



Disappointed in Biden’s Inaction, Immigrant Rights Advocates Look to the States

By Frances Madeson

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Hopes for abolishing one of U.S.’s most harmful immigration policies — deportation following incarceration in the criminal legal system, or “double punishment” — are withering as the Biden administration continues to snub immigration reform.

According to a recent Syracuse University [report](#), 3,481 immigrants are currently in removal proceedings because of criminal charges, and many of them were seized upon their release from prison, before they could take even a single breath in freedom. And while that number is on track to be less than last year, advocates warn that without changing the underlying laws, rules and policies, what goes down this reporting period can go up in the next.

“The numbers are still astronomical in terms of the sheer number of people deported from their loved ones after a conviction or arrest,” Heidi Altman, director of policy for the National Immigrant Justice Center (NIJC), told *Truthout*. “There are many ways this could be done even without congressional action — through reversal of harmful Board of Immigration Appeals precedent, through rulemaking to allow greater access to bond hearings for those detained on the basis of criminal convictions, through processes to allow those unjustly deported to be returned, and/or through policy memos and training that requires officers to consider the racial bias inherent in the criminal legal system when making detention and deportation decisions. But none of that has happened.”

Instead of being returned to their families and communities for reentry to society, they are often held six months or more in private for-profit detention facilities, and then deported to countries where they may not have lived for decades, know no one, and do not speak the language. Besides the financial burden to taxpayers — [\\$1.4 billion](#) is budgeted in 2023 for 25,000 beds in Immigration and Customs Enforcement (ICE) detention — and the harms to the people being doubly deprived of their liberty, there is a social cost for punishing people based solely on where they were born.

“You have two people who are arrested for the same thing and the sentencing judge says you both get X time in jail. But after that, one of those people gets to live the rest of their life with their loved ones and family, and the other one gets permanently exiled to a country they may not have seen since they were a baby — what does that say about our country?” Altman said.

How many more immigrants are vulnerable to “double punishment” is hard to pin down. One estimate comes from the [2017 Cato Institute policy brief](#), which used Migrant Policy Institute data from 2015, which itself was extrapolated from a 2012 Department of Homeland Security (DHS) report to Congress. The Cato report’s estimates of the total noncitizen population with criminal legal system involvement “vary widely, from about 820,000 according to the Migration Policy Institute to 1.9 million according to Immigration and Customs Enforcement (ICE).”

According to a subsequent 2020 Cato Institute [analysis](#) of the U.S. prison population, 83,698 undocumented immigrants and 71,472 documented immigrants were incarcerated in the U.S. in 2018, some portion of whom could potentially become vulnerable to detention and deportation by ICE upon their release. It is nowhere reported how many of the over [600,000](#) people released from prison every year are noncitizens, and therefore vulnerable to deportation. As of July 21, an estimated 6,347 immigrants with criminal legal system involvement have been detained by ICE in 2022, a number that has been declining overall, but which reflects according to [another Syracuse University report](#) “[m]any [with]only minor offenses, including traffic violations.”

Altman further notes that while overall detention numbers are lower than they were at their height under the Trump and Obama administrations, “they are still up significantly from where they were at inauguration (from 15,000 to 23 or 24,000) and the number of immigrants under surveillance programs the administration refers to as “Alternatives To Detention” have [skyrocketed](#).

What Happened to the New Way Forward?

Since before it was introduced in the 117th Congress by U.S Rep. Jesus “Chuy” Garcia (D-Illinois), there was [unity](#) among many immigrant advocates that the [New Way Forward Act](#) is also the best way forward to eradicate the system’s racist and nativist biases. According to the Immigrant Justice Network, only 7 percent of noncitizens in the U.S. are Black, but Black immigrants make up 20 percent of people facing deportation on “criminal” grounds. As written, the act repeals some of the most onerous aspects of the [Illegal Immigration Reform and Immigrant Responsibility Act](#) of 1996 (IIRIRA), largely considered a relic from the “tough on crime” era that fueled destructive “war on drugs” policies.

[Among other things](#), the New Way Forward Act would remove drug possession as grounds for deportation; and end mandatory detention for people who are caregivers or categorized as “vulnerable,” which could mean pregnant, younger than 21 or older than 60, or other criteria laid out in the bill’s definition section (102 (2) (b) (7)). It would open up the discretion of immigration judges so that nobody would be entirely precluded from mounting a defense against deportation because of a criminal conviction, and would prohibit state and local officers from helping ICE apprehend people.

In a memorandum dated September 30, 2021, Department of Homeland Security Secretary Alejandro Mayorkas provided [Guidelines for the Enforcement of Civil Immigration Law](#) that laid out his priorities for deportation — namely, national security, public safety and border security. These were largely reiterated in his April 2022 [“Prosecutorial Discretion” memorandum](#) to the 1,100 attorneys in ICE’s Office of the Principal Legal Adviser.

“We had, in the Trump administration, this moment where it was revealed to the world that our immigration enforcement system is built entirely on racism and corruption,” Altman explained. “This is what it’s built on, this is the food that feeds it — and I think there was an opportunity for

this administration to come in and say, ‘Look this has been revealed for all of us, let’s reflect on that and actually dismantle it and start again.’ But instead, they doubled down.”

Even with 45 co-sponsors, [the New Way Forward Act](#) has been stalled in the House Judiciary Committee’s Subcommittee on Immigration and Citizenship since March 2021, and has not yet been introduced in the Senate. Meanwhile, despite declining numbers of detentions and deportations in interior enforcement, Altman has observed a “hardening” in rhetoric and in policy under the Biden administration, Congress and the courts pertaining to people who have arrests or convictions on their record. Most recently, this was reflected in Congress’s narrow focus during the reconciliation debate on only moving *anti*-asylum measures. While those [amendments](#) were largely carried by Republicans, she notes how slow the administration has been to defend its plans to end the Migrant Protection Protocols (known as Remain in Mexico) and how long the administration allowed Title 42-based mass expulsions at the border to continue.

“It’s tragic, you have these really important pieces of federal legislation that could actually undo so much of this bad prior legislation and bring some measure of justice and proportionality back to the system,” Altman lamented.

The harmful amendments were defeated by a vote of 50-50 on August 7, and in the current environment, that was the only “win.” Nonetheless, NIJC [tweeted](#) its relief: “In the dark of night Senators tried to pass amendments that would fund the deadly border wall, codify Title 42 mass expulsions that undermine asylum rights, and increase enforcement tactics that destabilize immigrant communities. They failed!”

But a deeply flawed system remains intact. On the interior enforcement side, Altman wants people to be aware that the majority of people doubly punished will never see an immigration judge to consider their custody. Low-level ICE deportation officers, who follow Mayorkas’s stated priorities, are more often than not the sole deciders. Mayorkas did not instruct officers to consider the whole of a person’s experience — including the harms they may have experienced before their criminal legal system involvement, or their accomplishments while being rehabilitated for reentry to society — and as a result, the officers don’t take any of it into account. They may not understand or know that there are [millions](#) of immigrants who came here as traumatized refugees from countries where the U.S. had perpetrated wars. They may not have learned that many refugees were resettled by the U.S. in low-income areas where as newcomers, especially in such large numbers, they were perceived as competition for already scarce and meager resources, or considered that these circumstances led to conflicts and sometimes bloodshed in oppressed communities. It’s not part of the job description as defined by the DHS secretary, but it could be.

Nate Tan, a co-director at the Asian Prisoner Support Committee who was born in Cambodia, told *Truthout* that the way the Cambodian community was resettled, was a setup for criminalization: “The wars in Southeast Asia, the Vietnam War and the Khmer Rouge, displaced a lot of people and created this huge refugee wave in the United States from 1975-1979. A lot of Cambodian people were resettled in ‘high crime,’ high poverty neighborhoods; and what we know is that ‘high crime,’ high-poverty neighborhoods are over-policed neighborhoods, and serve as a funnel into the incarceration system.”

As a result, even in recent years thousands of Cambodians and other Southeast Asian refugees are in receipt of deportation orders, the overwhelming number of which are based on old criminal records, according to [a 2018 fact sheet](#) published by The Southeast Asia Resource Action Center.

Tan said this is not necessarily “a result of failed U.S. resettlement policy,” but the consequence of opting to do it cheaply. “‘*Where can we relocate refugees at the lowest cost?*’ And Section 8 housing in poor neighborhoods was kind of an easy target.”

Who Gets Deported Is Often a Coin Toss in a Sham System

“The first thing that ICE officers do is look at a person’s rap sheet and, I think, many of them just stop there,” Altman explained. But digging deeper into police reports can make matters worse. A recent NIJC [policy brief](#) analyzed the use of police reports in immigration decision-making and found that despite [widespread recognition](#) that police reports are often prejudicial and unreliable, immigration decisionmakers take them to be accurate as written.

There is a “case review” option on [ICE’s website](#), but for NIJC clients trying to make the most of it, Altman said it’s been a “coin-toss.” Advocates have been pushing the Biden administration for a meaningful file review process designed to kick in automatically after a certain amount of days in detention. They are also asking for an independent reviewer from outside of ICE to be responsible for conducting the review. They’ve received the usual response from the administration, which is to say, no response at all.

“If you’re in a detention center, without a lawyer and you can’t speak English, that system means nothing. It’s a sham,” Altman said. “Your liberty is entirely at the whim of this one deportation officer.”

When Biden announced his clemency and pardon process on June 2, 2021, NIJC along with the [National Immigration Project](#) and the [Black Alliance for Just Immigration](#) urged the president to take an important additional step: Change through pardon or clemency on the criminal side must trigger an equivalent release order on the immigration side. This, Altman said, is “to ensure that clemency is not rendered meaningless through immigration detention and/or deportation.” But this request was ignored.

Twenty long and frustrating months into this administration, advocates like Altman feel they’ve arrived at an impasse. “With every year it becomes increasingly clear that it’s the state legislatures that are going to have to do the heavy lifting to move the system toward justice,” she said, “because it’s not happening at the federal level.”

Looking to the States for Action

In June 2021, Illinois passed [laws](#) that banned police from assisting ICE in making arrests and ended private civil detention facilities in the state. Following its lead, other states are starting to move legislation to protect their immigrant communities from double punishment.

Most notably, the California legislature is considering [the VISION Act](#), and advocates far and wide are excited that its potential passage in a populous and politically important state could lead other states to close the prison-to-deportation pipeline, and further decriminalize immigration. The VISION Act would prohibit collaboration with ICE to remove people who are being released from prison or jail. Under it, immigration status will no longer be used as a determining factor in how people are treated by state and local agencies and the courts (whether they get probation or have access to mental health services, for example). It would also abolish certain discriminatory record keeping and reporting requirements.

On July 28, the [Colorado Immigrant Rights Coalition](#) — a statewide membership-based organization of over 80 immigrant, labor, youth, faith and ally organizations — [wrote to California](#)

[Gov. Gavin Newsom urging its passage](#), while also advocating for Californians detained by ICE in Aurora, Colorado:

We are heartbroken that abysmal conditions and systemic injustices inside ICE detention at Aurora pushed Gabby Solano, a survivor of domestic violence and [forced sterilization](#), to self-deportation. And we are deeply dismayed that [Marisela Andrade](#), a domestic violence and human trafficking survivor whose life would be in danger if deported, has been detained for six months and counting as she awaits a decision in her asylum application.

The VISION Act would have protected them. The [California Coalition for Women Prisoners](#) (CCWP) is doing everything in its power to assist [Andrade](#), whose deportation is under appeal, according to Pam Fadem, a long-time CCWP member on Andrade's support team. This includes circulating a [petition](#) seeking Governor Newsom's pardon for her.

The VISION Act would have protected Alex Murillo, a U.S. Navy veteran, father of four, co-founder of [Unified U.S. Deported Veterans](#), and VISION Act activist who was recently repatriated after an 11-year exile in Mexico. An estimated 94,000 U.S. veterans have been deported since IIRIRA was passed in 1996, and Murillo's group is committed to bringing them home.

The VISION Act would have protected Cambodian-born [Phoeun You](#), who after 26 years behind bars for a murder he committed when he was 20, was paroled from San Quentin State Prison by Governor Newsom in January, only to be transferred by the California Department of Corrections and Rehabilitation to ICE custody on his release day. On August 16, ICE [deported](#) You to Cambodia. The VISION Act also would have protected Salesh Prasad, a queer immigrant who fears discrimination if deported to Fiji. Both men asked Newsom for a pardon in their attempts to avoid deportation just weeks before the California State Senate considers the VISION Act. Newsom can still pardon You and bring him home to the only country he has ever known. A [fundraiser](#) has been set up to support You in Cambodia.

Further Criminalization After the Fall of *Roe v. Wade*

[Alejandra Pablos](#) is an Arizona-based abortion doula and immigration activist who spent two years (2011 to 2013) in ICE detention, [and is herself always at risk of deportation](#). Now that *Roe v. Wade* has fallen, she faces more state violence.

"How interesting that all of my identities have been criminalized," she told *Truthout*.

Then-President Bill Clinton criminalized immigrant communities in 1996 with a stroke of his presidential pen in signing IIRIRA. The VISION Act would reverse much of its harm, and that's why Pablos, vulnerable as she is to capture by ICE, says it's worth the risk of supporting.

"Passing [the VISION Act] could be so instrumental ... what does the vision look like? We want people to come home, we have the tools, we're ready to take care of one another, we don't need to be incarcerated," Pablos said. "I feel like it's a bigger risk if I don't speak up. We're not even asking for citizenship anymore, at least not us, we're asking for decriminalization."

She's aware that her life and her liberty could be interrupted again and she could be dragged back into the "crimmigration" dragnet, but she keeps those thoughts at bay.

"I really can't grasp what it would mean for them to come knock on my door, pick me up because of my abortion work or because of my very out-loud and unapologetic denouncing of ICE,"

confessed Pablos. “I’m always assessing risk: Am I willing to go to court for this, to face a judge in a court that is historically unjust, am I willing to defend this?”

“I am, because I know what side of history I’m trying to stay on,” she said.

Advocates note that passing the VISION Act in California could have a ripple effect.

“I understand the concern about state-by-state approaches,” Altman said. “Ideally, the needed changes should happen through federal legislation, and absent that, Biden could make bold, affirmative protections through TPS [temporary protected status], or through more expansive pronouncements, or through the use of advanced parole mechanisms or other combinations of programs. None of that has happened.”

“Passing the VISION Act in California sends a message to the federal government: This is how you move toward justice in the immigration space; this is what this very important politically progressive state was able to do to protect its immigrant communities from the federal government’s failing to do so,” Altman said. “The hope is it becomes a trend and eventually we can reach the tipping point where the federal government feels they have to respond.”