

# AGGRAVATED FELONIES AND THE HARMFUL EXCLUSION OF PEOPLE FROM IMMIGRATION RELIEF

During the failed “tough on crime” policies of the 1990s, and as part of the misguided and racist War on Drugs, Congress labeled a long list of crimes, many of which are not even felonies under state law, “aggravated felonies” for immigration purposes. People convicted of these crimes are subject to the harshest immigration consequences, including mandatory detention, exclusion from most forms of immigration relief, and deportation without a hearing in some cases.

The aggravated felony provisions punish people twice for the same offense, and do not take into account the racially disproportionate impact of the criminal legal system, the specifics of individual cases, or rehabilitation. Both Congress and the Biden Administration continue to use and rely on this problematic category to exclude people from benefits and to prioritize people for enforcement.

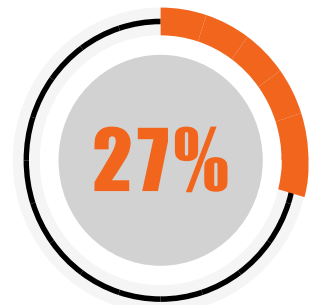
Under the Biden administration, ICE has issued new enforcement priorities that instruct agency officers to focus on detaining and deporting people who have been convicted of an aggravated felony, as one of three priority categories for enforcement. Having an aggravated felony conviction will also be a bar to legalization under each of the bills Congress is currently considering.

This exclusion is extremely harmful, particularly for Black immigrants and other immigrants of color who are disproportionately subject to arrest and conviction in the criminal legal system. The aggravated felony category should be eliminated from immigration laws, and the Biden administration should not rely on it to deny people prosecutorial discretion.

## THE BIG PICTURE

The criminal legal system **disproportionately** impacts Black immigrants and other immigrants of color, meaning harsh aggravated felony provisions disproportionately harm these communities, too.

In 2016 Black Americans comprised 27% of arrests in the United States—**double** their share of the total population.



Although Black immigrants comprise just **5.4%** of the unauthorized population in the United States, and **7.2%** of the total noncitizen population, they made up a striking **10.6%** of all immigrants in removal proceedings between 2003 and 2015.<sup>2</sup>

<sup>1</sup> Sentencing Project. Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System. [www.sentencingproject.org/publications/un-report-on-racial-disparities/](http://www.sentencingproject.org/publications/un-report-on-racial-disparities/)

<sup>2</sup> BAJI, NYU Law Immigrants Rights Clinic. The State of Black Immigrants. [www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf](http://www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf)

# What is an aggravated felony?

The term “aggravated felony” refers to several broad categories of criminal offenses listed in the Immigration and Nationality Act (INA). If a person is convicted of any of these kinds of offenses, that person becomes ineligible for almost all immigration relief (including asylum and cancellation of removal, two of the most common ways people are allowed to stay in the United States), and sometimes even for a hearing to fight their deportation. A person with an aggravated felony conviction also ordinarily cannot get released from detention on bond.

## WHERE DID THE TERM AGGRAVATED FELONY COME FROM?

Congress first added the term “aggravated felony” to the INA in 1988 as part of the Anti-Drug Abuse Act. That Act was a product of the racist “War on Drugs,” which marked the beginning of the era of mass incarceration in the United States. Originally, the aggravated felony category included murder, federal drug trafficking, and trafficking in guns and explosives. However, Congress later vastly expanded the category, especially with two laws from the “tough on crime” 1990s, the Anti-terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), both passed in 1996. IIRIRA also added extreme, punitive consequences of aggravated felony convictions, such as automatic deportation and categorical ineligibility for various forms of immigration relief. The aggravated felony category now covers over 30 different kinds of offenses, including ones that are not even felonies under state laws.

## WHAT IS INCLUDED IN THE AGGRAVATED FELONY CATEGORY?

The INA defines as an aggravated felony a long list of convictions, including many non-violent drug convictions, assisting someone who is not a relative to enter the United States unlawfully, and several other convictions that carry a sentence of one year or more, regardless of whether the sentence was suspended. The definition includes all the following generic offenses with no consideration of the particulars of a given case:

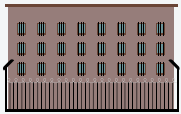
- » Murder, rape, or sexual abuse of a minor (which can include statutory rape, i.e. consensual sex with a person under the age of 16);
- » Certain firearm offenses;
- » Drug trafficking, including most controlled substance offenses involving sale or intent to sell;
- » Crimes of violence with a sentence of one year or longer imposed;
- » Theft or burglary with a sentence of one year or longer imposed;
- » Fraud or money laundering of more than \$10,000;
- » Owning or running a prostitution-related business;
- » Commercial bribery, counterfeiting, or forgery with a sentence of one year or longer imposed;
- » Obstruction of justice or perjury with a sentence of one year or longer imposed;
- » Failure to appear in court for certain felony offenses;
- » Attempt or conspiracy to commit any of the offenses included in the definition.

Because most convictions come from state criminal proceedings, and because aggravated felony is a federal term, it is often a complicated legal question whether a particular conviction counts as an aggravated felony. The category also applies to old convictions, even if they were not considered aggravated felonies when the person was convicted. A conviction can be an aggravated felony even if it is a misdemeanor under state law, and many aggravated felonies stem from offenses for which a person served little to no jail time (especially because the category includes crimes where a person received a suspended sentence).

## What are the consequences of an aggravated felony?



**ENFORCEMENT PRIORITY:** Currently, ICE will focus on detaining and deporting anyone whom an ICE officer believes has an aggravated felony.



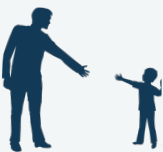
**MANDATORY DETENTION:** Any person who has an aggravated felony does not receive a bond hearing and is subjected to immigration detention for the entire duration of their proceedings, no matter how extended (unless they successfully litigate a habeas petition in federal court).



**NO HEARING BEFORE DEPORTATION:** ICE can deport people who have aggravated felonies and who are not lawful permanent residents without giving them a hearing in front of an immigration judge to argue their case.



**NO RELIEF FROM DEPORTATION:** An immigration judge cannot grant cancellation of removal (which “cancels” deportation for some lawful permanent residents and some others who can show that a U.S. citizen immediate relative would suffer extreme and unusual hardship) to anyone who has an aggravated felony conviction. An aggravated felony also makes people ineligible for asylum. A person with an aggravated felony also cannot take voluntary departure (where a person agrees to leave the United States, but does not receive an order of deportation).



**NO WAY TO RETURN:** People who have aggravated felonies and who are deported can never return to the U.S.



**LONGER SENTENCES:** People who are convicted of “illegal reentry” after an aggravated felony conviction face longer sentences - up to 20 years in federal prison.

# People impacted by harsh exclusions based on aggravated felony convictions

## RANDANE'S STORY

As a teenager, Randane fled to the United States from Jamaica after witnessing the murder of his father and uncle. Once here, Randane initially lived with his aunt, but because he did not get along with her boyfriend, she kicked Randane out of her home and he was placed in the foster care system. Randane received Special Immigrant Juvenile Status and ultimately became a Lawful Permanent Resident. Despite his traumatic youth, Randane graduated from high school and began attending community college, completing two semesters. Randane has worked consistently throughout his adult life. He had no prior contacts with the criminal legal system before February 2016, when he was convicted of possession of a controlled substance with intent to sell. The arrest record shows the basis of this conviction: an allegation that Randane had 1.1 grams of marijuana. ICE counts this conviction - for less than 0.04 ounces of marijuana - as an aggravated felony drug trafficking crime. As a result of this conviction Randane spent more than two years fighting his case in immigration detention in Etowah, a notoriously inhumane facility. Randane was subject to mandatory detention, and it took a federal court order due to the COVID-19 pandemic to secure his release. If ICE wins its argument that Randane's conviction counts as an aggravated felony, Randane will be subject to mandatory deportation.

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## ASHLEY'S STORY

Ashley is a transgender woman from Honduras. She has lived in the U.S. for nearly 20 years, and is now married to a military veteran. Her husband is disabled and Ashley provides critical care for him. Ashley would be eligible for multiple forms of immigration relief, including asylum, cancellation of removal, and a T Visa, but an aggravated felony conviction is complicating all of them. Ashley is a survivor of sex trafficking, but the person who trafficked her also forced her to assist with his drug trafficking enterprise, and when Ashley was caught, she was too terrified to explain the circumstances. Her minimal participation and duress must have been evident, because she received a sentence of only probation. Nevertheless, even with this sentence, ICE considers Ashley's conviction an aggravated felony for immigration purposes. Her aggravated felony conviction bars Ashley from receiving cancellation of removal, even though she would otherwise be eligible because of the care that she provides to her U.S. citizen husband. And the conviction likewise bars her from asylum, and allows her only to receive lesser forms of relief that would never lead to resident status or citizenship. Most frustratingly for Ashley, her aggravated felony conviction could prevent her from receiving work authorization, for which she would otherwise be eligible. Because of her husband's disability, Ashley is the

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sole provider for her family - her aggravated felony conviction stands between her and a stable life for herself and her family. Because Ashley later offered her assistance to federal law enforcement to aid in the arrest and prosecution of her trafficker, Ashley is now eligible for a T visa. However, her aggravated felony conviction - while not a bar - has severely complicated her application process and delayed it; she has now been waiting 4 years since she applied.

## MICHAEL'S STORY

**Michael has now been in ICE custody for nearly two years.** During that time, he has contracted COVID-19 twice and suffers from symptoms of “long COVID.” These symptoms include extreme fatigue and terrifying memory loss. Michael is an author and the memory loss especially harms him, because it impairs his ability to write. Michael has tried desperately to get out of ICE detention: he has requested humanitarian parole, filed a habeas petition on his own, and, with counsel, submitted a request for release under a class action habeas based on the risk of COVID-19. ICE has denied these multiple requests to release Michael. ICE’s sole reason is Michael’s conviction for wire fraud and identity theft, because these offenses are “aggravated felonies” under immigration law. Following his conviction, Michael transformed his life by becoming a member of a church; he now mentors others and tries to help them make positive choices. Michael also has a loving brother ready to provide him a stable home. But ICE only cares that Michael has an “aggravated felony.” Despite all the evidence of Michael’s rehabilitation, and even though detention could kill him, ICE refuses to release him.

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## Conclusion

**Aggravated felony convictions carry extremely harsh consequences, and despite their misguided and racist origins, continue to be used by Congress and the Biden administration to categorically exclude people from relief and prioritize them for enforcement.** The aggravated felony category punishes people twice for the same offense, and has resulted in family separation and in the deportation of many who face severe harm in other countries. The “aggravated felony” category should be eliminated from the immigration laws.