



2014

# A Meditation on Moncrieffe: On Marijuana, Misdemeanants, and Migration

Victor C. Romero

*Penn State Law*

Follow this and additional works at: [http://elibrary.law.psu.edu/fac\\_works](http://elibrary.law.psu.edu/fac_works)

 Part of the [Criminal Law Commons](#), and the [Immigration Law Commons](#)

---

## Recommended Citation

Victor C. Romero, *A Meditation on Moncrieffe: On Marijuana, Misdemeanants, and Migration*, 49 *Gonz. L. Rev.* 23 (2014).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

A Meditation on *Moncrieffe*:  
On Marijuana, Misdemeanants, and Migration

Victor C. Romero\*

ABSTRACT

*This essay is a brief meditation on the immigration schizophrenia in our law and legal culture through the lens of the Supreme Court's latest statement on immigration and crime, Moncrieffe v. Holder. While hailed as a "common sense" decision, Moncrieffe is a rather narrow ruling that does little to change the law regarding aggravated felonies or the ways in which class and citizenship play into the enforcement of minor drug crimes and their deportation consequences. Despite broad agreement on the Court, the Moncrieffe opinion still leaves the discretion to deport minor state drug offenders in the hands of the federal immigration bureaucracy. However, if the current debate among the states regarding the legitimate uses of marijuana helps lead immigration authorities to refocus their efforts on deporting serious criminals only, then immigrant advocates may come to view Moncrieffe in a much more favorable light.*

---

\* Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, Pennsylvania State University, Dickinson School of Law. Thanks to Deans McConaughay and Houck for their constant support of my work and to Corie, Ryan, Julia, and Matthew for their love and patience.

## TABLE OF CONTENTS

I. INTRODUCTION: CITIZENSHIP & CRIMINALITY .....	24
II. MONCRIEFFE AND KATZ: A TALE OF TWO STOPS .....	28
A. <i>Two Traffic Stops and Some Marijuana</i> .....	28
B. <i>Class Status: Accessing Private Counsel, Parlaying Social Standing</i> .....	29
C. <i>[Non-]Citizenship Status: Fighting Deportation</i> .....	31
D. <i>Moncrieffe v. Holder: A Limited Remedy</i> .....	32
III. CONCLUSION: MARIJUANA, MORALITY, AND MIGRATION .....	33

## I. INTRODUCTION: CITIZENSHIP &amp; CRIMINALITY

United States immigration policy is often described as schizophrenic.<sup>1</sup> On the one hand, many Americans embrace the narrative of an immigrant nation, invoking Lady Liberty, Ellis Island, the *Mayflower*, and other iconic images of integration and assimilation. On the other, some hold steadfastly to the notion that U.S. citizenship confers special privileges upon its beneficiaries appropriately withheld from foreigners, where high border walls, Guantanamo Bay, and enemy combatant status help maintain exclusion and separation.

Perhaps unsurprisingly,<sup>2</sup> our Founders reflected the same schizophrenia in adopting the Fourteenth Amendment, which utilizes both the exclusive term, “citizen,” and the more inclusive one, “person.”<sup>3</sup> As part of a three-amendment package to ensure equal rights to the newly freed slaves, the Fourteenth Amendment draws distinctions between birthright and naturalized citizens

---

1. See, e.g., Richard Lyon, *A Look at the U.S.' Historically Schizophrenic Immigration Policy*, HUFFINGTON POST: THE BLOG (Sept. 12, 2012, 9:19 AM), [http://www.huffingtonpost.com/richard-lyon/schizophrenic-us-immigration-policy\\_b\\_1876900.html](http://www.huffingtonpost.com/richard-lyon/schizophrenic-us-immigration-policy_b_1876900.html); Rebekah Metzler, *Mayor: U.S. Immigration Policy is 'Schizophrenic'*, U.S. NEWS ONLINE (Jan. 17, 2013), <http://www.usnews.com/news/articles/2013/01/17/mayor-us-immigration-policy-is-schizophrenic-mayor-us-immigration-policy-is-schizophrenic>; Fabian Valenzuela, *Schizophrenic Immigration Policies*, EXAMINER.COM (Feb. 18, 2011), <http://www.examiner.com/article/schizophrenic-immigration-policies>.

2. See Victor C. Romero, *Our Illegal Founders*, 16 HARV. LATINO L. REV. 147, 150, 154 (2013) (describing the illegal border crossing activities of prominent founding figures).

3. U.S. CONST. amend. XIV § 1.

against others, but simultaneously guarantees due process and equal protection for all persons, regardless of citizenship.<sup>4</sup>

In immigration scholarship, this schizophrenia has found expression in how our law and our culture alternately invoke *membership* and *personhood* as theories for adjudicating immigrant rights.<sup>5</sup> The membership perspective privileges formal citizenship status, as when a community crafts policies aimed at self-definition. Perhaps the paradigmatic example of this is limiting the franchise to full citizens.<sup>6</sup> Conversely, personhood theory recognizes the equality of all before the government, regardless of immigration status. Hence, as “Americans in waiting,”<sup>7</sup> resident immigrants presumably enjoy the same rights as citizens to live and work, raise families, and otherwise pursue their American dreams free from state interference.

In our current debate around national immigration reform, this schizophrenia manifests itself in the contrasting views of the American public regarding what to do about undocumented persons. A February 2013 Reuters/Ipsos poll revealed that fifty-three percent of U.S. citizens surveyed favored deporting most or all of the nation’s eleven million unauthorized migrants.<sup>8</sup> However, a separate March 2013 Public Religion Research Institute poll

4. Unlike the citizenship clause, which is limited to citizens through birth or naturalization, the equal protection and due process clauses extend to all “persons.” See U.S. CONST. amend. XIV, § 1.

5. See generally LINDA S. BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP*, ch. 1 (2006) (noting the difficulties in anchoring citizenship theory within nationalism, given the personhood of, among others, noncitizens within liberal democracies); Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 140-157 (2009) (describing society’s schizophrenic view toward the undocumented as “residents” versus “lawbreakers”); VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 161-169 (2005) (differentiating between membership and personhood theories); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 723-24 (1996) (describing the membership and personhood paradigms under constitutional immigration law).

6. Though excluding lawfully present noncitizens from voting it is not without its critics. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1393-1394 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH. L. REV. 1092, 1092-1093 (1977).

7. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 9 (2006) (arguing that lawful immigrants should be treated as Americans-in-waiting, who thereby enjoy a presumed equality with full U.S. citizens).

8. Rachele Younglai, *Majority of U.S. Citizens Say Illegal Immigrants Should be Deported*, REUTERS ON-LINE (Feb. 20, 2013), <http://www.reuters.com/article/2013/02/21/us-usa-immigration-idUSBRE91K01A20130221>.

revealed that sixty-three percent of Americans supported a pathway to citizenship for certain unauthorized migrants.<sup>9</sup>

For some, unauthorized migrants are no different from convicted criminals—they must be removed because they have broken our laws.<sup>10</sup> For others, unauthorized migrants, especially those who were brought across the border as infants,<sup>11</sup> are no different from our immigrant ancestors who came to this country to better their lives; they deserve a chance to adjust their status and become full members of our polity.

Despite these seemingly irreconcilable opinions around undocumented migrants, there appears to be more public consensus around the following question: Assuming that deportation is the proper remedy for immigration violations, should noncitizens who commit serious crimes be removed? While I have not come across a poll asking that question, I would be surprised if many U.S. citizens respond negatively. After all, if imprisonment of dangerous criminals is acceptable—regardless of their immigration status—then banishment of noncitizen criminals seems reasonable as well. Put differently, if the U.S. should deport anyone, it should deport criminals.<sup>12</sup>

Accordingly, the Immigration and Nationality Act reserves its most severe deportation consequences for those convicted of “aggravated felonies,” a designation originally reserved for the most serious offenders.<sup>13</sup> Over time, however, this definition has grown as Congress has expanded the immigration

---

9. Rachele Younglai, *Most Americans Back Path to Citizenship for Illegal Immigrants: Poll*, REUTERS ON-LINE (Mar. 21, 2013), <http://www.reuters.com/article/2013/03/21/us-usa-immigration-poll-idUSBRE92K04B20130321>.

10. Although certainly a part of U.S. immigration history, the “undocumented migrant-as-criminal” trope has resurfaced of late, prompting me to ask whether our current federal laws strictly criminalizing border crossings make sense. See Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 301 (2010); see also *Discussing “Decriminalizing Border Crossings” by Victor Romero*, <http://urbanlawjournal.com/?cat=15> (last visited on Sept. 2, 2013) (the on-line debate that this article engendered between myself and Prof. Won Kidane).

11. See generally MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND (2012) (documenting the growth of the legal and societal movement for equal access to education for undocumented youths); Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275, 276-77 (2011) (arguing that *Brown v. Board of Education* supports the idea of “integrative egalitarianism” – that “governmental programs that are designed to overcome arbitrary inequalities stemming from accidents of birth are a worthwhile investment in society’s future”).

12. Cf. KEVIN R. JOHNSON, OPENING THE FLOODGATES 196-99 (2007) (arguing that our byzantine immigration system should be simplified by focusing instead on excluding true criminals and terrorists only, rather than worrying over noncitizens’ legal status).

13. Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012) (defining “aggravated felony”).

dragnet to include crimes that are neither “aggravated” nor “felonies.”<sup>14</sup> For instance, while someone convicted of the “sexual abuse of a minor” might not garner much sympathy, this federal definition is broad enough to encompass consensual sex between two teenagers, a crime of statutory rape in some states.<sup>15</sup> Due to the variance in state criminal laws, what may be a minor offense in one jurisdiction may be a serious one in another. For U.S. citizens, this variance might matter some, but for noncitizens, even those lawfully here, the distinction among state criminal laws may spell the difference between continued residence and deportation.

The remainder of this essay is a brief meditation on this schizophrenia in our law and legal culture through the lens of the Supreme Court’s latest statement on immigration and crime, *Moncrieffe v. Holder*.<sup>16</sup> While hailed by

---

14. Suzy Khimm, *Obama Wants Judges to Decide Whether Immigrants Convicted of Minor Crimes Should be Deported*, WASH. POST, WONKBLOG (Feb. 20, 2013, 1:37 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/obamas-plan-judges-leeway-deportation/>. There is a growing and important literature on the increasing criminalization of immigration law. See, e.g., Jennifer Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 616 (2012); GOVERNING IMMIGRATION THROUGH CRIME: A READER 83-84 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013); César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 360 (2012); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 484-85 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83 (2005); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 673 (2008); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 383 (2006).

15. See *Aggravated Felonies: An Overview*, IMMIGRATION POLICY CENTER (Mar. 16, 2012), <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview>. This was not some hypothetical case dreamed up by an advocacy group; though the facts were slightly different, the government attempted to remove long-time permanent resident Jesus Collado upon his return from his native Dominican Republic because of a 24-year-old conviction of statutory rape for having had consensual sex with his younger teenage girlfriend. See Mirta Ojito, *Immigrant Fights Off His Deportation*, N.Y. TIMES (Sept. 4, 1998), <http://www.nytimes.com/1998/09/04/nyregion/immigrant-fights-off-hisdeportation.html>; Mirta Ojito, *Old Crime Returns to Haunt an Immigrant; Facing Deportation, Dominican May Become Test Case for New Law*, N.Y. TIMES (Oct. 15, 1997) <http://www.nytimes.com/1997/10/15/nyregion/old-crime-returns-haunt-immigrant-facing-deportation-dominican-may-become-test.html>.

16. *Moncrieffe v. Holder*, No. 11-702, slip op. at 1 (April 23, 2013). For a detailed practice advisory on the implications of *Moncrieffe* for lawyers, see Legal Action Center, *Moncrieffe v. Holder: Implications for Drug Charges and Other Categorical Approach Issues* (May 2, 2013), <http://www.legalactioncenter.org/practice-advisories/moncrieffe-v-holder-implications-drug-charges-and-other-categorical-approach-iss>.

the New York Times as a “common sense” decision,<sup>17</sup> *Moncrieffe* was a rather narrow ruling that did little to change the law regarding aggravated felonies or the ways in which class and citizenship play into the enforcement of minor drug crimes and their deportation consequences. Specifically, despite broad agreement on the Court (with Justices Thomas and Alito the sole dissenters), the *Moncrieffe* opinion still leaves the power to deport minor state drug offenders in the discretion of the federal immigration bureaucracy. However, if the current debate among the states regarding the legitimate uses of marijuana helps lead immigration authorities to refocus their efforts toward deporting serious criminals only, then immigrant advocates may come to view *Moncrieffe* in a much more favorable light.

## II. MONCRIEFFE AND KATZ: A TALE OF TWO STOPS

Given our nation’s ambivalence toward immigrants, it is perhaps no surprise that citizenship and class might play a role in the prosecution of minor drug crimes and the immigration consequences that attend those charges. While Adrian Moncrieffe’s story received much publicity this spring because of his then-pending Supreme Court case, New York State Assemblyman Stephen M. Katz’s tale<sup>18</sup> received very little news. Yet, both stories involved state police officers finding small amounts of marijuana during a routine traffic stop. What happened in each case is worth exploring in greater detail.

### A. *Two Traffic Stops and Some Marijuana*

Jamaican citizen Adrian Moncrieffe lawfully immigrated to the U.S. with his parents in 1984 when he was three. Prior to his run-in with the law, Mr. Moncrieffe appeared to live a normal, productive American life. He initially settled in Georgia, where he was gainfully employed as a home health care worker; later, he married his wife and started a family.<sup>19</sup>

During a traffic stop in 2007, the police found 1.3 grams of marijuana in Mr. Moncrieffe’s car, the equivalent of about two to three cigarettes.<sup>20</sup> As a

---

17. The Editorial Board, *A Common Sense Immigration Ruling*, N.Y. TIMES (April 23, 2013), <http://www.nytimes.com/2013/04/24/opinion/a-common-sense-immigration-ruling.html>.

18. Thomas Kaplan, *Assemblyman Makes Plea Deal on Marijuana Possession*, N.Y. TIMES (April 25, 2013), <http://www.nytimes.com/2013/04/26/nyregion/new-york-assemblyman-agrees-to-plea-bargain-on-marijuana-possession-charge.html?src=recg>.

19. Nina Totenberg, *Justices Say U.S. Improperly Deported Man Over Marijuana*, NPR (April 23, 2013), <http://www.npr.org/2013/04/23/178651009/justices-say-u-s-improperly-deported-man-over-marijuana>.

20. *Moncrieffe v. Holder*, No. 11-702, slip op. at 3 (April 23, 2013).

first-time offender, Mr. Moncrieffe pled guilty to possession of marijuana with intent to distribute and received no prison time.<sup>21</sup> Instead, he was placed on probation for five years, after which his record would be expunged.<sup>22</sup> Unfortunately, the federal government viewed Mr. Moncrieffe's plea as equivalent to an aggravated felony conviction and deported him to Jamaica, separating him from his wife and American children.<sup>23</sup>

Stephen Katz's illegal act was not much different from Mr. Moncrieffe's. On March 14, 2013, Assemblyman Katz was stopped for speeding on the New York thruway, where an ensuing search revealed a small bag of marijuana. Here is where the two stories diverge: Town justice Philip A. Crandall Sr. agreed to dismiss the charge of unlawful possession of marijuana against Mr. Katz, on condition that he perform twenty hours of community service and avoid reoffending. Justice Crandall also reduced Mr. Katz's speeding ticket to a parking violation that carried a seventy-five-dollar fine.<sup>24</sup>

#### B. *Class Status: Accessing Private Counsel, Parlaying Social Standing*

Why the different outcomes in these criminal cases? Setting aside for a moment that Mr. Katz is a U.S. citizen and Mr. Moncrieffe is not, the facts of the two cases are quite similar: a traffic stop leading to the discovery of a small amount of marijuana in an otherwise law-abiding person's car. Fortunately, Mr. Katz was represented by private counsel who was able to convince the town justice that the assemblyman is "not a bad guy. He's a hard worker for the people, and this story is behind him."<sup>25</sup> An upstanding citizen, Mr. Katz deserved not to be adversely judged based solely on that episode. Following his community service, Mr. Katz will not be deemed a criminal, and he will be able to continue to serve his constituents and the State of New York with distinction and honor.<sup>26</sup>

But what of Mr. Moncrieffe? As a gainfully employed husband with a wife and children to support, why was he not given such an option? Apparently, Mr. Moncrieffe was unaware<sup>27</sup> of the possible immigration consequences of his plea, a fact the Supreme Court now requires criminal defense counsel to

---

21. *Id.*; Ga. Code Ann. § 16-13-30(j)(1) (2007).

22. Ga. Code Ann. § 42-8-60(a) (2007) (allowing for more lenient treatment for first-time offenders).

23. Totenberg, *supra* note 19.

24. Kaplan, *supra* note 18.

25. Kaplan, *supra* note 18.

26. Kaplan, *supra* note 18.

27. Totenberg, *supra* note 19.

disclose.<sup>28</sup> It may be that Mr. Moncrieffe's lack of private counsel made all the difference.<sup>29</sup> While it is quite possible that Georgia's anti-marijuana laws are more stringent than those of New York, it appears that the authorities in both jurisdictions viewed neither Mr. Katz nor Mr. Moncrieffe as particularly dangerous individuals and chose to treat their cases with leniency, a fact not lost on Mr. Katz's counsel. But for Mr. Moncrieffe's deportation, neither man would have had any criminal record following each incident—Mr. Moncrieffe, because his record would have been expunged after five years, and Mr. Katz, because he would not have been charged at all following his community service.

Yet, the plea offer to Mr. Moncrieffe was slightly more serious than the crime Mr. Katz was charged with—"possession *with intent to distribute*" is usually more severe than simple "unlawful possession."<sup>30</sup> Distribution of a potentially harmful substance may affect more than the possessor alone, so the theory goes.<sup>31</sup> Was this difference in the severity of the crime charged due to effective negotiation by Mr. Katz's private counsel, or a lack of awareness of the immigration consequences by Mr. Moncrieffe's attorney? Was this due to Mr. Katz's prominence in the community? While it is difficult to come to any firm conclusions, in part because of the differences between New York and Georgia criminal law and its enforcement,<sup>32</sup> it is fair to surmise that Mr. Katz's class standing—his relative affluence, social prominence, and ability to hire

---

28. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482-83, 1486 (2010).

29. Moncrieffe presumably was entitled to a public defender under *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963), but the sad reality is that many government attorneys are so overworked and underfunded that they may not be able to adequately keep up with the immigration consequences of their clients' criminal convictions. See, e.g., Erik Kain, *Public Defenders are Overworked and Underfunded*, FORBES (June 29, 2011), <http://www.forbes.com/sites/erikkain/2011/06/29/public-defenders-are-overworked-and-underfunded/>.

30. See Ga. Code Ann. § 16-13-30(c)-(d) (2007).

31. See, e.g., Dist. Of Columbia Metro. Police Dep't, *Drug Trends in our Neighborhoods*, METROPOLITAN POLICE DEPARTMENT, <http://mpdc.dc.gov/page/drug-trends-our-neighborhoods> (last visited Oct. 16, 2013).

32. As one commentator noted, "The SCOTUS decision means Moncrieffe can appeal his deportation and hopefully return to his wife and five kids—*though we'd suggest getting the heck out of Georgia.*" David Downs, *Marijuana Deportation Overturned by Supreme Court Justices*, SMELL THE TRUTH BLOG (April 24, 2013, 9:43 AM), <http://blog.sfgate.com/smellthetruth/2013/04/24/marijuana-deportation-overturned-by-supreme-court-justices/> (emphasis added). That sentiment notwithstanding, even so-called liberal states may have strict anti-drug laws. For instance, New York, like Georgia, seems to proscribe the distribution, without remuneration, of a small amount of marijuana, as Justice Sotomayor pointed out in her opinion. See *Moncrieffe v. Holder*, No. 11-702, slip op. at 14 (April 23, 2013) (citing N.Y. Penal Law Ann. § 221.35 (West 2008)).

private counsel—may have played a role in obtaining the more favorable outcome in his case. Notwithstanding the state courts' attempts to treat Messrs. Katz and Moncrieffe individually as persons rather than as members of a class of criminals, socioeconomic differences may have played a role in how favorably each may have been treated.<sup>33</sup> Put starkly, if Mr. Moncrieffe had received the same favorable treatment as Mr. Katz—if he had received no conviction following completion of community service—Mr. Moncrieffe would not have been deportable at all.<sup>34</sup>

### C. *[Non-]Citizenship Status: Fighting Deportation*

Let us return to the difference that immigration status makes in these cases. One thing is clear: Mr. Katz, a United States citizen, would not have been deportable, period.<sup>35</sup> While, like Mr. Moncrieffe, Mr. Katz may have been concerned about possible incarceration, U.S. citizens do not need to worry about permanently leaving behind their homes, jobs, or families—all things that, to quote Justice Brandeis, “make[] life worth living.”<sup>36</sup> Even if he faced imprisonment without a community service option, Mr. Katz would still not have had to worry about possible deportation following a minor controlled substance conviction. Mr. Moncrieffe, on the other hand, had to pursue his case all the way to the U.S. Supreme Court in order to contest the deportation that followed his Georgia guilty plea for a similarly low-level offense.

Now, it may well be that federal immigration authorities stationed in a more progressive state like Colorado or Washington, where personal possession of less than an ounce of marijuana is now legal,<sup>37</sup> may have viewed Mr.

33. On the growth of the American criminal justice system and its disproportionately ill effects on socioeconomic and racial minorities, *see generally* BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 7 (2006) (“The punitive turn in criminal justice disappointed the promise of the civil rights movement and its burdens fell heavily on disadvantaged African Americans.”). *See also* JONATHAN SIMON, *GOVERNING THROUGH CRIME* 14 (2007) (“In the conventional syllogism, crime (and the violence it authorizes) is generally a last response, the end point of a pathway of resistance to lawful governance. What is visibly different about the way we govern since the 1960s is the degree to which crime is a first response.”).

34. To be deportable under the Immigration and Nationality Act, a noncitizen must first be convicted in order to be charged under § 237(a)(2)(B)(i) for violating a drug law. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

35. *Cf.* Immigration and Nationality Act § 240, 8 U.S.C. § 1229a (2012) (providing for removal proceedings of noncitizens).

36. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

37. *See* Roger Parloff, *Yes We Cannabis*, *FORTUNE*, April 8, 2013, at 67, 68 (“Everything changed last Nov. 6[ , 2012], when voters in Colorado and Washington approved, by 10-percentage-point margins, ballot initiatives that not only made it lawful for

Moncrieffe's plea deal differently; but they still would have been able to consider deportation as a legal remedy. In contrast, no U.S. citizen would have been subject to such an immigration calculus. Membership—by way of U.S. citizenship—matters.<sup>38</sup>

#### D. Moncrieffe v. Holder: *A Limited Remedy*

Still, Mr. Moncrieffe won a majority of the Court's sympathy.<sup>39</sup> But what exactly did he win? Writing for the Court, Justice Sotomayor held that because the Georgia statute was broad enough to encompass conduct that could be considered either a federal drug felony or a misdemeanor, Mr. Moncrieffe's conviction should not be viewed categorically as an "aggravated felony."<sup>40</sup> Federal law draws distinctions between drug traffickers and simple drug possessors, based in part on whether remuneration or more than a small amount of marijuana is involved.<sup>41</sup> Because Georgia's statutory scheme draws no such distinctions, Mr. Moncrieffe could not have been categorically deemed a federal felon; he may well have only been a state misdemeanor.<sup>42</sup>

Although this ruling saved him from the "aggravated felony" grounds of removal, Mr. Moncrieffe was still deportable for having possessed a controlled substance.<sup>43</sup> As Justice Sotomayor noted, "Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal."<sup>44</sup> Mr. Moncrieffe is free to seek relief from the government, although such relief is discretionary.

So perhaps we might deem this a partial victory for Mr. Moncrieffe. While he may ask U.S. Attorney General Holder for permission to return to his wife

adults to use and possess up to an ounce of marijuana—for any purpose, not just medical—but also ordered state regulators to begin licensing commercial businesses to engage in for-profit cultivation and distribution of the drug, much as those regulators currently do with tobacco and alcohol." See Colo. CONST. art. XVIII, § 16; see also WASH. REV. CODE § 69.50.101.

38. See VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 161-169 (2005).

39. *Moncrieffe*, No. 11-702, slip op. at 1 (April 23, 2013).

40. *Id.* at 22.

41. *Id.* at 8.

42. "Ambiguity on this point [i.e., whether the conviction involved a federal drug felony or misdemeanor] means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA [Controlled Substances Act]." *Moncrieffe*, No. 11-702, slip op. at 9 (April 23, 2013).

43. Immigration and Nationality Act § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (providing that a noncitizen convicted of an offense relating to a controlled substance is deportable).

44. *Moncrieffe*, No. 11-702, slip op. at 19 (April 23, 2013).

and children, such relief lies solely in the hands of Mr. Holder. Although I would have preferred a judicial limit on such discretion, in fairness to the Court, one advantage of deferring to the administration's expertise is that the immigration authorities might be in a better position to understand the politics and practicalities of a case-by-case application of discretion, unless and until Congress decides to repeal the provision making small-time possession and non-remunerative distribution a deportable offense.

Perhaps this is as it should be: The Attorney General (or his designee) has the Court's blessing to treat Mr. Moncrieffe as a *person*, an individual who made a mistake, rather than as a *non-member*, an aggravated felon who, through his criminal activity, has relinquished his claim to remain in the country. Perhaps the Court intended to mitigate the exclusionary effects of the aggravated felon designation (i.e., an aggravated felon is not, by definition, a fit member of our society) by requiring the executive branch to consider the personhood of the individual before it (i.e., Mr. Moncrieffe, a longtime permanent resident, is a first-time offender who otherwise is a productive member of society with a steady job and U.S. citizen family members to support—not unlike, if I may, Assemblyman Katz). Short of attempting to influence federal drug policy through immigration law, the Court may have felt that this was the best it could do as arbiter of this dispute.

### III. CONCLUSION: MARIJUANA, MORALITY, AND MIGRATION

The narrow lesson of *Moncrieffe* is that a lawful permanent resident may not automatically be deported as an aggravated felon for a state drug conviction involving the intent to distribute a small amount of marijuana without remuneration. Nonetheless, the noncitizen may still be deported based on a controlled substances conviction, barring a discretionary reprieve from the U.S. Attorney General. More broadly, I'd like to share a few thoughts about how *Moncrieffe* might be viewed from a slightly wider lens, one in which we may well see the federal government's role changing in light of state debates regarding the regulation of marijuana.

In 2005, the Supreme Court in *Gonzales v. Raich* upheld Congress's commerce clause power to criminalize the personal use of marijuana, notwithstanding a California law allowing users to partake in the drug for medical reasons.<sup>45</sup> Currently, nineteen other states and the District of Columbia

---

45. 545 U.S. 1, 5, 22 (2005).

permit medical marijuana use,<sup>46</sup> while Colorado and Washington voters recently approved a narrow exception for certain recreational use, as well.<sup>47</sup>

Although President Obama has stated that he views the federal prosecution of recreational drug users an unwise use of resources, some U.S. Attorneys wonder about potential abuse. In October 2011, for instance, federal prosecutors announced a crackdown on a burgeoning medical marijuana industry they saw as motivated by greed, not compassion.<sup>48</sup> As Melinda Haag, the U.S. Attorney for the Northern District of California, put it, “What we are finding is that people are using the cover of medical marijuana to make extraordinary amounts of money. . . . In short, to engage in drug trafficking.”<sup>49</sup> In the meantime, Representative Dana Rohrabacher, a California Republican, recently introduced the Respect State Marijuana Laws Act, which would leave the states to self-regulate, protecting them from unwanted federal interference.<sup>50</sup>

What might these developments mean for deportation law? Because the *Moncrieffe* Court reads the “aggravated felony” definition to exclude minor drug crimes, the federal Immigration and Customs Enforcement Agency (“ICE”) may well be reluctant in the future to focus its attention on offenders like Mr. Moncrieffe, even if they may be deportable under the controlled substances provision. While the federal government may legitimately concern itself with regulating large-scale interstate and international trafficking, and therefore seek to deport big-time smugglers, it may well decide to leave states and local governments to oversee medical and recreational marijuana use through regulation and taxation. Such a sensible approach may have the unintended consequence of restoring fairness and balance to our overextended criminal grounds of deportation.

---

46. National Conference of State Legislatures, *State Medical Marijuana Laws*, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx> (last updated September 2013).

47. Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN MONEY (Nov. 8, 2012), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>.

48. Jon Brooks, *Federal Crackdown on Medical Marijuana: Oakland Fights Back, Mendocino County Still Deciding*, KQED (Dec. 19, 2012, 3:15 PM), <http://blogs.kqed.org/newsfix/2012/12/19/federal-crackdown-on-medical-marijuana-oakland-fights-back-mendocino-county-still-deciding/>. On the growth of marijuana as a legitimate business enterprise, witness a recent issue of *Fortune* magazine, with the following cover story: *Marijuana Inc.: Meet the Entrepreneurs and Investors Firing Up a New Industry*, April 8, 2013. See Parloff, *supra* note 33.

49. Brooks, *supra* note 48.

50. H.R. 1523, 113th Cong. (1st Sess. 2013).

If this should happen, when ICE next seeks to deport a drug kingpin for an “aggravated felony,” society may reasonably assume that it would be better off not having her be part of our polity. This is unlike how most people, including the majority of the Supreme Court, it seems, would view Mr. Moncrieffe, a law-abiding long-time resident who made a mistake. If the current debate regarding drug decriminalization leads federal, state, and local governments to treat immigrants, like Mr. Moncrieffe, with the same compassion and understanding accorded U.S. citizens, like Mr. Katz, then immigrant rights advocates may one day look back at *Moncrieffe v. Holder* in a more favorable light.

