

A SMALL BUT SIGNIFICANT REFORM THAT COULD HAVE PUT THE CAP BACK ON MISDEMEANOR SENTENCING FOR COLORADO’S NONCITIZENS

A power struggle between the states and the federal government has reached a heightened tension in the past year with the United States even filing a lawsuit against the State of California.¹ This heightened tension has been brought on by the conflict between the current administration’s intensified efforts at deporting removable noncitizens and local law enforcement agencies that have instituted various policies to limit their cooperation with federal immigration enforcement agents, more commonly known as “sanctuary cities” or “sanctuary states.”² The debate over the permissibility of these policies has largely focused on the intersection between the supremacy of federal immigration law to preempt state laws that “create an obstacle to the full purposes and objectives of Congress”³ and the federal government’s inability to commandeer state officers to carry out federal commands.⁴ Importantly, the states maintain a key power free from potential federal interference, which comes in the form of the power to establish state criminal laws and appropriate sentencing outside of the immigration context.⁵ Federal immigration authorities frequently depend on the elements of these state criminal laws and their sentences to determine whether a specific conviction qualifies as a deportable offense.⁶

Recently, the Colorado legislature debated a small reform that sought to utilize this key state power, in order to help Colorado’s authorized noncitizens⁷ avoid removal proceedings and potential deportation for certain first-time, low-level criminal convictions.⁸ That small but

1. Adam Liptak, *Sessions Targets California Immigrants Using a Ruling That Protected Them*, N.Y. TIMES (March 7, 2018), <https://www.nytimes.com/2018/03/07/us/politics/jeff-sessions-california-lawsuit.html>.

2. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

3. *Arizona v. United States*, 567 U.S. 387, 406 (2012) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

4. *Printz v. United States*, 521 U.S. 898, 935 (1997).

5. See Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 266–68 (2012).

6. *Id.*

7. For purposes of this brief article, the term “authorized noncitizen” refers to those noncitizens who have obtained a form of authorization to remain in the country from the United States government. While the precise consequences of criminal convictions can vary depending on the type of authorization, this broad term suffices for the general scope of this article because under the Immigration and Nationality Act any noncitizen remains subject to potential deportation. See 8 U.S.C. §§ 1227(a), 1101(a)(3) (2012).

8. Jesse Paul, *Effort to Help Immigrants in Colorado Avoid Deportation Gets Some GOP Support, but is Set Aside in Legislature for Summer Work*, DENV. POST (April 10, 2018), <https://www.denverpost.com/2018/04/10/364-days-in-jail-bill-colorado-immigrants/>.

significant reform came in the form of Senate Bill 18-166 (SB 18-166), which reduced the maximum sentence for class 2 misdemeanors, misdemeanors without a mandated penalty, and municipal violations by one day, from one year to 364 days.⁹ This one day reduction would have fixed a minor incongruity between Colorado's maximum sentencing for these categories of low-level offenses and the minimum *potential* sentence required for certain offenses to qualify as removable under federal immigration law. Unfortunately, SB 18-166 did not survive the debate and the Colorado House of Representatives killed the bill on May 9, 2018, missing an important opportunity to align Colorado's criminal sentencing with federal immigration law.

Like Colorado Senator Ray Scott, who voted to strike down a similar bill last year, some believe that this reform seeks "special treatment" for noncitizens.¹⁰ This belief, however, is out-of-place. Rather, this bill provided more equal treatment under Colorado law to Colorado's lawfully present noncitizens, a group of people that embodies an integral part of Colorado's communities and economy.¹¹ This reform remains necessary to create more equal treatment for this group because they can unfortunately find themselves in county or municipal courts on criminal charges for low-level offenses, as with any person in Colorado. However, Colorado's current criminal sentencing system exposes its noncitizens to drastically harsh collateral consequences that a citizen does not face for the same first-time low-level conviction.

Under current federal immigration law, even if a Colorado judge decides to sentence an authorized noncitizen to a sentence that is much less than the one-year maximum for these low-level convictions, "crimes involving moral turpitude" with a *potential* sentence of a year or more subjects authorized noncitizens to removal proceedings and potential deportation.¹² Therefore, in the federal system, regardless of the fact that Colorado has generally categorized these offenses as less serious misdemeanors, these offenses become deportable offenses because their potential sentence crosses the barrier beyond 364 days into a year.¹³ In this way, the judgment of what the Colorado legislature previously intended

9. S.B. 18-166, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

10. *Change Max Criminal Penalty One Year to 364 Days: Hearing on H.B. 17-1268 Before the S. Comm. on State, Veterans, & Military Affairs Committee*, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

11. See generally NEW AMERICAN ECON., THE CONTRIBUTIONS OF NEW AMERICANS IN COLORADO 2-3, 5-7, 10, 14-15 (2016), <http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-co-report.pdf> (providing an overview of immigrant contributions to Colorado's economy in 2014, which included approximately \$1.0 billion in state and local taxes; 10% of the overall workforce; employing 83,794 people; 52% of maids and housekeeping cleaners; 32% of agricultural workers; 26% of construction laborers; and 23% of students earning science, technology, engineering, and math PhDs).

12. Compare 8 U.S.C. § 1227(a)(2)(A)(i) (2012), with COLO. REV. STAT. § 18-1.3-501(1)(a) (2018) (establishing "[t]hree months imprisonment, or two hundred fifty dollars fine, or both" as the minimum sentence for a misdemeanor 2).

13. See 8 U.S.C. § 1227(a)(2)(A)(i) (2012).

as the just and proportionate maximum for these low-level offenses becomes unintentionally exacerbated into a much more severe sentence by an unintentional overlap with the minimum threshold imposed by federal immigration law.

Furthermore, other collateral immigration consequences may still stem from these types of convictions that this bill would not have necessarily addressed, including potential bars to citizenship,¹⁴ bars to adjustments of status,¹⁵ and difficulty with reentering the country from traveling abroad.¹⁶ While the precise consequences of this reform are beyond the scope of this brief article, the broad benefits of SB 18-166 to Colorado's noncitizens and court dockets should have been sufficient to justify passing this reduction of the maximum sentence by one day for these first-time, low-level convictions.

The Immigration and Nationality Act (INA) provides that any “alien who . . . is convicted of a crime involving moral turpitude committed within five years or 10 years in the case of an alien provided lawful permanent resident status . . . after the date of admission and is convicted of a crime for which a sentence of one year or longer *may be* imposed, is deportable.”¹⁷ Unfortunately, the INA does not provide a definition of what qualifies as a crime involving moral turpitude. Rather, the determination has been left up to the Board of Immigration Appeals (BIA) and the federal courts to craft on a case-by-case basis.¹⁸ The BIA has generally defined the term “moral turpitude” as relating to conduct that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”¹⁹ “To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state.”²⁰ However, the cases that have developed out of this process do not provide great clarity as to precisely which crimes fall into this category and which do not.²¹ There-

14. *See id.* §§ 1427(a)(3), 1101(f) (establishing that good moral character can be a discretionary factor).

15. *See id.* §§ 1229(a)–(c), 1182(a)(2)(A).

16. *See id.* § 1182(a)(2)(A).

17. *Id.* § 1227(a)(2)(A)(i).

18. *See* Lindsay M. Kornegay & Evan Tsen Lee, *Why Deporting Immigrants for “Crimes of Moral Turpitude” is Now Unconstitutional*, 13 DUKE J. CONST. L. & PUB POL’Y 47, 51 (2017).

19. Silva-Trevino, 26 I. & N. Dec. 826, 833–34 (B.I.A. 2016) (quoting Cisneros-Guerrero v. Holder, 774 F.3d 1056, 1058 (5th Cir. 2014)).

20. *Id.* (citing Nino v. Holder, 690 F.3d 691, 695 (5th Cir. 2012)).

21. *See* Kornegay & Lee, *supra* note 17, at 60–63 (“Despite the convoluted history and consistent judicial critique of the phrase, a fair number of offenses are always considered to involve moral turpitude, with courts generally finding explanation unnecessary. Murder and attempted murder, forcible rape, prostitution and solicitation of prostitution, theft with intent to permanently deprive (including petty theft), and possession of child pornography are always CIMT. Failure to register as a sex offender is never a CIMT. However, there are many other offenses sometimes considered CIMT and other times not. Among the offenses that may or may not be CIMT are manslaughter, fraud, sex offenses against children, child abandonment and child abuse, indecent exposure, assault, misprision of felony, false statements, and driving under the influence.”).

fore, making generalizations about the definition of what constitutes a crime involving moral turpitude is almost futile.²²

Instead of utilizing a broad concrete definition or standard, when determining whether a conviction qualifies as one involving moral turpitude, the BIA analyzes the statute defining the crime of conviction to see if it fits within the generic definition of a crime involving moral turpitude using the “categorical approach.”²³ The BIA’s categorical approach focuses on the minimum conduct that has a *realistic probability* of being prosecuted under the statute, rather than on the specific facts that led to the conviction.²⁴ Alternatively, there are some convictions where the statute at issue includes some offenses that involve moral turpitude and some that do not.²⁵ In these situations, the BIA applies a “modified categorical approach,” where the record of conviction may be used to identify the statutory provision that the respondent was convicted of violating.²⁶ The Supreme Court has recently clarified that the modified categorical approach only applies to “statutes having multiple alternative elements,” and it does not apply to statutes that “enumerate[] various factual means of committing a single element.”²⁷ The Supreme Court explained this concept further by using the following hypothetical:

[S]uppose a statute requires use of a “deadly weapon” as an element of a crime and further provides that the use of a “knife, gun, bat, or similar weapon” would all qualify. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors “conclude[d] that the defendant used a knife” while others “conclude[d] he used a gun,” so long as all agreed that the defendant used a “deadly weapon.”²⁸

In the end, this analysis rarely provides a clear answer and still leads to a lot of uncertainty on behalf of the noncitizen who has been charged with a crime that may qualify as a deportable offense. At base, it hardly seems like this lengthy analysis provides much clarity to the amorphous definition of “moral turpitude.” Despite the BIA developing a great deal of precedent, not much seems to have changed since 1951 when a dissenting Justice Jackson said, “[T]he guiding line seems to have no relation to the result reached. . . . How many aliens have been deported who

22. *Id.*

23. *Silva-Trevino*, 26 I. & N. Dec. at 831.

24. *Id.* Some circuits have rejected the realistic probability approach, but the Tenth Circuit, which controls over Colorado immigration courts has expressly adopted the realistic possibility approach. *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1267 (10th Cir. 2011).

25. *Id.* at 833.

26. *Id.*

27. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

28. *Id.* (citations omitted).

would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law.”²⁹

While going through Colorado’s entire misdemeanor code to determine what exactly qualifies as a crime involving moral turpitude is greatly beyond the scope of this article, at the very least, these are supposed to be the crimes that the United States Congress thinks Colorado finds serious enough to punish by at least a year *or more*.³⁰ Nonetheless, Colorado currently sends a different message. This message takes away a key aspect of the state’s criminal justice system that allows for alternative sentencing and rehabilitation, which Colorado even utilizes for more serious offenses.³¹ As vital members of Colorado’s population, noncitizens should also have a chance for rehabilitation that the immigration authorities may not permit through the application of their broad categorical approach to crime, which does not consider the underlying facts. In this way, Colorado’s legislature missed a great opportunity to make its own categorical decision that takes advantage of its sovereign power over criminal law and sentencing to pursue more equal treatment for its noncitizens. In striking down this small change, Colorado’s noncitizens may still be separated from their families and communities without having that one extra opportunity to make amends for their mistake by working to improve their own lives and the lives of others.

Of course, deportation may not always be the result after removal proceedings commence against an individual because they may be eligible for relief from removal.³² Despite this, the person still finds themselves facing the lengthy, stressful, and destabilizing wait for their case to be processed by the heavily congested immigration courts.³³ However, even after going through this lengthy process, the likelihood of obtaining relief at this level remains rather low, especially without the assistance of an attorney.³⁴ Yet, despite this reality, a noncitizen must either forgo an attorney or bear the high costs of representation because noncitizens in

29. *Jordan v. De George*, 341 U.S. 223, 239–40 (1951) (Jackson, J., dissenting).

30. See 8 U.S.C. § 1227(a)(2)(A)(i) (2012).

31. See generally COLO. REV. STAT. § 18-1.3-104 (providing the various alternatives that a trial court has to imposing a term of imprisonment).

32. See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 187–92 (2017) (describing the common narrative of immigration adjudications).

33. See generally ANDREW R. ARTHUR, CTR. FOR IMMIGRATION STUDIES, THE MASSIVE INCREASE IN THE IMMIGRATION COURT BACKLOG, ITS CAUSES, AND SOLUTIONS 1–2 (2017) (summarizing the findings of a June 1, 2017 Government Accountability Office report on the management of the immigration court system by the Executive Office for Immigration Review, which found that the immigration courts’ median pending time for cases increased from 198 days to 404 days from 2006 to 2012), <https://cis.org/sites/default/files/2017-07/arthur-court-backlog.pdf>.

34. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 8, 9, 9 n. 37 (2015) (finding that between 2007 and 2012 “detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% for their pro se counterparts” and “never-detained immigrants with counsel obtained a successful outcome in 60% of cases, three-and-a-half times greater than the 17% for their unrepresented counterparts”).

removal proceedings do not have the right to a court-appointed attorney.³⁵

Beyond the benefits that SB 18-166 provided Colorado's authorized noncitizens, it remains important to show many in the Colorado legislature that this bill did not create a benefit for either unauthorized noncitizens or noncitizens who pose a danger to those around them. First of all, unauthorized noncitizens gained no benefit from this reform. These individuals are already subject to removal on separate grounds and the commission of any crime, regardless of the sentence, only makes it more likely that they will be removed.³⁶ Additionally, SB 18-166 extended to those offenses that the Colorado legislature has previously determined to be lower-level, either by delegating jurisdiction to municipalities, categorizing them as misdemeanors, or setting the maximum penalty to one year. The fact that the current one year maximum may make these offenses deportable reflects an unintentional consequence that sends federal immigration authorities the impression that they are serious crimes in Colorado. Reducing the maximum jail sentence by one day still subjects a person to a lengthy punishment of up to 364 days in jail, which arguably should not even be the case for these low-level offenses.³⁷

In the future, even if the legislature sees some of these offenses as dangerous, the legislature should not abandon this legislation completely. If the legislature truly believes that a crime should be subject to the maximum penalty of a year, then it should either except those crimes from the general 364-day rule or reclassify them as more serious offenses.

On the other hand, the Colorado legislature should bear in mind that there are additional safeguards in the INA that most likely already address these concerns surrounding more serious crimes. Specifically, the INA provides that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."³⁸ While reducing the maximum sentence by one day creates an opportunity for a legal immigrant to make amends, repeat convictions for crimes involving moral turpitude subject that person to removal proceedings without any regard to the maximum sentence.

Also, the INA provides completely separate grounds of removability free from any minimum sentence requirement, which include con-

35. *See id.*

36. *See* 8 U.S.C. § 1227(a)(1) (2012).

37. Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 608–12 (2016) (citing Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313–15, 1317, 1319, 1330–32, 1368 (2012) (criticizing the assumption that a misdemeanor conviction—the vast majority of criminal matters—actually corresponds with guilt in the criminal justice system due to a lack of procedural integrity and race, which the immigration system only exacerbates).

38. 8 U.S.C. § 1227(a)(2)(A)(ii) (2012).

trolled substance offenses;³⁹ certain firearms offenses;⁴⁰ offenses involving domestic violence, stalking, violation of a protection order, and child abuse;⁴¹ and a broad range of more serious offenses under the “aggravated felony” category.⁴² The “aggravated felony” category is the only alternative category that also has a minimal sentence requirement.⁴³ However, instead of the *potential* sentence, crimes that fall under the “aggravated felony” category require that the sentence imposed *actually* be a year or more.⁴⁴ As previously mentioned, if the legislature finds that certain crimes are more serious, they should account for that or make exceptions to the general rule of 364 days in future legislation. Even if the legislature sees this potential maximum sentence as necessary, rehabilitative sentencing for these first-time, low-level offenses should still be taken into account as judges utilize their discretion in sentencing and are not obligated to maximize a sentence for these low-level offenses categorically.

Aside from the benefits that SB 18-166 provided this integral group of people contributing to the improvement of Colorado, it also offered a greater clarity for defense attorneys advising their noncitizen clients in court, leading to more efficient court dockets and better representation. As previously mentioned, what exactly qualifies as a “crime involving moral turpitude” remains unclear.⁴⁵ Due to this lack of clarity, defense attorneys who are required to advise their clients of the potential immigration consequences of a conviction must inform their clients that these first-time, low-level convictions *may* qualify as deportable offenses.⁴⁶ In the face of the ominous specter of deportation, many noncitizens will simply avoid pleading guilty and proceed to trial in hopes that they can avoid subjecting themselves to this overly harsh collateral consequence.⁴⁷ SB 18-166 provided needed clarity that would have allowed for defense attorneys to avoid presenting this dramatic consequence to their noncitizen clients in these cases, which would have incentivized faster resolution of cases through plea bargaining.⁴⁸ In this way, fewer cases would proceed to costly trials and the courts would be able to focus on cases involving more serious offenses than these first-time, low-level offenses.

39. *Id.* § 1227(a)(2)(B).

40. *Id.* § 1227(a)(2)(C).

41. *Id.* § 1227(a)(2)(E).

42. *Id.* §§ 1101(a)(43), 1227(a)(2)(A)(iii).

43. *Id.* § 1101(a)(43)(F), (G), (J), (R), (S).

44. *Id.*

45. *See supra* text accompanying notes 16–28.

46. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (“When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”).

47. *See* CHRIS CREIGHTON, LEGISLATIVE COUNCIL STAFF, LLS 18-0554, SB 18-166 FISCAL NOTE, 71st Gen. Assemb., 2d Reg. Sess., at 1–2 (Colo. 2018).

48. *See id.*

es.⁴⁹ However, it bears noting that these offenses may have other collateral consequences that defense attorneys may still have an obligation to advise their clients about.⁵⁰

This final point regarding improving court dockets only further demonstrates the necessity and common sense of this reform. Even without regard to this, at its base, SB 18-166 should have been adopted to make a statement of support for Colorado's noncitizens and their families as people. Instead of subjecting Colorado's noncitizens to the great uncertainty that stems from a conviction for one of these offenses that may qualify as a deportable offense for them, the Colorado legislature had the opportunity to make a moral judgment of its own and convey to the federal government that these first-time, low-level offenses are not as serious as the INA misconstrues them to be. While the legislature missed this great opportunity, Colorado can still offer its noncitizens a chance to make amends and work to keep contributing to the fabric of Colorado's culture, economy, and communities in the future. It simply makes no sense to allow for the potential sentence of a crime to lead to the actual destruction of families and lives for these first-time, low-level convictions. The current scheme only allows for an unintentional overlap with the INA's minimum sentence to blow the cap off of Colorado's maximum sentence for its noncitizens. Certainly, Colorado's noncitizens deserve better protection than that for all that they contribute. The Colorado legislature needs to show them that by passing a law like SB 18-166.

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49. See *id.* Again, the processing of misdemeanor convictions itself may not be the best determination of factual guilt due to a lack of procedural integrity and race, which the immigration system only exacerbates. See Cházaro, *supra* note 35, at 608–12.

50. See César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. 475, 508–14 (2012) (discussing the potential duties of criminal defense attorneys to advise their noncitizen clients of potential immigration consequences outside of deportation).

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