

REENTRY SERVICES FOR THE REMOVED

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A Response to Amy F. Kimpel, *Coordinating Community Reintegration Services for “Deportable Alien” Defendants: A Moral and Financial Imperative*

Each year, thousands of individuals are released from prisons in the United States.¹ Reentry services—services aimed at helping an individual reintegrate into the community upon his or her release—have long been neglected as an afterthought of the criminal justice system. However, in recent years, prison officials, criminal justice reformers, and politicians alike have increasingly recognized the critical role reentry services play in ensuring individuals do not reoffend once released from prison.²

In her article, *Coordinating Community Reintegration Services for “Deportable Alien” Defendants: A Moral and Financial Imperative*,³ Amy Kimpel convincingly argues that, despite this increased attention, there is at least one group of individuals being released from prison for whom reentry services remain inadequate. Noncitizens who face removal⁴ from the United States at the end of their prison sentence are unable to access many existing reentry services within the prison system.⁵ In addition, noncitizens lack reentry services specific to their unique needs both while in custody and upon reintegration into the country to which they are released.⁶ As Kimpel rightly points out, these failures have both moral and financial costs.⁷ Failing to help noncitizen offenders reenter society in the same way we help citizen offenders raises important questions about our prison system’s commitment to rehabilitation and our

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1. In 2016, 626,024 prisoners were released from state and federal prisons in the U.S. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, at 11 (2018). This number does not include the number of individuals reentering society after being released from jails, juvenile halls, and other custodial institutions.

2. See Amy F. Kimpel, *Coordinating Community Reintegration Services for “Deportable Alien” Defendants: A Moral and Financial Imperative*, 70 FLA. L. REV. 1019, 1022 (2018).

3. *Id.*

4. Immigration proceedings, colloquially referred to as “deportation” proceedings, are referred to by statute as “removal” proceedings. See 8 U.S.C. § 1229a (2012). Removal proceedings are immigration court proceedings for individuals who either: (1) have lawful status in the U.S. or a lawful entry to the U.S. but lose that status or permission due to a criminal conviction and subsequently face “deportation”; or (2) do not have lawful status in the U.S. and are therefore “inadmissible” to the U.S., and thus face removal from the country on that basis alone. See 8 U.S.C. §§ 1182(a), 1227(a) (2012).

5. See Kimpel, *supra* note 2, at 1027.

6. See *id.* at 1027–28.

7. See *id.* at 1042.

society's commitment to the value of equality among all individuals.⁸ In addition, and perhaps a consequence more persuasive to some, significant financial costs result from the recidivism and re-imprisonment rates for noncitizen offenders for whom reentry services either are ineffective or simply do not exist.⁹ Thus, Kimpel offers several reforms that would begin to address the reentry needs of those facing removal, ranging from smaller “in-house” changes within a prison to large governmental projects.¹⁰ This Response builds on Kimpel's work by considering the potential effectiveness of these proposals for noncitizen-focused reentry services and how their effectiveness should be evaluated.

Currently, the “success” of reentry services is predominantly measured by examining the recidivism rates of offenders who receive such services.¹¹ This method of evaluation is built upon the premise that reentry services target the reasons underlying the commission of crime (for instance, by providing drug treatment to individuals who commit crimes due to their drug addiction, or by offering education and skills training to individuals who commit crimes due to their lack of stable employment). Recidivism rates also serve as a proxy for determining how well offenders are able to reintegrate into the community upon release. A reduction in recidivism would therefore support the conclusion that the program is effective and justifies the commitment to the initial provision of reentry services.

Considering the reentry needs of noncitizens, as compared to the needs of citizens, brings into focus a group of noncitizen offenders for which there is not a citizen counterpart—individuals who violate federal immigration law.¹² These offenders are not convicted of more “traditional” crimes, such as drug crimes, property offenses, or violent crimes. Rather, the crimes they commit are criminal violations of federal immigration law, typically entering or re-entering the United States without lawful permission.¹³ As Kimpel points out, this group of

8. See, e.g., U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 1981 (2012); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (quoting U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1981 (previously codified at R.S. § 1977)).

9. See Kimpel, *supra* note 2, at 1042.

10. *Id.* at 1043.

11. See, e.g., NAT'L REENTRY RES. CTR. & COUNCIL OF STATE GOV'TS JUSTICE CTR., MAKING PEOPLE'S TRANSITION FROM PRISON AND JAIL TO THE COMMUNITY SAFE AND SUCCESSFUL: A SNAPSHOT OF NATIONAL PROGRESS IN REENTRY 4 (2017); Nat'l Inst. of Justice, *Reentry/Release*, CRIMESOLUTIONS.GOV (last visited June 8, 2019) <https://crimesolutions.gov/TopicDetails.aspx?ID=36> [<https://perma.cc/A68Z-K3R8>] (rating the effectiveness of reentry programs based on reduction in recidivism or arrest).

12. The most common federal immigration criminal offense is unlawful re-entry into the United States after a prior removal. See U.S. SENTENCING COMM'N, ILLEGAL REENTRY OFFENSES 8 (2015).

13. See 8 U.S.C. §§ 1325, 1326 (2012).

offenders has an extremely high rate of recidivism.¹⁴ In fiscal year 2013, thirty-eight percent of unlawful reentry offenders unlawfully came back into the country after being removed due to a prior unlawful entry.¹⁵ In addition, many noncitizens who were removed from the U.S. because they had committed other types of crimes re-offend simply by returning to the country, thereby committing the crime of unlawful re-entry.¹⁶

By examining these offenders in particular, it is possible to draw some important conclusions that impact the assessment of reentry services to noncitizens. First, as Kimpel notes, noncitizen offenders have varied ties with the U.S. and their birth country.¹⁷ The depth and strength of an individual's community ties in the U.S., versus those in his or her country of birth, will significantly impact the effectiveness of any particular proposed reentry service.¹⁸ For instance, providing an ID and notifying family of the time and place of release may be more effective in reducing recidivism for migrant workers than it would be for noncitizens who have lived and worked in the U.S. for many years. Similarly, an "inmate release plan" for an individual with significant ties to his or her birth country may be helpful, but such a plan would not meaningfully assist an individual facing deportation to a country where they do not speak the language or have familial or financial support.

Second, the reasons underlying the recidivism of those who commit entry-related offenses likely differ from the reasons underlying the recidivism of noncitizens who commit other state and federal crimes. Unlawful entry offenders are often highly motivated to return to the U.S. due to their desire to remain with their family, which frequently includes their own children.¹⁹ Many unlawful entry offenders have lived most of their lives in the U.S., and therefore their entire family and community exists in the U.S.²⁰ Although noncitizens who commit other types of crimes may be similarly motivated to remain in the U.S., the reasons underlying the recidivism rates of other types of crime committed by

14. See Kimpel, *supra* note 2, at 1022 n.10.

15. U.S. SENTENCING COMM'N, *supra* note 12, at 15.

16. See Kimpel, *supra* note 2, at 1042; U.S. SENTENCING COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES 1 (2018).

17. See Kimpel, *supra* note 2, at 1041.

18. The depth and strength of an individual's ties to the U.S. do not necessarily correspond with whether a person has lawful status to live in the U.S. There are individuals who are lawfully present, for instance, on a tourist visa, who do not have significant ties to a U.S. community. However, there are also noncitizens who have lived in the U.S. for several decades without lawful permission.

19. See Kimpel, *supra* note 2, at 1041; Jason Beaubien, *Deported Immigrants Struggle to Re-enter U.S.*, NPR (Dec. 2, 2008, 1:22 AM), <https://www.npr.org/templates/story/story.php?storyId=97531877> [https://perma.cc/LVJ3-WDRN].

20. Beaubien, *supra* note 19.

noncitizens likely center on issues such as drug addiction, mental illness, and poverty—reasons that also underlie citizen recidivism rates.²¹

Third, and finally, the high recidivism rate for individuals who commit entry-related offenses suggests that neither past incarceration nor the risk of future incarceration works as a means of deterrence to the same extent that it does for offenders who might re-commit other state or federal crimes. This implies that the motive behind the commission of an unlawful entry offense—namely, the desire to be with one’s family—often outweighs the risk of a significant prison sentence.²² A recognition of the enormous strength—and positive value—of the underlying motivation of these offenders should influence our understanding of why any particular reentry service may or may not affect the individual’s decision to “re-offend” by returning to the U.S. unlawfully.

For the moment, if we accept the current thinking that reentry services are designed primarily to reduce recidivism, and thus the success of any program is measured by a reduction in recidivism, the challenge in creating reentry services for noncitizens who commit entry-related offenses is to determine what services address the underlying motivations for unlawful reentry into the U.S. This inquiry raises a more fundamental question: Whether it is in fact even possible to create reentry services that would effectively address these underlying motivations to re-offend. For purposes of this Response, I suggest that the answer to this question is that it is not. Even if the American criminal justice system were to undertake many of the proposals made by Kimpel—for instance, allowing noncitizens access to skills classes and drug treatment within the prison, or helping noncitizens develop a release plan in the country of their removal—none of these reforms would directly address the primary motivation behind unlawful reentry: reuniting with family and returning to an established life in the U.S. Despite the potential positive impact these proposals may have on an individual offender’s life, it is difficult to imagine any significant impact they would have on the recidivism rate of entry-related offenses more broadly.

Several of Kimpel’s proposals require a significant financial and social investment by other countries, such as the creation of jobs, the provision of housing, and the establishment of mental health and treatment services.²³ If these societal reforms were carried out either by

21. See David Lowell et al., *Recidivism and Use of Services Among Persons with Mental Illness After Release from Prison*, 53 *PSYCHIATRIC SERVS.* 1290, 1295 (2002); Lindsay A. Phillips, *Substance Abuse and Prison Recidivism: Themes From Qualitative Interviews*, 31 *J. ADDICTIONS & OFFENDER COUNSELING* 10, 15–16 (2010).

22. See U.S. SENTENCING COMM’N, *supra* note 16, at 1 (providing statistics documenting the majority of illegal reentry offenders who received an increased sentence due to a prior state or federal conviction).

23. See, e.g., Kimpel, *supra* note 2, at 1044 (arguing that the U.S. could better coordinate with foreign countries for the benefit of deportees).

the country alone or in collaboration with the U.S., removed individuals may make a different choice about reentering unlawfully. Unfortunately, the likelihood of these large-scale societal changes occurring in many of the countries to which individuals are being deported is slim,²⁴ and the U.S. is unlikely to sufficiently invest in reforms based in other countries—much less in social programs directed at those who are considered “deported aliens.”²⁵

Despite my skepticism that reentry services can meaningfully reduce the recidivism rates of entry-related offenses, this does not mean that the *status quo* of the prison system is acceptable for these offenders. There are other critical reasons to provide reentry services to these individuals, as well as to all offenders, both citizen and noncitizen alike. These services provide basic dignities and the chance to have a better daily life, regardless of where the individual is released. In addition, services within the prison, such as education classes, skills training, and arts programming, provide a range of other benefits to both the prison and the offender, including better behavior among inmates and intangible gains like personal growth and increased self-awareness.²⁶ Furthermore, there may be at least a few individuals who receive relief from removal,²⁷ and who will then be reintegrated back into American society. Reentry services for noncitizens in custody should be provided for this reason as well.

In conclusion, in the context of immigration-related offenses, it may

24. Many of the countries to which noncitizens are deported face significant social problems, including gang violence, poverty, and political corruption. See Amanda Erickson, *Why Do Some Families Risk Crossing the U.S. Border? Because if They Don't, They'll be Killed*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/06/20/why-do-some-families-risk-crossing-the-u-s-border-because-if-they-dont-theyll-be-killed/?utm_term=.6db8b99082f0 [https://perma.cc/5GPD-33SA].

25. See Megan Specia, *Trump Wants to Cut Aid to Central America. Here Are Some of the Dozens of U.S.-Funded Programs*, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/world/americas/trump-funding-central-america.html?action=click&module=MoreInSection&pgtype=Article®ion=Footer&contentCollection=Americas> [https://perma.cc/TQA9-VKFV].

26. See Jane Fonda & Sabra Williams, *Prison Arts Programs Produce Change That No Audit Can Measure*, WASH. POST (Apr. 8, 2019), https://www.washingtonpost.com/opinions/prison-arts-programs-produce-change-that-no-audit-can-measure/2019/04/08/8c7fd7a0-5a0e-11e9-9625-01d48d50ef75_story.html?utm_term=.268180cc0e4e [https://perma.cc/VN2L-NHR6] (suggesting prison arts programs lead to safer prison environments and greater positive behavior by offenders); LAURA WINTERFIELD ET AL., THE URBAN INST. JUSTICE POLICY CTR., THE EFFECTS OF POSTSECONDARY CORRECTIONAL EDUCATION: FINAL REPORT 12 (2009) (finding that postsecondary education programs improved inmate behavior and made the prison environment safer).

27. Some examples of relief from removal include applying for asylum and a form of relief called “cancellation of removal.” See 8 U.S.C. § 1229(a)–(b) (2012).

not be possible to significantly reduce the recidivism rate through the provision of reentry services. I challenge the effectiveness of reentry services as measured by the recidivism rate for these offenses, not to question the need for reentry services for noncitizens or the nature of the proposals themselves, but rather to suggest that justifications other than the desire to reduce recidivism must motivate the provision of reentry services to noncitizen offenders.²⁸ If other reasons inspire the provision of reentry services at the front end, financial support for these services will not be questioned at the back end if advocates do not see a reduction in recidivism some had initially hoped for.

Moreover, questioning the link between reentry services and recidivism rates for noncitizens raises larger questions about the usefulness of incarceration for entry-related offenses, the criminalization of these types of violations of immigration law, and the consequence of “banishment” for a vast array of state and federal crimes. Indeed, we may look to the growing number of states that provide post-conviction relief in state court—that is, the vacatur of state criminal offenses in order to prevent adverse immigration consequences in federal immigration court—so that noncitizens are able to lawfully remain with their family in the U.S. after having served their sentence for the criminal offense.²⁹ If we were able to take removal out of the punishment for at least some offenses, reentry services could then effectively work to address employment in the U.S., provide drug addiction and mental health treatment, and ensure that children have the opportunity to be raised by their parents in their home and within their community.³⁰ Reentry services such as these are a benefit to all families and individuals alike.

28. *Cf.* Fonda & Williams, *supra* note 26 (arguing the recidivism rates of participants should not be the only marker of whether a prison arts program is valuable to offenders and the prison system).

29. *See, e.g.*, CAL. PEN. CODE § 1473.7 (West 2019); FLA. R. CRIM. P. 3.850; HAW. REV. STAT. ANN. § 802E-3 (West 2019); N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2019); OHIO REV. CODE ANN. § 2943.031 (West 2019); WASH. REV. CODE ANN. SUPER. CT. CRR 7.8 (West 2019).

30. There are many highly effective non-profit organizations providing reentry services to individuals released from prison in the U.S. *See, e.g.*, THE ANTI-RECIDIVISM COALITION, <http://www.antirecidivism.org/> [<https://perma.cc/6F3N-ZW5B>] (last visited Apr. 2, 2019); DELANCY STREET FOUNDATION, <http://www.delanceystreetfoundation.org> [<https://perma.cc/8AKL-RHCM>] (last visited Mar. 9, 2019); HOMEBOY INDUSTRIES, <https://homeboyindustries.org> [<https://perma.cc/7GHJ-VCW8>] (last visited Mar. 9, 2019); PROJECT KINSHIP, <https://www.projectkinship.org/> [<https://perma.cc/KVJ5-QB83>] (last visited Mar. 9, 2019).