


2015

Immigration Policy and the Rhetoric of Reform: “Deport Felons, Not Families,” Moncrieffe v. Holder, Children at the Border, and Idle Promises

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Recommended Citation

Terri R. Day & Leticia M. Diaz, Immigration Policy and the Rhetoric of Reform: “Deport Felons, Not Families,” Moncrieffe v. Holder, Children at the Border, and Idle Promises, 29 Geo. Immigr. L.J. 181 (2015).

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ARTICLES

IMMIGRATION POLICY AND THE RHETORIC OF REFORM: “DEPORT FELONS NOT FAMILIES,”* *MONCRIEFFE V. HOLDER*, CHILDREN AT THE BORDER, AND IDLE PROMISES

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I. INTRODUCTION

Eight years ago, when then Senator Obama was campaigning for the presidency, he promised comprehensive immigration reform.¹ During the campaign, Obama attacked the Bush administration’s stepped up efforts to crackdown on illegal immigrants.²

When communities are terrorized by ICE³ immigration raids, when nursing mothers are torn from their babies, when children come home from school to find their parents missing, when people are detained

* *Transcript: Obama’s Immigration Speech*, WASH. POST (Nov. 20, 2014), http://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html [hereinafter *Obama’s November 20th Speech*].

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Many thanks to Katelyn Scafidi, Claudia Pastorious, and Professor Khaled Beydoun. Your contributions to this article were invaluable. © 2015, Terri R. Day and Leticia M. Diaz.

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1. John D. Skrentny & Jane Lilly López, *Obama’s Immigration Reform: The Triumph of Executive Action*, 2 IND. J.L. & SOC. EQUALITY 62, 62 (2013).

2. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://nyti.ms/POlwXy>.

3. The Immigration and Customs Enforcement (ICE) is the investigative arm of the Department of Homeland Security (DHS). U.S. Immigration and Customs Enforcement, *Overview*, ICE.GOV, <https://www.ice.gov/about/overview/> (last visited Sept. 21, 2014).

without access to legal counsel, when all that's happening, the system just isn't working.⁴

Once in office, President Obama found those promises difficult, if not impossible, to keep.⁵

Like the previous administration, President Obama believed that his administration had to enforce existing laws and secure borders before opponents would agree to immigration reform.⁶ In fact, the President's strategies for achieving legislative support for immigration reform have worsened the plight of illegal immigrants.⁷ Dubbed the "Deporter-in-Chief," President Obama's commitment to rigorously enforce immigration laws has resulted in the deportation of illegal immigrants at unprecedented numbers.⁸ Based on government records over a ten year period, the largest increase of deportations involved people charged with minor crimes, including traffic violations, and those convicted of entering or re-entering the country illegally.⁹ Additionally, President Obama's administration has ensured that deported illegal immigrants are prohibited from returning to the United States for at least five years or else face a prison sentence, creating greater obstacles for families who are torn apart by immigration policies.¹⁰ Notwithstanding this large-scale surge in deportations under this administration, in an announcement to Americans on November 20, 2014, regarding immigration, President Obama claimed that mass deportation is both "impossible and contrary to [the American] character."¹¹

The administration blames Congress for the escalation of deportations.¹² In passing stricter immigration laws, providing more resources for enforcement, and blocking efforts to pave a pathway to citizenship for millions of productive, law-abiding illegal immigrants, President Obama places responsibility on Congress for his failed promises on immigration reform.¹³ While

4. See Thompson, *supra* note 2.

5. See *id.*

6. *Id.*

7. *Id.*

8. Barack Obama, *Deporter-in-Chief*, THE ECONOMIST (Feb. 8, 2014), <http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama>.

9. See Thompson, *supra* note 2. Deportations for illegal entry tripled and those for minor crimes quadrupled from the last five years of President Bush's administration to the first five years of President Obama's administration. *Id.*

10. *Id.* In the later part of Bush's administration, illegal immigrants without criminal records were deported without formal charges. *Id.* In contrast, this administration has filed formal charges against more than 90% of those deported, ensuring at least a five-year period before immigrants can return or face prison time. *Id.*

11. David Nakamura, et al., *Obama Announces Immigration Overhaul Shielding 4 Million From Deportation*, WASH. POST (Nov. 20, 2014), http://www.washingtonpost.com/politics/obama-immigration-plan-will-shield-37-million-from-deportation/2014/11/20/3345d672-70dd-11e4-893f-86bd390a3340_story.html.

12. See Skrentny, *supra* note 1, at 66.

13. See Thompson, *supra* note 2.

there is plenty of blame for both Congress and the President to share in refusing to fix our broken immigration system, there are some shameful consequences of this failure to act.

In recent months, headline news has shed light on the surge of immigrant children illegally migrating to the United States.¹⁴ The administration attributes the sudden influx of children to U.S. borders to the instability in Central America.¹⁵ However, others claim the motivation for this mass migration of unaccompanied women and children to the United States is “not to escape violence, crime or poverty, but to be reunited with family.”¹⁶ Regardless of the motivation, the increased pace of deportations has torn families apart and had the unintended consequences of an “urgent humanitarian situation.”¹⁷

Faced with the reality that the schism between the President and Congress is so great as to make comprehensive immigration reform impossible, President Obama took the initiative to salvage his broken promises and give hope to the millions of illegal immigrants living in the shadows of American life. For months, President Obama threatened, or promised, depending on which side of the political spectrum one falls, that he would exercise his executive powers regarding the immigration crisis. One week before Thanksgiving, President Obama outlined a three-step action plan for making the immigration system more “fair and just.”¹⁸ To quote directly from the President:

First, we’ll build on our progress at the border with additional resources for our law enforcement personnel so that they can stem the flow of illegal crossings and speed the return of those who do cross over. Second, I’ll make it easier and faster for high-skilled immigrants, graduates and entrepreneurs to stay and contribute to our economy, as so many business leaders proposed. Third, we’ll take steps to deal responsibly with the millions of undocumented immigrants who already live in our country.¹⁹

President Obama’s announcement—praised as momentous and timely by immigration action groups and disparaged by critics as executive overreach—only touches the tip of our country’s immigration crisis; yet, it may affect the

14. See, e.g., Richard Fausset & Ken Belson, *Faces of an Immigration System Overwhelmed by Women and Children*, N.Y. TIMES (June 5, 2014), <http://nyti.ms/1pJMwGZ>.

15. *Migration to the United States: Underage and on the Move*, ECONOMIST (June 28, 2014), <http://www.economist.com/news/briefing/21605886-wave-unaccompanied-children-swamps-debate-over-immigration-under-age-and-move>.

16. William La Jeunesse, *Undocumented Immigrant Children Spurred By Reuniting with Families, Not Just Violence*, FOX NEWS LATINO (June 27, 2014), <http://latino.foxnews.com/latino/news/2014/06/27/undocumented-immigrant-children-spurred-by-reuniting-with-families-not-just/>.

17. *Migration to the United States: Underage and on the Move*, *supra* note 15.

18. *Obama’s November 20th Speech*, *supra* note *.

19. *Id.*

fate of millions of undocumented residents currently in the United States.²⁰

This paper explores the symbiotic relationship between the criminal justice system and immigration law. The recent Supreme Court decision of *Moncrieffe v. Holder*²¹ illustrates the possible consequences of a state conviction for possession of a small amount of marijuana with intent to distribute on the removal of a noncitizen, who had legally resided in the United States for over twenty years. While the possibility of minor crimes can result in non-reviewable deportation orders, children at the borders have also faced an uncertain future. Part II will discuss the reasons behind the influx of unaccompanied alien children (UAC) and the legal issues involved in their presence and pending deportation proceedings. Part III will discuss the facts, issues, and lower court decisions in the *Moncrieffe* case. Part IV will review the various approaches courts have applied in determining whether a state law criminal conviction results in removal without relief and how the *Moncrieffe* decision affects previous precedent. Part V will discuss issues and developments in deportation policies under the Immigration and Nationality Act (INA) and the Obama Administration. Given President Obama's newly announced plan affecting deportation policy, this paper will conclude with a consideration of whether illegal immigrants' plight is improved at all with the latest Supreme Court decision and Executive Order.

II. UNACCOMPANIED ALIEN CHILDREN (UAC) AND THE NEED FOR IMMIGRATION REFORM

The 2014 humanitarian crisis of the influx of unaccompanied children arriving at the border has placed an international spotlight on the United States immigration system, making its flaws and injustices all the more apparent and further highlighting the urgent need for reform.²² The Trafficking Victims Protection Reauthorization Act of 2008 (TVPA) defines an unaccompanied alien child (UAC) as a child who "has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom—there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody."²³ The number of UAC arrivals increased from 2013 to 2014 by 88% (from 35,209 to 66,127).²⁴

20. *Id.*

21. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

22. See generally BIPARTISAN POLICY CENTER IMMIGRATION TASK FORCE, ISSUE BRIEF: CHILD MIGRATION BY THE NUMBERS (June 2014), available at <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC%20Immigration%20Task%20Force%20-%20Child%20Migration%20by%20the%20Numbers%20June%202014.pdf> [hereinafter CHILD MIGRATION BY THE NUMBERS].

23. 6 U.S.C. § 279(g)(2) (originally the Trafficking Victims Protection Act (TVPA) of 2000).

24. ABA COMMISSION ON IMMIGRATION, CENTRAL AMERICAN CHILDREN IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW 2 (2014), available at <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACIntroOct2014.authcheckdam.pdf> [hereinafter UAC REMOVAL OVERVIEW].

The reasons for the sharp increase in UAC arrivals are complex, but certain “push” and “pull” factors have been identified as catalysts.²⁵ The “push” factors originate in the home countries of the UAC and include gangs, cartels, domestic violence, endemic poverty, insecurity, impunity, and corruption.²⁶ “Pull” factors, incentives within the United States, include employment, reunification with family, and education.²⁷

Recently, there have been a greater number of UAC from Central America than from Mexico.²⁸ In the first eight months of 2014, 75% of the UAC came from Honduras, Guatemala, and El Salvador.²⁹ These three countries have among the highest poverty and homicide rates in the world.³⁰ In Honduras, for example, the poverty rate is 62-67% and on average, eighty-eight people per month are murdered, which is the highest homicide rate in the world.³¹

Behind the children crossing the border are stories that relate to violence, poverty, oppression, and such deep hopelessness that they are willing to risk their lives in the hope of a better life. The collateral risk they face is an encounter with the United States immigration system. This risk might appear to be mitigated with the perception of more lenient policies on aliens that enter the country as children.³² Smugglers spread stories about Deferred Action of Childhood Arrivals (DACA) or other programs for leniency, which may encourage more UAC to make the trip.³³ The tales of leniency offer false hope for many UAC. Recently arrived UAC are not eligible for deportation relief under DACA because the program requires continuous residency for five years in the United States between 2007 and 2012.³⁴ Additionally, the Obama administration’s reform plan does not readily account for the recently arrived UAC.³⁵ Furthermore, the promises regarding jobs, freedom from crime, and education are not available to all UAC.

25. Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATIONPOLICY.ORG (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

26. UAC REMOVAL OVERVIEW, *supra* note 24, at 5.

27. *Id.*

28. CHILD MIGRATION BY THE NUMBERS, *supra* note 22, at 2.

29. WILLIAM A. KANDEL, ET. AL., UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 3 (2014), available at <http://fas.org/sgp/crs/homesecc/R43628.pdf>.

30. *Id.* at 7-8. The poverty rate is 45% in El Salvador, 55% in Guatemala, and 67% in Honduras. *Id.* at 7.

31. *Id.*; see also UAC REMOVAL OVERVIEW, *supra* note 24, at 6 (as reported by *Casa Alianza*, showing a 62% poverty rate in Honduras).

32. KANDEL, *supra* note 29, at 17.

33. *Id.*

34. Alex Nowrasteh, *DACA Did Not Cause the Surge in Unaccompanied Children*, CATO (July 29, 2014), <http://www.cato.org/blog/daca-did-not-cause-surge-unaccompanied-children>.

35. Michael D. Shear et al., *Obama Plan May Allow Millions of Immigrants to Stay and Work in U.S.*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/us/obama-immigration.html?emc=edit_na_20141113&nliid=59871991&_r=0.

Conservative immigration reform advocates are concerned with expediting the immigration deportation proceedings for the UAC.³⁶ Under the TVPRA, UAC from the contiguous countries (Mexico and Canada) are subject to an expedited removal process and can be returned almost immediately after “a cursory screening by a uniformed Border Patrol agent.”³⁷ For children from other countries, the Trafficking Act’s provisions provide that the UAC must be placed in formal removal proceedings to appear before an immigration judge and have the opportunity to apply for relief.³⁸ Multiple conservative legislators have proposed that the provisions permitting expedited returns for UAC by Border Patrol should be extended to children from other countries as well.³⁹ The American Bar Association Commission for Integration, advocating for humanitarian treatment in the UAC crisis, has expressed that permitting returns without adequate process for more children would violate long-standing ABA policies.⁴⁰

For the UAC that have been permitted to stay, about ninety percent are reunited with family members in the country as they await deportation proceedings.⁴¹ However, this is nowhere near the end of the journey for the UAC. News reports reveal that many recently arrived UAC are being denied access to schools.⁴² Despite legal guidance to the contrary, local schools and school boards have imposed registration requirements that UAC cannot fulfill in order to attend school.⁴³ Although many rights afforded to illegal immigrants in criminal proceedings are not available to protect UAC in immigration proceedings,⁴⁴ the Supreme Court has consistently upheld the right to an education for legal and illegal alien children.⁴⁵ In *Plyler v. Doe*, the Supreme Court did not recognize a fundamental right to a public education or apply a heightened judicial scrutiny to classifications affecting

36. Lazaro Zamora, *Unaccompanied Alien Children: A Primer*, BIPARTISAN POLICY (July 21, 2014), <http://bipartisanpolicy.org/blog/immigration/2014/07/21/unaccompanied-alien-children-primer>.

37. AMERICAN BAR ASS’N (ABA) COMMISSION ON INTEGRATION, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED ALIEN CHILDREN AT THE SOUTHWEST BORDER 2 (2014), available at <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf> [hereinafter ABA CALL TO ACTION].

38. *Id.*

39. Zamora, *supra* note 36.

40. ABA CALL TO ACTION, *supra* note 37, at 2.

41. UAC REMOVAL OVERVIEW, *supra* note 24, at 15.

42. Benjamin Mueller, *Requirements Keep Young Immigrants Out of Long Island Classrooms*, N.Y. TIMES (Oct. 21, 2014), <http://nyti.ms/ZEFubE>.

43. Julia Preston, *District Told Not to Deny Students Over Immigration*, N.Y. TIMES (May 8, 2014), <http://nyti.ms/1jFEh2x>.

44. Compare Press Release, Dep’t of Justice, Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors (June 6, 2014), available at <http://www.justice.gov/opa/pr/justice-department-and-cncs-announce-new-partnership-enhance-immigration-courts-and-provide>, with Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES (June 6, 2014), <http://nyti.ms/1pNa0Lq>, and Scott v. Illinois, 440 U.S. 367 (1979) (extending right to counsel for noncitizen facing incarceration).

45. *Plyler v. Doe*, 457 U.S. 202 (1982).

UACs.⁴⁶ Instead, the Court said that there was no rational basis for a state to treat UACs differently from citizens and legal alien children for purposes of providing a public education.⁴⁷ Nonetheless, there are risks to enrolling UAC children in schools, such as exposing those living in the shadows to deportation.⁴⁸ Also, state and local governments are unable or unwilling to provide for the surge of alien children enrollments, and citizens oppose allocating scarce resources to educate alien children.⁴⁹

Enforcing the established right of the children to attend school is especially important considering that their length of stay and ultimate disposition of removal proceedings is largely indeterminate. Despite a push from legislators, and policy changes to expedite the removal proceedings for the UAC, the reality is that there is a backlog of approximately 357,000 cases in the immigration courts.⁵⁰ Further, almost half of formal removal proceedings with the assistance of counsel do not result in deportation.⁵¹

If the children are to become an integral part of the future of the American economy and culture, what will they face in the future as they navigate through the U.S. immigration system? When will the legislature finally agree upon a comprehensive immigration reform bill? When will the executive branch effectively execute immigration policies which humanely prioritize prosecutorial decisions? Will noncitizens, including legal residents, ever gain real due process rights in this country? Even if the UAC gain legal residency status, their socioeconomic circumstances often place them at a greater risk of facing the injustices in the immigration system again as adults.⁵² Although President Obama's recent executive order to provide "amnesty" and, ultimately, it is hoped a "pathway to citizenship" for children and families who have lived responsibly in the United States for a period of years, critics of his plan claim that these questions have not yet been answered.⁵³

46. *Id.* at 223.

47. *Id.* at 226.

48. *Id.*

49. Mueller, *supra* note 42.

50. BIPARTISAN POLICY CENTER IMMIGRATION TASK FORCE, ISSUE BRIEF: INTERIOR IMMIGRATION ENFORCEMENT BY THE NUMBERS 10 (2014), available at <http://bipartisanpolicy.org/library/research/interior-immigration-enforcement-numbers> [hereinafter INTERIOR IMMIGRATION ENFORCEMENT BY THE NUMBERS].

51. *Id.* at 4-5. The increase in the number of immigration proceedings that do not result in deportation is partly attributed to an increase in representation by counsel for noncitizens. *Id.* at 4. "Meanwhile, the share of immigrants with legal representation increased rapidly between 2006 and 2012, from 35 percent to 56 percent." *Id.* at 10.

52. Bill Ong Hing, *Re-examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL'Y REV. 141, 170 (2014).

53. Penny Starr, *Latino Leaders: Obama's Executive Order Doesn't Solve Immigration Problem*, CNS NEWS (Nov. 21, 2014 2:10 PM), <http://www.cnsnews.com/news/article/penny-starr/latino-leaders-obama-s-executive-order-doesn-t-solve-immigration-problem>.

III. FACTS AND ISSUES IN THE *MONCRIEFFE V. HOLDER* CASE

UACs are not the only group of immigrants that face inequality under U.S. laws. Illegal immigrants facing criminal charges, even for minor crimes, have found that the deportation consequences of their brush with the criminal justice system varies depending on the jurisdiction. Adrian Moncrieffe was only three years old when his family immigrated to the United States in 1984 from Jamaica.⁵⁴ Although Moncrieffe entered the country legally, he had never attained citizenship.⁵⁵ In 2007, Moncrieffe was arrested in Georgia for possession of the equivalent of two or three marijuana cigarettes.⁵⁶ Moncrieffe entered a guilty plea and was convicted under a Georgia statute for possession of marijuana with intent to distribute, a felony offense under state law.⁵⁷ He was sentenced to five years of probation and escaped incarceration because he was treated with leniency under Georgia's first-time offender statute, which is intended to promote rehabilitation.⁵⁸

The Immigration and Nationality Act (INA) provides that noncitizens convicted of certain crimes, including drug related crimes, are subject to deportation.⁵⁹ There is no distinction in the applicability of this INA provision to a long-term permanent resident like Moncrieffe, who had been in the United States over twenty years, and other noncitizen immigrants as ICE's policy is to focus on recidivist criminals for removal purposes.⁶⁰ However, a noncitizen may request discretionary relief from the Attorney General such as asylum or cancellation of removal in order to avoid deportation.⁶¹ The factors considered to decide whether discretionary relief should be granted include the length of stay in the United States, legal status, family relationships, level of education attained, and mental and physical health, among others.⁶² Discretionary relief is not available, however, to noncitizens that are convicted of specific crimes classified as aggravated felonies, which include drug trafficking crimes under the Controlled Substances Act (CSA).⁶³

54. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683 (2013).

55. *See id.*

56. *Id.*

57. *Id.*; GA. CODE ANN. § 16-13-30(j)(1) (2007).

58. *Moncrieffe v. Holder*, 133 S. Ct. at 1683.

59. Immigration and Nationality Act (INA), 66 Stat. 163, 8 U.S.C. § 1101, 1227(a)(2)(B), *et seq.*

60. INA, § 1227(a)(2)(B).

61. INA, §§ 1158, 1229(b).

62. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter *Morton Memorandum: Exercising Prosecutorial Discretion*]; *see also* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, Civil Immigration Enforcement: Guidance To The Use Of Detainer (Dec. 21, 2012), *available at* <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>.

63. INA, 8 U.S.C. § 1101(a)(43)(B).

The government argued that Moncrieffe's drug trafficking offense was an aggravated felony under the CSA because possession with intent to distribute is subject to punishment of up to five years of incarceration.⁶⁴ Moncrieffe argued that under § 841(b)(4), the CSA provides an exception which treats distributing a small amount of marijuana for no remuneration as a misdemeanor offense.⁶⁵ The immigration judge agreed that Moncrieffe's offense was an aggravated felony, and ordered his removal.⁶⁶ The order was affirmed on appeal with the Board of Immigration Appeals (BIA).⁶⁷

The issue addressed by the Supreme Court in *Moncrieffe* focused on what test to apply when determining whether an offense categorized as a felony under state, but not federal, law should trigger the consequences of mandatory deportation. The circuit courts of appeals have applied three different approaches: the categorical approach, the state felony approach, and the hypothetical federal felony approach.

IV. CATEGORICAL, STATE FELONY APPROACH, AND HYPOTHETICAL FEDERAL FELONY APPROACH

Prior to *Moncrieffe*, courts had been inconsistent in determining what constitutes an aggravated felony for deportation and immigration purposes.⁶⁸ The Supreme Court has held that "in order to be an 'aggravated felony' for immigration law purposes, a state drug conviction must be punishable as a felony under *federal* law."⁶⁹ The Third Circuit Court of Appeals reasoned that the determination of whether a crime is an aggravated felony should be based on federal law. "We believe that this conclusion properly reflects the policy favoring uniformity in construction of the INA because it subjects aliens to the same treatment regardless of how different states might categorize similar drug crimes."⁷⁰

In 2006, the Supreme Court adopted the categorical approach to determine whether a state crime constitutes an aggravated felony for immigration purposes.⁷¹ The categorical approach does not consider the subjective and personal singular circumstances of an individual petitioner's crimes and instead considers the objective minimum criminal conduct necessary to sustain a conviction under a given statute.⁷² The Court stated that the standard requires "look[ing] to the elements and the nature of the offense of

64. 21 U.S.C. § 841(b)(1)(D).

65. § 841(b)(4).

66. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683 (2013).

67. *Id.*

68. *See, e.g., Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).

69. *Id.* at 569 (citing *Lopez v. Gonzalez*, 549 U.S. 47, 56 (2006)) (emphasis in original).

70. *Gerbier v. Holmes*, 280 F.3d 297, 299 (3d Cir. 2002) (citing 21 U.S.C. § 802(13) (1999)).

71. *Lopez*, 549 U.S. 47; *Carachuri-Rosendo*, 560 U.S. 563 (reaffirming the categorical approach).

72. *Martinez v. Mukasey*, 551 F.3d 113, 118 (2d Cir. 2008) (citing *Gertsenshteyn v. Mukasey*, 544 F.3d 137, 143 (2d Cir. 2008)).

conviction, rather than to the particular facts relating to petitioner's crime."⁷³ In adopting this approach, the Supreme Court instructed that these objective elements should be used to determine "if [the crime were] prosecuted pursuant to federal criminal law, would [it] necessarily be punishable as a felony."⁷⁴ The Supreme Court reaffirmed this approach in 2010.⁷⁵ The Court eliminated the possibility of additional conjecture while making a determination, as the hypothetical federal felony approach allows, and found that simple drug possession does not rise to the level of an aggravated felony.⁷⁶

Despite the United States Supreme Court's adoption of the categorical approach, courts have not applied this approach consistently. Some courts have interpreted the INA aggravated felony provision differently, creating the state felony approach and the hypothetical felony approach.

Under the state felony approach, multiple courts conclude that if a drug crime is punishable as a felony under state law, it qualifies as an aggravated felony even if it is only a misdemeanor under federal criminal law.⁷⁷ The explanation given for this interpretation is based on the language of the provision of the federal criminal statute describing penalties,⁷⁸ which states that the offense must be punishable as a felony under the CSA.⁷⁹ This interpretation is applied by those courts that follow the state felony approach. Further, the CSA defines a felony to be "any Federal or State offense classified by applicable Federal or State law as a felony."⁸⁰ Thus, under the state felony approach, misdemeanor crimes under federal law could be considered an aggravated felony and require mandatory deportation.

The other alternative approach is the hypothetical federal felony approach. This hypothetical approach states that "if the *conduct proscribed by [the] state* offense could have been prosecuted as a felony" then the Defendant's conviction qualifies as an aggravated felony.⁸¹ Previously, the Fifth Circuit Court of Appeals incorrectly interpreted the United States Supreme Court's opinion in *Lopez*⁸² as adopting the hypothetical felony approach.⁸³ The Third Circuit also adopted this approach prior to the 2006 and 2010 United States

73. *Id.* at 118 (quoting *Dulal-Whiteway v. DHS*, 501 F.3d 116, 121 (2d Cir. 2007)).

74. *Id.* at 120 (citing *Lopez*, 549 U.S. 47).

75. *Carachuri-Rosendo*, 560 U.S. 563.

76. *Id.*

77. *See United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999), *abrogated by Lopez*, 549 U.S. 47; *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), *abrogated by Lopez*, 549 U.S. 47.

78. 18 U.S.C. § 924(c)(2).

79. *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), *abrogated by Lopez*, 549 U.S. 47.

80. *Gerbier v. Holmes*, 280 F.3d 297, 307 (3d Cir. 2002) (citing 21 U.S.C. § 802(13) (1999)).

81. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009), *rev'd by Carachuri-Rosendo*, 560 U.S. 563.

82. *Lopez*, 549 U.S. 47. The Supreme Court held in *Lopez* that a "conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is [not] a 'felony punishable about the Controlled Substance Act.'" *Id.*

83. *Carachuri-Rosendo*, 570 F.3d at 267.

Supreme Court holdings.⁸⁴ This approach differs from that of the categorical approach in that the court looks to the actual conduct of the Defendant in addition to the state statute under which the Defendant was convicted.⁸⁵

Ultimately, the Supreme Court in *Moncrieffe* utilized the categorical approach to determine whether the drug crime of which the defendant was convicted constituted a felony under federal law.⁸⁶ The Court stated:

Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.⁸⁷

The Court in *Moncrieffe* reiterated the use of the categorical approach.⁸⁸ Also, the Court in *Moncrieffe* reaffirmed the use of a modified categorical approach, which requires determining whether the state statute has divisible elements that may be excluded from the generic definition.⁸⁹ In Moncrieffe's case, "possession with intent to distribute" was the applicable portion of the Georgia statute.⁹⁰ The latter portion of the statute considers the issue of trafficking to determine whether the crime constitutes an aggravated felony.⁹¹ The Court, in its decision, stated that "[s]haring a small amount of marijuana for no remuneration, let alone possession with intent to do so, 'does not fit easily into the 'everyday understanding' of 'trafficking,' which 'ordinarily . . . means some sort of commercial dealing.'"⁹²

In Moncrieffe's case, the Court stated that to constitute drug trafficking, it must be established that the "offense involved either remuneration or more than a small amount of marijuana."⁹³ Thus, remuneration of a small amount of marijuana is still considered trafficking, and possession with intent to distribute is still trafficking if a large amount of marijuana is involved.⁹⁴ This new definition for immigration law purposes abrogates past precedent.

84. *Gerbier*, 280 F.3d at 307.

85. *See id.* at 315.

86. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1686-87 (2013).

87. *Id.*

88. *Id.* at 1684.

89. *Id.*

90. The Georgia statute also makes it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." GA. CODE ANN. § 16-13-30(j)(1) (2007).

91. GA. CODE ANN. § 16-13-30.

92. *Id.* at 1693. (citing *Carachuri-Rosendo*, 560 U.S. 563, 574 (2010)) (quoting *Lopez v. Gonzalez*, 549 U.S. 47, 53 (2006)) (also finding that a noncitizen must be convicted under a recidivist state statute in order to be considered to have committed an aggravated felony).

93. *Moncrieffe*, 133 S. Ct. at 1693-94.

94. KATHERINE BRADY, MONCRIEFFE AND OLIVAS-MOTTA: FOURTEEN CRIM/IMM DEFENSES IN THE NINTH CIRCUIT 5 (2013), available at http://www.ilrc.org/files/documents/moncrieffe_ninth_cir_defenses_final_5.28.pdf. In other sections of the INA, thirty grams is considered a "small" amount of marijuana. *Id.* at 8.

In *Garcia v. Holder*, the Sixth Circuit found that an immigrant's drug charge reached the federal felony threshold because the state law did not provide for a commercial transaction requirement and thus the intent to distribute sufficed.⁹⁵ Further, the court stated, "[a]lthough the precise amount of marijuana involved in Garcia's case is unknown, the attempt to possess with the intent to deliver any amount of marijuana less than 50 kilograms is punishable by up to five years in prison."⁹⁶ Similarly, the First Circuit dismissed the immigrant's argument that "the government failed to put forth enough facts from the record of conviction to prove that his conviction involved more than a 'small amount' of marijuana and that he intended to distribute it for remuneration."⁹⁷

The approach adopted by the Court in *Moncrieffe* is a convoluted standard and may result in disparate outcomes for noncitizens convicted of the same crime in different states, based on the specific phrasing of each state statute.⁹⁸ Since the categorical approach looks only to the generic definition of the crime, and not the individual's actual conduct, noncitizens found guilty of the minimum proscribed conduct in a state statute will likely be penalized the same as noncitizens guilty of the maximum proscribed conduct under the INA.⁹⁹ This is particularly troublesome when considered with the movement for legalizing marijuana in many states. There will be a great disparity in the immigration penalties for persons engaged in the same conduct considering that recreational and medical possession of marijuana is legalized in some states but prohibited in others.¹⁰⁰ The fundamental unfairness of the categorical approach due to the divergence of state laws also raises federalism questions for noncitizens subject to the harsh penalties of mandatory removal. Although Attorney General Holder announced that the Justice Department would no longer prosecute minor marijuana cases under the CSA, a new administration may reverse this prosecutorial discretion.¹⁰¹ The fear by noncitizens of non-reviewable deportation for minor marijuana offenses will

95. *Garcia v. Holder*, 638 F.3d 511, 516 (6th Cir. 2011) (citing 21 U.S.C. § 841(b)(1)(D)), *abrogated by Moncrieffe*, 133 S. Ct. 1678.

96. *Id.*

97. *Julee v. Mukasey*, 530 F.3d 30, 34 (1st Cir. 2008), *abrogated by Moncrieffe*, 133 S. Ct. 1678.

98. *Moncrieffe*, 133 S. Ct. at 1693, n.11. "Justice Alito's dissent suggests that he disagrees with the first premises of the categorical approach. He says it is a "strange and disruptive resul[t]" that "defendants convicted in different States for committing the same criminal conduct" might suffer different collateral consequences depending upon how those States define their statutes of conviction. Yet that is the longstanding, natural result of the categorical approach." *Id.* (internal citations omitted).

99. *Id.*

100. As of October 2014, "[t]wenty-one states and the District of Columbia currently have laws legalizing marijuana in some form. So far, only Colorado and Washington state have legalized marijuana for recreational use, while other states permit medical marijuana." *State Marijuana Laws Map*, GOVERNING.COM, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Oct. 22, 2014).

101. Eric Perez, *No Federal Challenge to Pot Legalization in Two States*, CNN (Aug. 30, 2013, 6:36 AM), <http://www.cnn.com/2013/08/29/politics/holder-marijuana-laws/>. However, Attorney General Holder does reserve the right to prosecute at a later date. *Id.*

persist unless Congress amends the CSA with regard to the classification of marijuana and the statutory penalties involving marijuana possession.¹⁰²

Nonetheless, some immigration law practitioners see an upside to the *Moncrieffe* decision in the sense that the convoluted standard can likely be used to remove the aggravated felony classification of some state statutes.¹⁰³ The Court acknowledged the probability that “[some] offenders may avoid aggravated felony status by operation of the categorical approach,” but stated it preferred this degree of imperfection to the burden that would be imposed by re-litigating cases for immigration purposes under the other approaches.¹⁰⁴ In fact, the Eleventh Circuit has applied *Moncrieffe*’s categorical approach to conclude that a conviction under Florida’s statute prohibiting the possession and distribution of marijuana cannot be qualified as an aggravated felony.¹⁰⁵ At least fourteen other state statutes relating to marijuana offenses have been identified that may no longer be considered aggravated felonies under the categorical approach.¹⁰⁶ Thus, the imperfection of the *Moncrieffe* approach will, in some instances, provide the possibility of discretionary relief from deportation for noncitizens.¹⁰⁷

V. REMOVAL AND DEPORTATION UNDER THE IMMIGRATION AND NATIONALITY ACT (INA)

The issues surrounding immigration extend beyond the courtroom and criminal activity. The humanitarian crisis of the influx of unaccompanied children at the border has placed a spotlight on the flaws and injustices of the U.S. immigration system.¹⁰⁸ Furthermore, the detention centers overflowing with noncitizens awaiting deportation raise more humanitarian concerns.¹⁰⁹

102. President Obama’s November 20th address regarding immigration specifically spoke about the continued deportation of criminals. It is not clear if the definition of crimes will be expanded or contracted as a result of the new executive action plan. *Obama’s November 20th Speech*, *supra* note *.

103. Practice Advisory, Manny Vargas, et. al., *Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach* (May 2, 2014), available at <http://immigrantdefenseproject.org/wp-content/uploads/2013/05/Moncrieffe-PA-5-1-13-FINAL.pdf>.

104. *Id.* (quoting *Moncrieffe*, 133 S. Ct. at 1693-94).

105. “Under the categorical approach, it is clear that the ‘least of the acts criminalized’ by Fla. Stat. § 893.13(1)(a)(2) does not necessarily violate 21 U.S.C. § 841(a)(1).” *Donawa v. United States Attorney General*, 735 F.3d 1275, 1281 (11th Cir. 2013).

106. Vargas, *supra* note 103, at 16.

107. *Moncrieffe* may also provide practitioners with additional arguments relating to overbroad and ambiguous state statutes, affirming the rule of lenity in favor of noncitizens. The Court concluded that the approach under *Moncrieffe* would “err on the side of underinclusiveness” and that “ambiguity in criminal statutes referenced by the INA must be construed in the noncitizens’ favor.” *Id.* at 14-15.

108. Fausset, *supra* note 14.

109. High detainee population density areas, like California, the Mid-Atlantic and Northeast states experience a shortage of space to hold detainees. DR. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>. Further, Congress set a highly disputed quota in the budget appropriations, which mandates that 34,000 noncitizens must be held in ICE detention centers on a daily basis. An internal review revealed that only about 11% of detainees have committed crimes involving violence, which seriously calls into question the legitimacy of a mandate to spend \$1.5 billion annually of taxpayer funds on detention centers. See Memorandum from John Roth, DHS Office of

These problems combined have created a heated political climate regarding the immigration reform debate. A major measure gauging the efficacy and flaws in the immigration system is the annual number of deportations.¹¹⁰ Humanitarian objectives to provide assistance to immigrants fleeing violence and seeking family reunification are undermined by policies resulting in a greater number of deportations for long-term residents.

The failure of the Obama administration to establish comprehensive immigration reform, despite his campaign promises, has generated great criticism.¹¹¹ President Obama's immigration policies face serious disparagement from both progressive and conservative groups.¹¹² Major news sources have reported that President Obama is deporting people in unprecedented record numbers, illustrating that in addition to the failure to enact reforms, the plight of noncitizens has been exacerbated.¹¹³ On the other hand, "restrictionists" and other critics believe that President Obama is inflating the deportation numbers to show that he is tough on immigration in order to garner support for his promise to reform immigration and to reunite families.¹¹⁴

There are several types of deportations and multiple ways that noncitizens can be expelled from the United States.¹¹⁵ They are mainly categorized into two groups, removals and returns.¹¹⁶ Removals occur when noncitizens are expelled from the country after being processed in one of the methods resulting in an official order of removal.¹¹⁷ Returns are expulsions from the country without an order, which often do not process the individual in a manner that requires personal information, fingerprints, purpose for entry, or marks personal immigration records.¹¹⁸ Compounding the confusion, removal is now considered the appropriate terminology for deportation but is

the Inspector General, to the Honorable Thomas S. Winkowski, Principal Deputy Assistant Secretary, U.S. Immigration and Customs Enforcement 7 n.3 (Aug. 7, 2014), *available at* http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

110. *See, e.g.*, Thompson, *supra* note 2; Barack Obama, *Deporter-in-Chief*, *supra* note 8.

111. *Id.*

112. Nora Caplan-Bricker, *Who's the Real Deporter-In-Chief: Bush or Obama?*, NEW REPUBLIC (April 17, 2014), <http://www.newrepublic.com/article/117412/deportations-under-obama-vs-bush-who-deported-more-immigrants>.

113. *See* Thompson, *supra* note 2; Mr. Boehner's weak immigration excuses, WASH. POST (Feb. 8, 2014), http://www.washingtonpost.com/opinions/mr-boehners-weak-immigration-excuses/2014/02/08/06ac75fe-904a-11e3-b227-12a45d109e03_story.html; *see also* Barack Obama, *Deporter-in-Chief*, *supra* note 8.

114. Skrentny, *supra* note 2, at 68-69 (characterizing "restrictionists" as those who "oppose large-scale immigration and undocumented immigration."); Andrew Stiles, *Obama Administration Inflating Deportation Numbers*, NATIONAL REVIEW (Feb. 10, 2014), <http://www.nationalreview.com/article/370784/obama-administration-inflating-deportation-numbers-andrew-stiles> ("Misleading classifications make it look like traditional deportations are up. They're not.").

115. Caplan-Bricker, *supra* note 112.

116. *Id.*; U.S. Department of Homeland Security, Yearbook of Immigration Statistics: 2013 Enforcement Actions, Aliens Removed Or Returned: Fiscal Years 1892 To 2013, last published date Oct. 1, 2014, table 39, *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions> (Source(s): U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM); January 2014, Enforcement Integrated Database (EID), November 2013.).

117. *Id.*

118. *Id.*; Caplan-Bricker, *supra* note 112.

still defined as limited to formal removals.¹¹⁹ Additionally, regarding the statistics is the fact that the statistical methodology has changed over the years, and ICE reports a different set of data than the Department of Homeland Security (DHS) and the Office of Immigration Statistics (OIS). In 2013, ICE reported 368,644 removals while the OIS reported approximately 438,000 removals.¹²⁰

<i>Clinton Administration</i>			
Year	Removals	Returns	Total
1993	42,542	1,243,410	1,285,952
1994	45,674	1,029,107	1,074,781
1995	50,924	1,313,764	1,364,688
1996	69,680	1,573,428	1,643,108
1997	114,432	1,440,684	1,555,116
1998	174,813	1,570,127	1,744,940
1999	183,114	1,574,863	1,757,977
2000	188,467	1,675,876	1,864,343

<i>Bush Administration</i>			
Year	Removals	Returns	Total
2001	189,026	1,349,371	1,538,397
2002	165,168	1,012,116	1,177,284
2003	211,098	945,294	1,156,392
2004	240,665	1,166,576	1,407,241
2005	246,431	1,096,920	1,343,351
2006	280,974	1,043,381	1,324,355
2007	319,382	891,390	1,210,772
2008	359,795	811,263	1,171,058

Removals are the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry owing to the fact of the removal.

Returns are the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

<i>Obama Administration</i>			
Year	Removals	Returns	Total
2009	391,597	582,624	974,221
2010	382,265	474,233	856,498
2011	387,134	322,124	709,258
2012	418,397	230,386	648,783
2013	438,421	178,371	616,792

Figure 1. Total Number of Noncitizens Expelled from United States, 1993-2013. Data Source: DHS, Office of Immigration Statistics (OIS); ENFORCE Alien Removal Module (EARM), Jan. 2014, Enforcement Integrated Database (EID), Nov. 2013.

As seen in Figure 1,¹²¹ under the Obama administration, the number of annual removals has been greater; however, under the Bush administration

119. U.S. Citizenship and Immigration Services, *Deportation*, USCIS.GOV, <http://www.uscis.gov/tools/glossary/deportation>.

120. The deportation statistics under Obama count some apprehensions by the Customs and Border Patrol as removals, which were previously counted as returns. *Compare ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS 1* (2013), with JOHN F. SIMANSKI, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 1 (2014), available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf; see also Stephen Dinan, *Deportations come mostly from border, DHS chief says*, WASH. POST (Mar. 12, 2014), <http://www.washingtontimes.com/news/2014/mar/12/deportations-come-mostly-from-border-dhs-chief-say/?page=all>.

121. DHS OFFICE OF IMMIGRATION STATISTICS, ALIENS REMOVED OR RETURNED: FYs 1892 TO 2013, available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions> (compiled directly from OIS data) [hereinafter Figure 1].

there was a greater total number of combined removals and returns.¹²² Further, a look back at the Clinton administration reveals the greatest number of total expulsions of noncitizens from the country.¹²³ Currently, the DHS definition of deportations only includes formal removals.¹²⁴ Thus, it is accurate and not inconsistent to state that the greatest number of annual deportations has occurred under President Obama, and that the number of noncitizens expelled from the country during each of the previous administrations has been greater. What these numbers illustrate is that the relevant issue in the debate on immigration reform is not how many people have been deported, but what types of deportations have occurred and why.¹²⁵

Several notable distinctions have been made regarding the shift in the types of deportations occurring under the Obama administration. Interior deportations of noncitizens residing in the country are distinguished from deportations that occur at the border or shortly after entry into the country.¹²⁶ Since 2008, the first year this category of statistics was reported, there has been a decrease in interior removals relative to the total number of removals.¹²⁷ The most salient difference in the types of deportations under the Obama administration, however, is the drastic increase in the number of criminal conviction removals.

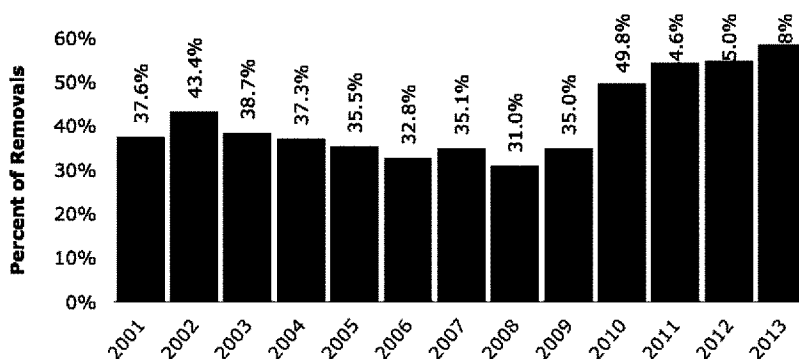


Figure 2. Percent of Removals with Criminal Convictions, FY2001-FY2013. Data Source: Graph by Bipartisan Policy Center, Immigration Task Force from ICE criminal removal statistics.

122. *Id.*

123. *Id.*

124. DHS, *Publications, Definition of Terms* (July 24, 2012), <http://www.dhs.gov/definition-terms#3> (“Deportation—The formal removal of an alien from the United States when the alien has been found removable for violating the immigration laws. Deportation is ordered by an immigration judge without any punishment being imposed or contemplated.”).

125. See Caplan-Bricker, *supra* note 112.

126. INTERIOR IMMIGRATION ENFORCEMENT BY THE NUMBERS, *supra* note 50, at 1.

127. *Id.*

As seen in Figure 2,¹²⁸ from 2008 to 2013, the amount of deportations due to criminal convictions has increased from 31% to 59%.¹²⁹ The increase in criminal deportations is largely attributed to the discretionary prosecution policies that have been executed by the Obama administration.¹³⁰ The policy directive that INS field officers prioritize deportations subsequent to criminal convictions highlights the importance of the judicial construction of the INS regulations and the rights of noncitizens under the Constitution.

Immigration proceedings are characterized as civil and thus can deny certain constitutional rights to noncitizens. The characterization of immigration proceedings as civil began in 1898 in *Fong Yue Ting v. United States*.¹³¹ The *Fong Yue Ting* case and following affirmations have permitted or facilitated the denial of most constitutional rights for noncitizens in immigration proceedings because they uphold the premise that “[t]he order of deportation is not a punishment for crime.”¹³² The rights that noncitizens may assert in deportation proceedings trace back to a 1903 Supreme Court case holding that aliens in the United States have rights under the Due Process Clause.¹³³ However, by characterizing deportation proceedings as regulatory, rather than punitive, the due process rights afforded in this context are limited.¹³⁴

Despite the severe consequences, due process rights in immigration proceedings do not include the Sixth Amendment right to counsel.¹³⁵ Some practitioners and immigration reform advocates are hopeful that more recent Supreme Court decisions have the potential to ameliorate the harsh consequences of not recognizing the right to representation for noncitizens in immigration proceedings.¹³⁶ In *Padilla v. Kentucky*, the Supreme Court acknowledged that for noncitizens the possibility of deportation is an integral, and often the most important, part of criminal proceedings.¹³⁷ The Court in *Padilla* held that noncitizens have the right to effective assistance of

128. *Id.* at 5.

129. *Id.* at 5 n.5.

130. See Morton Memorandum: *Exercising Prosecutorial Discretion*, *supra* note 62.

131. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); John Kanstroom, *United States Immigration Policy At The Millennium Deportation, Social Control, And Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1894 (2000).

132. *Fong Yue Ting*, 149 U.S. at 730.

133. *Yamataya v. Fisher*, 189 U.S. 86 (1903).

134. Kanstroom, *supra* note 131, at 1894.

135. Lucas Guttentag and Ahilan Arulanantham, *Extending The Promise Of Gideon: Immigration, Deportation, And The Right To Counsel*, 39 A.B.A. HUM. RTS. 14, 14 (2013). Although the immigration statutes permit removable noncitizens representations by counsel, the statutes also expressly state that counsel must come at “no expense to the government.” *Id.* (quoting 8 U.S.C. § 1362 (2012)). The result is that only about half of noncitizens are able to obtain lawyers for their immigration proceedings. *Id.*

136. See, e.g., Daniel Kanstroom, *Criminal Law and Immigration Law: Defining the Outsider: I. Padilla v. Kentucky: The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1463 (2011).

137. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

counsel regarding the immigration consequences of a criminal conviction.¹³⁸ Although this is a far cry from incorporating the holding in *Gideon v. Wainwright*¹³⁹ to immigration proceedings, the holding in *Padilla* clearly recognizes that deportation is not merely a civil matter.¹⁴⁰

The recent crisis regarding the influx of unaccompanied children at the border has placed the right to counsel for children in their deportation proceedings at issue. In June 2014, the federal government allocated \$2 million for a special program to provide some of the children with legal counsel.¹⁴¹ Nonetheless, the majority of the children have not had counsel at their deportation proceedings.¹⁴² In July 2014, in *J.E.F.M. v. Holder*, eight noncitizen children filed suit against the federal government in the Western District of Washington in order to obtain legal counsel at their deportation proceedings and to seek class certification for other similarly situated UAC.¹⁴³

Ten-year old plaintiff J.E.F.M. and his siblings fled gang violence in El Salvador and are unable to obtain counsel for their deportation proceeding in Seattle.¹⁴⁴ Their father was a former gang member who converted to Christianity, became a pastor, and started a rehabilitation center for former youth gang members.¹⁴⁵ The gangs retaliated against J.E.F.M.'s father and murdered him in front of the family's home with the children watching.¹⁴⁶ Considering J.E.F.M.'s situation, he may be able to raise certain defenses at his removal proceeding. It is unlikely, however, that the ten-year old would be able to navigate the complex procedural immigration system without counsel, especially when facing an experienced ICE prosecutor. J.E.F.M. and the other children in similar situations have the burden of demonstrating the need for asylum or other affirmative defenses and must do so without the resources to obtain counsel.¹⁴⁷ Furthermore, most UAC will also face a

138. *Id.* at 373.

139. The United States Supreme Court held that "the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions.'" 372 U.S. 335 (1963).

140. Kanstroom, *supra* note 131, at 1499.

141. Press Release, Dep't of Justice, Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors (June 6, 2014), *available at* <http://www.justice.gov/opa/pr/justice-department-and-cnscs-announce-new-partnership-enhance-immigration-courts-and-provide>; Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES (June 6, 2014), <http://nyti.ms/1pNa0Lq>.

142. Semple, *supra* note 141.

143. Amended Class Action Complaint at 22, *J.E.F.M. v. Holder*, No. 2:14-cv-01026-TSZ (W.D. Wash. Sept. 3, 2014). The complaint alleges violation of the Due Process Clause and several INA statutes and regulations. *Id.* ("The INA and immigration regulations require that all persons in removal proceedings have 'a reasonable opportunity' to present, examine, and object to evidence. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4). In addition, all persons in removal proceedings, whatever their age, have the right to be advised of the charges against them, 8 U.S.C. § 1229(a)(1)(D); 8 C.F.R. § 239.1, and 'the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing.' 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. §§ 238.1(b)(2), 1240.10(a)(1).").

144. *Id.* at 16.

145. *Id.*

146. *Id.*

147. *Id.* at 10.

language barrier, and some have other disabilities.¹⁴⁸

In the criminal context, although due process requires legal representation for noncitizens, the fear of deportation for these noncitizens is not mitigated by providing the right to counsel.¹⁴⁹ When it comes to the impact of convictions for drug-based and other minor crimes, the distinction, or lack of distinction, between legal residents and noncitizens that entered the country illegally is one of the most problematic legal aspects of mandatory deportation.¹⁵⁰ The effect of deportation on legal permanent residents can be the most devastating because they are more likely to have established ties in the country, as they are likely working or studying, and in many instances arrived in the United States in childhood and have formed families.¹⁵¹ The INA statutes and policies regarding prosecutorial discretion permit the Attorney General to consider cancellation of removal for deportable aliens, which could include consideration of the legal status of the noncitizen. While prosecutorial discretion includes the ability to cancel removal proceedings when certain rehabilitative factors are shown, when the noncitizen is convicted of an aggravated felony, those factors mean nothing.

Since the 1986 Immigration Reform and Control Act (IRCA), Congress has not been able to agree on a major reform bill despite multiple proposals and a great impetus from groups around the nation.¹⁵² Some of the subsequent amendments to the INA, like the 1990 Violent Crime Control and Law Enforcement Act (VCCLEA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), have increased the number of crimes that are considered aggravated felonies and decreased the prosecutorial discretion of the Attorney General as well as the judicial discretion of immigration judges and the BIA.¹⁵³ The number of annual deportations is attributed to both the budget Congress allocates for executing the INA and the specific policies of the President's administration.

The role of the executive branch in immigration matters has come under great scrutiny with the assertions that President Obama has exceeded the

148. *Id.*

149. U.S. CONST. amend. XIV ("nor shall any state deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.") (emphasis added); see also *Scott v. Illinois*, 440 U.S. 367 (1979) (extending right to counsel for noncitizen facing incarceration).

150. Wilder A. Barillas, *Collateral Damage: Drug Enforcement & Its Impact On the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & Soc. JUST. 1, 10 (2014).

151. See *id.* at 18-19.

152. Muzaffar Chishti, *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POLICY INSTITUTE (Nov. 16, 2011), <http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives>. There have been multiple additional amendments to the INA, including the Illegal Immigration Reform and Immigrant Responsibility Act (IIRICA) in 1996, but none as far reaching as the IRCA. *Id.*; see also MIGRATION POLICY INSTITUTE, *KEY IMMIGRATION LAWS AND POLICY DEVELOPMENTS SINCE 1986* (2013), available at <http://www.migrationpolicy.org/sites/default/files/publications/CIR-1986Timeline.pdf>.

153. *Id.*

bounds of his executive power in immigration matters.¹⁵⁴ The allegation that President Obama violated the separation of powers doctrine has only intensified. Days after President Obama's immigration speech, Congressman Boehner announced his plan to sue President Obama for exceeding his executive powers.¹⁵⁵ While the latest lawsuit involves executive action delaying some provisions of the Affordable Care Act,¹⁵⁶ it is only a matter of time until the immigration plan will be judicially challenged.

In 2012, ICE officials formally filed suit against DHS alleging that the directives for prosecutorial discretion under DACA and operational instructions from ICE Director John Morton¹⁵⁷ forced them to violate the INA statutes.¹⁵⁸ The case was ultimately dismissed in July 2013, with the court stating that while the ICE officials had a strong case on the merits, the court lacked subject matter jurisdiction to hear the case.¹⁵⁹ In July 2014, the House voted to file suit against President Obama claiming that he exceeded his presidential power in issuing his executive orders on immigration policies as well as on health care and climate change.¹⁶⁰ It is anticipated the lawsuit will be dismissed based on the political question prudential standing rule.¹⁶¹ These conflicts reveal the discord between the branches of the government that continue to impede the development of more humane and effective methods of immigration enforcement and reform.¹⁶²

The policies implemented by the Obama administration through executive orders are one layer of the current immigration system, and the judicial interpretations of the INA are another. Whether or not Congress chooses to enact legislative changes, it also establishes pragmatic parameters for the functioning of the immigration system by setting the annual budget for

154. *Crane v. Napolitano—Why has the Obama Administration not Rescinded the Unconstitutional DACA Program?*, IMMIGRATION REFORM LAW INSTITUTE (Aug. 5, 2013), <http://irli.org/crane-v-napolitano-why-has-the-obama-administration-not-rescinded-the-unconstitutional-daca-program/>.

155. Alan Fram, *House GOP Brings Lawsuit Against Obama*, THE BOSTON GLOBE (Nov. 22, 2014) <http://www.bostonglobe.com/news/nation/2014/11/22/house-gop-sues-obama-administration-health-law/mwrwalo3zhcoUK3BXSGZAP/story.html>.

156. *Id.*

157. *Morton Memorandum: Exercising Prosecutorial Discretion*, *supra* note 62.

158. *Id.*; *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660 (N.D. Tex. July 31, 2013).

159. *Crane*, No. 3:12-cv-03247-O, at *4.

160. Paul Kane & Zachary A. Goldfarb, *House clears way for lawsuit against Obama*, WASH. POST (July 20, 2014), http://www.washingtonpost.com/politics/house-clears-way-for-lawsuit-against-obama/2014/07/30/7436aca6-1809-11e4-9349-84d4a85be981_story.html.

161. *Baker v. Carr*, 369 U.S. 186 (1962). A question is considered a "political question" when there is not sufficient criteria for the judiciary to make a determination and thus the decision would be best left to the political process. "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statements of the Government's views." *Id.* at 210-11; *see also* Ralph Benko, *Faithful John Boehner to Faithless Barack Obama: Checkmate?*, FORBES (July 25, 2014 10:00 AM), <http://www.forbes.com/sites/ralphbenko/2014/07/25/faithful-john-boehner-to-faithless-barack-obama-checkmate/>.

162. *See id.*

immigration enforcement.¹⁶³ In recent years, it has been estimated that 400,000 deportations can be executed with the allocated budget and this figure has in turn been used to measure the performance of DHS, ICE, and Customs and Border Protection (CBP) in immigration enforcement.¹⁶⁴ The drive to meet performance expectations under the Obama administration has, for various reasons, led to questionable ICE field strategies.¹⁶⁵

In 2010, an internal memorandum from the ICE director to field officers revealed that the agency was setting quotas in order to fulfill performance goals.¹⁶⁶ Utilizing deportation quotas as a measure of the quality of INA performance is dehumanizing. The quotas have devastating consequences for the affected people and can lead to even more disparate immigration enforcement actions.¹⁶⁷ In order to drastically increase the number of cases processed in the second half of the fiscal year, the field director called upon ICE agents to increase the average daily population of detainees by 3,000, sweep the prisons in the criminal alien program, expedite removals in progress, and increase non-criminal removals.¹⁶⁸ Such a grading system can lead to field decisions such as choosing to focus on easier and quicker deportation such as mandatory removals for minor crimes like minimal drug offenses or criminal traffic offenses because more complex cases may take longer to process and could end in the cancellation of removal.¹⁶⁹

There was a public backlash against the removal quotas, followed by assurances from other ICE officials that the internal memos leaked in 2010 were not actually reflective of their policies.¹⁷⁰ However, more internal emails released in 2012 revealed further attention to the ICE deportation numbers and disturbing tactics devised to increase the deportation perfor-

163. "Congress provides enough money to deport a little less than 400,000 people," Morton said. "My perspective is those 400,000 people shouldn't be the first 400,000 people in the door but rather 400,000 people who reflect some considered government enforcement policy based on a rational set of objectives and priorities." Marcus Stern, *U.S. shifts approach to deporting illegal immigrants*, USA TODAY (Sept. 10, 2010), http://usatoday30.usatoday.com/news/washington/2010-09-10-immigration10_st_n.htm.

164. *Id.*

165. See Skrentny, *supra* note 1, at 69 (asserting that the "unprecedented number" of deportations attributed the Obama's policies was an attempt to appease the "restrictionists" and gather support for comprehensive immigration reform from opponents in Congress).

166. Spencer S. Hsu & Andrew Becker, *ICE officials set quotas to deport more illegal immigrants*, WASH. POST (Mar. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html?sid%3DST2010032700037>.

167. See *id.*

168. Memorandum from James M. Chaparro, ICE-DRO Dir., to Field Office Dirs. & Deputy Field Office Dirs. (Feb. 22, 2010), available at <http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf>.

169. See, e.g., Hsu, *supra* note 166.

170. See Andrew Becker, *ICE responds to CIR/Washington Post story on deportation quotas*, CENTER FOR INVESTIGATIVE REPORTING (Mar. 29, 2010), <http://cironline.org/blog/post/ice-responds-cirwashington-post-story-deportation-quotas-648>.

mance statistics.¹⁷¹ In April 2012, the Assistant of Field Operations sent an email stating, “ATL [Atlanta] is about 1200 criminal removals under when compared to last year. Please implement your initiatives and reallocate all available resources. *The only performance measure that will count this fiscal year is the criminal alien removal target.*”¹⁷² The tactics outlined in the 2012 leaked emails and memos to achieve the deportation numbers more easily included using biometrics, targeting probationers, and collaborating with sheriffs’ departments to set up two-part traffic checkpoints where:

[t]he locals would be the lead agency checking for DWIs, NOL, and other traffic/criminal offenses. When the vehicles get sent to the secondary location, we (ICE) would be set up there, waiting to interview all individuals that we deem necessary. This would include occupants in the vehicle if necessary. We would also have the mobile IDENT [identification] machines set up to take fingerprints to get an accurate account of all immigration and criminal history.¹⁷³

During confirmation hearings of the new DHS secretary and months after the release of these enforcement emails and memos, Jeh Johnson stated, “I do not believe that deportation quotas or numeric goals are a good idea.”¹⁷⁴ Nonetheless, the number of formal removals continued to rise in 2013 and the proportion of criminal removals in the total of deportations increased from 19% in 2010 to 31% in 2013.¹⁷⁵

Despite contrary protestations, the numbers suggest criminal deportations continue to be a centerpiece of INA policy. In fact, in announcing his newest immigration order, President Obama reiterated his administration’s commitment to deport noncitizens who commit crimes. Therefore, the *Moncrieffe* decision will play a key role in this administration’s immigration policy. The United States’ immigration law and policy on aggravated felonies essentially creates a strict zero-tolerance approach.¹⁷⁶ Noncitizens convicted of aggravated felonies are punished threefold for their crimes.¹⁷⁷ First, they must

171. Brad Heath, *Immigration tactics aimed at boosting deportations*, USA TODAY (Feb. 17, 2013), <http://www.usatoday.com/story/news/nation/2013/02/14/immigration-criminal-deportation-targets/1919737/>.

172. Email from David Venturella, ICE-ERO Assistant Dir. Field Operations (Apr. 19, 2012, 11:44 AM), available at <http://s3.documentcloud.org/documents/603861/ice-documents.pdf> (emphasis added).

173. *Id.*

174. *Homeland Security’s New Chief*, N.Y. TIMES (Dec. 25, 2013), http://www.nytimes.com/2013/12/26/opinion/homeland-securitys-new-chief.html?_r=0.

175. Matt Graham, *New immigration enforcement data: for the first time in history, most border crossers are not Mexican*, BIPARTISAN POLICY CENTER (Oct. 9, 2014), <http://bipartisanpolicy.org/blog/immigration/2014/10/09/new-immigration-enforcement-data-first-time-history-most-border-crossers-are-not>.

176. Hing, *supra* note 52, at 165.

177. *Id.*

serve their criminal sentence.¹⁷⁸ Second, their deportation is mandatory.¹⁷⁹ Third, aggravated felons are barred from reentry into the United States.¹⁸⁰ These severe penalties raise the issue of proportionality and undermine a commitment to treat noncitizens with dignity and to protect and reunite families.¹⁸¹

The net effect of the zero-tolerance approach on many noncitizens is that they can be torn from their homes, lose their jobs, be separated from their families, and forced to start over, facing turbulent conditions in their countries of origin.¹⁸² The disproportionality of the consequences is particularly evident when the aggravated felony is a minor crime like a criminal traffic offense or the possession of marijuana, which is now legal in many states. Further, deportation as a punitive measure for noncitizens also imposes real hardships on their children, parents, and other loved ones who depend on them.¹⁸³

President Obama's action plan based on executive authority focuses on extended protection that would affect millions of immigrants.¹⁸⁴ However, it remains clear that deportation for "convicted criminals, foreigners who pose national security risks and recent border crossers" shall proceed.¹⁸⁵ Thus, the Obama administration's attention has not shifted. Additionally, the proposed plan appears to revolve around immigrants that have been in the United States and not those who have recently entered or will enter in the future, making the promise to reunite families illusory.¹⁸⁶

VI. CONCLUSION

Immigration policy and reform will remain a hot button issue for many years to come. *Moncrieffe* created a policy for criminal deportation *intended* to promote fairness, predictability, uniformity, and equity. Whether the Supreme Court has settled the waters in the courtrooms by adopting a uniform approach in deciding when criminal activity subjects a noncitizen to automatic deportation remains to be seen. States continue to apply differing views of what qualifies as an aggravated felony, which affects judicial outcomes. However, criminal deportation is only a piece of the puzzle.

While the Obama administration attempts to protect immigrants within our borders, these protections are primarily for those with family ties, education, and certain desirable job skills. A policy must be proposed that will account

178. *Id.*

179. *Id.*

180. *Id.*

181. The issue of proportionality is basically an examination of whether the punishment fits the crime. *Id.* at 166.

182. *See id.* at 164.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

for the undocumented alien children and other immigrants who are flocking to our shores in record numbers. Many undocumented immigrants may see President Obama's recent executive action as their life raft to a sinking ship. While an estimated five million undocumented immigrants will benefit from this executive order by escaping immediate deportation, the President's action is only a band-aid. Cynics contend that the President's newly articulated immigration plan serves only to quell political unrest among Latino voters.¹⁸⁷ Indeed, politics aside, the President's executive order may have further muddied the already murky immigration waters.

Any policy that has real promise to provide the type of security illegal immigrants need to come out of the shadows must include a pathway to citizenship. Only Congress can provide that security. Without congressional action, President Obama's plan is limited. Polls indicate that the President's action is unpopular and some in his party are hesitant to approve funding through Congress.¹⁸⁸ However, congressional funding is not needed to carry out his Order since it can be funded through the Citizenship and Immigration Services (CIS) with application fees.¹⁸⁹ Additionally, no Democrat has attempted to clarify what further steps should be taken to strengthen the President's plan.¹⁹⁰ On the other hand, Republicans are quick to repudiate the President's so-called executive amnesty; yet, they too have failed to propose a plan to rectify this admittedly broken immigration system.¹⁹¹

Both parties agree on one thing: the only chance to effect real and lasting immigration reform is to pass legislation.¹⁹² The President's powers are limited, and the executive order can do no more than delay deportation. Without a pathway to citizenship, many undocumented immigrants will remain in limbo. The time for congressional action is now. The United States was built on the shoulders of immigrants. A failure to enact immigration reform will not change the past treatment of those who have suffered, but will alter the future, which depends on the contributions of immigrants living in the shadows. America was, is, and always will be, a nation of immigrants. It is time to ensure that the label illegal immigrant can be citizen for those who, like our ancestors, deserve the opportunity to contribute to society and improve their lives and our communities.

187. See Nakamura, *supra* note 11.

188. See Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html>.

189. *Id.*

190. *Id.*

191. Jessica Meyers, *Defying GOP, Obama acts on immigration*, THE BOSTON GLOBE (Nov. 20, 2014), <http://www.bostonglobe.com/news/nation/2014/11/20/congress-will-act-stop-obama-immigration-mcconnell-says/mkf7XuzhvVsbnnRieyXDRL/story.html>.

192. Karen Tumulty, *Obama's immigration order poses political challenges for both parties*, WASH. POST (Nov. 19, 2014), http://www.washingtonpost.com/politics/obamas-immigration-order-poses-political-challenges-for-both-parties/2014/11/19/9f98c124-701d-11e4-ad12-3734c461eab6_story.html.