

**REPORT ON LEGISLATION BY
THE CRIMINAL COURTS COMMITTEE
THE CRIMINAL JUSTICE OPERATIONS COMMITTEE AND
THE IMMIGRATION AND NATIONALITY LAW COMMITTEE**

A.2005-A / S.1505-A (Budget Article VII) – Part OO

Enacts into law major components of legislation necessary to implement the state public protection and general government budget for the 2019-2020 state fiscal year; to amend the penal law, in relation to reducing certain sentences of imprisonment for misdemeanors to three hundred sixty-four days

One Day to Protect New Yorkers Act

THIS PROVISION IS APPROVED

On behalf of the New York City Bar Association’s Criminal Courts, Criminal Justice Operations, and Immigration and Nationality Law Committees, we write to express our support for inclusion of the One Day to Protect New Yorkers Act (“the Act”) in the New York State Budget. This legislation would help ensure fairness, transparency, and proportionality for noncitizen New Yorkers in our criminal courts, and improve the efficiency and functioning of the New York criminal justice system. Passage of the Act has become even more vital due to the significant increase in immigration enforcement pursuant to the expanded enforcement priorities laid out by President Trump in his January 25, 2017 executive order.¹ Since that time, New York State has experienced several major enforcement operations, including the arrests of 225 immigrants over a six-day period in April 2018 and 118 immigrants in January 2019. The Immigrant Defense Project has documented a 1700% increase in ICE arrests at state courthouses under the Trump Administration.² Both documented and undocumented immigrant New Yorkers have been arrested. These actions by federal immigration officers threaten the trust between immigrant communities and the institutions meant to serve all New Yorkers, including

¹ Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017), available at <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>. See also Memorandum from Dep’t Homeland Sec. Secretary John Kelly, “Enforcement of the Immigration Laws to Serve the National Interest,” February 20, 2017, available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (noting that ICE no longer exempts classes or categories of removable immigrants from potential enforcement)(all websites last visited Jan. 30, 2019).

² “The Courthouse Trap: How ICE Operations Impacted New York’s Courts in 2018.” Immigrant Defense Project (January 2019), available at <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf>.

the courts and the criminal justice system. By reducing the maximum sentence for “A” misdemeanors as proposed by the Act, New York State can demonstrate its commitment to ensuring the law applies proportionally to all of its residents.

OVERVIEW

The One Day to Protect New Yorkers Act will amend New York’s current criminal sentencing laws with respect to A misdemeanors by reducing the maximum potential sentence by one day. Currently, the maximum potential sentence for an A misdemeanor “shall not exceed one year.”³ The Act would change this part of the Penal Law such that A misdemeanors instead would be punishable by a maximum of 364 days.⁴

The Act also would apply retroactively to reduce, by one day, the maximum sentence for anyone previously convicted of an A misdemeanor and sentenced to one year.⁵ Furthermore, with regard to the retroactivity section, the Act is drafted prudently so as not to burden the criminal justice system, courts, prosecutors or defense attorneys with the need for any additional judicial process. The retroactivity provisions are intended to work automatically by operation of law and a person so sentenced need only request from the court a certificate of conviction setting forth the 364 day sentence.

THE ONE DAY TO PROTECT NEW YORKERS ACT WOULD PROTECT IMMIGRANT NEW YORKERS, CONVICTED OF “A” MISDEMEANORS, FROM UNDULY HARSH AND INADVERTENT CONSEQUENCES

Due to some idiosyncrasies in the drafting of federal immigration laws, New York’s one year maximum sentence for A misdemeanors has extraordinary, harsh, and disproportionate consequences for immigrant New Yorkers—including lawfully present permanent residents (green card holders), asylees, and victims of domestic violence. There are three fundamental ways in which this can happen. They are explained briefly below, and each of these issues would be addressed by the one day reduction in the maximum sentence that the Act envisions.

First, federal law can subject an individual to deportation for a single conviction for a “crime involving moral turpitude . . . [if a] *sentence of one year or longer may be imposed.*”⁶ Notably, it is the *potential* for the one year sentence that is critical here, even in circumstances where a person is not subject to any incarceration whatsoever. “Crimes involving moral

³ NY Penal Law § 70.15.

⁴ The standalone version of the Act introduced by the legislature as A.4469 (Crespo)(NYS 2019) further amends NY Penal Law § 70.15(3) regarding sentences of imprisonment for an unclassified misdemeanor. The amendment reduces the maximum sentence for any unclassified misdemeanor punishable by one year to 364 days.

⁵ On the limited issue of what constitutes a crime involving moral turpitude for immigration purposes, the Board of Immigration Appeals held with regard to a similar California statute that the law *as it existed at the time of conviction* is controlling regardless of a retroactivity provision. See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018). However, retroactivity remains an important piece of this legislation given that the issue continues to be litigated and retroactivity still serves judicial efficiency and has bearing on other immigration consequences such as aggravated felonies.

⁶ Immigration and Nationality Act (INA) § 237(a)(2)(A)(i) (emphasis added).

turpitude” is an extremely broad category of offenses that includes some of the most minor crimes in the New York Penal Law (NYPL), including, for example, turnstile jumping, NYPL § 165.15, and minor shoplifting offenses, NYPL § 155.25.⁷ In practice, this means even individuals who entered the United States legally and have a green card could be detained and placed in deportation proceedings if they are convicted of a minor theft offense and are never sentenced to even one day in jail. Additionally, because there is no statute of limitations in immigration law,⁸ someone who came legally as a child and was convicted of an A misdemeanor as a teenager could be deported decades later based upon this single conviction, regardless of whether this individual had any subsequent contact with the criminal justice system.

An *actual* one year jail sentence for certain A misdemeanors serves to disqualify some of the most vulnerable New Yorkers from special protections that would otherwise be available to them under federal immigration law. Specifically, federal immigration law provides for asylum protection for people who have a well-founded fear of persecution in the countries from which they fled.⁹ Similarly, federal immigration law provides for special protections for certain victims of domestic violence.¹⁰ However, these protections generally become unavailable if the individual has been convicted of an “aggravated felony.”¹¹ However, because of the one-year maximum sentence for A misdemeanors in New York, certain New York misdemeanor convictions can be considered “aggravated felonies” under federal immigration law if an individual is actually sentenced to one year.¹² It is unlikely that Congress intended to deny protections to these vulnerable groups based upon a single misdemeanor conviction, but that is exactly what happens under current law. By reducing the maximum sentence for A misdemeanors to 364 days, New York can ensure that its most vulnerable population will not be disqualified from these vital protections based on this interplay between federal immigration law and New York penal law.

Second, the one day reduction in the maximum sentence for A misdemeanors in New York would mitigate the disproportionate consequences that can arise from a single minor conviction. It would also bring New York in line with the ten other states that punish all misdemeanors with maximum sentences of less than one year.¹³ Notably, multiple misdemeanor

⁷ See *Matter of De La Nues*, 18 I. & N. Dec. 140, 145 (BIA 1981) (all theft offenses, no matter how trivial, are usually considered to be crimes involving moral turpitude).

⁸ See *Restrepo v. Attorney General*, 617 F.3d 787, 801 (3d Cir. 2010) (holding that the federal civil statute of limitations provision at 28 U.S.C. 2462 does not apply to immigration removal proceedings because the Immigration and Nationality Act does not itself include any express statute of limitation provision)

⁹ See generally INA § 208 (asylum provisions).

¹⁰ See generally INA §§ 204(a)(1)(A)(iii)-(vii), 240A(b)(2)(A) (Violence Against Women Act (VAWA) provisions).

¹¹ See INA § 101(f)(8) (barring anyone with an aggravated felony from establishing good moral character); INA § 204(a)(1)(A)(iii)(II)(bb) (requiring good moral character to adjust status under VAWA); INA § 208(b)(2)(B)(i) (barring anyone with an aggravated felony from receiving asylum protection).

¹² See, e.g., INA 101(a)(43)(F), (G) (setting forth aggravated felony grounds that are triggered by a one year sentence).

¹³ See Ariz. Rev. Stat. Ann. § 13-707; Cal. Penal Code § 18.5; 720 Ill. Comp. Stat. Ann. 5/2-11; N.J. Stat. Ann. § 2C:43-8; N.M. Stat. Ann. § 30-1-6; N.C. Gen. Stat. Ann. § 15A-1340.23; Ohio Rev. Code Ann. § 2929.21; Tenn. Code Ann. § 40-35-111; Wash. Rev. Code Ann. § 9A.20.021; Wis. Stat. Ann. § 939.51. Three of these states have enacted this change for exactly the reasons for which this Act is being advanced. See Robert Reeves,

convictions, or a single felony conviction, for crimes involving moral turpitude would still trigger deportation,¹⁴ as would single misdemeanor convictions for certain other categories of offenses.¹⁵ This Act would not change the operation of those provisions of law in any way.

Thirdly, the *actual* one year maximum sentence for certain A misdemeanors divests immigration judges of the discretion they would otherwise have under federal immigration law to consider the totality of the circumstances in a given case. A judge could usually use this discretion in making determinations, for example, of whether or not to deport a non-citizen who has been a long-term resident and has close ties to his community in the United States. Historically, when such non-citizens faced deportation, immigration judges generally had broad discretion to consider the totality of the circumstances—weighing negative equities, like convictions, against positive equities, like rehabilitation, family ties, military service, etc.—to determine whether or not deportation was warranted.¹⁶ However, in 1996, Congress sharply constrained immigration judges’ discretion in this regard, subjecting many non-citizens to mandatory deportation.¹⁷ As with asylum and VAWA protections, any permanent resident with an “aggravated felony” conviction is now subject to mandatory deportation and an immigration judge is powerless to consider the individual circumstances of the case.¹⁸ Similarly, non-permanent residents, who might otherwise qualify for cancellation of removal due to their long-term residence and family ties in the United States, along with other positive equities, will be barred from such relief if they are convicted for an aggravated felony or a single “crime involving moral turpitude” under immigration laws.¹⁹

For the same reasons described above, the one year maximum sentence for A misdemeanors allows some misdemeanor convictions in New York, including some convictions for crimes like petit larceny, NYPL § 155.25, to be classified as aggravated felonies and thus to divest immigration judges of any discretion.²⁰ As a practical matter, this means, for example, that

California Misdemeanor Maximum Penalty Reduction from 365 to 364 Days Brings Relief to Some Noncitizens, ASIAN J. (Aug. 7, 2014), available at <http://asianjournal.com/immigration/california-misdemeanor-maximum-penalty-reduction-from-365-to-364-days-brings-relief-to-some-noncitizens/>; Kristi Pihl, *Measure Reduces Misdemeanor Sentence by 1 Day*, THE SEATTLE TIMES (Apr. 24, 2011), available at <http://www.seattletimes.com/seattle-news/measure-reduces-misdemeanor-sentence-by-1-day/>; Daniel M. Kowalski, *Nevada Gross Misdemeanor Statute Modified to 364 Days*, (June 4, 2013), available at <https://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/archive/2013/06/28/nevada-gross-misdemeanor-statute-modified-to-364-days.aspx?Redirected=true>.

¹⁴ INA § 237(a)(2)(A)(i), (ii) (establishing deportability for crimes involving moral turpitude).

¹⁵ See, e.g., INA § 237(a)(2)(B) (deportable for a single controlled substance conviction), INA § 237(a)(2)(C) (deportable for a single firearm conviction), INA § 237(a)(2)(E) (deportable for a single domestic violence conviction), INA § 237(a)(2)(A)(iii) (deportable for a single aggravated felony conviction (some New York misdemeanors, such as Criminal Sale of Marijuana, NYPL §§ 221.35, 221.40, are routinely charged as aggravated felonies)).

¹⁶ See INA 212(c), *repealed by* Sec. 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

¹⁷ See *id.*

¹⁸ See INA § 240A(a)(3).

¹⁹ See INA § 240A(b)(1)(C); INA §§ 237(a)(2)(A)(ii)-(iii).

²⁰ See INA § 101(a)(43)(G) (classifying any theft offense with a one year sentence imposed as an aggravated felony).

someone who came here legally, who has lived here for decades with a green card, who served in the U.S. military, who supports her spouse and children, and who may not have set foot in her country of origin since childhood, can still be subjected to mandatory deportation based upon a single misdemeanor conviction that occurred decades earlier, when she was a teenager. By reducing the maximum sentence for A misdemeanors to 364 days, New York can ensure that immigration judges will have discretion to consider circumstances like these when deciding whether or not to deport a longstanding member of the New York community for a misdemeanor conviction.

The same considerations apply to unclassified misdemeanors, and for this reason, we recommend that the Act restore the inclusion of unclassified misdemeanors to the amendatory provisions of the sentencing laws, as set forth in A.4469 (NYS 2019). An unclassified misdemeanor is any offense not defined in the Penal law (other than a traffic violation) for which a sentence of imprisonment of greater than 15 days but not in excess of one year may be imposed. NYPL § 55.10(2)(c). Examples of unclassified misdemeanors include criminal offenses listed under the Tax Law and Vehicle and Traffic Law (VTL). Although not identified as misdemeanors in the statute, several criminal offenses under the VTL are considered “unclassified misdemeanors” in case law and are currently punishable by up to one year of incarceration.²¹ These include Driving while intoxicated (DWI) and Driving while ability-impaired (DWAI) offenses.²² In addition, state law permits towns and villages to designate their own regulations and ordinances as unclassified misdemeanors. By failing to include this amendment in the final version of the Act, immigrants convicted of such unclassified misdemeanors would be excluded from the relief intended by the Act.

THE IMPACT OF THE ONE DAY TO PROTECT NEW YORKERS ACT ON THE CRIMINAL JUSTICE SYSTEM

The One Day to Protect New Yorkers Act will serve to make the New York criminal justice system more efficient and fair. In 2013, 91,652 people were convicted of A misdemeanors in New York State.²³ Of these convictions, 40% did not result in *any* sentence of incarceration, and only 4% resulted in the maximum sentence of one year, with virtually no one actually serving the full year.²⁴ While no data is kept regarding the immigration status of defendants by the Division of Criminal Justice Services, by extrapolating from data about the percentage of non-citizens in New York generally, we conclude that thousands of non-citizen New Yorkers are convicted of A misdemeanors each year, and thus thousands could be affected by this change in the law.

Apart from mitigating the harsh and disproportionate consequences of misdemeanor convictions on non-citizens, this Act will also improve the functioning of our criminal justice system. Specifically, it will improve the process of negotiating pleas between prosecutors and

²¹ See NY VTL § 1193(1)(b)(i).

²² NY VTL § 1192(2), § 1192(3), § 1192(4), and § 1192(4-a).

²³ See Division of Criminal Justice Services (DCJS) data (available on file).

²⁴ See *id.*

defense attorneys, which would, in turn, be beneficial for the efficacy of the courts. Under current law, the Sixth Amendment's requirement of effective assistance of counsel mandates that an attorney provide a noncitizen with accurate advice concerning the potential immigration consequences of a contemplated guilty plea.²⁵

Following *Padilla*, plea negotiations have become more complicated. Defendants, now aware of the negative immigration consequences of a given conviction, are often unwilling to take a plea that might otherwise seem like a good outcome to all parties. In these cases, defendants may rather prolong negotiations or take a gamble and face trial rather than accept a plea that is likely to get them deported. By eliminating many of the disproportionate immigration consequences that can flow from minor convictions, the One Day to Protect New Yorkers Act will simplify plea negotiations and thereby improve the overall efficiency of our system for courts, prosecutors, defense attorneys and defendants.

In addition, the change in law would likely reduce the number of motions to vacate judgments filed by non-citizens due to ineffective assistance of counsel under *Padilla* because they were not warned of the immigration consequences of these pleas.²⁶ The ineffective assistance of counsel argument also applies to applicants who were affirmatively misadvised regarding their immigration consequences when pleading guilty to criminal charges.²⁷ Rather than responding to these motions, courts and prosecutors will better be able to focus their resources on other priorities.

PASSING THE ONE DAY TO PROTECT NEW YORKERS ACT IS TIMELY AND JUSTIFIED

It is the ideal time for New York to enact this legislation, and join with the other ten states that have taken action to protect their respective immigrant communities through similar reductions to their misdemeanor sentencing statutes.²⁸ These states recognized that their vital immigrant populations were being harmed by the interaction between their criminal law and federal immigration laws, and took action to protect these communities.²⁹

CONCLUSION

Other immigrant-rich states across the country have reacted to the concerns presented by the interaction between federal immigration laws and local penal laws by reducing their maximum misdemeanor sentences to 364 days. By passing the One Day to Protect New Yorkers Act, New York would join these states in protecting its vital immigrant communities and

²⁵ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²⁶ See NY CRIM PRO LAW § 440.10 (McKinney 2015).

²⁷ See *People v. McDonald*, 1 N.Y.3d 109 (N.Y. 2003); see also *U.S. v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea constitutes ineffective assistance).

²⁸ See Reeves, *supra* note 10; Pihl, *supra* note 10; Kowlaski, *supra* note 10.

²⁹ See *id.* (all three articles).

ensuring that families are not torn apart as a consequence of a technicality in the interaction between federal and local criminal law. Furthermore, this Act would also improve the efficiency of the New York criminal justice system.

For the foregoing reasons, we respectfully ask the Legislature to support inclusion of the Act in the final State Budget.

Criminal Courts Committee
Kerry Ward, Chair

Criminal Justice Operations Committee
Sarah J. Berger, Chair

Immigration and Nationality Law Committee
Victoria Neilson, Chair

February 2019