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One Strike and You're Out! The Crumbling Distinction between the Criminal and the Civil for Immigrants in the Twenty-first Century

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ONE STRIKE AND YOU'RE OUT! THE CRUMBLING DISTINCTION BETWEEN THE CRIMINAL AND THE CIVIL FOR IMMIGRANTS IN THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

The twenty-first century dawned ominously for immigration law. While many of the changes to U.S. immigration law we discuss in this article occurred just before the turn of the twenty-first century, it is our observation that the September 11, 2001, terrorist

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attacks and America's launch of the war on terror led directly to the current atmosphere of enforcement—first by the agencies responsible for administering U.S. immigration laws. This has included renewed energy for the deportation of non-U.S. citizens convicted of a wide range of crimes, both violent and non-violent.

There are numerous fascinating legal areas into which any discussion of immigration could tend to take us, including federal versus state power, labor law, income taxation and Social Security, refugee issues—not to mention policy discussions about whether and how to change our immigration laws¹—and what, if anything, to do about illegal² immigrants in the United States (a population most recently estimated at almost twelve million).³ Our aim in this article is more modest: we will focus on immigration consequences

1. The main body of immigration laws is the Immigration and Nationality Act of 1952, which has been amended numerous times and is commonly referred to by all immigration agencies and courts as the “INA.” The INA appears in the U.S. Code at Title 8, Chapter 12. Because the numbering of sections within the INA does not exactly correspond to those same sections’ numbering in Title 8 of the U.S. Code, this article will give the corresponding 8 U.S.C. section number for any INA section cited.

2. This article will use the term “illegal” to describe the legal status of those foreign citizens who do not currently have an approved, unexpired immigration status authorized by the Department of Homeland Security. The supposedly less offensive term “undocumented” is simply not suitable to a professional level discussion of immigration law because it implies that it is the mere lack of a piece of paper that determines whether or not a foreign citizen has the right to be in the United States. The term “undocumented” obscures the fact that ultimately immigration documents either are or are not issued based upon *legal* rights. The terms “legal” and “illegal” place the proper emphasis on the fact that it is the *law* (with interpretation and application) that determines whether a foreign citizen has an unexpired right to be in the United States. Furthermore, the term “undocumented” would only cover those foreign citizens who cross into the United States illegally from the very start (those who “enter without inspection,” commonly referred to as having “EWT’d,” usually across the southern border). By contrast, the term “illegal” properly includes not only those who have EWT’d but also those many tens of thousands who were in fact initially admitted lawfully on a visa (such as a visitor’s visa) and then overstayed the permitted temporary period of time, or who though lawfully admitted on a visa then engaged in activity (usually employment) that is not permitted for their particular nonimmigrant visa category. The term “illegal” also includes those foreign citizens who used fake documents (such as someone else’s valid passport) to enter the United States through a proper port of entry such as an international airport—such an individual was “documented” but committed an act of fraud that complicates the individual’s immigration case in the future in ways very different from someone who EWT’d.

3. See JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW (2008), <http://pewhispanic.org/files/reports/94.pdf>.

of criminal convictions, with an eye to Minnesota-specific examples that illustrate the topics we address.

We do not intend for this article to be a comprehensive practice guide for practicing immigration attorneys and criminal defense attorneys—even limited to the issue of immigration consequences of criminal convictions, the topic is much too broad for a single article to serve as a tool for daily practice. There are several well-reputed practice guides⁴ available to the criminal defense and immigration bars, as well as one Minnesota-specific manual prepared by a highly reputed, then-local, immigration attorney for use by public defenders.⁵ Rather, our more modest goal in this article is to present the general legal community with a glimpse into the sometimes Kafkaesque world of immigration, and to provide judges, prosecutors, defense attorneys, and law clerks alike with an appreciation for the immigration ramifications of criminal proceedings. It is precisely because the immigration consequences of criminal convictions can be so harsh (with little room for discretionary relief by the time a deportation⁶ case is

4. See, e.g., DAN KESSELBRENNER & LORI ROSENBERG, *IMMIGRATION LAW AND CRIMES* (Nat'l Law. Guild); NORTON TOOBY, *CRIMINAL DEFENSE OF IMMIGRANTS* (4th ed. 2007).

5. MARIA BALDINI-POTERMIN, *DEFENDING ALIENS IN MINNESOTA COURTS: A SUMMARY OF PROVISIONS OF IMMIGRATION LAW AND CLIENT SCENARIOS* (1999). A version of this resource was published in *Law and Inequality: A Journal of Theory and Practice*, 17 *LAW & INEQ.* 567 (1999). To the best of the author's knowledge, there has not been an opportunity for this manual to be updated since 1999, and thus certain conclusions it reaches must be modified in light of the past nine years of immigration case law. It remains, however, an exceptionally useful and well-written presentation with practical advice for real cases.

6. The term "deportation" is somewhat outdated. The original Immigration and Nationality Act of 1952 distinguished between "deportation" proceedings (for foreigners who had entered the United States, whether legally or not) and "exclusion" proceedings (for foreigners who had not made an entry to the United States, i.e., were apprehended while trying to enter the United States even if later physically paroled into the United States to await exclusion proceedings). Compare INA § 236(a), 8 U.S.C. §§ 1251–52 (2006) (exclusion proceedings) with INA § 242(b) (removal proceedings). The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 merged these two separate kinds of proceedings into a single "removal" proceeding. See IIRAIRA, Pub. L. No. 104-208, § 304, 110 Stat. 3009–588 (1996) (creating present-day INA § 240 removal proceedings). Despite this change from "deportation proceedings" to "removal proceedings," the term "deportable" is maintained in the statute and continues to be used. See, e.g., INA § 237, 8 U.S.C. § 1227 ("deportable aliens"). Since "deportation" remains the word in general usage among the public outside the realm of Immigration Court, this article will use the terms "deportable" and "deportation" instead of "removable" and "removal."

before an immigration judge) that immigration considerations must figure into criminal defense strategy.

To frame the discussion properly, we will first briefly look at the all-critical distinction between citizens and aliens.⁷ We will then turn to the “collateral consequences” doctrine that is at the heart of the problem of deportation, resulting sometimes unintentionally as the result of certain criminal convictions.⁸ We will pause briefly to consider the recent instance of the complete dissolution of the civil–criminal divide in the case of criminal proceedings that from their very inception are designed to achieve deportation as the outcome.⁹ We will then turn to the immigration laws’ very broad definition of “conviction” that goes well beyond what most states’ law would consider a conviction.¹⁰ This will lead us to consider strategies both pre- and post-criminal court process that may arise in the cases of immigrants facing criminal charges or who already have criminal “convictions” for immigration purposes.¹¹ Where appropriate, we will use Minnesota-specific examples to illustrate how immigration laws apply.

II. CITIZENS VS. ALIENS—WHO IS AT RISK OF DEPORTATION?

It is the authors’ experience that in everyday speech, the concepts of “citizen” and “alien” often are blurred. It is common for native-born American citizens to think that when foreigners “get legal” they have become actual U.S. citizens. However, in truth it is very uncommon for foreign citizens to go from having no U.S. immigration status directly into U.S. citizenship.¹² For most foreigners, “getting legal” refers to becoming a Lawful Permanent

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.

11. See *infra* Parts VI–VII.

12. One narrow exception is the provision for children who are born outside the United States to a U.S. citizen parent (but do not automatically acquire U.S. citizenship at birth) and who continue to reside abroad. INA § 322, 8 U.S.C. § 1433 (2006). This provision allows certain such children under the age of eighteen to enter the United States as a temporary visitor, at which time a brief interview is conducted and U.S. citizenship conferred, so that the child goes directly into U.S. citizenship status without ever having first become a Lawful Permanent Resident. See *id.* This provision for children residing abroad is the counterpart of a provision that applies to children of U.S. citizens where the family resides in the United States. Compare INA § 322, 8 U.S.C. § 1433 with INA § 320, 8 U.S.C. § 1431 (2008). See also 3A C.J.S. *Aliens* § 1824 (2008).

Resident (LPR). LPR status is the right to reside permanently and work in the United States without restriction.¹³

Achieving LPR status is usually the end result of a tortuous (and torturous) process, often through more than one federal agency.¹⁴ Approval of Permanent Residence is genuine cause for

13. More accurately, “the term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). Permanent Resident status may be “abandoned” by voluntary relinquishment or involuntarily through either spending too much time outside the United States or taking other actions inconsistent with residing permanently in the United States, such as taking full-time employment abroad, purchasing a primary home abroad, and/or claiming nonresident status to reduce U.S. income tax liability. See Deborah F. Buckman, Annotation, *Abandonment of Lawful Permanent-Resident Status*, 193 A.L.R. FED. 673 (2004). For a comprehensive discussion of how to avoid abandonment of Permanent Residence, including a thorough scholarly discussion of the applicable federal and immigration case law, see Gary Endelman & Cyrus Mehta, *Home is Where the Card Is: How to Preserve Lawful Permanent Resident Status in a Global Economy*, 13 *Bender’s Immigration Bulletin* 849 (2008). For purposes of this article, it is only necessary to consider Permanent Residents who reside in the United States and who have not abandoned their status. If a Permanent Resident is deported from the United States (usually because of a criminal conviction), the status of Permanent Resident is automatically rescinded. See INA § 246(a), 8 U.S.C. § 1256(a) (2006).

14. The main federal agency charged with administration and enforcement of the immigration laws is the U.S. Department of Homeland Security (DHS). See INA § 103, 8 U.S.C. § 1103. DHS subdivides its immigration functions into three sub-agencies: U.S. Citizenship and Immigration Services (USCIS), primarily charged with approving immigration benefits such as I-485 applications to adjust to permanent resident status; Customs and Border Protection (CBP), which includes the Border Patrol and which inspects all foreign citizens arriving at international airports and land/sea ports of entry who seek lawful admission on either a temporary or permanent basis; and Immigration and Customs Enforcement (ICE) charged with apprehending and removing foreigners subject to deportation. See Noël L. Griswold, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 *SUFFOLK U. L. REV.* 207 (2005). Some immigration functions, however, are handled by the U.S. Department of State (DOS), which issues visas through U.S. Embassies and Consulates overseas and the U.S. Department of Labor (DOL), which has a role in cases concerning both temporary and permanent employment of foreign citizens in the United States. Each of these agencies publishes regulations that appear in the Code of Federal Regulations (CFR) as well as other various memoranda, cables, and letters that do not have the force of regulatory authority but nonetheless are highly relevant to the daily practice of immigration law. Unless needed to illustrate a specific point, this article will not provide the CFR cites that correspond to and clarify the procedures concerning particular INA provisions. For the issues raised in this article, the case law of the Board of Immigration Appeals (BIA) and the federal courts is more often the authority that interprets the provisions of the INA as they apply to criminal convictions versus the agencies’ regulations.

celebration, yet it is still a far cry from being a U.S. citizen. Becoming a naturalized U.S. citizen is a separate process that in most cases requires first being a Permanent Resident for at least five years.¹⁵ Many Permanent Residents never become U.S. citizens, either by choice or because they are unable to meet the requirement to demonstrate an ability to read, write, and speak words in ordinary usage in English,¹⁶ or are unable to demonstrate “good moral character”¹⁷ for the applicable period of time.

For law abiding Permanent Residents who do not incur any criminal convictions, being a Permanent Resident (but not a U.S. citizen) might not make much difference in their day-to-day life. Permanent Residents can work for any employer of their choice, be self-employed, or not be employed at all if they are financially supported.¹⁸ Permanent Residents may buy and sell property, and even hold political office so long as U.S. citizenship is not a requirement for such positions.¹⁹ The main right that U.S. citizens have, which Permanent Residents do not have, is the right to vote.²⁰

The distinction between being a LPR versus a U.S. citizen, however, comes into stark relief when criminal convictions arise. It comes as a shock to some Permanent Residents that they are still subject to deportation from the United States for a wide variety of crimes. The distinction between having Permanent Resident status versus having one of the lesser immigration statuses²¹ is not

15. See INA § 316, 8 U.S.C. § 1427. For certain spouses of U.S. citizens, the required period of Permanent Residence is reduced to three years or shorter. Cf. INA § 319(a), (b), 8 U.S.C. § 1430(a), (b).

16. INA § 312(a)(1), 8 U.S.C. § 1423(a)(1).

17. See INA § 316(a), 8 U.S.C. § 1427(a) (requirements for naturalization to U.S. citizenship, including “good moral character”) and INA § 101(f), 8 U.S.C. § 1101(f) (defining certain categorical cases where good moral character is lacking).

18. 3 C.J.S. *Aliens* § 48 (2008).

19. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

20. If a Permanent Resident votes in any federal, state, or local election and such voting violates a federal, state, or local law restricting voting to U.S. citizens only, the Permanent Resident becomes deportable with virtually no chance of relief from deportation. See INA § 237(a)(6), 8 U.S.C. § 1227(a)(6). For a comprehensive discussion of state and local laws permitting or prohibiting voting by non-U.S. citizens, including policy arguments in favor of allowing Permanent Residents to vote, see Elise Brozovich, *Prospects for Democratic Change: Noncitizen Suffrage in America*, 23 *HAMLIN J. PUB. L. & POL’Y* 403 (2002).

21. Lower down in the hierarchy of immigration status are “nonimmigrants,” who are foreign citizens admitted to the United States on a visa that limits them to a specific activity for a specific, definite period of time. Common examples are foreign citizens who enter the United States on a B-1/B-2 visitor’s visa with

controlling on the issue of deportability for criminal activity—having secured Permanent Resident status does not provide immunity from deportation when it comes to criminal activity.

Rather, the key distinction is between citizens and aliens. In short, an alien is any person who is not a citizen of the United States.²² Aliens may be deported, while citizens may not. It is as simple as that. When it comes to deportation for criminal activity, being a Permanent Resident versus having one of the lesser alien statuses²³ offers little additional relief.²⁴ Very little discretionary relief is available for Immigration Judges to consider applying to Permanent Residents who face deportation for certain criminal convictions. For certain criminal convictions, the determination of whether or not an alien will be deported is more categorical—either the outcome of criminal proceedings will result in no

permission to stay up to six months (without work authorization); F-1 students attending a college or university to earn a Bachelor or higher degree; and H-1B temporary workers in “specialty occupations.” *See generally* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). Many nonimmigrants aspire to become Permanent Residents through employer sponsorship, though not all are successful. Other legal immigration statuses that are less than full Permanent Residence include refugee/asylee status (which allows applying for Permanent Residence after a one-year waiting period) and Temporary Protected Status (TPS) for individuals from certain countries designated in the Federal Register on a sporadic basis. *See* INA §§ 207–08, 244, 8 U.S.C. §§ 1157–58, 1254a.

22. More accurately, “the term ‘alien’ means any person not a citizen *or national* of the United States.” INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (emphasis added). The term “national of the United States” in turn is defined as either an actual U.S. citizen or “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” INA § 101(a)(22), 8 U.S.C. § 1101(a)(22). This narrow category applies mainly to individuals born in certain outlying possessions of the United States. *See* INA § 308, 8 U.S.C. § 1408. For purposes of this article, the distinction between “citizen” and “national” is unimportant, since nationals are not “aliens” and thus not subject to deportation.

23. *See supra* note 21. For other non-criminal grounds of deportability, the distinction between being a Permanent Resident versus a temporary nonimmigrant or an illegal alien is more significant. For example, the grounds of deportation for having entered illegally, INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), or for having entered legally but later fallen out of temporary nonimmigrant status, INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C), do not apply to a Permanent Resident.

24. *See e.g.*, INA § 236(c), 8 U.S.C. § 1226(c) (requiring mandatory detention of aliens deportable for criminal convictions, regardless of whether or not the alien is a long-time Permanent Resident). *See also*, *Demore v. Kim*, 538 U.S. 510 (2003) (rejecting constitutional challenge by Permanent Resident to mandatory detention under INA § 236(c) and noting “[i]n sum, the detention at stake under [INA § 236(c)] lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal.”).

deportability or will result in near-certain deportability because the forms of relief available in Immigration Court are virtually eliminated.²⁵

Many immigration attorneys have witnessed the spectacle of aliens who became Permanent Residents at a young age (through family-based immigration, or whose family was granted refugee or asylee status and became Permanent Residents later, or who came through adoption)²⁶ only to be deported to the country they left as infants or as young children. While it is not the authors' intention to downplay the seriousness of crimes committed by aliens who are subject to deportation, such cases involving lifelong Permanent Residents who did not become automatic U.S. citizens are especially tragic. Many such Permanent Residents were not aware that they were not U.S. citizens and have grown up culturally as Americans, with little or no knowledge of the country from which they were adopted. Yet, under deportability grounds for criminal convictions, their long period of residence often does not factor

25. See *infra* note 36 (listing commonly sought forms of relief from deportation). Attention concerning the issue of deportability for criminal convictions tends to focus on aliens who are Permanent Residents, because aliens who have fallen out of status or who have never had any valid immigration status in the first place are much more easily deported under the grounds related to expiration of or lack of status. See *supra* note 23. Even for illegal aliens, however, who if apprehended by DHS would be deportable under those easier grounds, avoiding deportability for a criminal conviction through careful planning at the criminal court stage is vital and should not be neglected. This is because such an illegal alien's future ability to get Permanent Resident status will require proving that the alien is "not inadmissible" to Permanent Resident status. While the grounds of inadmissibility for criminal activity do not exactly match the grounds of deportability for criminal convictions (the grounds of inadmissibility are broader, see Section VI below), the two are similar and a proper analysis of immigration consequences of crime should also take inadmissibility into account. Where necessary below, this article discusses inadmissibility as well.

26. Following enactment of the Child Citizenship Act (CCA) of 2000, Pub. L. No. 106-395 (2000) (codified at INA § 320, 8 U.S.C. § 1431), orphans adopted by U.S. citizens who acquire Permanent Residence through an established procedure assisted by USCIS automatically become U.S. citizens as well. This avoids the problem of such children (and their U.S. citizen adoptive parents) thinking they are U.S. citizens, only to discover as adults that they are still only Permanent Residents and have unwittingly rendered themselves deportable by claiming to be U.S. citizens, either through applying for a U.S. passport or through voting. The CCA created exemptions from deportability for such unintentional claims to U.S. citizenship by an adopted Permanent Resident. See, e.g., INA § 237(a)(6)(B), 8 U.S.C. § 1227(a)(6)(B). Yet, adopted children who turned eighteen prior to the effective date of the CCA and who did not become automatic U.S. citizens under the more restrictive pre-CCA law remain Permanent Residents; such aliens remain subject to deportation for certain criminal convictions.

into whether they may stay in the United States.²⁷ Thus, the analysis of deportability must be an integral part of strategizing criminal defense at the outset of criminal proceedings. By the time an alien with a criminal conviction comes to the attention of Homeland Security, it may well be too late to prevent deportation.²⁸

III. THE CIVIL–CRIMINAL DIVIDE & THE COLLATERAL CONSEQUENCES DOCTRINE

Avoiding deportation due to criminal activity is complicated by the fact that deportation proceedings are civil in nature, not criminal.²⁹ The civil–criminal distinction is a longstanding one in American law; many of the constitutional protections in criminal proceedings have not extended to civil court proceedings.³⁰ As the

27. See *infra* note 36 (explaining that Cancellation of Removal under INA § 240A, 8 U.S.C. §1229b (a) is a discretionary form of relief that is categorically barred if the Permanent Resident has a conviction for an aggravated felony).

28. It is, of course, wise for criminal defense counsel to determine whether a client is in fact a U.S. citizen. While not common, some defendants are pleasantly surprised to find out that they are in fact U.S. citizens without knowing it (as compared to the more tragic situation). See *supra* note 26. There are provisions for deriving U.S. citizenship automatically at birth even if not physically born in the United States. See INA § 301, 8 U.S.C. § 1401. Or there is the possibility for some Permanent Residents to acquire U.S. citizenship automatically before the age of eighteen, even if they are not aware of it. See *supra* note 26 and accompanying text. Because automatic acquisition of citizenship most often hinges on the citizenship laws in effect at either the time of birth or time the relevant triggering events occurred, and since U.S. citizenship laws have been amended numerous times in the second half of the twentieth century, interested practitioners are recommended to consult Daniel Levy's comprehensive treatise that compiles and analyzes past and current U.S. citizenship law. Daniel Levy, U.S. CITIZENSHIP & NATURALIZATION HANDBOOK (2007 ed.). There is no better way to win a deportation case than to prove that your client is a U.S. citizen and thus not deportable.

29. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.”).

30. See, e.g., *Hudson v. United States*, 522 U.S. 93 (1997) (where a federal agency imposed monetary penalties and occupational debarment on bankers, then later criminally prosecuted the bankers for essentially the same conduct, held, that the Double Jeopardy Clause of the Fifth Amendment was not implicated because the federal administrative agency proceedings were civil, not criminal). Deportation proceedings are administrative agency proceedings conducted by the Executive Office for Immigration Review (EOIR), a part of the Department of Justice. See generally 8 C.F.R. § 1003.0 (2008). The immigration judges who hear deportation cases are appointed by the Attorney General, see 8 C.F.R. § 1003.10 (2008); they are not Article III judges with lifetime tenure, and the quality of decision making varies greatly. Recently the Department of Justice's own internal Office of Professional Responsibility (OPR) published an extensive report on the

U.S. Supreme Court has famously stated, “it must be remembered that although deportation technically is not criminal punishment . . . deportation may result in the loss ‘of all that makes life worth living.’”³¹

The effect of this civil–criminal distinction is particularly catastrophic in the case of immigrants facing deportation for criminal convictions. Other civil sanctions such as debarment from the practice of law, or forfeiture of property, leave a U.S. citizen criminal defendant still able to earn some other livelihood in the United States. But deportation means permanent exclusion from the United States with almost no hope of ever returning, except to visit briefly.³² Although deportation will be the near certain result from incurring any one of a broad range of criminal convictions, it is nonetheless deemed only a “collateral consequence” of the criminal process.

The distinction between the direct consequences of a conviction or guilty plea and the collateral consequences is a

allegations of politicized hiring for numerous positions within the Justice Department, including Immigration Judges, commonly abbreviated as “IJs.” See U.S. DEPARTMENT OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008) www.usdoj.gov/opr/. The position of IJ is a civil service position for which considering applicants’ political and ideological affiliations is not permitted; however, for a period of several years, the Office of the Attorney General applied a political litmus test to the hiring of IJs. In fact, the OPR concluded that “[t]he evidence showed that the most systematic use of political or ideological affiliations in screening candidates for career positions occurred in the selection of IJs [versus in other Justice Department hires].” *Id.* at 137. The OPR report’s conclusion concerning the hiring of IJs stated that:

[i]n sum, the evidence showed that [Office of Attorney General] employees [Kyle] Sampson, [Jan] Williams, and [Monica] Goodling violated federal law and [Justice] Department policy, and Sampson and Goodling committed misconduct, by considering political and ideological affiliations in soliciting and selecting IJs, which are career positions protected by the civil service laws.

Id.

31. *Bridges v. Wixon*, 326 U.S. 135, 147 (1945), (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

32. Deportation from the United States for a criminal conviction will generally (though not absolutely always) leave aliens permanently “inadmissible” to the United States for the rest of their lives. See INA § 212(a), 8 U.S.C. § 1182(a) (2006) (inadmissibility grounds). There is the possibility of making temporary visits to the United States in the future if a waiver is granted, but this waiver is temporary and does not make it possible to apply for Permanent Residence in the future. See INA § 212(d)(3), 8 U.S.C. § 1182(d)(3).

legitimate one—to require criminal courts to advise a defendant of *every* possible collateral consequence under the sun could become absurd. (E.g., “Your honor, when you accepted my plea of guilty to solicitation of a prostitute it was a manifest injustice because you did not advise me that my wife was likely to find out about it, and now she’s divorcing me.”). If guilty pleas could be overturned because a defendant was not advised of every single remote possibility of pleading guilty, there would not be any finality to the criminal court process.³³

Compared to lesser hardships such as the loss of a professional license or forfeiture of property, though, deportation is arguably not just a “collateral” consequence that *might* happen following certain criminal convictions. Under present immigration laws, the fact that an alien defendant will or will not become deportable is near certain by the time criminal proceedings are concluded.³⁴ Where in the past there was the possibility of an immigration judge granting a discretionary waiver by taking into consideration factors such as the alien’s length of residence in the United States,³⁵ at present the relief from deportation that is available has been almost entirely proscribed once the conviction passes a certain threshold.³⁶

33. Procedurally, many of the claims by aliens that they were not advised of the likelihood of deportation arise not at the trial court level itself but rather in the form of motions to vacate guilty pleas after criminal proceedings are complete. We will touch on the issue of vacating of pleas further below. See *infra* Part VII.

34. See *infra* note 36.

35. See INA § 212(c), 8 U.S.C. § 1182(c), *repealed by* Illegal Immigration Reform & Immigration Responsibility Act of 1996 (“IIRAIRA”), Pub. L. No. 104-208, INA § 304(b), 110 Stat. 3009, 3597 (1996). After much litigation, the Supreme Court restored INA § 212(c) relief for aliens who had pled guilty prior to April 24, 1996. See *INS v. St. Cyr*, 533 U.S. 289 (2001).

36. The three most commonly triggered grounds of deportation for criminal convictions are for Crimes Involving Moral Turpitude (“CIMTs”), see INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), aggravated felonies, see INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), and controlled substance offenses, see INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). The “aggravated felony” ground is defined by a very broad list of offense categories defined at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). The aggravated felony list is quite broad and includes attempts to commit any enumerated aggravated felony, leading to extreme results such as one recent case in which a Permanent Resident was deportable for being convicted of an aggravated felony for an attempt to commit a crime involving fraud or deceit in which the loss to the victim(s) was more than \$10,000, even if the loss did not actually occur. See *In re S-I-K*, 24 I. & N. Dec. 324 (2007). The most commonly sought forms of relief from deportation in immigration court are (ignoring for the moment the distinction between Permanent Residents versus aliens with a lesser or no status and not including the

Thus, we would submit that the reality of deportation (unlike other “collateral consequences”) is that in almost black-and-white, up-or-down fashion, the outcome of the criminal court proceedings determines whether or not deportation will result. Though this reality certainly is not the fault of the states, it is the present reality. We submit that deportation *should* be considered a direct consequence of criminal court proceedings that must be fully explored and discussed between the judge, prosecutor and defense attorney, and the alien defendant, before any plea is entered.

Much as we might like to see this shift in the law take place, we must admit that this argument has not found traction in the courts. In this regard, it is worth examining what the Minnesota Supreme Court has held concerning deportation as a collateral consequence of pleading guilty to a crime. In the *Alanis* case, defendant Roel Alanis was a longtime Permanent Resident who pled guilty to felony and misdemeanor offenses involving controlled substances and welfare fraud.³⁷ The nature of the offenses and the maximum possible punishments³⁸ made Alanis deportable.³⁹ The court

small category of family-based immigrants with the proper facts to “adjust status” to Permanent Resident to avoid being deported): asylum, INA § 208, 8 U.S.C. § 1158, cancellation of removal, § 240A, 8 U.S.C. § 1229(b), withholding of removal, § 241(b)(3); 8 U.S.C. § 1231(b)(3), withholding of removal under the Convention Against Torture (CAT), see Pub. L. No. 105-277, Div. G, § 2242(a) (1998); see also 8 C.F.R. §§ 1208.16–18), and for some nationalities, Temporary Protected Status (TPS), see INA § 244, 8 U.S.C. § 1254(a). Each of these forms of relief is either categorically or near effectively barred for aliens convicted of aggravated felony crimes. See INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (barring asylum), INA §§ 240A(a)(3) & (b)(1)(C), 8 U.S.C. §§ 1229b(a)(3) & (b)(1)(C) (barring cancellation of removal), INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (barring withholding of removal in most cases). About the only form of relief from deportation not barred by an aggravated felony conviction is withholding under the CAT. See, e.g., *In re J-F-F*, 23 I. & N. Dec. 912 (2006) (alien with aggravated felony conviction permitted to request withholding of removal under CAT, though relief was denied due to a lack of evidence that it was more likely than not the alien would be tortured if returned to his home country).

37. *Alanis v. State*, 583 N.W.2d 573 (Minn. 1998).

38. Of the main deportation grounds for criminal convictions, one hinges upon the maximum *possible* punishment for the particular crime (regardless of the actual sentence imposed), see INA § 237(a)(2)(A)(a)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(a)(i)(II) (deportability for crimes involving moral turpitude “for which a sentence of one year or longer *may* be imposed”), while others hinge on the actual sentence imposed, see, e.g., INA §§ 101(a)(43)(G) and 237(a)(2)(A)(a)(iii), 8 U.S.C. §§ 1101(a)(43)(G) and 1227(a)(2)(A)(a)(iii) (deportability for aggravated felony theft crime only if an actual sentence of one year or longer is imposed), as interpreted by the BIA in *In re Song*, 23 I. & N. Dec. 173 (2001) (not deportable under INA §§ 101(a)(43)(G) and 237(a)(2)(A)(a)(iii) where a criminal court vacated the one year prison sentence

agreed that Alanis indeed had not been warned of the possible immigration consequences.⁴⁰ That lack of a warning, however, did not mean that Alanis's plea was not intelligent, thus failing the third prong of the test that a manifest injustice has occurred when a guilty plea is made which is not accurate, voluntary, and intelligent.⁴¹ Since Alanis's guilty plea was accurate, voluntary, and intelligent as to the *direct* consequences of his plea (i.e., the maximum prison sentence to be imposed and the amount of any fine), his lack of knowledge of the collateral consequence of deportation did not constitute a manifest injustice.⁴² As the court put it,

[I]t makes sense that deportation is not a direct consequence of the guilty plea because deportation is neither definite, immediate, nor automatic. Before a resident alien [i.e., a Permanent Resident] such as Alanis can be deported, the INS⁴³ must exercise its discretion to commence deportation proceedings and, prior to deportation, there are various administrative procedures which must be followed.⁴⁴

The reality, however, is that deportation is virtually definite, immediate, and automatic. Contrary to the court's assertion that the decision whether or not to initiate removal proceedings against a particular alien with a deportable criminal conviction is a pure discretionary decision by DHS that might well not result in deportation, the Immigration and Nationality Act clearly states: "[I]n the case of an alien who is convicted of an offense which [sic] makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of conviction."⁴⁵

of an alien convicted of a theft offense and revised the sentence to 360 days of imprisonment).

39. For the controlled substance offense convictions that Alanis pled guilty to, deportability under INA § 237(a)(2)(C)(i), 8 U.S.C. 1127(a)(2)(C) was certain.

40. *Alanis*, 583 N.W.2d at 578.

41. *Id.*

42. *Id.* at 579.

43. The INS was dissolved on March 1, 2003 and its functions were transferred to DHS. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

44. *Alanis*, 583 N.W.2d at 578-79.

45. INA § 239(d)(1); 8 U.S.C. § 1229(d)(1) (emphasis added). For criminal court proceedings in federal court against an alien who is not a Permanent Resident, the INA allows for the deportation order for an aggravated felony crime to be entered as part of the very same criminal court proceeding, which further

The use of “shall” (as opposed to “may”) confirms that the deportation of aliens who are deportable for criminal convictions is given the highest priority. And as noted earlier, once an alien defendant is convicted of any of the wide range of crimes that constitute an “aggravated felony” for immigration purposes, the chances of escaping deportation are next to none.⁴⁶

Lest it seem that we are blaming the state courts for unwittingly luring alien defendants into getting deported without squarely confronting the issue, we will note that following the Minnesota Supreme Court’s decision in *Alanis*, the Minnesota Rules of Criminal Procedure were updated to require that all defendants who intend to plead guilty first be advised that if the defendant is not a U.S. citizen, a plea of guilty may result in deportation.⁴⁷ It must be noted, however, that these advisals are made as part of a long list of advisals at the beginning of a hearing at which a defendant generally already plans to plead guilty. Based upon our own experience we are forced to question whether these advisals truly “sink in” and result in alien defendants factoring in the risk of deportation into their decision to plead guilty or not. For an advisal about possible deportation to be more effective, it should be required at the beginning of the criminal court process, no later than the charging stage, with repetition later in the proceedings before pleading guilty or proceeding to trial.

IV. THE BLURRING OF THE CRIMINAL–CIVIL DISTINCTION: DEPORTATION AS AN INTENDED CONSEQUENCE

Even if federal and state case law will for the foreseeable future continue to treat deportation as only a collateral consequence of a criminal conviction or other disposition, the reality is that the civil–criminal distinction is being eroded steadily. Or, to be more accurate, in some recent instances the pretense of deportation being a collateral consequence is maintained while the reality is that criminal proceedings are undertaken with the desired

erodes the claim that deportation is not a direct consequence of the criminal conviction. *See* INA § 238, 8 U.S.C. § 1228.

46. *See supra* note 36. Even if a criminal conviction happens to not belong to the aggravated felony list, deportable convictions for crimes involving moral turpitude or controlled substances weigh against granting discretionary relief from deportation.

47. MINN. R. CRIM. P.15.01 ¶ 10(d) (2006). About half of the fifty states have similar rules requiring that defendants be warned about possible deportation consequences. *See* Kesselbrenner, *supra* note 4, at Appendix K.

immigration outcome in mind.

Nowhere was this clearer than the recent mass prosecution of illegal alien workers conducted in concert with the workplace raid on the Agriprocessors kosher meatpacking plant in Postville, Iowa, in May 2008. Much has been written from various sides in the debate(s) over illegal immigration about Postville and more generally about the soundness and civility of using of workplace raids as a deterrent to the hiring of illegal workers, and we do not intend to rehash those arguments. The single issue that concerns us here is the publicly documented reality that the criminal prosecution of illegal alien employees at Agriprocessors was intentionally structured to achieve a supposedly noncriminal collateral consequence, i.e., deportation.

First consider a brief summary of the Postville raid and criminal prosecution. On May 12, 2008, U.S. Immigration & Customs Enforcement (ICE) executed a criminal search warrant at the Agriprocessors plant, as well as a civil search warrant for aliens illegally in the United States.⁴⁸ The coordinated effort was the result of several months of collaboration between ICE and the Department of Justice (DOJ).⁴⁹ Within seventy-two hours of the initial arrests on immigration charges, U.S. Attorneys charged 306 workers on a variety of charges including alleged aggravated identity theft, fraudulent use of Social Security numbers, fraudulently using a Permanent Resident card, and other alleged crimes.⁵⁰ Despite the serious nature of the felony charges, barely a week later on May 20, 2008, eighty-five of the defendants had already pled guilty; of them, seventy-seven had been sentenced to five-month prison terms.⁵¹ The joint effort between ICE and DOJ was openly promoted by the agencies as designed to achieve a particular immigration outcome: that the alien defendants who pled guilty would be immediately deported after serving their five-month prison terms⁵² or else face a trial on more serious charges, which if convicted would also result in certain deportation after a longer prison term.⁵³ Aside from any concerns about the coercive

48. News Release, U.S. Immigration and Customs Enforcement (May 12, 2008), <http://www.ice.gov/pi/news/newsreleases/index.htm>.

49. *Id.*

50. *Id.*

51. News Release, U.S. Immigration and Customs Enforcement, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080520waterloo.htm>.

52. *Id.*

53. *See supra* notes 45–46 and accompanying text.

nature of the proceedings⁵⁴ and the appropriateness of using identity theft statutes that are traditionally reserved for charging those operating fraud rings versus those who commit identity theft in order to work illegally,⁵⁵ what is relevant for our brief examination is that the criminal justice system and the immigration enforcement system were working in lockstep to ensure that aggravated felony convictions were secured and that deportation was certain. This included the court invoking the not commonly used judicial removal provision that allows a federal judge who has convicted a non-Permanent Resident of an aggravated felony to simultaneously enter an order of deportation without need for a separate later proceeding before an immigration judge.⁵⁶

Again, without taking a position on whether it is appropriate to expend law enforcement resources⁵⁷ on the kind of tactics and mass criminal court processing procedures employed in Postville to enforce the restriction against hiring of unauthorized workers,⁵⁸ for

54. The American Civil Liberties Union (ACLU) criticized the proceedings as involving “pressure cooker tactics” with scripted responses for the judges, prosecutors, and defense attorneys prepared in advance. See Press Release, Am. Civil Liberties Union, ACLU Obtains Government ‘Manual’ for Prepackaged Guilty Pleas for Prosecution of Immigrant Workers in Postville, Iowa (July 31, 2008), <http://www.aclu.org/immigrants/workplace/36219prs20080731.html>.

55. It has been argued that merely making up a nine-digit number out of thin air (which happens to coincide with a real person’s Social Security Number, though not intentionally so) and using it to work illegally does not constitute knowingly stealing that real person’s identity. Following the Postville raid and mass prosecutions and several other similar high-profile raids employing similar tactics, the U.S. Supreme Court granted certiorari in an Eighth Circuit case to determine whether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the government must show that the defendant knew that the means of identification used belonged to another person. See *U.S. v. Flores-Figueroa*, 274 Fed. App’x. 501, No. 07-2871 (8th Cir. Apr. 23, 2008) (per curiam), cert. granted sub nom. *Flores-Figueroa v. U.S.*, No. 08-108, 2008 U.S. LEXIS 7827 (U.S. Oct. 20, 2008). See also Associated Press, *Justices Will Hear Identity-Theft Case*, N.Y. TIMES, Oct. 20, 2008, and Adam Liptak, *Justices Take Case on Illegal Workers and Penalties for Identity Theft*, N.Y. TIMES, Oct. 21, 2008, at A14 (discussing potential impact on Postville-type raids of a Supreme Court ruling on this issue).

56. See INA § 238, 8 U.S.C. § 1228(c) (2006).

57. According to a recent article in the Des Moines Register, ICE reported that the cost of the Postville Raid was approximately \$5.2 million. This figure includes only the costs to the ICE agency specifically, and does not include any further costs to the other agencies involved (e.g., DOJ & DOL), who declined the Des Moines Register’s requests to provide cost figures for the Postville raid. See William Petroski, *Taxpayers’ Costs Top \$5 Million for May Raid at Postville*, DES MOINES REGISTER, Oct. 14, 2008.

58. The requirement to verify a new hire’s authorization to work in the United States specifically prohibits employers from trying to determine whether a

purposes of this article we merely note that the Postville operation shows that deportation is anything but a “collateral” consequence of criminal proceedings. Instead of being a possible civil action taken after the criminal justice process has run its course, the present reality of criminal prosecution of aliens is that deportation may be a virtual certainty or even intended outcome of criminal prosecution. It is thus beholden upon counsel,⁵⁹ and indeed we would contend the courts and prosecuting bodies, to consider openly the likely immigration outcome of any criminal prosecution of an alien.

V. WHAT IS A “CONVICTION”? IT DEPENDS WHO YOU ASK . . .

For fans of the television drama *Law and Order*,⁶⁰ the criminal justice system appears neat and predictable. Bad guy commits crime. Good cop solves crime. Good prosecutor fights against zealous defense attorney, and jury pronounces an often just decision. If producer Dick Wolf wanted to present an alternative script filled with messy and unpredictable results, a *Law and Disorder* of sorts, the defendant would be an alien. This is because in the world of immigration law a “conviction” is not limited to a formal plea of guilt or a verdict or finding of guilt by a judge or jury, as it is under state law.⁶¹ Instead it encompasses a wide variety

new hire is a citizen or an alien, and requires the employer to focus only on whether the new hire presents any of a wide range of documents establishing identity and authorization to work. Thus, the requirement to show authorization to work (the process of completing Form I-9 within three days of hire for any job in the United States) applies to U.S. citizens as much as to aliens. *See generally* INA §§ 274A–274B, 8 U.S.C. §§ 1324(a)–1324(b).

59. The Ninth Circuit has overturned an alien’s federal court conviction for fraud based upon defense counsel’s affirmative and gravely incorrect advice that the alien defendant would not become deportable by pleading guilty. *See* U.S. v. Kwan, 407 F.3d 1005 (9th Cir. 2005). In a 2004 decision, the New Mexico Supreme Court went further and imposed an affirmative obligation on criminal defense counsel to advise clients of the specific immigration consequences of pleading guilty. *See* *State v. Paredes*, 101 P.3d 799, 805 (N.M. 2004) (“We hold that criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, *including whether deportation would be virtually certain*. . . . An attorney’s failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney’s omission.”) (emphasis added).

60. *See* NBC, http://www.nbc.com/Law_&_Order/ (last visited Dec. 13, 2008).

61. MINN. STAT. § 609.02 subd. 5 (2006) (defining “conviction” under

of dispositions that might surprise prosecutors and defense attorneys alike.

To elucidate this difference between the meanings of “conviction” in criminal law versus immigration law, it is important to first understand the basic idea of what a conviction is as it applies to all persons in the United States, citizens and aliens alike. Minnesota Statute section 609.02 subdivision 5 defines a conviction as either “a plea of guilty; or . . . [a] verdict of guilty by a jury or a finding of guilty by the court.”⁶² This is the generally accepted definition understood by the public nationwide, as evidenced by a simple online search of the term in non-lawyer resources. In laymen’s terms “conviction” refers to the final judgment rendered on the criminal after the plea of guilt.⁶³ Final judgment includes ascertainment of guilt by either judge or jury.⁶⁴ Where the defendant either admits to guilt in a plea, or does not contest the charge (also known as plea of *nolo contendere*), a judge accepts this plea as admission of guilt.⁶⁵ The regurgitation of these elementary concepts in criminal law may seem unnecessary, but these basic rules as to what is a conviction for citizens do not hold for aliens.

Let us now turn to the definition of “conviction” under immigration law. The definition is much broader than what most states would define as a conviction:

(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a

Minnesota criminal law).

62. *Id.*

63. See BLACK’S LAW DICTIONARY 358 (8th ed. 2004).

64. See The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/Criminal+conviction> (last visited Dec. 13, 2008).

65. See *id.*

court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.⁶⁶

This definition is designed to work around well-accepted state court procedures which allow a middle ground of “withholding adjudication of guilt” that does not let a defendant off scot-free but which provides one opportunity for a defendant (usually a first-time offender) to avoid incurring a conviction under state law. For example, for first-time drug offenders, the Minnesota Statutes allow criminal court proceedings to be deferred without an adjudication of guilt if the first-time offender pleads guilty and agrees to be placed on probation and participate in a drug or alcohol abuse awareness program.⁶⁷ Successful completion of the probation period requires that the court dismiss the proceedings, and the successful defendant thereby does not incur a conviction.⁶⁸ Indeed, the Minnesota Statutes go so far as to state that “[t]he discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime *or for any other purpose.*”⁶⁹

In the immigration realm, however, the immigration definition of conviction clearly would support finding a “conviction for immigration purposes” because this deferral procedure under Minnesota law requires that the defendant plead guilty to receive the deferral.⁷⁰ When adding on the probation that is imposed as part of this deferral, it is a restraint on the alien defendant’s liberty that thereby satisfies the immigration definition of conviction. Thus, we are left with the curious result that the immigration laws rely on state law and state criminal procedures/proceedings to create the “conviction” needed to make an alien defendant deportable, but then promptly ignore the sovereignty of the states to determine the boundaries of what is and is not a conviction under that state’s laws. The immigration laws are satisfied to allow the state to provide enough facts to find a “conviction” but then

66. See INA § 101(a)(48), 8 U.S.C. § 1101(a)(48) (2006) (emphasis added).

67. See MINN. STAT. § 152.18 subdiv. 1 (2007).

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.* (for first-time offenders “after trial *or upon a plea of guilty* . . . the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for a period, not to exceed the maximum sentence provided for the violation.”) (emphasis added).

quickly turn a blind eye to any additional reality that the state itself did not seek to impose a conviction and indeed allows for the charges to be dismissed entirely for some first-time offenders.⁷¹

In addition to this overly broad definition of conviction for immigration purposes, the alien defendant facing criminal charges also confronts the fact that for some immigration purposes, even merely “admitting” facts sufficient to constitute a criminal conviction is enough to be barred from the United States.⁷² This stems from the fact that in order to secure either temporary “nonimmigrant” entry to the United States, or especially to secure Permanent Resident status (for which two distinct FBI criminal background checks are performed), an alien must not be “inadmissible.”⁷³ As noted previously, “inadmissibility” is a slightly different concept than “deportability” because an alien seeking to enter the United States has less procedural rights than an alien already admitted to the United States.⁷⁴ This diminished procedural position applies as well to Permanent Residents who have committed a crime and then travelled outside the United States and have been apprehended by U.S. Customs and Border Protection at the port of entry.⁷⁵ Given that Permanent Residents who have committed crimes must prove “admissibility” the next time they travel outside the United States, proper strategizing around the immigration consequences of criminal convictions requires considering “admissibility” as well.⁷⁶

The main concern in this regard is the ground of inadmissibility for crimes involving moral turpitude (CIMTs) and controlled substance offenses, which reads in relevant part as follows:

In general . . . any alien convicted of, or *who admits having committed, or who admits committing acts which constitute the essential elements of—*

71. In the next section we discuss the possibility of interceding in criminal proceedings even earlier in the process, at the stage of pretrial diversion.

72. See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

73. *Id.*

74. See *supra* note 25.

75. See INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (defining “admitted,” which places Permanent Residents who have committed crimes after being granted Permanent Resident status into the same procedural position of having to prove “admissibility” as if they had not already been admitted to Permanent Resident status in the past).

76. See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.⁷⁷

The italicized language goes even further beyond the definition of conviction under the average states' law.⁷⁸ It is worth considering several examples of "admitting" to crimes that will make an alien inadmissible even if state law would not consider the alien defendant to have anything close to a conviction.

First, consider an admission of having committed a crime, even if the offender is not caught—this would be essentially the same as a "conviction" for purposes of inadmissibility under immigration law.⁷⁹ One example of such an admission could be an alien who admits to an immigration officer during an interview for either Permanent Residence or for naturalization to U.S. citizenship that she has forged a check belonging to her ex-husband to pay for daycare for her young children since her husband is a deadbeat who has skipped out on his child support payments. Unfortunately, in Minnesota, forgery of a check (depending on the amount) may be punishable with imprisonment exceeding one year.⁸⁰ Thus, even though no criminal proceeding may have occurred at all, the requirement as part of either the Permanent Residence process or naturalization process to admit to having committed any crimes for which no prosecution occurred may trigger a finding of inadmissibility or deportability.⁸¹

77. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (emphasis added). There are two exceptions to the CIMT ground of inadmissibility listed in the next subparagraph of this statute: the "minors exception" and the "petty offense exception," the latter of which says this ground of inadmissibility does not apply if the maximum possible punishment for the crime does not exceed one year. See INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). Thus, a crime punishable as a "gross misdemeanor" under Minnesota law does not raise inadmissibility under the CIMT ground because the maximum possible punishment for a gross misdemeanor is up to exactly one year, but does not *exceed* one year. MINN. STAT. § 609.02 subdvs. 2, 4 (2007).

78. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

79. *Id.*

80. See MINN. STAT. § 609.631 (2007).

81. For many years, the Form I-485 most commonly used to apply for Permanent Residence through the INS/USCIS has asked applicants to disclose if they have ever inside or outside the United States "[k]nowingly committed any

Second, consider an admission of elements which when taken together constitute a crime—this too is equivalent to having incurred a conviction for purposes of inadmissibility.⁸² As we discuss in the next section, many pretrial diversion programs require an admission in writing to all elements of a crime—such as theft—in order to participate in such programs.⁸³ To ensure compliance and to more efficiently conclude criminal court proceedings if later the defendant does not comply with pretrial conditions, prosecutors often require admissions of guilt with a degree of specificity sufficient to constitute a plea of guilty prior to agreeing to entry in a pretrial diversion program.⁸⁴ Where admissions are made to each and every element of a crime, the alien defendant has the equivalent of a conviction for purposes of inadmissibility even if the charges are dismissed after successful completion of the pretrial diversion program.⁸⁵

In summary, several types of admissions of guilt made to criminal and immigration agents are deemed “convictions” or “admissions” for immigration purposes and such convictions will support exclusion from the United States.⁸⁶ This is contrasted with the regular understanding of “conviction” in the criminal justice system as limited to pleas of guilty, no contest (*nolo contendere*); a verdict of guilty by a jury or a finding of guilt by a judge, with any one of these actions followed by the judge actually adjudicating the

crime of moral turpitude or a drug-related offense for which [they] have not been arrested.” See USCIS, Application to Register Permanent Status or Adjust Status at 3, May 27, 2008, available at <http://www.uscis.gov/files/form/i-485.pdf>. A similar question appears on the Form N-400 application for naturalization to U.S. citizenship. See USCIS, Application for Naturalization at 8, Oct. 15, 2007, available at <http://www.uscis.gov/files/form/N-400.pdf>. The USCIS’s own publication provided to the public for explaining the naturalization process warns potential applicants for naturalization that, if they have criminal convictions, then applying for naturalization might result in being deported from the United States. See USCIS, A GUIDE TO NATURALIZATION at 25, 2008, available at <http://www.uscis.gov/files/article/M-476.pdf>.

82. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

83. Pretrial diversions at the county level are authorized by Minnesota Statutes section 401.065 (2006). The statute itself does not require an admission to the essential elements of the crime that would otherwise be charged, but the requirement to admit or stipulate to those elements often is a requirement imposed by the programs themselves. See *infra* Section VI.

84. See *State v. J.Y.M.*, 711 N.W.2d 139, 140–41 (Minn. Ct. App. 2006). See also *infra* note 93.

85. See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

86. See INA § 101(a)(48)(A)(i)–(ii), 8 U.S.C. § 1101(a)(48)(A)(i)–(ii).

defendant's guilt on the record.⁸⁷ To escape a conviction merely for state law purposes is not sufficient to guard against immigration consequences.⁸⁸

VI. PRETRIAL DIVERSION AS A POSSIBLE ALTERNATIVE

Given how much broader the immigration definition of "conviction" is, when the nature of the charges and the early awareness of potential immigration impact permits, one vital avenue to explore for avoiding near-certain deportability or inadmissibility is pretrial diversion.⁸⁹ Justice and mercy are two important but sometimes competing values when dealing with criminal punishment. Mercy, as a value, plays a bigger role when dealing with first-time offenders whose crimes are deemed partly excusable and deserving of leniency.⁹⁰ In the late 1960s, the final report of the President's Commission of Law Enforcement and Administration of Justice recommended the use of diversion programs for benign offenders who did not deserve the full weight of their punishments.⁹¹ Minnesota law allows for pretrial diversion, which is defined as "the decision of a prosecutor to refer an offender to a diversion program on condition that the criminal charges against the offender will be dismissed after a specified period of time, or the case will not be charged, if the offender successfully completes the program."⁹²

A pretrial diversion program is often lauded as a progressive concept and allows first-time offenders to rehabilitate and reintegrate into society.⁹³ In a pretrial diversion program, the defendant is usually required to attend classes, complete community service, or perform other related rehabilitative acts. When the defendant completes the assigned tasks satisfactorily, the

87. MINN. STAT. § 609.02, subdiv. 5(1)–(2) (2006).

88. See INA § 101(a)(48)(A)(i)–(ii), 8 U.S.C. § 1101(a)(48)(A)(i)–(ii).

89. See *supra* note 83.

90. *Id.*

91. See John P. Bellasi, *A Short History of the Pretrial Diversion of Adult Defendants from Traditional Criminal Justice Processing Part One: The Early Years*, NAT'L ASS'N OF PRETRIAL SERV., <http://www.napsa.org/publications/diversionhistory.pdf> (last visited Oct. 25, 2008).

92. MINN. STAT. § 401.065 subdiv. 1(2) (2006).

93. See *id.* at subdiv. 2 (mandating that the program be "designed and operated to . . . reduce costs and caseload burdens . . . [and] minimize recidivism among diverted offenders").

prosecutor dismisses the charges.⁹⁴ For a U.S. citizen defendant, the benefits of having no conviction on his or her record as well as a chance to start over and make better choices are obvious. For an alien defendant, however, completing a pretrial diversion program does not necessarily eliminate the threat of deportation.

An alien's participation in a pretrial diversion program will most likely avoid a conviction for immigration purposes *if* the prosecutor does not require an admission of guilt as a prerequisite for participation in diversion programs.⁹⁵ As discussed above, an admission of guilt coupled with *any* restraint on liberty—such as having to complete a specified drug or alcohol awareness program⁹⁶—is a conviction under immigration law.⁹⁷ If a prosecutor requires an admission of guilt to enter a pretrial diversion program and this admission is recorded, then for immigration purposes the alien's participation in pretrial diversion is deemed a conviction all the same.⁹⁸ This is true even if, as a result of successful completion of the diversion program, the prosecutor drops the charges.⁹⁹ While the purpose of pretrial programs is to permit first-time offenders to rehabilitate without any criminal record on their file, where admission of guilt is required to participate, the result has been that aliens who

94. *See id.*

95. *See In re Grullon*, 20 I. & N. Dec. 12, 14 (B.I.A. 1989). In this case the Board of Immigration Appeals (BIA) applied a prior definition of "conviction," which matched the two elements of the current definition in the Immigration and Nationality Act (INA) § 101(a)(48)(A) (2000), for immigration purposes. *Id.* The BIA held that where the record clearly indicated the alien did not plead guilty in order to enter a Florida pretrial diversion program, which the alien subsequently completed, the alien did not have a conviction for immigration purposes. *Id.* at 15. The definition of conviction was subsequently amended by the enactment of INA § 101(a)(48)(A) to eliminate the third element described in the case. INA, Pub. L. No. 104-208, § 322(a)(1) (1996) (codified as amended at 8 U.S.C. § 1101(a)(48)(A) (2006)). Still, *Grullon* remains good law on the first element of the definition of conviction, holding that diversion into a pretrial program without a plea of guilty means the first element of the definition of conviction for immigration purposes is not satisfied.

96. "[R]estraint of liberty was found to include incarceration, probation, fine or restitution, and community-based sanctions such as rehabilitation programs, work-release or study release programs, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community services." *Grullon*, 20 I. & N. Dec. at 14, n.3. *See also supra* note 70.

97. It is also a conviction for the issue of "inadmissibility," as even without any restraint on liberty just the admission alone may be enough to trigger inadmissibility. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

98. *See id.*

99. *See id.*

participate in these programs have a conviction for immigration purposes and may be deportable depending on the type of crime committed.¹⁰⁰

As noted above, Minnesota law authorizes pretrial diversion programs at the county level.¹⁰¹ Of seven existing programs as of November 1999, five required an admission of guilt.¹⁰² Hennepin, Ramsey, Anoka, Washington, and Dakota counties, which arguably contain a large number of alien defendants,¹⁰³ require admissions of guilt,¹⁰⁴ as does the Stearns County program.¹⁰⁵ Where an alien defendant is being entered into a pretrial diversion program in an attempt to stave off deportation, it would be best if such admissions of guilt be limited to only a general statement acknowledging or not contesting involvement (and indeed some states do permit entering pretrial diversion without an admission of guilt).¹⁰⁶ This is an important point since an admission that does not rise to a full admission of guilt or of committing acts sufficient to constitute the elements of a crime may evade immigration consequences.¹⁰⁷ Such a general, non-specific admission, however, might not satisfy the requirements of the prosecution for participation in the pretrial program.¹⁰⁸ If each element of the crime has to be admitted, then

100. See INA § 212 (a)(2)(A)(i)(I), 8 U.S.C. § 1182 (a)(2)(A)(i)(I).

101. See MINN. STAT. § 401.065, subdiv. 2 (2006).

102. See JESSICA SIMON & SARAH WELTER, REVIEW OF ADULT PRETRIAL DIVERSION IN HENNEPIN COUNTY, COUNCIL ON CRIME AND JUSTICE (1999), <http://www.crimeandjustice.org/researchReports>, (last visited Oct. 18, 2008) [hereinafter SIMON & WELTER].

103. See IMMIGRATION TRENDS IN MINNESOTA: POWER POINT PRESENTATION ON IMMIGRATION (2003), <http://www.demography.state.mn.us/immigration.htm>.

104. The likely purpose of requiring admissions of guilt is so that a conviction can be entered in the record if the terms of the diversion program are not met. See SIMON & WELTER, *supra* note 102, at 23.

105. See JANELLE P. KENDALL, ADULT DIVERSION PROGRAM DESCRIPTION, <http://www.co.stearns.mn.us/documents/AdultDivProgram.pdf> (last visited Oct. 18, 2008).

106. See, e.g., ELIGIBILITY CRITERIA FOR THE SAN FRANCISCO PRE-TRIAL DIVERSION PROJECT, INC. (2007), <http://www.sfpretrial.com/eligibilitycriteria.html> (last visited Oct. 18, 2008) (“Acceptance of diversion and compliance with conditions imposed shall not be deemed to constitute an admission of guilt.”). In Florida’s Seventeenth Judicial District, a defendant seeking pretrial diversion must “provide facts indicative of knowledge or conduct on the part of the Applicant consistent with guilt” without explicitly admitting guilt. See MISDEMEANOR DIVERSION PROGRAM, BROWARD SENIOR INTERVENTION AND EDUCATION PROGRAM, TRUANCY DIVERSION PROGRAM AND D.W.L.S. DIVERSION PROGRAM, <http://www.sao17.state.fl.us/pretrial.htm> (last visited Dec. 13, 2008).

107. See *supra* notes 68, 74, 77–78, 94 and accompanying text.

108. See, e.g., Stearns County Adult Diversion Program Description *supra* note

an alien might not be able to escape immigration consequences such as removal from the United States.

VII. THE LIMITED POSSIBILITY OF POST-CONVICTION RELIEF

We feel we can speak for all immigration attorneys when we say that we always prefer that for all aliens facing criminal charges that the issue of deportability always be fully explored and strategized at the start of the criminal court process. The reality, though, is that for many aliens the realization that they have pled guilty to a crime that makes them deportable with no hope of relief only comes after the court's acceptance of the plea and entry of judgment have become final. In this all too common situation, many aliens turn to post-conviction relief, seeking to vacate the plea of guilty so as to subvert deportation.

There are substantive and equitable reasons for a court to expunge or set aside a conviction so that a former defendant has no criminal record. Where such relief is granted, the conviction ceases to exist for most practical purposes, thus giving former offenders a second chance to "straighten up and fly right" and not be barred from many jobs due to the taint of a criminal record. Under Minnesota law, expungement or "setting aside" of a conviction refers to a former offender petitioning the criminal court to seal the records and disallow disclosure of certain criminal convictions.¹⁰⁹ Setting aside a conviction is accomplished through a pardon extraordinary, granted by the Board of Pardons and effectively results in "setting aside and nullifying the conviction and of purging the person of [the conviction], and the person shall never after that be required to disclose the conviction at any time or place other than in a judicial proceeding or as part of the licensing process for peace officers."¹¹⁰ The restoration of civil rights refers to one's ability to vote and hold office.¹¹¹ Minnesota state courts have identified means to rehabilitate the criminal record of the individual when it is shown that he or she has effectively shown to possess good moral character and has

105, at 4 ("To be eligible for the diversion program, the offender must . . . [a]dmit guilt, acknowledge responsibility, and provide a FACTUAL BASIS REGARDING THE OFFENSE.") (emphasis in original).

109. See MINN. STAT. § 609A.01-02 (2006).

110. See MINN. STAT. § 638.02 (2006).

111. See MINN. STAT. § 609.165 subdiv. 1 (2006).

integrated into society in a positive manner.¹¹²

In addition, Minnesota courts also dismiss cases where a defendant has pled guilty and the plea has been accepted, but imposition of the sentence of imprisonment has been stayed and the defendant placed on probation with perhaps payment of a fine or restitution depending on the crime.¹¹³ If the defendant complies with the probation requirements, then the case is later dismissed, and the former defendant is restored to the position that existed prior to the commission of the crime (i.e., has no conviction under Minnesota law).¹¹⁴

Thus, there are several means through which a convicted criminal can ultimately turn back the clock and remove convictions from his or her record. The vast majority of these rehabilitative procedures, however, have no effect for immigration purposes.¹¹⁵ This is because for immigration purposes, the Board of Immigration Appeals (BIA) has held that the vacating of a criminal conviction for reasons solely related to rehabilitation or immigration hardships does not eliminate the conviction for immigration purposes.¹¹⁶ Only if the conviction was vacated on the merits on the basis of a procedural or substantive defect in the underlying criminal proceedings would the action of the criminal court to vacate the conviction be respected as having eliminated the conviction for immigration purposes (and therefore in most cases having eliminated the deportability).¹¹⁷ Indeed, even if a

112. *See, e.g.*, *State v. Ambaye*, 616 N.W.2d 256, 258 (Minn. 2006) (“In addition to statutory expungement under chapter 609A, Minnesota courts also have the inherent power to expunge criminal records . . . ‘[by deciding] whether expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order.’”) (quoting *State v. C.A.*, 304 N.W.2d 353, 354 (Minn. 1981)).

113. *See* MINN. STAT. § 609.135 (2006 & Supp. 2007).

114. *See, id.* at subdiv. 2(f) (“The defendant shall be discharged six months after the term of the stay expires, unless the stay has been revoked or extended under paragraph (g), or the defendant has already been discharged.”).

115. One exception is a full, unconditional executive pardon, which is the one rehabilitative action that does not vacate the conviction on its merits but nonetheless serves to relieve the alien from deportability for an aggravated felony conviction. INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (2006 & Supp. 2008). If the nature of the elements of the crime separately also would trigger inadmissibility in the event of future travel outside the United States, that inadmissibility would not be cured by the pardon, which does not vacate the conviction on its merits.

116. *In re Pickering*, 23 I. & N. Dec. 621, 624 (2003).

117. *Id.* *See also In re Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (2000) (according

criminal court ostensibly states that it has vacated a conviction on the merits due to a substantive or procedural defect, if the record of the proceedings reflects an ulterior motive to avoid immigration consequences, the action of the criminal court might still not be given the full faith and credit it should be given.

On the other hand, if state law requires a defendant to be advised that there may be immigration consequences to pleading guilty¹¹⁸ and the defendant is not in fact so advised by the court, then that *is* a substantive defect in the conviction. If that conviction is then vacated on the merits, it is due to an error under state law and not solely for immigration reasons, and thus the order vacating the conviction will eliminate the conviction for immigration purposes.¹¹⁹ Thus, for aliens who have pled guilty to a crime that is now realized to cause deportability, it is vital to obtain a complete copy of the criminal court records and transcripts of hearings to determine if any such required advisal was given. Even if a required advisal about immigration consequences was given in a particular case, competent criminal appellate counsel should be consulted to determine if there were any other substantive defects (e.g., constitutional defects) in the record of conviction that would warrant seeking post-conviction relief to vacate the conviction on its merits for a reason independent of immigration consequences.

VIII. SUMMARY AND CONCLUSION

As much as we might like to see deportation be considered a direct consequence of pleading guilty and thus actively analyzed and considered from the very start for all alien criminal defendants, we acknowledge that to do so would require additional resources that are presently unavailable to the criminal justice system. To say the least, it requires a complex analysis to determine exactly what final disposition of a criminal charge will or will not affect an alien defendant's deportability (or future "inadmissibility") and in some cases requires taking the alien

full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute).

118. See *supra* note 47.

119. See *In re Adamiak*, 23 I. & N. Dec. 878 (2006) (holding that, where an alien defendant was allowed to plead guilty in Ohio without prior instruction by the court of possible immigration consequences in violation of Ohio Revised Code § 2943.031, a state court action vacating the conviction as provided for in the same statute eliminated the conviction for immigration purposes because the state court action was based on an underlying defect in the proceedings under state law).

defendant's country of origin into account. We are forced to admit that is probably not realistic to expect federal and state district court judges, prosecutors, and criminal defense attorneys to become experts in immigration law. But at the same time we cannot turn a blind eye to the fact that the immigration deck is often heavily stacked against the criminal alien defendant, especially one who might receive rather lenient treatment as a first-time offender under state law.

In the end, most alien defendants must take the initiative to either seek assistance from legal services organizations or from private counsel who are sufficiently knowledgeable of immigration, so that the possibility of deportation can be taken into consideration as an integral part of plea negotiations or deciding whether or not to proceed to trial. It is our hope that this article helps to raise the awareness of all members of the bench and the bar to this critical need in light of how closely entwined our criminal justice and immigration enforcement systems have become.