

# Deportations for Drug Convictions in the United States and the European Union: Creating a More Compassionate Approach Toward Drug Convictions in the Immigration Law

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## ABSTRACT

*This Comment begins by examining and comparing the legal framework for deportation and other immigration consequences for convictions of drug offenses in the United States, the European Union, and the United Kingdom. This Comment then looks at the harsh effects of current immigration policy on individuals and marginalized communities. Finally, this Comment argues that immigration law should be reformed to adopt a more humanitarian approach toward non-citizens convicted of drug offenses. Deportation and other harsh immigration consequences for drug offenses levy disproportionately severe punishments toward vulnerable minority immigrant communities, exposing them to consequences much harsher than non-immigrants would face for the same charges. In the United States, drug offenses are often a complete bar to relief from deportation, regardless of a non-citizen’s ties to the country. This Comment argues that the framework developed in the EU can provide some insight into a more compassionate approach toward crime-based deportations, such as the need for individualized humanitarian considerations in making deportation decisions. Ultimately, however, immigration reform should go beyond that framework to provide protections for immigrants to minimize the potentially disastrous effects on immigrants and their families due to deportation.*

## I. INTRODUCTION

In 2022, discussions about drug abuse and criticism of the ways that previous policies have addressed drug abuse have become widespread in

the United States.<sup>1</sup> The United States currently incarcerates more people than any other country in the world<sup>2</sup> and has spent the past several decades attempting to combat the public health crisis of widespread addiction through the mechanisms of the criminal justice system.<sup>3</sup> While there has been a lot of focus on changing policy surrounding drug abuse in legislatures across the country,<sup>4</sup> there has been significantly less focus on how many of the same problems that plague the criminal justice system at large also affect vulnerable immigrant populations.

This Comment aims to examine the legal framework for deportation and other immigration consequences for convictions of drug offenses in the United States, the European Union, and the United Kingdom. This Comment will then look at the effects of current immigration policy on individuals and communities. Finally, this Comment will argue for needed reform in the way drug convictions are treated in immigration law in the United States and will present possible solutions.

Deportations for drug offenses often levy disproportionately severe punishments toward vulnerable minority immigrant communities.<sup>5</sup> The policies surrounding deportations for drug offenses in the United States, as well as crime-based deportations in general, can be compared to policies in the European Union, where, often, circumstances such as family ties and time spent in a country can be taken into consideration in deportation hearings.<sup>6</sup> By contrast, in the United States, drug offenses are often a complete bar to relief from deportation, regardless of a non-citizen's ties

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1. *Drug Law Reform*, NAT'L ASS'N of CRIM. DEF. LAW., <https://www.nacdl.org/Landing/DrugLaw> [<https://perma.cc/H44M-3VF8>].

2. *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) [<https://perma.cc/2M2C-FEY7>].

3. Redonna Chandler, Bennett Fletcher & Nora Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 JAMA 183, 183 (2009), <https://jamanetwork.com/journals/jama/article-abstract/183208> [<https://perma.cc/SC34-2V6T>].

4. *Drug Law Reform*, *supra* note 1.

5. Grace Meng, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses*, HUMAN RIGHTS WATCH (June 16, 2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses> [<https://perma.cc/PG8R-H4U9>].

6. See *Üner v. The Netherlands*, 2006-XII Eur. Ct. H.R. 129, 147 (2006); *see also* Case C-448/19, *WT v. Subdelegación del Gobierno en Guadalajara*, ECLI:EU:C:2020:467, ¶ 3 (June 11, 2020).

to the country.<sup>7</sup> The United States' approach to handling drug offenses under current immigration law should be reformed to reflect a modern understanding of addiction and a more compassionate approach toward the family and community affected by forced deportations.

## II. IMMIGRATION CONSEQUENCES FOR DRUG OFFENSES IN THE UNITED STATES

Non-citizens convicted of drug offenses in the United States find themselves vulnerable to a wide range of immigration consequences stemming from their conviction. Drug offenses involving federally controlled substances are often grounds for deportation and almost always grounds for denial of discretionary relief from deportation.<sup>8</sup> Deportation, inadmissibility, and a bar to discretionary relief are consequences for a broad range of drug offenses, from drug trafficking charges to simple possession of a controlled substance (except for possession of a small amount of marijuana).<sup>9</sup> Addiction itself is a statutory ground for deportation in the United States.<sup>10</sup> Ultimately, with few exceptions, drug offenses can form the basis for deportation of non-citizens, with minimal room to consider any family or community ties or the impact on the affected immigrant.<sup>11</sup> These harsh punishments only used against non-citizens often ruin lives and hurt families.<sup>12</sup>

### A. Removal

Removal based on a conviction for a drug offense can affect all categories of non-citizens. The Immigration and Nationality Act (hereinafter "INA") provides that "any alien who at any time after admission has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance . . . is deportable."<sup>13</sup> A listed exception for deportability includes a single offense of possession of thirty grams or less of marijuana.<sup>14</sup> While any immigrant could be removed for a controlled substance offense, the immigrant's legal status determines the effect an offense will have on potential relief from removal.

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7. Meng, *supra* note 5, at 21.

8. *California Quick Reference Chart and Notes: § N.8 Controlled Substances*, IMMIGRANT LEGAL RESOURCE CENTER (Mar. 2019) [hereinafter *California Quick Reference Chart and Notes*], [https://www.ilrc.org/sites/default/files/resources/n8\\_controlled\\_substance-032019.pdf](https://www.ilrc.org/sites/default/files/resources/n8_controlled_substance-032019.pdf) [<https://perma.cc/PD33-ZCF4>].

9. *Id.* at 4.

10. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

11. Meng, *supra* note 5, at 6, 27.

12. *See id.*

13. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

14. *Id.*

An immigrant can be subject to deportation if they are later found to have been inadmissible at their time of entry into the United States.<sup>15</sup> The INA includes several categories of inadmissibility which, if any are met, would bar an individual from entering the country. A person is inadmissible to the United States if that person has been “convicted of, or . . . admits having committed . . . a violation of any law or regulation . . . relating to a controlled substance.”<sup>16</sup> Additionally, an individual that “the consular officer or the Attorney General knows or has reason to believe . . . is or has been an illicit trafficker in any controlled substance” is also inadmissible.<sup>17</sup> Because the statute only requires a “reason to believe” an individual is involved in illicit trafficking, it does not require a conviction.<sup>18</sup> A person found to be inadmissible can sometimes apply for a waiver of inadmissibility for reasons of extreme hardship to a United States’ citizen family member.<sup>19</sup> Waivers are discretionary, and in cases of inadmissibility for crime, the severity of the crime and the length of time since the crime was committed are taken into consideration.<sup>20</sup> However, while these waivers can be considered for most criminal grounds of inadmissibility, waivers are automatically unavailable to people with controlled substance, murder, or torture convictions.<sup>21</sup>

For the purposes of removal, a controlled substance conviction includes any kind of court mandated drug treatment program, even if completion of the program diverts someone from incarceration.<sup>22</sup> The definition includes expunged convictions unless the conviction is vacated due to a purely legal defect.<sup>23</sup> Additionally, any kind of guilty plea to an offense relating to a controlled substance, even one that reduces a sentence or avoids prison altogether, will subject a non-citizen to potential removal.<sup>24</sup> Pardons are insufficient to block the immigration consequences of drug convictions.<sup>25</sup> Therefore, expansion of pre-trial diversion programs, which help avoid a conviction in the first place, can help mitigate the impact of drug offenses

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15. INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).
  16. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).
  17. INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).
  18. RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 67 (5th ed. 2020).
  19. INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).
  20. BOSWELL, *supra* note 18, at 57–58.
  21. *Id.* at 69.
  22. Meng, *supra* note 5; *California Quick Reference Chart and Notes*, *supra* note 8.
  23. Meng, *supra* note 5; *California Quick Reference Chart and Notes*, *supra* note 8.
  24. *California Quick Reference Chart and Notes*, *supra* note 8.
  25. Meng, *supra* note 5.

on removal as completion of pre-trial diversion programs do not count as a “conviction” for immigration purposes.<sup>26</sup>

State drug offenses are not grounds for removal unless the drug is classified as a federally controlled substance.<sup>27</sup> This distinction led criminal defense attorneys to develop a “categorical approach” to certain drug convictions under state laws, attempting to avoid the harsh consequences of removal.<sup>28</sup> Indeed, many criminal defendants benefit from this approach by avoiding removal. For example, if a defendant is convicted under a state statute, and that statute is both overbroad (lists both controlled and uncontrolled substances) and indivisible (the statute does not clearly distinguish between the two), a conviction under that statute is not a conviction of a controlled substance for immigration purposes.<sup>29</sup> In this type of case, if *all* conduct under the statute is not a basis for removal, then convictions under that statute will not trigger removal.<sup>30</sup> However, the categorical approach may no longer work for statutes that are divisible as to the offenses.<sup>31</sup> In *Pereida v. Wilkinson*, the Supreme Court decided that when a state statute is divisible, the defendant has the burden of proving the conviction was not for an offense that creates a bar for relief even in circumstances where the record of conviction is ambiguous as to the specific crime charged under the statute.<sup>32</sup>

Due to the impact of *Pereida* on the categorical approach and the strength of federal immigration laws, reforms that address the effects of drug convictions on removal must happen on a federal level. Immigration law is federal; it is based on federal statutes and executive orders. In regard to drug offenses, federally controlled substances form the basis for removal grounds.<sup>33</sup> Differences between state and federal laws can help shield immigrants from removal by providing an opportunity to plead to an alternative state offense that does not necessarily implicate a federally controlled substance.<sup>34</sup> However, a conviction under any statute that implicates a

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26. *California Quick Reference Chart and Notes*, *supra* note 8.

27. *Mellouli v. Lynch: Further Support for a Strict Categorical Approach for Determining Removability Under Drug Deportation and Other Conviction-Based Removal Grounds*, IMMIGRANT DEFENSE PROJECT 1 (June 8, 2015), <https://www.immigrantdefenseproject.org/wp-content/uploads/2015/06/Mellouli-Advisory-6-8-15-FINAL.pdf> [<https://perma.cc/3T7H-KUVW>].

28. *Id.* at 6, 14–15.

29. Kathy Brady, *Pereida v. Wilkinson and California Offenses*, IMMIGRANT LEGAL RESOURCE CENTER 1, 6 (Apr. 14, 2021), [https://www.ilrc.org/sites/default/files/resources/pereida\\_v\\_wilkinson\\_california\\_4.19.21.pdf](https://www.ilrc.org/sites/default/files/resources/pereida_v_wilkinson_california_4.19.21.pdf) [<https://perma.cc/J5Q7-HBKF>].

30. *Id.* at 5–6.

31. *Id.* at 6.

32. *Pereida v. Wilkinson*, 141 S. Ct. 754, 763 (2021).

33. *See Lopez v. Gonzales*, 549 U.S. 47 (2006).

34. *See Brady*, *supra* note 29, at 5–6.

federally controlled substance listed in the INA, regardless of how the drug is defined in state law, will cause an immigrant to be subject to removal.<sup>35</sup>

### *B. Denial of Cancellation of Removal*

Once a person is subject to a removal order, they can apply to an immigration judge for a form of discretionary relief from removal, such as an adjustment of status or a cancellation of removal.<sup>36</sup> A cancellation of removal is discretionary by statute, stating that “the Attorney General may cancel removal of an alien who is inadmissible or deportable from the United States” provided that certain requirements are met.<sup>37</sup> The person petitioning for relief has the burden of proving that they meet all of the requirements for eligibility of relief.<sup>38</sup> This includes proving that they have not been convicted of a crime that would bar discretionary relief, even where the record of conviction does not specify a particular element of a statute.<sup>39</sup> Eligibility requirements differ between lawful permanent residents and those without lawful permanent resident status.<sup>40</sup>

Lawful permanent residents (hereinafter “LPRs”) must show that they have been an LPR for at least five years, have continuously resided in the United States for at least seven years, and have not been convicted of an aggravated felony.<sup>41</sup> Aggravated felonies include any drug offense that could also be considered an illicit drug trafficking offense.<sup>42</sup>

Additionally, some drug offenses not considered aggravated felonies can affect an LPR’s petition for cancellation of removal under the “stop-time” rule. The “stop-time” rule cuts off the period of continuous residency for an LPR at the point in time at which they would be deemed inadmissible.<sup>43</sup> The “stop time” rule cuts off the period of residency at the point that the person committed the offense, not at the point when the conviction occurred.<sup>44</sup>

35. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

36. IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 1719 (17th ed. 2020).

37. INA § 239(b), 8 U.S.C. § 1229(a).

38. *See* *Pereida v. Wilkinson*, 141 S. Ct. 754, 757 (2021).

39. *Id.* at 763.

40. KURZBAN, *supra* note 36, at 1760.

41. INA § 239(b), 8 U.S.C. § 1229(b).

42. *See* CÉSAR CUAUTHÉMOC & GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 52–55 (2015).

43. Hillel R. Smith, *Immigration Consequences of Criminal Activity*, CONG. RES. SERV., 16–17 (May 28, 2021), <https://crsreports.congress.gov/product/pdf/R/R45151> [<https://perma.cc/WQG9-KKHB>].

44. *See* *Barton v. Barr*, 140 S. Ct. 1442, 1449 (2020).

Additionally, the offense that cuts off the period of residency does not need to be the same offense that later creates the basis for removal.<sup>45</sup>

The range of crimes that make a non-LPR ineligible for cancellation of removal is much broader than that for LPRs. A non-LPR applying for cancellation of removal must show that they have been physically present in the United States for at least ten years, have been a person of “good moral character” during that period, have not been convicted of a specified crime, and that removal would result in exceptional hardship to a United States citizen or LPR family member.<sup>46</sup> Non-LPRs are also subject to the “stop-time” rule in determining the requirement for continuous physical presence and are ineligible for cancellation of removal for any crime that would also make them inadmissible or removable.<sup>47</sup>

A conviction for a controlled substance offense within the required period of residence is also a bar to establishing “good moral character” (hereinafter “GMC”).<sup>48</sup> Additionally, while many automatic bars to GMC are defined by statute, a finding of GMC is discretionary.<sup>49</sup> As set out in the Department of Homeland Security’s Code of Federal Regulations, “the Service shall evaluate claims of good moral character on a case-by-case basis.”<sup>50</sup> Conduct outside the statutory period for good moral character can also be considered “if the conduct of the applicant during the statutory period does not reflect that there has been reform of character . . . or if the earlier conduct and acts appear relevant to a determination of the applicant’s present moral character.”<sup>51</sup> Therefore, the “good moral character” requirement can broaden the scope of convictions and other behaviors that bar discretionary relief beyond a specifically listed crime for inadmissibility or deportability.<sup>52</sup>

### C. “Particularly Serious Crimes” and Asylum

A conviction of a “particularly serious crime” can result in a bar to applying for asylum, or a bar for petitioning for withholding of removal for those who fear deportation will threaten their lives.<sup>53</sup> A “particularly

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45. *Id.*

46. INA § 239(b), 8 U.S.C. § 1229(b).

47. SMITH, *supra* note 43, at 16.

48. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).

49. *See* KURZBAN, *supra* note 36.

50. 8 C.F.R. § 316.10 (2022).

51. *Id.*

52. *Aggravated Felonies: An Overview*, AMERICAN IMMIGRATION COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview> [https://perma.cc/4B4N-W6WD].

53. *Aggravated Felonies: An Overview*, AMERICAN IMMIGRATION COUNCIL (Mar. 6, 2021), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview> [https://perma.cc/4B4N-W6WD].



serious crime” generally means a conviction for an aggravated felony, though the category can include some other offenses as well.<sup>54</sup> If someone has a conviction for an aggravated felony, they are not eligible for asylum unless they can prove they are exempt for reasons of fearing torture.<sup>55</sup>

What counts as an aggravated felony does not have a specific definition. A conviction is considered an aggravated felony simply because a conviction has been statutorily defined that way.<sup>56</sup> Many drug-related convictions are not aggravated felonies, depending on the circumstances around the conviction, but any drug offense that can be considered a trafficking offense is presumptively a “particularly serious crime” for immigration purposes and a bar to asylum, regardless of the sentence imposed.<sup>57</sup> A drug offense can be considered a trafficking offense if the conviction includes any kind of intent or conspiracy to distribute, transport, sell, or manufacture a controlled substance.<sup>58</sup>

#### D. Bar to Obtaining Citizenship and Other Legal Status

Citizenship is an important step for many immigrants living in the United States because citizenship affords people protection from negative immigration decisions.<sup>59</sup> Naturalization also provides new citizens the ability to sponsor family members in the immigration process, since citizens can sponsor more categories of family visas than LPRs, as well as being able to avoid quotas and long waits for immediate family members.<sup>60</sup> Citizenship also grants people the right to vote, an empowering step granting access to the political process that in turn determines the policies around immigration as well as criminal law in general.<sup>61</sup>

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54. “Particularly Serious Crime” Bars on Asylum and Withholding of Removal: Legal Standards and Sample Case Law Determinations, IMMIGRANT DEFENSE PROJECT (July 2018) [hereinafter *Particularly Serious Crime*], <https://www.immigrantdefenseproject.org/defender-resources/> [<https://perma.cc/Y3BH-3WHH>].

55. BOSWELL, *supra* note 18.

56. *Aggravated Felonies: An Overview*, *supra* note 52.

57. *Particularly Serious Crime*, *supra* note 54.

58. *See id.*

59. *Should I Consider U.S. Citizenship?*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (July 5, 2020), <https://www.uscis.gov/citizenship/learn-about-citizenship/should-i-consider-us-citizenship> [<https://perma.cc/4BN3-Y953>].

60. *Id.*

61. *Id.*

An application for U.S. citizenship requires a showing of “good moral character.”<sup>62</sup> As previously discussed, a conviction for a drug offense can be a basis for finding that someone does not have “good moral character” and is therefore ineligible to become a U.S. citizen. A finding of GMC is largely discretionary, though there are some categories that are specifically defined as a bar to GMC.<sup>63</sup>

One mandatory, permanent bar to GMC is a conviction of any illicit drug trafficking offense.<sup>64</sup> Any other drug conviction for a controlled substance is considered to be a conditional bar if it occurs within the statutory period of naturalization, which is the period five years prior to applying and up to the Oath of Allegiance, and will result in a finding that the person lacks GMC.<sup>65</sup> Any conviction outside the statutory period can still be considered, however, and can still affect someone’s ability to establish GMC if the past conduct is perceived as being relevant to current moral character.<sup>66</sup>

However, any other conviction, even if not for a controlled substance, can still affect someone’s ability to establish “good moral character” due to the discretionary nature of the finding.<sup>67</sup> Additionally, some marijuana-related convictions continue to be a bar to GMC, even in states where it has since been legalized, since it remains a federally controlled substance.<sup>68</sup>

Undocumented immigrants with drug convictions face a lifetime bar from ever obtaining legal status in the United States.<sup>69</sup> This includes a bar to obtaining a family-based visa through a United States citizen sponsor.<sup>70</sup> While immigrants convicted of other types of crimes can apply for a waiver of the bar to legal status, no such waiver exists for drug offenses.<sup>71</sup>

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62. INA § 316(a), 8 U.S.C. § 1427(a).

63. 8 C.F.R. § 316.10 (2022).

64. *Policy Manual: Chapter 4—Permanent Bars to Good Moral Character*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 22, 2022) [hereinafter *Permanent Bars to Good Moral Character*], <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-4> [https://perma.cc/PPC4-DATG].

65. *Id.*

66. *Policy Manual: Chapter 2—Adjudicative Factors*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 23, 2022) [hereinafter *Adjudicative Factors*], <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2> [https://perma.cc/7N7R-MZ55].

67. *Policy Manual: Chapter 5—Conditional Bars for Acts in Statutory Period*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 23, 2022), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5> [https://perma.cc/35DG-A38N].

68. *Id.*

69. Meng, *supra* note 5.

70. *California Quick Reference Chart and Notes*, *supra* note 8.

71. Meng, *supra* note 5.

*E. Executive Discretion in Immigration Enforcement*

Throughout the years leading into 2022, the basis for much of immigration enforcement has shifted from that of congressional actions to discretionary decisions of executive administrations.<sup>72</sup> While the underlying statutes that make up immigration law are under the control of Congress, those statutes grant broad prioritization and enforcement powers to the executive branch and administrative agencies.<sup>73</sup> Much of immigration enforcement now rests in the powers of federal agencies like the Department of State and the Department of Homeland Security (hereinafter “DHS”), which includes U.S. Citizenship and Immigration Services (hereinafter “USCIS”), Customs and Border Protection (hereinafter “CBP”), and Immigration and Customs Enforcement (hereinafter “ICE”).<sup>74</sup> In almost every stage of an immigration proceeding, prosecutorial and executive discretion plays a major role in the outcomes.

The removal of “dangerous,” criminal immigrants has consistently been a popular priority for immigration enforcement throughout the years. In 2020, for example, the Immigration and Customs Enforcement (“ICE”) reported that 92% of internal removals were of people who had criminal convictions or pending criminal charges, which the agency attributes to its efforts to prioritize public safety.<sup>75</sup>

In September 2021, the Biden administration issued new guidelines through the Secretary of the Department of Homeland Security, updating its immigration enforcement priorities to be implemented under the discretion granted to the executive branch in federal immigration laws.<sup>76</sup> The guidelines propose to focus resources on removal proceedings for those who pose a threat to public safety.<sup>77</sup> The Department asks enforcement officials to consider the totality of the circumstances in any given removal case, weighing aggravating factors like the seriousness of a conviction with mitigating factors like family in the country and assimilation into a

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72. See KURZBAN, *supra* note 36, at 39–41.

73. *Id.* at 40–41.

74. BOSWELL, *supra* note 18.

75. *ICE Statistics*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (May 12, 2021), <https://www.ice.gov/remove/statistics> [<https://perma.cc/N7FR-92KU>].

76. *Secretary Mayorkas Announces New Immigration Enforcement Priorities*, DEPARTMENT OF HOMELAND SECURITY (Sept. 30, 2021) [hereinafter *Secretary Mayorkas*], <https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities> [<https://perma.cc/8STK-39QN>].

77. *Id.*

community.<sup>78</sup> The enforcement guidelines also state that undocumented status should not alone be a reason for removal.<sup>79</sup> This is a shift from the priorities of the prior administration, which sought to pursue removal more broadly for anyone living in the country without status.<sup>80</sup> Additionally, the focus on considering a totality of the circumstances in deciding whether to pursue removal is a notable shift away from the use of a strictly categorical approach to enforcement priorities in the past.<sup>81</sup>

The nature of these constantly shifting priorities, however, creates uncertainty in the lives of immigrants. Any positive change one administration makes in implementing a more humanitarian approach to immigration enforcement can be swiftly undone as soon as a new administration steps in. The discretionary power of the executive branch in immigration law is fickle and does little to offer long term solutions to the problems that systemically plague the United States' overburdened immigration system. Significant congressional action is necessary to make any kind of lasting impact, but it is precisely Congress's refusal to make these necessary changes that has led to the system of patchwork executive policy that the United States has today.

### III. IMMIGRATION CONSEQUENCES FOR CRIME IN THE EU

In the European Union, there is a general framework for determining relief from crime-based deportations that, at least in theory, generally includes considering the individual's circumstances. Certain drug offenses can still be grounds for deportation, and policies differ between Member States, with some nations having much stricter policies for removal than others.<sup>82</sup> Removal decisions can also vary depending on whether the immigrant is from another EU country or a third-party country.<sup>83</sup> However, a non-citizen facing deportation for a crime will generally have the opportunity for a deportation hearing that will consider special circumstances of the

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78. *Guidelines for the Enforcement of Civil Immigration Law*, DEPT. OF HOMELAND SECURITY (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [<https://perma.cc/8YAA-K2XC>].

79. *Id.*

80. Hillel R. Smith, *The Biden Administration's Immigration Enforcement Priorities: Background and Legal Considerations*, CONG. RESEARCH SERV. (Dec. 10, 2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10578> [<https://perma.cc/BT5S-6K3L>].

81. *Secretary Mayorkas*, *supra* note 76.

82. José A. Brandariz, *The Removal of EU Nationals: An Unaccounted Dimension of the European Deportation Apparatus*, 10 CENT. & E. EUR. MIGRATION REV. 13, 15 (2021), <http://ceemr.uw.edu.pl/sites/default/files/Brandariz.pdf> [<https://perma.cc/X9CU-TEDE>].

83. *Id.*

resident's case, and long-term residents will be expelled only where there is a sufficient threat to public safety.<sup>84</sup>

#### *A. Removal Framework for Member States*

The European Convention on Human Rights (ECHR) was first adopted by the Council of Europe in 1950 and established the European Court of Human Rights to adjudicate violations of the ECHR.<sup>85</sup> The ECHR has been ratified by 47 countries, including all Member States of the EU, and remains important international law for those countries.<sup>86</sup>

Article 8 of the ECHR establishes “the right to respect for private and family life, home and correspondence.”<sup>87</sup> Under the ECHR, interpretation of Article 8, “the expulsion of a settled migrant constitutes an interference with his or her right to respect for private life.”<sup>88</sup> However, States can prove that such an interference is necessary by showing that it is “justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.”<sup>89</sup> Therefore, States remain free to expel non-citizens who are convicted of criminal offenses, as long as the State's policies are proportionate.<sup>90</sup>

84. Council Directive 2003/109, of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 2004 O.J. (L 16) 44, 49.

85. COUNCIL OF EUR., THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LIVING INSTRUMENT 5 (2020), [https://echr.coe.int/Documents/Convention\\_Instrument\\_ENG.pdf](https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf) [<https://perma.cc/UX4P-LABG>].

86. *Id.*

87. COUNCIL OF EUR., Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, E.T.S. No. 005, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) [<https://perma.cc/PX4Q-APKM>].

88. EUR. CT. OF HUM RIGHTS., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 69 (Aug. 31, 2021) [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf) [<https://perma.cc/4MMB-TTMP>].

89. *Uner v. The Netherlands*, App. No. 46410/99, ¶ 54 (Oct. 18, 2006), <https://hudoc.echr.coe.int/eng?i=001-77542> [<https://perma.cc/282X-ZKSB>].

90. *Id.* at ¶¶ 57–58 (In *Boultif v. Switzerland*, App. No. 54273/00, the Court laid out some criteria to determine whether expulsion is “proportionate.” Those criteria include: “the nature and seriousness of the offence committed by the applicant; the length of the applicant’s stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant’s conduct during that period; the nationalities of the various persons concerned; the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; . . . the seriousness of the difficulties which the spouse is likely to encounter in the country to

The 2008 EU Return Directive, or Directive 2008/115/EC, creates common standards for Member States for the removal of third-party nationals who are residing in the country illegally.<sup>91</sup> For long-term residents, removal standards are laid out in Council Directive 2003/109/EC.<sup>92</sup> While the directives apply to all EU nations, removals do not occur equally across the countries.<sup>93</sup> For example, from 2008 to 2019, five EU countries were responsible for a majority of the removals of third party nationals from the EU: the United Kingdom, Germany, Greece, France, and Spain.<sup>94</sup> Although EU countries work under the same general framework regarding immigration policies, individual countries still exercise some discretion in enforcing removal of non-citizens.

### 1. Removal of EU Citizens

A citizen of a Member State of the European Union typically has the right to move freely between their country and other countries in the EU, as laid out in the Citizens' Rights Directive, or Directive 2004/38/EC.<sup>95</sup> The right for EU citizens to move freely between member countries is well understood to be a foundational one.<sup>96</sup> Accordingly, the directive grants EU nationals significant protections from expulsions from other Member States.<sup>97</sup> For example, removals of an EU national requires more than just a criminal record, but a case-by-case analysis of the threat to public safety the person poses.<sup>98</sup>

According to the Citizen's Rights Directive, for an EU citizen to be deported from another Member State, that person "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."<sup>99</sup> Deportations on the grounds of public policy must "comply with the principle of proportionality," and can only occur after taking into

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which the applicant is to be expelled; . . . the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination.").

91. Georgiana Sandu, *Fact Sheets on the European Union: Immigration Policy*, EUROPEAN PARLIAMENT (June 2022), <https://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy> [<https://perma.cc/3MNF-92D>].

92. *Id.*

93. Brandariz, *supra* note 82.

94. *Id.*

95. *Id.* at 15–16.

96. *See id.*

97. Leandro Mancano, *Punishment and Rights in European Union Citizenship: Persons or Criminals*, 24 EUR. L.J. 206 (2018).

98. *Id.*

99. Council Directive 2004/38, 2004 O.J. (L 158) 77, 114 (EC), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038> [<https://perma.cc/GN25-29HK>].

consideration mitigating factors, such as “how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.”<sup>100</sup> Additionally, if someone has resided in another Member State for ten years, or is a minor, removal can only occur if it is “based on imperative grounds of public security,” though this standard is defined by the host country.<sup>101</sup> While the fundamental right to move freely in the EU significantly protects nationals from removal, the use of public security grounds to remove EU citizens is not uncommon.<sup>102</sup> For some EU countries, such as France and Germany, the removal of EU citizens based on public safety comprises a significant portion of the removals ordered, though, still much less than that of third-party removals.<sup>103</sup>

## 2. *Removal of Non-EU Citizens*

Immigrants who are not citizens of an EU country are not afforded protections as robust as those afforded to EU citizens facing deportation from another Member State. Additionally, long-term residents are granted significantly more protection from removal than those residing in the EU without legal status.

Those residing in an EU country without legal status are subject to removal based simply on that fact alone. However, third-party nationals in removal proceedings are still granted some procedural safeguards, including, “an effective remedy to appeal against or seek review of decisions related to return.”<sup>104</sup> In general, during the removal process, countries “shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.”<sup>105</sup>

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100. *Id.* at 114–15.

101. *Id.* at 115.

102. José A. Brandariz, *The Removal of EU Nationals: An Unaccounted Dimension of the European Deportation Apparatus*, 10 *CENTRAL AND EASTERN EUROPEAN MIGRATION REVIEW* 13, 18–21 (2021).

103. *Id.*

104. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98, 104.

105. *Id.* at 102.

Member States can only expel long term residents, “where he/she constitutes an actual and sufficiently serious threat to public policy or public security.”<sup>106</sup> Additionally, before expelling a long term resident, a Member State “shall have regard to the following factors: (a) the duration of residence in their territory; (b) the age of the person concerned; (c) the consequences for the person concerned and family members; (d) links with the country of residence or the absence of links with the country of origin.”<sup>107</sup>

The Court of Justice of the European Union (CJEU), interprets the requirement for an “actual and serious threat” to include consideration of mitigating factors.<sup>108</sup> Even where a criminal conviction is involved, Directive 2004/38/EC precludes national legislation that automatically expels a long-term resident without considering whether that person is actually a serious threat, and without considering the mitigating factors laid out.<sup>109</sup> Of course, this does not provide an absolute protection for every case where mitigating factors exist. The Directive only requires a consideration of the enumerated factors, leaving the ultimate decision up to the discretion of individual countries.

### *B. Drug Convictions in the EU*

Penalties for drug offenses in the EU vary among the many Member States. While the EU directives and the ECHR provide a framework of protections and factors to consider in a case for removal, it still grants a lot of discretion to countries to make the final decision on whether an immigrant meets those standards. The underlying criminal codes of an individual country can therefore help inform a country’s designation of an immigrant as a significant threat to public safety for the purposes of removal.

Generally, Europe’s comparatively more lax penalties for drug offenses help protect those charged with simple drug offenses from being qualified for removal, even in countries with relatively high rates of removal. For example, in some countries, like Spain, illicit drug use on its own is not considered a criminal offense.<sup>110</sup> However, countries vary on the treatment

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106. Council Directive 2003/109, of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 2004 O.J. (L 16) 44, 49–50.

107. *Id.*

108. CJEU: *Interpretation of the expulsion of third-country nationals who are long-term residents*, EUROPEAN DATABASE OF ASYLUM LAW (June 11, 2020), <https://www.asylumlawdatabase.eu/en/content/cjeu-interpretation-expulsion-third-country-nationals-who-are-long-term-residents> [https://perma.cc/RQ9L-BZSM].

109. See Case C-448/19, *WT v. Subdelegación del Gobierno en Guadalajara*, ECLI:EU:C:2020:467, ¶ 3 (June 11, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2020%3A467> [https://perma.cc/SML4-HNUG].

110. *Penalties for Drug Law Offences in Europe at a Glance*, EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION (Mar. 2, 2022), <https://www.emcdda.europa.eu/>



of specific offenses, and in countries where drug use is treated as a more serious criminal offense, an immigrant may still face the risk of removal.

This Comment will therefore next look at the intersection of crime-based removal and drug policies in several EU countries that have the highest rates of removals and are subject to both the ECHR and the EU directives, as well as Ireland and the UK, which are both subject to the ECHR but not the EU directives regarding removal.

### *C. Examples of Legislation Among the Member States*

#### *1. France*

The Code on the Entry and Stay of Foreigners and the Right to Asylum regulates removals of non-citizens from France.<sup>111</sup> Criminal convictions can be grounds for deportation in France as a threat to public policy or safety,<sup>112</sup> as well as grounds for bans from the country, either temporary or permanent.<sup>113</sup> Which convictions result in removal or bans from the country depend on the punishment listed for that specific offense in the criminal code.<sup>114</sup> However, certain categories of immigrants are granted some protection from removal, such as those who are married to a French citizen, have French children, or have resided in the country for a significant period of time.<sup>115</sup> These protections are not absolute and can be overcome

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publications/topic-overviews/content/drug-law-penalties-at-a-glance\_en [https://perma.cc/3RRR-M5ZE].

111. CODE DE L'ENTREE ET DU SEJOUR DES ETRANGERS ET DU DROIT D'ASILE [CODE ON THE ENTRY AND STAY OF FOREIGNERS AND THE RIGHT TO ASYLUM], [https://www.legifrance.gouv.fr/codes/section\\_1c/LEGITEXT000006070158/LEGISCTA000042771022/#LEGISCTA000042777342](https://www.legifrance.gouv.fr/codes/section_1c/LEGITEXT000006070158/LEGISCTA000042771022/#LEGISCTA000042777342) [https://perma.cc/XB9N-ZQUE].

112. *Id.* art. L631-1.

113. *Id.* art. L612-6 à L612-11.

114. Chloé Peyronnet, *Undesirable and Unreturnable Migrants under French Law: Between Legal Uncertainty and Legal Limbo*, 36 REFUGEE SURV. Q. 35, 40–41 (2017), <https://academic.oup.com/rsq/article/36/1/35/2964484?login=true> [https://perma.cc/M58Y-56Y9].

115. CODE DE L'ENTRÉE ET DU SÉJOUR DES ÉTRANGERS ET DU DROIT D'ASILE [CODE ON THE ENTRY AND STAY OF FOREIGNERS AND THE RIGHT TO ASYLUM], art. L631-2, [https://www.legifrance.gouv.fr/codes/section\\_1c/LEGITEXT000006070158/LEGISCTA000042772922/?anchor=LEGIARTI000042775403#LEGIARTI000042775403](https://www.legifrance.gouv.fr/codes/section_1c/LEGITEXT000006070158/LEGISCTA000042772922/?anchor=LEGIARTI000042775403#LEGIARTI000042775403) [https://perma.cc/ANZ3-UTJS]; Judith Sunderland, *In the Name of Prevention: Insufficient Safeguards in National Security Removals*, HUM. RTS. WATCH 16–17 (June 2007), <https://www.hrw.org/reports/2007/france0607/france0607web.pdf> [https://perma.cc/TZ3U-AJ3V].

by a court weighing the severity of the offense against the interest of the immigrant.<sup>116</sup>

Several extremist attacks in France have increased the nation's interest in expelling immigrants who pose a threat to public safety.<sup>117</sup> For example, the French government announced a plan to revoke asylum status for any radical and dangerous refugee.<sup>118</sup> Therefore, any immigrant who is not a French citizen and who is convicted of a terrorism related offense is not afforded any protections from deportation, regardless of their status.<sup>119</sup> Additionally, the reactionary changes toward criminal immigrants include reviewing resident permits with an eye toward deporting those who had committed serious crimes, including drug trafficking.<sup>120</sup>

Convictions for drug possession on their own, however, still remain fairly low-level offences in France, though its criminalization of drugs is still more harsh than many of its European neighbors.<sup>121</sup> In France, drug use is a criminal offense that is punishable with up to a year of jail time and a fine, but a conviction would likely not be a serious enough to overcome mitigating circumstances like family ties to the country.<sup>122</sup> The punishment for drug trafficking offenses is much more severe, however, and anything beyond simple drug use can be punished more significantly<sup>123</sup> and may subject an immigrant to potential removal.<sup>124</sup>

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116. Peyronnet, *supra* note 114, at 43.

117. *Macron Urges Europe to Strengthen Border Controls After Terror Attacks*, FRANCE 24 (May 11, 2020, 4:15 PM), <https://www.france24.com/en/france/20201105-macron-urges-europe-to-strengthen-border-controls-after-terror-attacks> [<https://perma.cc/8TLZ-DRBA>].

118. Marlène Panara, 'Deportation is not Automatic' for Migrants when Asylum Protection Status is Withdrawn, INFO MIGRANTS (May 14, 2021), <https://www.infomigrants.net/en/post/32201/deportation-is-not-automatic-for-migrants-when-asylum-protection-status-is-withdrawn> [<https://perma.cc/BTF9-NZDT>].

119. Judith Sunderland, *In the Name of Prevention: Insufficient Safeguards in National Security Removals*, HUMAN RIGHTS WATCH 16–17 (June 2007), <https://www.hrw.org/reports/2007/france0607/france0607web.pdf> [<https://perma.cc/D4WM-F7CD>].

120. *France Hopes Deporting More Alleged Radicals Will Bring Security*, DEUTSCHE WELLE (Apr. 7, 2021), <https://www.dw.com/en/france-hopes-deporting-more-alleged-radicals-will-bring-security/a-58153079> [<https://perma.cc/J2WM-6YET>].

121. *Penalties for Drug Law Offences in Europe at a Glance*, *supra* note 110.

122. *Id.*

123. *Id.*

124. *See Dalia v. France*, App. No. 26102/95, (Feb. 19, 1998), <https://hudoc.echr.coe.int/eng?i=001-58130> [<https://perma.cc/DV9C-DSX9>] (finding that an exclusion order of an immigrant with a French child was not a disproportionate in to a legitimate aim to prevent crime where the conviction was for aiding in drug trafficking of heroin, and therefore did not violate Article 8 of the ECHR). *But see Mehemi v. France*, App. No. 25017/94, (Sept. 26, 1997), <https://hudoc.echr.coe.int/eng?i=001-58098> [<https://perma.cc/CRG5-AH54>] (finding that an exclusion order for an immigrant who was born in France with no family ties outside France was disproportionate to a legitimate aim to prevent crime where the conviction was for conspiracy to import hashish, and therefore violated Article 8).

## 2. Spain

Removal of non-citizens from Spain for criminal offenses is described in Title III of Organic Law 4/2000 on the Rights and Freedoms of Foreign Nationals in Spain and Their Social Integration.<sup>125</sup> Article 57 states that:

[W]here an offender is a foreign national and commits offences which may be classified as very serious or serious, . . . having regard to the principle of proportionality, it is possible to order [their] removal from Spanish territory[.] Likewise, the foreign national's conviction, in Spain or abroad, of willful misconduct constituting . . . a criminal offence punishable by a term of imprisonment of more than one year shall constitute a legal basis for expulsion.<sup>126</sup>

There are protections from expulsion for some categories of non-citizens, such as those born in Spain or long-term residents.<sup>127</sup> For decisions to expel long-term residents, Article 57(5)(b) states that, “consideration should be given to the length of time they have resided in Spain and the links created [with Spain], their age, the consequences for the person concerned and the members of their family, and the links with the country to which they are to be removed.”<sup>128</sup>

The Court of Justice of the European Union reviewed these sections of Article 57 following challenges against the Spanish Supreme Court's interpretation of the statute that long-term residents could be expelled without applying the long-term resident considerations for intentional criminal acts with sentences of more than one year.<sup>129</sup> The court found Article 12 of Directive 2003/109 to preclude legislation of Member States that would provide for

125. Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social [Organic Law 4/2000, of the 11th of January, on the Rights and Freedoms of Foreign Nationals in Spain and Their Social Integration], <https://www.boe.es/eli/es/lo/2000/01/11/4/con> [<https://perma.cc/5PHE-JL6Y>].

126. Case C-448/19, *WT v. Subdelegación del Gobierno en Guadalajara*, ECLI:EU:C:2020:467, ¶ 7 (June 11, 2020), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=227296&doclang=EN> [<https://perma.cc/SML4-HNUG>].

127. Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social [Organic Law 4/2000, of the 11th of January, on the Rights and Freedoms of Foreign Nationals in Spain and Their Social Integration], art. 57.

128. Case C-448/19, *WT v. Subdelegación del Gobierno en Guadalajara*, ECLI:EU:C:2020:467, ¶ 7 (June 11, 2020).

129. Case C-448/19, *WT v. Subdelegación del Gobierno en Guadalajara*, ECLI:EU:C:2020:467 (June 11, 2020), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=227296&doclang=EN> [<https://perma.cc/SML4-HNUG>]; *see also* Case C-636/16, *Wilber López Pastuzano v Delegación del Gobierno en Navarra*, ECLI:EU:C:2017:949, (Dec. 7, 2017).

the expulsion of long term residents with sentences of over a year without examining their ties to the country and whether they present a genuine threat to public safety.<sup>130</sup>

Therefore, under Spanish law, any recurring minor crimes or crimes with a sentence of over one year can put an immigrant at risk for deportation, particularly those who are not long-term residents, subject to some consideration for individual circumstances. However, while the use of controlled substances in Spain is illegal, illicit drug use on its own is not a criminal offense in Spain, nor is it a specified offense in Spanish immigration law.<sup>131</sup> Over the past several decades, Spain has developed drug policies that focus on addiction treatment and administrative public health solutions to address individual drug users while focusing criminal sanctions and police power on drug trafficking.<sup>132</sup> Drug trafficking and related offenses, therefore, remain grounds for severe criminal sentences.<sup>133</sup>

### 3. Germany

The Residence Act of 2004 lays out Germany's legislation for the removal of non-citizens and non-EU nationals.<sup>134</sup> Section 53 of the Residence Act establishes that:

[F]oreigners whose stay endangers public safety and order, . . . will be expelled if, after weighing the interest in their departure against their individual interest in remaining in the federal territory, taking into account all the circumstances of the particular case, there is an overriding public interest in the foreigners' departure.<sup>135</sup>

The Residence Act specifies that:

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130. Case C-448/19, *WT v. Subdelegación del Gobierno en Guadalajara*, ECLI:EU:C:2020:467 (June 11, 2020).

131. *Spain: Where Drug Consumption is Not a Crime*, EURONEWS (June 11, 2013), <https://www.euronews.com/2013/11/06/spain-where-drug-consumption-is-not-a-crime> [<https://perma.cc/V8WG-RJN2>].

132. NATIONAL STRATEGY ON ADDICTIONS 2017–2024, SPANISH MINISTRY OF HEALTH (2017), [https://pnsd.sanidad.gob.es/en/pnsd/estrategiaNacional/docs/ESTRATEGIA\\_ADICCIONES\\_2017-2024\\_en\\_ingles.pdf](https://pnsd.sanidad.gob.es/en/pnsd/estrategiaNacional/docs/ESTRATEGIA_ADICCIONES_2017-2024_en_ingles.pdf) [<https://perma.cc/SYR7-3MHN>].

133. Constanza Sánchez & Michael Collins, *Better to Ask Forgiveness Than Permission: Spain's Sub-national Approach to Drug Policy*, GLOBAL DRUG POLICY OBSERVATORY (June 2018), <http://fileserv.idpc.net/library/GDPO-PolicyBrief12-Spain's-Sub-national-Approach-to-Drug-Policy-June2018.pdf> [<https://perma.cc/75GN-RUU7>].

134. *Law on Foreigners*, FEDERAL MINISTRY OF THE INTERIOR AND CMY., <https://www.bmi.bund.de/EN/topics/migration/law-on-foreigners/law-on-foreigners-node.html> [<https://perma.cc/26LT-Q6FB>].

135. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], February 25, 2008, Bundesgesetzblatt [BGBl] at 162, § 53 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_aufenthg/englisch\\_aufenthg.html#p1121](https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html#p1121) [<https://perma.cc/NU8L-SFGH>].

[T]he public interest in expelling the foreigner . . . is serious where the foreigner . . . has been incontestably sentenced to a prison term of at least six months for one or more intentionally committed offences, . . . has committed or attempted to commit . . . the offence under section 29 (1) sentence 1 no. 1 of the Narcotics Act, [(an offence involving the trafficking of narcotics)], or uses heroin, cocaine or a comparably dangerous narcotic drug and is not prepared to undergo the necessary treatment for rehabilitation, or evades such treatment.”<sup>136</sup>

Therefore, similar to other European countries, the law includes a process for weighing the individual interests of the immigrant against the public safety interest in deportation. Unlike French and Spanish immigration law, German immigration law specifies certain types of drug use as grounds for finding that the public interest is weighed in favor of deportation as well as language dealing with crime in general.<sup>137</sup>

The use of drugs on its own technically is not a criminal offense in Germany; but the possession and purchase of controlled substances can lead to imprisonment for several years.<sup>138</sup> Where only small quantities for personal use are involved, the law will sometimes allow a sentence to be postponed or revised if the offender enters treatment.<sup>139</sup> However, this is not an option for convictions involving supply or manufacture or for convictions involving the possession of higher quantities of controlled substances.<sup>140</sup>

Similarly, while the immigration law specifies that drug convictions are grounds for deportation, the law also allows in some circumstances for an immigrant to avoid deportation if the immigrant agrees to enter treatment for their drug use.<sup>141</sup> However, the law only provides alternative treatment for the simple use of a controlled substance, and not for convictions involving any kind of drug trafficking, where the law specifies that the public interest in expelling the immigrant is serious.<sup>142</sup> An immigrant convicted of a drug offense, especially a drug trafficking conviction, would not be eligible for

136. *Id.* § 54.

137. *Id.*

138. EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, GERMANY COUNTRY DRUG REPORT 2019 4, [https://www.emcdda.europa.eu/system/files/publications/11334/germany-cdr-2019\\_0.pdf](https://www.emcdda.europa.eu/system/files/publications/11334/germany-cdr-2019_0.pdf) [<https://perma.cc/5SWZ-TQ35>].

139. *See id.*

140. *See id.*

141. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], section 54.

142. *Id.*

the alternative treatment and would face the risk of deportation despite the existence of individual ties to the country.<sup>143</sup>

#### 4. Ireland

The Republic of Ireland is a member of the EU but is not part of the Schengen area, which means that its immigration policies are separate from other EU countries.<sup>144</sup> The Return Directive and Directive 2004/38/EC both exclude Ireland from the adoption of the directives.<sup>145</sup> Accordingly, the main immigration policy for non-EU immigrants is Irish law, laid out in the Immigration Act of 2004, and policies around deportation and refugee status are laid out in the Immigration Act of 1999.<sup>146</sup> EU nationals, however, still enjoy the same freedom of movement protections provided by other EU countries.<sup>147</sup> Additionally, while Ireland is not bound by the EU directives addressing removal, it has still ratified and is thus bound by Article 8 of the ECHR,<sup>148</sup> and its immigration policies likewise incorporate consideration of the rights to private and family life in accordance to Article 8.<sup>149</sup>

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143. See *T.C.E v. Germany*, App. No. 58681/12 (Mar. 1, 2018), <https://hudoc.echr.coe.int/eng?i=001-181177> [<https://perma.cc/42U2-AZK3>].

144. *Immigration to Ireland*, BALTIC LEGAL, <https://www.immigration-residency.eu/immigration-to/ireland/> [<https://perma.cc/KY64-5E3L>].

145. See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0038> [<https://perma.cc/HC77-5W9Q>]; see also Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98, 102 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115> [<https://perma.cc/JU6G-JRED>].

146. *Legislation: Immigration Act 1999*, EUR. MIGRATION NETWORK, <https://emn.ie/legislation/immigration-act-1999/> [<https://perma.cc/UHF4-RLWS>].

147. Charter of Fundamental Rights of the European Union, art. 45, 2012 O.J. (C 326) 391, 404 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=cs> [<https://perma.cc/CNW4-KTE6>].

148. EUR. CT. OF HUM. RTS., *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LIVING INSTRUMENT* 4, at 22 (Aug. 2021), [https://echr.coe.int/Documents/Convention\\_Instrument\\_ENG.pdf](https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf) [<https://perma.cc/UX4P-LABG>].

149. Ken Foxe, *€2.2 million spent on deporting people from Ireland in last three years*, THE JOURNAL.IE (Mar. 15, 2021, 6:30 AM), <https://www.thejournal.ie/deportation-2-2-million-euro-5381299-Mar2021/> [<https://perma.cc/PZL3-F5SV>].

A person wishing to remain in Ireland legally would need to apply for “Permission to Stay.”<sup>150</sup> Under the Immigration Act of 2004, permission can be refused when “the non-national has been convicted . . . of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty.”<sup>151</sup> The “Permission to Stay” process is discretionary and includes a review of the individual merits of each application, but permission can ultimately be refused on public safety grounds. Even where an immigrant has received permission, it can be revoked by a deportation order under the Immigration Act of 1999.<sup>152</sup>

Under the Immigration Act of 1999, a deportation can be ordered to “[1] a person who has served or is serving a term of imprisonment imposed on him or her by a court in the State . . . [2] a person whose deportation has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence . . . [3] a person whose deportation would, in the opinion of the Minister, be conducive to the common good.”<sup>153</sup> Therefore, committing a crime is grounds for deportation. However, the statute also states that “in determining whether to make a deportation order . . . the Minister shall have regard to—(a) the age of the person; (b) the duration of residence in the State of the person; (c) the family and domestic circumstances of the person; (d) the nature of the person’s connection with the State,” and other humanitarian considerations.<sup>154</sup> After considering the immigrant’s circumstances, the Minister of Justice can revoke the deportation order and grant temporary permission to stay.<sup>155</sup> A conviction of a crime is not an automatic ground for deportation, but the severity of the crime is weighed against any other considerations, and the decision to revoke a deportation order is ultimately discretionary.

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150. *Immigration Permission/Stamps*, DEP’T OF JUST. (Feb. 11, 2022) (Ir.), <https://www.irishimmigration.ie/registering-your-immigration-permission/information-on-registering-immigration-permission-stamps/> [https://perma.cc/WW45-97SH].

151. Immigration Act 2004, § 4 (Act No. 1/ 2004) (Ir.), <https://www.irishstatutebook.ie/eli/2004/act/1/section/4/enacted/en/html> [https://perma.cc/Z3PZ-QT56].

152. *Id.*

153. Immigration Act, 1999, § 3 (Act No. 22/1999) (Ir.), <https://www.irishstatutebook.ie/eli/1999/act/22/section/3/enacted/en/html#sec3> [https://perma.cc/45AL-JJXD].

154. *Id.*

155. *Repatriation Division*, DEP’T OF JUST. (Dec. 9, 2021), <https://www.irishimmigration.ie/my-situation-has-changed-since-i-arrived-in-ireland/spouse-civil-partner-of-irish-national-scheme/repatriation-division/> [https://perma.cc/F7ZV-NJ5K].

Illicit drug use is a criminal offense in Ireland, and possession of controlled substances can lead to a potential sentence of up to seven years.<sup>156</sup> For possession of marijuana, a fine is typically imposed, or up to twelve months imprisonment on the third offense.<sup>157</sup> Intent to sell drugs is a serious offense which can possibly impose a life sentence.<sup>158</sup>

It is important to note that the number of actual deportations from Ireland is relatively small compared to many other European countries. For example, in 2019, 293 people were deported, which was a large jump from the 2018 number of 163.<sup>159</sup> However, due to the discretionary nature of deportation decisions in Ireland, the number of deportations in a given year can change drastically based on enforcement priorities.<sup>160</sup> While immigration officials must consider individual circumstances in making decisions, immigrants whose presence is labeled as contrary to the public interest still risk being deported.<sup>161</sup>

#### IV. IMMIGRATION CONSEQUENCES FOR CRIMINAL CONVICTIONS IN THE UNITED KINGDOM

When the United Kingdom was a part of the European Union, it was one of the five countries responsible for the majority of deportations ordered.<sup>162</sup> While the UK was still part of the EU, UK immigration enforcement against other EU nationals complied with the framework set out for all Member States regarding the protection of the right to freedom of movement. Therefore, like in other EU countries, an EU citizen could typically only be barred or removed from the UK if it could be shown that the person presented a genuine, present, and serious threat.<sup>163</sup> However, like Ireland, the United Kingdom was excluded from the directives governing the removals of third-party nationals, even while it was still part of the EU.<sup>164</sup>

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156. *Drug Offenses*, CITIZENS INFO. (Dec. 18, 2020), [https://www.citizensinformation.ie/en/justice/criminal\\_law/criminal\\_offences/drug\\_offences.html](https://www.citizensinformation.ie/en/justice/criminal_law/criminal_offences/drug_offences.html) [<https://perma.cc/Y3UF-83BL>].

157. *Id.*

158. *Id.*

159. Foxe, *supra* note 149.

160. See Sorcha Pollak, *Five Deportation Orders Issued so far in 2021 Compared to 883 in 2020—Data*, THE IRISH TIMES (May 9, 2021, 3:01PM), <https://www.irishtimes.com/news/social-affairs/five-deportation-orders-issued-so-far-in-2021-compared-to-883-in-2020-data-1.4559659> [<https://perma.cc/6CHR-EC8W>].

161. *See id.*

162. Brandariz, *supra* note 82.

163. *Brexit: UK to Ban More EU citizens with Criminal Records*, BBC (Oct. 22, 2020), <https://www.bbc.com/news/uk-54639677> [<https://perma.cc/5CZ3-BHFW>].

164. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying



For non-EU citizens, the UK usually only deported those who were convicted of severe crimes, though policy emphasized a priority on public interest prior to the UK's withdrawal from the EU.<sup>165</sup> Low-level offenders with sentences of less than a year typically did not face automatic deportation.<sup>166</sup> Medium level offenders with sentences between one and four years could be automatically deported, unless the person showed a private or family life exception under Article 8 of the ECHR, or other compelling circumstances.<sup>167</sup> Those exceptions include having a "subsisting partner" who is a British citizen, a child who would be harmed by deportation, or sufficient integration into British society.<sup>168</sup> A criminal conviction leading to a sentence of over four years would generally lead to automatic deportation unless the person could prove compelling circumstances for being allowed to remain.<sup>169</sup>

Since leaving the EU, both EU and non-EU nationals with criminal records are now generally treated the same under British immigration law regarding admissibility and deportation.<sup>170</sup> Irish citizens are an exception as they are still free to travel to and live and work in the UK as part of the still remaining Common Travel Area agreement between the UK and Ireland.<sup>171</sup> Any non-citizen trying to enter the UK with a record of a criminal conviction can be barred from entry.<sup>172</sup> Any conviction with a sentence of 12 months or more, or multiple smaller convictions, displaying that the

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third-country nationals, 2008 O.J. (L 348) 98, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115> [<https://perma.cc/JU6G-JRED>].

165. Amar Ali, *Deportation after a Criminal Conviction in the UK*, REISS EDWARDS (Nov. 27, 2020), <https://immigrationlawyers-london.com/blog/deportation-after-a-criminal-conviction-in-the-uk.php> [<https://perma.cc/DT8B-7WY7>].

166. Nick Nason, *Briefing: what is the law on deporting non-EU foreign criminals and their human rights?*, FREEMOVEMENT (July 2, 2020), <https://www.freemovement.org.uk/what-is-the-law-on-the-deportation-of-non-eu-foreign-criminals-and-their-human-rights/> [<https://perma.cc/UCZ6-A29F>].

167. Amar Ali, *Deportation after a Criminal Conviction in the UK*, REISS EDWARDS (Nov. 27, 2020), <https://immigrationlawyers-london.com/blog/deportation-after-a-criminal-conviction-in-the-uk.php> [<https://perma.cc/DT8B-7WY7>].

168. *Immigration Rules part 13: deportation: section 399*, Gov.UK (Feb. 17, 2022), <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-13-deportation>.

169. Nason, *supra* note 166.

170. *Brexit: UK to ban more EU citizens with criminal records*, BBC (Oct. 22, 2020), <https://www.bbc.com/news/uk-54639677> [<https://perma.cc/5CZ3-BHFW>].

171. *Common Travel Area guidance*, Gov.UK (Oct. 4, 2021), <https://www.gov.uk/government/publications/common-travel-area-guidance/common-travel-area-guidance> (last visited Mar. 5, 2022).

172. *Immigration Rules part 9: grounds for refusal*, Gov.UK (Feb 17, 2022), <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal>.

offender has a particular disregard for the law, is a mandatory ground for refusal for entry and for leave to remain in the country.<sup>173</sup>

Drug offenses can form the basis for a refusal of leave to remain or of settlement in the UK; sentences for both overseas convictions and convictions within the UK are considered.<sup>174</sup> Possession of a controlled substance can be a serious offense in the UK and can carry prison sentences of up to seven years depending on the class of substance.<sup>175</sup> Offenses that include selling or dealing carry even harsher punishments.<sup>176</sup> A non-custodial sentence to a rehabilitation or similar program, however, can trigger a discretionary review of an application rather than a mandatory refusal.<sup>177</sup>

Policy for the deportation of non-citizens with criminal convictions living in the UK remains—at the time of writing—the same as before Brexit, though it is now applicable to EU and third-party nationals alike due to the UK’s continuing obligations under Article 8 of the ECHR.<sup>178</sup> British immigration law incorporates Article 8 by allowing a private or family life exception for deportation orders of people convicted of crimes with sentences of less than four years.<sup>179</sup> Beyond that, the UK’s interest in public safety outweighs the immigrants’ interests except in very compelling circumstances.<sup>180</sup>

Additionally, EU citizens who were living in the UK before December 31, 2020, could apply to the EU Settlement Scheme in order to remain in the country after Brexit.<sup>181</sup> EU citizens applying for pre-settled or settled status in the UK can be barred by a criminal conviction on a case-by-case basis, but are still eligible for status if the convictions are only for minor crimes.<sup>182</sup>

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173. See HOME OFFICE, GROUNDS FOR REFUSAL—CRIMINALITY 13 (Nov. 9, 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032285/Criminality.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032285/Criminality.pdf) [<https://perma.cc/L8QQ-WLEX>].

174. See *id.* at 5, 30.

175. See *Drug penalties*, GOV.UK, <https://www.gov.uk/penalties-drug-possession-dealing> [<https://perma.cc/GU3F-UNFE>].

176. See *id.*

177. HOME OFFICE, GROUNDS FOR REFUSAL—CRIMINALITY 19 (Nov. 9, 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1032285/Criminality.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032285/Criminality.pdf) [<https://perma.cc/L8QQ-WLEX>].

178. *The Supreme Court and Europe*, THE SUPREME COURT, <https://www.supremecourt.uk/about/the-supreme-court-and-europe.html> [<https://perma.cc/W8CW-7MKH>].

179. See Home Office, *Immigration Rules part 13: deportation*, §§ 398-99 Gov.UK (Feb. 17, 2022), <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-13-deportation> [<https://perma.cc/T482-ZS85>].

180. See *id.*

181. See *Apply to the EU Settlement Scheme (Settled and Pre-settled Status)*, GOV.UK, <https://www.gov.uk/settled-status-eu-citizens-families> (last visited July 19, 2022) [<https://perma.cc/HY9F-LA2Q>].

182. *Id.*

## V. IMPACTS OF CRIME-BASED DEPORTATIONS

Overall, one of the most significant differences between how immigration policies address drug convictions in the United States, the EU, and the UK is that language regarding drug offenses is baked into the statutory language of the United States' Immigration and Nationality Act. In contrast, immigration consequences for drug offenses are not listed specifically in the language of the EU directives or the UK's immigration laws. Therefore, the law in the EU and the UK tends to provide a framework for weighing removal decisions, rather than a given set of consequences for any specific crime (except for some policies of individual Member States like Germany). While crime remains grounds for deportation throughout the EU, subject to the limitations within the ECHR and the Directives, when it comes to drug offenses specifically, immigration consequences are largely dependent upon the individual country's policies regarding drug use and the extent to which that country considers drug use a serious crime. Therefore, there is room both for reform to immigration law and reform of drug policies as a way to reduce the immigration consequences for drug offenses in EU countries.

While many of the consequences of drug offenses are specified in American immigration law, drug policy and immigration policy still influence each other. Changes to either can have negative consequences for immigrants with drug convictions. The past several decades have seen movement toward harsher sentencing for drug convictions in the United States,<sup>183</sup> and immigration policy has likewise suffered from tough on crime attitudes toward drug users, making immigration reform regarding crime-based deportations more unpopular and out of reach. Also, like much of the tough on crime policies of previous decades, harsh immigration consequences for drug offenses and other crimes affect some of the most vulnerable communities in the United States.

*A. Impact of Tough on Crime Attitudes in American Drug Policy*

Mass incarceration and the immigration system's involvement with correctional systems in the United States have increased sharply since 1980, due to a series of policy changes involving harsh sentencing reforms, and

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183. See COMM. ON L. JUSTICE, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70 (Jeremy Travis, Bruce Western & Steve Redburn eds., National Academies Press 2014).

due in large part to the “War on Drugs.”<sup>184</sup> In 1980, there were less than 500,000 people incarcerated in the United States.<sup>185</sup> In 2019, that number was over 2 million.<sup>186</sup> In 2008, when the prison and jail populations peaked, nearly 1% of the adult population in the United States were incarcerated.<sup>187</sup> Since 2008, the rate of incarceration has decreased slowly but still remains high.<sup>188</sup> Currently, the United States still has the highest rate of incarceration of any country in the world, around seven times higher than countries in the European Union.<sup>189</sup>

Additionally, the number of people in the adult correctional system, including those on probation or parole, is even higher. In 2019, over six million people were under the supervision of the country’s adult correctional systems, which amounts to around one in forty United States residents.<sup>190</sup> This number has also decreased steadily since 2009, when that number exceeded seven million.<sup>191</sup>

The “War on Drugs” contributed significantly to the explosion of mass incarceration in the United States.<sup>192</sup> The term “War on Drugs” generally refers to the political movement that began in the 1970s focused on adopting stricter criminal policies to combat illegal drug use in the country.<sup>193</sup> Following the adoption of these stricter policies, the number of individuals that have been imprisoned for drug-related offenses has skyrocketed.<sup>194</sup> In the years that followed the start of the “War on Drugs”, drug offenses accounted for approximately two-thirds of the increase in incarceration rates in federal prisons and half of the increase in state prisons between 1985 and 2000.<sup>195</sup> Today, drug convictions still account for nearly half of the inmates currently housed in federal prisons.<sup>196</sup> Additionally, drug-related offense charges

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184. *See id.*

185. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW* 60 (2012).

186. John Gramlich, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RESEARCH CENTER (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/F4XZ-G4MB>].

187. *Id.*

188. TODD D. MINTON, LAUREN G. BEATTY & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2019—STATISTICAL TABLES* (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf> [<https://perma.cc/EU8Z-QMB4>].

189. COMM. ON L. JUSTICE, *supra* note 183, at 33.

190. MINTON, BEATTY & ZENG, *supra* note 188.

191. *Id.*

192. ALEXANDER, *supra* note 185.

193. *War on Drugs*, ENCYCLOPEDIA BRITANNICA (July 23, 2020), <https://www.britannica.com/topic/war-on-drugs> [<https://perma.cc/4RQX-GV9G>].

194. *Id.* at 59–60.

195. *Id.*

196. *Statistics: Offenses*, FEDERAL BUREAU OF PRISONS (Feb. 26, 2022), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) [<https://perma.cc/9RTG-SCFV>].

are the basis for the incarceration of around one in five people currently being held in local jails.<sup>197</sup>

The “War on Drugs” coincided with an overall shift in societal attitudes toward tougher, harsher penalties toward crime in all areas, generally aimed towards deterrence and incarceration.<sup>198</sup> The ultimate deterrent effect on crime rates created by these policies is uncertain, but their effect on incarceration rates is significant, and those effects were not borne equally across American society.<sup>199</sup> A disproportionate number of the people who were affected by policies of stricter sentencing and harsher penalties were—and still are—people of color, particularly those in black and Hispanic communities located in impoverished neighborhoods.<sup>200</sup>

Another one of the significant societal changes that resulted from the “War on Drugs” and an increased focus on tough on crime criminal policies was a broader acceptance of those with criminal drug convictions as a type of underclass.<sup>201</sup> Even for U.S. citizens, criminal convictions for controlled substances have negative consequences well beyond that of the prison sentence, such as a lack of job access, lack of access to public housing options or other public benefits, and disenfranchisement.<sup>202</sup> These consequences are particularly significant when a disproportionate number of the incarcerated population is composed of black and brown people including those of Hispanic descent and Native American descent.<sup>203</sup> Negative attitudes toward criminality and drug abuse compound negative attitudes surrounding racial bias, and coupled together the two continue to perpetuate imprisonment as a solution rather than consider humanitarian policy making. Excessively negative perceptions of drug abusers lead to a general acceptance of reactionary policies that do little to comprehensively address larger, underlying public health and economic problems. High rates of recidivism in

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197. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/W9SX-LQB5>].

198. COMM. ON L. JUSTICE, *supra* note 183, at 335–36.

199. *Id.* at 339–40.

200. *Id.*

201. ALEXANDER, *supra* note 185, at 141–45.

202. *Id.* at 141–48.

203. *Race and Ethnicity*, PRISON POLICY INITIATIVE, [https://www.prisonpolicy.org/research/race\\_and\\_ethnicity/](https://www.prisonpolicy.org/research/race_and_ethnicity/) [<https://perma.cc/B68N-Y65H>].

American prisons help to exemplify this fact, since current policy still tends to focus more on punishment rather than rehabilitation and deterrence.<sup>204</sup>

In the years leading up to 2022, policy reform movements have successfully pushed back on many of the policies enacted during the “War on Drugs.”<sup>205</sup> As new waves of addiction crises affect a broader section of American society, a more empathetic approach toward drug abuse has slowly gained favor, much of it from communities that had once pushed the hardest for tougher on crime policies.<sup>206</sup> Because many state legislatures have begun to recognize drug addiction as a disease that should be cared for by doctors, and not law enforcement, state legislatures have advocated for new drug policy reform to reflect such.<sup>207</sup> This reform coupled with the realization that tough on crime policies are hurting more than just the individual who is incarcerated, has led to states scaling back harsh sentencing guidelines pertaining to drugs.<sup>208</sup> States are increasing the use of diversion programs rather than prison sentences for those arrested on low level drug charges.<sup>209</sup>

Notably, however, the push for changes to the national approach to drugs has not reached all areas of the country or all areas of the law. For example, although marijuana has been legalized in many states, marijuana remains federally classified as a Schedule I controlled substance, with negative immigration consequences.<sup>210</sup> Additionally, much of the progress that has been made in reframing conversations around drug use has had very little impact on criminal immigration policies.

### *B. Impacts of Tough on Crime Policies on the American Immigration System*

Immigration policy in America has historically been reactionary in nature. For example, much of the earliest immigration policies in the United States

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204. Redonna Chandler, Bennett Fletcher, & Nora Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 (2) JAMA 183 (2009).

205. Brian Mann, *After 50 Years Of The War On Drugs, 'What Good Is It Doing For Us?'*, NPR (June 17, 2021, 5:00 AM), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us> [<https://perma.cc/B68N-Y65H>].

206. *Drug Law Reform*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, <https://www.nacdl.org/Landing/DrugLaw> [<https://perma.cc/H44M-3VF8>].

207. Mann, *supra* note 205.

208. *Drug Law Reform*, *supra* note 206.

209. *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*, CENTER FOR HEALTH AND JUSTICE AT TASC (Dec. 2013) [https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report\\_web.pdf](https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf) [<https://perma.cc/7BKA-MSAT>].

210. *California Quick Reference Chart and Notes: § N.8 Controlled Substances*, IMMIGRANT LEGAL RESOURCE CENTER (March 2019), <https://www.ilrc.org/chart> [<https://perma.cc/PD33-ZCF4>].

were aimed at keeping certain “undesirables” out of the country. For instance, The Chinese Exclusion Act of 1882, was passed in response to a wave of Chinese immigrants coupled with a growing nativist movement creating racial tensions.<sup>211</sup> In response to a wave of new immigrants in the beginning of the twentieth century, Congress passed legislation in 1917 further restricting immigration from Asia, before enacting a quota system in 1924 that set specific nationality-based quotas on the number of immigrants who were allowed to come to the United States.<sup>212</sup> Following the unrest caused by skyrocketing unemployment during the Great Depression, the 1930s saw a mass “repatriation” campaign that began targeting immigrants of Mexican decent.<sup>213</sup> This campaign led to the mass deportation of thousands of Mexican-Americans, most of whom were actually U.S. citizens that were deported without formal removal proceedings.<sup>214</sup>

The Immigration and Nationality Act was passed in 1952 and remains the foundation of immigration policy in the United States.<sup>215</sup> Later reforms to the INA in the 1960s and 1970s reworked the quota system and adopted a worldwide quota,<sup>216</sup> and the amendments to the INA enacted in the following decades shaped the law into what it is today. Some of the significant changes that came from these amendments were broader grounds for inadmissibility, allowance for quicker deportations, and expanded categories of crimes and convictions included in the statute’s admissibility restrictions and deportation grounds.<sup>217</sup>

One of the most significant changes to the INA to come out of the tough on crime era was the addition of the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA), which significantly expanded the grounds for deportation.<sup>218</sup> The IIRAIRA followed earlier legislation that also expanded deportable offenses, such as the Anti-Drug Abuse Act of

211. BOSWELL, *supra* note 18, at 7.

212. *Id.*

213. Becky Little, *The U.S. Deported a Million of Its Own Citizens to Mexico During the Great Depression*, HISTORY (July 12, 2019), <https://www.history.com/news/great-depression-repatriation-drives-mexico-deportation> [<https://perma.cc/XP6Y-YLF7>].

214. *INS Records for 1930s Mexican Repatriations*, U.S. CITIZENSHIP & IMMIGR. SERVICES (July 29, 2020), <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/ins-records-for-1930s-mexican-repatriations> [<https://perma.cc/YHP2-X5BV>].

215. BOSWELL, *supra* note 18, at 10.

216. KURZBAN, *supra* note 36, at 4–5.

217. *See* BOSWELL, *supra* note 18, at 11–12.

218. *See* Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC. 192, 192 (2018).

1986, the Anti-Drug Abuse Act of 1988, and the 1990 Immigration Act.<sup>219</sup> However, the IIRAIRA was much more restrictive in the way that it expanded immigration detention, expanded the law enforcement functions of immigration officials, restricted public benefits for legal immigrants, and restricted the use of discretionary individualized determinations for non-citizens convicted of crimes.<sup>220</sup> The IIRAIRA also widened mandatory detention for immigrants facing deportation for most criminal charges until the final resolution of their cases.<sup>221</sup> As a result, immigration detention increased significantly.<sup>222</sup>

In addition to restrictive immigration policies stemming from tough on crime attitudes and shifting public opinion around drug use, a rise in anti-immigration sentiment post-9/11 led to another round of reactionary policies.<sup>223</sup> Concerns about the immigration status of those involved in the 9/11 attacks led to anxiety around the immigration system and its effectiveness in maintaining national security, which led the federal government to enact more immigration reform that emphasized expanding border security and harsher treatment of non-citizens convicted of crimes.<sup>224</sup>

Reactionary policies following the war on drugs and the 9/11 attacks have created a compounding effect on immigration policy. Reform in policies targeting non-citizens convicted of crimes must overcome negative attitudes toward drug offenders as well as negative attitudes toward immigration in general. Sympathetic comprehensive immigration reform can therefore be a difficult political task, particularly in an increasingly divided political atmosphere. Additionally, because immigration law involves so much executive discretion, the general attitudes toward immigrants of a particular administration has a significant impact on the outcomes of immigrants convicted of crimes.

### *C. Impacts of Deportation on the Individual, the Family, and the Community*

Individuals who are deported from the countries where they reside often face a host of issues when they arrive in their country of citizenship. At times people are returned to countries where they have little knowledge of the local language or culture. People may also be returned to countries

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219. *Id.* at 193.

220. *See id.* at 194–95.

221. *Id.* at 196–97.

222. Melina Juárez, Bárbara Gómez-Aguñaga & Sonia P. Bettez, *Twenty Years after IIRIRA: The Rise of Immigrant Detention and its Effects on Latinx Communities across the Nation*, 6 J. ON MIGRATION & HUM. SEC. 74, 77 (2018).

223. Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, 38 HUM. RIGHTS 10, 10 (2011).

224. *See id.*



where they are not safe or where they have significantly less access to economic support, healthcare programs, and public services. Additionally, being deported can separate the individual from their support system of family members, friends, coworkers, and community members.

For those who receive drug convictions due to underlying addiction issues, deportation can have a significant negative impact on recovery and their overall outcome. The stress of deportation and the loss of valuable support systems can make it more difficult for individuals to seek out treatment and for that treatment to be effective. Additionally, immigrants who are held in detention while awaiting trial or an immigration decision are restricted in their access to rehabilitation or treatment.<sup>225</sup>

Looming threats of deportation also make it more likely that someone who needs help will not ask for it out of fear that seeking treatment could expose them to potential immigration consequences.<sup>226</sup> Beyond individuals, communities and families who fear their own deportation or the deportation of family members are also less likely to report crimes, even when they are a victim of the crime.<sup>227</sup> The harsher immigration policies are, and the more people in a community who are deported, the more likely it is that members of that community will not want to cooperate with government officials at all, in any capacity.<sup>228</sup>

Harsh immigration policies also punish the families of immigrants who are deported. For example, non-citizens who are deported from the United States can face lengthy separations from their families who remain in the United States. Children whose parents are detained or deported face economic instability as it limits the ability of parents to provide financially for their children.<sup>229</sup> Additionally, children whose parents are deported face a greater risk of ending up in the child welfare system, meaning parents risk both

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225. Meng, *supra* note 5.

226. Samuel Garcia, *What Happens To Immigrants Who Face Addiction*, FORBES (Oct. 5, 2018, 2:18 PM), <https://www.forbes.com/sites/samuelgarcia/2018/10/15/what-happens-to-immigrants-who-face-addiction/?sh=46953b074745> [<https://perma.cc/CGU3-RQYE>].

227. Regina Day Langhout et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. OF CMTY. PSYCH. 3, 6–7 (2018).

228. *See id.* at 6.

229. U.S. Citizen Children Impacted by Immigration Enforcement, AMERICAN IMMIGRATION COUNCIL 3 (2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/us\\_citizen\\_children\\_impacted\\_by\\_immigration\\_enforcement\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf) [<https://perma.cc/TQ7W-DQ9Z>].

separation from their children and losing parental rights following deportation.<sup>230</sup> Children and families who are separated from their loved ones through deportation also often face a long-term or even permanent separation, and the children often suffer trauma as a result.<sup>231</sup> Someone who is deported for any kind of drug trafficking conviction, for example, will face a permanent bar from obtaining legal status in the United States, cutting off the possibility that the family might ever reunite in the United States.<sup>232</sup>

## VI. NON-CITIZENS AND DUE PROCESS

### A. *Non-Citizens and the Constitution*

The United States Constitution provides non-citizens constitutional protections in criminal proceedings as it would citizens, even in the resulting immigration proceedings.<sup>233</sup> In *Padilla v. Kentucky*, for example, the Supreme Court held that both the Sixth Amendment protections against ineffective assistance of counsel applied in deportation proceedings following a criminal conviction, and also that deportation was not just a “collateral consequence” of criminal proceedings.<sup>234</sup> The Supreme Court acknowledged that deportation is often a much more severe punishment than a short-term prison sentence for people who have no ties to their birth countries; indeed, it is rational for some people to risk longer sentences for a chance to remain in the United States, and that “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>235</sup> The repercussions of such crimes is one of the reasons that the Constitution requires attorneys to advise non-citizens of the consequences of pleading guilty to a crime.

Although the Supreme Court has acknowledged that deportation is often a much harsher punishment than a lengthy prison sentence, non-citizen criminal defendants are frequently deported for crimes that would not otherwise subject them to such harsh consequences. Of course, citizens who are convicted of controlled substance offenses are often subjected to overly harsh sentences, as is reflected in the high incarceration rates in the United States. However, for non-citizens, immigration consequences for similar crimes are often far harsher. For one, immigrants who are convicted of

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230. *Id.*

231. *Id.* at 1–2.

232. Meng, *supra* note 5.

233. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

234. *Id.*

235. *Id.* at 364–65.

drug crimes are held in mandatory pretrial detention, limiting their access to attorneys and support systems and increasing the likelihood that they will plead guilty, often not being fully advised of the immigration consequences of their guilty pleas.<sup>236</sup> Detention also restricts an immigrant's ability to access rehabilitation and treatment for addiction that might otherwise be available to them.<sup>237</sup> Additionally, deportations often follow prison sentences, effectively subjecting a non-citizen to double punishment for the same crime.

While there are contexts where the government can reasonably justify distinguishing between citizens and non-citizens, it makes little sense for criminal sentencing to be one of those areas. By subjecting immigrants to deportation for crimes like simple possession of a controlled substance, the punishment a non-citizen receives is excessively disproportionate. While the criminal law in other contexts has sometimes begun to treat sentencing for drug offenses less severely, even sometimes offering treatment programs as an alternative to incarceration, there are no similar options for non-citizens, who face deportation for any conviction even where the individual completes a drug diversion program, and no sentence is imposed.<sup>238</sup>

Criminal laws that require a specific punishment without regard to individual circumstances are bound to create injustice in any context, including in the context of deportations. A one-size-fits all approach for punishments as potentially devastating as deportation leaves very little room to consider the complexities of addiction, drug use, or the possible effects on an individual's life and family.

#### *B. Protections of Non-Citizens in the EU*

In the European Union, the EU Directives, as well as the European Convention on Human Rights, both create some protections for immigrants by requiring consideration for a person's private and familial ties to a country. The European Court on Human Rights has held that, "the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life,'" and that "very serious reasons are required to justify the expulsion of a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a

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236. Meng, *supra* note 5.

237. *Id.*

238. *Id.*

host country.”<sup>239</sup> The European Court of Justice has held that, at least for the expulsion of long-term residents it is “necessary to examine whether the third country national represents a genuine and sufficiently serious threat to public order or public security,” and “take into account the duration of residence in the territory of that Member State, the age of the person concerned, the consequences of expulsion for the person concerned and family members and the links with the country of residence or the absence of links with the country of origin.”<sup>240</sup>

This type of framework is an important step for immigrants facing the possibility of deportation. The requirement for a court to, at a minimum, look into some of the unique circumstances in a particular case can help avoid some of the harshest consequences for immigrants convicted of crimes.

However, this is not a total protection. As the European Court of Human Rights has noted, “the Convention does not guarantee the right of a foreign national to enter or to reside in a particular country.”<sup>241</sup> While the framework provided by the Directives and the ECHR recognize the importance of unique individual circumstances in removal decisions, great discretion is still afforded to individual Member States in determining how that framework applies to their own immigration policies. Therefore, while Member States are sometimes precluded from enacting particularly egregious policies, there is still variation between countries in how much protection immigrants are offered from harsh immigration consequences. Even so, the overall rationale behind the Directives and the ECHR framework for removal decisions may still provide some significant guidance for potential improvements to the United States immigration policy.

Additionally, while non-binding on member states, the Council of Europe’s 2001 Recommendation 1504 provides some further guidance for important principles in dealing with long-term residents. For long-term residents, the Council recommends that governments of member states:

[A]cept that expelling persons after they have served a prison sentence is a double punishment . . . ensure that offences committed by long-term migrants which constitute a threat to or violation of public order are defined and penalised under criminal law in the same way as for nationals . . . ensure that persons facing expulsion can secure detailed examination of their humanitarian situation in order

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239. Üner v. the Netherlands, App. No. 46410/99, ¶ 59 (Oct. 18, 2006), <https://hudoc.echr.coe.int/eng?i=001-77542> [<https://perma.cc/MX2U-KZFU>].

240. Case C-448/19, WT v. Subdelegación del Gobierno en Guadalajara, ECLI:EU:C:2020:467, ¶ 19 (June 11, 2020).

241. EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 8 of the European Convention on Human Rights*, 92 (Aug. 31, 2021), [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf) [<https://perma.cc/4MMB-TTMP>].

to highlight the consequences of their possible expulsion for themselves and their families and, if appropriate, to adopt alternative measures.<sup>242</sup>

The Council also stated that it “finds it totally unacceptable that legal long-term immigrants who have been sentenced to expulsion are held in prison while they await their expulsion.”<sup>243</sup>

These principles, if adapted into the United States’ immigration system could help many immigrants facing the harsh consequences of automatic removal decisions, particularly those who have significant long-term ties to the United States. For those with permanent resident status, a framework that adopts a presumption against removal, except in cases where the person presents a true serious threat, could offer significantly more protection than the current United States policy.

## VII. RECOMMENDATIONS

The opportunity to have an individualized hearing for a non-citizen’s circumstances and family ties could help mitigate the impact of harsh immigration decisions on people and their families. At one point in the United States, before 1996, individualized hearings were available even for non-citizens convicted of aggravated felonies—including drug trafficking.<sup>244</sup> However, immigration law was amended to restrict the use of these types of hearings. An opportunity for immigrants to present compelling reasons to remain in the country is an important step towards eliminating some of the most negative impacts of current policy, particularly for families who would have an opportunity for their needs to be considered as well. Treating every immigrant with a qualifying drug offense as the same for the purposes of removal does little to promote justice because it does not consider the ways that an individual’s circumstances interact with the reasons for their convictions. Providing an opportunity for those circumstances to be considered could help to limit removal decisions to those situations where it is actually necessary to serve a public interest.

However, providing for the consideration of individual circumstances would likely not, on its own, improve outcomes in many cases. Individual hearings would still be subject to a large amount of discretion, leaving immigrants vulnerable to variations among courts. Immigration law should therefore

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242. EUR. PARL. ASS., *Non-expulsion of long-term immigrants*, Doc. No. 8986 (2001).

243. *Id.*

244. Meng, *supra* note 5.

be reformed to provide statutory protections for non-citizens, particularly permanent residents, that are not subject to executive discretion. This could include restricting the number of qualifying offenses for deportation and listing circumstances that would create a presumption that removal is against public interest, such as in cases where someone has spent most of their life in the United States and has no ties elsewhere. Additionally, certain federally controlled substances like marijuana should be decriminalized in the interest of promoting equitable treatment. Because immigration law is dependent on federal controlled substance law, reform in federal drug laws could provide less harsh consequences in many cases.

Finally, immigration law should be reformed to better reflect the United States' culture's evolving understanding of the interplay between drug use and addiction. As legislatures begin to approach addiction as a public health issue, rather than a criminal justice issue, and begin to recognize many criminal sentences for drug offenses as disproportionate, the same shift should be reflected in immigration law. Simple possession and drug use on its own should never be grounds for removal. Additionally, an immigrant who completes drug diversion programs or who seeks out treatment should not remain at risk of removal. Punishing immigrants suffering from addiction with removal does little to combat the overall problems of addiction in communities and deporting non-citizens with drug convictions is often a disproportionate punishment which creates unnecessary stress and trauma for the individuals and their families.

#### VIII. CONCLUSION

In the United States, tough-on-crime attitudes toward criminal immigrants have created a system rife with injustice, particularly when it comes to the removal of non-citizens convicted of drug related offenses. The framework developed in the EU can provide some insight into a more compassionate approach toward crime-based deportations, such as the need for individualized humanitarian considerations in making deportation decisions. Ultimately, however, protections for immigrants should go beyond that framework to minimize the potentially disastrous effects on immigrants and their families due to deportation.

Non-citizens with drug convictions should not be doubly punished through removal after being convicted of a drug offense. Non-citizens should, at the very least, be subject to the same punishments as citizens without being at risk for the disproportionate consequence of deportation, particularly in situations where a person is a long-term resident or is convicted of simple possession. Immigration law should therefore be reformed to adopt a more humanitarian approach toward non-citizens convicted of drug offenses.