ALBANY LAW SCHOOL
GOVERNMENT LAW CENTER

EXPLAINER

State Criminal Law and Immigration: How State Criminal-Justice Systems Can Cause Deportations, or Limit Them

by Kendra Sena*

The Government Law Center's explainers concisely map out the law that applies to important questions of public policy.

This explainer was updated on May 6, 2019.

Introduction

While the federal government makes the ultimate decision whether to admit or deport a noncitizen, the states often play a crucial role. Several provisions of federal immigration law that trigger deportation depend in large part on crimes that are defined, charged, and sentenced at the state level. Even a conviction for a low-level crime for which a state imposes no jail time can result in serious immigration consequences—including deportation.

Some states are adopting policies to take account of the immigration consequences of criminal convictions. This explainer will briefly review the intersection of state criminal law and federal immigration law. It will then outline several ways in which states are exercising their authority over state criminal law and procedure to influence federal immigration enforcement.

I. Background: Crimmigration

The intersection between immigration and criminal law is highly complex. Although immigration proceedings are civil matters, some criminal convictions may make a noncitizen deportable or inadmissible under federal law. This interplay between immigration law and criminal law is often referred to as "crimmigration."[1]

The Immigration and Nationality Act (INA), the federal law that governs immigration, includes a broad set of crimes for which a conviction may make a noncitizen—even a lawful, permanent resident—deportable or ineligible for certain immigration relief. This includes both federal and state crimes, many of which are not defined in the INA.

Several provisions of the INA set out only a category of crimes for which a conviction will trigger immigration consequences. For example, a noncitizen may be deported for having committed a "crime involving moral turpitude" or an "aggravated felony." Whether specific crimes count as crimes involving moral turpitude, or aggravated felonies, depends on a state's definition of

the crime and the potential sentence permitted under state law. This means that the same criminal acts may trigger deportation if committed in one state, but not if committed in another state.

Recognizing the highly complex and technical laws involved, and the seriousness of deportation as a consequence of a criminal plea, the United States Supreme Court's 2010 case *Padilla v. Kentucky* held that defense attorneys are constitutionally obligated to advise their clients about whether their plea carries a risk of deportation.[2] The *Padilla* decision injected immigration law directly into the practice of criminal defense attorneys, prosecutors, and judges alike.[3] Failure to advise a noncitizen client about the immigration consequences of their plea is ineffective assistance of counsel under the Sixth Amendment for which a defendant may seek post-conviction relief.[4]

RESOURCES

For more on the intersection of immigration and criminal law, see:

Sarah Herman Peck and Hillel R. Smith, Congressional Research Service, "Immigration Consequences of Criminal Activity," (April 5, 2018) https://fas.org/sgp/crs/homesec/R45151.

II. State efforts to limit immigration consequences of criminal convictions

Since the Supreme Court's ruling in *Padilla*, many states have made changes to their criminal systems to take into account the immigration consequences of criminal convictions for noncitizen defendants.

Padilla counsel. In 2011, the state of New York authorized funding for immigration-related legal support, training, and resources to assist indigent-defense and family-law attorneys in complying with the mandate of *Padilla*.[5] The result was the nation's first statewide network of immigration assistance centers to advise criminal and family court attorneys on immigration law.[6] The six Regional Immigration Assistance Centers (RIAC) issue advisory letters that analyze the potential immigration consequences of a case disposition and offer possible dispositions that reduce the immigration impact on the noncitizen.[7]

RESOURCES

For more on RIACs in New York, see:

https://www.ils.ny.gov/content/regional-immigration-assistance-centers

Prosecutorial discretion. Some prosecutors have changed the way that they charge low-level and nonviolent offenders to take into account the potential immigration consequences of a conviction. In 2016, California enacted a statewide law mandating that prosecutors "consider the avoidance of adverse immigration consequences in the plea negotiation process" for all cases.[8] Elsewhere, individual prosecutor's offices have adopted similar practices. In Baltimore, the state's attorney instructed the office's prosecutors to consider the "unintended collateral consequences that our decisions have on our immigrant population."[9] In Brooklyn, NY, and Philadelphia, PA, the district attorneys' offices have hired immigration counsel to train prosecutors on how to minimize the

risk of deportation for noncitizens charged with low-level and nonviolent offenses.[10]

Executive pardons. In some instances, states have the power to remove immigration consequences associated with past convictions. For most crimes, a state governor's pardon has the effect of erasing a conviction for immigration purposes and protecting a noncitizen from deportation on account of the conviction.[11] For some crimes—drug and firearm convictions, for example—a governor's pardon may remove the *automatic* deportation trigger, giving the immigration judge the discretion to issue relief.

In 2000, the Georgia Board of Pardons and Parole made two key procedural changes to its pardon process in order to protect noncitizens at risk of deportation because of convictions for low-level state crimes. First, the Board opened its pardon process to misdemeanors, and second, it waived the otherwise applicable eligibility waiting period. In a 15-month period, the Board pardoned 138 legal permanent residents at risk of deportation—all of whom had either a U.S. citizen spouse or children and all but one of whom had been convicted of only a misdemeanor.[12]

State governors in New York and California have recently exercised their discretion in this space, commuting the sentences of people convicted of crimes that carry the potential for immigration consequences.[13] In California, a new law requires the state parole board to consider an expedited review of pardon applications from people at risk of deportation.[14]

RESOURCES

For more on executive pardons, see:

Pardon: Immigrant Clemency Project

https://immigrantpardonproject.com/

Reducing misdemeanor sentences. A noncitizen can be subject to deportation for a single conviction of a crime involving moral turpitude or an aggravated felony when the potential sentence for the crime is a year or more. The immigration law does not define a crime of moral turpitude, but courts have explained that it includes theft and fraud crimes—even misdemeanors like petit larceny or passing a bad check. Even when a person doesn't spend a single day in jail, conviction for a crime involving moral turpitude with the *potential* for a one-year sentence makes deportation automatic. Similarly, a conviction for an aggravated felony, for immigration purposes, often includes misdemeanor crimes. Possession of stolen property, forgery, or failure to appear in court—often misdemeanors under state law—render a noncitizen deportable when a sentence of a year or more is imposed.[15]

New York recently became the fifth[16] state to amend its criminal laws to reduce the maximum penalty for misdemeanors from 365 days to 364 days in order to remove those crimes from the class of convictions that trigger deportation and inadmissibility.[17]

RESOURCES

The Board of Immigration Appeals has held that the California law does not apply retroactively, despite the language of the statute. The case is being appealed in the 9th Cir. Matter of Velazquez-Rios 27 I&N Dec. 470 (BIA Oct. 4, 2018).

Decriminalization. States have broad authority to define classes of unlawful behavior. Unlawful acts that are less than criminal—infractions or violations, for example—do not typically come along with the same constitutional guarantees (e.g., right to counsel) as for criminal activity. For this reason, sanctions for noncriminal offenses will not usually constitute convictions for immigration purposes.[18]

Some states have moved to decriminalize certain unlawful behaviors so as not to subject noncitizens to detention and deportation based on these low-level violations. In 2018, California passed a law decriminalizing street vending after a widely-publicized incident in which a woman who had been arrested for selling corn in a public park was held in immigration custody for 6 months.[19] Under the new law, local governments are permitted to set up regulatory structures to regulate street vending; vendors who violate local regulations are subject to administrative penalty only.[20]

Notably, a state's decision to decriminalize the possession, use, or sale of cannabis (marijuana) *will not* remove some immigration consequences associated with it. The U.S. Department of Justice recently issued a policy alertto indicate that a noncitizen may be found to lack the "good moral character" necessary to become a U.S. citizen because of their involvement with cannabis, "even where such activity is not a criminal offense under state law."[21]

Conclusion

The federal government has exclusive authority to determine which noncitizens it will permit to enter and remain in the country. But immigration law relies heavily on the states to define crimes that trigger deportation of noncitizens. Because the states enjoy exclusive authority over state criminal laws, states have the ability to influence federal immigration enforcement. No state-law measure could take away the federal government's power over the nation's immigration laws and enforcement. But some states are exercising their authority at the intersection of criminal and immigration law to exert some measure of control over the effect that states' actions have on the immigration status of people who encounter their criminal-justice systems.

Endnotes

[*] Kendra Sena is the Senior Staff Attorney at the Government Law Center at Albany Law School.

[1] Professor Juliet Stumpf has been credited with coining the term "crimmigration" in her article, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376 (2006).

[2] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

[3] García Hernández, César Cuauhtémoc, *Deconstructing Crimmigration*, 52 U. C. Davis L. Rev. 197, 198 (2018).

[4] *See Lee v. U. S.*, 582 U.S. ___ (2017) (holding that a defendant can show prejudice from their counsel's deficient performance in plea proceedings by establishing that there is a reasonable probability that but for counsel's errors, they would not have pled guilty).

[5] *See* N.Y.S. Office of Indigent Legal Services, Regional Immigration Assistance Centers, https://www.ils.ny.gov/content/riac-general-information (last visited May 7, 2019).

[6] *See* Press Release, N.Y.S. Office of Indigent Legal Services, "ILS Awards Grants for Regional Immigration Assistance Centers," (Jul. 6, 2015), *available at*: https://tinyurl.com/y3fcx2tk.

[7] *See e.g.*, Oneida County, Public Defender – Criminal Division, Regional Immigration Assistance Center-2, "What We Do," http://www.ocgov.net/pdcriminal/RIAC2/WhatWeDo (last visited May 7, 2019).

[8] Assemb. Bill 1343, 2015–2016 Reg. Sess. (Cal. 2015).

[9] Press Release, Office of the State's Attorney for Baltimore City, "States Attorney Marilyn Mosby Instructs Her Office to Strongly Consider Prosecutorial Discretion for Cases Involving Immigrant Defendants, Witnesses, and Victims" (May 4, 2017), *available at*: http://tinyurl.com/yanatg4b.

[10] *See* Press Release, Brooklyn District Attorney's Office, "Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants," (Apr. 24, 2017), *available at*: https://tinyurl.com/y8dz2m8x; Alicia Victoria Lozano, "Philadelphia District Attorney's Office Trains 300 Attorneys to Protect Immigrant Rights," NBC PHILADELPHIA, (Jan. 24, 2019), https://tinyurl.com/y2r724hm.

[11] INA § 237(a)(2)(A)(vi).

[12] Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 Federal Sentencing Reporter 184 (2001).

[13] *See, e.g.*, Melissa Gira Grant, "California Governor Jerry Brown is Fighting Trump with Pardons. Will Other Governors Follow Suit?" The Appeal, Nov. 29, 2018, https://tinyurl.com/y2q48dtv; John Leland, "With a Fresh Swipe at Trump, Cuomo Pardons 22 Immigrants," THE NEW YORK TIMES, Dec. 21, 2018.

[14] Agnes Constante, "New California Pardon Law May Help Those Facing Deportation," NBC NEWS, Oct. 3, 2018, https://tinyurl.com/y9qgzsga.

[15] American Immigration Council, "Aggravated Felonies: An Overview," (Dec. 2016), https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview.

[16] The other states are: California, Nevada, Utah, and Washington.

[17] Jason Stevenson & Marina Lowe, "Utah Passed a Law to Protect Noncitizens From Automatic Deportation," ACLU, April 9, 2019, https://tinyurl.com/yylqbuow.

[18] Leticia Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. Davis Law Review 471, 499 (2018).

[19] Kristina Bravo, "Gov. Brown Signs Bill Legalizing Street Vending," KTLA Broadcasting (Sept. 17, 2018), https://ktla.com/2018/09/17/gov-brown-signs-bill-legalizing-street-vending-in-california/.

[20] Public Counsel Law Center, "Legislative Alert: SB 946 – Safe Sidewalk Vending Act," (Dec. 2018), http://www.publiccounsel.org/tools/assets/files/1100.pdf.

[21] U.S. Dept. Homeland Sec., U.S. Citizenship and Immigration Services, Policy Alert, "Controlled Substance-Related Activity and Good Moral Character Determinations," April 19, 2019, https://tinyurl.com/y6366zbv. The amendment to the USCIS Policy Manual can be found in Volume 12: Citizenship and Naturalization, Part F, Good Moral Character, Chapter 5, Conditional Bars for Acts in Statutory Period [12 USCIS-PM F.5].