

# Crimmigration in Oregon

Protecting the rights of noncitizen defendants

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# ABOUT

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## OREGON JUSTICE RESOURCE CENTER

The Oregon Justice Resource Center (OJRC) is a Portland, Oregon, 501(c)(3) nonprofit founded in 2011. We work to promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them. Our clients are currently and formerly incarcerated Oregonians. We work in partnership with other, like-minded organizations to maximize our reach to serve underrepresented populations, train public interest lawyers, and educate our community on civil rights and civil liberties concerns. We are a public interest law firm that uses integrative advocacy to achieve our goals. This strategy includes focused direct legal services, public awareness campaigns, strategic partnerships, and coordinating our legal and advocacy areas to positively impact outcomes in favor of criminal justice reforms.

## IMMIGRANT RIGHTS PROJECT

The Immigrant Rights Project (IRP) is a program of the OJRC that provides free personalized advice to noncitizen clients of Oregon public defense providers regarding the immigration consequences of pleas and convictions. IRP attorneys work with defense counsel to assess the risks of detention, deportation, and inadmissibility, as well as the likelihood and best options for discretionary relief from deportation based on the non-citizen's criminal, immigration, family, and personal history.

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June 2018

# INTRODUCTION

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Dedication to ensuring that justice is done for all those involved - victims and their families, defendants, and our communities - should be at the heart of our criminal justice system. To achieve this, we must defend the rights of noncitizens intersecting with our justice system, and their family members - both citizen and noncitizen.

Several studies show that immigrants in the United States commit crimes at lower rates than native-born citizens and rates of violent crime in metropolitan areas fall as the immigrant population rises.<sup>1</sup> Despite this, the specter of the “criminal alien” continues to haunt the popular imagination, aided by lurid media coverage highlighting the few cases of serious or violent crimes committed by immigrants.<sup>2</sup>

Donald Trump and his administration have greatly expanded the groups of people targeted for removal from this country, while severely limiting legal immigration.<sup>3</sup> Enforcement actions are taking place against a broad group of noncitizens, including those who have committed only minor crimes

or even no crimes at all. Even lawful permanent residents (informally known as green card holders) are being targeted more aggressively, with cases such as that of a 62-year-old grandfather from California taken from his home and family by Immigration and Customs Enforcement (ICE) because of a misdemeanor conviction from eighteen years ago.<sup>4</sup>

## NONCITIZENS AND THE CRIMINAL JUSTICE SYSTEM

Like the grandfather from California, long-time lawful residents of the United States can find themselves facing essentially permanent banishment from their homes and families because of minor criminal offenses. Noncitizens without lawful permanent resident status, even if present in the country legally, are even more at risk. The federal government is changing or cancelling long-standing programs that have permitted many people to enter and remain in the United States due to their education, employment, exceptional qualities, strong ties to this country, or the dangers they could face if they are forced to “return” to a country

they may barely know.<sup>5</sup>

Noncitizens who find themselves involved with the criminal justice system are often doubly punished. While the Constitution recognizes that criminal defendants have certain inalienable rights, “aliens” are treated differently: at least one court has gone as far as saying that noncitizens are not “people” under the Constitution,<sup>6</sup> the largest cities in the United States are within a “constitution-free zone” where the government claims powers in the name of border enforcement that would not normally be allowed under the Fourth Amendment,<sup>7</sup> and Congress has “plenary power” beyond the Constitution to control immigration.<sup>8</sup>

The criminal justice system continues to be a major apparatus for the detection and apprehension of noncitizens suspected of being removable from the United States. Likewise, the administrative system that regulates immigration has become increasingly punitive, and the immigration consequences of even minor crimes are often severe and permanent.

## WHAT CAN OREGON AND OREGONIANS DO?

In response to the policies and rhetoric issuing from the White House, prominent Oregon leaders have spoken in support of our state being a sanctuary for all immigrants.<sup>9</sup> Important though these affirmations are, in light of the often xenophobic, Islamophobic, and racist language<sup>10</sup> used to describe immigrants to the United States and their countries of origin, words are not enough to keep noncitizen Oregonians safe. This report sets out a roadmap for protecting the rights of justice-involved noncitizens

in our state. It offers several detailed recommendations to ensure that noncitizens are afforded basic protections and treated with fairness, dignity, and respect. Oregon cannot entirely mitigate the increasingly broad and aggressive enforcement of immigration law by the federal government. However, legal reforms, policy changes, better training for state actors, and upholding the existing state sanctuary law for noncitizens will all help. Oregon needs to codify our commitment to the idea of sanctuary with further legal and policy protections to ensure that all noncitizen Oregonians as

well as their U.S. citizen family members, friends, neighbors, and coworkers feel safe.

*Make no mistake:* The suggestions in this report are not directed toward giving special treatment to so-called “illegal aliens.” Anyone who is not a citizen of the United States remains under the watchful eyes of ICE, and can be deported, barred from re-entry, or denied immigration benefits because of a criminal offense – sometimes even without a criminal conviction.

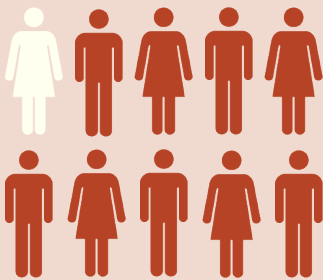
## GLOSSARY OF TERMS

- ★ **Noncitizen:** Anyone who is not a citizen or national of the United States. Generally, one can be a U.S. citizen by birth in the United States, through naturalization, or through a U.S. citizen parent.
- ★ **Alien:** In the language of the immigration statutes, any noncitizen is described as an “alien.”
- ★ **Inadmissible:** Unable to enter or re-enter the United States, or ineligible for lawful status, e.g. lawful permanent residence.
- ★ **Deportable:** Subject to forced removal after having been lawfully admitted in any status, commonly because of a criminal offense.
- ★ **Removable:** Subject to forced removal because the person is deportable or inadmissible.
- ★ **“Criminal Alien”:** There is no legal definition for “criminal alien.” It is used to refer to so many different groups that it is essentially meaningless.<sup>11</sup> Like “illegal alien,” the term only serves to demonize noncitizens.

# WHO ARE OREGON'S IMMIGRANTS AND NONCITIZENS?<sup>12</sup>

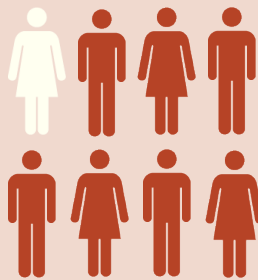
1 IN 10

Oregonians is an immigrant



1 IN 8

Oregonians is a native-born U.S. citizen with at least one noncitizen parent



The top countries of origin for immigrants in Oregon are:



Mexico



China



Vietnam



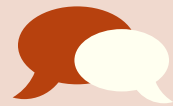
India



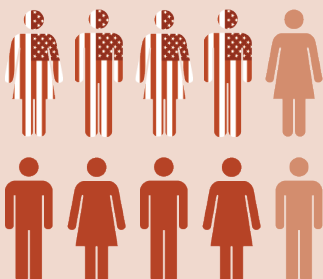
Canada



3/4 immigrants in Oregon report speaking English "very well" or "well"

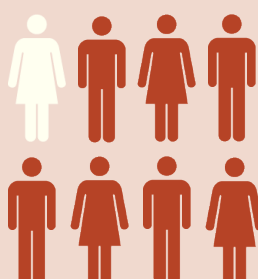


More than 4/10 Oregon immigrants have become U.S. citizens and a further 2/10 are eligible.



1 IN 8

workers in Oregon is an immigrant.



Immigrant-led households in Oregon paid \$1.7bn in federal taxes and \$736.6m in state taxes in 2014.



# WHAT IS CRIMMIGRATION?

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Those caught in both the immigration and criminal law systems often face the highest stakes but have the least access to resources. This intersection of criminal law and immigration law has been dubbed “crimmigration law.” It is unfortunate that because of the complexity involved in navigating both systems, the number of attorneys and advocates dedicated to serving this population remains small.

Immigration law is complex and hyper-technical. One court compared it to King Minos’s fabled labyrinth and cited the Immigration and Nationality Act as an example of “Congress’ ingenuity in passing statutes certain to accelerate the aging process of judges.”<sup>13</sup>

Crimmigration broadly includes the criminalization of migration, increased immigration detention and use of private prisons, the prison-to-deportation pipeline, and a deportation process described by immigration judge Dana Leigh Marks as “what amount to death penalty cases heard in traffic court settings.”<sup>14</sup>

Viewed narrowly, crimmigration refers to the immediate

and long-term immigration consequences of criminal convictions. Examples of minor crimes that can have serious immigration consequences include simple drug possession, shoplifting, and even the most technical violation of a restraining order. Certain offenses called “aggravated felonies” preclude virtually all relief from deportation. While once limited to only the most serious offenses, the definition of “aggravated felony” is now so broad it includes misdemeanors.<sup>15</sup>

## WHO IS AT RISK?

Any noncitizen with a criminal history might be subject to arrest by ICE, immigration detention, deportation, permanent or temporary banishment from the United States, or denial of lawful status or citizenship, even for a misdemeanor conviction that happened decades ago.

A lawful permanent resident’s criminal history might make them ineligible for citizenship, prevent them from being lawfully admitted into the United States after travel abroad, or cause them to be deported.

For an undocumented person, any negative contact with law enforcement could trigger detention and deportation proceedings, even if no crime is ultimately charged. This is because local law enforcement agencies automatically share information with the federal government, including ICE, through myriad inter-connected databases.<sup>16</sup> Under the Executive Order “Enhancing Public Safety in the Interior of the United States,” issued by President Trump in 2017, almost every undocumented person is a priority for deportation regardless of criminal history.<sup>17</sup>

The immigration consequences for other noncitizens in the U.S., including exchange students, foreign workers, visitors, refugees and “dreamers,” will depend on their specific status. But again, even a minor offense can trigger deportation or cause them to lose their status.

## WHAT LEGAL PROTECTIONS ARE AVAILABLE FOR NONCITIZENS AND THEIR FAMILIES?

Even if someone is found deportable or inadmissible to the United States, there may

be waivers and other forms of relief available to those who can prove eligibility and that they warrant favorable discretion. Relief generally depends on immigration status, length of presence in the United States, family ties, and showing that U.S. citizen or permanent resident family members will suffer hardship if the relief is denied.

Unfortunately, the current administration is aggressively applying its broad authority to make it as difficult as possible for noncitizens to obtain relief

from removal, even if legally eligible. It continues to strip away the power of immigration officers, prosecutors and judges to use discretion in deciding who should be allowed to remain in the United States. At the same time, new requirements and restructuring make it more difficult for the immigration court system to function, which in turn makes it more difficult for noncitizens in removal proceedings to have their day in court.<sup>18</sup>

The current immigration system has been crafted to deny state

criminal judges the ability to use their own judgment as to how noncitizen defendants should be treated. Once upon a time, state criminal judges could make “judicial recommendations against deportation,” if a judge believed that a defendant should not be deported for certain minor offenses.<sup>19</sup> These days, even expunged and diverted crimes are still “convictions” for immigration purposes and can never be cleared from a person’s record.<sup>20</sup>

## IMMIGRATION STATUSES

- ★ Undocumented: Present without authorization. This includes people who entered unlawfully or who overstayed their period of authorized presence, e.g. overstaying a visa.
- ★ Lawful Permanent Resident (LPR): Green card holder authorized to live in the United States indefinitely, but still subject to being removed or denied entry for violations under the Immigration and Nationality Act (INA).
- ★ Immigrant: Legally, “immigrant” essentially means a lawful permanent resident. In common usage, it means anyone born in a foreign country or who was not a U.S. citizen at birth.
- ★ Nonimmigrant: Noncitizen granted lawful status for a limited time and purpose, e.g. a tourist, certain employees, and international students.
- ★ Refugee or Asylee: A person granted permission to live in the United States because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.
- ★ Deferred Action for Childhood Arrivals (DACA): Temporary protection from deportation for certain individuals who entered the United States as children, or “Dreamers.” DACA is not a lawful status, but one of many forms of deferred action that suspends the removal process and allows work authorization. As of the date of this publication, the DACA program is in jeopardy of ending completely.



# WHAT OREGON HAS ALREADY DONE TO PROTECT THE RIGHTS OF NONCITIZENS

Oregon has already taken several steps to protect noncitizens and their families.

★ Thirty years ago, the Oregon Legislature passed what is now known as the “sanctuary state law,” which prevents the State from assisting in the enforcement of civil immigration violations.<sup>21</sup> Unfortunately, U.S. Attorney General Jeff Sessions has threatened to sue Oregon because of this statute, and there is a concerted effort underway to repeal it.<sup>22</sup>

★ Oregon recently reduced the maximum possible punishment for a misdemeanor from 365 days to 364 days.<sup>23</sup> The primary effect of this change is to prevent certain minor misdemeanor offenses, generally by first-time offenders, from triggering

deportation, and allow some noncitizens to apply for relief from removal.

★ The U.S. District Court in Oregon found, in *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317 (D.Or. April 11, 2014), that it is unconstitutional for Oregon’s jails to hold noncitizens past their release dates so that ICE can pick them up.

★ In 2017, Oregon’s Office of Public Defense Services (OPDS) contracted with the Oregon Justice Resource Center to provide individualized consultations to Oregon’s public defense providers regarding the immigration consequences faced by their noncitizen clients, as mandated by the U.S. Supreme Court.<sup>24</sup>



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# WHAT THE OREGON LEGISLATURE CAN STILL DO

While Oregon has already taken strong positions in protecting the rights of noncitizens, there are more steps that can be taken that do not conflict with existing federal laws and would be of real benefit to Oregonians. These legislative recommendations strive to protect the constitutional rights and dignity of noncitizen defendants.

**Recommendations One and Two** allow noncitizens to preserve eligibility for immigration benefits or relief from deportation. For example, an undocumented immigrant who has lived in the United States for at least 10 years, has good moral character, and has a U.S. citizen or lawful permanent resident spouse, parent, or child who would suffer “exceptional and extremely unusual” hardship,<sup>25</sup> may be barred from applying for relief from deportation based on a petty theft conviction.<sup>26</sup> Preserving eligibility does not guarantee the person will be granted lawful status; it simply means they get the opportunity to apply, to demonstrate their merit, and show how their removal would affect their family and their community.

**Recommendations Three through Six** protect defendants' constitutional rights and contribute to the efficiency and fairness of criminal court proceedings.

**Recommendation Seven** gives those who received constitutionally deficient advice from their criminal defense lawyer an opportunity for redress.

## 1. Create Pre-Plea Diversion

People facing certain criminal charges may qualify to enter pretrial diversion or deferred adjudication. These alternative dispositions or outcomes focus on rehabilitation and discouraging future anti-social behaviors such as driving under the influence of drugs or alcohol. Oregon should amend its diversion statutes to allow qualified defendants to enter pretrial diversion or deferred adjudication without requiring the entry of a guilty or no contest plea, or admission of facts that would be sufficient to warrant a finding of guilt. As the law stands, once a charge has been dismissed after successful completion of post-plea

diversion, the person is not considered to have a conviction for state purposes. However, this disposition is still a conviction for immigration purposes and can have disastrous immigration consequences.<sup>27</sup> Creating pre-plea diversion would help to give discretion back to Oregon's criminal judges and to immigration judges, allowing them to consider the individual, as well as their family and community.

## 2. Allow Prior Convictions to Fit Current Law

While Oregon has already reduced the maximum possible punishment of Class A misdemeanors from 365 days to 364 days, there is no means to allow this new standard to apply to prior convictions. Since there is no statute of limitations when it comes to deportability, even very old misdemeanor convictions can make someone removable from the United States. There should be a process, possibly similar to that for reducing a felony to a misdemeanor, to allow a prior misdemeanor to be treated as punishable by 364 days.

### 3. Define the Prosecutor's Duty

Prosecutors, in the interests of justice, should consider the avoidance of adverse immigration consequences in plea negotiations. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court contemplated the consideration of immigration consequences by defense and prosecution, stating “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.” Defining the prosecutor’s duty to consider the adverse immigration consequences of a plea will provide consistency in criminal proceedings and promote fundamental fairness.

### 4. Improve Effectiveness of the Court's Admonishment

Amend or supplement ORS 135.385(2)(d)’s requirement that the court, prior to accepting a plea of guilty or no contest, advise every defendant that if the defendant is not a citizen of the U.S., conviction of a crime may result in deportation, exclusion from admission to the U.S., or denial of naturalization. This advisal should be given much earlier in the process - at arraignment - so that the defendant has reasonable notice and time to obtain competent advice on the immigration consequences of the offense. The court should ensure that reasonable time is

allowed to obtain competent immigration legal advice. Noncitizens who were not properly given these warnings should have a legal remedy.

### 5. Prohibit Disclosure of Immigration Status in Court

No one should be forced to disclose their immigration status to the court. Such a disclosure could put them at unnecessary risk of immigration enforcement and discrimination before the state court. It jeopardizes their Fifth Amendment protection against self-incrimination, risks interference with attorney-client confidentiality, and impairs counsel’s ability to provide effective assistance. Finally, it is contrary to obligations under the Oregon Judicial Code of Conduct, including Rule 2.1 Promote Confidence in the Judiciary and Rule 3.3 Impartiality and Fairness.

### 6. Define Defense Counsel's Duty

In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice about the immigration consequences of pleas or convictions. The legislature should recognize that defense counsel has a duty to first ensure that their client understands the potential criminal dispositions in their case and the effects of those dispositions on their immigration

status, and then to give their clients the opportunity to make decisions in their criminal case based on that understanding. Legislative recognition of these duties will better protect the rights of noncitizen defendants and provide greater clarity to defense counsel regarding Oregon’s values and standards for effective assistance of counsel.

### 7. Expand Post-Conviction Relief

Amend or supplement ORS 138.510, the law detailing who may file a petition for post-conviction relief, to allow defendants to apply for relief within a reasonable time of discovering they received constitutionally deficient advice about the immigration consequences of a plea or conviction. Federal immigration authorities might not initiate deportation proceedings or find a noncitizen ineligible to remain in the United States until years after a conviction has occurred. Therefore, many noncitizens do not realize they received inadequate advice until the two-year filing deadline for post-conviction relief has expired. Time-barring claims to relief when someone had no knowledge, nor could reasonably have known, of the ineffective assistance of counsel is fundamentally unfair and contrary to the purpose of ORS 138.510. Vacating a prior conviction is often the only way to preserve relief from deportation and avoid removal.

# WHAT ELSE CAN OREGON DO?

Legislation is not the only option for Oregon to help ensure that noncitizens caught in the criminal justice system are treated fairly.

## 1. Uphold Existing Law

Oregon law already prohibits use of state resources, equipment, or personnel to detect or apprehend people whose only violation of the law is that they are foreign citizens present in the United States in violation of federal immigration laws.<sup>28</sup> In addition:

a. County and city leadership, district attorneys' offices, sheriffs, and chiefs of police should issue a memo to their staff instructing them that they are expected to follow ORS 181A.820.<sup>29</sup>

b. All public employees should receive mandatory training on ORS 181A.820, which should be provided with input from community partners.

c. Chiefs of police, district attorneys, and sheriffs should pledge to investigate

any violation of ORS 181A.820 and charge offenders with a violation of ORS 162.405 Official Misconduct in the Second Degree.

d. County and city leadership, district attorneys' offices, sheriffs, and chiefs of police should make public each quarter a report of all memos and trainings on this issue, investigation of any violations, and discipline for violations.

## 2. End "Broken Windows" Policing Targeting Low-Level Offenders<sup>30</sup>

A sincere commitment on the part of cities and counties in Oregon being declared or wishing to be recognized as "sanctuary cities" requires an immediate end to policies and practices of policing and prosecution that bring individuals to the courts and jails for low-level offenses where they are vulnerable to aggressive ICE enforcement. Local law enforcement should implement policies to end "broken windows policing" that targets low-level offenders.

## 3. Limits on Information Sharing

Law enforcement agencies, DAs' offices, probation offices, the Department of Corrections, the Department of Human Services and others should establish policies that prohibit employees from contacting ICE where such contact goes beyond the scope of their assigned duties. Consequences should be established for violating these policies.

## 4. No More Contracted Jails

Oregon's jails should immediately stop contracting with ICE to detain noncitizens.<sup>31</sup> It is not the role of the state or of the counties to enforce immigration law, and it is wrong and against the spirit of being a sanctuary state for Oregon's jails to profit from deportation.

Following these recommendations would go a long way to ensuring that noncitizen Oregonians and their families feel safe in our courts, state offices, and agencies, and when interacting with state and local law enforcement.

# CONCLUSION

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Although the term "crimmigration" may be unfamiliar to many Oregonians, the line between criminal justice and immigration enforcement has significantly blurred. In a 2006 article, Lewis & Clark Law School Professor Juliet Stumpf described a dystopian future "grounded in the present in which criminal law is poised to swallow immigration law. Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct."<sup>32</sup>

It is unacceptable to harden our hearts to the fact that even

minor criminal offenses are being used to justify breaking apart families, disrupting careers, and exiling people from what may be the only home they have ever known. It is unacceptable to think that if we treat everyone exactly the same, then we have achieved fairness and justice, even while certain groups are repeatedly left behind or disadvantaged by this approach. We must reject this simplistic thinking and act with clear intent.

Oregon needs to recognize that if we truly value protecting the rights of all Oregonians, it is not enough for our leaders

to just speak in support of sanctuary. They must act to provide meaningful protections through legislation, policy, and practice. They must also ensure that these reforms trickle down through state and local agencies to the officials "on the ground" who make the day-to-day decisions. It is time to move past rhetoric and symbolism and take meaningful steps to ensure our justice system treats everyone with dignity, respect, and fairness.

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