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Jacqueline Stabnow
Seton Hall Law

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Lifetime Banishment for Selling a Few Joints: The Case for the Modified Categorical Approach and Prosecutorial Discretion for Marijuana Sale Convictions in the Immigration Context

By Jacqueline Stabnow*

I. Introduction

Juan¹ is a 25 year old legal permanent resident (“LPR”) from the Dominican Republic who entered the United States legally when he was seven years old. He graduated high school and attended college in the United States. Since graduating college, he has held a steady, managerial-level position and supported his mother with the income. In addition, Juan has eight U.S. citizen siblings and has only returned to the Dominican Republic twice since he immigrated 18 years ago.

Last year, upon his return from a work-related trip abroad, Immigration and Customs Enforcement (“ICE”) officials detained Juan at John F. Kennedy International Airport in New York. The ICE officials stopped Juan because they discovered Juan’s old conviction of New York Penal Law § 221.40 (“NYPL § 221.40”), which is a misdemeanor marijuana sale statute. Juan had already completed the criminal sentence for this crime. However, pursuant to current immigration law, ICE has charged Juan with an “aggravated felony” under USC §101(a)(43)(B) of the Immigration and Nationality Act (“INA”). ICE has been holding Juan in a detention facility for over a year while he awaits his final deportation hearing before an immigration judge. If the immigration judge decides that he has committed what the immigration laws call an

* J.D. Candidate, 2012.

¹ Not his real name.

“aggravated felony,” the United States will deport Juan and he will never be able to re-enter the United States again.²

Juan would never be able to re-enter to the United States because Congress has decided that some crimes, namely aggravated felonies, are so heinous that most non-citizens³ who commit them should be deported and never allowed to return to the United States.⁴ The plain language of the term “aggravated felony” indicates that these crimes should be limited to dangerous felonies. However, ICE routinely charges immigrants who violate state misdemeanor marijuana sale statutes, such as NYPL § 221.40, with aggravated felonies. The Second Circuit has used what is called the “categorical approach” to analyzing criminal convictions and determined that a violation of NYPL § 221.40 is not an aggravated felony for immigration purposes. Conversely, the Third, Fifth, and Ninth Circuits have supported ICE’s policy and used a “modified categorical approach” to hold that a violation of the statute is usually an aggravated felony.

This Note argues that, in order to comply with congressional intent, courts must analyze convictions under NYPL § 221.40 using the modified categorical approach. Under that approach, NYPL § 221.40 convictions are usually aggravated felonies, and people like Juan who sold marijuana for money are subject to deportation. However, ICE has the ability to exercise prosecutorial discretion, and may decide not to commence deportation proceedings against a non-citizen. ICE should exercise its prosecutorial discretion with regard to convictions such as

² Email from Sarah Deri-Oshiro, Immigration Attorney, The Bronx Defenders, to author (Sept. 12, 2011, 10:47 EST) (on file with author).

³ My use of the term “non-citizens” refers to people in the United States who are not U.S. citizens and includes people in categories such as legal permanent residents, asylees, refugees, immigrant visa holders, non-immigrant visa holders, and undocumented immigrants. The Immigration and Nationality Act refers to all of these people as “aliens,” but I have chosen not to use that term because of its inflammatory nature. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1 (4th Ed. 2005) (noting that “alien” suggests “dehumanizing” qualities that emphasize segregation and stereotypes).

⁴ Some immigrants who commit aggravated felonies are eligible for a 212(c) waiver of inadmissibility under 18 U.S.C. § 1182(h). Legal permanent residents who have been convicted of aggravated felonies are ineligible for this waiver. Non-citizens who are not legal permanent residents may be eligible for the waiver depending on the type of crime that they committed. *See, e.g.,* Malagon de Fuentes v. Gonzales, 462 F.3d 498, 507-08 (5th Cir. 2007).

NYPL § 221.40 because, as reflected in their status as misdemeanors, they are relatively minor offenses and should be subject to lesser punishments. Immigrants with small marijuana sale convictions would still serve their criminal sentences and be deportable, but they would not face the harsh consequences of an aggravated felony conviction if ICE chose not to initiate proceedings.

It is important to discuss the fact that selling small amounts of marijuana is an aggravated felony for immigration purposes and to properly analyze statutes such as NYPL § 221.40 because of the immense consequences that these relatively minor criminal convictions can have on a non-citizen. Many non-citizens may not even be aware that these convictions may result in the worst possible immigration consequence, permanent banishment from the United States. This is also a timely issue in light of the fact that lawyers are currently litigating the categorization of NYPL § 221.40 and the current national discussion on the potential benefits and harms of marijuana.

Part II will provide an overview of the current federal immigration law making aggravated felonies deportable offenses and the practical consequences of viewing small marijuana sale convictions as aggravated felonies. Part III presents the relevant federal drug law and its interaction with the aggravated felony statute. Part IV examines the text of NYPL § 221.40 and the relevance of state criminal law to the aggravated felony determination. Part V defines the modified categorical approach and the categorical approach to analyzing criminal convictions and presents the relevant court decisions on these approaches. Part VI argues that courts should use the modified categorical approach to analyze NYPL § 221.40 convictions. Finally, Part VII argues that ICE should use its prosecutorial discretion to decide not to begin deportation proceedings against people with convictions like NYPL § 221.40 because of the relatively minor

nature of the crime, lack of federal resources, and the government's disparate treatment of medical marijuana dispensaries.

II. Federal Immigration Law

A. Introduction

The statute that defines the term “aggravated felony” is part of the INA and is codified at 8 U.S.C. § 1101.⁵ Any non-citizen “who is convicted of an aggravated felony at any time after admission to the United States is deportable.”⁶ This section of the INA lists over 30 crimes that are aggravated felonies ranging from failure to appear in court to murder.⁷ Congress first created the “aggravated felony” category in the immigration context with the Anti-Drug Abuse Act of 1988.⁸ At that time, the only aggravated felony crimes were murder, drug trafficking crimes, and certain illicit trafficking offenses.⁹ In 1994, Congress broadened this definition through the Immigration and Nationality Technical Correction Act of 1994 to include crimes of violence, fraud and theft offenses, money laundering, child pornography, and document fraud.¹⁰

Prior to 1996, the simple conviction of one of the enumerated crimes was insufficient to sustain an aggravated felony conviction.¹¹ In addition to the conviction, the judge had to actually sentence the immigrant to a term of five years or more in order for the crime to be considered an

⁵ Immigration and Nationality Act, 8 U.S.C.A. §1101 (a)(43)(B) (2011).

⁶ 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2008).

⁷ *Id.*

⁸ Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 394 (2007).

⁹ *Id.*; Prior to 1996, a non-citizen convicted of an aggravated felony was deportable and, if deported, could seek re-admission to the United States after twenty years. Non-citizens who were sentenced to less than five years in prison could apply for a waiver of deportation under Section 212(c) of 8 U.S.C. 1182(c). Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 299, 301, 305 (2003).

¹⁰ Wadhia, *supra* note 8, at 394.

¹¹ Dawn Marie Johnson, *Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477 (2001).

aggravated felony.¹² In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)¹³ and Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”)¹⁴ which changed the sentencing requirements and definition of a conviction.¹⁵ It also made the aggravated felony statute retroactive, such that the statute’s penalties apply to immigrants who committed crimes before the statute was enacted.¹⁶

B. Current Law

The most recent version of the law requires an immigrant to be convicted of an enumerated crime and sentenced only to “some form of punishment, penalty, or restraint on the alien’s liberty.”¹⁷ A conviction, for aggravated felony purposes, is a “formal judgment of guilt entered by a court, guilty plea, or the admission of sufficient facts to warrant a finding of guilt”¹⁸ The definition of conviction also includes suspended sentences and dispositions that are not treated as convictions by the state such as expunged convictions.¹⁹

During the debate on the Anti-Drug Abuse Act, one senator described the 1988 aggravated felony statute as very limited, “focusing on a particularly dangerous class of ‘aggravated alien felons,’ that is, aliens convicted of murder and drug . . . trafficking.”²⁰ However, it now applies to over 30 crimes, and immigrants can be considered to have been convicted of aggravated felonies that, under the relevant criminal law, are neither aggravated nor

¹² Johnson, *supra* note 11, at 477.

¹³ Omnibus Appropriations Act, Division C—Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹⁴ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1014.

¹⁵ Wadhia, *supra* note 8, at 394,395.

¹⁶ Immigration and Nationality Act, 8 U.S.C.A. §1101 (a)(43)(U) (2011) (“Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996).

¹⁷ 8 U.S.C.A. §1101 (a)(43)(B) (2011).

¹⁸ *Id.*

¹⁹ 8 U.S.C.A. §1101 (a)(43)(A) (2011); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936,1942 (2000); Wadhia, *supra* note 8 at 397.

²⁰ *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 1015, 1024 (9th Cir. 2004) (citing 134 CONG. REC. S17301, S17318 (1988) (statement of Sen. D’Amato)).

felonious.²¹ In the criminal context, a felony is a “serious crime usually punishable by imprisonment for more than 1 year or by death.”²² Jurisdictions only consider very serious felonies to be “aggravated,” and they usually involve violence, use of a deadly weapon, or intent to commit another crime.²³ In the immigration context, however, federal courts and the Board of Immigration Appeals have ruled that under the 1996 amendments to the INA even some state misdemeanor convictions are aggravated felonies.²⁴ As the Second Circuit has stated, Congress can make the word “misdemeanor mean felony because we consider Congress to be the master—that’s all.”²⁵

C. Immigration Consequences

Thus, any controlled substance violation that is punishable as a federal felony is an aggravated felony for immigration purposes.²⁶ In Juan’s case, ICE charged him with an aggravated felony under the INA, 8 U.S.C. § 1101(a)(43)(B) because of his state misdemeanor marijuana sale conviction. This subsection of the aggravated felony definition states that “illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)” is an aggravated felony.²⁷

One immigration scholar has commented that “[a]ggravated felons populate the eighth ring of immigration hell.”²⁸ This is because an aggravated felony conviction results in the worst possible immigration consequences. As previously stated, any non-citizen who is charged with an aggravated felony at any time after admission to the United States is deportable.²⁹ The U.S.

²¹ Morawetz, *supra* note 19, at 1939.

²² Carachurri-Rosendo v. Holder, 130 S. Ct. 2577, 2585 (2010).

²³ *Id.*

²⁴ *See, e.g.*, U.S. v. Pacheco, 225 F.3d 148, 153 (2000); Matter of Aruna, 24 I. & N. Dec. 452, 454 (2008).

²⁵ *Pacheco*, 130 S. Ct. at 149.

²⁶ Lopez v. Gonzales, 549 U.S. 47, 59-60 (2006); U.S. v. Simpson, 319 F.3d 81, 85 (2d Cir. 2002).

²⁷ Immigration and Nationality Act, 8 U.S.C.A. § 1101 (a)(43)(B) (2011).

²⁸ Cook, *supra* note 9, at 298.

²⁹ 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2008).

Supreme Court recognized the severity of deportation as far back as 1947 when it remarked that “[d]eportation is a drastic measure and at times the equivalent of banishment or exile.”³⁰ While deportation is not technically a criminal sentence, the effects of deportation on an immigrant may be worse than a criminal sentence.³¹ Deportation may cause a person to “lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution or even death.”³²

In some limited circumstances, deportable immigrants are able to remain in the United States because defenses to deportation are available to them.³³ However, this is almost never true for non-citizens who are convicted of aggravated felonies; these immigrants are barred from virtually all relief from deportation.³⁴ The 1996 revisions to the aggravated felony statute eliminated what is called the 212(c) waiver for LPRs with aggravated felony convictions.³⁵ Before these revisions, the 212(c) was the most common form of relief from deportation for LPRs with criminal convictions and allowed some LPRs with aggravated felony convictions to receive discretionary relief from an immigration judge.³⁶ Now, because of the Supreme Court decision in *Immigration and Naturalization Service v. St. Cyr*, non-citizens with aggravated felony convictions are able to obtain a 212(c) waiver in only very limited circumstances.³⁷

³⁰ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgadillo v. Carmichael*, 332 U.S. 388 (1947)).

³¹ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893).

³² Cook, *supra* note 9, at 293.

³³ BRYAN LONEGAN, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 13-17 (2004), available at <http://shusterman.com/pdf/detention1004.pdf>.

³⁴ Aggravated felons cannot receive asylum, but the Department of Homeland Security (“DHS”) may grant them the lesser remedies of withholding of removal or deferral under the Convention Against Torture. 8 U.S.C.A. § 1158(b)(2)(A)(ii) (2009); 8 CFR § 212.17(b)(2) (2011). A non-citizen with an aggravated felony may be able to receive a “U” or “T” visa if the Attorney General grants the person a waiver. Immigration and Nationality Act, 8 U.S.C.A. § 1182(d)(14) (2010).

³⁵ *INS v. St. Cyr*, 121 S. Ct. 2271, 2277 (2001); see also Lonagan, *supra* note 33, at 13.

³⁶ *St. Cyr*, 121 S. Ct. at 2276-77; see also Lonagan, *supra* note 33, at 13.

³⁷ *St. Cyr*, 121 S. Ct. at 2293; see also Lonagan, *supra* note 33, at 13-14.

Also, all non-citizens charged with aggravated felonies are subject to mandatory detention.³⁸ Thus, because Juan decided to fight his aggravated felony conviction, ICE has held him in a detention center since April 2010.³⁹ Time in a detention facility is technically not a criminal punishment, and non-citizens typically stay in detention the entire time while they fight their cases or wait for a flight to their country of origin.⁴⁰ Non-citizens in mandatory detention cannot request bond from an immigration judge and may stay in detention for years while they fight their cases.⁴¹ As a result of this system, non-citizens who have never been in jail or have served their sentences are effectively incarcerated.⁴² Due to varying bed availability in ICE's network of immigration detention centers, ICE may move immigrants in detention thousands of miles away from their homes, families, and available legal counsel for the duration of the litigation.⁴³

Finally, many non-citizens who are convicted of aggravated felonies and deported can never return to the United States.⁴⁴ This is the perhaps the most drastic consequence of an aggravated felony conviction. LPRs who are deported because of an aggravated felony conviction are not eligible for a 212(h) waiver of inadmissibility under 8 U.S.C. § 1182(h).⁴⁵ This waiver allows non-citizens who have been convicted of some crimes to re-enter the United States.⁴⁶ Non-citizens with aggravated felony convictions who are not legal permanent residents

³⁸ 8 U.S.C.A. § 1226(c)(1)(B) (2006).

³⁹ Email from Sarah Deri-Oshiro, Immigration Attorney, The Bronx Defenders, to author (Sept. 12, 2011, 10:47 EST) (on file with author).

⁴⁰ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see also *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893).

⁴¹ Immigration and Nationality Act, 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2008); Morawetz, *supra* note 19, at 1939, 1947.

⁴² Morawetz, *supra* note 19, at 1940; Wadhia, *supra* note 8, at 396.

⁴³ Morawetz, *supra* note 19, at 1944.

⁴⁴ See 8 U.S.C.A. § 1182(a)(9)(A)(ii) (2006).

⁴⁵ 8 U.S.C.A. § 1182(h) (2010).

⁴⁶ *Id.*

may be eligible for a 212(c) waiver.⁴⁷ However, these non-citizens are ineligible for a 212(c) waiver if they have been convicted of any drug crime except for simple possession of 30 grams or less of marijuana.⁴⁸ This can create a terrible situation in which all the members of a person's family are U.S. citizens or LPRs and the aggravated felon is banished to another country where he has few or no family ties, no job, no place to live, and may not even speak the language.

D. Consequences of Viewing Small Marijuana Sales as Aggravated Felonies

It is very difficult to find statistics on the exact number of people who are deported from the United States each year for marijuana sale convictions because ICE does not break down the data on criminal deportations into specific types of drug offense crimes in the statistics it makes readily available to the public.⁴⁹ However, a ten year study from Human Rights Watch of all non-citizens deported for criminal conduct between April 1, 1997 and August 1, 2007 found that 897,099 people were deported after serving their sentences for criminal conduct.⁵⁰ Marijuana sale convictions were one of the top fifteen reasons that people with criminal convictions were deported from the United States and accounted for 8,317 deportations, or roughly 0.9 percent of all criminal deportations.⁵¹ There is no reason to believe that these numbers will decline. For fiscal year 2011, ICE deported 396,906 people, which is about forty-two percent of the total number of people deported between 1997 and 2007.⁵² Assuming that approximately the same

⁴⁷ See, e.g., *Gonzales*, 462 F.3d at 507-08.

⁴⁸ See Immigration and Nationality Act, 8 U.S.C.A. § 1182(h) (2010).

⁴⁹ DEPARTMENT OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2010 (2010), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

⁵⁰ *Forced Apart (By the Numbers)*, HUMAN RIGHTS WATCH (Apr. 15, 2009), <http://www.hrw.org/node/10856/section/7> (last visited Jan. 22, 2011, 4:25 PM).

⁵¹ *Id.*

⁵² Alan Silverleib, *Obama's Deportation Record: Inside the Numbers*, CNN (Oct. 19, 2011), http://articles.cnn.com/2011-10-19/politics/politics_deportation-record_1_ice-director-john-morton-undocumented-immigrants-criminal-alien-program?_s=PM:POLITICS (last visited Jan. 22, 2012).

number of people were deported for marijuana sales as between 1997 and 2007, then ICE deported about 3,572 people for marijuana sales in fiscal year 2011 alone.⁵³

As previously discussed, the consequences of an aggravated felony convictions are steep and include deportability,⁵⁴ lack of most defenses to deportation,⁵⁵ mandatory detention,⁵⁶ and, for many, a permanent bar to re-entering the United States.⁵⁷ These consequences are felt most heavily by LPRs, or “green card holders.”⁵⁸ LPRs have permission to reside in the United States and must reside continuously in the United States except for “innocent, casual, and brief” trips abroad.⁵⁹ In order to become a LPR, a person must possess employment skills needed in the United States or have a close family member who already has status in the U.S.⁶⁰ LPRs have many of the same rights and responsibilities as U.S. Citizens such as U.S. military service, equal protection and due process rights.⁶¹ Despite the fact that some LPRs, like Juan, have spent more of their lives in the U.S. than abroad, they can be deported for aggravated felony convictions.⁶² The separation of families as a result of this statute contradicts one of the main objectives of immigration law to keep families together.⁶³ The banishment of close family from the United States for life can have devastating effects on other family members. For example, seventeen year old Gerardo Mosquera Jr. committed suicide in 1998 after his father, an LPR for twenty-

⁵³ Author’s calculations based on the data in *Forced Apart (By the Numbers)*, HUMAN RIGHTS WATCH (Apr. 15, 2009), <http://www.hrw.org/node/10856/section/7> (last visited Jan. 22, 2011, 4:25 PM).

⁵⁴ Immigration and Nationality Act, 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2008).

⁵⁵ Lonegan, *supra* note 33 at 13-17; *see supra* note 34.

⁵⁶ 8 U.S.C.A. § 1226(c)(1)(B) (2006).

⁵⁷ *See* 8 U.S.C.A. § 1182(a)(9)(A)(ii)(2010).

⁵⁸ Johnson, *supra* note 11, at 479.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Immigration and Nationality Act, 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2010); Natalie Liem, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More than Aggravated Felons*, 59 FLA. L. REV. 1071, 1091 (2007).

⁶³ Morawetz, *supra* note 19, at 1950-51.

nine years, was deported to Colombia because of a \$10 marijuana sale he made in 1989.⁶⁴

Gerardo was a U.S. citizen, and stories like his raise questions about the damage that the current interpretation of the drug trafficking portion of the aggravated felony statute have on U.S. citizen children when their parents are permanently deported for minor drug crimes.

III. Federal Drug Law

To determine if a non-citizen like Juan has committed an aggravated felony for illicit trafficking in a controlled substance, immigration judges must determine if the drug crime in question is a federal felony. Immigration judges look to the sections of the federal Controlled Substances Act (“CSA”)⁶⁵ referred to by the INA’s aggravated felony statute in order to make that determination. Under the CSA, marijuana is a schedule I controlled substance because, according to the federal statute, it has a high potential for abuse and no currently accepted medical use.⁶⁶ The CSA defines “drug trafficking crime” by stating that it is illegal for a person to “knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”⁶⁷ In the case of marijuana, all sales for remuneration are federal felonies.⁶⁸ There is also a misdemeanor exception for “distributing a small amount of marijuana for no remuneration.”⁶⁹ If a non-citizen sells marijuana for no remuneration, he has committed a federal misdemeanor and not a federal felony and therefore has not committed an aggravated felony for immigration purposes.⁷⁰

IV. The Relevance of State Criminal Law to Aggravated Felony Determinations

⁶⁴ Patrick J. McDonnell, *Deportation Shatters Family*, L.A. TIMES, Mar. 14, 1998, at B1.

⁶⁵ Controlled Substances Act, 21 U.S.C.A. § 801 (2006).

⁶⁶ 21 U.S.C.A. § 812(c)(c)(10) (2006).

⁶⁷ 21 U.S.C.A. § 841 (2010).

⁶⁸ 21 U.S.C.A. § 841(b)(1)(A)-(D) (2010).

⁶⁹ Controlled Substances Act, 21 U.S.C.A. § 841(b)(4) (2010).

⁷⁰ *Lopez v. Gonzales*, 549 U.S. 47, 59-60 (2006); *U.S. v. Simpson*, 319 F.2d 81, 85 (2d Cir. 2002).

Due to the references to them in the INA, the federal drug statutes are relevant to the question of whether a crime is an aggravated felony, even when a non-citizen is convicted of a state - and not federal- drug offense. A state drug conviction is an “aggravated felony” if it is a felony under federal criminal law and contains a trafficking element or is punishable under the CSA.⁷¹ Therefore, a state misdemeanor that contains the element of trafficking can qualify as an aggravated felony if the conduct would be punishable as a felony under federal law.⁷² A state conviction for sale of marijuana is an aggravated felony if it is equivalent to a felony drug trafficking conviction under the CSA.⁷³ This analysis leads to the counterintuitive conclusion that a state misdemeanor marijuana sale conviction may be a federal felony and therefore an aggravated felony for immigration purposes.

New York penal law section 221.40 (NYPL § 221.40), the statute under which Juan was convicted, provides an excellent example of this interaction between state and federal law and the application of the aggravated felony statute. NYPL § 221.40 punishes the criminal sale of marijuana in the fourth degree and is a misdemeanor offense.⁷⁴ It states that a person is guilty of this crime when he “knowingly and unlawfully sells marihuana except as provided in section 221.35.”⁷⁵ This statute punishes marijuana sales between two and 25 grams.⁷⁶ An important aspect of this statute for immigration purposes is the definition of the word “sell.” The statute

⁷¹ *Lopez*, 549 U.S. at 59-60; *Simpson*, 319 F. 2d at 85.

⁷² *Lopez*, 549 U.S. at 59-60; *Simpson*, 319 F. 2d at 85.

⁷³ *Martinez v. Mukasey*, 551 F.3d 113, 115 (2d Cir. 2008).

⁷⁴ N.Y. PENAL LAW § 221.40 (McKinney 1977).

⁷⁵ N.Y. PENAL LAW § 221.40; NYPL § 221.35 is sale of marijuana in the fifth degree. N.Y. PENAL LAW § 221.35 (McKinney 1979). This statute does not expressly state the amount of marijuana necessary to be convicted under NYPL § 221.40. However, it is situated between the statute defining fifth degree criminal marijuana sale, which punishes distribution of two grams or fewer of marijuana or a single marijuana cigarette for no consideration, and the statute defining third degree criminal marijuana sale which punishes distribution of 25 grams or more. Therefore, NYPL § 221.40 must cover distribution of fewer than 25 grams for consideration or between two and 25 grams for no consideration.

⁷⁶ For reference, a paperclip weighs approximately 1 gram. Two grams is 0.004 (1/250) of a pound, and twenty-five grams are 0.055 (11/200) of a pound. Allan Turner & Becky Lewis, *Stopping Drugs in the Mail*, CORRECTIONS TODAY, July 2002, at para. 4.

defines “sell” as “sell, exchange, give or dispose of to another, or to offer or agree to do the same.”⁷⁷ This means that a person can be convicted of a marijuana sale under NYPL § 221.40 without ever literally selling marijuana in exchange for money or other consideration. If someone gives fewer than 25 grams of marijuana to a friend in New York, he may be convicted of a misdemeanor marijuana “sale.”

In some states, the sale of any amount of marijuana for remuneration is a felony.⁷⁸ In 1977, the New York legislature decided to exclude marijuana from its definition of a controlled substance and create criminal penalties for marijuana separate from other drugs such as heroin.⁷⁹ The legislature decided to make these changes in order to reduce the penalties for marijuana crimes and to decriminalize the possession of small amounts of marijuana.⁸⁰ In doing so, New York made clear that the state did not want to encourage marijuana use. Indeed, the legislature’s goal was to “insure that the many people in New York who commit the conduct which this act makes a violation *not be subjected to unduly harsh sanctions.*”⁸¹ Additionally, the legislature remarked that the new penalties were more “reasonably appropriate to the nature of marijuana.”⁸² Therefore, for the INA to consider a misdemeanor marijuana sale conviction under NYPL §221.40 to be an aggravated felony and a deportable offense is an interpretation that directly collides with the intent of the legislative body that created NYPL §221.40.

V. The Modified Categorical Approach and the Categorical Approach

A. Overview

⁷⁷ N.Y. PENAL LAW § 221.40 (McKinney 1977).

⁷⁸ John B. Gettman, *Crimes of Indiscretion: Marijuana Arrests in the United States*, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (2005), http://norml.org/pdf_files/NORML_Crimes_of_Indiscretion.pdf (last visited Jan. 22, 2012).

⁷⁹ Marijuana Reform Act of 1977, L.1977, c. 360, (1977).

⁸⁰ *Id.*

⁸¹ *Id.* (emphasis added).

⁸² *Id.*

Immigration courts use either what is called the “categorical approach” or what is known as the “modified categorical approach” in order to determine whether a crime is an aggravated felony.⁸³ In deciding which approach to implement, the immigration judge must evaluate whether the state conviction is divisible. If a statute is divisible, the courts will use what is called the modified categorical approach instead of the categorical approach to analyze the conviction.⁸⁴

There does not appear to be any definitive Supreme Court standard for what makes a statute divisible. According to the Second Circuit, a criminal statute is divisible if it encompasses multiple categories of offensive conduct, some, but not all, of which would categorically constitute aggravated felonies under the INA.⁸⁵ Thus, in the context of marijuana sale statutes, those statutes which include acts that are not federal felonies, such as the sale of small amounts for no remuneration, as well as acts that are felonies, are arguably divisible.

If a statute is not divisible, the categorical approach requires that courts look at whether the minimum conduct in the state criminal statute is sufficient to qualify as a felony under federal law.⁸⁶ If it is not, then the person cannot be considered an aggravated felon for INA purposes. For example, if a court analyzes a marijuana sale statute using the categorical approach, it looks to the statute that defines the offense and decides whether all convictions under that statute necessarily meet the requirements of the aggravated felony statute.⁸⁷ The court does not examine the facts underlying the conviction in a person’s particular case to see if the person actually

⁸³ *Nijhawan v. Holder*, 129 S. Ct. 2294, 2299-2300 (2009); MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 157-59 (Richard J. Link ed., 3d. ed. 2008).

⁸⁴ *Nijhawan*, 129 S. Ct. at 2299; *Canada v. Gonzales*, 448 F. 3d 560, 565-66 (2d. Cir. 2006).

⁸⁵ *Vargas Saramiento v. U.S. Dep’t. of Justice*, 448 F. 3d 159 (2d Cir. 2006).

⁸⁶ *Dulal Whiteway v. U.S. Dep’t of Homeland Security*, 501 F. 3d 116, 124-127 (2d Cir. 2007).

⁸⁷ *Nijhawan*, 129 S. Ct. at 2298-99.

committed acts comprising a felony under the CSA.⁸⁸ Under this approach, an immigration judge will never find a non-citizen who has been convicted of NYPL § 221.40 to have committed an aggravated felony regardless of whether he sold marijuana for money or for no remuneration. This is because the state statute's minimum conduct necessary for a conviction does not constitute an aggravated felony.

If a statute is divisible and the court then uses the modified categorical approach, it examines the record of conviction to see if the immigrant actually committed an act that constitutes an aggravated felony.⁸⁹ If, for example, a divisible statute punishes both the sale of marijuana for remuneration and the sale of marijuana for no remuneration, the court will look to the record of conviction to determine if the person actually sold marijuana for remuneration.⁹⁰ The court will decide that the immigrant committed an aggravated felony if the record of conviction indicates that the person actually performed behavior that constitutes an aggravated felony.⁹¹ Under the modified categorical approach, a person convicted of NYPL § 221.40 will have committed an aggravated felony unless the person sold marijuana for no remuneration.

B. Supreme Court Decisions

The Supreme Court has never specifically ruled on NYPL § 221.40 or any other state marijuana sale law as an aggravated felony for immigration purposes. However, the complicated nature of the aggravated felony bar has recently led the Supreme Court to issue rulings on its application.

First, in *Lopez v. Gonzales*, the Court decided that an LPR's state felony conviction for aiding and abetting another person's possession of cocaine was a misdemeanor under federal law

⁸⁸ *Thomas v. Attorney General*, 625 F.3d 134,143 (3d Cir. 2010).

⁸⁹ *Nijhawan*, 129 S. Ct. at 2298-99; *Kramer*, *supra* note 83, at 158.

⁹⁰ Dep't. of Homeland Sec.'s Position on Resp't's Eligibility for Relief 5 (on file with author).

⁹¹ *Kramer*, *supra* note 83, at 158-59.

and therefore not an aggravated felony.⁹² The Court examined the language of the INA's aggravated felony provision and the phrase "punishable as a felony under the CSA."⁹³ Mere possession is not a felony under the CSA, so even though the LPR committed a state felony, his crime did not meet the requirements for an aggravated felony.⁹⁴ This case reinforces the fact that misdemeanors under federal law are not aggravated felonies. Therefore, even if a court uses the modified categorical approach, those non-citizens with NYPL § 221.40 convictions who sold marijuana for no remuneration would not be aggravated felons.

In *Nijhawan v. Holder*, a case not involving drug crimes, the Court rejected the application of the categorical approach to a conviction involving "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000."⁹⁵ This is because the Court believes that Congress intended for an immigration court to decide if the person did in fact cause a loss exceeding \$10,000.⁹⁶ The categorical approach would not be sufficient in that case because of the circumstance-specific nature of the crime.⁹⁷ The Court contrasted this statute with other provisions such as the illicit drug trafficking statute which "must refer to generic offenses" and therefore receives categorical treatment.⁹⁸ While the Court mentions the illicit drug trafficking statute in dicta, it actually gives credence to the use of the modified categorical approach when analyzing NYPL § 221.40 convictions because the circumstances of the crime, whether or not the person sold marijuana for money, are crucial to the aggravated felony determination.

C. Circuit Court Decisions

⁹² *Lopez*, 549 U.S. at 50.

⁹³ *Id.* at 60.

⁹⁴ *Id.* at 53, 60.

⁹⁵ 129 S. Ct. 2294, 2298, 2302 (2009).

⁹⁶ *Id.* at 2302.

⁹⁷ *Id.* at 2587.

⁹⁸ *Id.*

There is still a lot of dispute among the circuit courts over what state crimes constitute aggravated felonies and when to apply the categorical or modified categorical approaches. The Second Circuit, which has jurisdiction over New York State, stated in *Dulal-Whiteway v. U.S. Department of Homeland Security*⁹⁹ that the Court had only found statutes to be divisible where the different forms of conduct are “listed in different subsections or comprise discrete elements of a disjunctive list of proscribed conduct.”¹⁰⁰ However, in *Dickson v. Ashcroft* the Second Circuit also found a statute divisible if its definitional section, located outside of the specific text of the statute, describes two forms of conduct.¹⁰¹ The Court stated that a broader concept of divisible statutes could more fully effectuate the purpose of the immigration laws.¹⁰² Like the statute in *Dickson v. Ashcroft*, NYPL § 221.40’s definitional section is outside of the specific text of the statute and describes two forms of conduct. This decision indicates that NYPL § 221.40 is divisible even though the different forms of conduct are not listed in different subsections or comprise discrete elements of a disjunctive list in the text of the statute.¹⁰³

The Second Circuit later applied the categorical approach in *Martinez v. Mukasey* to a conviction under NYPL §221.40 and ruled that it is not an aggravated felony because the statute encompasses convictions for no remuneration and as little as two grams of marijuana.¹⁰⁴ The Court stated that it takes no position on whether NYPL § 221.40 is subject to the modified categorical approach because “neither party indicated anything in the record of conviction that would bring about a different result were the modified categorical approach to apply.”¹⁰⁵

Therefore, there is no precedential Second Circuit case on whether to use the modified

⁹⁹ *Dulal-Whiteway v. U.S. Dep’t. of Homeland Sec.*, 501 F. 3d 116, 126 (2007).

¹⁰⁰ *Id.* at 95.

¹⁰¹ *Id.* at 127.

¹⁰² *Id.* at 128.

¹⁰³ *Id.*

¹⁰⁴ 551 F. 3d 113, 115 (2008).

¹⁰⁵ *Id.* at 115 n.4.

categorical approach or the categorical approach with regard to NYPL § 221.40 and this decision does not conflict with *Dulal-Whiteway*.

The Third, Fifth, and Ninth Circuits have all applied the modified categorical approach to NYPL § 221.40.¹⁰⁶ In *Thomas v. Attorney General*, the Third Circuit determined that the definition of “sale” under definitional section NYPL § 200.00(1) is disjunctive and “gives rise to four alternative grounds for establishing culpability under the statute.”¹⁰⁷ Of the four grounds, “selling and exchanging” constitute federal felonies under the CSA and are therefore aggravated felonies.¹⁰⁸ Consequently, courts must apply the modified categorical approach to determine which type of conduct the person actually performed.¹⁰⁹

The Fifth Circuit used a similar analysis in *Allen v. Holder* and *Jordan v. Gonzales*.¹¹⁰ In both cases, the defendants had NYPL § 221.40 convictions and the court applied the modified categorical approach.¹¹¹ However, the records in *Jordan* did not indicate that there was remuneration, so the court held that Jordan was not an aggravated felon.¹¹² Conversely, in *Allen*, the record of conviction indicated that Allen sold marijuana for remuneration and Allen committed an aggravated felony.¹¹³ These two cases provide the perfect example of how the modified categorical approach operates to ensure that only those non-citizens who actually commit federal felonies will be charged with aggravated felonies for immigration purposes. In *Dias v. Holder*, the Ninth Circuit used the same analysis to decide that a NYPL § 221.40

¹⁰⁶ See, e.g., *Dias v. Holder*, No. 08-73051, 2011 WL 4431009, at *1 (9th Cir. Sept. 23, 2011); *Allen v. Holder*, No. 10-60799, 2011 U.S. App. LEXIS 14035, at *2 (5th Cir. July 7, 2011); *Thomas v. Attorney General*, 625 F. 3d 134, 143 (3rd Cir. 2010); *Jordan v. Gonzales*, No. 05-60539, 2006 U.S. App. LEXIS 27186, at *7 (5th Cir. Nov. 2, 2006).

¹⁰⁷ *Thomas*, 625 F. 3d at 143.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Allen*, No. 10-60799 at *2; *Jordan*, No. 05-60539 at *7.

¹¹¹ *Allen*, No. 10-60799 at *2; *Jordan*, No. 05-60539 at *7.

¹¹² *Jordan*, No. 05-60539 at *8.

¹¹³ *Allen*, No. 10-60799 at *2.

conviction is not categorically an aggravated felony but remanded to the Board of Immigration Appeals without discussing the underlying record or facts of the case.¹¹⁴

D. Selected Board of Immigration Appeals Decisions

The Board of Immigration Appeals (“BIA”)¹¹⁵ has issued several unpublished decisions with conflicting opinions regarding NYPL § 221.40 and the application of the modified categorical approach and the categorical approach. For example, in *In re Mascoll*¹¹⁶ the BIA applied the categorical approach to NYPL § 221.40 and decided that it is an aggravated felony, but it applied the modified categorical approach to NYPL § 221.40 in *In re Scarlett*.¹¹⁷ In *In re Mascoll*, the BIA applied the categorical approach and concluded that NYPL § 221.40 is an aggravated felony.¹¹⁸ The BIA based this conclusion on its misconception that the misdemeanor to the CSA is only a sentencing mitigating exception and because Mascoll’s police report indicates that he sold remuneration, he is not eligible for this mitigating factor.¹¹⁹ This analysis conflates the modified categorical approach and the categorical approach and mischaracterizes the misdemeanor felony provision under the CSA as a mitigating factor instead of a separate type of crime.¹²⁰

Less than a year later, in *In re Scarlett*, the BIA decided that the modified categorical approach must be applied to NYPL § 221.40 convictions because the statute includes offenses

¹¹⁴ *Dias*, No. 08-73051 at *1.

¹¹⁵ After a decision at the administrative immigration judge level, an immigrant may appeal to the Board of Immigration Appeals (BIA). The BIA is an administrative appeals body of fifteen judges. If the BIA decides to publish its opinion, the opinion becomes binding authority on the BIA and all immigration courts. An immigrant who loses an appeal may appeal to the Circuit Court of his jurisdiction and then to the Supreme Court if he continues to have an appealable case. Legomsky, *supra* note 3 at 2-6.

¹¹⁶ *In re Mascoll*, A072748004, 2010 WL 4972424 (BIA Nov. 12, 2010).

¹¹⁷ *In re Scarlett*, A041649170, 2011 WL 2261202 (BIA May 26, 2011).

¹¹⁸ *In re Mascoll*, 2010 WL 4972424, at *1. (SEE BB PAGE 109)

¹¹⁹ *Id.* at *2.

¹²⁰ *See* Controlled Substances Act, 21 U.S.C.A. § 841(b)(4) (2010).

that do and do not constitute aggravated felonies.¹²¹ While this decision conflicts with *In re Mascoll*, the BIA based its decision in *In re Mascoll* on a misinterpretation of federal drug law. Therefore, *In re Scarlett* provides a better analysis of the actual law and probable outcome of a future precedential BIA decision on NYPL § 221.40.

VI. NYPL § 221.40 Should Be Analyzed Under the Modified Categorical Approach

In light of congressional intent, federal and state law, and prior court decisions, courts should use the modified categorical approach to analyze convictions under NYPL § 221.40. The application of the modified categorical approach means that more immigrants may become deportable as aggravated felons, but under the current judicial and statutory framework, it is not feasible to analyze these convictions under the categorical approach.

First and foremost, NYPL § 221.40 is a divisible statute.¹²² The text of the statute itself only includes the verb “sell,” but a quick glance at the definitional section, NYPL § 220.00, reveals that “sell” means to “sell, exchange, give or dispose of to another, or to offer or agree to do the same.”¹²³ Advocates of the categorical approach argue that, under *Dulal-Whiteway*, the statute is not divisible because it is not divided by commas or into subsections.¹²⁴ However, under Second Circuit precedent in *Dickson v. Ashcroft*, a statute may be divisible if its definitional section includes both conduct that is and is not an aggravated felony.¹²⁵ A state drug conviction qualifies as an aggravated felony when it is either a felony under state law and contains a trafficking element or is punishable as a felony under the CSA.¹²⁶ NYPL § 221.40 is a

¹²¹ *In re Scarlett*, 2011 WL 2261202, at *3.

¹²² *Dias v. Holder*, No. 08-73051, 2011 WL 4431009, at *1 (9th Cir. Sept. 23, 2011); *Allen v. Holder*, No. 10-60799, 2011 U.S. App. LEXIS 14035, at *2 (5th Cir. July 7, 2011); *Thomas v. Attorney General*, 625 F. 3d 134, 143 (3rd Cir. 2010); *Jordan v. Gonzales*, No. 05-60539, 2006 U.S. App. LEXIS 27186, at *7 (5th Cir. Nov. 2, 2006).

¹²³ NYPL § 220.00 (2011).

¹²⁴ Resp’t’s Reply to the Dept. of Homeland Sec. (DHS)’s Position on Resp’t’s Eligibility for Relief 9-10 (on file with author).

¹²⁵ 346 F. 3d 44, 52 (2d Cir. 2003).

¹²⁶ *Lopez*, 549 U.S. at 59-60; *Simpson*, 319 F. 2d at 85.

misdemeanor, so the question is whether it is punishable as a felony under the CSA.¹²⁷ All sale offenses under the CSA are felonies except for sale of “small amount of marijuana for no remuneration.”¹²⁸ The sale of a “small amount of marijuana for no remuneration is a misdemeanor” under the CSA.¹²⁹ Therefore, statute NYPL § 221.40 includes both conduct that is an aggravated felony and is not an aggravated felony and is a divisible statute. Once a statute is divisible, a court applies the modified categorical approach and look at the record of conviction to discover which type of conduct the individual actually committed.¹³⁰

The modified categorical approach allows the U.S. government to charge those immigrants who committed acts that are punishable as felonies under the CSA with aggravated felonies. This approach may lead to heartbreaking results in which an LPR like Juan becomes separated from his entire family and is unable to re-enter the country where he established his life because of the sale of a very small amount of marijuana. However, Congressional intent indicates that this is the type of result that Congress desires for individuals who engage in illicit trafficking, no matter how small. Illicit drug trafficking was one of the first aggravated felonies Congress established in alongside murder.¹³¹ Statements that Congress intended to punish “a particularly dangerous type of aggravated felon” such as “drug traffickers” lends credence to this argument.¹³² The fact that Congress has increased the qualifying aggravated felony crimes and made the penalties harsher indicates that Congress is fully aware that an aggravated felony

¹²⁷ *Martinez v. Mukasey*, 551 F. 3d 113, 115 (2d. Cir. 2008).

¹²⁸ Controlled Substances Act, 21 U.S.C.A. § 841(b)(4) (2010).

¹²⁹ *Id.*

¹³⁰ *Nijhawan v. Holder*, 129 S. Ct. 2294, 2299-2300 (2009); *Kramer*, *supra* note 83 at 157-59.

¹³¹ *Wadhia*, *supra* note 8, at 394.

¹³² *Cazarez-Gutierrez v. Ashcroft*, 382 F. 3d 905, 915-16 (9th Cir. 2004) (citing 134 CONG. REC. S17301, S17318 (1988) (statement of Sen. D’Amato)).

conviction imposes tough consequences and applies to crimes that are much more minor than murder.¹³³

Advocates of the categorical approach cite *Carachurri-Rosendo v. Holder* and *Nijhawan* as stating that courts must apply the categorical approach to drug-trafficking convictions.¹³⁴ However, neither case makes such a statement nor specifically analyzes a divisible statute like NYPL § 221.40. The Supreme Court case of *Carachurri-Rosendo* only indicates that it “might be appropriate” to apply the categorical approach to drug trafficking crimes and does not make the application mandatory.¹³⁵ In *Nijhawan*, the court contrasted drug-trafficking crimes with crimes such as fraud involving \$10,000 or more which is a fact specific inquiry.¹³⁶ However, the *Nijhawan* Court was not analyzing a drug conviction and this dicta should not be taken as a reflection of the Supreme Court’s willingness to apply the categorical approach to the divisible drug statute.¹³⁷

Martinez v. Mukasey also does not support the application of the categorical approach in the face of a divisible statute. At first glance, the *Martinez* analysis appears to state that NYPL § 221.40 convictions are categorically not aggravated felonies. It is true that the Court applied the categorical approach and held that despite his conviction for NYPL § 221.40, Martinez did not commit an aggravated felony because the minimum conduct necessary to be convicted for that offense, “sale” of two grams of marijuana for no remuneration, would not be punishable as a felony under the CSA.¹³⁸ However, the Court discussed in a footnote the use of the modified categorical approach for divisible statutes when a statute “encompasses diverse classes of

¹³³ Kramer, *supra* note 83, at 173; *See also* Cracking Down on Criminal Aliens 133 Cong. Rec. H8961-01 (1987).

¹³⁴ Resp’t’s Reply to the Dept. of Homeland Sec. (DHS)’s Position on Resp’t’s Eligibility for Relief 4 (on file with author).

¹³⁵ *Carachurri-Rosendo v. Holder*, 130 S. Ct. 2577, 2587 n.11 (2010).

¹³⁶ *Nijhawan*, 129 S. Ct. at 2300.

¹³⁷ *Id.*

¹³⁸ *Martinez*, 551 F. 3d at 115.

criminal acts-some of which would be grounds for removal and others of which would not.”¹³⁹ Importantly, the Court states that it takes no position on whether NYPL § 221.40 is subject to the modified categorical approach because “neither party indicated anything in the record of conviction that would bring about a different result were the modified categorical approach to apply.”¹⁴⁰ This statement indicates that either the government did not raise the issue of divisibility or the record indicated that Martinez did not sell marijuana for remuneration. Either way, the Second Circuit specifically reserved the question of NYPL § 221.40’s divisibility and did not create a binding precedent that courts should always use the categorical approach to analyze these convictions.¹⁴¹

Although the BIA has not published a binding opinion on the divisibility of NYPL, its decisions in *In re Mascoll* and *In re Scarlett* indicate that it finds NYPL § 221.40 to be a divisible statute and would apply the modified categorical approach. The BIA should review the CSA and be sure to familiarize itself with the misdemeanor crime of selling a small amount of marijuana for no remuneration so that it won’t charge immigrants who did not actually perform sufficient conduct to constitute an aggravated felony with an aggravated felony.

VII. ICE Should Use Its Prosecutorial Discretion to Not Begin Deportation Proceedings Against Non-citizens with Small Marijuana Sale Convictions Because of its Limited Enforcement Resources and Disparate Treatment of Medical Marijuana Dispensaries

Many of the advocates for the categorical approach to analyzing marijuana sale convictions such as NYPL § 221.40 are not advocating for the approach solely because they believe that precedent supports its use. They support the categorical approach because it has the potential to prevent people like Juan from facing the disastrous consequences of an aggravated

¹³⁹ *Id.* at 115 n.4.

¹⁴⁰ *Id.*

¹⁴¹ Dep’t. of Homeland Sec.’s Position on Resp’t’s Eligibility for Relief 5-6 (on file with author).

felony conviction if the statute of conviction includes conduct that is not a federal felony under the CSA. While their argument may not make sense legally, there is an argument to be made that ICE officers should use their prosecutorial discretion and not begin deportation proceedings against non-citizens. ICE should use its prosecutorial discretion in the small marijuana sale context because of its limited enforcement resources and the widespread disregard for federal marijuana law in 15 states and Washington, D.C.

A. ICE Should Use its Prosecutorial Discretion in Favor of Non-Citizens with Small Marijuana Sale Convictions in Light of its Limited Enforcement Resources and the Overburdened Immigration Court System

An ICE officer has the ability to exercise prosecutorial discretion to decide which non-citizens it wants to begin deportations proceedings against.¹⁴² ICE must set priorities because it would be impossible for it to conduct deportation proceedings against the estimated 11 million undocumented people residing in the United States.¹⁴³ This figure also does not begin to take into account the other non-citizens who entered the country legally, such as Juan, and are now deportable for various reasons. ICE reservedly states that the agency is “confronted with more administrative violations that its resources can address.”¹⁴⁴

Additionally, the administrative courts who adjudicate all of the immigration cases have extremely overcrowded dockets.¹⁴⁵ This is due in part to the fact that there are simply not enough

¹⁴² U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹⁴³ See Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, PEW RESEARCH CENTER (March 7, 2006), <http://pewhispanic.org/reports/report.php?ReportID=61>.

¹⁴⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹⁴⁵ Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 Bender's Immigr. Bull. 3, 14 (2008), available at http://law.psu.edu/_file/Urgent%20Priority.pdf.

immigration judges to hear the cases promptly.¹⁴⁶ Twelve percent of the immigration judge positions remain unfilled.¹⁴⁷ In 2006, 215 judges were responsible for over 300,000 cases, which means that each judge heard approximately 1400 cases that year.¹⁴⁸ The number of cases in 2006 was an eighty-two percent increase from 1996.¹⁴⁹ As a result of the lack of judges and increased number of cases, there are currently about 297,551 immigration cases backlogged in immigration court waiting to be heard.¹⁵⁰ The average wait time for an immigrant's case to be heard before a judge is a whopping 489 days.¹⁵¹ For people like Juan who fight an aggravated felony charge, that can mean spending over a year in a detention facility before an immigration judge decides whether his criminal conviction is actually an aggravated felony.¹⁵² While the overburdened immigration court system is a symptom of a much larger problem with the immigration system in our country, it gives ICE even more reason to be selective in who it decides to charge.

On June 17, 2011, ICE issued a memorandum setting forth its enforcement priorities and providing guidance to its officers on how to exercise prosecutorial discretion.¹⁵³ The memorandum lists its priorities as ensuring national security, border security, public safety, and the integrity of the immigration system.¹⁵⁴ In addition to these broad principles, the memorandum lists negative factors that should get "prompt particular care and consideration" by ICE.¹⁵⁵ These include: individuals who pose a clear risk to national security, serious felons,

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 8.

¹⁴⁸ *Id.* at 13.

¹⁴⁹ *Id.*

¹⁵⁰ *Immigration Backlog Rises for Another Year*, TRAC (Dec. 8, 2011), <http://trac.syr.edu/immigration/reports/269/> (last visited Jan. 30, 2011, 6:48 PM).

¹⁵¹ *Id.*

¹⁵² See Immigration and Nationality Act, 8 U.S.C.A. § 1226(c)(1)(B) (2006).

¹⁵³ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.* at 5.

repeat offenders, individuals with lengthy criminal records of any kind, known gang members or other individuals who pose a clear danger to public safety, individuals with an egregious record of immigration violations, and individuals with a record of illegal re-entry and those who have engaged in immigration fraud.¹⁵⁶ Of course, ICE reserves the right to begin deportation proceedings against anyone it believes is deportable.¹⁵⁷ The memorandum also lists factors that should be given positive discretion such as being a long-time LPR, people who have lived in the United States since childhood, individuals with serious health issues, and members of the U.S. armed forces.¹⁵⁸

Someone like Juan with only one state misdemeanor marijuana conviction for less than twenty-five grams, no gang affiliation, and no immigration violations does not squarely fit within ICE's stated "negative factors" that require "prompt particular care and consideration." Juan actually falls under two of the positive factors, because he is a long-time LPR and has lived in the United States since childhood.¹⁵⁹ Nonetheless, ICE still initiated deportation proceedings against him.¹⁶⁰ It may be possible to categorize someone with that type of conviction as a "serious felon" or dangerous to "public health and safety." However, that stance is difficult to argue in light of the federal government's inconsistent position towards prosecuting marijuana dispensary owners in the 16 states that have legalized medical marijuana.

B. The Federal Government's Lack of Action Towards Medical Marijuana Sellers Highlights Its Disparate, Harsh Treatment of Immigrants

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 6.

¹⁵⁸ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS 5 (2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹⁵⁹ Email from Sarah Deri-Oshiro, Immigration Attorney, The Bronx Defenders, to author (Sept. 12, 2011, 10:47 EST) (on file with author).

¹⁶⁰ *Id.*

The legalization of medical marijuana poses a direct challenge to the federal government's stance on marijuana and marijuana sales and reveals the disparate treatment of non-citizens versus that of marijuana dispensaries. Advocates of medical marijuana believe that selling marijuana to relieve pain and suffering is theoretically different than selling marijuana for recreational purposes.¹⁶¹ The California Medical Association even calls for full legalization of marijuana.¹⁶² However, under federal law there is no legal difference between selling marijuana for recreational use and selling marijuana to people who want to relieve their ailments. All marijuana sales for remuneration are felonies.¹⁶³ Therefore, the fifteen states that have legalized medical marijuana in some form have acted completely in violation of federal law.¹⁶⁴

On closer inspection, the medical marijuana dispensaries in states such as California are basically marijuana stores. Californians with a doctor's recommendation can possess as much marijuana as they need for their medical conditions.¹⁶⁵ Doctors can recommend marijuana for ailments such as migraines, chronic pain, or any other illness that may cause "serious harm to the patient's safety or physical or mental health."¹⁶⁶ Patients can buy one-fourth or one-eighth of an ounce of marijuana from a marijuana dispensary or grower.¹⁶⁷ While the dispensaries are theoretically supposed to be non-profit facilities, tax revenue from marijuana dispensaries in the city of Oakland, California alone totaled \$1.5 billion in 2010.¹⁶⁸ Americans for Safe Access, an

¹⁶¹ MARK EDDY, CRS, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 31 (2010) available at <http://www.fas.org/sgp/crs/misc/RL33211.pdf>.

¹⁶² Anthony York, *California Medical Assn. calls for legalization of marijuana*, LOS ANGELES TIMES (Oct. 15, 2011), <http://www.latimes.com/news/local/la-me-doctors-marijuana-20111016,0,2723871.story>.

¹⁶³ Controlled Substances Act, 21 U.S.C.A. § 841(b)(1)(A)-(D) (2010).

¹⁶⁴ See Eddy, *supra* note 161, at 18-23 (explaining the various medical marijuana laws in California, Oregon, Alaska, Washington, Maine, Hawaii, Colorado, Nevada, Vermont, Montana, Rhode Island, New Mexico, Michigan, New Jersey, Arizona, Maryland, New Jersey, and the District of Columbia).

¹⁶⁵ Medical Marijuana Program, CAL. HEALTH & SAFETY CODE § 11362.77(b) (West 2004).

¹⁶⁶ CAL. HEALTH & SAFETY CODE, § 11362.77(h) (West 2004).

¹⁶⁷ David Samuels, *How medical marijuana is transforming the pot industry*, THE NEW YORKER (July 28, 2008), http://www.newyorker.com/reporting/2008/07/28/080728fa_fact_samuels?currentPage=1.

¹⁶⁸ Eddy, *supra* note 161, at 18.

organization that supports medical marijuana legalization, reports that there are two hundred thousand sanctioned marijuana users in California about 2000 marijuana dispensaries.¹⁶⁹

During President Obama's first year in office 2009, attorney General Eric Holder announced that the DEA would no longer raid or prosecute medical marijuana dispensaries.¹⁷⁰ For over two years the raids ceased and the dispensaries flourished while people like Juan were charged with aggravated felonies and deported for two gram marijuana sales. In October 2011, Eric Holder announced a change in policy and decided to begin raiding dispensaries and prosecuting their owners again, although as of this writing no raids or prosecutions have occurred.¹⁷¹

Despite threats of federal enforcement, marijuana dealers appear to be undeterred.¹⁷² The federal government simply does not have the manpower to be able to enforce federal law without the help of state and local police forces.¹⁷³ With the number of states that have legalized medical marijuana increasing ever year, it seems likely that subsequent presidential administrations will only have to deal with more violations and may need to reverse their enforcement policy again. Meanwhile, no matter how much states such as New York reduce the penalties for marijuana sales, unless the federal law changes, every state's non-citizen residents may be permanently banished for these minor crimes.

¹⁶⁹ Samuels, *supra* note 167; Overview of Medical Cannabis Dispensaries, AM. FOR SAFE ACCESS (Feb. 1, 2011), <http://www.safeaccessnow.org/article.php?id=6384>.

¹⁷⁰ See U.S. DEP'T OF JUSTICE, INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA (2009), *available at* <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

¹⁷¹ See U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE OGDEN MEMO IN JURISDICTIONS SEEKING TO AUTHORIZE MARIJUANA FOR MEDICAL USE (2011), *available at* <http://www.mpp.org/assets/pdfs/library/Cole-memo.pdf>.

¹⁷² In fact, 2,000 marijuana sellers in California and Colorado have even joined the United Food and Commercial Workers Union as the Medical Cannabis and Hemp Workers Division in order to receive benefits and retirement accounts. Holly Rosenkrantz, *Marijuana Dealers Join Union, Seeking Retirement Benefits*, *Clout*, BLOOMBERG BUSINESSWEEK (Oct. 19, 2011, 2:17 PM), <http://www.businessweek.com/news/2011-10-19/marijuana-dealers-join-union-seeking-retirement-benefits-clout.html>.

¹⁷³ See Eddy, *supra* note 161, at 25.

While selling marijuana for remuneration remains a felony under federal law, it is patently unfair to permanently banish non-citizens from the United States for selling small amounts of marijuana while many marijuana dispensaries in California and other states continue to be able to sell marijuana for large profits. It is a non-citizen's privilege to reside in the United States. However, it sends a confusing message to non-citizens and the world when the U.S. government decides to permanently deport a non-citizen for committing the same act that is occurring in many states under the premise of medical marijuana. Congress must have an open dialogue about medical marijuana and marijuana in general in an attempt to reconcile the state and federal laws. Until that takes reconciliation takes place, ICE should use its discretion to not begin deportation actions against those non-citizens who are only deportable by virtue of a single small marijuana sale.

If ICE decided to actively use its prosecutorial discretion to not begin removal proceedings against non-citizens with small marijuana sale convictions, this does not mean that these non-citizens would face zero penalties. Noncitizens who sell marijuana would still be subject to criminal sentences for their crimes at the state and federal levels. The only difference would be that at the end of their criminal sentences, these noncitizens would not face aggravated felony charges before an immigration judge.

C. There is Currently No Other Viable Avenue for Relief for Non-Citizens with Small Marijuana Sale Convictions Except Prosecutorial Discretion

Some scholars who are dissatisfied with the current aggravated felony statutes propose that the aggravated felony statute should be completely changed to allow for more discretion for immigration judges.¹⁷⁴ In order to specifically address the discrepancy between state and federal drug law, Congress could choose to reform the CSA. Critics of prosecutorial discretion believe

¹⁷⁴ Johnson, *supra* note 11, at 489.

that it is not enough of a solution, because non-citizens who have committed crimes that may be aggravated felonies would continue to live in fear that someday ICE may decide to begin deportation proceedings against them.¹⁷⁵ While these ideas and points are valid, they are not currently practical solutions for the estimated 3,572 non-citizens who are deported for marijuana sales each year.¹⁷⁶ Congress last seriously addressed comprehensive immigration reform in 2006 and was unable to pass the proposed legislation.¹⁷⁷ That proposed legislation would actually have added more crimes to the already lengthy aggravated felony list.¹⁷⁸ In light of Congress's current gridlock and the upcoming presidential election, it seems unlikely that Congress will make any serious changes to the INA in the foreseeable future.¹⁷⁹ Until then, prosecutorial discretion is the only possible solution.

As far as federal drug law reform, there is currently a bill proposed by Representatives Ron Paul and Barney Frank which, if passed, would remove marijuana from the list of federal controlled substances so that states can decide how to regulate it.¹⁸⁰ It is not expected to pass.¹⁸¹ Instead of waiting, -potentially for decades, for any serious reform, it makes sense for the advocates of non-citizens with small marijuana convictions to support ICE's use of prosecutorial discretion in their cases. Prosecutorial discretion is not a complete remedy to the situation, but it

¹⁷⁵ *Id.* at 480-89.

¹⁷⁶ *See supra* note 53.

¹⁷⁷ MIGRATION POLICY INSTITUTE, U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM, 6-7 (2011) available at <http://www.migrationpolicy.org/pubs/RMSG-post-9-11policy.pdf>.

¹⁷⁸ MICHAEL JOHN GARCIA AND LARRY M. EIG, CRS, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 18 (2006) available at <http://fpc.state.gov/documents/organization/73944.pdf> (listing the addition of crimes such as "soliciting, aiding, abetting, counseling, commanding, inducing, or procuring the commission of any crime constituting an aggravated felony" as aggravated felonies for immigration purposes).

¹⁷⁹ Allan Wernick, *Immigration reform unlikely until after 2012 election*, N. Y. DAILY NEWS (May 13, 2011), http://articles.nydailynews.com/2011-05-13/local/29554013_1_dream-act-immigration-reform-undocumented-immigrants (last visited Nov. 14, 2011).; *see also* Caren Bohan, *Fears grown of gridlock on jobs, deficit*, REUTERS (Nov. 4, 2011), <http://www.reuters.com/article/2011/11/04/us-washington-summit-preview-idUSTRE7A34W820111104> (last visited Nov. 14, 2011) (discussing the current congressional gridlock).

¹⁸⁰ H.R. 2306, 112th Cong. (2011).

¹⁸¹ Lexis Congressional Bills Legislative Forecasts, Current Congress, H. R. 2306, 112th Cong. (2012).

would provide some relief for the non-citizens like Juan who have their lives invested in the United States, are otherwise law-abiding residents except for one conviction, and are earning an honest living in the United States to support their U.S. citizen relatives.

VIII. Conclusion

Despite non-citizens' advocates best efforts to the contrary, under the current scheme for analyzing immigrants' drug convictions, courts must apply the modified categorical approach to § NYPL 221.40 convictions. This approach means that many non-citizens with § NYPL 221.40 will be ordered deported and removed from the United States and never allowed to return to the country. While some individuals might see these non-citizens' deportations as an effective use of immigration law, it is hard to ignore the non-citizens like Juan who are productive LPRs of the United States and currently have no flexibility to argue that the positive factors in their lives outweigh one misdemeanor marijuana sale conviction. A complete overhaul of the INA might remedy those situations, but in the meantime, ICE should use its enforcement discretion to choose not to initiate deportation proceedings against immigrants convicted of statutes such as NYPL § 221.40. It is particularly appropriate for ICE to exercise its prosecutorial discretion in light of the blatant disregard for federal marijuana law by fifteen states and Washington, D.C. People like Juan should not be convicted of aggravated felonies for a marijuana sale of two grams while marijuana dispensaries in California make millions of dollars off of selling marijuana. Until the federal government and the states are able to reconcile their marijuana policies, ICE should use its prosecutorial discretion and decide not to begin deportation proceedings against non-citizens with small marijuana sale convictions.