

# JUSTICE DETAINED, JUSTICE DENIED

Immigration and Customs Enforcement Prevents  
Immigrants from Fighting Unlawful Criminal Convictions



NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC AND  
FAMILIES FOR FREEDOM

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**A REPORT BY THE IMMIGRANT RIGHTS CLINIC AT  
NEW YORK UNIVERSITY SCHOOL OF LAW  
COMMISSIONED BY FAMILIES FOR FREEDOM**

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#JusticeDetained

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## ACKNOWLEDGEMENTS

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### FAMILIES FOR FREEDOM

Founded in September 2002, Families for Freedom is a New York-based multi-ethnic human rights organization by and for families facing and fighting deportation. We are current and former detainees, deportees and their loved ones. We come from dozens of countries, across continents. FFF seeks to repeal the laws that are tearing apart our homes and neighborhoods; and to build the power of immigrant communities as communities of color, to provide a guiding voice in the growing movement for immigrant rights as human rights. FFF has evolved into an organizing center against deportation. We are source of support, education, and campaigns for directly affected families and communities—locally and nationally.



### NYU IMMIGRANT RIGHTS CLINIC

The Immigrant Rights Clinic at New York University School of Law is a leading institution in both local and national struggles for immigrant rights. Its students engage in direct legal representation of immigrants and community organizations in litigation at the agency, federal court, and Supreme Court level, and in immigrant rights campaigns at the local, state, and national level.<sup>a</sup>

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a. The name of the Law School is provided solely for purposes of identification of the clinic's affiliation. The views expressed in this report should not be regarded as the position of the Law School.

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# EXECUTIVE SUMMARY

The report **“Justice Detained, Justice Denied: Immigration and Customs Enforcement Prevents Immigrants from Fighting Unlawful Criminal Convictions,”** authored by the Immigrant Rights Clinic at New York University School of Law and commissioned by Families for Freedom, reveals the fundamental contradiction between New York state and constitutional laws designed to protect people from unlawful convictions, and the deportation machinery of U.S. Immigration and Customs Enforcement (ICE).

This report highlights the importance of post-conviction relief for noncitizen New Yorkers, and the ways in which ICE deprives people of their state, federal, and internationally guaranteed rights. We include several stories that illuminate the barriers in this convoluted system. Our recommendations to New York City, Immigration and Customs Enforcement and foreign consulates and embassies aim to preserve meaningful safeguards that are designed to protect people’s human rights.

# JAVIAN'S STORY

**IN THE FALL OF 2012** the phones at the Families for Freedom office in Manhattan were buzzing with calls from New Yorkers in a county jail in Alabama. The New Yorkers were Jamaican citizens incarcerated at Etowah County Detention Center for civil immigration violations. Most of the Jamaican nationals had prior convictions and were actively seeking relief with wrongful conviction motions pending in New York State courts. In the meantime, U.S. Immigration and Customs Enforcement (ICE) prepared to deport them before the New York State court could determine the lawfulness of their convictions.

On September 12, 2012, a New York criminal court judge encountered the basic contradiction between state and constitutional rights designed to protect people from unlawful convictions and ICE's deportation machinery. The judge had scheduled a hearing for Javian Lawrence, who was challenging a conviction from 2003 on the ground that his constitutional right to effective assistance of counsel had been violated when his lawyer failed to advise him that pleading guilty would make him subject to deportation. Because Javian was being held in ICE detention, the judge had ordered ICE to bring Javian to criminal court, so that he could testify. But ICE refused to cooperate. Astonished by ICE's blatant disregard of his order, the judge rescheduled the case for another date and issued another order, demanding again that ICE produce Javian in court. When the next hearing date arrived, Javian had been deported to Jamaica.

Javian's story illustrates the ways in which ICE prevents immigrants from fighting unlawful criminal convictions.

Born in Jamaica, Javian came to New York City as a lawful permanent resident when he was 14 years old. In 2003, when he was 17, Javian pleaded guilty to having sex with his high school girlfriend, who was not yet 17, and therefore too young to consent under New York law. Javian was convicted at the Kings County court in downtown Brooklyn for sexual misconduct, a misdemeanor. His lawyer did not inform Javian that this conviction made him subject to deportation.

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## FOR ICE, IT WAS IRRELEVANT THAT NEW YORK STATE LAW GUARANTEED JAVIAN THE RIGHT TO BE AT HIS HEARING.

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Javian discovered the deportation consequence of this conviction seven years later, after he was arrested for driving without a license in New York State. ICE took Javian from criminal custody *through a detainer (immigration hold)* and transferred him to Buffalo Federal Detention Facility in upstate New York. In December 2010, ICE initiated deportation proceedings to remove him from the country. Two months later, Javian exercised his state-granted right to file a motion for post-conviction relief. However, the Immigration Judge presiding over his deportation proceedings disregarded this development, and in March 2011 he ordered that Javian be permanently removed from the U.S. Javian appealed to the Board of Immigration Appeals, which affirmed his order of deportation in June of that year. Javian was then transferred to a remote ICE detention facility in Alabama.

While ICE wanted to banish

Javian from the United States long before the New York courts had an opportunity to review his 2003 conviction, it could not do so, since the Jamaican consulate refused to issue the necessary travel documents before Javian's post-conviction case was resolved. The consulate considered it important that Javian had come to the United States as a minor, with his entire family, and no longer had any ties to Jamaica. It determined that it had a responsibility to ensure that Javian had full access to available judicial remedies, before ICE exiled him from his home and uprooted him from his family and community.<sup>1</sup>

More than a year after Javian initially filed for post-conviction relief, the New York State judge presiding over his case scheduled the September 12, 2012 hearing. The judge required that Javian testify, so that he could assess Javian's credibility and determine whether relief was warranted. After ICE refused to bring Javian to court, the next hearing was set for December 2012. But rather than complying with the New York judge's orders, ICE renewed its demands that the Jamaican consulate issue Javian's travel documents. Ultimately, the consulate gave in and agreed to cooperate, and on November 30, 2012, less than two weeks before he was scheduled to appear in court, ICE deported Javian to Jamaica. For ICE, it was irrelevant that New York State law guaranteed Javian the right to be at his hearing. Similarly, that his 2003 conviction may have been unlawful was of no concern. ICE refused to acknowledge the central role that post-conviction relief plays in achieving fairness in New York's criminal justice system.

## THE ISSUE

Despite its immigrant past and present, New York has fallen behind other municipalities in protecting the rights of its noncitizen residents who have come into contact with the criminal justice system. Counties across the country are now refusing to comply with federal “detainers,”<sup>2</sup> which are non-binding requests that local law enforcement detain noncitizens set to be released from criminal custody, so that Immigration and Customs Enforcement (ICE) can take them into federal custody and initiate deportation proceedings against them. However, New York City continues to comply with ICE’s detainer requests and hands over thousands of its foreign-born residents to ICE every year.<sup>b</sup>

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WHILE THE CITY COUNCIL RECENTLY TOOK SOME STEPS TO REFORM NEW YORK’S DETAINER POLICY, THESE REFORMS LEFT OUT A CRITICAL POPULATION: NONCITIZENS WITH PRIOR CONVICTIONS.

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Under current New York City policy, there is only one way that a noncitizen arrested by the NYPD can ensure that ICE does not deport her on the basis of a prior, unlawful conviction. In order to preserve her ability to access the safeguards enshrined in New York’s criminal justice system, she must remain in jail until her claim for post-conviction relief has been resolved, so that she is not transferred to ICE custody. The consequences of this policy are far reaching and take a toll on all New Yorkers.

While the City Council recently took some steps to reform New York’s detainer policy, these reforms essentially left out a critical population: noncitizens with prior convictions. Under current city laws, any noncitizen who is arrested for any reason will be handed over to ICE upon request, if she has been convicted of a crime in the previous ten years.<sup>3</sup> This transfer to ICE custody and civil immigration detention<sup>4</sup> can seal the fate of an immigrant New Yorker and send her irrevocably down the path to deportation and exile from her family and loved ones. Critically, this is true for many New Yorkers who would have access to relief from deportation if they were released and not subject to months or years in immigration detention. By transferring immigrant New Yorkers with prior convictions to ICE custody, New York City prevents its residents from accessing the rights guaranteed to them by New York State, and consequently subjects them to deportations based on invalid convictions.

Detention can determine deportation outcomes for immigrant New Yorkers with prior convictions, because a criminal conviction can make a noncitizen ineligible for relief from deportation, no matter how strong her ties to the United States, how long she has lived here, or whether or not she has legal status. For someone in this situation, the only way to prevent deportation is to challenge this conviction and seek to vacate it, which is possible under New York law if the conviction was unlawfully obtained. Many noncitizen immigrants in deportation proceedings are in fact eligible for **post-conviction relief**, because noncitizens who pleaded guilty to a crime without having been informed of the immigration consequences of doing so have been convicted in violation of their state and federal constitutional rights.<sup>5</sup> Nevertheless, accessing post-conviction relief from the confines

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b. In the 2.5 months after NYC passed its most recent legislation restricting the circumstances under which the city would comply with detainer requests from Immigration and Customs Enforcement, the NYC Department of Corrections handed 568 people over to ICE custody. N.Y.C. Dep’t of Correction, Summary of Discharges of Inmates with Federal Immigration and Customs Enforcement Detainers (2013), available at [http://www.nyc.gov/html/doc/html/events/summaryICEreport103013\\_2.pdf](http://www.nyc.gov/html/doc/html/events/summaryICEreport103013_2.pdf).

of ICE detention is often impossible, no matter how strong an immigrant's legal claim. This report reveals how ICE prevents immigrants from exercising their state right to challenge unlawful criminal convictions.

## KEY REPORT FINDINGS

### How ICE obstructs detained immigrants' ability to seek post-conviction relief

1. ICE will refuse to bring an immigrant detainee to have her post-conviction relief claim heard by a state judge. ICE will not produce her to the state criminal court even if she manages to remain in the country long enough to reach her hearing date or even if the criminal court judge requires her to be physically present in order to receive post-conviction relief.
2. ICE requests travel documents from foreign embassies and consulates to expedite deportation, knowing that a post-conviction case is pending. Sadly, foreign embassies and consulates contribute to ICE's deprivation of immigrant New Yorkers' rights by issuing travel documents for people who are waiting on state courts to decide their cases, thus enabling ICE to continue its practice of deporting people who have post-conviction relief claims pending.
3. ICE will remove from the United States noncitizens who have post-conviction relief cases pending, and some state courts refuse to hear the post-conviction relief claims of noncitizens after ICE has deported them.

## SUMMARY OF RECOMMENDATIONS

New York City, the federal government and foreign consulates and embassies must not be complicit with ICE's detention and deportation machine or with preventing New Yorkers from fighting unlawful convictions.

1. New York City must act to protect the rights of its residents and the integrity of its criminal justice system by refusing to comply with all ICE detainer requests.
2. The federal government must adopt policies that ensure immigrants' access to state post-conviction relief procedures, in order to prevent detention and deportations premised on unlawful convictions. It must require ICE to deliver a detained person summoned to state court, per the Judge's orders. ICE must not be permitted to deport people before they have had the chance to fight for relief or while a relief claim is pending.
3. Foreign consulates and embassies have an obligation under international human rights law to ensure their citizens' access to post-conviction relief, by refusing to issue travel documents for noncitizen New Yorkers who have post-conviction relief cases pending in state court.

# THREE WAYS IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) THWARTS JUSTICE AND PREVENTS POST-CONVICTION RELIEF

MISGUIDED GUILTY PLEA

PLEADS GUILTY



“JENNIFER” a green card holder and nearly life-long New Yorker, is uninformed and misguided about her case and rights. She pleads guilty in criminal court instead of fighting her case, thinking this will mean a shorter sentence. **Her attorney and the judge do not inform her about the dire immigration consequences faced by green card holders or undocumented people who plead guilty and end up with convictions.**

SENTENCE IS COMPLETED

RELEASED



**SCENARIO 1** = Jennifer completes her sentence in the criminal system. **ICE is waiting for her and apprehends her** via a detainer request.

RELEASED



**SCENARIO 2** = Jennifer completes her sentence in the criminal system and goes home to Brooklyn. **Years later, she is apprehended by ICE.**

APPREHENDED BY ICE & DETAINED IN IMMIGRANT JAIL

DETAINED



Regardless of when she is apprehended, Jennifer is **detained in an immigrant jail** located Anywhere, USA.



FILES POST-CONVICTION RELIEF CLAIM

FIGHTS BACK



While in detention, Jennifer finds out **her wrongful conviction in criminal court can be fought via an Article 440 claim** for post-conviction relief.



ICE THWARTS JUSTICE

AT RISK



In cases like Jennifer's ICE is known to disregard pending cases, due process, judges and courts, and dole out the life sentence of banishment. Jennifer is now **at risk of ICE obstructing her wrongful conviction case and post-conviction relief in three ways:**



## DANGER #1 ❌

ICE refuses to transport Jennifer to court knowing she needs to be there for her post-conviction claim to move forward.

## DANGER #2 ❌

ICE requests travel documents provided by the consulate to expedite Jennifer's deportation, knowing her case is pending.

## DANGER #3 ❌

ICE quickly deports Jennifer before her court appearance fully knowing her case is pending.

## CONCLUSION

**LIFE LONG BANISHMENT FOR JENNIFER AT THE HANDS OF ICE.**

### KEY RECOMMENDATIONS TO PREVENT ICE FROM THWARTING JUSTICE

**1** New York must refuse to comply with all ICE detainer requests.

**2** Foreign consulates and embassies must protect noncitizen New Yorkers and refuse to collaborate with ICE by issuing travel documents, especially when they have post-conviction relief cases pending.

**3** ICE must not deport people before they have had the chance to fight for relief or while a relief claim is pending, and if a detained person is summoned to court, ICE must deliver them per the Judge's orders.

# I. INTRODUCTION

**FAMILIES FOR FREEDOM (FFF) IS COMPRISED OF CURRENT AND FORMER DETAINEES** and their loved ones. Our lives have been directly affected by the intersection of the criminal legal system and the U.S. deportation machine. We understand our stories through a systems lens – and often it is by learning one another’s stories that we are able to uncover systemic injustices.

In the fall of 2012 the phones at the FFF office in Manhattan were buzzing with calls from Jamaican New Yorkers in Alabama incarcerated at Etowah County Detention Center by Immigration and Customs Enforcement (ICE). Most of the Jamaican nationals had prior convictions and were actively seeking relief with wrongful conviction motions pending in New York State courts. In the meantime, ICE prepared to deport them before the New York State court could determine the lawfulness of their convictions, despite the fact that it was those convictions that made many of them subject to deportation.

It was Javian’s story, as detailed in the executive summary, that highlighted the contradiction between the right to post-conviction relief designed to protect people from unlawful convictions and the injudicious deportation machinery of ICE. From Etowah, Javian informed us that a judge at the Kings County court in Brooklyn, NY had asked ICE to produce him for his post-conviction hearing and ICE vehemently denied the request. Shocked that ICE would not heed his order, the criminal court judge rescheduled the hearing. But before the rescheduled hearing took place, we received another call from Javian. He told us the Jamaican consulate had given his passport to ICE and he was being forced onto a plane. We made frantic calls to the Jamaican consulate to figure out why, after so long, they had decided to issue Javian’s travel documents to ICE – key to facilitating his deportation. We learned that ICE had told the Jamaican embassy officials that their nationals’ open court cases didn’t matter – ICE’s only concern was that the Jamaican New Yorkers had been ordered deported. Shortly after, our phones were buzzing again, only this time Javian was calling us from Jamaica after being deported. We reached out to the New York University School of Law Immigrant Rights Clinic (IRC) and they agreed that the issue warranted exposure. After several conversations we commissioned this report. We are grateful for the passion and commitment of the IRC.

Throughout its history, New York City has been a city of immigrants: in both 1900 and 2011, 37% of the city’s population was foreign-born.<sup>6</sup> Today, more than three million New Yorkers are immigrants, and 60% of the city’s residents are immigrants or the children of immigrants.<sup>7</sup> At the same time, New York is a city in which one in nine adults has been convicted of a crime in the last ten years.<sup>8</sup> It is well documented that racial bias, discrimination and disproportionate suffering of people of color is present at every stage of the criminal justice system<sup>9</sup> (from Stop and Frisk<sup>10</sup>, to legal representation, to sentencing<sup>11</sup>). Given that people of color are stopped on the street and arrested at nearly nine times the rate of white people,<sup>12</sup>

and 83% of foreign-born New Yorkers are people of color,<sup>13</sup> it is no surprise that many immigrants have been deported after contact with the city's criminal justice system. This population is reflected in the 13,000 inmates imprisoned at NYC's Rikers Island.

We are in solidarity with the fight for the human rights of U.S. citizens imprisoned throughout the country and, due to their convictions, excluded from civil, economic and political life. The majority of them are people of color, disproportionately African American. The mainstream immigrant rights movement has distanced itself from people with convictions in order to gain policy concessions by distinguishing so-called "good" immigrants from "bad" immigrants. Yet, this has only entrenched us further in draconian enforcement policies. Agreeing to the incarceration and deportation of people with convictions has sealed the fate of many, when instead we must be fighting for the right for all to remain. We believe everyone must have the right to reintegrate into their communities and be reunited with their families with their human rights in tact - and we believe the same is true for non-citizens.

This report reveals the basic contradiction between New York laws designed to protect people from wrongful convictions and ICE's deportation machinery. ICE's role in preventing post-conviction relief for noncitizens is an inconvenient truth that disproves the myth that immigration enforcement is "just" or that it's "working." Working for whom? Because there aren't systems of accountability and measurement, it was important for us to figure out how to follow up in the face of ICE tactics that are tantamount to obstruction of justice. The stories gathered in this report can't be waved away - these injustices transpired and more will follow unless critical interventions are made. New York City and its Department of Corrections continue to collaborate with ICE. Consulates often misunderstand the protections in our judicial system and ICE is taking advantage of that. ICE is preventing people from exercising their state-granted right to relief from unconstitutional convictions and their international right to exhaust legal remedies before banishment from their communities.

With this report, we urge New York City, foreign consulates and embassies, and ICE to be accountable, take responsibility, and restore basic rights that are inherent for all people, everywhere.

Sincerely,

Abraham Paulos  
Executive Director, Families For Freedom

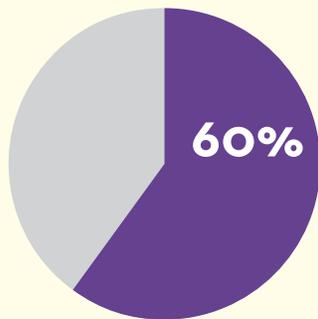


# PROFILING AND CONVICTING IMMIGRANT NEW YORK

In both **1900** and **2011**,



**37%** of the city's population was **foreign-born**.<sup>i</sup>



**60%** of New York City's residents are **immigrants** or the children of immigrants.<sup>ii</sup>

**MORE THAN THREE MILLION NEW YORKERS ARE IMMIGRANTS.**

**83%** of foreign-born New Yorkers are people of color.<sup>iii</sup>



**People of color** are **stopped** on the street and **arrested** at nearly **nine times** the rate of **white people**.<sup>iv</sup>



**ONE IN NINE ADULTS**



in New York City has been **CONVICTED OF A CRIME IN THE LAST TEN YEARS**.<sup>v</sup>

**94-97%** of convictions are obtained through **guilty pleas**. People plead guilty due to: **bad counsel, misinformation, taking deals for less time, etc.**

**CONVICTED**



## SOURCES

i. N.Y.C. Dep't of City Planning, *The Newest New Yorkers: Characteristics of the City's Foreign-Born Population 9* (2013) [hereinafter *The Newest New Yorkers*], available at [http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny\\_2013.pdf](http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny_2013.pdf).

ii. *Id.* at 2.

iii. *THE NEWEST NEW YORKERS*, supra note 1, at 12.

iv. N.Y. Police Dep't, *Stop Question & Frisk Activity 26* (Oct. 1, 2013 - Dec 31, 2013), available at [http://www.nyclu.org/files/2013\\_4th\\_Qtr.pdf](http://www.nyclu.org/files/2013_4th_Qtr.pdf).

v. N.Y. State Dep't of Criminal Justice Servs., *Computerized Criminal History Sys., New York City: Adult Convictions by Year* (2014).

## KEY TERMS

noncitizen  
DETAINER

article  
440

AGGRAVATED  
FELONY

the  
1996  
laws

**NONCITIZEN:** In this report we describe people who are undocumented, who are legal permanent residents (green card holders), refugees, asylum seekers or people with any status that is not U.S. citizenship, as “noncitizens.”

**DETAINER:** An ICE detainer is a written request that a local jail or other law enforcement agency detain an individual for an additional 48 hours (excluding weekends and holidays) after his or her release date, in order to provide ICE agents time to decide whether to take the individual into federal custody and begin formal deportation proceedings. An ICE detainer or “hold” is nothing more than a request and it offers no legal authority for detention.

**ARTICLE 440:** In New York State, individuals have a right to seek post-conviction relief under Article 440 of New York’s Criminal Procedure Law (Article 440), which allows a court to vacate convictions or re-sentence an individual who was convicted or sentenced unlawfully.

**AGGRAVATED FELONY:** A federal immigration category that includes more than 50 classes of offenses, some of which are neither “aggravated” nor a “felony” (for example, misdemeanor shoplifting with a one-year sentence, even if suspended). This term was first created by the 1988 Anti-Drug Abuse Act, which defined it to include murder, rape, drug trafficking, and trafficking in firearms or destructive devices. Congress expanded this term numerous times over the years, and most extensively in 1996. This category is one of the government’s most powerful tools for deportation because it strips an immigrant of most choices in the deportation process. An immigrant – including a lawful permanent resident – who is convicted of an offense categorized as an “aggravated felony” is subject to mandatory detention (no bond) and mandatory deportation (no possibility of applying for cancellation of removal, or any other forms of relief).<sup>14</sup>

**THE 1996 LAWS:** In 1996, following the first World Trade Center attack and Oklahoma City bombing, President Clinton signed the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. These laws made deportation of noncitizen legal residents much faster and more frequent by classifying increasingly minor crimes as automatically deportable offenses.

Critics of the 1996 laws point out that definitions of what constitutes crimes of “moral turpitude” or “aggravated felonies” are intentionally vague and frequently changed to increase the number of deportable individuals. As a result, noncitizens are subject to laws that apply no matter how long ago their crime was committed, regardless of time-served, without recourse to judicial review or appeal, and without the chance to challenge their deportation based on ties to family or length of time in the U.S.—even if they arrived as infants. For immigrants, perhaps the most disturbing effect of the 1996 legislation was its vast restriction on judicial review. Not only are noncitizens vulnerable to old convictions—including minor crimes like shoplifting committed decades earlier—but these convictions trigger an irreversible chain reaction that ends in permanent exile without a chance to protest.<sup>15</sup>

# II. POST-CONVICTION RELIEF AND IMMIGRANT NEW YORKERS

## **A** Post-conviction relief is an essential part of New York’s criminal justice system.

### 1. The criminal justice system produces wrongful and unlawful convictions.

With the highest incarceration rate and the largest prison population in the world, it is no secret that federal and state courts in the United States are overwhelmed. New York City alone prosecutes almost 350,000 cases annually.<sup>16</sup> In February 2014, the *New York Times* reported that “[c]oncerns about an overburdened, underfinanced court system have nagged with increasing urgency across New York City,”<sup>17</sup> and such concerns are not unique to New York.<sup>18</sup>

Given the unparalleled volume of cases and the lack of resources to deal with them, it is unsurprising that courts make mistakes. Sometimes defendants are convicted of crimes they did not commit.<sup>19</sup> Sometimes defendants are convicted of crimes that did not occur.<sup>20</sup> Sometimes judges get the law wrong.<sup>21</sup> Violations of constitutional rights occur at every stage of the criminal process: when police conduct illegal searches and coerce confessions, when prosecutors introduce inadmissible evidence and hide exculpatory evidence, or when defense lawyers fail to inform clients of the consequences of pleading guilty or simply give inaccurate legal advice.<sup>22</sup> Meanwhile, the realities of prolonged jail-time, uncertain outcomes, and excessively harsh sentences for people who choose to go to trial lead most defendants to plead guilty, even to crimes of which they are innocent.<sup>23</sup>

### 2. Post-conviction relief is a time-honored and vital safety mechanism.

Post-conviction relief exists in recognition of the fact that people are sometimes unlawfully convicted, and justice requires a safety mechanism for when this happens. Indeed, habeas corpus, a common law form of post-conviction relief, has been described as “the oldest human right in the history of English-speaking civilization.”<sup>24</sup> The “privilege of the writ of habeas corpus” guarantee prisoners the right to have a court determine if their imprisonment is unlawful. It is enshrined in Article I of the U.S. Constitution,<sup>25</sup> and has been recognized by the Supreme Court as “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”<sup>26</sup> Today, all fifty states, the District of Columbia and the federal system have statutes and procedures in place to provide post-conviction relief to people who are suffering from ongoing consequences of unlawful convictions.<sup>27</sup> These statutes and procedures, like the constitutional safeguards provided to all criminal defendants—such as the presumption of innocence, the right to a jury trial and effective counsel, and protections against self-incrimination and unreasonable searches—are a testament to how high the stakes are when a person may be denied her liberty.

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**POST-CONVICTION RELIEF  
EXISTS IN RECOGNITION  
OF THE FACT THAT  
PEOPLE ARE SOMETIMES  
UNLAWFULLY CONVICTED,  
AND JUSTICE REQUIRES  
A SAFETY MECHANISM  
FOR WHEN THIS HAPPENS.**

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**A FAMOUS USE OF  
ARTICLE 440 WAS THE  
EXONERATION OF A  
GROUP OF YOUNG MEN  
NOW KNOWN AS THE  
“CENTRAL PARK FIVE.”**

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Post-conviction relief can remedy rights violations that occur at any stage of criminal proceedings, including during plea-bargaining. This is crucial because, as the Supreme Court recently noted, 94-97% of convictions in the United States are obtained through guilty pleas.<sup>28</sup> Plea bargaining is no longer “some adjunct to the criminal justice system; it is the criminal justice system . . . To a large extent[,] horse trading between prosecutor and defense counsel determines who goes to jail and for how long.”<sup>29</sup> Consequently, the Supreme Court has held that a defendant is entitled to post-conviction relief if her lawyer provides constitutionally ineffective assistance in a way that influences her decision about whether to accept an offered plea deal or go to trial.<sup>30</sup>

### **3. New York State provides broad access to post-conviction relief to protect the integrity of its convictions.**

In New York State, individuals have a right to seek post-conviction relief under Article 440 of New York’s Criminal Procedure Law (Article 440), which allows a court to vacate convictions or alter sentences for individuals who were convicted or sentenced unlawfully. A famous use of Article 440 was the exoneration of a group of young men now known as the “Central Park Five.” In 1989, police held and interrogated the five teenage boys, all 14-16 years old, until they confessed to a crime that they had not committed. They were wrongfully convicted solely on the basis of these false confessions. In 2002, after the five boys had spent years in prison, the actual perpetrator came forward, and DNA evidence corroborated his admission. Article 440.10 allows courts to vacate convictions for a number of reasons, including on the basis of prosecutorial misconduct, because a defendant’s constitutional rights were violated, or when new and material evidence, which the defendant could not have accessed at the time of trial, is discovered. The Central Park Five were therefore able to use this statute to vacate their convictions.<sup>31</sup>

In general, to access relief under Article 440, a defendant must file a written motion with the New York State court where she was convicted. In this motion she must explain why her conviction is unlawful, by describing the factual or legal problems with it. For example, if a defendant claims that her conviction should be vacated because she was deprived of her constitutional right to effective assistance of counsel,<sup>32</sup> she will have to describe the errors that her lawyer made, and the court must then decide if those errors rise to the level of ineffective assistance. If there is a question about the facts—for example, whether the defendant is telling the truth about her lawyer’s mistakes, or the court simply needs more detail or context in order to decide if the lawyer’s mistakes constitute ineffective assistance—the court must hold a hearing to determine what the relevant facts are. At this hearing, the defendant must prove that her claims are truthful and sufficient to warrant relief. The defendant has a right to be present at this hearing,<sup>33</sup> and it is always in her best interest to attend.<sup>34</sup>

## **B Post-conviction relief is especially important for achieving just results for noncitizen New Yorkers.**

As the number of people deported from the United States each year has exploded, post-conviction relief has become particularly important for



**Miranda-Olivares v. Clackamas County**

In April of 2014, a federal judge in Central Oregon decided that Ms. Miranda-Olivares' Fourth Amendment rights were violated when Clackamas County incarcerated her without probable cause, and based only on ICE's request that the County detain her. Because the County violated her constitutional rights, they will have to pay her. Since this decision came down, 13 counties in Oregon are no longer honoring detainer requests, so as to avoid any liabilities.

**People v. Peque**

In 2013, the New York Court of appeals held that trial judges must explain the consequence pleading guilty to a felony to noncitizen defendants who are at risk of detention and deportation.

**Padilla v. Kentucky**

In 2010, the Supreme Court noted that the "drastic measure of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."<sup>41</sup> The Court held that a noncitizen's constitutional right to effective assistance of counsel is violated when her lawyer fails to advise her about the immigration consequences of pleading guilty.<sup>42</sup>

noncitizens. Approximately one in every four immigrants who are deported from inside the United States is deported on the basis of a prior criminal conviction.<sup>35</sup> In many cases, these prior convictions make noncitizens ineligible for discretionary relief from deportation, regardless of their strong ties to this country and the lives they have built here over years or even decades.<sup>c</sup> It is crucial both for immigrants and their families and communities, and for the integrity of New York's criminal justice system, that noncitizens who pleaded guilty to a crime without knowledge of its immigration consequences are ensured access to post-conviction relief.

**1. Post-conviction relief prevents deportations based on unlawful convictions.**

Post-conviction relief is the last, and often only, opportunity for a state court to vindicate a defendant's claim that her conviction was obtained in violation of her constitutional rights. Post-conviction relief is thus particularly vital for immigrants, who not only risk losing their liberty as a result of an unlawful conviction, but also may face "banishment or exile" from their homes and often permanent separation from their families.<sup>36</sup> Post-conviction relief can prevent the consequences of a miscarriage of justice from multiplying because of a defendant's immigration status.

In 2010, in a case called *Padilla v. Kentucky*, the Supreme Court noted that the "drastic measure of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."<sup>37</sup> Because the consequences of unlawful convictions can be exponentially greater for noncitizens than for citizens, the Court recognized that additional procedures are necessary to safeguard the constitutional rights of noncitizen criminal defendants. Therefore, the Court held that a noncitizen's constitutional right to effective assistance of counsel is violated when her lawyer fails to advise her about the immigration consequences of pleading guilty.<sup>38</sup>

Following in the footsteps of *Padilla*, the New York Court of Appeals ruled in November 2013 that due process and fundamental fairness require trial judges to warn noncitizen defendants charged with New York State felonies that pleading guilty can—and likely will—result in deportation.<sup>39</sup> In this case, *People v. Peque*, the court held that "deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea."<sup>40</sup> Both *Padilla* and *Peque* provide a firm basis for post-conviction relief for noncitizens who pleaded guilty to a crime without knowledge of the immigration consequences, in violation of their federal and state constitutional rights.

c. Under federal immigration law, a wide array of convictions can have devastating consequences. For example, a green card holder can be barred from relief from deportation because of a single drug possession conviction from the first seven years of residence, 8 U.S.C. §§ 1229b(a)(2), 1229b(d), or a shoplifting conviction from the first five years of residence, 8 U.S.C. § 1229b(a)(2). A person fleeing persecution can be barred from asylum due to a minor drug sale, 8 U.S.C. §§ 1158(b)(2)(B) (barring asylum for persons with aggravated felony convictions), 1101(a)(43)(B) (treating broad array of sale offenses as aggravated felonies). A person married to a United States citizen with United States citizen children can be barred from obtaining legal status due to a wide array of offenses, 8 U.S.C. §§ 1255(a) (requiring person seeking adjustment to be admissible), 1182(a)(2) (describing sweeping grounds of inadmissibility based on criminal convictions).

# SOFIA'S STORY

## “SOFIA’S” STORY HIGHLIGHTS

the importance of post-conviction relief for noncitizens and illustrates how it operates for immigrants who are not detained by ICE. Sofia was born in the Dominican Republic, and came to the United States as a lawful permanent resident in 1968, at the age of seven. She grew up in New York and Massachusetts with her parents and seven siblings, and at 53 years old, she has never returned to the Dominican Republic. Since 2005, when her daughter, Eva, was born with Down’s syndrome and other developmental problems, Sofia has devoted herself completely to caring for Eva. In 2012, Sofia was put into deportation proceedings. She would have been deported had she not been able to access post-conviction relief under Article 440 of New York’s Criminal Procedure Law. Even though the government and the Immigration Judge agreed that she should not be deported, had she not been able to vacate an old conviction, they would have had no choice in the matter.

When Sofia was younger she struggled with drug addiction, until a residential treatment program helped her overcome it in 2003. Although Sofia has been clean ever since, ICE placed her in deportation proceedings in 2012 based on the encounters she had had with law enforcement years earlier, when she was still battling the addiction. In 1993 Sofia had pleaded guilty to selling drugs, a deportable offense, and in 2002 she was arrested in Brooklyn and charged with trespass and drug possession, both misdemeanors. While both of the 2002 charges would lead to similar

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**BECAUSE SOFIA’S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL HAD BEEN VIOLATED, THE CRIMINAL COURT AGREED TO VACATE THE CONVICTION, AND IN OCTOBER 2013 SOFIA WAS ALLOWED TO RE-PLEAD TO TRESPASS.**

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sentences, trespass carries no immigration consequences, while a drug possession conviction would make Sofia subject to mandatory deportation, with no possibility of discretionary relief. Nevertheless, Sofia’s appointed attorney suggested to the prosecution that she plead guilty to the drug possession charge, in exchange for having the trespass charge dismissed, and entered that plea on her behalf. The lawyer did not inform Sofia about the immigration consequences of her plea, and she was given a two-day sentence.

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**THE GOVERNMENT AGREED WITH THE IMMIGRATION JUDGE’S DETERMINATION THAT SOFIA SHOULD BE PERMITTED TO STAY WITH HER DAUGHTER IN THE UNITED STATES, WHERE SHE HAS LAWFULLY RESIDED FOR MORE THAN 45 YEARS, AND WAIVED ITS RIGHT TO APPEAL THE DECISION.**

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Sofia did not find out that she was deportable until July 2012, when ICE initiated deportation proceedings against her. It took Sofia months to find a lawyer to take her immigration case, but she was ultimately able to secure legal representation. Her immigration lawyer advised her that she would need to file a motion to vacate her 2002 conviction, and referred her to a criminal defense attorney who would take her case

for free. The criminal defense attorney helped her file for post-conviction relief under Article 440 in early 2013. When the prosecution reviewed Sofia’s 440 motion, they agreed that her 2002 lawyer had provided ineffective assistance of counsel when she did not attempt to secure a favorable plea for Sofia, and when she failed to inform Sofia of the immigration consequences of her plea. Because Sofia’s constitutional right to effective assistance of counsel had been violated, the criminal court agreed to vacate the conviction, and in October 2013 Sofia was allowed to re-plead to trespass.

As a result, Sofia was no longer subject to mandatory deportation, and she was able to have a hearing in front of an Immigration Judge. Recognizing Sofia’s strong connections to this country, and the fact that deportation would force her to choose between abandoning her young daughter or taking her daughter to live in a foreign country where she would not have access to critical resources, the judge granted Sofia relief from deportation in March 2014. The government agreed with the judge’s determination that Sofia should be permitted to stay with her daughter in the United States, where she has lawfully resided for more than 45 years, and waived its right to appeal the decision. Had Sofia not been able to access post-conviction relief, the judge would have had no choice but to deport her; but because she was able to vindicate her rights under Article 440, Sofia is now able to stay with her daughter, Eva, together in their home.

## 2. Post-conviction relief allows prosecutors to treat immigrant defendants fairly.

Post-conviction relief not only helps noncitizen defendants, but also serves the interests of all actors in the criminal justice system. Through post-conviction relief, prosecutors can offer “deportation-safe” pleas in appropriate cases where an immigrant’s defense lawyer failed to seek a deportation-safe plea in the original proceeding, or failed to advise the noncitizen defendant about the immigration consequences of pleading guilty. Just as criminal defense attorneys have a constitutional duty to provide effective assistance of counsel at the plea-bargaining stage of criminal proceedings, prosecutors have an ethical duty to offer appropriate plea deals.<sup>43</sup> Indeed, this is a prosecutor’s guiding principle during the plea-bargaining that constitutes the bulk of her work.<sup>44</sup>

Deportation, which can result even from convictions that do not carry any jail time, can transform an appropriate sentence for a misdemeanor offense into a lifelong punishment—one that prosecutors had no intention of seeking and that they do not consider proportional to the conduct underlying the conviction. Therefore, when a noncitizen seeks post-conviction relief for a prior conviction, some New York prosecutors are willing to offer immigration-safe pleas, which carry sentences that are proportional to the crime—sometimes equivalent to the initial sentence imposed—but do not lead to deportation.

## DARIO’S STORY

### THE ROLE OF PROSECUTORS

can be seen in “Dario’s” case. Dario had come from the Dominican Republic to the United States as a lawful permanent resident in 1994, when he was a young man. In 2012, after nearly twenty years living in Brooklyn, he wanted to naturalize, and he wanted to travel. However, he was afraid that any attempt to naturalize or travel would lead

Nobody, including his defense attorney, had said anything about immigration consequences when he pleaded guilty in 1997, but in 2012 immigrants were getting deported at an unprecedented rate.<sup>45</sup> When Dario finally spoke to a lawyer, he found out that he was right to be afraid: because of this conviction, he was subject to mandatory deportation. Even without trying to travel or naturalize, he was at risk. Fortunately, with the assistance of this lawyer, he was able to seek post-conviction relief.

Dario’s lawyer helped him prepare an Article 440 motion, based on

Brooklyn District Attorney’s office agreed that this failure deprived Dario of his constitutional right to effective counsel and joined the motion to have his conviction vacated. The prosecutors also believed that deportation was an inappropriate and unjust outcome given the circumstances. Dario, who is now middle-aged, lives in New York City with his family, including his children and one grandchild. He works as a taxi driver, and he pays his taxes every year. He was only ever arrested that once, in 1997, and after pleading guilty he was sentenced to one year of conditional discharge, with no jail time—a sentence he served without incident. So the prosecutors offered Dario a new plea deal, allowing him to re-plead to disorderly conduct, which has no deportation consequences. Because he was able to access post-conviction relief, Dario and his family no longer have to live in fear of deportation and permanent separation.

### SO THE PROSECUTORS OFFERED DARIO A NEW PLEA DEAL, ALLOWING HIM TO RE-PLEAD TO DISORDERLY CONDUCT, WHICH HAS NO IMMIGRATION CONSEQUENCES.

to deportation, because of his one conviction—for misdemeanor drug possession—from 1997.

his defense attorney’s failure to advise him about the immigration consequences of his 1997 plea. The

# III. FEDERAL IMMIGRATION ENFORCEMENT'S DISTORTION OF NEW YORK'S JUSTICE SYSTEM

**ICE DETENTION PREVENTS MANY NEW YORKERS** from accessing meaningful post-conviction relief and vacating unlawful convictions. Consequently, ICE detention deprives immigrant detainees of a critical defense against deportation. Detainees who attempt to secure post-conviction relief are typically thwarted by rapid immigration proceedings, an inability to appear at post-conviction proceedings in state courts, and consulates and embassies that are too ready to provide travel documents for their citizens who are in the process of pursuing post-conviction relief.

## **A NYC's detainer policy feeds immigrant New Yorkers into a detention and deportation system that deprives them of essential rights and processes.**

While New York City has no obligation to cooperate with ICE, and has in fact moved to reduce the number of transfers to ICE custody, NYC continues to hand over to ICE hundreds of noncitizens every month, pursuant to "detainers."<sup>46</sup> An ICE detainer is a request from the federal government for local authorities to keep an arrested or incarcerated noncitizen in custody for an additional 48 hours after she would otherwise be released, so that ICE can take her directly from jail or prison into its own custody. Detainers are the principal mechanism through which ICE detains immigrants who have been arrested by local or state authorities.<sup>47</sup> Almost any ICE officer can issue detainers and there is no requirement that the officer have proof that the noncitizen is deportable.<sup>48</sup> An ICE detainer is nothing more than a request and it offers no legal authority for detention.<sup>49</sup>

As of the publication date of this report, New York City cooperates with most ICE detainers, regardless of the merits of an individual's case: from July 16 to September 30, 2013, NYC handed over to ICE 570 of the 934 people against whom ICE had lodged detainers.<sup>50</sup> Crucially, NYC automatically complies with almost all detainers lodged against noncitizens who have been convicted of a crime during the past ten years, even if the conviction did not lead to a jail sentence.<sup>51</sup> NYC's policy of broad cooperation with federal immigration enforcement thus targets precisely the New Yorkers who are most in need of and most able to benefit from post-conviction relief—that is, noncitizens with prior convictions—and sends them to ICE detention, where they are deprived of their right to access this relief.

Once ICE detains a noncitizen, it is often impossible for her to obtain release. The majority of immigrants detained in New York are ineligible for bond,<sup>52</sup> refused bond hearings, or granted bonds that they cannot afford to pay.<sup>53</sup> Consequently, they are forced to remain in detention for the duration of their deportation proceedings.<sup>54</sup> As the next section explains,

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**IN 2013, 45% OF NEW YORKERS WHO WERE CHARGED AS DEPORTABLE BECAUSE OF A PRIOR CONVICTION WERE DETAINED FOR THE DURATION OF THEIR DEPORTATION PROCEEDINGS, WHILE 55% WERE NEVER DETAINED OR WERE RELEASED FROM DETENTION PART WAY THROUGH THEIR PROCEEDINGS.**

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**[M]OST IMMIGRANTS  
IN DETENTION ARE  
UNABLE TO OBTAIN ANY  
LEGAL REPRESENTATION  
WHATSOEVER.**

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ICE detention imposes often-insurmountable obstacles to accessing post-conviction relief. This is reflected in the outcomes of deportation proceedings in New York. In 2013, 45% of New Yorkers who were charged as deportable because of a prior conviction were detained for the duration of their deportation proceedings, while 55% were never detained or were released from detention part way through their proceedings.<sup>55</sup> The ones who remained in detention throughout were three times more likely to be deported than those who were not detained when their cases were ultimately decided.<sup>d</sup>

By complying with ICE detainers, New York City funnels New Yorkers into a system that arbitrarily deprives them of essential procedural safeguards that New York’s criminal justice system is designed to guarantee. As a result, NYC’s detainer policy leads to unjust and preventable deportations, and New Yorkers who are eligible for post-conviction relief are expelled from their homes and uprooted from their communities and families based on unlawful convictions.

## **B Immigration detention obstructs New Yorkers’ access to post-conviction relief.**

In New York City, deportation or “removal” proceedings take place in two different courts: non-detained immigrants appear at 26 Federal Plaza, while detained immigrants are tried at 201 Varick Street. Generally, these proceedings consist of several preliminary hearings in front of an Immigration Judge, before a final “merits hearing” takes place, and the Immigration Judge issues a final decision. The speed of removal proceedings on the detained docket is accelerated, such that detainees often do not have sufficient time to pursue post-conviction relief. As a rule, the Immigration Judges who preside over the detained docket at Varick Street are unwilling to postpone hearings in order to give immigrant detainees the time that is necessary to access post-conviction relief, and will order people deported even while their post-conviction relief claim is pending in New York State courts. Moreover, even if an immigrant detainee manages to get to the hearing stage of a post-conviction relief case, Immigration and Customs Enforcement will refuse to bring her to court, which may be a prerequisite for obtaining relief. While extraordinary efforts of competent and dedicated advocates can sometimes enable an immigrant detainee to access post-conviction relief despite these obstacles, most immigrants in detention are unable to obtain any legal representation whatsoever.

### **1. Immigration Judges do not give detained immigrants sufficient time to pursue post-conviction relief.**

With ICE deporting hundreds of thousands of immigrants each year, detained immigrants are pushed through deportation proceedings at a speed that demonstrates ICE’s indifference to accommodating slower-

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d. In 2013, 65.3% of people on detained docket who were charged with criminal grounds of removal were deported, while only 22% of those on non-detained docket charged with criminal grounds of removal were deported. *U.S. Deportation Outcomes by Charge: Complete Cases in Immigration Courts*, TRAC IMMIGRATION (2014) [http://trac.syr.edu/phptools/immigration/court\\_backlog/deport\\_outcome\\_charge.php](http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php).

moving state criminal systems. According to attorneys who work with people pursuing post-conviction relief under Article 440, the process can take between six months and a year, even when no hearing is required to make findings of fact. This is largely due to the fact that judges and prosecutors in New York City have overwhelming caseloads, and open criminal cases tend to be prioritized over Article 440 motions. In 2012, there were an average of approximately 13,000 calendared cases per judge in NYC.<sup>56</sup> With this magnitude of work, judges struggle to find time in their calendars to hear Article 440 motions.<sup>57</sup> In addition, District Attorney offices are heavily backed up, and prosecutors often must ask for extra time to respond to 440 motions.<sup>58</sup> If the defendant is in immigration detention, Article 440 cases can take even longer to resolve, because of the difficulties of getting to criminal court,<sup>59</sup> and the obstacles to retaining a criminal attorney who can help her efficiently navigate the process of obtaining post-conviction relief.

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**AN IMMIGRANT  
IN DETENTION  
CAN ASK THE  
IMMIGRATION JUDGE  
PRESIDING OVER  
HER DEPORTATION  
PROCEEDINGS TO  
ADJOURN**

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Because of the availability of continuances and adjournments on the non-detained docket at 26 Federal Plaza, deportation proceedings of immigrant New Yorkers who are not detained can accommodate the delays of the state post-conviction relief process. This is true even in cases like Sofia's, where it takes many months for the non-detained immigrant to find first an immigration lawyer who informs her that Article 440 relief is necessary, and then a criminal defense attorney to advise her about her eligibility for 440 relief and to represent her in the process of obtaining it. In contrast, for the 65% percent of immigrants on the detained docket who will be removed from the United States, an order of removal will be issued, on average, less than 4.5 months after they were initially placed in deportation proceedings.<sup>60</sup> This is simply not enough time to obtain the legal assistance necessary to pursue Article 440 relief—especially given the difficulties of finding and retaining a lawyer from detention—and then wait up to a year for the motion to be adjudicated.

An immigrant in detention can ask the Immigration Judge presiding over her deportation proceedings to adjourn, in order to give her time to file for post-conviction relief under Article 440, or—if she has managed to file before receiving an order of deportation—to give the state court enough time to adjudicate the motion. However, attorneys who represent immigrant detainees at Varick Street report that Immigration Judges there have refused to grant these requests, holding that Article 440 motions are “too speculative” to warrant adjournment. By denying these requests, the Immigration Judges make it impossible for many detained immigrants to pursue post-conviction relief. Further, when immigrant detainees have appealed an Immigration Judge's decision to deny an adjournment request on the basis of a pending 440 motion, the Board of Immigration Appeals has affirmed the denial and the Second Circuit Court of Appeals (which has jurisdiction over appeals of immigration proceedings in New York) has held that it lacks authority to review the Immigration Judge's decision.<sup>61</sup> Consequently, immigrant New Yorkers are ordered deported while their claims for post-conviction relief under Article 440 are still pending.

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**NEVERTHELESS,  
ICE WILL NOT  
BRING IMMIGRANT  
DETAINEES TO STATE  
COURT, EVEN WHEN  
ORDERED TO DO SO  
BY A STATE JUDGE**

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## 2. ICE will not produce detained immigrants in state criminal court.

While ICE has the capacity to bring detainees to state court, and in fact has a policy to bring immigrants in its custody to state family court to defend their parental rights,<sup>62</sup> ICE has no policy, and in fact refuses, to bring detainees to state criminal courts for post-conviction proceedings. As a result, in cases where the state court reviews an immigrant detainee's challenged conviction before she has been deported, she will usually be unable to get to state criminal court for a hearing, even when her testimony or presence is required. For ICE, it does not matter that she has a state-granted right to be at this hearing, or that the challenged—and potentially unlawful—conviction may be the only basis for her deportation.

ICE's refusal to produce immigrant detainees in state criminal court can be fatal to their post-conviction relief claims. First, a defendant's testimony is often critical to success at a post-conviction relief hearing.<sup>63</sup> Second, a defendant may be required to physically appear in court in order to go through the mechanics of vacating a conviction, and—often—re-pleading to a different offense. Nevertheless, ICE will not bring immigrant detainees to state court, even when ordered to do so by a state judge,<sup>64</sup> or when appearing in criminal court is the only thing standing between a detained immigrant and returning home to her family.

## RICHARD'S STORY

### **"RICHARD'S" STORY**

**DEMONSTRATES** how difficult it is for ICE detainees to get to state court, and the extraordinary lengths to which lawyers must go—in addition to the extraordinary intervention necessary—to obtain a detainee's appearance, even in cases where it is certain that a detainee will be granted post-conviction relief. Richard was raised in orphanages and foster homes in Jamaica until he was twelve years old, when his grandmother who lived in the United States sponsored him for a green card. He arrived in the United States as

a lawful permanent resident, and lived with his grandmother in New Jersey until she passed away. After his grandmother's death, Richard moved to Brooklyn, graduated from high school, and then served in the U.S. Navy for two years. Richard has only one criminal conviction: in 2007, he and a friend were pulled over in New Jersey. The police searched the car they were in and found marijuana that Richard and his friend had bought for themselves and to share with other friends. They were both arrested and charged with possession of marijuana with intent to distribute. Richard pleaded guilty, unaware of any immigration consequences to

doing so, and was released on two years of probation.

In 2010 Richard was arrested in Brooklyn and charged with possession of a stolen credit card. Although the charges were dismissed, he was turned over to ICE and found out that he was subject to mandatory detention and deportation because of his 2007 conviction. With the help of an immigration attorney in New York and criminal defense attorney in New Jersey, Richard filed a motion to vacate his conviction. The prosecution determined that he was eligible for post-conviction relief, and agreed to let him re-plead

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**WITH THE HELP OF AN IMMIGRATION ATTORNEY IN NEW YORK AND CRIMINAL DEFENSE ATTORNEY IN NEW JERSEY, RICHARD FILED A MOTION TO VACATE HIS CONVICTION.**

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to another marijuana possession offense that would make it possible for him to remain in the country. But in order to re-plead, he needed to physically appear in state court. Pursuant to this agreement, Richard's defense attorney got the state criminal court judge to issue an order that was served on ICE, instructing the agency to release Richard into the custody of state court officers. Richard was detained in Bergen County, New Jersey, two-hours from the court where he had been convicted in 2007. The state

with various explanations given for why Richard could not be brought down when the state court officers came for him, Richard's immigration attorney brought the problem to the attention of the Immigration Judge presiding over Richard's deportation proceedings. She also produced a written confirmation of the post-conviction relief agreement that had been reached between the prosecution and defense in state criminal court. The Immigration Judge then told the government lawyer in Richard's

themselves in a noncitizen's criminal proceedings. Richard likely benefitted from the fact that the prosecutor and defense were able to come to an agreement regarding post-conviction relief before he received a final order of deportation. If there had been no prior agreement, the Immigration Judge would not have pressured ICE to let Richard go to state court.

Furthermore, once a noncitizen is ordered deported, it is common for ICE to transfer New Yorkers to detention centers in Western Pennsylvania or the American south.<sup>65</sup> Attorneys who work with detained clients report that when someone is detained so far from their lawyers and the courts that can grant them post-conviction relief, it is impossible to get them to those courts. While defendants can sometimes testify via videoconference, this is dependent on ICE's cooperation and a lawyer's ability to coordinate between the federal immigration authorities and the state's judicial bureaucracy, and lawyers who have witnessed such hearings say that the testimony is very vulnerable to technical difficulties. Moreover, even if a defendant is able to testify remotely, courts often will not grant relief when the defendant is not physically present. Consequently, where obtaining post-conviction relief is the only possibility an immigrant has to stay here with her family, being transferred to a far away detention center can ensure her deportation. Thus, it worked in Richard's favor that he was detained in the same state as the court where he needed to appear in order to obtain relief. In fact, even if his 2007 conviction had simply been a New York conviction, or he had been detained in New York rather than New Jersey, state court officers would not have crossed the state border to bring him to criminal court.

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**RICHARD WAS ABLE TO APPEAR IN COURT THANKS TO THE EXTRAORDINARY EFFORTS OF TWO ATTORNEYS AND THE INTERVENTION OF AN IMMIGRATION JUDGE WHO WAS WILLING TO TAKE STEPS TO ENSURE THAT ICE ALLOWED RICHARD TO EXERCISE HIS RIGHT TO ACCESS POST-CONVICTION RELIEF.**

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officers would pick him up from the detention center on his court date, bring him to criminal court to re-plead, and then return him to ICE detention that same day.

ICE agreed to comply and the state court confirmed the logistics with Richard's Deportation Officer in advance. However, when the county court officers came to the detention center to pick Richard up, the Deportation Officer informed them that he did not have the necessary sign-off to release Richard. ICE had said that the proper paperwork had not been filed. So Richard's defense attorney got the state judge to issue another order. Again ICE agreed to comply, and again the court officers confirmed the logistics of the transfer with Richard's Deportation Officer. Yet, when they arrived, they were told that he was not on the list of people to be brought down.

After ICE failed to allow Richard to go to the state court three times,

deportation proceedings that he wanted ICE to release Richard to the state authorities so that he could re-plead, and made clear that the immigration case would not proceed until Richard had been produced in criminal court. The next time the state court officers came to pick Richard up at the ICE detention center, he was brought out, and they were able to take him to the criminal court to re-plead.

Richard was able to appear in court thanks to the extraordinary efforts of two attorneys and the intervention of an Immigration Judge who—remarkably—was willing to take steps to ensure that ICE allowed Richard to exercise his right to access post-conviction relief. As noted above, Immigration Judges on New York's detained docket usually do not even grant continuances or adjournments to give noncitizens sufficient time to pursue post-conviction relief, let alone proactively involve

### 3. Detention leads to deportations based on the judgments of a justice system stripped of essential safeguards.

Although ICE is very willing to accept convictions that come out of New York State's criminal justice system, it is far from eager to have the New York criminal justice system take a second look at those convictions. Indeed, the federal immigration and detention system creates obstacles to post-conviction relief that are insurmountable for most detained immigrants. Without extraordinary legal representation and advocacy, as well as extraordinary intervention, an immigrant detainee stands little chance of having her post-conviction claim adjudicated by New York State courts.

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**NEW YORK FAMILIES  
ARE THUS BROKEN UP  
AS PEOPLE ARE  
DEPORTED ON THE  
BASIS OF JUDGMENTS  
PRODUCED BY AN  
OVERTAXED SYSTEM  
THAT HAS HAD ITS  
SAFETY NET REMOVED.**

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At the same time, because people lose their incomes when they are detained, most immigrant detainees cannot afford to retain a private lawyer. In addition, detention makes it exceedingly difficult to seek out pro bono or low cost attorneys. First, detained immigrants are unable to attend "intake days" at non-profit legal service organizations, which is how many non-detained immigrants obtain representation in their deportation proceedings. Furthermore, prohibitive phone rates and restrictive visitation policies at detention centers limit contact between immigrant detainees and their loved ones outside, who might otherwise be able to facilitate the process of finding a lawyer.<sup>66</sup> As a result, 60% of detained New Yorkers are unable to retain counsel to represent them in their deportation proceedings.<sup>67</sup> Fewer still are also able to retain criminal defense attorneys who can help them through the process of filing for post-conviction relief. It is well documented that access to counsel has an enormous impact on outcomes in removal proceedings.<sup>68</sup> The stories in this report demonstrate that counsel is similarly critical in post-conviction relief proceedings, especially for immigrants in detention.

ICE's policies undermine New York's criminal justice system by rendering an essential safeguard a nullity with respect to detained New Yorkers. Yet, ICE continues to rely on convictions that come out of the lopsided system that their policies create, in order to deport these very same New Yorkers. New York families are thus broken up as people are deported on the basis of judgments produced by an overtaxed system that has had its safety net removed.

### **C Foreign embassies and consulates cut off immigrant New Yorkers' access to post-conviction relief, by allowing ICE to deport people with pending cases.**

Foreign embassies and consulates play a central role in cutting off access to post-conviction relief. ICE routinely seeks to deport noncitizens who have post-conviction relief cases pending in state courts, but in order to carry out these deportations, ICE requires travel documents for the people who will be deported, which it obtains from the embassies and consulates of their countries of citizenship. Therefore, embassies and consulates have the power to prevent deportations that deprive New Yorkers of access to their state-granted rights. However, as a rule, these embassies and consulates instead issue the travel documents necessary for deportations, thus becoming inadvertently complicit in ICE's rights violations. Meanwhile, some state

courts treat the very fact of deportation as a reason to dismiss legitimate post-conviction challenges, thereby eclipsing any hope of achieving redress for wrongful convictions for people who have been deported.

### 1. Deportation can preclude New Yorkers from obtaining post-conviction relief.

After a noncitizen is ordered deported, ICE has the authority to grant a “stay of removal” to postpone the noncitizen’s physical expulsion from the United States.<sup>69</sup> In practice, though, ICE has proved unwilling to issue stays of removal for New Yorkers who have post-conviction relief claims under Article 440 pending in state court. On the contrary, ICE will carry out deportations even when Article 440 hearings have been granted, connoting that the Article 440 claim is valid and potentially meritorious,<sup>70</sup> and even when a state court judge has ordered ICE to produce the noncitizen defendant in state court. In this way, ICE denies New Yorkers an opportunity to be heard before a state judge, despite the fact that New York state law guarantees defendants the right to be present at their Article 440 hearings.<sup>71</sup>

## ANDRE’S STORY

**FURTHERMORE, ONCE A NONCITIZEN** New Yorker is deported, it can be impossible to continue adjudicating her claim for post-conviction relief under Article 440, regardless of its merits. In March 2014, the Appellate Division covering Brooklyn, Queens and Staten Island dismissed an Article 440 case after granting the defendant leave to appeal, simply because the defendant had been deported.<sup>72</sup> In that case, the defendant, Andre, argued that his 2008 conviction for attempted possession of a weapon should be vacated, because he had relied on erroneous legal advice when he pleaded guilty. Specifically, his appointed defense attorney had told him that this conviction would not lead to mandatory deportation, and that he should not worry about his immigration status because he

had been in the country so long, and because he was still in school. Contrary to his lawyer’s advice, this plea did render him subject to mandatory deportation, with no chance of discretionary relief. This lawyer has since been disbarred.<sup>73</sup>

Andre, who was a lawful permanent resident of the United States, moved to New York from Jamaica at the age of 15, and his entire family, including his parents, two siblings, grandmother and young daughter, are U.S. citizens living in this country. In April 2008, he was arrested for the first time, and pleaded guilty to attempted possession of a weapon. At the time, he was 22 years old, working full-time and living with his mother in Queens. After serving his sentence, Andre was transferred to federal immigration custody in December 2009. In July 2010 he filed for post-conviction relief in Queens County Court under Article 440, without the help of a lawyer.

The Queens County court denied Andre’s Article 440 motion in March 2011, without a hearing. However, the Appellate Division

found that his claim had enough merit to warrant appeal, and it appointed Andre an attorney. This was the first attorney Andre had at any stage of his efforts to prevent his deportation. The case was then set for oral argument, but before his appellate court date arrived, ICE deported Andre to Jamaica. The prosecution subsequently moved to dismiss Andre’s appeal on the basis of his deportation, and the court granted the motion, holding that Andre’s inability to appear in court and his absence from the court’s jurisdiction were sufficient grounds to dismiss.

Although noncitizens with Bronx or Manhattan convictions are currently able to pursue Article 440 motions even after deportation,<sup>74</sup> the New York Court of Appeals has yet to decide whether or not deportation renders an Article 440 motion moot. Until the issue is settled, all New Yorkers face the possibility that deportation will permanently bar them from post-conviction relief for precisely the wrongful convictions that are the basis of their orders of deportation.

## 2. Deportation impedes the effectiveness of post-conviction relief.

Even if Andre had been able to pursue relief under Article 440 after deportation, the “relief” may have come too late to challenge the validity of his deportation. Once a noncitizen receives a final order of deportation, she has only 90 days to file a motion to reopen her immigration case.<sup>75</sup> While this deadline can be waived,<sup>76</sup> the Board of Immigration Appeals (BIA) has generally held that only people who are physically present in the United States can benefit from such a waiver.<sup>77</sup> Meanwhile, federal courts have held that the BIA’s decisions regarding motions filed after the 90-day deadline are not subject to judicial review.<sup>78</sup>

Moreover, even when people are able to overturn their deportation orders from abroad, they must overcome enormous hurdles in order to return to the United States. While ICE has recently implemented a “return policy” to help wrongfully deported noncitizens return to their lives and families in the United States, this policy only applies to a small subset of noncitizens who succeed in overturning their deportation orders in the federal courts.<sup>79</sup> Further, ICE retains full discretion not to facilitate the return of a wrongfully deported person who is eligible for assistance under this policy.<sup>80</sup> The cost of return can also be prohibitive, as wrongly deported immigrants must pay for their journey back to the United States.<sup>81</sup> Finally, lawyers report that ICE’s “intransigence, confusion and lack of coordination” make it extremely onerous to get clients who are eligible for assistance under ICE’s return policy back to the United States; for people who do not have lawyers, it is even harder.<sup>82</sup>

Andre fought for almost four years to remain in this country with his family, without the help of any legal representation. It was not until the New York Appellate Division court found that he was potentially eligible for post-conviction relief under Article 440—and, therefore, potentially not deportable—that Andre was finally appointed an attorney. But just when Andre’s legal remedy was starting to look promising, the Jamaican consulate issued his travel documents, and ICE promptly deported him. Had Andre been able to remain in the United States, his journey through the courts could be coming to an end. Now, however, even if Andre does eventually win his 440 motion (his attorneys have challenged the Appellate Division’s decision to dismiss his case), he will still face the obstacle of getting the BIA to reopen his case to overturn his deportation order; and even if the BIA determines that he should not have been deported, it will be extremely difficult for him to return to the United States to reunite with his family.

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**BUT JUST WHEN ANDRE’S ODYSSEY IN COURTS WAS STARTING TO LOOK PROMISING, THE JAMAICAN CONSULATE ISSUED HIS TRAVEL DOCUMENTS TO ICE.**

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# IV. UNACCEPTABLE COMPLICITY WITH ICE'S RIGHTS VIOLATIONS

**ICE DOES NOT WORK ALONE IN DEPRIVING NEW YORKERS** of access to post-conviction relief. Instead it relies on other actors—including New York City, which hands its residents over to ICE through detainers and other programs, and foreign embassies and consulates, which provide travel documents that seal the fate of their citizens fighting to prevent wrongful deportations. These actors play an important role in an immigration system that relies on the New York criminal justice system to justify who is deported, while depriving those very people of access to critical legal remedies for wrongful convictions. They also are complicit in exacting enormous costs on New Yorkers and their families, because noncitizens who are arrested have no choice but to remain in city jails until they are able to vindicate their state-guaranteed rights.

## **A NYC's cooperation with ICE violates its duty to protect the city's communities.**

### **1. The impact of NYC's detainer policy is devastating and far-reaching.**

An unintended consequence of New York City's collaboration with ICE via the detainer policy is that it forces noncitizens with prior convictions to remain incarcerated in city jails in order to access the post-conviction relief that will allow them to remain in their communities with their families. This is because any noncitizen convicted of a crime in the last ten years who gets arrested in NYC will be transferred to federal immigration custody as soon as she is released from criminal custody—regardless of whether the arrest was illegal or the charges were dismissed. This prior conviction can be the basis of a New Yorker's deportation and it can preclude her from having a hearing in front of an immigration judge where her ties to the U.S. will be considered, no matter how strong they are.

In these cases, obtaining post-conviction relief is the only way a noncitizen can hope to remain with her loved ones, and so a noncitizen must stay out of ICE detention at all costs, to ensure that she has access to this relief. But because of New York City's detainer policy, the only way she can stay out of ICE detention is to remain in criminal custody until she has obtained post-conviction relief. When one in nine adult New Yorkers has been convicted of a crime in the last ten years, and one in three New Yorkers is foreign born,<sup>84</sup> the effects of this policy are far-reaching.

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**WHEN ONE IN NINE ADULT NEW YORKERS HAVE BEEN CONVICTED OF A CRIME IN THE LAST TEN YEARS, AND SIX OUT OF TEN NEW YORKERS ARE IMMIGRANTS OR CHILDREN OF IMMIGRANTS, THE EFFECTS OF THIS POLICY ARE FAR-REACHING.**

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# CARL'S STORY

**“CARL,” A 48-YEAR-OLD** trade unionist and father of five, found himself in this predicament when he was arrested in 2011 and charged with misdemeanor assault. When he found out that ICE had lodged a detainer against him, Carl was shocked. He had no idea that he was deportable. He had moved to New York from Jamaica in 1987, and he had been living here as a lawful permanent resident for almost 25 years. His children are all U.S. citizens, and his father and brothers and sisters all live here. Unfortunately, in 2006, Carl had been arrested and pleaded guilty to a misdemeanor: attempted possession of a forged instrument. His lawyer did not inform him about

the immigration consequences of pleading guilty, and Carl was released on time served.

The 2006 conviction, in conjunction with two other misdemeanor convictions from when he was in his twenties (attempted assault leading to conditional discharge in 1989, and marijuana possession in 1991, for which he was sentenced to 30 days and a \$250 fee), not only made Carl deportable, it made him subject to mandatory detention and deportation.<sup>85</sup> This meant that if he was handed over to ICE, he would not get a bond, he would not be able to get the relief under Article 440 for which he was clearly eligible, and he would be deported and separated from his children. It also meant that the New York City Department of Corrections would hand him straight over to ICE as soon as he paid the \$1000 bail that was set for him while the misdemeanor assault charge was pending.

On the advice of his lawyer, Carl chose not to pay bail, although he could afford it, and languished in jail. Relief under Article 440 was his only hope for avoiding deportation, and the only way he could get this relief was to stay out of immigration detention by remaining imprisoned in Rikers Island. It took a year, but his 2006 conviction was finally vacated. The court ruled that his constitutional right to effective assistance of counsel had been violated when his lawyer failed to inform him about the consequences of pleading guilty, and he was permitted to re-plead to disorderly conduct. The pending assault charges were also brought down to disorderly conduct, for which the maximum sentence is 15 days in jail.<sup>86</sup> Carl was released from Rikers Island on time served, and his immigration case was transferred to the non-detained docket at 26 Federal Plaza, where he will now have an opportunity to be heard before an immigration judge.

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**ONCE CARL WAS FREE, HE MANAGED TO GET HIS OLD JOB BACK, AND TO GET HIS CHILDREN INTO KINSHIP FOSTER CARE, BUT HE IS STILL WAITING FOR AN APARTMENT, AND IS NOT YET REUNITED WITH HIS CHILDREN.**

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## 2. NYC's detainer policy imposes intolerable costs on the city and its communities.

Even when immigrants like Carl are able to fight off deportation by remaining in criminal custody, the harm from New York's detainer policy can be irreparable. For those who do not have the resources and knowledge of Carl's attorneys and are sent into the ICE detention system, the harm can be even greater. The costs of detention and deportation—both personal and financial—are evident on the individual, community, and citywide level.

Carl's situation illustrates both the human and economic costs of detainers. Carl lost a year of his life because New York City's detainer policy left him with only two options: stay in jail or face mandatory deportation. The costs were also imposed on his children. Carl's three youngest children, who were 14, 15 and 17 years old and still living with him when he was arrested, were put into foster care. He lost his apartment and he lost his job. Once Carl was free, he managed to get his old job back, but he is still waiting for an apartment, and is not yet reunited with his children. Of course, this is preferable to deportation and permanent separation, but it is unjust, cruel and harmful.

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**THE RIGHTS GRANTED  
BY THE ICCPR HAVE  
BEEN RECOGNIZED TO  
APPLY TO ALL PEOPLE  
RESIDING IN A COUNTRY,  
REGARDLESS OF  
IMMIGRATION STATUS.**

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Furthermore, the burden of the unnecessary incarceration or deportation caused by New York City's detainer policy is borne not only by immigrants and their families, but also by the city as a whole.<sup>87</sup> In fact, the annual turnover-related costs for New York employers to replace workers who are detained or deported is \$9.1 million,<sup>88</sup> and New Yorkers pay over \$562,000 each year to place the U.S. Citizen children of immigrants who are detained or deported into foster care, and \$685,000 to provide them with health care.<sup>89</sup> In addition, NYC loses millions of dollars of potential tax revenue each year, as these children drop out of school and are unable to secure higher-wage jobs.<sup>90</sup>

## **B Foreign consulates and embassies' issuance of travel documents for deportation violates their obligations under international human rights law.**

By facilitating the deportation of non-U.S. citizens who have been deprived of access to state courts, foreign consulates and embassies violate their obligations under international law to ensure that their citizens have the same rights as any other person residing in the United States. Absent cooperation from these bodies, noncitizens can postpone deportation, which will allow them to pursue post-conviction relief and, if it is granted, enjoy the right to reunite with their families and communities.

### **1. Noncitizens have a right to post-conviction relief under domestic and international law.**

Federal, state, and international law all grant legal protections that bear on noncitizens' right to access to post-conviction relief in New York. The First Amendment of the U.S. Constitution guarantees the right to "petition the Government for a redress of grievances,"<sup>91</sup> and the Fifth and Fourteenth Amendments guarantee the right to "due process of law."<sup>92</sup> The Fourteenth Amendment also guarantees the "right of access to the courts," including for the purpose of post-conviction relief.<sup>93</sup> Moreover, the New York State legislature explicitly granted New Yorkers the right to seek post-conviction relief when it enacted Article 440 of the state's criminal procedure law. Meanwhile, the Universal Declaration of Human Rights (UDHR) states that "[e]veryone has the right to an effective remedy" if her constitutional or other state-granted rights are violated.<sup>94</sup> In addition, the UDHR makes clear why this guarantee is so important for noncitizen New Yorkers, when it declares that "[n]o one shall be subjected to arbitrary . . . exile."<sup>95</sup>

New Yorkers' right to the remedies afforded by post-conviction relief are further enshrined in binding instruments of international human rights law, including the American Convention on Human Rights (American Convention) and the International Covenant on Civil and Political Rights (ICCPR). According to Article 7(6) of the American Convention, states must provide people who are imprisoned access to *habeas corpus* relief,<sup>96</sup> and Article 25(1) states that everyone has the right petition courts for an effective remedy for acts that violate her rights under "the constitution or laws of the state concerned." Both the American Convention and the ICCPR require states to ensure that anyone who claims her rights have been violated will have a court determine if that is the case; if so, the

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## FOREIGN GOVERNMENTS HAVE A RESPONSIBILITY TO ENSURE THAT THE RIGHTS OF THEIR CITIZENS WHO RESIDE IN THE UNITED STATES ARE PROTECTED.

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courts must enforce an effective remedy.<sup>97</sup> Both conventions also hold that “[a]ll persons are equal before the law [and] are entitled, without discrimination, to equal protection of the law.”<sup>98</sup> The ICCPR further guarantees all persons equality “before the courts and tribunals.” The rights granted by the ICCPR have been recognized to apply to *all* people residing in a country, regardless of immigration status.<sup>99</sup>

### 2. By issuing travel documents preemptively, foreign governments inadvertently become complicit in ICE’s human rights violations.

States Parties to the American Convention or the ICCPR have a legal obligation to protect their citizens’ human rights. It is particularly important that these governments take active steps to protect the rights of their citizens who reside in the United States. The U.S. does not consider itself bound by the American Convention and only considers itself bound by some provisions of the ICCPR.<sup>100</sup> When consulates and embassies give in to ICE’s demands to issue travel documents for individuals who are exercising their right to an effective remedy for constitutional violations, it has the opposite effect: it enables preemptive deportations that violate the human rights guaranteed to them by these binding legal instruments.

When ICE obstructs immigrant New Yorkers’ access to post-conviction relief, it violates their constitutional rights—such as the right to petition the government for redress, the right to due process of law, and the right of access to the courts—and their state-granted right to seek relief under Article 440. And because New Yorkers who are detained by ICE are subject to these obstructions, ICE policies prevent all people from enjoying equal protection of the law, in violation of both domestic and international legal guarantees. Moreover, ICE detention and deportation policies effectively circumvent judicial review of the very convictions upon which their detention and deportations are based. This violates the American Convention and ICCPR’s prohibition on restricting a person’s access to judicial review of any actual or threatened deprivation of liberty.<sup>101</sup> It also violates the conventions’ guarantee of access to enforceable judicial remedies for rights violations.<sup>102</sup>

Foreign governments have an obligation to ensure that the rights of their citizens who reside in the United States are protected. When consulates and embassies issue travel documents for people who have post-conviction relief cases pending in state courts, thus enabling ICE to deport them, these embassies and consulates become complicit in ICE’s rights violations. For those states that are Parties to the ICCPR or the American Convention, this compliance contravenes their international obligation act affirmatively on behalf of their citizens when the rights afforded by those legal instruments are at risk.

# V.

## RECOMMENDATIONS

**THIS REPORT DEMONSTRATES THAT ICE SYSTEMATICALLY PREVENTS** detainees' from accessing state post-conviction relief, even as it uses state convictions as a basis for deportations. Federal immigration judges compound the problem when they refuse adjournments to allow immigrants to pursue post-conviction relief. New York City compounds the problem when it hands noncitizens over to a system where they will be prevented from accessing New York's criminal justice system. Foreign embassies and consulates compound the problem when they issue travel documents for those who are in the process of pursuing post-conviction remedies. The solution lies with all of these actors—each is responsible for the problem, and each can be part of the solution.

### To the New York City Council:

**Pass legislation that prohibits city agencies from cooperating with any ICE detainer requests.** While the two bills passed in 2011 and 2013 respectively, which limit the circumstances in which the city will cooperate with ICE detainers, were a positive step towards protecting immigrant New Yorkers and their families and communities, current legislation does not go far enough to adequately protect New Yorkers from ICE's overreach. Any policy that complies with detainer requests, to any extent, deprives New Yorkers of their state- and constitutionally-guaranteed rights, and is not a policy that serves the best interest of the city, its communities, or its residents.

### To the Federal Immigration System:

**ICE must create policies that respect all aspects of states' criminal justice systems.** A binding policy that underscores the agency's commitment to stay deportation proceedings and produce individuals upon the request of a state court is necessary to ensure that persons are not deported on the basis of wrongful or unlawful convictions.

**Immigration courts must grant requests to adjourn deportation hearings for noncitizens who have open and pending post-conviction relief motions.** The desire for a speedy proceeding should never undermine the desire for justice. The current lack of production procedures for individuals with pending post-conviction relief claims flies in the face of this axiom. It is the responsibility of the federal government to ensure individuals are not deported on the basis of wrongful or unlawful convictions.

### To Consulates and Embassies:

**Refuse to issue travel documents for individuals who are in the process of seeking post-conviction relief.** Embassies and consulates can protect their nationals in the U.S. from human rights violations by refusing to issue travel documents for individuals who have post-conviction relief claims pending in state courts. Issuing travel documents before state courts render their final decisions makes these individuals vulnerable to preemptive and wrongful deportations, harm that is potentially irreparable. Waiting until state courts issue their final decisions will enable individuals who should be eligible for relief from deportation to access that relief.

## METHODOLOGY

**THE CONTENT OF THIS REPORT** is based on interviews that the authors conducted between January and May 2014 with immigration and criminal defense attorneys who work primarily in New York City. Interviews were conducted over the phone, in person, and via email. Attorneys who responded to initial solicitations were asked about their general experiences with clients seeking post-conviction relief while in removal proceedings, as well as specific questions regarding detention, production, and premature deportation with clients with pending 440 motions. Some of the names in this report have been changed in order to maintain confidentiality and protect the privacy of individuals and their families.

# ENDNOTES

1. Letter from Consulate Gen. of Jam., N.Y.C., to Immigration and Customs Enforcement (Sept. 19, 2011) (on file with Families for Freedom) (responding to ICE's Aug. 12, 2011 request for Javian Lawrence's travel documents).
2. Ivan Moreno, *Some Colorado sheriffs ending immigrant detainers*, POSTSTAR.COM (Apr. 29, 2014), [http://poststar.com/news/national/article\\_5942ee60-e1b7-51f9-a2d3-013a4b95f460.html](http://poststar.com/news/national/article_5942ee60-e1b7-51f9-a2d3-013a4b95f460.html) (noting similar judicial, legislative and policy decisions in Oregon, Pennsylvania, and Washington state).
3. There are exceptions for convictions of certain misdemeanor prostitution and unlicensed driving offenses. See N.Y.C. Admin. Code §§ 9-131(2)-(3), 14-154(2)-(3) (2013).
4. Sixty-three percent of immigrants taken into ICE custody in New York State will remain in ICE detention for the duration of their immigration proceedings. *Decisions on ICE Detainees: State-by-State Details*, TRAC Immigration tbl.4 (May 22, 2013) [hereinafter *Decisions on ICE Detainees*], <http://trac.syr.edu/immigration/reports/320>.
5. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Peque v. Peque*, 22 N.Y.3d 168 (2013).
6. N.Y.C. Dep't of City Planning, *The Newest New Yorkers: Characteristics of the City's Foreign-born Population 9* (2013) [hereinafter *The Newest New Yorkers*], available at [http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny\\_2013.pdf](http://www.nyc.gov/html/dcp/pdf/census/nny2013/nny_2013.pdf).
7. *Id.* at 2.
8. N.Y. State Dep't of Criminal Justice Servs., *Computerized Criminal History Sys., New York City: Adult Convictions By Year* (2014).
9. See generally, Cyndi Banks, *Criminal Justice Ethics* ch. 3 (3d ed. 2013).
10. See Juan Gonzalez, *Gonzalez: Judge's ruling on stop-and-frisk confirms policy's racial bias*, Daily News (Aug. 13, 2013 09:46 PM), <http://www.nydailynews.com/news/crime/gonzalez-stop-and-frisk-race-bias-cited-judge-article-1.1426131>.
11. See generally, *Racial Disparity*, The Sentencing Project, <http://www.sentencingproject.org/template/page.cfm?id=122>.
12. N.Y. Police Dep't, *Stop Question & Frisk Activity 26* (Oct. 1, 2013 - Dec 31, 2013), available at [http://www.nyclu.org/files/2013\\_4th\\_Qtr.pdf](http://www.nyclu.org/files/2013_4th_Qtr.pdf).
13. *The Newest New Yorkers*, *supra* note 6, at 12.
14. See Detention Watch Network et al., *Deportation 101* 6 (2010), available at: <http://familiesforfreedom.org/sites/default/files/resources/Deportation101Manual-FINAL%2020100712-small.pdf>.
15. See *U.S. Immigration Policy*, [i]ndependentlens, <http://www.pbs.org/independentlens/sentencedhome/immigration.html> (last visited June 28, 2014).
16. See N.Y.C. Criminal Justice Agency, *Annual Report 2012 9* (2014) (indicating a total of 345,017 cases prosecuted in 2012), available at <http://www.nycja.org/library.php>.
17. William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. Times (Apr. 13, 2013), <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html>.
18. See *ABA describes over-criminalization problems in criminal justice system*, Am. Bar Assoc., [http://www.americanbar.org/publications/governmental\\_affairs\\_periodicals/washingtonletter/2013/june/overcriminalization.html](http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2013/june/overcriminalization.html) (last visited May 10, 2014).
19. See, e.g., The Innocence Network, *Innocence Network Exonerations 2013* (2013), available at <http://www.innocencenetwork.org/resources/innocence-collateral/network-exoneration-reports/innocence-network-exoneration-report-2013>.
20. Ed Pilkington, *Record number of people exonerated of crimes in US in 2013*, The Guardian (Feb. 4, 2014), <http://www.theguardian.com/world/2014/feb/04/record-exonerations-crimes-convictions-us>.
21. *People v. Fuller*, 501 N.Y.S.2d 116 (App. Div. 1986) (vacating a sentence that exceeded the maximum authorized by law).
22. See, e.g., *People v. Gant*, 786 N.Y.S.2d 492 (App. Div. 2004) (vacating a second degree murder conviction because of the prosecution's failure to disclose prior inconsistent testimony of a central witness).
23. See generally Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty 2* (2013), available at <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse> ("Only three percent of federal drug defendants go to trial."). Similar rates of guilty pleas exist at the state level.
24. *Habeas Corpus*, The Rutherford Institute, [https://www.rutherford.org/constitutional\\_corner/habeas\\_corpus](https://www.rutherford.org/constitutional_corner/habeas_corpus) (last visited May 11, 2014).
25. U.S. Const. art. I, § 9, cl. 2.

26. *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).
27. *E.g.*, 28 U.S.C. §§ 2241, 2254-55 (habeas corpus statutes); Fed. R. Crim. P. 33 (“New Trial”), 35 (“Correcting or Reducing a Sentence”; 18 U.S.C. §§ 3582(c) (“Modification of an imposed term of imprisonment”), 3600 (“DNA Testing”).
28. *Missouri v. Frye*, 132 S. Ct. 1399, 1407.
29. *Id.* (internal quotation marks and citations omitted).
30. *Laffler v. Cooper*, 132 S. Ct. 1376; *Missouri v. Frye*, 132 S. Ct. 1399.
31. *People v. Wise*, 752 N.Y.S.2d 837 (Sup. Ct. 2002).
32. See, e.g., *People v. Toporczyk*, 578 N.Y.S.2d 742 (App. Div. 1991); *People v. Rumble*, 584 N.Y.S.2d 360 (App. Div. 1992); *People v. Laraby*, 762 N.Y.S.2d 456 (App. Div. 2003).
33. N.Y. Crim. Proc. Law § 440.30(5)(d) (2012).
34. In-person interview with Labe Richman, Criminal Defense Attorney, New York, NY (Jan. 30, 2014) [hereinafter Labe Richman] (noting that he always has his clients testify at Article 440 hearings because of the difficulty of satisfying the defendant’s burden of proof without this testimony).
35. See *U.S. Deportation Outcomes by Charge: Completed Cases in Immigration Courts*, TRAC Immigration (2014), [http://trac.syr.edu/phptools/immigration/court\\_backlog/deport\\_outcome\\_charge.php](http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php). This figure does not include people who are deported on the basis of immigration violations that are criminally prosecuted.
36. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citing *Delgado v. Carmichael*, 332 U.S. 388, 390-391 (1947)).
37. *Id.* at 356.
38. *Id.* at 360.
39. *People v. Peque*, 22 N.Y.3d 168, 176 (2013).
40. *Id.*
41. *Id.* at 356.
42. *Id.* at 360.
43. In fact, under the American Bar Association Criminal Justice Standards, a prosecutor may drop a particular charge, despite having sufficient evidence to support a conviction, if the authorized punishment is disproportionate to the crime. ABA Criminal Justice Standards R. 3-3.9(iii).
44. See Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 10 Geo. L. J. 1 (2012).
45. See Corey Dade, *Obama Administration Deported Record 1.5 Million People*, NPR.org (Dec. 24, 2012 05:00 PM), <http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people>.
46. N.Y.C. Dep’t of Correction, Summary of Discharges of Inmates with Federal Immigration and Customs Enforcement Detainers (2013) [hereinafter N.Y.C. Summary of Discharges], available at [http://www.nyc.gov/html/doc/html/events/summaryICEreport103013\\_2.pdf](http://www.nyc.gov/html/doc/html/events/summaryICEreport103013_2.pdf).
47. Christopher Lasch, *The Faulty Legal Arguments Behind Immigration Detainers*, Immigration Policy Center (Dec 18, 2013) <http://www.immigrationpolicy.org/perspectives/faulty-legal-arguments-behind-immigration-detainers>.
48. *Id.*
49. See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (explicitly holding that the language of the federal regulations did not impose a mandatory command to detain an individual upon request).
50. N.Y.C. Summary of Discharges, *supra* note 46; N.Y. Police Dep’t, Statistics on Civil Immigration Detainers Received July 16, 2013 - September 30, 2013 (2013), available at [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/civil\\_immigration\\_detainers\\_received\\_07\\_16\\_2013\\_to\\_09\\_30\\_2013.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/civil_immigration_detainers_received_07_16_2013_to_09_30_2013.pdf).
51. N.Y.C. Admin. Code §§ 9-131(2)-(3), 14-154(2)-(3) (2013) (There are exceptions for convictions of certain misdemeanor prostitution and unlicensed driving offenses.).
52. I.N.A. § 236(c) (even minor offenses can render a noncitizen ineligible for release on bond).
53. Joshua Occhiogrosso-Schwartz, N.Y.U. Immigrant Rights Clinic & Immigrant Defense Project, *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City 8-12* (2012) available at <http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf>. The minority who are granted bonds that they can afford, will have their cases transferred to 26 Federal Plaza once the bond is paid and they are released.
54. *Decisions on ICE Detainees*, *supra* note 4.
55. *U.S. Deportation Proceedings in Immigration Courts*, TRAC Immigration (2014) [http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php).

56. Office of the Chief Clerk of N.Y.C. Criminal Court, *Criminal Court of the City of New York: Annual Report 2012*, 6, 15 (2013), available at <http://www.nycourts.gov/COURTS/nyc/criminal/AnnualReport2012.pdf>.
57. Phone interview with Talia Peleg, Staff Attorney, Brooklyn Defender Services (Jan. 14, 2014).
58. Phone interview with Lisa Napoli, Supervising Attorney, Appellate Advocates (Mar. 12, 2014).
59. See discussion *infra* Part III.B.2.
60. *Immigration Court Processing Time by Outcome*, TRAC Immigration (2014) [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php).
61. See, e.g., *In Re: Anny Miosoty Velazquez-Jimenez*, 2007 WL 4711456 (BIA Dec. 27, 2007); *Velazquez-Jimenez v. Mukasey*, 314 F. App'x 352 (2d Cir. 2008).
62. U.S. Immigration and Customs Enforcement, Policy 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (2013), available at [http://www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf). ICE adopted a non-binding policy in August 2013, recognizing the importance of ensuring that immigrant detainees involved family court proceedings are allowed to appear before the state family court when required by a judge, so that their parental rights are not disrupted unnecessarily. The policy provides guidelines for production of detained noncitizens to family court hearing, which are civil adjudications in state courts.
63. See Labe Richman *supra*, note 34.
64. See *supra* Introduction.
65. See NYIR Study Steering Committee, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, *New York Immigrant Representation Study Report: Part I*, 33 *Cardozo L. Rev.* 357, 363 (2011) [hereinafter *NYIR Study Report: Part I*] (explaining that ICE transfers nearly two-thirds of immigrants detainees in New York to far-off detention centers, usually in Louisiana, Pennsylvania, and Texas); cf. U.S. Immigration and Customs Enforcement, Policy 11022.1: Detainee Transfers 5.2(1)(c) (2012), available at <https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf> (directing ICE to avoid transferring detainees far away from ongoing removing proceedings).
66. See *Locked Up But Not Forgotten*, American Friends Service Committee, <http://www.afsc.org/resource/locked-not-forgotten> (last visited May 11, 2014).
67. *NYIR Study Report: Part I*, *supra* note 65, at 363. Compare to 27% of non-detained immigrant New Yorkers who are not represented in deportation proceedings. *Id.*
68. *Id.* at 363-64 (Represented immigrants are six times more likely to have successful outcomes than those who are not.).
69. 8 C.F.R. § 241.6.
70. See N.Y. Crim. Proc. Law § 440.30(2) (A hearing will not be granted if there is no possibility of relief).
71. *Id.* § 440.30(5).
72. *People v. Harrison*, 982 N.Y.S.2d 544 (App. Div. 2014).
73. Debra Cassens Weiss, *Lawyer Disbarred for Helping Ex-Con Colleague Practice Law*, *ABA Journal*, Sept. 23, 2008, [http://www.abajournal.com/mobile/article/lawyer\\_disbarred\\_for\\_helping\\_ex\\_con\\_colleague\\_practice\\_law](http://www.abajournal.com/mobile/article/lawyer_disbarred_for_helping_ex_con_colleague_practice_law).
74. *People v. Badia*, 964 N.Y.S.2d 906 (2013).
75. I.N.A. § 240(c)(7)(C)(i).
76. I.N.A. § 240(c)(7)(C).
77. *Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646, 660 (BIA 2008).
78. See, e.g., *Zhang v. Holder*, 617 F.3d 650, 652 (2d Cir. 2010).
79. See U.S. Immigration and Customs Enforcement, Policy 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (2012) available at [http://nationalimmigrationproject.org/legalresources/ICE\\_Return\\_Policy\\_Memo\\_Feb\\_2012.pdf](http://nationalimmigrationproject.org/legalresources/ICE_Return_Policy_Memo_Feb_2012.pdf). This can happen if a person who has been ordered deported submits a “petition for review” of the BIA’s deportation order to a federal circuit court. Petitions for review must be filed before deportation and within 30 days of receiving a final order of deportation from the BIA. I.N.A. § 242(b)(1).
80. Trina Realmuto et. al., *Nat’l Immigration Project et al., Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider 5* (2012), available at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Return\\_to\\_US\\_After\\_Successful\\_Petition\\_for\\_Review\\_or\\_%20Motion%20\(12-21-2012\).pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Return_to_US_After_Successful_Petition_for_Review_or_%20Motion%20(12-21-2012).pdf).
81. *Id.* at 6.
82. *Id.* at 2.
84. *The Newest New Yorkers*, *supra* note 6, at 9.
85. Carl had four class B misdemeanor convictions:
- In 1989 he was convicted of attempted assault, which was considered to be a “crime involving moral turpitude” (CIMT).
  - In 1991 he was convicted of possessing marijuana. Because this happened within seven years of his arrival in the United States, this conviction makes him ineligible for one form of relief

available to lawful permanent residents, known as Cancellation of Removal. See I.N.A. § 240A(d)(1).

- In 1995 he was convicted of possessing marijuana. Because this was his second drug conviction, he became deportable, I.N.A. § 237(a)(2)(B)(i), but because this happened before 1996, he was still eligible for another form of relief available to lawful permanent residents, known as 212(c) relief, *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).
- In 2006 he was convicted of attempted possession of a forged instrument. Because this conviction was his second CIMT, it formed another ground of deportation, I.N.A. § 237(a)(2)(A)(ii), and because happened after 1996 it made him ineligible for 212(c) relief. It also made him subject to mandatory detention. I.N.A. §§ 236(c)(1)(A), 212(a)(2)(A).

86. N.Y. Penal Law § 240.20.

87. See Center for Popular Democracy et. al., *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers* (2013), available at <http://populardemocracy.org/news/new-york-immigrant-family-unity-project-report>.

88. *Id.* at 10-11.

89. *Id.* at 5, 14.

90. *Id.* at 11.

91. U.S. Const. amend. I.

92. U.S. Const. amend. I, V, XIV.

93. See *Bounds v. Smith*, 430 U.S. 817 (1977).

94. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

95. *Id.* at art. 9.

96. Organization of American States, art. 7(6), American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

97. See *id.* at art. 25(2); International Covenant on Civil and Political Rights, art. 2(3)(b)-(c), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

98. See ACHR, *supra* note 96, at art. 24; ICCPR, *supra* note 97, at art. 26.

99. See Carmen Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* 112-15 (2001).

100. 138 Cong. Rec. S4,781-01 (daily ed. Apr. 2, 1992) (listing the reservations, understandings, and declarations that limit the enforceability of the International Covenant on Civil and Political Rights with respect to the United States). The United States has not ratified the American Convention on Human Rights.

101. ACHR, *supra* note 96, at art. 7(6); see also ICCPR, *supra* note 97, at art. 9(4).

102. ACHR, *supra* note 96, at art. 25(2); ICCPR, *supra* note 97, at art. 2(3)