

CHAPTER 1
WHY IMMIGRANT POST-CONVICTION RELIEF?

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On May 19, 2003, Angel Ramirez¹ was pulled over while driving home from work. A careful driver, Angel was sure he hadn’t been speeding, but during this “routine stop,” police asked for proof of citizenship. Having none, he was immediately arrested, transferred to immigration custody, and placed in removal proceedings. At the time of his arrest, Angel had lived in the United States for thirty years. He was a well-liked, civically engaged, small-business owner. He and his U.S. citizen wife had four children together and a fifth on the way. But due to a single marijuana conviction from 1999, when he was eighteen and represented by counsel who never told him the lasting immigration consequences of a plea deal, Angel faced losing his family, his business, and the only country he had ever called home. Barred by his conviction from lawful permanent resident status and any opportunity for discretionary relief, he faced deportation to Mexico.

Sann Chey, a father of five, came to the United States when he was a young child. He and his family fled Cambodia when the Khmer Rouge seized power and launched a brutal genocide. His family escaped to a refugee camp in Thailand, and then, in 1981, the U.S. government resettled them in the United States. Sann built a successful life in his adopted country. He graduated from high school, served in the U.S. Army, married, found steady work as a mechanic, and had sole custody over his five children, ages eleven to eighteen, all of whom were U.S. citizens. But Sann Chey faced deportation to a country he had never called home due to a decades-old domestic violence conviction. The conviction arose from a dispute with his then wife. Even though the conviction was subsequently reduced to a misdemeanor, ICE nevertheless classified Sann’s misdemeanor conviction as an “aggravated felony,” subjecting him to mandatory immigration imprisonment and denying him the opportunity to present to an immigration judge the injustice and harm that deportation would inflict on him and his five children.

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

¹ All names have been changed.

immediately to immigration custody where she discovered, for the first time, that her two convictions subjected her to mandatory deportation.

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

For millions of immigrants, the story ends there. But in Angel, Sann Chey, Abigail, and Richard's cases, there was a rare happy ending. They were able to secure post-conviction relief to successfully erase their unconstitutional convictions. Because the convictions were vacated based on legal error, the grounds for removal evaporated. All four individuals are now naturalized U.S. citizens living with their families in the United States.

This manual is part of an effort to turn these stories into the rule, rather than the exception, by helping to build the capacity of the legal community to provide effective post-conviction relief to immigrants who would face certain deportation without it.² This resource provides an entry point and overview of the basic legal tools necessary to use state criminal procedural vehicles to erase or mitigate the immigration consequences of convictions.

NOTE: While this manual is focused on California practices and procedures, some of the principles are applicable outside of the state. We encourage out-of-state practitioners to read this manual and consider what vehicles exist in their own states that might have parallel applications to the California laws referenced herein.

This introductory chapter will explore the context that makes post-conviction relief essential: the legal framework governing the immigration consequences of crimes.

§ 1.1 Overview of “Crimmigration” Landscape

More than 40 million people who reside in the United States—and more than 10 million in California alone—were born in another country.³ These immigrants, 83 percent of whom are people of color, are subject to the same racially discriminatory policing and prosecution that infects the entire criminal legal landscape in the United States.⁴ In the United States, an estimated

² This manual is meant to supplement, not substitute, the rich canon of criminal and immigration law resources that already exists including, e.g., *California Post-Conviction Relief for Immigrants* (2d ed. 2009) and *Defending Immigrants in the Ninth Circuit* (ILRC 2008).

³ U.S. Census Bureau, American Community Survey, 2020 American Community Survey 5-Year Estimates Table DP02, <https://data.census.gov/cedsci> (6 July 2022).

⁴ Pew Research Center, Facts on U.S. Immigrants 2018, <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants-current-data/> (last visited July 6, 2022); Dakin Andone, *California police disproportionately cite Black and Latino residents for non-traffic infractions like sitting and sleeping in*

65 million people suffer more than 4,800 lifelong consequences of a prior conviction.⁵ Immigrants face all the long-term consequences of a conviction citizens face, plus an additional compounding horror: lifelong banishment and permanent separation from their families.⁶ The drastic and devastating immigration consequences of convictions have a uniquely destabilizing effect in California, the most immigrant-rich state in the country, where one out of every two children lives in a home with a parent born outside of the United States.⁷

§ 1.2 Legal Framework for Deportation Based on Crimes

The United States' immigration system is heavily focused on swiftly deporting noncitizens who come into any contact with law enforcement. This dates back to the inception of the immigration system but has escalated in recent years. In 2020, Immigration and Customs Enforcement (ICE) reported that 92 percent of interior removals—deportations of individuals from within the United States, not apprehended at the border—were individuals who had been convicted of crimes.⁸ Many of these convictions are decades old, or they are for misdemeanors, infractions, or even just being charged with, or arrested for, a crime. It is these increasingly interconnected dual systems of criminal and immigration law that some scholars and advocates have titled “cimmigration.”⁹

Most of these laws were codified or expanded in a sweeping set of reforms that went into effect in 1996: the Anti-terrorism and Effective Death Penalty Act (AEDPA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). The 1996 laws made broad changes to the U.S. immigration system. The laws drastically curbed due process rights and limited the rights of immigration judges to hear many cases. Under these laws, non-permanent residents with certain types of convictions, including a single misdemeanor, can be denied the right to appear before an immigration judge prior to being deported—regardless of U.S. Citizen relatives, number of decades in the country, eligibility to apply for relief from removal, or other equities.¹⁰ A permanent resident with certain types of convictions, including a single

public, study says, CNN (Oct. 2, 2020), <https://www.cnn.com/2020/10/02/us/california-black-latino-infractions-study-trnd/index.html>.

⁵ Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp't Law Project, *65 Million “Need Not Apply”*: *The Case for Reforming Criminal Background Checks for Employment*, 1-3 (Mar. 2011); *See also* Pew Ctr. on the States, *One in 31: The Long Reach of American Corrections*, 4 (Mar. 2009) Californians for Safety and Justice, *Repairing the Road to Redemption*, (Sept. 2018), <https://www.ilrc.org/repairing-road-redemption-california>.

⁶ Pew Research Center, *Facts on U.S. Immigrants 2018*, <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants-current-data/> (last visited July 6, 2022).

⁷ Hans Johnson, Cesar Alesi Perez & Marisol Cuellar Mejia, Public Policy Institute of California (PPIC), *Just the Facts: Immigrants in California*, (Mar. 2021).

⁸ U.S. Immigration and Customs Enforcement, *ICE Statistics*, <https://www.ice.gov/remove/statistics> (updated May 12, 2021).

⁹ *See, e.g.*, Juliet P. Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. Law Rev. 367 (2006).

¹⁰ INA § 235(b)(1) provides an “expedited removal” process in which an ICE official who is not a lawyer can order the removal of any person who is not a permanent resident if, in the ICE officer’s opinion, the person was convicted of an “aggravated felony.” The person has no possibility of appeal (other than

misdemeanor, can physically appear before a judge but may be barred from submitting any application to stop the deportation.¹¹ These laws also limit how federal courts can review the proceedings to ensure that these life-and-death legal decisions were correctly made.¹² The result is that, for immigrants with criminal convictions, often the only way that they can remain in the United States, or at least have an immigration judge consider the merits of their case, is to go back into state criminal courts and obtain post-conviction relief to erase the conviction.

§ 1.3 Obligations of Justice Stakeholders to Immigrant Defendants

In light of the severe and immutable consequences that attach to even low-level convictions, the U.S. Supreme Court, California courts, and the courts and legislatures of states across the country have created specific legal obligations that govern the responsibilities owed to immigrant defendants by justice stakeholders including defense counsel, prosecutors, and judges. Though these will be discussed in greater detail in subsequent chapters, we provide a brief overview here.

Defense counsel has the duty to investigate and inform a noncitizen defendant about the case-specific immigration consequences of a particular charge.¹³ Without this advice, the immigrant defendant cannot make an informed decision on how to plead or whether to take a case to trial. In addition, defense counsel has the duty to try to avoid these consequences by identifying and attempting to plea bargain for an immigration neutral alternative disposition.¹⁴ It is often the case that a plea to one misdemeanor or felony would result in an immigration catastrophe, but a plea to a related misdemeanor or an alternative felony, with different elements but the same or even greater criminal punishments, would not have such dire immigration consequences.¹⁵ Defense counsel therefore has critical responsibilities when representing noncitizen defendants.

But defense counsel is not alone in their legal obligations to immigrant defendants. The U.S. Supreme Court recognized that “informed consideration of possible deportation can only benefit

asserting mistaken identity) and no access to an immigration judge. “Aggravated felony” is a term of art defined at INA § 101(a)(43), that includes many misdemeanor offenses and even infractions. For example, Cal. H&S C 11358(c), a six-month misdemeanor for growing more than six marijuana plants, is an aggravated felony. *See United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008). Another problem is that the definition of “aggravated felony” is complex and frequently litigated, so that a non-attorney officer is not qualified to make this analysis with no possibility of legal review.

¹¹ Again, many misdemeanor and felony offenses are “aggravated felonies” under INA § 101(a)(43). A permanent resident convicted of an aggravated felony is barred from the basic waiver for long-time residents with a green card, cancellation of removal. *See* INA § 240A(a)(3) (barring cancellation of removal, the main form of equitable relief from deportation, for green card holders with an “aggravated felony” conviction (which includes misdemeanors); INA § 240A(b)(1)(C) (creating bars to cancellation of removal for other criminal offenses). The 1996 laws also eliminated the former INA § 212(c) waiver, which gave immigration judges much more discretion to grant relief.

¹² *See, e.g.*, INA § 242 (stripping federal courts of jurisdiction to review many immigration judge decisions).

¹³ *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010); *People v. Soriano*, 194 Cal. App. 3d 1470, 1482 (1987); Cal. Penal Code §§ 1016.2, 1016.3.

¹⁴ *See Lee v. United States*, 137 S. Ct. 1958, 1962 (2017); *People v. Bautista*, 115 Cal. App. 4th 229, 239 (2004).

¹⁵ *Bautista*, 115 Cal. App. 4th at 240.

both the State and noncitizen defendants.... By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”¹⁶ Accordingly, under California law, prosecutors also have a duty to “consider the avoidance of adverse immigration consequences in the plea negotiation process.”¹⁷

Finally, any time defendants enter a plea of guilty or no lo contendere courts must provide a pro forma advisement about potential immigration consequences.¹⁸

Defense counsel, prosecutors, and courts all have distinct and specific obligations to noncitizen defendants. If any of those entities fails to comply with its duties, the underlying conviction may be illegal.

§ 1.4 Importance of Post-Conviction Relief

Under the 1996 laws, where criminal courts frequently serve as the gateway to the mandatory, and permanent consequences meted out by the immigration system, it is often necessary to return to those same criminal courts to seek relief.

For people whose convictions effectively close all doors to remaining in the United States, post-conviction relief—going back into criminal court to erase or “vacate” a prior conviction—is the key to, and the only means of, accessing immigration relief and preserving a chance of remaining in the United States. Vacating convictions is an especially just measure when it comes to noncitizens, many of whom suffered unconstitutional or illegal convictions after receiving no warning of the catastrophic consequences that might flow from a plea to even a minor offense.

For immigrants who fall within one of the more than fifty crime-based grounds of removability, challenging old, legally invalid criminal convictions in the courts in which they occurred is the only way to prevent deportations, the only way to keep families unified, and the only way to obtain eligibility for immigration relief. Erasing the immigration-damaging criminal conviction and repleading to a non-damaging alternative is not just *a* helpful removal defense strategy, it is often *the* only effective removal defense strategy.

¹⁶ *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

¹⁷ Cal. Penal Code § 1016.3(b).

¹⁸ *See* Cal. Penal Code § 1016.5(a). The warning is not required if the defendant pleads to an infraction. However, some California infractions carry severe immigration consequences. *See, e.g.,* Cal Health & Safety Code § 11358(b) (infraction for growing a marijuana plant for personal use while between age 18-21 is likely a “drug trafficking aggravated felony” for immigration purposes; *see United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008)); Cal. Penal Code § 490.1 (infraction for theft is a crime involving moral turpitude).

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