deterring them from accessing health services and emergency medicine, and contributing to the risk of overdose.²⁵ At the same time, people are cycling through jails and prisons with limited to no access to services—and overdose risk increases after they leave.²⁶

Criminalization also stigmatizes people who use drugs and people convicted of drug law violations—who are, in the United States, disproportionately Indigenous, Black, Latinx, marginalized, and low-income—and exposes them to lifelong barriers, including the loss of social services and support, occupational licenses, housing, and voting rights.

Drug policy reforms should reduce criminalization, repair past harms, and refocus funding on improving community health and safety. This is a cost-effective approach that enables resources to go towards services and support such as voluntary treatment,²⁷ housing, employment, and harm reduction programs that keep people alive.²⁸ Shifting the focus from criminalization to such evidence-based interventions promises to improve the health of communities.

Harsh Federal Immigration Penalties for Drug Convictions

Lawmakers laid the blueprint for today’s severe civil immigration penalties for drug offenses in the 1980s and 1990s—decades that saw the simultaneous rise of the myth of the “criminal alien” and the widely-discredited, racially discriminatory “war on drugs,” first declared by President Richard Nixon in 1971. In a now infamous interview, Nixon’s former domestic policy chief, John Ehrlichman, said:

You want to know what this [war on drugs] was really all about? ... Nixon ... had two enemies: the antiwar left and black people ... We knew we couldn’t

²⁵ Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States* (New York: Human Rights Watch, 2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

²⁶ Shabbar I. Ranapurwala et al., “Opioid Overdose Mortality Among Former North Carolina Inmates: 2000–2015,” *American Journal of Public Health*, August 8, 2018, accessed June 24, 2024, doi: 10.2105/AJPH.2018.304514.

²⁷ Drug Policy Alliance, “Substance Use Disorder Treatment,” <https://drugpolicy.org/substance-use-disorder-treatment/>.

²⁸ Drug Policy Alliance, “Harm Reduction,” <https://drugpolicy.org/harmreduction/>.

make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.²⁹

Following Nixon, President Ronald Reagan made drugs a priority when he took office in 1981, just as crack cocaine emerged. As more people started using the drug, an alarmist narrative in the media and politics bred hysteria, which built up support for more policing and harsher sentences for drug use and sales. The public did not show marked concern about drugs until drugs were linked to public safety by politicians and the media.³⁰

Over the same time period, politicians started to promote an insidious association between Black and brown migrants—especially in this period, Haitian and Cuban—and crime, adding to the fervor to criminalize drugs.³¹ This climate led to the Anti-Drug Abuse Act (ADAA I) of 1986, which began to partly merge the criminal and immigration systems through collecting and sharing data on immigrants arrested or convicted of drug offenses and facilitating immigration “detainers” on people held in jails.³²

²⁹ Dan Baum, “Legalize It All,” *Harper’s Magazine*, April 2016, <https://harpers.org/archive/2016/04/legalize-it-all/> (accessed April 28, 2024).

³⁰ César Cuahtémoc García Hernández, “Creating Crimmigration,” *Brigham Young University Law Review*, vol. 2013 (2014), doi: 10.2139/ssrn.2393662 (accessed April 28, 2024), p. 1494.

³¹ *Ibid.*, p. 1504. Following the arrival of 125,000 refugees from Cuba in 1980, politicians called for increased immigration enforcement against migrants they perceived as threatening and criminal. Because many of these Cuban refugees were Black, the media and politicians also played into false associations of Blackness with criminality in both Cuba and the United States. Also in 1980, 15,000 Haitians arrived in the US, and concerns about drug use in Black American neighborhoods were imputed onto Haitian immigrants. The association of these recently arrived, racialized populations stirred up local demands to address the large Miami drug trade with policing, incarceration, and deportation.

³² Public Law 99-570 Oct. 27, 1986. Subtitle M, Section 1751 (stating a policy to “establish or improve the computer capabilities of the local offices of [INS] and of local law enforcement agencies to respond to inquiries concerning aliens who have been arrested or convicted for... a violation of any law relating to controlled substances.”). A section of the ADAA titled the “Narcotics Traffickers Deportation Act” created a “pilot program” for the Immigration and Nationality Service (INS), ICE’s predecessor, to collect and share data on immigrants arrested or convicted of drug offenses. This “pilot” program would later expand into the US government’s current nationwide data sharing program, through which fingerprints taken at arrest are automatically forwarded to immigration authorities. Immigration, drug regulation, and the criminal system have a long, entwined history that predates the war on drugs. See Drug Policy Alliance, “The Drug War Invades Immigrant Communities,” undated, <https://uprootingthedrugwar.org/immigration/#:~:text=The%20drug%20war%20is%20at,for%20non%2Dtraffic%20drug%20offenses> (accessed April 22, 2024). See also García Hernández, “Creating Crimmigration,” p. 1512.

The Anti-Drug Abuse Act of 1988 (ADAA II) claimed it would address a “drug syndicate established and managed by illegal aliens.”³³ But the ADAA II went far beyond “drug syndicates” and developed for the first time in US immigration law the concept of “aggravated felonies,” which targeted all types of non-citizens. Those convicted of “aggravated felonies” are subject to mandatory detention and deportation, with few procedural rights.³⁴

The drug trafficking “aggravated felony” includes selling, sharing, or possessing drugs to sell in basically any amount and applies to all non-citizens.³⁵ Many deportations for “drug trafficking” are based on minor conduct, including possession of a drug packaged in a certain way, that prosecutors use to charge people with intent to sell—regardless of amount—as well as cultivation and several other non-sale offenses.³⁶ While ICE aggressively charges a wide range of offenses as “aggravated felonies,” the federal appeals court covering New York has found that certain New York drug sale convictions are not “drug trafficking” aggravated felonies.³⁷

Two years after the ADAA II was passed, President George H. W. Bush signed into law the Immigration Act of 1990, declaring that it “improve[d] this Administration’s ability to secure the US border—the front lines of the war on drugs.”³⁸ The law eliminated “Judicial Recommendations Against Deportation,” which had previously allowed judges to make

³³ 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.

³⁴ Anti-Drug Abuse Act of 1988 § 7343.

³⁵ INA § 101(a)(4)(B). The drug trafficking “aggravated felony” includes sale or possession for sale of a very small amount of a controlled substance, as well as offenses not related to trafficking such as sharing a controlled substance for free, or growing marijuana for one’s own use. Today felonies, misdemeanors, and even some infractions are considered “drug trafficking aggravated felonies.” *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008), holding that California Penal Code 11358, growing marijuana for personal use, is an “aggravated felony.” That offense is currently punishable as a misdemeanor or infraction in California law.

³⁶ Immigration authorities have continued to push for broader interpretations, although the Supreme Court often reject the government’s misinterpretations. For example, the Court held that a second or subsequent conviction for simple possession does not constitute drug trafficking and that a conviction for an offense that could include social sharing cannot be considered “drug trafficking.” See *Moncrieffe v. Holder*, 569 U.S. 184 (2013) and *Carachuri-Rosendo v. Holder*, 560 U.S.C. 563 (2010).

³⁷ See *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018) and *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017). See also *United States v. Minter*, 80 F.4th 406 (2d Cir. 2023), which held that a New York conviction for selling cocaine is categorically broader than the federal counterpart and may render certain individuals with similar convictions no longer removable or ineligible for relief.

³⁸ 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).

recommendations against deportation for non-citizens. The law also disqualified non-citizens with “aggravated felony” convictions who had served at least five years in prison from 212(c) relief, which allowed green card holders to present evidence of the impact of deportation through demonstration of family and community ties, rehabilitation, and other positive factors to the immigration judge with authority to not deport them.³⁹

Meanwhile, along the Mexico-US border, crime control and “border security” narratives had been expanding during the 1980s.⁴⁰ Drug cartels started to move drugs across the US-Mexico border instead of through the Caribbean and Miami.⁴¹ Simply due to geography, migrants who bore no relationship to those cartels were painted by President Reagan and other elected officials with a broad brush as “drug traffickers,” and the federal government allotted new resources to Border Patrol⁴² to fight these “traffickers” in the form of equipment, staffing, support from the National Guard and the Marines, and large increases in funding.⁴³ Border communities experienced the impact of policing and surveillance in their neighborhoods, environmental impacts, and obstacles to maintaining longstanding economic and community ties with Mexico.

With more policing at the border came more arrests of migrants in the region, and the US built immigration detention centers to hold them. From 1982 to 1988, detention beds increased from 1,720 to approximately 7,439, an increase of over 400 percent.⁴⁴ By 1990, President George H.W. Bush described the border as “the front lines of the war on drugs.”⁴⁵ US government efforts to “militarize” the border had little impact on the expanding drug trade that was going hand in hand with more aggressive smuggling. In fact, the two had a symbiotic relationship—as one scholar put it: “[T]he boom in the drug trade also meant a boom for law enforcement.”⁴⁶ The infrastructure was set up for the US government to police, surveil, and detain migrants in the years to come.

³⁹ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (November 29, 1990).

⁴⁰ García Hernández, “Creating Cimmigration,” p. 1505-1507.

⁴¹ *Ibid.*, p. 1506.

⁴² On the same day that Congress passed the ADAA, it approved the Immigration Reform and Control Act (IRCA), legislation that included significant funding for border enforcement, which started to gain traction as a policy solution for addressing drug supply.

⁴³ García Hernández, “Creating Cimmigration,” p. 1509.

⁴⁴ *Ibid.*, p. 1511.

⁴⁵ *Ibid.*, p. 1507.

⁴⁶ Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide*, (Ithaca: Cornell University Press, 2022), p. 35-45.

In 1996, with the enactment of the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, Congress expanded its efforts to use the criminal legal system as a tool to deport non-citizens with criminal convictions, including drug offenses. It dramatically broadened the definition of an “aggravated felony,” which now included many categories of crimes and countless individual offenses, expanding the number of misdemeanors that constitute “aggravated felonies.” It also created one of the most extreme aspects of modern US immigration law: mandatory deportation.

Anyone convicted of an “aggravated felony” for a drug offense, regardless of the length of sentence imposed or years since completing their criminal sentence, was stripped of eligibility for any protection against deportation unless they fear torture.

Under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), adopted in 1970, people can end up with federal drug convictions based on low-level conduct that then trigger federal immigration penalties. These convictions are often deemed “aggravated felonies” for conduct that spans a vast spectrum: from simply possessing a small amount of drugs for sale, being involved in sales at a low level by passing communications, acting as a lookout, or allowing a drug seller to hold money on their property, to high-level drug operation leadership and coordination. Contrary to media narratives of going after kingpins, most people prosecuted for drug conspiracies under RICO are accused of only low-level activity, often for subsistence. Finally, it is worth noting that a “sale” may capture a variety of activities that do not necessarily include selling illicit substances, such as when someone is sharing a substance with a friend or loved one.

Congress also broadened the definition of a “conviction” for immigration purposes to include many dispositions that criminal justice systems do not consider a “conviction,” such as expunged convictions and some cases resolved or vacated through diversion programs. This means that non-citizens are subjected to a double standard, with federal immigration law continuing to attach immigration penalties even though the state criminal legal system intends to erase civil penalties. Mandatory detention was also expanded in

1996 to include any controlled substance offense, and other non-drug offenses, in addition to drug trafficking offenses.⁴⁷

The 1996 Act imposed mandatory detention without possibility of bond on immigrants with even very minor criminal convictions. Under this law, any non-citizen with such convictions can be held in any ICE facility in the country, in very harsh conditions, and often in isolated areas hundreds of miles from their home. The vast majority—70 percent—are held with no legal representation.⁴⁸

Federal immigration law has not been materially amended or reformed since these laws were passed over 35 years ago.

The few federal drug law reforms introduced to since then either do not address immigrants or explicitly exclude them. The First Step Act of 2018 allowed people incarcerated under prior sentencing rules to apply for release, but immigration status disqualified many people from its programs. In fact, the non-citizens who successfully fought for release under the First Step Act were not released but immediately placed in deportation proceedings.⁴⁹ Furthermore, President Biden pardoned federal simple marijuana possession convictions, however, the pardon only applies to citizens and certain green card holders. Pardons were also largely ineffective at removing past or future immigration penalties. While the US Drug Enforcement Administration (DEA) has announced its intention as of May 2024 to reschedule marijuana from Schedule I to Schedule III of the Controlled Substances Act (CSA), this will maintain the federal marijuana prohibition and keep non-citizens vulnerable to harsh immigration consequences for marijuana activity, including automatic detention and deportation.

This 35 year long legal framework has facilitated—within the war on drugs’ broader criminalization of Black and brown citizens—the systematic criminalization of

⁴⁷ The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104-132, 110 Stat. 1214 279 (April 24, 1996); The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Public Law 104-208, 100 Stat. 3009 (September 30, 1996).

⁴⁸ American Immigration Lawyers Association, *Featured Issue: Immigration Detention and Alternatives to Detention*, April 16, 2024, <https://www.aila.org/library/featured-issue-immigration-detention> (accessed June 6, 2024).

⁴⁹ George, “First Step Offers Release for Some Prisoners—But Not Non-Citizens,” *The Marshall Project*.

disproportionately Black and brown immigrants throughout the United States and the deportation of thousands of immigrants ever since.

ICE Arrests and Deportations

Since Congress made detention mandatory and slashed the ability of immigration judges to weigh the seriousness of the drug-related offense against the harm of deportation for the immigrant, ICE officers became judge, jury, and executioner in deciding who will be deported.

The Immigration and Naturalization Service (INS)⁵⁰ and subsequently ICE have used memoranda to guide their decision making on who should be arrested and deported based on public safety falsehoods. Their broad discretion—and failure to use it to uphold rights—has not resulted in meaningful improvements for immigrants wishing to remain with their families and longstanding communities in the United States. Using its own version of such a memorandum,⁵¹ the administration of former President Barack Obama deported more people than any other US administration, including thousands of individuals who may have had past criminal system contact but posed no threat to public safety. The Trump⁵²

⁵⁰ In 2000, INS released a prosecutorial discretion memorandum that enumerated principles for “exercis[ing] discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders....” These priorities reincorporated many of the same factors that judges had previously considered in all cases, regardless of criminal history, prior to the 1996 laws—length of residence in the United States, medical conditions, criminal history, family ties, immigration history, likelihood of deportation, and eligibility for immigration relief. Officers were told that not every deportable person should be deported, the memorandum emphasizing that “this is true even when an alien is removable based on his or her criminal history....” See US Department of Justice, “Exercising Prosecutorial Discretion,” November 17, 2000, <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf> (accessed June 6, 2024).

⁵¹ Under President Obama, immigration enforcement made a marked shift toward so-called public safety and criminality. ICE reorganized enforcement priorities into tiers, with priority 1 being “threats to national security, public safety, and border security,” including people who “pose a danger to national security,” “aliens apprehended at the border or ports of entry,” and individuals convicted of felonies and “aggravated felonies.” See US Department of Homeland Security, “Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants,” November 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (accessed June 6, 2024).

⁵² The Trump administration’s enforcement priorities included focusing on deporting “removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.” US Department of Homeland Security, “Enforcement of the Immigration Laws to Serve the National Interest,” February 20, 2017, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (accessed June 6, 2024).

and Biden⁵³ administrations’ memoranda on enforcement have made slight adjustments without directly addressing drug offenses.

In Fiscal Year (FY) 2023, ICE Enforcement and Removal Operations (ERO) identified 170,590 people⁵⁴ for “ICE arrest,”⁵⁵ the highest number since Fiscal Year 2018 and double the number in 2022.⁵⁶ When policing immigrants, ICE relies on the US criminal legal system’s approach to drugs—which is marred by racial discrimination⁵⁷—to identify people for ICE arrest and deportation. People who have had contact with the criminal legal system comprised 43 percent of all ICE arrests in FY 2023, or nearly 74,000 people,⁵⁸ 83 percent of whom were in jail—many people in jail are not convicted—or in prison when ICE made the

⁵³ President Biden’s enforcement priorities included a similar focus on threats to national security, individuals arrested upon entering the country, and those convicted of “aggravated felonies.” However, these priorities also include a list of discretionary “mitigating factors” for individuals who have criminal history, including family ties, length of residence, eligibility for relief, and post-conviction relief, stating that agents “should not rely on the fact of conviction or the result of a database search alone.” US Department of Homeland Security, “Guidelines for the Enforcement of Civil Immigration Law,” September 30, 2021, <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>, (accessed June 6, 2024).

⁵⁴ US Immigration and Customs Enforcement, “ICE Annual Report FY 2023,” December 29, 2023, <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf> (accessed April 22, 2024), p. 12.

⁵⁵ We define “ICE Arrests” as the identification of a non-citizen for possible removal, or deportation, based on underlying state or federal criminal convictions, for unlawful entry, or for other immigration law violations. These are not new arrests for new state or federal criminal law violations but are based only on the enforcement of US immigration law.

⁵⁶ The large number of “ICE arrests” may be due to a variety of causal factors: ICE may have made fewer arrests when Covid-19-era policies limited local law enforcement jail and detention space, ICE also may have made fewer arrests because immigrants were not allowed inside the US due to the Covid-19-era border policy known as Title 42. Migration Policy Institute, “Biden at the Three-Year Mark: The Most Active Immigration Presidency Yet Is Mired in Border Crisis Narrative,” January 19, 2024, <https://www.migrationpolicy.org/article/biden-three-immigration-record> (accessed May 26, 2024).

⁵⁷ See, e.g. Drug Policy Alliance, “Uprooting the Drug War,” <https://uprootingthedrugwar.org/immigration/>; Human Rights Watch and the American Civil Liberties Union, *Racial Discrimination in the United States* (New York: Human Rights Watch, 2022), https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission#_ftn185; “Civil and Human Rights Groups Urge Biden to Include Immigrants in Marijuana Pardons,” sign on letter, November 4, 2022, <https://www.hrw.org/news/2022/11/04/civil-and-human-rights-groups-urge-biden-include-immigrants-marijuana-pardons>; Grace Meng, “Does Anyone Still Believe Marijuana is a Gateway Drug?,” commentary, Human Rights Watch dispatch, April 19, 2017, <https://www.hrw.org/news/2017/04/19/does-anyone-still-believe-marijuana-gateway-drug>; Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*; Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (New York: Human Rights Watch, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>; *Targeting Blacks: Drug Law Enforcement in the United States* (New York: Human Rights Watch, 2008), <https://www.hrw.org/report/2008/05/05/targeting-blacks/drug-law-enforcement-and-race-united-states>; *Punishment and Prejudice: Racial Disparities in the War on Drugs* (New York: Human Rights Watch, 2000), <https://www.hrw.org/report/2000/05/01/punishment-and-prejudice-racial-disparities-war-drugs>; *Race Drugs and Law Enforcement in the United States* (New York: Human Rights Watch, 2009), <https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states>.

⁵⁸ US Immigration and Customs Enforcement, “ICE Annual Report FY 2023,” p. 12.

arrest.⁵⁹ Of the state or federal criminal charges or convictions made public⁶⁰ of those subjected to ICE arrest in FY 2023, 14 percent were state or federal charges or convictions for drugs.⁶¹

Ending Marijuana Prohibition

Despite marijuana being legal in many states, it is still one of the most arrested offenses in the United States. In 2021, over 170,000 people were arrested for marijuana possession.⁶² Moreover, marijuana remains federally prohibited due to it being scheduled on the Controlled Substances Act (CSA) (see definition in “key terms and concepts”). Prohibition has a discriminatory impact on people of color, with Black people in the US getting arrested 3.5 times more than white people for possessing,⁶³ despite nearly identical marijuana usage rates for both white and Black people, according to US government data.⁶⁴

Individuals who have suffered from the impact of a marijuana arrest or conviction are still affected by the many unique collateral consequences of over-enforcement of marijuana laws—collateral consequences that include difficulty securing or maintaining employment, housing, federal financial aid, nutritional assistance, the

⁵⁹ Human Rights Watch analysis of Immigrations and Customs Enforcement data from US Immigration and Customs Enforcement, “ICE Annual Report FY 2023.”

⁶⁰ ICE does not publish data on the most serious state or federal criminal charge of people it subjects to ICE arrest (most often resulting in the person being placed in deportation proceedings). Rather, they publish some data on the total state or federal criminal charges or convictions among all people arrested.

⁶¹ Immigration and Customs Enforcement, “ICE Annual Report FY 2023,” p. 14.

⁶² Moreover, marijuana is federally prohibited and remains scheduled on the Controlled Substances Act (CSA). Julia Haines, “States with the Most Arrests for Marijuana Possession,” October 17, 2022, <https://www.usnews.com/news/best-states/articles/2022-10-17/states-with-the-most-arrests-for-marijuana-possession> (accessed June 25, 2024).

⁶³ American Civil Liberties Union, *A Tale of Two Cities*, 2020, https://www.aclu.org/wp-content/uploads/publications/marijuanareport_03232021.pdf; United States Sentencing Commission, 2021 Datafile, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Drug-Offenses-Section.pdf> (accessed June 25, 2024).

⁶⁴ Substance Abuse and Mental Health Services Administration, “Highlights by Race/Ethnicity for the 2022 National Survey on Drug Use and Health,” <https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-race-eth-highlights.pdf> (accessed June 25, 2024).

ability to vote, or a valid driver’s license; as well as harsh immigration related consequences for noncitizens.⁶⁵

Ending marijuana prohibition on the federal level requires descheduling it and removing it from the CSA. Federal and state marijuana reform should also center health, justice, equity, and community investment. It is long past time to end marijuana criminalization and restore the lives and communities damaged by prohibition.

State and local police make nearly one million arrests for drug law violations in the US each year.⁶⁶ Since 2010, marijuana arrests have declined, however, increased arrests for methamphetamine have offset the decline, even while arrests for other crimes fell by 25 percent over the same period.⁶⁷ However, not all drug arrests are equal. More than one in four arrests (27 percent) are for marijuana possession.⁶⁸ Only about one in 10 drug related arrests are for sale or manufacturing.⁶⁹ Glaring disparities in enforcement exist along racial lines despite the fact that people use and sell drugs at similar rates across racial and ethnic groups.⁷⁰ Black people are 27 percent of those arrested for drug law violations, but only make up 14 percent of the US population. Black adults are more than two-and-a-half times as likely as white adults to be arrested for possession of any drug in the US.⁷¹

⁶⁵ Sarah Berson, “Beyond the Sentence - Understanding Collateral Consequences,” *National Institute of Justice Journal*, February 16, 2013, <https://nij.ojp.gov/topics/articles/beyond-sentence-understanding-collateral-consequences> (accessed June 25, 2024).

⁶⁶ For example, there were an estimated 907,000 such arrests in 2022. Federal Bureau of Investigation (FBI), “Uniform Crime Report Master File,” 2022, <https://cde.ucr.cjis.gov/LATEST/webapp/#> (accessed March 15, 2024).

⁶⁷ The Pew Charitable Trusts, *Issue Brief: Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019*, report, February 15, 2022, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019> (accessed April 22, 2024).

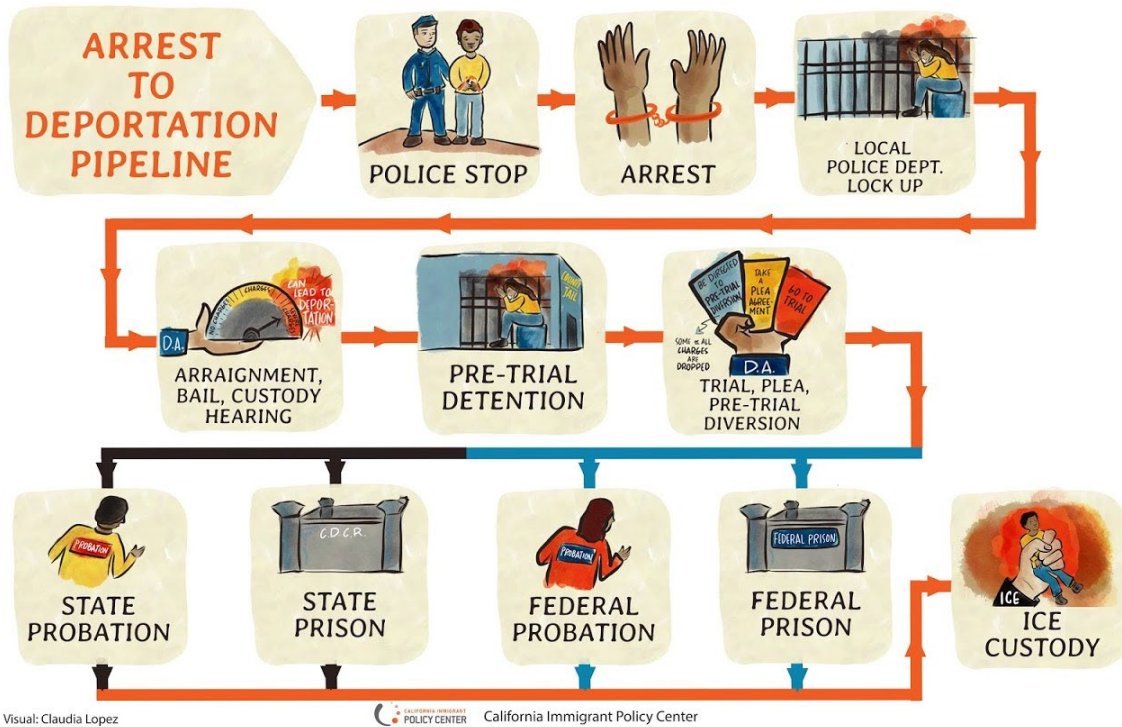
⁶⁸ Federal Bureau of Investigation, “Uniform Crime Report Master File,” Arrest table for drug abuse violations percent distribution by regions.

⁶⁹ Ibid.

⁷⁰ Ibid., Table 43a; Brookings Institution, Hamilton Project, “Rates of Drug Use and Sales, by Race,” October 21, 2016, <https://www.hamiltonproject.org/data/rates-of-drug-use-and-sales-by-race-rates-of-drug-related-criminal-justice-measures-by-race/> (accessed June 25, 2025).

⁷¹ Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*.

Figure 1 – Federal or State Criminal Arrest to ICE Custody and Deportation



Source: California Immigration Policy Center, “Arrest to Deportation Pipeline,” <https://caimmigrant.org/what-we-do/policy/arrest-to-deportation-pipeline/> (accessed June 19, 2024).

For immigrants, a single drug arrest of any kind, even if it ends in a case dismissal, can set the deportation process in motion. When any person is booked on a criminal charge, their fingerprints are sent to the FBI which in turn sends them to ICE. If someone whom ICE believes is a deportable non-citizen is in jail, even just awaiting their first hearing, ICE can put a “detainer” on them that asks the jailer to transfer the person directly to ICE upon their release from criminal custody. As shown in Figure 1, if any non-citizen is convicted of any drug offense, which in about 97 percent of state and 98 percent of federal cases means accepting a guilty plea without having a trial,⁷² they become deportable and subject to mandatory detention in ICE facilities without possibility of bond.

⁷² Thea Johnson, American Bar Association Criminal Justice Section, *Plea Bargain Task Force Report*, report, undated, p. 2, <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf> (accessed April 22, 2024).

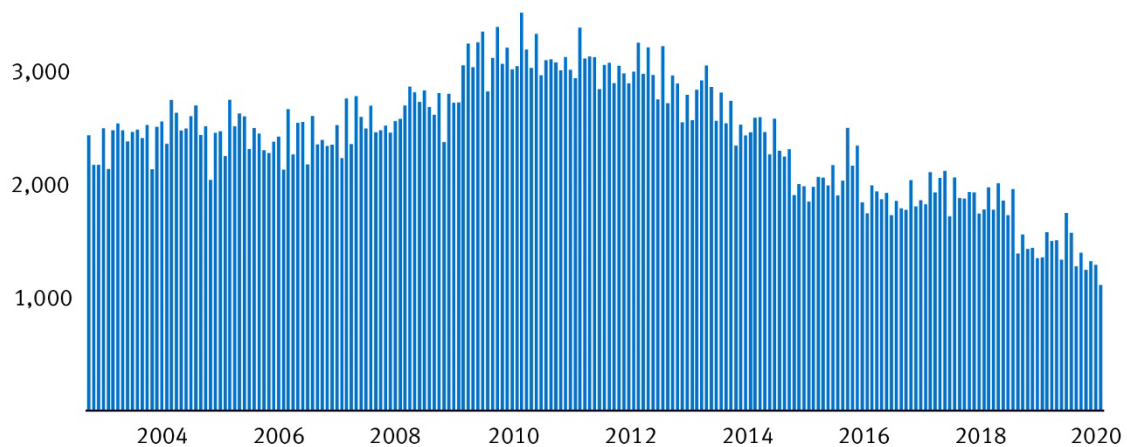
Any drug conviction, including simple possession of a small amount of a controlled substance—except for a first offense of possessing a small amount of marijuana—bars noncitizens from being able to apply for many types of relief from deportation. The result is that immigration judges are not permitted to consider any factors such as a person’s family or community ties, length of residence in the country, minor nature of the offense, or hardship faced by family if they are deported. If the conviction is an “aggravated felony”—which includes, e.g., possession for sale of a small amount of marijuana—it is an absolute bar to almost every form of immigration relief, including asylum and waivers for long-time permanent residents. Even if not categorized as an “aggravated felony,” other drug offenses, including some sales offenses, are categorized by ICE as “crimes involving moral turpitude” or “controlled substance offenses” and can also result in a person being deported. If the person still is eligible to bring some immigration application or defense, the mandatory detention law means that they will be in ICE detention during the case and appeals—detention that may last months or even years.

Nationwide Data: Deportations of Non-Citizens with Drug Convictions

Between October 2002 and February 2020, the US government deported over 505,000 people whose most serious criminal conviction was a drug offense, more than 2,400 people per month on average.⁷³ As shown in Figure 2, these deportations peaked during 2009 and 2010, the first two years of Barack Obama’s presidency. Since then, there has been a decrease in immigrants charged with deportation from the United States for any type of criminal conviction, which appears to be mirrored in deportations of people whose most serious criminal conviction is drug related.⁷⁴

Figure 2

Deportations of People Whose Most Serious Criminal Conviction was a Drug Offense in the US by Month October 2002 – February 2020



Source: Human Rights Watch/Drug Policy Alliance analysis of Transactional Records Access Clearinghouse (TRAC) at Syracuse University data.

⁷³ Human Rights Watch/Drug Policy Alliance analysis of Transactional Records Access Clearinghouse (TRAC) at Syracuse University data on US Immigrations and Customs Enforcement removals.

⁷⁴ Transactional Records Access Clearinghouse, “Fewer Immigrants Face Deportation Based on Criminal-Related Charges in Immigration Court,” July 28, 2022, www.tracfed.syr.edu/immigration/reports/690/ (accessed June 19, 2024): stating “in 2010, across all Notices to Appear (NTAs) received by the immigration courts that year, ICE listed a total of 57,199 criminal-related grounds for deportation. By 2021, just over a decade later, that number dropped to 8,694, less than a sixth of its original height.” The 2021 drop noted by TRAC is likely in part caused by the Covid-19 pandemic.

As detailed below, immigrants deported from the US after drug offenses are likely to have lived in the United States for longer periods of time than other people removed from the US for criminal convictions. Some people subjected to deportation after being convicted for drug offense have built their lives in the United States, with deep community and family connections.

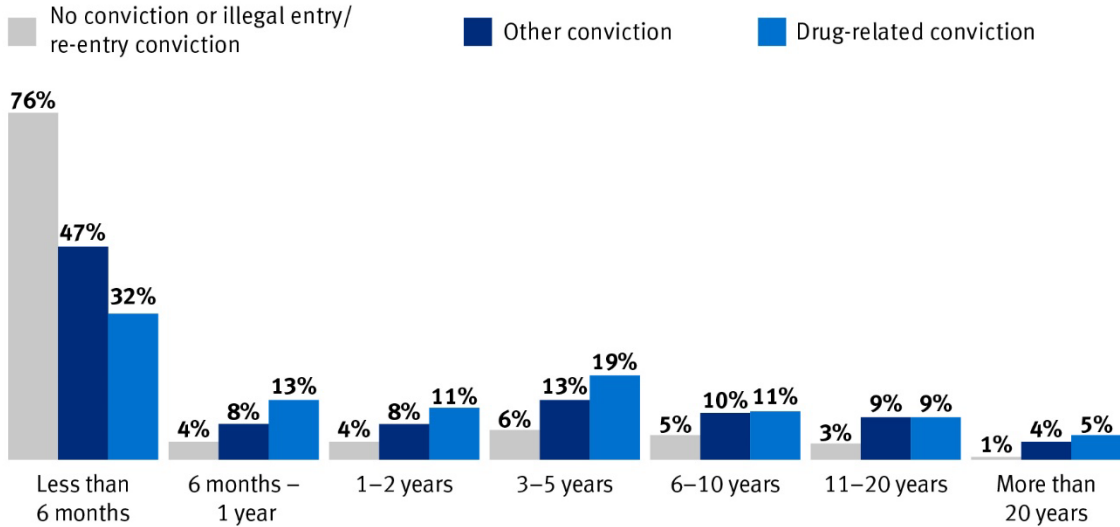
We examined the length of time people resided in the US between the most recent entry date to the US and the deportation date.⁷⁵ While the dataset did not include a person's first entry to the US, we know that some people in the ICE data first entered the United States decades ago, but since ICE records their most recent dates of entry, these people—who may have traveled abroad or may have re-entered the country to return to family and home after deportation—are recorded in the data as more recent arrivals than they are in fact. Figure 3 shows that even with this flaw in the dataset, people with drug offenses have the longest presence in the US of all people removed for criminal offenses. For people with drug offenses, the median length between last entry and deportation was 491 days (1 year, 4 months). The mean length, driven much higher than the median due to long-term residents, was 1,604 days or over 4 years.

Broad categories of drug types were included in the data in approximately 72 percent of cases. After removing cases of people deported from the US where the drug type and offense type were unknown, the most common drugs involved were cocaine (40 percent) and marijuana (35 percent). Figure 4 provides the breakdown for several types of drugs.

⁷⁵ This is a somewhat inconsistent variable in the datasets released by ICE. Therefore, analysis of time in the US between latest entry and deportation should be considered with caution. We have taken several steps to attempt to gain confidence in the number. We have removed people without an entry date—25 percent of the total dataset—and people with an entry date marked 1/1/2001—4.7 percent of the data. The 1/1/2001 date was removed because it was used for an unrealistic number of entries. We also removed the 0.13 percent of entries where the entry date was later than the removal date—it is possible that the entry date is overwritten in the ICE database every time an individual is apprehended, so that people apprehended multiple times may have a latest entry date that is later than an earlier deportation date. Many people have their entry dates marked on the 1 or 15 of a given month, which appears to be used when the specific date is not known. Most other dates from the late 1990s onward are used for between 1/1000 of a percent and 5/1000 of a percent of the entries in the data. This distribution spread suggests that no other specific dates were over or under used and provides some confidence that the dates for these individuals gives a sense of when they last entered the United States.

Figure 3

Deportations Based on Length of Time in US October 2002 – February 2020



Source: Human Rights Watch/Drug Policy Alliance analysis of Transactional Records Access Clearinghouse (TRAC) at Syracuse University data.

Figure 4

Types of Drugs Involved in Deportations

People deported by ICE whose most serious conviction is drug-related, 2002–2020

Drug type	Number	Percent of drug-related convictions
Cocaine	146,589	40.3%
Marijuana	127,387	35.0%
Amphetamine	48,712	13.4%
Heroin	27,943	7.7%
Synthetic	11,201	3.1%
Hallucinogen	944	0.3%
Opium or derivatives	689	0.2%
Barbituate	181	0.0%

Source: Human Rights Watch/Drug Policy Alliance analysis of Transactional Records Access Clearinghouse (TRAC) at Syracuse University data.

The data provided by ICE does not include criminal code citations or precise descriptions of the underlying drug offenses. Rather, it includes a generic description of whether the conviction was for drug possession, sales, smuggling,⁷⁶ or whether the type of charge was unknown. Figure 5 shows that of people deported with drug convictions, at least 30 percent of the offenses were for drug possession/use, though the true percentage is likely higher, as some unknown percentage of the “other/unknown” group are also possession/use convictions.⁷⁷

Figure 5
Types of Drug Offenses Involved in Deportations
 People deported by ICE whose most serious conviction is drug-related, 2002–2020

Offense Type	Number	Percentage
Sales	207,261	41.0%
Possession/use	155,654	30.8%
Other/unknown	106,215	21.0%
Smuggle	35,896	7.1%

Source: Human Rights Watch/Drug Policy Alliance analysis of Transactional Records Access Clearinghouse (TRAC) at Syracuse University data.

The type of conviction differed depending on drug type, as shown in Figure 6. For example, none of the amphetamine-related convictions were for smuggling, while approximately 18 percent of those with a marijuana-related conviction were convicted of smuggling. About 42 percent of deported people whose most serious conviction was marijuana-related were convicted for possession/use. This equals nearly 47,000 people who were deported with a marijuana possession/use conviction as their most serious offense.

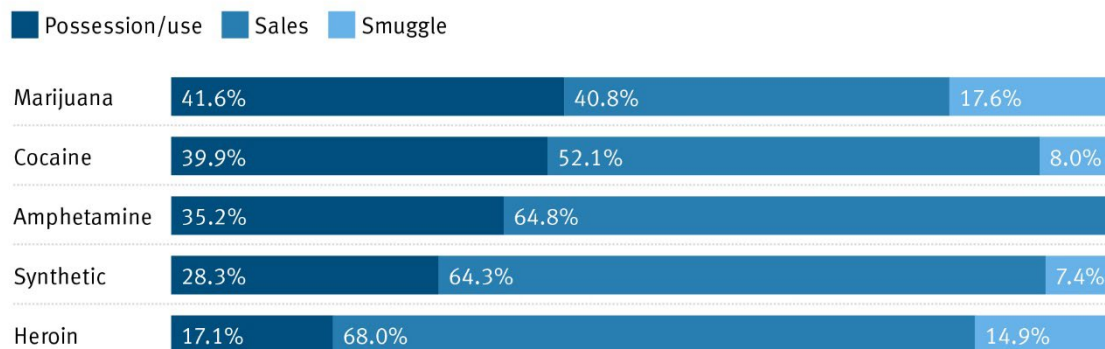
⁷⁶ ICE classifies offenses differently from federal and state criminal laws. It is likely the smuggling category includes some individuals with state or federal drug trafficking offenses. Despite the serious nature of the conduct implied by the words, some deportations for “smuggling” or “trafficking” are based on minor conduct, including possession of a drug packaged in a certain way, which prosecutors use to charge people with intent to sell, regardless of amount, as well as cultivation and several other non-sale offenses.

⁷⁷ Over time, the percentage of drug offenses that were coded as “unknown” decreased in the dataset, while the percentage labelled as “sales” increased at similar rates. Some unknown proportion of these changes is likely due to improved data quality or coding, though some proportion may be due to changes in charging policies and practices.

Figure 6.

Types of Convictions by Drug Type

Drugs that more than 1,000 deported people had a conviction for, 2002–2020



Source: Human Rights Watch/Drug Policy Alliance analysis of Transactional Records Access Clearinghouse (TRAC) at Syracuse University data.

Immigration Penalties for Drugs: California, New York, Illinois, Texas, Federal Cases

The US Census counts at least 21.6 million non-citizens in both authorized and unauthorized status living in the US, amounting to 1 in every 15 people in the country.⁷⁸ Nearly half of these non-citizens live in one of the four states featured in this report. California holds over 22 percent of all non-citizens living in the US, Texas 14 percent, New York 8.2 percent, and Illinois 4 percent.⁷⁹ Expert analyses relying on methods separate from the US Census estimate the number of unauthorized non-citizens living in the United States as about 11 million in total, although these analyses do not calculate to what extent that number overlaps with or is in addition to the 21.6 million, nor do we know how that estimated number of unauthorized people might be distributed among the four states of focus for this report.⁸⁰

Researchers spoke with immigrants in California, New York, Texas, and Illinois about how federal immigration law continues to harm them, in spite of some limited state drug law reforms where they reside, or resided prior to deportation, that advance public health approaches, decriminalization, and legalization. Since these harms are due to federal law, immigrants in California and Illinois may have experiences strikingly similar to non-citizens living in New York and Texas, and vice-versa. Moreover, the harsh consequences imposed by US immigration law for drug offenses apply to authorized and unauthorized non-citizens alike.

⁷⁸ US Census Bureau, “Nativity and Citizenship Status in the United States American Community Survey 1-year estimates,” 2021, <https://censusreporter.org> (accessed June 25, 2024); The American Community Survey of the US Census is understood by researchers to include both authorized and unauthorized non-citizens, but has been demonstrated by expert analysts as undercounting both the authorized and the unauthorized population. See Migration Policy Institute, “MPI Methodology for Assigning Legal Status to Noncitizen Respondents in U.S. Census Bureau Survey Data,” undated, <https://www.migrationpolicy.org/about/mpi-methodology-assigning-legal-status-noncitizens-census-data> (accessed June 25, 2024).

⁷⁹ US Census Bureau, “Nativity and Citizenship Status in the United States.”

⁸⁰ Migration Policy Institute, “Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins,” fact sheet, December 2020, <https://www.migrationpolicy.org/research/unauthorized-immigrants-united-states-stable-numbers-changing-origins> (accessed April 18, 2023).

California

California's Non-citizens and Drug Policy

Non-Citizen Residents of California

California has the largest non-citizen population in the country.⁸¹ According to US Census data, there are an estimated 4.75 million non-citizens living in California, representing 12 percent of the state's population. About 70 percent of the non-citizen population are between the ages of 20 and 55. The vast majority, nearly 70 percent, have been living in the US for over 10 years; more than two million have lived in California for more than 21 years.

Households in California are often made up of both citizens and non-citizens. In fact, 72 percent of non-citizen adults in the state live in a household that also includes at least one US citizen. There are over 1.7 million non-citizens living with a US citizen spouse in the state, more than 1.95 million US citizen children who live with at least one non-citizen parent, and over 660,000 US citizen young adults aged 18-25 who live with a non-citizen parent. There are over 43,000 non-citizen grandparents in the state who are the primary caregivers for their US citizen grandchildren under the age of 18.⁸²

Drug Policy in California

There were over 150,000 arrests for drug offenses in California in 2022 (the most recent year of available data).⁸³ Drug related offenses accounted for about 20 percent of arrests in California in 2022 and were the most common offense for which police arrested people.⁸⁴ Over 90 percent of drug arrests in California in 2022 are for possession or use. About 9 percent are for sales.

⁸¹ We analyzed the immigrant population of California using the American Community Survey of the US Census, which is understood by experts who interpret US Census data to include both authorized and unauthorized immigrants.

⁸² The preceding two paragraphs are based on a Human Rights Watch analysis of US Census Bureau data, 2022 American Community Survey 1-year Public Use Microdata Sample (PUMS) files, (accessed March 24, 2024).

⁸³ California Department of Justice, "Crime in California 2022," Tables 22 and 27, <https://data-openjustice.doj.ca.gov/sites/default/files/2023-06/Crime%20In%20CA%202022f.pdf> (accessed April 5, 2024).

⁸⁴ Ibid.

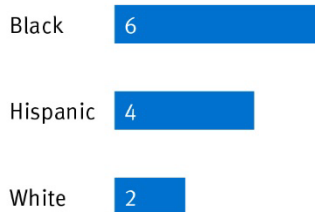
Figure 7

Arrest rates in California, 2022 per 100,000 people

Non-marijuana misdemeanor drug offenses



Felony drug offenses



Source: California Department of Justice, Crime in California 2022, Tables 31 and 34, <https://data-openjustice.doj.ca.gov/sites/default/files/2023-06/Crime%20In%20CA%202022f.pdf> (accessed April 5, 2024).

The arrest rates for both misdemeanor and felony drug offenses in California decreased year over year for the previous five years. The misdemeanor drug arrest rate of 422 per 100,000 population of focus (defined as adults age 18 to 69) in 2022 was 29 percent lower than the 2017 rate and the felony arrest rate of 70 per 100,000 was 31 percent lower than the 2017 rate.⁸⁵

While arrests in California overall have decreased, Figure 7 shows that racial disparities in drug enforcement persist. Police arrest Black people for drug misdemeanors at nearly double the rate that they arrest white people. The rate is tripled for felony drug offenses. Police also arrest Hispanic⁸⁶ Californians much more frequently than white people in the state.

⁸⁵ Ibid.

⁸⁶ We use the term “Hispanic” because this is the term used by the California Department of Justice for collecting and aggregating data on race/ethnicity.

Despite these drug law enforcement racial disparities in the state, California has been a leader in drug policy reform. In 1996, California became the first state to legalize medical marijuana. Adult-use marijuana was legalized 20 years later. Yet these legalization reforms offer no relief for people who may be facing deportation due to marijuana convictions that predate these reforms.

California is home to the largest marijuana job market in the country.⁸⁷ California implemented a first of its kind “social equity” program to help people most impacted by drug prohibition with priority access to loans, grants, training, and licensing to join the legal industry.⁸⁸ However, the largely Black and brown communities that are supposed to benefit from this approach have been hindered by the program’s bureaucracy, the enduring structural problem of unequal access to capital for Black and brown people, and the legal and other resources required to get a license.⁸⁹ Moreover, as with many state drug law reforms, non-citizens are left behind. Non-citizens employed in California’s legal industry are barred from becoming permanent residents; a permanent resident working in the industry cannot naturalize to US citizen status and in some cases can lose their permanent resident status.

Sentencing enhancements for drug offenses have been reduced in California, with certain drug offenses now newly eligible for probation.⁹⁰ State judges in California are also authorized to dismiss prior felony convictions that would add a five-year sentencing enhancement⁹¹ and sentencing enhancements based on prior drug offenses were repealed in 2017.⁹² However, since deportation is triggered by convictions and by the length of a

⁸⁷ Bruce Barcott et al., *Leafly Jobs Report 2022*, report, Leafly, <https://leafly-cms-production.imgix.net/wp-content/uploads/2022/02/18122113/Leafly-JobsReport-2022-12.pdf> (accessed June 6, 2024), p. 5.

⁸⁸ See, e.g., Kyle Jaeger, “California Offering Millions of Dollars to Support Local Marijuana Business Development and Social Equity Programs,” *Marijuana Moment*, October 4, 2021, <https://www.marijuanamoment.net/california-offering-millions-of-dollars-to-support-local-marijuana-business-development-and-social-equity-programs/> (accessed June 25, 2024).

⁸⁹ Erika D. Smith, “Column: California’s Cannabis Industry is Broken. But Here’s How We Can Fix One Part of It,” *Los Angeles Times*, April 10, 2023, <https://www.latimes.com/california/story/2023-04-10/cannabis-social-equity-bill-last-chance-cannabis-equity> (accessed April 28, 2024).

⁹⁰ Probation: Eligibility: Crimes Relating to Controlled Substances, California Senate Bill (SB) 73 of 2021, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB73 (accessed June 25, 2024).

⁹¹ The Fair and Just Sentencing Reform Act, California Senate Bill (SB) 1393 of 2018, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1393 (accessed June 25, 2024).

⁹² RISE Act, California Senate Bill (SB) 180 of 2017, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB180 (accessed June 25, 2024).

sentence beyond 364 days, these reforms do little to mitigate against deportation in federal immigration law.

Proposition 36, passed in 2000, made California one of the first states to introduce a program offering treatment instead of jail or prison in certain first- and second-time drug possession cases.⁹³ Unfortunately, Proposition 36 requires a guilty plea and as a result creates a drug “conviction” for immigration purposes, regardless of whether the person succeeds or fails in the program. Diversion programs that require a guilty plea are an unintended trap for immigrant defendants: once the person pleads guilty, they will have a harmful drug conviction for immigration purposes even if they succeed in the program and end up with no conviction under California law.⁹⁴

However, in 2018 California passed a “pre-trial” diversion statute that can be offered in cases involving minor drug charges, which permits a defendant to enter a “not guilty” plea before being diverted. This change is critical for immigrants, making it possible to avoid the conviction that would trigger deportation.

The Alternate Plea Act,⁹⁵ passed in 2022, gives California prosecutors the option to offer a non-controlled substance plea as a substitute for certain drug-related offenses.⁹⁶ The alternate plea, a public nuisance conviction, can protect individuals from consequences such as eviction, denial of licensing, and loss of immigration status or deportation.⁹⁷

Yet progress has not been without backlash. In recent years, certain elected officials have attempted to cast blame on immigrants for the overdose crisis and have proposed legislation to weaken “sanctuary” policies—which reduce collaboration between state and local police and ICE—both in San Francisco and statewide. Both measures risked

⁹³ California Penal Code § 1210, 3063.1; California Health and Safety Code Division 10.8.

⁹⁴ See *Matter of Mohamed*, 27 I. & N. 92 (BIA 2017).

⁹⁵ The Alternate Plea Act, California Assembly Bill (AB) 2195 of 2022, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2195 (accessed June 25, 2024).

⁹⁶ See Drug Policy Alliance, “Press Release: Governor Newsom Signs Groundbreaking Legislation to Protect California Residents from The Lifelong Consequences of a Drug Conviction,” press release, September 26, 2022, <https://drugpolicy.org/news/governor-newsom-signs-groundbreaking-legislation-protect-california-residents/> (accessed April 28, 2024).

⁹⁷ Letter from Human Rights Watch to Governor Newsom, Governor of California, “Human Rights Watch Supports California AB 2195 (Jones-Sawyer), The Alternate Plea Act,” August 26, 2022, <https://www.hrw.org/news/2022/08/26/human-rights-watch-supports-california-ab-2195-alternate-plea-act>.

distracting the public from solutions that actually address the root causes of the overdose crisis. In both cases, the proposed legislation itself faced push-back and did not advance. In San Francisco, a member of the Board of Supervisors proposed a carve-out to the city’s sanctuary ordinance in early 2023, decrying “fentanyl-dealing undocumented immigrants” in a press release. The supervisor faced significant pushback from community and labor groups, and no other members of the board supported the proposal.⁹⁸ Meanwhile, in 2024, a legislator in Sacramento also introduced a proposal to create carve-outs to California’s sanctuary law. The carve-outs would have allowed for collaboration with ICE to deport individuals either suspected or convicted of fentanyl-based charges. Dozens of organizations expressed opposition, arguing that the proposal could result in widespread abuses. The bill was defeated at its first committee hearing and denied reconsideration.⁹⁹

Prison Guards Sexually Assaulting Immigrant Women with Drug Convictions

This patchwork of reforms has not ended the harmful effects of federal immigration law on people with drug convictions in California. Women have endured specific harms. The drug war is a leading driver of criminalization and family separation for women.¹⁰⁰ A quarter of all women who are incarcerated nationwide are convicted of a drug-related offense.¹⁰¹ At Federal Correctional Institute Dublin in California (FCI Dublin), several employees have been convicted or are under investigation for sexually abusing numerous women in their custody, including non-citizens locked up for federal drug convictions.¹⁰² Perpetrators used the immigration status of survivors and the threat of deportation against them.

⁹⁸ Adam Shanks, “Dorsey, Alone, Continues Fight to Change S.F. Sanctuary Law,” *San Francisco Examiner*, April 4, 2023, https://www.sfexaminer.com/news/politics/dorsey-alone-continues-fight-to-change-s-f-sanctuary-law/article_66255fo8-cf44-11ed-886b-278e42ee301a.html (accessed April 28, 2024).

⁹⁹ California Values Act, Exception, AB 2209, February 7, 2024, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB2209 (accessed June 25, 2024).

¹⁰⁰ Interrupting Criminalization, Drug Policy Alliance, and the In Our Names Network, “Building Black Feminist Visions to End the Drug War,” undated, <https://drugpolicy.org/wp-content/uploads/2023/12/black-feminist-visions-NoBleed.pdf> (accessed June 25, 2024).

¹⁰¹ *Ibid.*

¹⁰² See Letter from Centro Legal De La Raza et al. to Tae D. Johnson, ICE Deputy Director et al., “Letter in Support of Non-Citizen Survivors + Witnesses of Staff Abuse at FCI Dublin,” February 15, 2023, <https://www.centrolegal.org/wp-content/uploads/2023/02/2.16.23-Organizational-Sign-on-Letter.pdf>. See also Michael Balsamo and Michael R. Sisak, “AP Investigation: Women’s Prison Fostered Culture of Abuse,” *Associated Press*, February 6, 2022, <https://apnews.com/article/prisons-california-united-states-sexual-abuse-only-on-ap-d321ae51fe93dfd9d6e5754383a95801> (accessed April 28, 2024); Samantha Michaels, “In Rare Trial, Ex-Warden of Federal ‘Rape Club’ Prison Convicted of Sexual Abuse,” *Mother Jones*, December 7, 2022, <https://www.motherjones.com/criminal-justice/2022/12/dublin-california-women-prison-warden-sexual-abuse-rape/> (accessed April 28, 2024).

Alma S., a Latinx green card holder, explained in a declaration for a civil lawsuit that she was one of these women sexually assaulted by a prison guard.¹⁰³ While she was incarcerated at the facility for a drug conviction that is considered a deportable offense under federal immigration law, she was sexually assaulted by the officer in charge of the kitchen, where Alma worked. He repeatedly pressured her to go to a back room without cameras, known to everyone in the prison as a place where guards took women to sexually assault them.¹⁰⁴ The prison guard sexually assaulted Alma and verbally abused her using degrading language.¹⁰⁵ Alma witnessed several other incidents of sexual abuse against other women in the prison. When two guards discovered that she had witnessed these acts, they abused her, physically and verbally. One such officer called her a “fucking wetback.”¹⁰⁶

California prosecutors have failed to provide readily available protection against deportation to immigrant survivors who have come forward in this case. The US government issues U-visas to people who are victims or witnesses of crimes, including sexual assault and abuse. However, an application requires a law enforcement certification that confirms the person’s cooperation with a criminal investigation, and drug convictions complicate that process. Human Rights Watch has previously documented the failures to uphold U-visa protections to crime victims nationwide.¹⁰⁷

Susan Beaty, an attorney at California Collaborative for Immigrant Justice, explained that prosecutors refused to complete the law enforcement certification one of her clients needs to apply for a U-visa.¹⁰⁸ Another one of Susan’s clients from FCI Dublin had been granted a U-visa in the past, but she is now deportable due to a past felony drug conviction.¹⁰⁹

¹⁰³ Declaration of Alma S. (pseudonym) in Support of Plaintiffs’ Motions for Preliminary Injunction and Provisional Class Certification, *California Coalition for Women Prisoners et al. v. United States Federal Bureau of Prisons et al.*, No. 3:23-cv-04155-YGR (N.D. Cal. filed August 17, 2023).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Human Rights Watch, *Immigrant Crime Fighters: How the U Visa Program Makes US Communities Safer* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/07/03/immigrant-crime-fighters/how-u-visa-program-makes-us-communities-safer>.

¹⁰⁸ Drug Policy Alliance / Human Rights Watch interview with Susan Beaty, senior attorney at California Collaborative for Immigrant Justice, California, March 4, 2024.

¹⁰⁹ Ibid.

According to data shared with Human Rights Watch and the Drug Policy Alliance by the Dublin Prison Solidarity Coalition, an alliance of individuals currently and formerly incarcerated at FCI Dublin and their supporters, there are 46 non-citizen survivors of sexual abuse by FCI Dublin staff who have come forward.¹¹⁰ Thirty-two of these women were incarcerated for drug offenses.¹¹¹ Of those 46 survivors, 17 have already been deported, 21 are in immigration proceedings, and eight survivors are still in prison with immigration detainers lodged against them.¹¹²

Immigrants Eligible for US Citizenship Barred by Drug Convictions

Nationwide, including in California, drug convictions and conduct make long-term residents deportable and subject to mandatory detention. A drug offense, or even work in the legal cannabis industry, will also bar them from becoming naturalized citizens.¹¹³ This “good moral character” bar also applies to immigrants seeking cancellation of removal, people applying for immigration relief under the Violence against Women Act, and applicants for visas available to survivors of human trafficking with some very rare exceptions.

For example, Oswaldo Barrientos, originally from El Salvador and a US lawful permanent resident since age 13, was denied citizenship due to his employment with a state-licensed company that grows marijuana.¹¹⁴ Those who use marijuana for medical purposes are also not exempt. Maria Sanchez, a grandmother and lawful permanent resident living in Sonoma County, California, was charged with an “aggravated felony” based on a cultivation conviction. She had grown four small plants and soaked them in rubbing alcohol as a tincture for her arthritis.¹¹⁵

¹¹⁰ Email to Human Rights Watch / Drug Policy Alliance from Susan Beaty, senior attorney at California Collaborative for Immigrant Justice, March 4, 2024 (on file with Human Rights Watch).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ US Citizenship and Immigration Services, USCIS Policy Manual, Part F, Chapter 5(C)(2), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5> (accessed April 28, 2024).

¹¹⁴ Becky Perlow and Clayton Sandell, “Legal Immigrants with Jobs in the Marijuana Industry are Being Denied US Citizenship,” *ABC News*, April 3, 2019, <https://abcnews.go.com/US/legal-immigrants-jobs-marijuana-industry-denied-us-citizenship/story?id=62133442> (accessed April 28, 2024).

¹¹⁵ Richard Gonzales, “Immigrant Felons and Deportation: One Grandmother’s Case,” *NPR*, April 9, 2016, <https://www.npr.org/2016/04/09/473503408/immigrant-felons-and-deportation-one-grandmothers-case-for-pardon> (accessed April 28, 2024).

James T., a lawful permanent resident who works in California's marijuana industry, described how his profession landed him in immigration purgatory, unable to become a US citizen and thereby fully participate in US life, including by voting, and live without fear of deportation.¹¹⁶ James came to the US from Australia for college and earned his BFA. He then moved to Arizona, where he had his first interaction with law enforcement. Police pulled him over and found a small amount of marijuana and a pipe in his car. They arrested him, and he was convicted of marijuana and paraphernalia possession. James moved on with his life. He had a child and moved back to California with his partner. The marijuana industry was in its early days then, and James decided to start farming. Because marijuana was legalizing, he expected to pay taxes and be part of a legitimized system. It never occurred to him that the government would continue to punish immigrants for legal conduct.

James was one of the first people in California to get a marijuana permit. A few months later, he received a letter from the county tax office charging him a fee in error. After six months of multiple appearances before the county board, the fee was retracted but immigration authorities could now link James' earlier conviction with his permit battle and could deny his citizenship application if he ever applies.¹¹⁷ James explains:

I'm not able to live and operate without fear because I'm not a citizen. There's always this kind of ... sword hanging over my head that at any moment, something really bad could happen. And I've lived in that paradigm for way too long now. I've lived here for more than twenty years now. This is my home. I have children here. I want to be a citizen, and I'm making every effort to do that. But it seems like that's not going to be possible.¹¹⁸

Refugee Separated from Family

Dimitri W., a refugee from Ukraine and a US lawful permanent resident, experienced a single police stop which led to cascading problems, ultimately resulting in his deportation and permanent separation from his family. Dimitri first moved to the US when he was six years old, a Jewish refugee fleeing the Soviet Union. Immigration was tough on his family.

¹¹⁶ Drug Policy Alliance / Human Rights Watch interview with James T. (pseudonym), California, September 6, 2023.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

His father struggled with alcoholism in adjusting to the country. Police were called to the house regularly because his father abused Dimitri and his mother. Eventually, his parents separated. Dimitri's mother could not afford to live in San Francisco alone, so they moved to Sacramento.

Dimitri then lived with his mother and her new boyfriend, who treated him poorly. He started hanging out with a new group of kids and smoking marijuana. He did well in school, earning his high school diploma and completing some courses at American River College. When he turned 18, he started working in construction. He also joined a marijuana farm and dispensary where he could harvest marijuana planted there.

On the way back from the farm with his harvested marijuana plant in his car, he was pulled over for speeding.¹¹⁹

He showed the officer his medical card, but the officer still called the drug task force. The officers weighed the whole plant¹²⁰, which put him over the legal limit on his prescription card. Dimitri was charged with illegal transportation of marijuana.

When Dimitri went to jail, his counselor told him that he was ineligible for certain programs due to his immigration status and said there was an ICE "hold" (or detainer) on him. Dimitri said, "I didn't even know what ICE was, nothing. While this is all occurring, I'm a legal permanent resident and I'm renewing my green card."¹²¹ His criminal defense attorney never mentioned anything to him about immigration. The hold meant that he would be sent to immigration detention while he fought his deportation case. However, because Dimitri was born in the Soviet Union, which no longer existed, and held a no-longer-recognized Soviet passport, the government could not deport him and he was released.¹²² The drug conviction and order of deportation remained in ICE's records.

¹¹⁹ Drug Policy Alliance / Human Rights Watch interview with Dimitri W. (pseudonym), London, England, September 12, 2023.

¹²⁰ This practice is called "aggregate weight" in drug law enforcement parlance.

¹²¹ Drug Policy Alliance / Human Rights Watch interview with Dimitri W. (pseudonym), September 12, 2023.

¹²² Kelly Ann Whelan, *When You Cease to Exist: The State of Statelessness in the Former Soviet Union*, report, US Committee for Refugees and Immigrants, https://refugees.org/wp-content/uploads/2020/12/8_3_20_Brief_StatelessSoviet-1.pdf (accessed May 28, 2024), p. 3.

With a chance to get back on his feet, Dimitri started working again. Then, one of his best friends was found dead at home just one day after Dimitri had been too tired to hang out with him. “It was a very heartbreaking situation, and I always blame myself. I went into a destructive path.”¹²³

He started reselling property that he knew had been stolen by others—jewelry, electronics, and even firearms. He was eventually arrested, completed a four-and-a-half-year sentence, and transferred to ICE detention again. But unlike the previous time, Ukraine was now accepting deportees and Dimitri was deported in 2016.¹²⁴

In Kiev, Dimitri found his calling in life: teaching English. He became the director of his school’s summer program and managed a staff of 60 people. And then Russia invaded Ukraine. He had been previously eligible to become a naturalized citizen before his first marijuana arrest, but now, after that arrest and his stolen property conviction, he cannot even enter the United States to visit:

I don’t know how long I’m deported for. Am I deported for this many years? Am I deported for life? ... All my family are all US citizens. They all live in the US. I was the only one that didn’t get citizenship. And when I realized I should, it was already too late ... I would love to come back to the US one day ... I think I would be a totally different person. I would be very, very thankful, even to come back temporarily just to visit my grandmother. She’s almost 90 years old. She’s at an old folks’ home with dementia. I would love to see her before she doesn’t remember me.¹²⁵

New York

New York’s Non-citizens and Drug Policy

Non-citizen residents of New York

According to US Census data, nearly one out of every ten people in New York state is a non-citizen, an estimated 1.75 million people in total. Two-thirds of these non-citizens are

¹²³ Drug Policy Alliance / Human Rights Watch interview with Dimitri W. (pseudonym), September 12, 2023.

¹²⁴ Drug Policy Alliance / Human Rights Watch interview with Dimitri W. (pseudonym), September 12, 2023.

¹²⁵ Ibid.

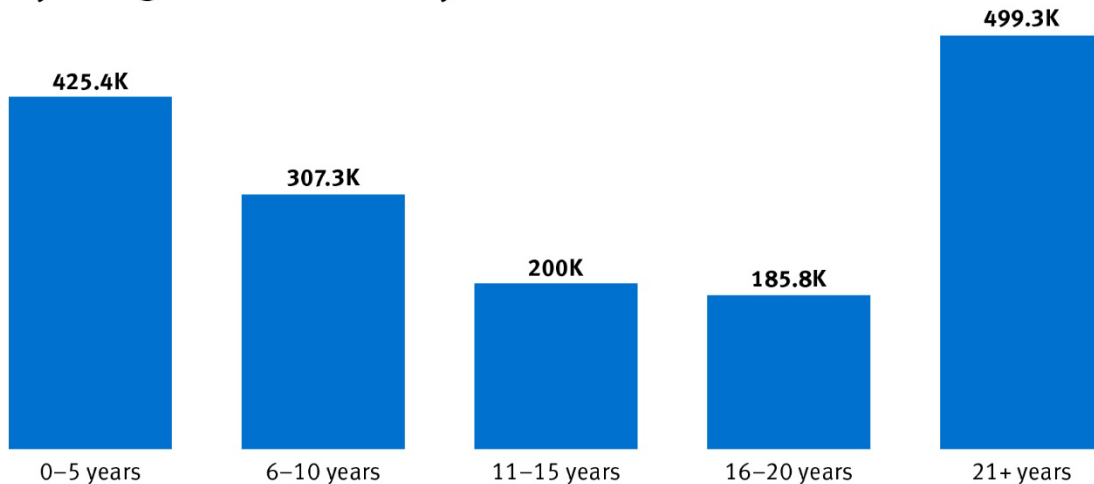
between the ages of 20 and 55. About 43 percent of the non-citizens in New York are Hispanic, according to the Census Bureau. Of the states profiled in this report, New York has the highest proportion of non-citizens who are non-Hispanic Black, with 229,000 such people or 13 percent of all non-citizens in the state.

A quarter of New York’s non-citizens entered the US within the past five years, but the majority (55 percent) have lived in the country for 11 years or longer.

Two-thirds of non-citizens in New York live in a mixed-status household. Nearly 500,000 non-citizens live with a US citizen spouse, and over half a million US citizen children live with at least one non-citizen parent. There are about 131,000 US citizen young adults (age 18 to 25) who live with a non-citizen parent and an additional 135,000 US citizen adults over the age of 25 who live in the same household as their non-citizen parent. Additionally, there are 117,000 non-citizen children living with a non-citizen parent in the state.¹²⁶

Figure 8

Number of Non-Citizens in New York, 2022 by Length of Residency in US



Source: Human Rights Watch analysis of US Census Bureau data, 2022 ACS 1-year Public Use Microdata Sample (PUMS) files.

¹²⁶ The preceding three paragraphs are based on a Human Rights Watch analysis of US Census Bureau data, 2022 American Community Survey 1-year Public Use Microdata Sample (PUMS) files.

Drug Policy

Arrests for drugs in New York have greatly decreased over the past decade. Drug offenses accounted for 21 percent of adult arrests in 2013 and now account for about 10 percent. In 2022, the most recent year for which data is available, there were nearly 30,000 felony or misdemeanor adult drug arrests in New York state.¹²⁷ Black adults were arrested for drugs at a rate nearly four times higher than white people.¹²⁸ Hispanic adults were arrested at 1.8 times the rate of white adults. A subset of arrest data published by the FBI, covering about half of the arrests counted by the state, showed that marijuana sales accounted for 16 percent of drug arrests in New York in 2022.¹²⁹ Possession or use of drugs accounted for 72 percent of all drug arrests.

Most recently, a successful lawsuit filed by New York Attorney General Letitia James against opioid makers and distributors made \$2.6 billion dollars available for a variety of public health measures regarding drug use, including harm reduction efforts.¹³⁰ Health experts and nonprofit organizations have advocated for the money to be invested in more overdose prevention centers, which have prevented more than 1,500 overdoses since 2021.¹³¹

New York's notorious Rockefeller drug laws, passed in 1973, were among the harshest in the country, handing out a minimum sentence of 15 years to life for a single drug possession conviction. It took over 35 years for the state to end these mandatory minimums and expand access to treatment, when the successful campaign to "Drop the Rock" repealed and revised the draconian Rockefeller drug laws in 2009. Nevertheless, non-citizens with drug convictions prior to these reforms cannot benefit from them.

¹²⁷ New York State Division of Criminal Justice Services, "Adult Arrests," <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/index.htm> (accessed April 3, 2024).

¹²⁸ Rates computed by Human Rights Watch. Arrest data from New York State Division of Criminal Justice Services, "Adult Arrest Demographics," <https://www.criminaljustice.ny.gov/crimnet/ojsa/adult-arrest-demographics/2022/index.html> (accessed April 4, 2024). Population data from Human Rights Watch analysis of US Census Bureau, 2022 American Community Survey 1-year estimates.

¹²⁹ Federal Bureau of Investigation, "Uniform Crime Reporting (UCR) Program, Arrest data," <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest> (accessed April 30, 2024).

¹³⁰ Sharon Otterman, "Federal Officials May Shut Down Overdose Prevention Centers in Manhattan," *New York Times*, August 8, 2023, <https://www.nytimes.com/2023/08/08/nyregion/drug-overdoses-supervised-consumption-nyc.html> (accessed April 28, 2024).

¹³¹ On Point NYC, "Our Services," <https://onpointnyc.org/> (accessed May 27, 2024).

The state broke from this punitive history in passing the Marijuana Regulation and Taxation Act (MRTA) in 2021,¹³² a law that provides a model for building an equitable and diverse marijuana industry, including a social equity licensing program that prioritizes state residents disproportionately impacted by marijuana prohibition in the past. The law also automatically expunged most prior marijuana offenses and created procedural vehicles to reopen legally invalid prior marijuana convictions, a provision that also provides relief for non-citizens with such marijuana convictions.¹³³ These provisions acknowledge the ongoing harm of criminalization and provide an avenue for individuals to clear their records for the purposes of immigration, housing, employment, and child welfare. This reform will keep thousands of people out of the criminal legal system and its pipeline to deportation,¹³⁴ but unfortunately many other drug convictions in New York still result in deportation under federal immigration law.

Immigrants with Drug Convictions Deported to Danger in Haiti

The US government regularly deports people with drug offenses to countries where they face constant fear and danger. US immigration courts will not hear claims that non-citizens with convictions considered “aggravated felonies” have a fear of persecution upon return before ordering them deported. Those with simple drug possession convictions are subject to mandatory detention, which severely limits their ability to gather evidence needed to support their asylum claims; however, they are not fully barred from asylum or withholding of removal,¹³⁵ depending on such factors as the sentence and whether the drugs were for personal use.¹³⁶ People with drug distribution offenses often cannot meet the standards for withholding of removal set out in the federal immigration ruling of *Matter of Y-L*.¹³⁷

¹³² The Marijuana Regulation and Taxation Act, New York Senate Bill (S) 854A of 2021, <https://legislation.nysenate.gov/pdf/bills/2021/S854A> (accessed June 25, 2024).

¹³³ New York Criminal Procedure Law § 440.46-a and § 440.10(1)(k).

¹³⁴ Before the MRTA became law, tens of thousands of New Yorkers were arrested for marijuana offenses each year. See The Data Collaborative for Justice at John Jay College of Criminal Justice, *Trends in Marijuana Enforcement in New York State, 1990 to 2017*, report, February 8, 2019, <https://datacollaborativeforjustice.org/wp-content/uploads/2020/04/Marijuana-Report.pdf>. In just over six months after the law was enacted, 784 people had moved to vacate their marijuana convictions under the MRTA; the vast majority were immigrants who still benefit from vacating expunged convictions. New York State Cannabis Control Board Meeting, October 21, 2021, video clip, YouTube, <https://www.youtube.com/watch?v=ROexpWJINw> (accessed June 25, 2024) (see slide at minute 23:00).

¹³⁵ Granted by an immigration judge, withholding of removal protects an individual from being deported to a country where they face persecution. However, this grant is temporary and can be revoked if conditions in that country change.

¹³⁶ Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy* (New York: Human Rights Watch, 2010), <https://www.hrw.org/report/2010/05/06/costly-and-unfair/flaws-us-immigration-detention-policy>.

¹³⁶ *Ibid.*

¹³⁷ *Matter of Y-L, A-G, R-S-R*, 23 I&N Dec. 270 (A.G. 2002).

Numerous federal courts have found that a single sale of a small amount of drugs falls within the broad US definition of a “particularly serious crime,” which is fatal to an asylum or withholding of removal application. In Chicago, a man was denied withholding of removal because of a conviction of possession with intent to deliver, for which he completed a six-month sentence.¹³⁸ In California, a conviction for attempted possession for sale of marijuana was a “particularly serious crime” barring asylum and withholding.¹³⁹

In New York, several types of drug offenses render it nearly impossible to avoid deportation to danger. For example, Paul Pierrulus currently lives in constant danger and threat in Haiti, the country to which the US government deported him in 2021, even though he was born in the country St. Martin. Paul came to the US with his Haitian family when he was 5 years old. They settled in Spring Valley, New York, where he was embraced by a large extended family of aunts, uncles, and cousins. From a young age, education was his family’s top priority. When he was in high school, Paul started preparing for college. Tuition was a significant challenge, so he researched financial aid. That’s when he found out he was undocumented.

How I found out what my [immigration] status was in this country ... was trying to get financial aid ... [A]s far as FAFSA goes, you’re so limited. So I had to pay out of pocket to further my education.¹⁴⁰

Paul enrolled in college and started earning money when he could while going to school. He sold cocaine to other students for a short period of time and was arrested. Paul completed “shock incarceration,” a six-month, boot-camp-style prison sentence that allows for early release. At the facility, someone in his platoon mentioned ICE might be waiting for him when he left the camp. This was the first time Paul heard about the possibility of deportation, as his criminal defense attorney failed to disclose the immigration penalties that would attach to his conviction, in addition to his sentence.

Paul successfully graduated from the shock program. Unfortunately, his shortened sentence was immediately eclipsed by immigration detention, where he was incarcerated

¹³⁸ *Delgado-Artega v. Sessions*, 856 F.3d 1109 (7th Cir. 2017).

¹³⁹ *Usher v. Lynch*, 609 F. App’x 521 (9th Cir. July 15, 2015).

¹⁴⁰ Drug Policy Alliance / Human Rights Watch interview with Paul Pierrulus, Haiti, August 22, 2023.

for more than two-and-a-half years. Over these years, Paul became entangled in a bureaucratic nightmare. The United States government was trying to deport him to Haiti, the country where his parents were born, but where he had never lived. Paul was born in St. Martin and had documentation to prove it, yet the United States continued to try to exile him to Haiti. “I was nervous, scared... I was very, very aware of what [ICE is] supposed to do, and what the reality [of what ICE actually does] could be,” Paul reflected.¹⁴¹

ICE only released Paul after he met with representatives from the Haitian embassy, who said what Paul had asserted all along: he was not a citizen of Haiti. He was placed on ICE supervision and required to report to an ICE officer. He got a job in strategic consulting at a financial firm, where he worked for 13 years. He became a godfather to several kids in his community, including his sister’s son.

I literally raised him ... my sister, she’s a nurse and her husband, he works for a medical company. And the hours that they work, it kind of conflicts. So I’m with him until early in the morning ... and then my sister picks him up. I would watch him every single morning.¹⁴²

Then, suddenly, after almost 15 years, ICE again requested documentation proving he was not a citizen of Haiti. According to Paul and his attorneys, he submitted his correspondence with the Haitian consulate confirming he was not a citizen of the country. At his next ICE check-in, officers arrested him and sent him back to immigration detention.

For almost a decade and a half, I’ve been productive in society, yet that’s when out of nowhere, out of the blue, you come and just shake up my whole entire life.¹⁴³

Paul told a researcher for this report: “They put a restraint on the floor... a straitjacket... [T]hat was like, hey, you could either go back to your country in one piece, or you could go the hard way....”¹⁴⁴ After this very difficult interaction, Paul was deported to Haiti in

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

February 2021, where violence by criminal groups in recent years has escalated and spread outside the capital Port-au-Prince and its metropolitan area to other regions, with killings, kidnappings, sexual violence, and extortion routinely reported.¹⁴⁵ Paul regularly moves locations to stay under the radar. Paul does not tell his mother his precise location to protect her from worrying too much.

Following a recent federal court decision finding that deportations based on certain New York drug sale convictions are illegal and not “drug trafficking” convictions,¹⁴⁶ Paul is applying to reopen his immigration case and hopes to return to his family. He also applied for, and received, a pardon from the governor of New York. Even with a full pardon, Paul has a long road ahead to persuade the federal government to allow him to return to his home in New York.

Despite Legalization of Marijuana in NY, Stuck in Exile for Marijuana Conviction

Despite the Supreme Court’s decision in *Padilla v. Kentucky*, which held that immigrants accused of crimes have the right to receive immigration advice,¹⁴⁷ defense attorneys regularly fail to investigate and disclose the immigration penalties that will follow from a criminal conviction before their client pleads guilty. In such cases, immigrants’ only option is to seek post-conviction relief and vacate these unlawful convictions. Obtaining this post-conviction relief is difficult, beginning with finding and paying for an attorney. Other types of legal error may provide additional grounds to apply for post-conviction relief.

New York’s Marijuana Regulation and Taxation Act provided for automatic expungement for many marijuana offenses. It also set up a process to vacate convictions.¹⁴⁸ One New Yorker, Kwame Siriboe, was able to utilize this law to get his convictions thrown out,¹⁴⁹

¹⁴⁵ Human Rights Watch, “*Living a Nightmare*”: *Haiti Needs an Urgent Rights-Based Response to Escalating Crisis*, (New York: Human Rights Watch, 2023), <https://www.hrw.org/report/2023/08/14/living-nightmare/haiti-needs-urgent-rights-based-response-escalating-crisis>.

¹⁴⁶ *U.S. v. Minter*, 80 F.4th 406 (2d Cir. 2023).

¹⁴⁷ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹⁴⁸ This additional mechanism was needed because under US immigration law an automatic expungement does not provide relief for noncitizens; an individualized decision in their case is required, necessitating vacatur.

¹⁴⁹ Jill Applegate, “Their Pot Convictions Were Erased, but They Still Face Deportation,” *New York Times*, June 11, 2023, <https://www.nytimes.com/2023/06/11/opinion/immigrants-deportation-marijuana.html> (accessed April 28, 2024).

which immigration authorities forced him to do to avoid deportation, despite having been granted a pardon for those same offenses.¹⁵⁰

However, Leonel Pinilla, who was deported due to marijuana possession convictions, is still fighting to return to the United States now that marijuana is legal in New York.¹⁵¹ Leonel left his home country of Panama when he was 17 years old. The son of a former politician, he came to escape the political unrest and danger of an increasingly powerful military regime. When he arrived in New York City, his cousin helped him find a job at a Manhattan supermarket. He married and had two daughters. After working steadily for years, Leonel became a lawful permanent resident.

Leonel was arrested and charged with attempted sale of a controlled substance. Suddenly, he faced 5 to 10 years in prison. Leonel wanted to fight the charges, but he was scared. He decided to plead guilty so he could get back to work. He was incarcerated for three months and then released.

In 2009, Leonel was involved in a car accident and arrested for a traffic violation, driving with a suspended license. He was only supposed to be held for a few days on Rikers Island, the city jail, but when his release date came and went, an ICE officer arrived and pressed him to agree to be deported.

Leonel refused to sign the deportation papers. He told a researcher he “did not work and pay taxes for decades to sign away his life in a day.”¹⁵² The possibility of being separated from his daughters pushed him to fight. ICE moved him between five different detention centers over three years.

Finally, in 2012, ICE deported Leonel to Panama. Leonel has tried to stay positive, but things have not been easy. His daughter is now the primary supporter for her brother, mother, and her own two children. Leonel has only met his two granddaughters through a screen.

¹⁵⁰ Governor Cuomo Grants 11 Clemency, *WGY News Radio*, January 4, 2020, <https://wgy.iheart.com/content/2020-01-04-governor-cuomo-grants-11-clemency/> (accessed April 28, 2024).

¹⁵¹ Drug Policy Alliance / Human Rights Watch interview with Leonel Pinella, Panama, August 25, 2023.

¹⁵² Ibid.

I hope to come back, work, pay my taxes, and find the best way to help my daughter. That's what's killing me. I cannot hold my daughter. I cannot hold my grandkids, play with them, be that example for them in life.¹⁵³

The end of marijuana prohibition in New York brought a new opportunity. New York's MRTA helped him vacate his marijuana convictions, and Leonel now has another chance to come home.

Unable to Apply for Citizenship and Watched, Indefinitely, By ICE

John H., a Vietnamese immigrant who was born in Vietnam and came to the US as a lawful permanent resident, spoke with a researcher on a school night as his teenage boys were coming home from school in Staten Island. John has lived in New York City for almost four decades. His grandmother escaped the Vietnam war by boat, and miraculously made it to the US after capsizing at sea. The rest of the family followed and lived together in a two-room apartment in public housing—his uncle, his parents, and his three siblings.

John's mother worked in a sewing factory, and his father made deliveries for a supermarket. Most of the kids at John's school were Black or Chinese. No one understood his accent, and he was bullied mercilessly. One day, when he was playing handball in the park, a group of older Vietnamese kids approached him.

Constantly, the kids were picking on me ... I told these guys, and [one of them] came back to the school, and we beat up all the guys that used to pick on me ... I fe[lt] powerful at that time.¹⁵⁴

John had a choice: he could go to school and get beat up every day, or go hang out with these guys, who had shown him that they cared about him. John never went back to school and ran away from home. During this time, he was convicted of a low-level robbery offense.

¹⁵³ Ibid.

¹⁵⁴ Drug Policy Alliance / Human Rights Watch interview with John H. (pseudonym), Staten Island, New York, August 29, 2023.

One night, John drove out to Long Island with a friend, who said he could pick up drugs there. When they arrived, police were waiting to arrest John. The police did not find any drugs in John’s car, however, they did find some residue.

“In Nassau County... they don’t play down here unless you give somebody up. I said, give up who? I don’t know nobody.”¹⁵⁵ John was convicted and sentenced to one to three years in prison.

Since his release from prison, John has been under an order of supervision, which requires him to report to an ICE office to “check in” on a regular basis. ICE officers continue to demand he obtain travel documents to Vietnam. But he has no passport, and Vietnam has no record of his birth. Like many other Southeast Asian refugees who are effectively stateless, John has no country that will accept him, yet ICE has tried to force his deportation for almost 20 years.

[To them,] [i]t doesn’t matter what your background is, what your history is. Is that fair? Is that human? Is that right? Is that how you treat a human? We did our time. How much can we do since we came out?¹⁵⁶

John has built a life for himself regardless. He married a US citizen, but he is still ineligible to have his green card reinstated or to naturalize due to his convictions. John travels for work, but the new REAL ID laws will prohibit him from flying domestically, so he worries about having to find a new job. He may never be able to vote. Even though the US government cannot deport people like John, they are never offered an opportunity to have their cases reassessed or reapply for lawful permanent residence or citizenship.

Illinois

Illinois Non-citizens and Drug Policy

Non-Citizen Residents of Illinois

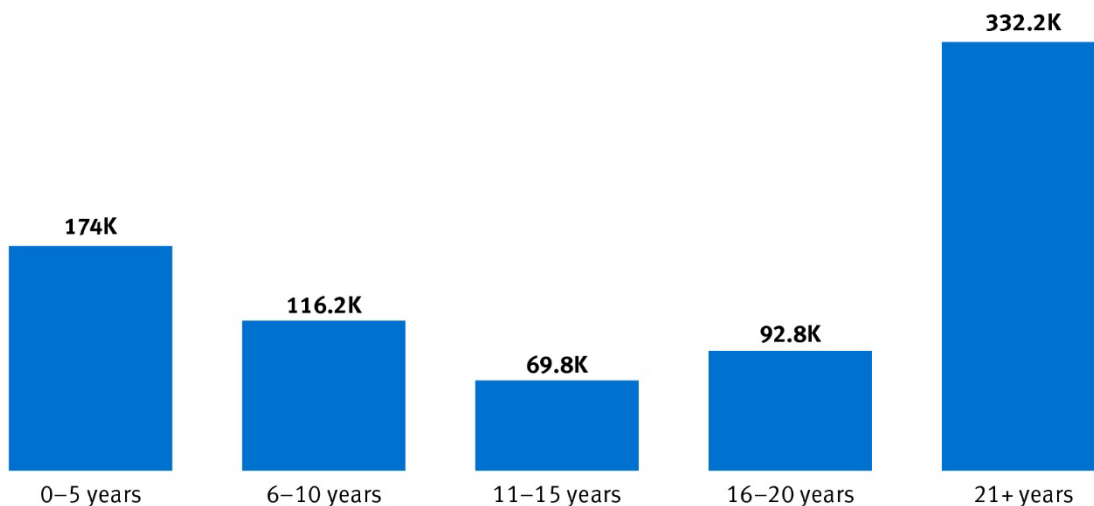
According to US Census data, there are an estimated 838,000 non-citizens living in Illinois, or 1 person out of every 15 people in the state. About 53 percent of non-citizens living in

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

Figure 9

Number of Non-Citizens in Illinois, 2022 by Length of Residency in US



Source: Human Rights Watch analysis of US Census Bureau data, 2022 ACS 1-year Public Use Microdata Sample (PUMS) files.

Illinois were identified as Hispanic by the Census Bureau. Approximately 39,000 are non-Hispanic Black. Over 63 percent of Illinois’ non-citizen adults have lived in the US for 11 years or longer. Over 330,000 entered the US over 21 years ago.

Most—70 percent—of Illinois’ non-citizens live in a household with at least one US citizen. Over 305,000 live with a US citizen spouse, and over 370,000 US citizen children live with at least 1 non-citizen parent in Illinois. There are also over 47,000 non-citizen children living with a non-citizen parent in the state. About 7,000 non-citizen grandparents are the primary caregivers for a US citizen child at home in Illinois.¹⁵⁷

Drug Policy

The most recent arrest data for Illinois is from 2021, when there were over 21,000 adult arrests for drug offenses.¹⁵⁸ In each of the previous 10 years, between 12 and 14 percent of

¹⁵⁷ The preceding two paragraphs are based on a Human Rights Watch analysis of US Census Bureau data, 2022 American Community Survey 1-year Public Use Microdata Sample (PUMS) files.

¹⁵⁸ “Illinois Criminal Justice Information Authority,” *Arrest Explorer*, 2021, <https://icjia.illinois.gov/arrestexplorer/> (accessed April 4, 2024).

annual arrests in the state were drug related. In 2022, according to Illinois state data, 85 percent of all drug-related arrests in the state were for drug possession or use and 15 percent were for sales.¹⁵⁹

Illinois legalized marijuana in 2020. While the law has some notable carveouts, like prohibiting public consumption of marijuana, the law set up an expungement and vacatur process for past marijuana convictions. Like California and New York, Illinois’s law includes multiple equity provisions—job training and low-interest loans for formerly incarcerated people and residents of neighborhoods with the highest historic rates of drug policing. The rollout of the financing program has not been without its challenges, with Black and Brown business owners still noting structural barriers to accessing capital.¹⁶⁰

To speed up and expand post-conviction relief for people with past marijuana convictions, Illinois Governor J.B. Pritzker issued over 11,000 pardons for “low-level” marijuana convictions in 2019, and an additional 9,000 pardons in 2020.¹⁶¹ These pardons have limited impact for immigrants, because immigration authorities do not honor state pardons for people charged with controlled substance offenses.¹⁶²

Aside from marijuana, Illinois has some of the toughest drug sentencing laws in the country. From 1972-2002, the Illinois legislature incrementally increased penalties for drug possession and distribution. As a result, there are no drug misdemeanors in the state—all criminalized drug activity is classified as a felony.¹⁶³ Most drug convictions in Illinois result in deportation under federal immigration law.

¹⁵⁹ Data submitted by 520 of the 925 Illinois law enforcement agencies to the National Incident-Based Reporting System (NIBRS) of the FBI.

¹⁶⁰ Alex Nitkin, “Illinois Doled Out Millions to Pot Growers. It Still May Not Be Enough to Save the Industry,” *Illinois Answers Project*, October 19, 2023, <https://illinoisanswers.org/2023/10/19/illinois-cannabis-business-development-fund-craft-growers/> (accessed April 28, 2024).

¹⁶¹ “Pritzker Pardons 9,100 Low-Level Cannabis Convictions,” *Associated Press*, January 1, 2021, <https://apnews.com/103d7f58aa2af2de3fb34957ab699321> (accessed April 28, 2024); Brian Mackey, “On Eve Of Legal Marijuana In Illinois, Governor Pardons 11,017 Past Convictions,” *NPR Illinois*, December 31, 2019, <https://www.nprillinois.org/statehouse/2019-12-31/on-eve-of-legal-marijuana-in-illinois-governor-pardons-11-017-past-convictions> (accessed April 28, 2024).

¹⁶² See text accompanying footnote 19, above.

¹⁶³ Chicago Appleseed Center for Fair Courts et al., *Reducing Barriers to Recovery: Shifting Low-Level Drug Possession From Felonies to Misdemeanors in Illinois*, report, 2022, https://www.aclu-il.org/sites/default/files/field_documents/reducing_barriers_to_recovery_online_report.pdf.

US Military Veteran Deported to Mexico

Miguel Perez, Jr. lived in Chicago, Illinois, for 30 years. He is a US military veteran who deployed twice to Afghanistan. Perez told the Drug Policy Alliance that after his second deployment to Afghanistan “it was a little bit different.” He described experiencing a desire to feel an adrenaline rush like he had during his service, and he had feelings of anxiety, sweats, and nightmares, which he recognized only later as the symptoms of post-traumatic stress disorder. He said: “in order to cope with all that, I was drinking heavily, and using powder cocaine at the same time.”

Perez was arrested in November 2008 and was convicted of manufacture and delivery of a controlled substance, cocaine. He was slated for release from prison in 2016, but instead ICE arrested and deported him to Mexico. Perez told Drug Policy Alliance:

Yes, I committed a crime. Yes, I pled guilty. But yes, I served my time. So I should go back home, where my father, my mother, my nieces, my son, daughter [are]. My whole community is in Chicago. That’s where I belong.¹⁶⁴

Perez was granted clemency by Illinois Governor J.B. Pritzker in August 2019 and granted US citizenship by USCIS in October 2019.¹⁶⁵

Deported, Blocked from DACA Legal Status Due to Marijuana Conviction

Jesus “Beto” Lopez moved to Illinois with his family when he was young. He liked living in Chicago right away. “I got lucky with some great friends in school that were always there to help me with my language barriers... I was very into nature, so I always had friends going to parks, hiking,” Beto told a researcher.¹⁶⁶

For his birthday in May 2019, he went on a road trip to Colorado to hike with his friends. On the way back, in Iowa, he was pulled over while going just a few miles over the speed limit.

¹⁶⁴ Drug Policy Alliance, “Uprooting the Drug War: Miguel’s Story,” last updated February 9, 2021, <https://uprootingthedrugwar.org/miguel-perez-transcript/> (accessed April 28, 2024).

¹⁶⁵ Steve Almasy, “Deported Veteran Miguel Perez Sworn in as US Citizen,” *CNN*, October 4, 2019, <https://www.cnn.com/2019/10/04/us/deported-veteran-miguel-perez-citizenship/index.html> (accessed July 2, 2024)

¹⁶⁶ Drug Policy Alliance / Human Rights Watch interview with Jesus “Beto” Lopez, Chicago, Illinois, April 4, 2024.

I feel like we were racially profiled since they saw we're Hispanics in a nice car ... instead of asking questions, they just told us to step outside the vehicle, we're going to search your car ... without even asking for my license.¹⁶⁷

The officer found marijuana in the car. Beto and his friends were held in the local jail and paid bail to be released. Beto met with a lawyer via video conference, who told him to plead guilty and pay a fine. But before Beto could leave, the officer told him he had a phone call:

It was actually an ICE officer. He just told me, after you're being released, we're picking you up and we're outside the police station ... I asked can I know your name? I just thought it was a scam.¹⁶⁸

Beto's friends asked if they should wait for him. He told them to go back to Chicago and see what happened. He never expected to be in ICE detention for almost an entire year, with the judge denying bond at multiple hearings. "Since I admitted that I was possessing cannabis... I was a danger to society according to the judge." Beto tried to renew his Deferred Action for Childhood Arrivals (DACA) status, which prevents deportation if the status is active, and confers other benefits, but it was denied because he was in detention. Finally, the judge granted bond. "I would see the people getting bonds like \$1500, \$3000. They gave me \$25,000."¹⁶⁹ Organized Communities Against Deportation (OCAD), a Chicago-based organizing group of which Beto is a member, fundraised his bond and he was released.

Antonio Gutierrez, a strategic coordinator with OCAD, spoke to Human Rights Watch and Drug Policy Alliance about the organization's framework for understanding the experiences of people like Beto:

Our bodies are criminalized and considered "illegal" when we are undocumented, as the system that determines our status also benefits of the

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

extraction of our labor and lack of rights. Drugs are also kept criminalized until there is an opportunity for profit such as in the example of cannabis.¹⁷⁰

Beto was released in February 2020 and able to reunite with his family for a few months, however, at an ICE check-in June 2020, he was rearrested. In less than 24 hours, he was on a deportation flight to Mexico. He tried to get used to the idea of living in Mexico for the rest of his life, but as soon as he had an opportunity to return to the US, he took it.

Beto returned to the US in 2022 when he was granted humanitarian parole, an extraordinarily rare result, possible only due to community and legal support on his case that is typically unavailable for others. But he still lives in uncertainty, with an order of deportation against him, wondering whether ICE will haul him into court. He is DACA-eligible—except for the time he spent in Mexico due to his deportation, which breaks the “continuous residence” requirement for DACA. He hopes it can be waived.

Antonio Gutierrez from OCAD reflected on how the communities of color he works with in Chicago have been traumatized and demonized by these policies, including people with mental health problems: “OCAD has seen multiple cases of individuals who were clearly suffering from mental health issues and who are arrested or convicted from DUI [or] cannabis-related arrests for personal use, creating inconsistency and confusion... [and] further isolating [them] as second class citizens...”¹⁷¹

Texas

Texas Non-citizens and Drug Policy

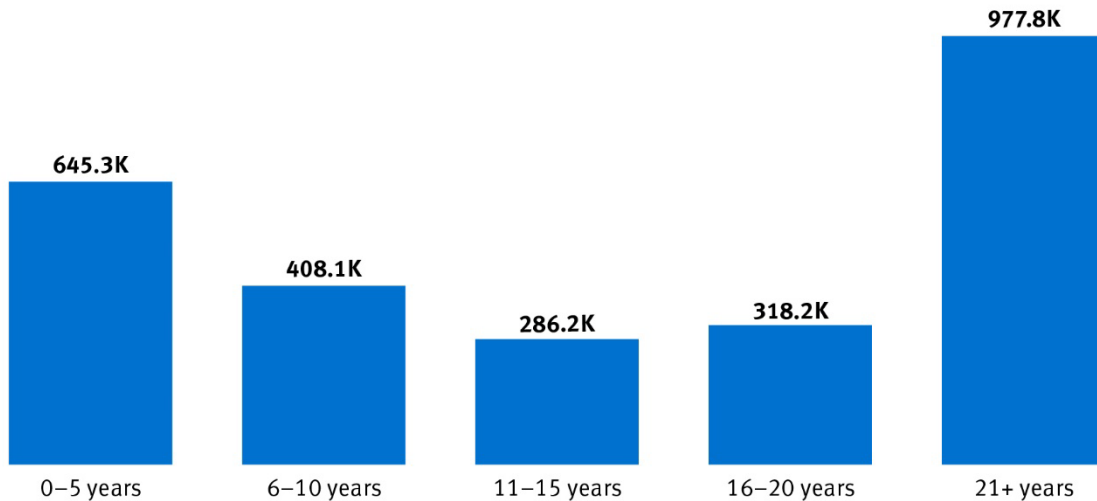
According to US Census data, an estimated 2.9 million people in Texas, 10 percent of the state population, are non-citizens. About 80 percent of all non-citizens are between the ages of 20 and 55. Nearly three out of four non-citizens in Texas are Hispanic, according to the Census Bureau. Additionally, there are 139,000 non-Hispanic Black non-citizens, or 5 percent of all non-citizens in the state. The bulk of non-citizen adults who live in Texas have been in the US for years. About 60 percent have been in the US for 11 years or longer and nearly 1 million non-citizens in Texas entered the US over 21 years ago.

¹⁷⁰ Email to Human Rights Human Rights Watch / Drug Policy Alliance from Antonio Gutierrez, Strategic Coordinator at OCAD, April 23, 2024 (on file with Human Rights Watch).

¹⁷¹ Ibid.

Figure 10

Number of Non-Citizens in Texas, 2022 by Length of Residency in US



Source: Human Rights Watch analysis of US Census Bureau data, 2022 ACS 1-year Public Use Microdata Sample (PUMS) files.

Nearly 70 percent of non-citizens in Texas live in a household with a US citizen. Texas is home to a large number of mixed-status households. Nearly 1.1 million non-citizens live with a US citizen spouse, and nearly 1.4 million US citizen children live with a non-citizen parent. Over 35,000 non-citizens in Texas are the primary caregivers for their citizen grandchildren.¹⁷²

Drug Policy

Drug offenses accounted for approximately 15 percent of all arrests in Texas in 2022.¹⁷³ Among drug offenses, arrests for possession or use accounted for 94 percent of arrests.¹⁷⁴ There were at least 24,000 arrests in 2022 for possession or use of marijuana. Black

¹⁷² The preceding two paragraphs are based on a Human Rights Watch analysis of US Census Bureau data, 2022 American Community Survey 1-year Public Use Microdata Sample (PUMS) files.

¹⁷³ Federal Bureau of Investigation, “Uniform Crime Reporting Program, Crime Data Explorer,” <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest> (accessed April 5, 2024). 1,063 of 1,220 participating law enforcement agencies in the state submitted data.

¹⁷⁴ Ibid.

people are arrested at more than double the rate that white people are arrested for drug offenses in Texas—38 per 100,000, compared with 17.8 per 100,000.¹⁷⁵

The state of Texas has adopted a policing and punishment first approach to drugs. Basic measures, such as decriminalizing drug testing strips and paraphernalia, have failed to pass the legislature, and the state has not allocated any additional state funds for drug treatment programs to address increasing overdoses.¹⁷⁶ Instead, the legislature passed a drug-induced homicide law, which prosecutes sale and delivery of fentanyl as murder if the recipient dies of an overdose. Research by the Drug Policy Alliance suggests these laws do not reduce drug sale, use, or deadly overdoses, and instead undermine good Samaritan laws, which encourage people to report overdoses without fear of police and arrest, and make racial disparities worse.¹⁷⁷

However, seven Texas counties near large metropolitan areas—Harris, Travis, Dallas, Bexar, El Paso, Hays, and Nueces—have diversion programs for marijuana arrests.¹⁷⁸ The Travis County District Attorney’s office, which includes the city of Austin, has a policy of declining to prosecute people who possess a small amount of drugs.¹⁷⁹ Five cities have passed local ordinances to decriminalize low-level marijuana possession, however, earlier this year Texas Attorney General Ken Paxton sued to block the ordinances.¹⁸⁰ These narrowly defined, but compassionate, drug policies are popular with the public and provide limited protection in a few Texas cities from aggressive drug policing—when

¹⁷⁵ Human Rights Watch analysis. Arrest data from Federal Bureau of Investigation, “Uniform Crime Reporting Program, Crime Data Explorer”; Population data from US Census Bureau, American Community Survey 1-year estimates, 2022. UCR data does not disaggregate data by hispanic or non-hispanic ethnicity.

¹⁷⁶ Katharine Neill Harris, “Texas Doubles Down on Ineffective Drug Policies that Could Cost Lives,” *Rice University’s Baker Institute for Public Policy*, June 30, 2023, <https://www.bakerinstitute.org/research/texas-doubles-down-ineffective-drug-policies-could-cost-lives> (accessed April 28, 2024).

¹⁷⁷ Drug Policy Alliance, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, report, November 2017, https://drugpolicy.org/wp-content/uploads/2023/05/Overdose_Death_Is_Not_Murder_Report.pdf (accessed June 25, 2024).

¹⁷⁸ Katharine Neill Harris, “Is the War on Drugs at Its End? Sobering Lessons from Texas,” *Rice University’s Baker Institute for Public Policy*, August 13, 2021, <https://www.bakerinstitute.org/research/war-drugs-its-end-sobering-lessons-texas> (accessed April 28, 2024).

¹⁷⁹ Letter from José P. Garza, District Attorney, Travis County, to Travis County Community, January 29, 2021, https://www.traviscountytx.gov/images/district_attorney/docs/Press_Releases/2021/pr-210129-da-community-letter.pdf?fbclid=IwAR2wT6VxiPmgSBTMCeLYopIPNM14rkD0l4BDEoMo87ZM5RvgUtWU-glsAcA (accessed April 28, 2024).

¹⁸⁰ Ikram Mohamed, “Ken Paxton Sues Five Texas Cities that Decriminalized Marijuana,” *Texas Tribune*, January 31, 2024, <https://www.texastribune.org/2024/01/31/texas-lawsuit-marijuana-decriminalization/> (accessed April 28, 2024).

arrests and convictions are curtailed, the harsh federal consequence of deportation is also avoided.¹⁸¹

However, in myriad other ways, deportations for drug-related offenses continue unabated for immigrants in Texas.

Operation Lone Star, Texas’s massive border policing regime that involves thousands of National Guard and law enforcement from Texas and other states, and has led to injuries and deaths, and consistently violated the rights of migrants and US citizens,¹⁸² is paraded by Texas elected officials as a tough-on-drug-crime policy. But there is reason to believe Operation Lone Star has only made international criminal drug trafficking groups stronger. Previous Human Rights Watch research has showed how organized crime groups in Mexico profit from US border policies that make it more difficult to cross the border legally.¹⁸³ The governor’s office has provided misleading data to make it appear as though Operation Lone Star has seized more drugs than it actually has.¹⁸⁴ Even the inflated statistics are underwhelming—twenty percent of arrests attributed to Operation Lone Star were for possession of small amounts of marijuana.¹⁸⁵

Driving While Brown: Racial Profiling of Latinx Non-Citizens

While Operation Lone Star is one highly visible and harmful example of rampant racial profiling in the state, police stops that profile people due to suspected immigration status and race are an everyday occurrence.

¹⁸¹ Ibid.

¹⁸² Human Rights Watch, “US: Texas Border Policies Threaten Deadly Outcomes,” Human Rights Watch news release, February 1, 2024, <https://www.hrw.org/news/2024/02/01/us-texas-border-policies-threaten-deadly-outcomes>; *So Much Blood on the Ground: Dangerous and Deadly Vehicle Pursuits under Texas’ Operation Lone Star* (New York: Human Rights Watch, 2023), https://www.hrw.org/sites/default/files/media_2023/11/us_texas1123%20web_o.pdf.

¹⁸³ Human Rights Watch, *We Couldn’t Wait: Digital Metering at the US-Mexico Border* (New York: Human Rights Watch, 2024), <https://www.hrw.org/report/2024/05/01/we-couldnt-wait/digital-metering-us-mexico-border>.

¹⁸⁴ Human Rights Watch, *So Much Blood on the Ground*.

¹⁸⁵ Allie Morris, “Texas’ Operation Lone Star Counts Low-Level Pot Arrests as Part of Effort to Secure Border,” *Dallas Morning News*, June 10, 2022, <https://www.dallasnews.com/news/politics/2022/06/10/texas-operation-lone-star-counts-low-level-pot-arrests-as-part-of-effort-to-secure-border/> (accessed April 28, 2024).

A criminal and immigration attorney in Austin, Texas, told a researcher for this report that drugs are commonly used as a narrative to demonize immigrants and stop people for “driving while brown.”¹⁸⁶ She said:

Along the border, the false idea that all immigrants are involved in drug trafficking crimes is really common ... we do everything we can to advocate so [our clients] are not convicted and do everything we can to protect them from negative consequences, which follow even from just the drug arrest.¹⁸⁷

She described one client who had nine possession of marijuana arrests. “He lived in an area where the cops did ‘random’ checks and stopped him for not having insurance through their ‘random’ checks,” she described.¹⁸⁸ Eventually, he was able to get DACA approval, a temporary, two-year renewable shield from deportation, because the arrests were dismissed. However, he was still in immigration detention and deportation proceedings until his DACA was approved.

Another client was arrested for having less than a gram of cocaine. While this case would have likely been dropped in Travis County, where they decline to prosecute small possession charges, the client was arrested one town over in Waco. He ultimately completed a pre-trial intervention program after a long negotiation. However, any drug offense, and some drug-related conduct or even admission of certain conduct, results in a bar to applying for immigration status or adjusting one’s status. Unless a limited waiver is available, a single drug-related offense can result in denial of an application that would otherwise be approved without question.¹⁸⁹ Even without a conviction, an admission of

¹⁸⁶ Drug Policy Alliance / Human Rights Watch interview with lawyer (name withheld), Austin, Texas, January 20, 2024.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ INA § 212(a)(2)(i)(II); Certain past offenses can be “waived” under Section 212(h) of the Immigration and Nationality Act (INA) if the applicant can show that a US citizen or permanent resident spouse, parent, or child would suffer “extreme hardship.” 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: INA Section 212(h), 8 U.S.C. § 1182(h); However, the waiver is not available for drug offenses except for a single conviction for possessing 30 grams or less of marijuana: Ibid; 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 U.S.C. § 1182(a)(1)(A)(iv); A non-citizen is inadmissible by formally admitting all of the elements of a controlled substance conviction, when that offense was not charged in criminal court: 8 U.S.C. 1182(a)(2)(A)(i).

having committed a controlled substance offense can bar a non-citizen from gaining permanent resident status.¹⁹⁰

Federal

The federal government lags far behind the states in reforming drug laws, but has taken small steps to rein in some of the most excessive provisions and policies. Congress passed two complementary laws, the 2010 Fair Sentencing Act and the 2018 First Step Act, which reduced a subset of the most egregious federal drug sentences under the deeply racist 100-to-1 crack to cocaine sentencing disparity,¹⁹¹ and allowed individuals to apply for release if they were sentenced under the old sentencing scheme.¹⁹²

After these cocaine sentencing reforms, federal sentencing rules impose a sentence 18 times longer for the same quantity of crack versus powder cocaine—this disparity has no scientific basis, as crack and powder cocaine are pharmacologically identical.¹⁹³ In 2022, Attorney General Merrick Garland issued guidance encouraging federal prosecutors to “take... steps to promote the equivalent treatment of crack and powder cocaine cases” in an attempt to close the sentencing gap further.¹⁹⁴ Regardless, federal immigration law still interprets most of these convictions as deportable offenses.

In October 2022, President Biden issued an executive order pardoning people with simple federal marijuana possession charges and calling on the government to review marijuana policy.¹⁹⁵ In December 2023, President Biden issued another executive order pardoning

¹⁹⁰ Immigration authorities can also deny an application if an officer has “reason to believe” the applicant is a “drug trafficker.” There are no clear evidentiary standards for this determination, but evidence of drug-related conduct can suffice “even though criminal charges have been dismissed, or even if an [applicant] has never been arrested:” 9 FAM 302.4-3(B)(1)(b); See also Immigrant Defense Project, “Practice Alert for Immigration Attorneys and Advocates: Marijuana Legalization and Considerations for Immigrant New Yorkers,” March 2021, https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Imm-Attorneys-MJ-Legalization_-Issue-Spotting-Docs.pdf (accessed June 25, 2024); Immigration officers may even find “reason to believe” someone is a drug trafficker due to participation in a legal marijuana market.

¹⁹¹ Fair Sentencing Act of 2010, Public Law 111-220, August 3, 2010.

¹⁹² First Step Act of 2018, Public Law 115-391, December 21, 2018.

¹⁹³ Drug Policy Alliance, “Facts About Cocaine,” March 6, 2023, https://drugpolicy.org/wp-content/uploads/2023/05/2023.04.05_cocaine_factsheet.pdf (accessed April 28, 2024).

¹⁹⁴ Office of the Attorney General, “Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases,” December 16, 2022, <https://www.justice.gov/ag/file/1265321/dl?inline> (accessed April 28, 2024).

¹⁹⁵ President Joseph R. Biden Jr., “A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana,” presidential action, October 6, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/> (accessed April 28, 2024).

attempted possession and charges for possession or use of marijuana on federal properties.¹⁹⁶ He acknowledged that “[t]oo many lives have been upended because of our failed approach to marijuana.”¹⁹⁷ In addition, the Biden administration announced in May 2024, that the DEA is seeking to move marijuana to Schedule III of the Controlled Substances Act, which may lighten some federal restrictions on the substance but will maintain federal criminalization.¹⁹⁸ Despite these reforms, the same immigration penalties will continue to apply, because marijuana will remain federally prohibited.

Each of these policies ignored the plight of immigrants, many of them longstanding members of, and contributors to, the US communities in which they live, and left penalties intact for immigrants with existing federal drug convictions. Biden’s categorical pardons did not include immigrants who are not lawful permanent residents,¹⁹⁹ such as people without authorization to be in the US, refugees, asylees, individuals with visas obtained because they are crime victims or victims of domestic violence, people granted Temporary Protected Status, and others. Even for lawful permanent residents, the president has not clarified whether immigration authorities would honor the pardon, and the Department of Homeland Security has thus far interpreted immigration law to preclude a presidential pardon from eliminating all immigration impacts of a drug conviction. As a result, people with marijuana convictions have remained vulnerable to immigration detention and deportation.²⁰⁰

¹⁹⁶ President Joseph R. Biden Jr., “A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana, Attempted Simple Possession of Marijuana, or Use of Marijuana,” presidential action, December 22, 2023, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/22/a-proclamation-on-granting-pardon-for-the-offense-of-simple-possession-of-marijuana-attempted-simple-possession-of-marijuana-or-use-of-marijuana/> (accessed April 28, 2024).

¹⁹⁷ President Joseph R. Biden Jr., “Statement from President Joe Biden on Clemency Actions,” press release, December 22, 2023, <https://whitehouse.gov/briefing-room/statements-releases/2023/12/22/statement-from-president-joe-biden-on-clemency-actions/> (accessed April 28, 2024).

¹⁹⁸ US Department of Justice, “Justice Department Submits Proposed Regulation to Reschedule Marijuana,” press release, May 16, 2024, [https://www.justice.gov/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana#:~:text=The%20Justice%20Department%20today%20announced,Controlled%20Substances%20Act%20\(CSA\)](https://www.justice.gov/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana#:~:text=The%20Justice%20Department%20today%20announced,Controlled%20Substances%20Act%20(CSA)) (accessed June 19, 2024).

¹⁹⁹ President Joseph R. Biden Jr., “A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana, Attempted Simple Possession of Marijuana, or Use of Marijuana,” presidential action, December 22, 2023, <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/22/a-proclamation-on-granting-pardon-for-the-offense-of-simple-possession-of-marijuana-attempted-simple-possession-of-marijuana-or-use-of-marijuana/> (accessed April 28, 2024); President Joseph R. Biden Jr., “A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana,” presidential action, October 6, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/> (accessed April 28, 2024).

²⁰⁰ When he issued the pardons, President Biden stated: “... [N]o one should be in a federal prison solely due to the use or possession of marijuana, no one should be in a local jail or state prison for that reason, either.” President Joseph R. Biden Jr., “Statement from President Joe Biden on Clemency Actions,” press release, December 22, 2023,

Immigrants were also excluded from some of the First Step Act’s most impactful provisions. The law excluded certain non-citizens from earning new time credits and participating in the Residential Drug Abuse Program, which helps people work toward early release.²⁰¹ It also led to shortened sentences for 750 incarcerated non-citizens, but none of them were released. Instead, they were transferred to ICE detention to immediately begin the deportation process.²⁰² Among them was Robert Panton, whom Human Rights Watch and Drug Policy Alliance interviewed for this report.

Permanent Resident Ordered Deported for “Drug Trafficking”

Robert Panton, an immigrant from Jamaica, is facing mandatory deportation due to a decades-old federal “drug trafficking” conviction that was interpreted as an “aggravated felony” under immigration law. Robert moved to Harlem over a half-century ago when he was just five years old. Robert can still invoke the wonder of coming to New York as a child: “I remember looking out the window and the cars looked like toys from that high up, and my fondest memory was of my mother taking me to school. It was winter and the snow was so high, it was up to my mother’s knee.”²⁰³

Robert’s mother pushed him to focus on academics from a young age, and he excelled. He developed a passion for boxing and an interest in films. After graduating high school and business school, Robert started taking courses in arts and theater management. At the same time, he started spending more time with guys at the boxing gym. They sold drugs. At first, he told them he had no interest in it. But when they wanted to sell in his neighborhood, he agreed to keep the money they earned at his apartment.

I was never needed to actually sell drugs. They just needed somebody that was going to be honest with their money ... I didn’t plan to even stick

<https://whitehouse.gov/briefing-room/statements-releases/2023/12/22/statement-from-president-joe-biden-on-clemency-actions/> (accessed April 28, 2024); The implication is that this “failed approach to marijuana” is unacceptable for all people in the United States—except immigrants.

²⁰¹ National Immigration Project of the National Lawyers’ Guild et al., “Concerns Over First Step Act: Immigration Analysis,” December 2018, https://www.ilrc.org/sites/default/files/resources/concern_first_step_act-20181217.pdf (accessed April 28, 2024).

²⁰² George, “First Step Offers Release for Some Prisoners—But Not Non-Citizens,” *The Marshall Project*.

²⁰³ Drug Policy Alliance / Human Rights Watch interview with Robert Panton, Harlem, New York, August 30, 2023.

around the position I had for long. I was like, okay, maybe I can get some money, do a business or something. I'm gone.²⁰⁴

But before he could get out, after about a year and a half, Robert was arrested for conspiracy to possess heroin with intent to distribute and prosecuted under federal law. “It was my first offense. They sentenced me to life in prison.”²⁰⁵ The criminal legal system decided he should die behind bars.

Instead of accepting these odds, Robert willed himself to change them. He was as ambitious and curious as ever. He completed thousands of hours of coursework, in topics ranging from emotional intelligence to entrepreneurship. He challenged his draconian sentence in court and earned his paralegal certificate. He counseled youth with behavioral issues, under a family court program that sent youth to visit incarcerated individuals. In one young woman who visited him in prison, he noticed signs of sexual abuse and encouraged her to report it, resulting in her removal from the abusive parent.

He never gave up on his dream. He took a screenwriting class and wrote his first feature screenplay, *Can You Cross Over?* He was named a finalist in a screenwriting competition.

In 2021, Congress passed the First Step Act. Robert immediately became eligible to shorten his sentence. A federal judge found that Robert’s achievements met the “extraordinary and compelling” standard to merit resentencing, and he became immediately eligible for release.

Even though he was a lawful permanent resident, Robert was aware his conviction might trigger some immigration issues, but given the extraordinary measure taken by the federal judge, he thought he would have a chance at relief from deportation. However, Robert’s conviction, a “drug trafficking” aggravated felony, subjects him to mandatory deportation, a concept that did not exist when Robert was arrested in 1990. “My conviction is before AEDPA and IIRIRA get signed into effect, so how do I get subjected to [laws] when everybody knows it didn’t even exist at the time?” said Robert.²⁰⁶ If he had seen an

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

immigration judge back then, he would have had an individualized hearing and chance at relief. But ICE pressed on, and an immigration judge ordered his deportation.

Robert continues to live under risk of deportation because ICE's 2024 decision to grant him prosecutorial discretion can be reversed at any time. He moved back home to Harlem and has now completed four screenplays that he is working to get produced. He has a great job at a nonprofit to support youth, and a new life partner. After missing so many life milestones, he was overjoyed to be home when his grandchild was born, and his son got married. ICE has agreed to defer his deportation for now, however, he is still deportable, and ICE could reopen his case at any time. Robert has asked President Biden for a presidential pardon to stop his deportation. Despite all of this, Robert remains grateful:

Everything right now, if this immigration proceeding were to go away, my life would be perfect. It would be the perfect life. My [sentencing] judge saw fit to get me out of even being supervised by anybody because it's not necessary. A waste of taxpayer money. And I've proven that, which I'm glad I'm able to do, prove her correct.²⁰⁷

In the US Since Childhood but Deported Away from Family

Once deported, it is extremely difficult for anyone to return to the US legally. Even when someone has a legitimate legal claim, non-citizens are held to strict time, number, and procedural requirements to reopen or reconsider their cases.²⁰⁸

Samuel Anthony, an immigrant from Sierra Leone, was deported in 2021, after more than a decade of fighting his case and enduring two periods in immigration detention. Samuel came to the US with his family when he was just 6 years old. They settled in Washington, DC, home to the largest community of Sierra Leoneans outside of the country itself. Samuel told a researcher for this report that when he showed up for first grade, the kids teased him for his accent, and he had trouble making friends. Samuel also experienced

²⁰⁷ Ibid.

²⁰⁸ 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 U.S.C. §§ 1229a(c)(6) and 1229a(c)(7); Some immigrants may have arguments for equitable tolling, see National Immigration Project, "Practice Advisory: Post-Departure Motions to Reopen and Reconsider," September 2023, https://nipnlg.org/sites/default/files/2023-07/2023_post-departure-bar-advisory.pdf.

trauma early on in his life, being physically abused by his father and sexually abused by his pediatrician. He did not have anyone to talk to about the abuse, so he held it in and, like many young boys, acted tough.

In Samuel's childhood neighborhood, the U Street Corridor where houses sell for millions today, the crack epidemic and the "war on drugs" were in full swing. Samuel started running errands for people selling drugs when he was in sixth grade. He started selling and using drugs when he was 15 years old. This was the start of his substance use disorder.

Drugs [are] something that America will always have, something America will always deal with. The policy that they need to come up with is the one ... that identif[ies] addicts as [having] a disease . . . A lot of us [who] sold drugs, it was not because we wanted to sell drugs. It benefited our addiction.²⁰⁹

Samuel was arrested several times over the next few years. Then, in 1995, he was arrested on drug conspiracy charges. With a name like Samuel Anthony, and having lost his childhood accent, no one confirmed his citizenship or advised him about his possible deportation. He was just 22 years old and sentenced to 16 years in prison.

It was only as Samuel prepared for his release from prison in 2010 that he realized the government was trying to deport him. He was arrested by ICE and brought to Farmville federal immigration detention center, where he was incarcerated for two more years. He was in disbelief. As a green card holder who had lived his whole life in the US, Samuel did not think he would have immigration issues, let alone face permanent inability to return to the US.

Samuel successfully fought his deportation in immigration court, and an immigration judge found that his deportation would violate the Convention Against Torture. However, the government appealed, and the decision was overturned. In 2017, ICE put electronic monitoring devices on Samuel and made him meet with an ICE officer twice a week. Then, in 2019, ICE put him back in immigration detention. This time, Samuel filed complaints to challenge the abysmal conditions, including mold and bathrooms that were seldom

²⁰⁹ Drug Policy Alliance / Human Rights Watch interview with Samuel Anthony, Freetown, Sierra Leone, August 15, 2023.

cleaned. The facility remained filthy, but the guards started treating him even worse, targeting him in retaliation for speaking up.

The more uncomfortable you are, the more you say you are ready to [be deported]. That's the whole objective. They put you in a stressful situation so that you just say, I just want to go. Just get me out of here ... they kept the place cold, the food [was] barely edible.²¹⁰

ICE deported Samuel in 2021. In Sierra Leone, Samuel has had to adjust to a completely different culture and way of life. He navigates these dangers while continuing to fight to return to the US. Now 51 years old, Samuel simply wants to live out his years with his family, who all reside in the US, and find his peace once again.

²¹⁰ Ibid.

International Human Rights Standards

For decades, Human Rights Watch has documented and reported on violations of international human rights law, especially the prohibition against racial discrimination, associated with United States drug policy—namely drug law enforcement, prosecutions, sentencing, and the criminalization of drug possession for personal use.²¹¹

With regard to this report’s focus on US immigration penalties for drug offenses, in accordance with international human rights law, the United States, like all governments, does not have unfettered discretion to deport non-citizens in all circumstances.²¹² The ways in which US immigration law treats immigrants who have committed drug offenses often violates human rights. We focus here on human rights to be free from racial discrimination, to raise key defenses against deportation, and to fundamental fairness under the law. We also address abusive conditions in immigration detention.

US Immigration Consequences for Drug Offenses are Discriminatory

For 30 years, the United States has been party to the International Convention on the Elimination of all forms of Discrimination (ICERD), and federal and state governments are

²¹¹ Human Rights Watch and the American Civil Liberties Union, *Racial Discrimination in the United States*; Human Rights Watch, “Civil and Human Rights Groups Urge Biden to Include Immigrants in Marijuana Pardons”; Human Rights Watch, Meng, “Does Anyone Still Believe Marijuana is a Gateway Drug?”; Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*; Human Rights Watch, *An Offer You Can’t Refuse; Targeting Blacks; Punishment and Prejudice*; Human Rights Watch, *Race Drugs and Law Enforcement in the United States*; See also Drug Policy Alliance, “Uprooting the Drug War.”

²¹² 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), <https://www.refworld.org/legal/general/hrc/1986/en/38724> (accessed June 25, 2024): “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, <https://www.cidh.org/annualrep/98eng/Merits/Mexico%2011610.htm> (accessed June 25, 2024): 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), doi: 10.1093/ijrl/15.2.212, 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.

therefore bound by the treaty as the law of the land.²¹³ US federal immigration law, including its intersection with US drug law and policy, violates ICERD.

Article 5 of ICERD guarantees equality before the law, including “the right to equal treatment before tribunals and all other organs administering justice.” Article 1 makes clear that laws and policies appearing race-neutral are considered discriminatory if they have the *effect* of impairing or nullifying human rights on the basis of race.

The text of the Convention does not explicitly prohibit differential treatment on the basis of citizenship,²¹⁴ but the Committee on the Elimination of Racial Discrimination (CERD) has clearly stated that, “differential treatment on the basis of citizenship or immigration status will constitute discrimination” under the Convention “if the criteria for such differentiation... are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”²¹⁵

This report demonstrates how US federal immigration law takes US criminal law applicable to drug offenses, already shown to be racially discriminatory,²¹⁶ and adds harsh, often disproportionate immigration consequences and treatment. Those federal immigration consequences, which are only experienced by non-citizens, include deportation away from family, community, and home; return to danger and persecution in countries of origin; bars

²¹³ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, adopted by the United States on November 20, 1994; Article VI, para. 2 of the US Constitution makes all treaties the “supreme law of the land.” When ratifying the ICERD the United States expressed its view that it was bound to the extent that US laws implemented the treaty’s provisions.

²¹⁴ Ibid, art. 5; The CERD committee has noted that governments may limit nondiscrimination protections to citizens for some human rights, but has noted that for the rights enumerated: “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.” CERD, General Comment No. 14, Discrimination Against Non-Citizens, (2004), <https://www.refworld.org/docid/45139e084.html> (accessed June 25, 2024) para. 3.

²¹⁵ CERD, General Comment No. 14, Discrimination Against Non-Citizens, (2004), <https://www.refworld.org/docid/45139e084.html> (accessed June 25, 2024); The United States noted that the “The United States strongly shares the Committee’s view that citizens and noncitizens alike should enjoy protection of their human rights and fundamental freedoms” and therefore “prioritizes elimination of racial discrimination against all individuals, both citizens and noncitizens alike.”; See CERD, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports,” CERD/C/USA/CO/7-9, August 29, 2014, <https://www.ohchr.org/en/documents/concluding-observations/cerdcusaco7-9-concluding-observations-combined-seventh-ninth> (accessed June 25, 2024), paras. 12-14.

²¹⁶ See, e.g. Drug Policy Alliance, “Uprooting the Drug War”; Human Rights Watch and the American Civil Liberties Union, *Racial Discrimination in the United States*; Human Rights Watch, “Civil and Human Rights Groups Urge Biden to Include Immigrants in Marijuana Pardons”; Meng, “Does Anyone Still Believe Marijuana is a Gateway Drug?”; Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*; Human Rights Watch, *An Offer You Can’t Refuse; Targeting Blacks; Punishment and Prejudice; Race Drugs and Law Enforcement in the United States*.

against naturalization to US citizenship; and detention in prisons and ICE detention centers where conditions can be abusive, and where perpetrators can abuse immigrants with impunity.

Providing oversight over drugs and immigration are both legitimate aims of government, however, the extreme nature of US criminal law and immigration law is not proportionate to those aims. The layering of new immigration consequences on top of an already racially discriminatory approach to drug law enforcement and policy in the United States violates Articles 1 and 5 of ICERD. Separately, as Human Rights Watch has argued elsewhere, the use of criminal laws, even without the additional layer of immigration law, to further those governmental aims can be incompatible with international human rights law.²¹⁷ For example, Human Rights Watch opposes the criminalization of personal drug use or possession of drugs for personal use because it amounts per se to disproportionate punishment and restricts individuals' autonomy and privacy in ways that contravene international human rights law.²¹⁸

Also of concern under ICERD's prohibition against racially discriminatory effects is the fact that Black immigrants suffer harsher treatment at the intersection of US drug and criminal laws, even within the category of non-citizens. As explained by the immigrants' rights group Black Alliance for Immigrant Justice, Black immigrants account for nearly 12 percent of the US's Black population²¹⁹ and 7.2 percent of non-citizens in the US;²²⁰ but more than 20 percent of non-citizens facing deportation on criminal grounds.²²¹ Racial discrimination against Black immigrants also affects the length of time they are detained. According to a

²¹⁷ Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*; Human Rights Watch, *Turning Migrants Into Criminals* (New York: Human Rights Watch, 2013), [Human Rights Watch World Report 2014, \[https://www.hrw.org/sites/default/files/related_material/drugreform.pdf\]\(https://www.hrw.org/sites/default/files/related_material/drugreform.pdf\).](https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions#:~:text=Human%20Rights%20Watch's%20research%2C%20however,no%20or%20minor%20criminal%20records; Maria McFarland Sánchez-Moreno (Human Rights Watch),)

²¹⁸ Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds*; Human Rights Watch, *Turning Migrants Into Criminals*.

²¹⁹ IRC Analysis of US Census Bureau, American Community Survey, 2014 ACS 1-Year PUMS. Data available for download at http://factfinder.census.gov/bkmk/navigation/1.0/en/d_dataset:ACS_14_1YR/d_product_type:PUMS.

²²⁰ US Census Bureau, American Community Survey, 2014 1-Year Estimates, Tables S0201 and B05003B.

²²¹ Black Alliance for Just Immigration, et al., Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD) 107th Session, "Anti-Black Discrimination Against Non-Citizens and Ongoing Violations of International Protections for Migrants, Refugees, and Asylum Seekers of African Descent," August 2022, https://rfkhr.imgix.net/asset/US-Coalition_anti-Black-Discrimination-in-Immigration__CERD-Report_072222.pdf, (accessed June 25, 2024), para. 165 (internal citations retained).

2022 study by Human Rights First, “Asylum seekers from Black-majority countries... for whom Human Rights First researchers were able to track detention periods were detained on average for nearly 4.3 months—27 percent longer than asylum seekers from non-Black majority countries.”²²²

The United States has long acknowledged that “discrimination against immigrants” is one of the principal causative factors of the “subtle and elusive” forms of discrimination that “persist in American society.”²²³ Indeed, the United States government has reported to the Committee on the Elimination of Racial Discrimination, the expert body that examines government compliance with the treaty, that there is a long history of “discriminatory provisions in US immigration law and policy,” dating to the 19th century.²²⁴

The CERD has made a series of recommendations about how the United States should more effectively protect non-citizens from discrimination. In 2014, the Committee called on the United States to ensure the rights of non-citizens, “are fully guaranteed in law and in practice,” including by “abolishing ‘Operation Streamline’ [a program of mass criminal prosecution of migrants for unauthorized entry and reentry] and dealing with any breaches of immigration law through [a] civil, rather than criminal immigration system”; undertaking “thorough and individualized assessment concerning detention and deportation and guaranteeing access to legal representation in all immigration-related matters.”²²⁵

Article 2(1) of ICERD states that states parties need to pursue the elimination of racial discrimination in all its forms. ICERD prohibits discriminatory practices and requires states parties “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws which have the effect of creating or perpetuating

²²² Human Rights First, “‘I’m a Prisoner Here:’ Biden Administration Policies Lock Up Asylum Seekers,” report, September 2022, <https://humanrightsfirst.org/wp-content/uploads/2022/09/ImaPrisonerHere.pdf> (accessed June 25, 2024), p. 22.

²²³ Government of the United States, Initial, Second, and Third Periodic Report to the Committee on the Elimination of Racial Discrimination, CERD/C/351/Add.1, October 10, 2000, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F351%2FAdd.1&Lang=en (accessed June 25, 2024), para. 71.

²²⁴ *Ibid.*, para. 13.

²²⁵ Committee on the Elimination of Racial Discrimination, “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of American, Adopted by the Committee at Its 2317th Session,” (August 26, 2014), U.N. Doc CERD/C/USA/CO/7-9, para. 18 (b).

discrimination.”²²⁶ An essential step in ensuring United States compliance with this treaty obligation would be wholesale reform of its immigration laws to rescind those provisions that have the effect of perpetuating racial discrimination—among those provisions that should be reformed is the penalty of removal for drug offenses without any consideration for mitigating factors or human rights concerns.

US Immigration Law Violates the Right to Raise Defenses to Deportation

By ratifying the International Covenant on Civil and Political Rights (ICCPR) in 1992, the United States accepted its provisions as binding on both federal and state governments.²²⁷ US federal immigration law governing the immigration penalties for many criminal offenses, including drugs, violates the ICCPR because it generally fails to allow non-citizens to raise defenses to deportation. It also fails to require the US, in most cases involving a criminal conviction or conduct, to consider a non-citizen’s fear of return to danger; the strength of their connections to the United States, including as their “home” or “own” country; and their family relationships in the US before subjecting them to permanent removal from the US.

The UN Human Rights Committee (HRC), the main expert body on the implementation of the ICCPR, has explained that immigrants should be able to defend against their deportation, in part to ensure that no deportation is arbitrary. The Committee has stated: “if the legality of an alien’s entry or stay is in dispute... [a]n alien must be given full facilities for pursuing his remedy against expulsion.”²²⁸

One constant in the HRC’s jurisprudence is that any interference with a person’s family, and increasingly “home,” caused by deportation is inevitably arbitrary if the state fails to weigh that human rights impact in the balance against its own interests in deporting the person. This is precisely what US immigration law does as a matter of routine.

²²⁶ ICERD, art 2.

²²⁷ International Covenant on Civil and Political Rights, 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, Art. 25: The US ratified the ICCPR on June 8, 1992. Article VI, para. 2 of the US Constitution makes all treaties the “supreme law of the land.” Article 50 of the ICCPR provides that the provisions of the covenant “shall exten[d] to all parts of federal States without any limitations or exceptions.” ICCPR Art. 50.

²²⁸ UN Human Rights Committee, General Comment 15, para. 9 and 10.

Human Rights, Family and Home

Human rights treaties binding on the United States protect the right to family unity. Article 17 of the ICCPR states no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” Article 23 provides 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 people have the right “to marry and to found a family.” The right to found a family includes the right “to live together.”²²⁹ The UN special rapporteur on the rights on non-citizens has stated: “[D]eportation is justified only if the interference with family life is not excessive compared to the public interest to be protected.”²³⁰

The UN Human Rights Committee, the expert body that interprets and monitors state party compliance with the ICCPR, has explicitly stated that the right to family unity entails limits on states’ power to regulate immigration.²³¹ In *Winata v. Australia*, the HRC found 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. Under these circumstances, the Committee found the state would have to identify government interests beyond the “simple enforcement” of Australia’s immigration laws to justify the deportation of both of the child’s parents. Because it did not do so, Australia’s attempts to remove the child’s parents constituted an arbitrary interference with the right to family unity.²³² The HRC has since applied the same analysis to other countries in other cases, with varying results.²³³

Article 12(4) of the ICCPR requires that “no one shall be arbitrarily deprived of the right to enter his own country,” and the Human Rights Committee has found that the definition of “one’s own country” is broader than the concept of a person’s country of nationality.²³⁴ In two cases involving people who were brought to Australia and Canada from other countries

²²⁹ UN Human Rights Committee, General Comment No. 19, “Protection of the Family, the Right to Marriage and Equality of the Spouses,” U.N. Doc. HRI/GEN/1/Rev.6 at 149 (2003), <http://www1.umn.edu/humanrts/gencomm/hrcom19.htm> (accessed July 1, 2010), para. 5.

²³⁰ UN Office of the High Commissioner for Human Rights (OHCHR), *The Rights of Non-Citizens*, 2006, HR/PUB/06/11, <http://www.refworld.org/docid/46ceabb22.html> (accessed June 19, 2024), p. 22.

²³¹ UN Human Rights Committee, General Comment No. 15, para. 5 and 7.

²³² *Winata and Li v. Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001).

²³³ See, e.g. *Madaferi v. Australia*, Communication No. 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (2004); *Husseini v. Denmark*, Communication No. 2243/2013, UN Doc CCPR/C/112/D/2243/2013 (2014); *MGC v. Australia*, Communication No. 1875/2009, UN Doc CCPR/C/113/D/1875/2009 (2015).

²³⁴ UN Human Rights Committee, General Comment No. 27, *Freedom of Movement (Art. 12)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 20.

as young children, the Committee found a violation of Article 12(4) where the state sought to deport those individuals later on in life.²³⁵ The facts in both of these cases are closely analogous to many of the cases of people featured in this report.

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.” The Human Rights Committee has stated that the term “home” is “to be understood to indicate the place where a person resides or carries out his usual occupation.”²³⁶

Children’s Rights

As demonstrated by Natalie’s case, which opens this report, non-citizens subjected to immigration penalties for drug offenses often have children. These children’s rights to not be separated from their parents due to deportation are given little consideration in US immigration law.

Article 24 of the ICCPR 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.” The Convention on the Rights of the Child, signed but not ratified by the United States, provides 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.”²³⁷

To give effect to the best interest principle and to protect children’s right not to be deprived of a family, the Committee on the Rights of the Child has called on states to “refrain from detaining and/or deporting parents if their children are nationals.” The committee has stated:

²³⁵ UN Human Rights Committee, *Nystrom v. Australia*, Communication No. 1557/07, U.N. Doc CCPR/C/102/D/1557/2007; UN Human Rights Committee, *Warsame v. Canada*, Communication No. 1959/10, U.N. Doc CCPR/C/102/D/1959/2010 (2011).

²³⁶ UN Human Rights Committee, General Comment No. 16, “The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,” *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 142 (2003), <http://www1.umn.edu/humanrts/gencomm/hrcom16.htm> (accessed June 25, 2024), Art 17, para. 5.

²³⁷ Convention on the Rights of the Child (CRC), article 9, adopted November 20, 1989, G.A. Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989), entered into force September 2, 1990, signed by the United States, on February 16, 1995.

Instead, their [parents'] regularisation should be considered ... Alternatives to detention and deportation in accordance with the child's best interests, including regularisation, should be established by law and through practice.²³⁸

Nonrefoulement

The principle of nonrefoulement in international refugee law imposes well-recognized limits on states' powers to deport a refugee to places where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion.²³⁹ Refugee law permits a very narrow exception to nonrefoulement 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."²⁴⁰ The United States bound itself to follow the Refugee Convention by ratifying the 1967 Protocol on Refugees,²⁴¹ and has implemented its obligations in domestic law through the Refugee Act of 1980.²⁴²

As discussed above, US courts and immigration authorities have eroded the "particularly serious crime" standard, arguing that virtually any "aggravated felony" constitutes a "particularly serious crime,"²⁴³ without any individualized assessment of whether the person poses a danger to the community. For offenses that are assessed case-by-case, US immigration authorities interpret immigration law to require an individual to demonstrate extreme and unusual circumstances in order to overcome the particularly serious crime bar.²⁴⁴ Nothing in the analysis requires a showing of future danger to the community,²⁴⁵ nor

²³⁸ Committee on the Rights of the Child, "Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration," September 28, 2012, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>.

²³⁹ Convention Relating to the Status of Refugees (Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954, art. 33.

²⁴⁰ *Ibid.*

²⁴¹ Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

²⁴² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

²⁴³ *Matter of Y-L-, A-G-, R-S-R*, 23 I&N Dec. 270 (A.G. 2002); *Delgado-Artega v. Sessions*, 856 F.3d 1109 (7th Cir. 2017); *Usher v. Lynch*, 609 F. App'x 521 (9th Cir. July 15, 2015).

²⁴⁴ *Matter of Y-L-, A-G-, R-S-R*, 23 I&N Dec. 270 (A.G. 2002).

²⁴⁵ Sir Elihu Lauterpacht and Daniel Bethlehem, UNHCR, "The Scope and Content of the Principle of Non-Refoulement," June 2003, <https://www.unhcr.org/us/media/refugee-protection-international-law-scope-and-content-principle-non-refoulement->

gravity of the offense—according to the UN Refugee Agency, the crime in question should be a “capital crime or a very grave punishable act”²⁴⁶—or weighing these factors against persecution if a person is deported, as required under international law.²⁴⁷

As a result, the United States regularly deports people to countries where individuals with past criminal legal system contact face serious risk of being tortured and threatened. For example, credible reports have shown that in Haiti some people with past criminal offenses are imprisoned, tortured, and denied basic needs like food and water.²⁴⁸ In 2022, conditions in Haiti were so life-threatening as to prompt the United Nations High Commissioner for Refugees and the United Nations High Commissioner for Human Rights to urge no returns of Haitian nationals.²⁴⁹ In light of further deterioration of the security situation, they reiterated the call to refrain from returning Haitians in 2024.²⁵⁰

opinion-2-1 (accessed June 25, 2024), para. 147 and 164: “While past conduct may be relevant to an assessment of whether there are reasonable grounds for regarding the refugee to be a danger to the country in the future, the material consideration is whether there is a prospective danger to the security of the country.”; Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses,” *Background Paper for UNHCR Global Consultations* (2001), <http://www.unhcr.org/publ/PUBL/419dba514.pdf> (accessed May 31, 2007), p. 27: “[M]ere conviction of a particularly serious crime in the country of refuge, unless there is also evidence that the refugee poses a danger to the community in the future, should not satisfy Article 33.2.”

²⁴⁶ UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,” HCR/1P/4/ENG/REV. 4, February 2019, <https://www.unhcr.org/us/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967> (accessed June 25, 2024), para. 155.

²⁴⁷ Immigrant Defense Project and Harvard Immigration and Refugee Clinical Program, *United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened*, report, Fall 2018, p. 9-16, https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Harvard_Report_FINAL.pdf (accessed June 6, 2024).

²⁴⁸ Haitian Bridge Alliance, et al., *Submission to the Human Rights Committee for the Committee’s 139th Session on the United Nations International Covenant on Civil and Political Rights: Treatment of Foreign Nationals, including Refugees and Asylum-seekers, Disparately Impacting Black People and other Peoples Protected by the Covenant and the Convention on the Elimination of All Forms of Racial Discrimination*, September 2023, https://ccrjustice.org/sites/default/files/attach/2023/09/HBA-Coalition%20Report_ICCPR_U.S.A_2023.pdf (accessed June 25, 2024), para. 57.

²⁴⁹ Office of the United Nations High Commissioner for Refugees, “UNHCR Calls on States to Refrain from Forced Returns of Haitians,” press release, November 3, 2022, <https://www.unhcr.org/us/news/press-releases/unhcr-calls-states-refrain-forced-returns-haitians#:~:text=%E2%80%9CGiven%20this%20very%20troubling%20situation,Commissioner%20for%20Refugees%20Filippo%20Grandi;Office%20of%20the%20United%20Nations%20High%20Commissioner%20for%20Human%20Rights,Statement%20of%20Voker%20Turk,%20Haiti%20International%20community%20must%20act%20now%20to%20avert%20tragedy,%20Turk> (accessed June 25, 2024).

²⁵⁰ Office of the United Nations High Commissioner for Refugees, “UNHCR Issues New Guidance on International Refugee Protection for Haitians,” press release, March 20, 2024, <https://www.unhcr.org/news/press-releases/unhcr-issues-new-guidance-international-refugee-protection-haitians>.

International human rights law, particularly the Convention against Torture (CAT),²⁵¹ provides additional and absolute bars to refoulement, which make no exception for people who have committed crimes. Non-citizens who are ineligible for asylum and withholding because of a drug trafficking conviction are still eligible for deferral of removal under the Convention against Torture. However, the US government only grants CAT to immigrants who demonstrate that it is more likely than not that they would face a threat of being tortured if deported,²⁵² which is a standard that cannot be met by many individuals whose life or freedom would be threatened in their country of removal and whose removal would therefore violate US obligations under the Refugee Convention.

US Immigration Law Violates Principle of Proportionality

Deportation and related immigration detention are not considered punishment under US law, however, they are severe penalties that often outweigh the criminal justice penalties that trigger them.²⁵³ Practically speaking, for immigrants who find themselves in removal proceedings and immigration detention after a criminal conviction, deportation is indistinguishable from punishment.

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 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.²⁵⁴

²⁵¹ The US ratified CAT in 1994, and the INS issued regulations setting out standards under the Convention. See 8 C.F.R. § [1]208.16 to [1]208.18.

²⁵² 8 CFR § 1208.16(c)(2).

²⁵³ 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).

²⁵⁴ 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

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. Two ways for the United States to better conform its immigration law with the principle of proportionality are to apply *lex mitior* and a statute of limitations to the civil penalty of deportation.

Lex mitior is provided for in Article 15 of the ICCPR, and is a legal concept broadly adhered to by governments, requiring that when a law is amended the more lenient penalty should be applied to those convicted under the prior law.²⁵⁵ The European Court of Human Rights in interpreting this principle in *Scoppola v. Italy*, stated:

[A] consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law.²⁵⁶

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 people have already been deported under the earlier, wrongful interpretations of law. In the many cases in which state law has decriminalized or legalized conduct in relation to drugs, and/or made the penalties applicable to a case less punitive than they were previously, imposing civil immigration penalties raises concerns under the principle of *lex mitior*.

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).

²⁵⁵ ICCPR art. 15(1).

²⁵⁶ Nearly 20 years prior to the *Scoppola* decision, the United States entered a reservation to Article 15(1) of the ICCPR. Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992), reprinted in 31 I.L.M. 645 (1992). European Court of Human Rights, *Scoppola v. Italy (No.2)*, (Application no. 10249/03), Judgement of September 17, 2009, available at <http://hudoc.echr.coe.int/eng?i=001-94135c>, para. 106.

A second way to limit the disproportionate harm of deportation for offenses that occurred years, or even decades ago, would be to establish something akin to a statute of limitations for deportations based on past offenses. US courts have explained that, among other reasons, the purposes of a statute of limitations include:

- “[T]o minimize the danger of official punishment because of acts in the far-distant past;”²⁵⁷ and to
- “[A]llow[] persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability.”²⁵⁸

US Immigration Detention Violates Human Rights

Under international human rights standards, immigration detention may not be mandatory; it may only occur if it is reasonable, necessary, and proportionate to achieve a legitimate state interest, and it needs to take into account less invasive means of achieving the same end.²⁵⁹ The United Nations Working Group on Arbitrary Detention has stated that “immigration detention should gradually be abolished” and that “[i]f there has to be administrative detention, the principle of proportionality requires it to be the last resort.”²⁶⁰ The Working Group has also found mandatory detention of migrants in the United States to be against international legal standards and applied in practice to deter immigration.²⁶¹

Yet most people facing deportation due to drug offenses will be subject to mandatory detention and may not get a bond hearing at all.²⁶²

²⁵⁷ *Toussie v. United States*, 397 U.S. 112, 115 (1970).

²⁵⁸ *Tarnowsky v. Socci*, 271 Conn. 284, 296 (2004).

²⁵⁹ UN Human Rights Committee, General Comment No. 35, Article 9: Liberty and Security of the Person, CCPR/C/GC/35, December 16, 2014, <https://documents.un.org/doc/undoc/gen/g14/244/51/pdf/g1424451.pdf?token=MdzeBNl7rBDXZRPBRc&fe=true> (accessed June 25, 2024), para. 18.

²⁶⁰ UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, para. 59.

²⁶¹ United Nations Office of the High Commissioner, “Arbitrary Detention: UN Expert Group Urges the USA to Abolish Mandatory Detention of Migrants,” news release, October 24, 2016, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20749&LangID=E> (accessed June 9, 2024).

²⁶² In 2018, the US Supreme Court held that people facing deportation due to certain past criminal offenses do not have the right to a bond hearing, effectively permitting prolonged detention while immigration proceedings take place: *Johnson v. Arteaga-Martinez* 142 S.Ct. 920 (2021), *Garland v. Aleman Gonzalez* 596 U.S. ____ (2022); Despite this, lower courts have held that the Constitution requires a bond hearing once detention reaches a certain length. See, e.g., *Reid v. Donelan*, No. 19-1787 (1st Cir. 2021), and other legal arguments are available; See Immigrant Defense Project Practice Advisory, “Making Statutory

Although it is beyond the scope of this report to address in detail, in other investigations Human Rights Watch and other organizations have shown how conditions in immigration detention violate international human rights law.²⁶³ US immigration detention policies also implicate ICERD, with immigrants from Africa and the Caribbean, people likely racialized as Black “overrepresented in solitary confinement cases by 680 percent, compared to their share of the detained population.”²⁶⁴ Black immigrants are also more likely to be held in detention for longer and are less likely to be granted release.²⁶⁵

Arguments in the Second Circuit on the Meaning of ‘When... Released’ and ‘Released’ in U.S.C. § 1226(c) to Challenge Mandatory Detention after Jennings and Lora,” May 9, 2018, <https://www.immigrantdefenseproject.org/wp-content/uploads/post-lora-practice-advisory-ST-edits.pdf> (accessed June 25, 2024).

²⁶³ See, e.g. American Civil Liberties Union, National Immigrant Justice Center, Human Rights Watch, *Justice Free Zones*, report, April 30, 2020, https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf; Human Rights Watch, *Code Red: the Fatal Consequences of Dangerously Substandard Medical Care in US Immigration Detention* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration>; *Systemic Indifference: Dangerous Substandard Medical Care in US Immigration Detention* (New York: Human Rights Watch, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>; Other examples include Farmville Detention Center in Virginia, which advocates explained subjected people detained there to a massive Covid-19 outbreak, on top of a years-long history of abuse, including use of force, food contamination, and use of pepper spray and restraints without justification: Advancement Project National Office, et al., “New Documents Illuminate a Dark Pattern of Abuse in ICA-Farmville,” news release, August 18, 2020, <https://lacolectiva.org/farmvilleabuse> (accessed June 25, 2024); At Stewart Detention Center in Georgia, several women filed complaints against employees alleging they had been sexually assaulted. See Rita Omokha, “Detainees Speak Out Against ‘Abusive’ US Migrant Jail: ‘This Place is Horrible,’” *Guardian*, December 6, 2023, <https://www.theguardian.com/us-news/2023/nov/28/ice-detainees-lumpkin-georgia> (accessed April 28, 2024); A DHS Office for Civil Rights and Civil Liberties investigation found evidence of racial discrimination, medical neglect, and mold infestation. See Tom Dreisbach, “Government’s Own Experts Found ‘Barbaric’ and ‘Negligent’ Conditions in ICE Detention,” *NPR*, August 16, 2023, <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions> (accessed April 28, 2024).

²⁶⁴ Konrad Franco et al., “Punishing Status and the Punishment Status Quo: Solitary Confinement in U.S. Immigration Prisons, 2013-2017,” *Punishment and Society*, vol. 24 (2020), doi :10.31235/osf.io/zdy7f (accessed April 28, 2024), p. 13.

²⁶⁵ Black Alliance for Just Immigration et al., Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD) 107th Session, “Anti-Black Discrimination Against Non-Citizens,” para. 67-72.

Conclusion

Starting in the 1970s, the US “war on drugs,” and its escalation through changes to US immigration law, have created harsh and endless consequences for immigrants in the United States charged with or convicted of drug offenses. Most voters are realizing the drug war has failed, however, despite support for new approaches the drug war continues to pose a threat to immigrants. The data presented in this report demonstrates that over the course of 18 years, more than 2,400 people per month whose most serious offense was drug-related were deported from the United States. The current system is punishing people with deep connections to the United States, where they have formed families, attained education, and built their lives. Some immigrants are being deported to countries where they have no family ties and where their safety is at risk.

A series of federal laws since the 1970s have made it almost impossible for immigrants with drug-related convictions to avoid a second penalty in the immigration system after punishment under criminal law. There are significant racial disparities in the imposition of immigration penalties. More than one out of every five noncitizens facing deportation on criminal grounds before US immigration courts is Black. The infiltration of the drug war into the immigration system is not only a powerful mechanism of mass incarceration but also a form of racial oppression.

Fortunately, there are policymakers that have decided to rethink their approach to drug policy, such as legislatures in California, New York, Illinois, and certain city officials in Texas. The most notable drug policy reform that has taken place in these states, apart from Texas, has been the legalization of marijuana. The legalization of marijuana has brought opportunities to start repairing the harms of the drug war. However, this does not protect immigrants from detention and deportation because marijuana remains classified as a controlled substance at the federal level. To prevent these shameful double standards going forward, federal actions on drug reform need to include all immigrants, not explicitly exclude them as has been the case in recent federal actions.

Amid an unprecedented overdose crisis, the false associations between immigration and drugs are distracting policymakers and the public from evidence-based solutions that actually address the root causes of this public health crisis. The harsh immigration

penalties imposed on non-citizens with drug offenses has resulted in a waste of resources, human rights violations, and the disruption of the lives of immigrants, many of whom are deeply woven into the fabric of their communities and families in the United States. Once deported, it is extremely difficult for a person to return to the US legally.

With millions of families at risk of being separated, every level of government has a critical role to play. States should continue advancing drug policies that protect immigrants from being caught in the deportation machine. It is clear the failure to enact meaningful reforms to federal immigration law to keep pace with drug reforms at the state level will continue to affect immigrants and their families in the United States. Until the federal government recognizes the discrimination in the enforcement of drug and immigration laws, the drug war will remain a leading driver of the criminalization of immigrants, as well as their separation from family and the country they often regard as home.

Policy Recommendations

To the United States Congress

Immigration Law

- As initial steps, while drug prohibition is more fully reconsidered in favor of a rights and evidence-based policy response to drugs:
 - Eliminate immigration penalties from US law for any drug related conduct that is no longer penalized under state or federal law.
 - Ensure 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 the harms of deportation and evidence of rehabilitation, family ties, and other equities and choose to decline deportation.
- Ensure 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 a case-by-case determination that takes into account the seriousness of the crime—whether the crime is a “capital crime or a very grave punishable act”—and whether the non-citizen poses a future threat to public safety. If found ineligible for asylum and withholding of removal, the law should be amended to provide that such a person shall not be removed to a place where the person would be subjected to torture—already the case in existing law—or to cruel, inhuman or degrading treatment or punishment—which the US is bound to consider as a party to the ICCPR.
- Pass legislation to provide for time limits—akin to a statute of limitations—after which non-citizens may not be removed on criminal grounds, including for drug offenses or convictions.
- Pass the New Way Forward Act, or similar legislation, which begins to take steps toward ending the immigration penalties faced by immigrants based on drug-related conduct or offenses, especially containing provisions that:
 - Clear criminal records for past drug offenses, through both automatic expungement and vacatur that is effective for immigration purposes.
 - Restore judicial discretion to allow an immigration judge to consider an individual’s equities and grant relief or decline deportation in all cases

involving past criminal offenses, including those deemed “aggravated felonies” under immigration law.

- Amend the definition of “conviction” in the Immigration and Nationality Act (INA) to respect all post-conviction processes, diversion practices, and treatment off-ramps.
- Eliminate the controlled substance offense inadmissibility bar and deportability ground.
- Eliminate the inadmissibility bar based on an adjudicator’s “reason to believe” an applicant has had any connection with drug trafficking.
- Narrow the inequitably harsh definition of “aggravated felony.”
- Ensure non-citizens who are barred from entering the US, gaining lawful resident status, or naturalizing to US citizenship because of drug-related conduct or offenses are eligible to apply for individualized consideration, i.e., a waiver of the bar, based on equities.
- Immediately end immigration detention that is unnecessary or prolonged, with the aim to gradually abolish immigration detention. Eliminate mandatory detention and ensure all non-citizens are given an opportunity for parole or an individualized bond hearing, with a presumption in favor of release and access to alternatives to detention.
- End the involvement of state and local law enforcement in immigration enforcement by ending the 287(g) program—ICE/police collaboration—and by ending the use of criminal databases, through programs like Secure Communities, to surveil non-citizens and issue immigration detainers.
- Provide people an opportunity to return to the United States if they were deported based on conduct that has been legalized or no longer triggers immigration consequences.
- Make retroactive all changes to US law that reverse the immigration impact of drug offenses.

Drug Law

- Reconsider drug prohibition in US law in favor of a rights and evidence-based policy response to drugs.
- Eliminate criminal penalties for possession of personal-use quantities of controlled substances.

- Remove marijuana from the Controlled Substances Act.
- Shift federal resources away from criminal enforcement strategies and toward supportive initiatives to protect public health and safety, including by shifting regulatory authority over drugs from the Drug Enforcement Administration to a health agency.
- Expand access to voluntary and culturally responsive substance use disorder treatment like medications for opioid use disorder (MOUD) in different settings such as community-based programs, harm reduction programs, outpatient clinics, and carceral settings.
- Protect and fund harm reduction services to increase access points to substance use treatment and reduce barriers to health care and support that people who use drugs encounter due to language differences, stigma, racism, discrimination, or immigration status.

To the Biden Administration

- The President should:
 - Pardon all federal simple drug possession convictions regardless of immigration status.
 - Support removing marijuana from the Controlled Substances Act (“descheduling”) since marijuana’s status as a federally prohibited substance continues to be a driver of deportation.
- The Department of Homeland Security should issue agency guidance to:
 - Exercise discretion to refrain from immigration policing actions based on drug-related arrests, charges, or convictions, including issuing detainers and arrests, initiating removal proceedings, and executing removal orders.
 - End enforcement actions based on expunged, vacated, and pardoned convictions, including drug convictions.
 - Stop using pleadings or statements in criminal proceedings related to drug use as justification to deny immigration benefits.
 - Allow individuals who have been deported due to a drug conviction to apply for reentry through an immigration waiver.
 - Interpret federal immigration law to respect pardons as removing immigration penalties based on drug offenses.
- The Department of Justice should issue agency guidance to:

- Provide bond hearings for all detained people in a timely fashion.

To State and Local Governments

Treatment and Comprehensive Care

- Expand and better fund voluntary evidence-based drug treatment that is culturally and linguistically responsive, including a wide range of housing options for individuals who use drugs or are in recovery; accurate, fact-based drug education for youth and adults; access to harm reduction resources, such as life-saving drugs like naloxone, methadone, and buprenorphine; drug checking that can detect adulteration in the drug supply; syringe exchange services; and overdose prevention centers, where trained professionals can reverse fatal overdoses and connect participants with health care, and ensure that immigrants can access these services without fear of immigration arrest or penalty.
- Integrate substance use treatment, including medication for opioid use disorder in prisons and juvenile facilities, as well as increased access and availability of housing first and transitional housing for previously incarcerated individuals.

Criminal Legal System

- Reconsider drug prohibition in favor of a rights and evidence-based policy response to drugs.
- Pass legislation to ensure people understand the immigration consequences of a guilty plea to drug offenses.
- End the use of local and state law enforcement resources to engage in federal immigration policing.
- End mandatory minimums and disproportionate sentencing for drug offenses.
- End the criminalization of the personal use of drugs and the possession of drugs for personal use. In the alternative, decline to prosecute drug possession cases.
- Create pre-arrest and pretrial diversion programs that do not use coercive tactics, such as the requirement of a guilty plea or admission of guilt, as an incentive to complete programs successfully.
- Ensure people charged with drug offenses have full and accurate advice from defense counsel about the immigration penalties of plea offers by fully implementing and funding programs to implement *Padilla v. Kentucky*.

- Ensure alternate pleas offer opportunities to avoid stigmatization and collateral consequences, including immigration consequences.
- Expand access to post-conviction relief for drug offenses by ending legal barriers to judicial review of legally invalid convictions and providing funding for counsel.
- Fully fund legal services that ensure immigrants can defend against deportation and obtain immigration benefits for which they are eligible.
- Ensure expungement does not limit a court's jurisdiction to consider other forms of post-conviction relief or access to one's own criminal case files.
- More assertively use the clemency power to pardon drug convictions.

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“Disrupt and Vilify”

The War on Immigrants Inside the US War on Drugs

Drug laws are being reformed across the United States to move away from the harsh punitive approaches of the war on drugs, but federal immigration law continues to treat drug offenses, including decades-old offenses, as grounds for deportation of immigrants. Those harmed, authorized and unauthorized immigrants alike, often have deep connections to the country, where they have formed families, attained education, and built their lives.

“Disrupt and Vilify” analyzes new federal government data from 2002 to 2020, finding the US has deported 500,000 people whose most serious offense was drug-related. Of these, 240,000 were deported between 2013 and 2020, amounting to about one of every five deportations of immigrants with a criminal conviction for that period.

A conviction for even minor drug offenses—for example, drug possession (including marijuana)—can carry devastating immigration consequences that far outstrip the criminal sentence imposed. Some would not be criminal offenses if committed today or involve conduct that is now legal under state law. There are significant racial disparities in the imposition of immigration penalties. One out of five noncitizens facing deportation on criminal grounds is Black.

Human Rights Watch and the Drug Policy Alliance call on the US Congress to reform federal law to ensure that immigrants with criminal convictions, including drug offenses, are not subject to “one-size-fits-all” deportations. Instead, immigration judges should have the discretion to make individualized decisions. Congress should impose a statute of limitations on deportations for past offenses. Drug policy reforms should prioritize evidence-based policies rooted in public health and human rights to address the root causes of the overdose crisis and problematic drug use, and not continue the vilification of immigrants.



*Miguel Perez holds a photo of his son Miguel Perez Jr., on April 4, 2017 in Chicago, Illinois. Perez Jr. is an immigrant and US army veteran who was deported after serving seven years in state prison on a drug charge.
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