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Citizenship Considerations in Minnesota Criminal Justice and the Supremacy of Federal Immigration Law

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CITIZENSHIP CONSIDERATIONS IN MINNESOTA CRIMINAL JUSTICE AND THE SUPREMACY OF FEDERAL IMMIGRATION LAW

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I. INTRODUCTION

Minnesota criminal courts are venturing into the complex federal world of immigration law.[1] The courts are doing this by granting post-conviction relief—vacating criminal convictions after allowing withdrawals of guilty pleas—to prevent the deportation of non-citizens under federal law.[2] These crimes either may be the basis for deportation or may bar relief from deportation. Non-citizen criminals argue that their deportation under federal law is a manifest injustice resulting from their guilty pleas, either because they were unaware that they could be deported or their counsel failed to inform them, or misinformed them, at the time they entered their plea that they could be deported. They also may argue that although they knew of possible deportation when they pled guilty, deportation is, by itself, a manifest injustice resulting from their guilty pleas. Yet another argument is that the federal immigration laws have changed—to their detriment. After all, the argument continues, United States citizens cannot be deported for their criminal activities so neither should they. In essence, deportation resulting from a conviction is an additional punishment for the crime and, therefore, non-citizens receive harsher penalties than United States citizens receive for the same crime. To prevent this stricter punishment, non-citizens argue that they should have their

1. The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.), made major changes to the federal immigration laws. One change pertinent here is that Congress changed the terms "excludable" and "deportable" to "inadmissible" and "removable." Congress also merged exclusion and deportation proceedings, formerly different types of proceedings, into a single removal proceeding. Nevertheless, for ease of reference for the reader who is not an intimate to the world of federal immigration laws, I will use the terms "inadmissible," "deportable" and "deportation" in this article. Also, in the immigration statutes, someone who is not a United States citizen or national is an "alien." *See* Immigration and Nationality Act, § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994 & Supp. IV 1999) (originally enacted as Immigration and Nationality (Walter McCarran) Act of 1952, Pub. L. No. 82-414, § 101(a)(3), 66 Stat. 163). When the term "alien" is used in immigration law, it is a legally defined term—not a lay term used derogatorily. Nevertheless, because some people are offended by the legal term "alien," I will strive to use the term "non-citizen" in this article when referring to people who are not United States citizens or nationals.

2. Minnesota courts are also providing post-conviction relief in the form of reduced sentences, for example. While these other forms of post-conviction relief raise the same concerns as vacations of convictions, this article focuses on the latter.

criminal convictions vacated or, from the outset, be sentenced to less imprisonment or convicted of lessor charges than United States citizens.

On August 6, 1998, the Minnesota Supreme Court decided three cases in which non-citizens sought post-conviction relief because of federal immigration consequences.[3] The court denied post-conviction relief to three criminals, each trying to vacate their convictions to avoid deportation.[4] Defendant Berkow pled guilty to theft by swindle, discharge of a firearm and third-degree arson.[5] Defendant Alanis pled guilty to second-degree possession of a controlled substance, unlawfully obtaining Aid to Families with Dependent Children, unlawfully obtaining food stamps, possession of a small amount of marijuana, and driving after revocation of his driver's license.[6] Defendant Barragan was convicted of a fifth-degree sale of a controlled substance after pleading guilty.[7]

Each defendant asked the criminal court to allow them to withdraw their guilty pleas and vacate their criminal convictions.[8]

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3. *See* Alanis v. State, 583 N.W.2d 573, 575-76 (Minn. 1998); Barragan v. State, 583 N.W.2d 571, 572-73 (Minn. 1998); Berkow v. State, 583 N.W.2d 562, 564 (Minn. 1998).

4. *See Alanis*, 583 N.W.2d at 579; *Barragan*, 583 N.W.2d at 572-73; *Berkow*, 583 N.W.2d at 564.

5. *See Berkow*, 583 N.W.2d at 563.

6. *See Alanis*, 583 N.W.2d at 575.

7. *See Barragan*, 583 N.W.2d at 571.

8. *See Alanis*, 583 N.W.2d at 575; *Barragan*, 583 N.W.2d at 571; *Berkow*, 583 N.W.2d at 563. Minnesota law allows a criminal defendant, after sentencing, to move the criminal court to allow them to withdraw their plea of guilty and have the conviction vacated, if necessary to correct a manifest injustice. *See* MINN. R. CRIM. P. 15.05. That rule provides in relevant part:

> Subd. 1. To Correct Manifest Injustice. The court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice. Such a motion is not barred solely because it is made after sentence. If a defendant is allowed to withdraw a plea after sentence, the court shall set aside the judgment and the plea.
> Subd. 2. Before Sentence. In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.
> Subd. 3. Withdrawal of Guilty Plea Without Asserting Innocence. The defendant may move to withdraw a plea of guilty without an assertion of not guilty of the charge to which the plea was entered.

Mr. Berkow said he did not understand that if he pled guilty he might become deportable from the United States.[9] He also said his attorney never told him of possible immigration consequences.[10] Therefore, he claimed his plea was not intelligent and he was denied effective assistance of counsel.[11] Mr. Alanis advanced several reasons for his motion for post conviction relief. Two concerned immigration: (1) he was not advised that by pleading guilty he became deportable; and (2) he had been deprived of effective assistance of counsel.[12] Mr. Barragan argued that becoming deportable is itself a manifest injustice.[13] Moreover, Mr. Barragan claimed that the prosecutor made misrepresentations about the likelihood of being deported.[14]

The Minnesota Supreme Court ruled in these cases that there was no "manifest injustice" warranting post-conviction relief under the three different but related grounds. First, federal immigration consequences of criminal convictions are collateral, not direct, consequences of the convictions.[15] Therefore, guilty pleas made in ignorance of possible federal immigration consequences are still knowing, voluntary and intelligent.[16] Second, because federal immigration consequences are collateral to a conviction, a criminal defense attorney does not have a duty to inform the defendant of federal immigration law.[17] Because there is no duty, there is no ineffective assistance of counsel in the absence of this advice.[18] Third, the Minnesota Supreme Court held that deportation is not a manifest injustice warranting post-conviction relief in a state criminal proceeding.[19]

Despite the three Minnesota Supreme Court decisions, these issues are not moot. Since these three decisions, Minnesota district

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MINN. R. CRIM. P. 15.05.

9. *See Berkow*, 583 N.W.2d at 563.

10. *See id.*

11. *See id.*

12. *See Alanis*, 583 N.W.2d at 575.

13. *See Barragan*, 583 N.W.2d at 572.

14. *See id.*

15. *See Alanis*, 583 N.W.2d at 578; *Berkow*, 583 N.W.2d at 563-64. Criminal convictions may result in many collateral, yet negative, consequences and may affect current and future employment, credit, and public benefits, to name just a few.

16. *See Alanis*, 583 N.W.2d at 578.

17. *See id.* at 579; *Berkow*, 583 N.W.2d at 564.

18. *See Alanis*, 583 N.W.2d at 579; *Berkow*, 583 N.W.2d at 564.

19. *See Alanis*, 583 N.W.2d at 579; *Barragan*, 583 N.W.2d at 572-73; *Berkow*, 583 N.W.2d at 564.

courts have continued to allow non-citizens to withdraw their guilty pleas and vacate criminal convictions solely because the criminal may face deportation from the United States.[20] Also, the Minnesota Rules of Criminal Procedure have been amended to require that, before accepting a plea of guilty, the court must question defendants to ensure that they understand that a conviction may have immigration consequences.[21]

As sympathetic as an individual case may be of a non-citizen wanting to remain in the United States (especially if the non-citizen alleges dire consequences should they leave the United States and/or return to their country of citizenship), at least four significant problems arise with decisions by a state granting post-conviction relief for these reasons. First, these decisions are unconstitutional under the Supremacy Clause of the United States Constitution.[22] Minnesota courts exceed their proper authority by venturing into these federal decisions. The state judge is deciding that a non-citizen should remain in the United States. This is an immigration determination. Immigration determinations are exclusively federal decisions. A complex federal system and detailed federal law govern these decisions. State criminal courts do not abide by these federal laws. The federal government is not represented in these state criminal proceedings and is not able to cross-examine the defendant, test their credibility or present evidence to the criminal court. While a state court is concerned only about the fate of the defendant before it, the United States is concerned about uniform immigration treatment of all non-citizens.[23]

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20. In fact, despite the ruling from the Minnesota Supreme Court, Mr. Barragan, one month later, got his conviction vacated because he may be deported. *See* Transcript of Motion Hearing at 24, State v. Barragan, No. K8-96-861 (Minn. Dist. Ct., 7th Jud. Dist., Sept. 14, 1998). He cited no new law or statute, and presented no new reason. *See id.* at 23. He told the court he was there under equity, not law. *See id.* at 3. The sole reason for his motion was to avoid the federal immigration laws. *See id.* at 3-5. This time, however, after the Minnesota Supreme Court ruled that Barragan is not entitled to post-conviction relief because he may be deported under federal law, the court granted Mr. Barragan's motion. *See id.* at 24. Mr. Barragan withdrew his guilty plea and his criminal conviction was vacated. *See id.* at 23. The State of Minnesota amended the original complaint and charged Mr. Barragan with possession of less than 30 grams of marijuana. *See id.* at 20. Mr. Barragan pled guilty to this charge. *See id.* at 19. This conviction, by itself, does not subject Mr. Barragan to deportation under federal law. *See id.* at 23.

21. *See* MINN. R. CRIM. P. 15.01 (effective for all criminal actions commenced or arrests made after 12:00 a.m. on January 1, 1999).

22. *See* U.S. CONST. art. VI, § 2.

23. Unfortunately, the State of Minnesota does not have statistics available on

Second, by granting this benefit to non-citizens and not to citizens, Minnesota courts are violating the equal protection of United States citizens who cannot vacate their convictions for these reasons. States do not have a legitimate interest in distinguishing between citizens and non-citizens to make immigration determinations, let alone a substantial or compelling interest. Therefore, these citizenship distinctions violate the Equal Protection Clause of the United States Constitution.[24] Third, these decisions appear to disregard Minnesota Supreme Court precedent. Fourth, these decisions are inconsistent with stated Minnesota policies of achieving uniform sentencing for criminals—sentencing that does not unfairly discriminate.

Minnesota criminal justice should operate without regard to a criminal's citizenship status. This is legally correct and fundamentally fair. Those who disagree with federal law have the opportunity to change it through their duly elected federal representatives. They should not disregard federal and state law and contort state criminal laws at the expense of fair treatment of U.S. citizens to achieve what they believe to be the fair result in federal immigration matters.

Ultimately, regardless of whether a state vacates a conviction to allow a non-citizen to escape deportation, the federal government should not recognize this state action. This state action is an unconstitutional exercise of federal authority and is preempted by

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the citizenship status of criminals from arrest to incarceration. However, in 1991, the U.S. Department of Justice, Bureau of Justice Statistics, Criminal Offenders Statistics reported that approximately four percent of State prison inmates were not United States citizens. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Offender Statistics* (visited Nov. 8, 1999) <http://www.ojp.usdoj.gov/bjs/crimoff.htm#fed>. In fiscal year 1996, 27.3% of federal criminal defendants were not United States citizens. *See* U.S. SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, CITIZENSHIP STATUS OF DEFENDANT BY PRIMARY OFFENSE CATEGORY tbl. 9 (Oct. 1, 1995 through Sept. 30, 1996) (1996). The current percentage of non-citizen federal prisoners is approximately 28.0%. *See United States Bureau of Prisons* (visited Nov. 8, 1999) <http:\\www.bop.gov>. This percentage has remained fairly steady during the last few years: 24.2% in 1990; 24.7% in 1991; 24.9% in 1992; 25.0% in 1993; 24.7% in 1994; and 25.4% in 1995. *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 1995 tbl. 6.39 (1995). The Immigration and Naturalization Service removed, or deported, approximately 51,231 non-citizens with criminal records in fiscal year 1997 and approximately 55,211 non-citizens with criminal records in fiscal year 1998. The criminal records may or may not have been the basis for removal. *See* U.S. DEPARTMENT OF JUSTICE–INS, OFFICE OF POLICY AND PLANNING, MONTHLY REMOVALS FY 1998 YEAR END REPORT (1998).

24. *See* U.S. CONST. amend. XIV § 1.

federal law, making the citizenship distinctions in Minnesota criminal courts even less supportable and understandable.

To understand these issues, we need to understand federal immigration authority—what it is, how it is implemented, and how it has dealt with criminal behavior—as well as the Supremacy and Equal Protection Clauses. Many people outside the world of federal immigration law have only a general, vague understanding of this authority and how it is implemented. We also will examine the historic interplay of federal immigration and state criminal law and the evolution of the interplay. Finally, we can then determine the appropriateness of the Minnesota criminal justice system making decisions based upon a criminal's citizenship.

II. FEDERAL IMMIGRATION AUTHORITY AND STRUCTURE

The federal government has exclusive and paramount control over immigration issues. "[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[25] "When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land."[26] The "[p]ower to regulate immigration is unquestionably exclusively a federal power."[27]

Within the federal government, the Attorney General has primary responsibility for enforcing immigration laws.[28] She does so through three main, separate components within the Department of Justice: (1) the Immigration and Naturalization Service ("INS"), which adjudicates benefits and applications for various immigrant and non-immigrant status and naturalization, investigates fraud, arrests those who are in violation of the immigration laws and admin-

25. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citing Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)).

26. Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941).

27. De Canas v. Bica, 424 U.S. 351, 354 (1976).

28. *See* Immigration and Nationality Act § 103, 8 U.S.C. § 1103 (1994 & Supp. IV 1999). The Attorney General does not, however, have an exclusive role. The United States Department of State, the President, the Department of Labor, and the Department of Health and Human Services each have a role in implementing and/or enforcing immigration laws. *See* Immigration and Nationality Act §§ 103, 104, 204; *see also, e.g.*, 8 C.F.R. pts. 204, 274A; 22 C.F.R. et seq.; 29 C.F.R. et seq,: 42 C.F.R. et seq.

istratively prosecutes and removes illegal non-citizens;[29] (2) the Executive Office for Immigration Review ("EOIR"), which, through independent administrative judges and an administrative appellate tribunal, decides and reviews cases prosecuted by the INS of people applying for admission to the United States who appear inadmissible and those who have been admitted and are later accused of being in the United States in violation of law;[30] and (3) the Office of Chief Administrative Hearing Office ("OCAHO"), which, through administrative law judges, decides cases involving the employment verification, civil document fraud and employment discrimination cases brought by the INS and the Office of Special Counsel.[31] Also, the United States attorneys prosecute criminal immigration violations in federal district court brought by the INS.[32]

With few exceptions, the INS does not have the authority to order someone deported from the United States.[33] Rather, the INS

29. *See* 8 C.F.R. pts. 2, 100, 103, 287 (1999), 28 C.F.R. §§ 0.105-0.110 (1998).

30. *See* 8 C.F.R. pt. 3 (1999); 28 C.F.R. §§ 0.115-0.118 (1998).

31. *See generally* Immigration and Nationality Act §§ 274A, 274B & 274C; *see also* 28 C.F.R. §§ 0.115, 0.118 (1998).

32. *See* 28 C.F.R. § 0.55(f) (1998).

33. The Immigration and Naturalization Service may remove an alien applying for admission to the United States without referring the case to an immigration judge in limited circumstances. This is commonly referred to as "expedited removal." These are cases of people without valid entry documents or who have made material misrepresentations of fact in order to get an immigration benefit, who are not lawful permanent residents and who do not possess a credible fear of returning to their country. Non-citizens who are found to possess a credible fear of returning may apply for asylum and withholding of removal before an immigration judge. *See* Immigration and Nationality Act § 235; 8 U.S.C. § 1225 (1994 & Supp. IV 1998). Also, people entering, or who have entered, the United States under the Visa Waiver Pilot Program have waived their right to an immigration judge hearing as part of participating in the program, which does not require a visa. *See* Immigration and Nationality Act § 217, 8 U.S.C. § 1187 (1994 & Supp. IV 1999). Once again, however, non-citizens may nevertheless apply for asylum and withholding of removal before an immigration judge. There is another limited exception to a removal hearing before an immigration judge in the case of a person who is not a lawful permanent resident alien who is convicted of an "aggravated felony." *See* Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1994 & Supp. IV 1999). The Immigration and Naturalization Service may issue an order of removal without referring the case to an immigration judge. *See id.* Finally, although this is not necessarily considered a new order of removal, the Immigration and Naturalization Service may deport a non-citizen who illegally enters the U.S. after having been previously deported without referring the case to another hearing before an immigration judge. This is commonly referred to as "reinstatement" of removal—the previous order is reinstated by statute. *See* Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1231(a)(5) (1994 & Supp. IV 1999).

initiates a civil, administrative hearing before an immigration judge.[34] The immigration judge has authority to enter an order of deportation.[35] These hearings involve many statutory and regulatory rights for the non-citizens. For instance, they have the right to be represented by counsel at no expense to the government, the right to present evidence and witnesses and to cross-examine witnesses presented by the government.[36] If needed, the hearings are translated into a language that the respondent understands.[37]

Every removal hearing contains essentially two parts. The first concerns whether a person is inadmissible to or deportable from the United States. If a person applies for admission to the United States and an immigration judge determines that the person is admissible to the United States, the immigration judge grants admission. Likewise, if a person has previously been admitted to the United States and an immigration judge determines that the person is not deportable from the United States, the immigration judge terminates the removal proceedings.[38] On the other hand, if the immigration judge determines that a person is not admissible to the United States or is deportable from the United States, the

34. *See* Immigration and Nationality Act § 239, 8 U.S.C. § 1229 (1994 & Supp. IV 1999); *see also* 8 C.F.R. pt. 239 (1999).

35. *See* Immigration and Nationality Act § 240, 8 U.S.C. § 1229a (1994 & Supp. IV 1999); *see also* 8 C.F.R. §§ 1.1(l), 3.9, 3.10, pt. 240 (1999). There are some instances in which a non-citizen can be refused admission to the United States, or deported from the U.S., without a hearing before a judge. *See* 28 C.F.R. §§ 0.5, 0.55(f) (1998). These fall under the provisions for expedited removal (Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (1994 & Supp. IV 1999)) and reinstatement of previously entered deportation orders when a person subsequently reenters the United States illegally (Immigration and Nationality Act §241(a)(5), 8 U.S.C. § 1231(a)(5) (1994 & Supp. IV 1999)). Also a United States district court may order a non-citizen deported as part of the criminal proceedings at the time of sentencing if requested by the United States Attorney and only upon the concurrence of the Commissioner of the Immigration and Naturalization Service. *See* Immigration and Nationality Act § 238(c)(1), 8 U.S.C. § 1228(c)(1) (1994 & Supp. IV 1999). In fact, an Assistant United States Attorney has no authority to agree not to deport a non-citizen, absent express concurrence by the Immigration and Naturalization Service. *See* 28 C.F.R. § 0.197 (1998). Finally, there are rarely used, but separate procedures for removal hearings in the case of terrorists. *See* Immigration and Nationality Act tit. V, 8 U.S.C. §§ 1531-1537 (1994 & Supp. IV 1999).

36. *See* Immigration and Nationality Act §§ 240(b)(4)(B), 292; 8 U.S.C. §§ 1229a(b)(4)(B), 1362. The statutory rights of non-citizens are fewer under Immigration and Nationality Act tit. V, 8 U.S.C. §§ 1531-1537 (1994 & Supp. IV 1999), which provides for special hearings for terrorists.

37. *See* 8 C.F.R. § 3.22 (1999).

38. *See* 8 C.F.R. § 240.12(c) (1999).

second part of the hearing begins. In this second part, a non-citizen may apply for relief (as it is commonly termed), which allows them to avoid deportation.[39] This relief, contained in federal statutory provisions, waives certain grounds of inadmissibility or deportability, allowing a non-citizen to enter or remain as an immigrant or non-immigrant.[40] Each form of relief has its own require-

39. Also, in the case of a non-citizen arriving in the United States applying for admission, the immigration judge may allow the non-citizen to withdraw their application for admission and leave the United States. *See* 8 C.F.R. § 240.1(d) (1999).

40. The waivers/exceptions for admission include Immigration and Nationality Act §§ 212(a)(2)(A)(ii) (8 U.S.C. § 1182(a)(2)(A)(ii) (1994 & Supp. IV 1999)); 212(a)(6)(A)(ii) (8 U.S.C. § 1182(a)(6)(A)(ii)); 212(a)(6)(E)(ii) (8 U.S.C. § 1182(a)(6)(E)(ii); 212(a)(9)(B)(v) (8 U.S.C. § 1182(a)(9)(B)(v)); § 212(d) (8 U.S.C. § 1182(d)); 212(g)–(i) (8 U.S.C. § 1182(g)-(i)), and 212(k)–(l) (8 U.S.C. § 1182(k)-(l)). The waivers for deportation include Immigration and Nationality Act §§ 237(a)(1)(D)(ii) (8 U.S.C. § 1227(a)(1)(D)(ii) (1994 & Supp. IV 1999)); 237(a)(1)(E)(ii)–(iii) (8 U.S.C. § 1227(a)(1)(E)(ii)-(iii)); 237(a)(1)(H) (8 U.S.C. § 1227(a)(1)(H)); 237(a)(2)(A)(v) (8 U.S.C. § 1227(a)(2)(A)(v)); 237(a)(3)(C)(ii) (8 U.S.C. § 1227(a)(3)(C)(ii)), and 237(c) (8 U.S.C. § 1227(c)). Other forms of relief include: adjustment of status (Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1994 & Supp. IV 1999)); cancellation of removal (Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b (1994 & Supp. IV 1999)); voluntary departure (Immigration and Nationality Act § 240B, 8 U.S.C. § 1229c (1994 & Supp. IV 1999)); asylum (Immigration and Nationality Act § 208 (8 U.S.C § 1158 (1994 & Supp. IV 1999)); withholding of removal (Immigration and Nationality Act § 241(b)(3), (8 U.S.C. § 1231(b)(3) (1994 & Supp. IV 1999) (not discretionary)); and registry (Immigration and Nationality Act § 249, 8 U.S.C. § 1259 (1994 & Supp. IV 1999)).

Additionally, the Immigration and Naturalization Service may "parole" someone into the United States. This authority allows a person, under limited circumstances, to be in the United States without having been "admitted." *See* Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1994 & Supp. IV 1999). It is used in cases of urgent humanitarian reasons or for significant public benefit in a case by case basis. *See id.* In addition to all of these types of relief codified in the Immigration and Nationality Act as amended, Congress may pass private bills for the benefit of an individual, and special types of legislation benefiting certain nationality groups.

Finally, a non-citizen may apply for relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988). This convention prohibits the returning of people to a country in which there are substantial grounds for believing that they would be in danger of being tortured by a government or public official. *See id.* Unlike asylum and withholding of removal, the fear or danger need not be on account of race, nationality, religion, political opinion, or membership in a particular social group. *See id.* However, legitimate punishment that is proportionate to criminal activity is not within the terms of protection under this convention.

ments, and almost all relief is discretionary.

Both the non-citizen and the INS may appeal a decision by an immigration judge to the Board of Immigration Appeals ("BIA").[41] If the non-citizen does not like the decision of the BIA, the non-citizen can, in limited circumstances, seek judicial review of certain decisions in the appropriate federal circuit court of appeals.[42] If the INS does not like the decision of the BIA, the INS Commissioner may request that the U.S. Attorney General review the decision.[43]

Moreover, even though a person may be subject to a final order of deportation, they may apply for a stay of their deportation from the INS.[44] They also may seek protection under Temporary Protected Status.[45] Temporary Protected Status allows a stay of deportation for nationals of designated countries during designated periods of armed conflict; earthquake, flood, drought, epidemics or other environmental disasters; when the foreign country is unable to handle the return of their citizens; or when extraordinary and temporary conditions prevent the safe return of foreign nationals to their countries.[46] Non-citizens also may request that Congress pass a private bill granting relief to an individual non-citizen.[47] In the harsh realities of our world political climate, the United States may not be able to execute orders of deportation to coun-

41. *See* 8 C.F.R. §§ 3.1(b), 3.38 (1999). An exception exists when a person fails to appear for their hearing and the hearing is conducted in absentia. No appeal lies from an in absentia order of removal, although the proceeding can be reopened in limited circumstances. *See* Immigration and Nationality Act § 240(a)(5), 8 U.S.C. § 1230(a)(5) (1994 & Supp. IV 1999); 8 C.F.R. § 3.23(b)(4)(ii)–(iii) (1999).

42. Formerly, virtually all decisions of the BIA were reviewable in federal courts. In 1996, however, frustrated by lengthy and time-consuming litigation in federal court, coupled with limited judicial resources, Congress restricted judicial review of many administrative immigration decisions. Now, most discretionary decisions of the Attorney General to grant relief are not reviewable. (Asylum decisions remain subject to judicial review.) *See* Immigration and Nationality Act § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (1994 & Supp. IV 1999). Also, Congress precluded review of orders of removal for criminal aliens. *See* Immigration and Nationality Act § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (1994 & Supp. IV 1999).

43. *See* 8 C.F.R. § 3.1(h)(1)(iii) (1999).

44. *See* Immigration and Nationality Act § 241(c)(2), 8 U.S.C. § 1254(c)(2) (1994 & Supp. IV 1999); *see also* 8 C.F.R. § 241.6 (1999).

45. *See* Immigration and Nationality Act § 244, 8 U.S.C. § 1254 (1994 & Supp. IV 1999).

46. *See id.*

47. *See* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 74.09 (Matthew Bender ed., 1998).

tries without operational governments, with which we do not have diplomatic relations or which are not accepting return of their citizens.[48]

The entirety of federal immigration law enforcement, from how the executive branch structures its immigration enforcement to who qualifies for relief and the forms of relief available, is implemented in detail in accordance with federal law.

III. STATE ACTIONS BASED UPON CITIZENSHIP OR REGULATING IMMIGRATION

We begin again with the fundamental legal principal that the federal government has exclusive authority to regulate immigration. By this authority, the federal government routinely distinguishes between citizens and non-citizens. States, however, have only limited authority to make such distinctions. In the words of the United States Supreme Court:

> Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, . . . and to "take into account the character of the relationship between the alien and this country" . . . only rarely are such matters relevant to legislation by a State. . . . States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.[49]

State action is impermissible when it does not mirror federal objectives, but stands, "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[50] Over the years, states have enacted various laws impacting non-citizens.

48. *See* Immigration and Naturalization Service Operations Instruction 243.3. Cuba, for example, is the most well-known. Additionally, federal statutes and regulations govern whether and when a person may be held in custody pending their deportation after a deportation order becomes final. Generally speaking, if the federal government cannot execute an order of deportation within a statutory period of time, the non-citizen may usually be released from custody in accordance with regulation. *See* Immigration and Nationality Act § 241(a)(3), 8 U.S.C. § 1231(a)(3) (1994 & Supp. IV 1999). *See also* Immigration and Nationality Act § 241(a)(6), 8 U.S.C. § 1231(a)(6) (1994 & Supp. IV 1999); 8 C.F.R. §§ 241.4 & 241.5 (1999).

49. Plyler v. Doe, 457 U.S. 202, 225 (1982).

50. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (citations omitted).

The validity of each law has depended on its nature and the constitutional provisions it may offend. State regulation invokes primarily two constitutional concerns: (1) the Supremacy Clause[51] and naturalization power, which vest the federal government with primary and supreme authority to regulate immigration and naturalization;[52] and (2) the Equal Protection Clause.[53] In simple terms, state action must clear two primary federal hurdles. First, it must not intrude into the federal government's authority to regulate immigration. If it does, then it is unconstitutional. If it does not, then the state action must not violate the Equal Protection Clause.

A. *Supremacy Clause*

Not every state law, "which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power, whether latent or exercised."[54] Regulation of immigration is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[55] "Under the Constitution the states are granted no such powers; *they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence* of aliens in the United States or the several states."[56]

State law may violate the Supremacy Clause in three ways: (1) if it regulates a particular field that is exclusively within the authority of the federal government to regulate;[57] (2) if the regulation is not exclusively within the federal government's authority to regulate, then the nature of the subject matter permits no other conclusion than that it is within the federal authority or Congress has or-

51. *See* U.S. CONST. art. IV, § 2.

52. The U.S. Constitution does not explicitly address the authority to regulate immigration. Throughout the years, the source of this authority has been attributed to: (1) the constitutional provision granting Congress the power to establish a uniform rule of naturalization; (2) the Commerce Clause; (3) the plenary authority over foreign relations; and (4) an inherent power which all sovereign nations have to regulate its borders. *See Plyler*, 457 U.S. at 225; *see also* Toll v. Moreno, 458 U.S. 1, 10-11 (1982).

53. *See* U.S. CONST. amend. XIV, § 1.

54. De Canas v. Bica, 424 U.S. 351, 355 (1976).

55. *Id.*

56. *Id.* at 358 n.6 (emphasis in original); *see also Toll*, 458 U.S. at 12-13 ("State regulation not congressionally sanctioned . . . that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.") (citations omitted).

57. *See De Canas*, 424 U.S. at 354, 356.

dained that the federal government alone has regulatory authority;[58] or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[59]

Early in our history, state attempts to charge a passenger fee or direct that non-citizens arriving from foreign ports post bonds to ensure that they would not become a public charge, were held to be unconstitutional regulations of commerce and immigration.[60] In fact, even state regulation appearing harmonious with federal law may be unconstitutional if it stands as an obstacle to the accomplishment to the execution of the full purposes and objectives of Congress.[61]

For example, in 1971, California enacted an employment law to protect authorized workers.[62] This law prohibited employers, when authorized workers would be adversely affected, from knowingly hiring non-citizens who were not entitled to lawful residence in the United States.[63] In this immigration-related context, the United States Supreme Court set forth their three-part preemption test in *De Canas v. Bica*:[64] (1) whether the state regulates a particular field which is exclusively within the authority of the federal government to regulate; (2) whether the nature of the subject matter concerned by state regulation, while not exclusively within the federal government's authority to regulate, is of the nature which permits no other conclusion than that it is within the federal authority or Congress has ordained that the federal government alone has regulatory authority; or (3) whether the state law stands as an obstacle to the accomplishment to the execution of the full purposes and objectives of Congress.[65]

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58. *See id.* at 357.

59. *Id.* at 363 (citations omitted); *see also* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1252-53 (C.D. Cal. 1997). The *Wilson* court applied the *De Canas* analysis to California's Proposition 187 which, among other things, restricted unauthorized non-citizens from receiving many state public benefits as well as mandated certain reporting of unauthorized non-citizens to the INS. *See id.* at 1249. The district court found that federal law preempted many of Proposition 187's provisions. *See id.* at 1261.

60. *See* Passenger Money Cases, 48 U.S. (7 How.) 283 (1849).

61. *See De Canas,* 424 U.S. at 363 (citations omitted).

62. *See id.*

63. *See id.*

64. 424 U.S. 351 (1976).

65. *See id.* at 354, 356-57, 363. The Supreme Court could not decide all constitutional preemption issues based upon the record and remanded the case for full consideration based upon their analysis. *See id.* at 364. It was unclear whether

The Supreme Court recognized that regulation of immigration is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[66] They believed, in 1976, that, "[t]he comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the *employment* of illegal aliens as 'plainly within . . . [that] central aim of federal regulation.'"[67] Moreover, other federal statutes appeared to allow states to regulate the employment of aliens consistent with federal law.[68]

The Court then recognized that states have, "broad authority under their police powers to regulate the employment relationship to protect workers within the State."[69] The Court found that this California law was enacted under proper police power for the express purpose of addressing local problems of job deprivation for authorized workers, curtailing the substandard wages and working conditions for all workers which result from employing non-authorized workers and the diminished effectiveness of labor unions.[70] However, the Supreme Court did not stop there. "[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation."[71] The Supreme Court then

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the California law, as written or interpreted, would apply to non-citizens who were authorized to work, though were illegally residing in the United States. *See id.* At the time of this decision, which is much different than now, the Immigration and Nationality Act did not regulate employment of aliens. Since then, Congress has amended the Immigration and Nationality Act to regulate the employment of non-citizens, discrimination in the employment process, and administrative document fraud provisions. *See* Immigration and Nationality Act §§ 274A–274C, 8 U.S.C. § 1324(a)-(c) (1994 & Supp. IV 1999). At the time of the *De Canas* decision, however, the Court noted the comprehensiveness of the INA in dealing with the entry and stay of aliens in the United States, but not their employment. *See De Canas,* 424 U.S. at 360-61. Also, there were other federal statutes that appeared to give states authority to regulate as California did. *See id.* at 362. Nevertheless, the Court was concerned that even state legislation which was a proper exercise of police power, and apparently harmonious with federal law, could nevertheless be unconstitutional because it may frustrate the purposes of Congress. *See id.* at 364. Since the record on this issue needed to be developed, the Court remanded the case. *See id.*

66. *De Canas,* 424 U.S. at 355.
67. *Id.* at 359 (emphasis added).
68. *See id.* at 362.
69. *Id.* at 356-57.
70. *See id.* at 357, 365.
71. *Id.* at 357.

remanded the case for development of this issue.[72]

Therefore, we learn from *De Canas* that state regulation of immigration simply is impermissible. We also learn that even state action not directly regulating immigration—action taken pursuant to proper state police authority—may nevertheless be unconstitutional if it frustrates the full purposes and intent of Congress.

The issue of whether a state can vacate convictions for the purpose of allowing non-citizens to avoid federal immigration laws has not been brought before the United States Supreme Court. Under United States Supreme Court analysis, however, it would be unconstitutional. First, it is evident that such action is a direct regulation of immigration. It is a state taking action to bar the application of federal immigration law to a non-citizen. It is a state determination that a non-citizen, whom Congress has said should be placed in federal immigration proceedings and subject to federal immigration laws, should remain in the United States and not be placed in federal removal proceedings. As a direct regulation of immigration, federal law preempts it.

Second, states have police powers to regulate criminal matters within their jurisdiction. However, as the Court stated in *De Canas*, even regulations which are meant to protect vital state interests must give way to paramount federal legislation.[73] A state may say that its interest in granting post-conviction relief to a non-citizen is to ensure that its police power is exercised in a fair and just manner, so that the non-citizen will not be deported for a crime which the court does not think merits deportation. After all, because of the immigration consequences, a conviction and sentence may well be much harsher for the non-citizen than for the citizen. If state law and punishment is to be exercised fairly, then the state must consider and act upon the potential immigration consequences. Otherwise, the state will punish the non-citizen more harshly than the citizen. However, Congress has clearly set forth which non-citizens will be placed in immigration proceedings, what criminal behavior will subject the non-citizen to immigration proceedings, what relief is available to that person and under what conditions the non-citizen may remain in the United States. Therefore, this purported state interest is in direct conflict with the full purposes and intent of Congress and must fail. Federal law again preempts

72. *See id.* at 365.
73. *See* 424 U.S. at 357.

it.

Furthermore, Congress has, in great detail, set forth procedures for hearings, decisions and review of these hearings and decisions in immigration matters.[74] This involves representation by the INS, submission and consideration of evidence and argument by both the non-citizen and the federal government, and adherence to federal immigration law. State criminal court hearings vacating convictions for alleged immigration consequences involve no representation by the federal government. The United States does not present evidence on the facts alleged by the defendant, has no opportunity to cross-examine the defendant, and has no review of these decisions by the BIA or federal courts. Simply put, state criminal courts do not adhere to any of the federal immigration laws. These unaccountable immigration decisions clearly are preempted by federal law.

Congress has sole authority to regulate which aliens enter and remain in the United States. Although states certainly can make and enforce criminal laws, they cannot do so to regulate immigration.

B. Equal Protection

The Equal Protection Clause affords all persons in the United States equal protection under the law.[75] In the immigration context, this clause comes into play when states make distinctions based upon citizenship. For instance, states have required that only United States citizens can be licensed in certain professions or receive public assistance. Generally, these distinctions must meet the heightened standard of being necessary to further a compelling state interest, which has been difficult for states to establish.[76]

74. *See* Immigration and Nationality Act §§ 239, 240, 242; 8 U.S.C. §§ 1229, 1230, 1252 (1994 & Supp. IV 1999).

75. *See* U.S. CONST. amend. XIV, § 1; University of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

76. *See, e.g., In re* Griffiths, 413 U.S. 717, 724-25 (1973) (holding state requirement that lawyers be U.S. citizens is unconstitutional); Examining Bd. of Eng'rs, Architects and Surveyors v. Flores De Otero, 426 U.S. 572, 605-06 (1976) (deciding U.S. citizenship requirement in Puerto Rico for engineers engaged in private practice is unconstitutional); Truax v. Raich, 239 U.S. 33, 43 (1915) (concluding that state statute requiring employers with more than five employees to employ at least 80% qualified electors or native born citizens is unconstitutional); Bernal v. Fainter, 467 U.S. 216, 225-26 (1984) (determining that states cannot restrict notary publics to U.S. citizens); Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (finding that state statute barring resident aliens from receiving state financial as-

However, the United States Supreme Court has used a lower, intermediate standard when reviewing a state law prohibiting the use of public funds to educate children who are not legally in the United States.[77]

Citizenship distinctions for public employment or office are given more deference and are reviewed under the lessor, intermediate standard in what often is referred to as the "political function" exception.[78] These distinctions are upheld if: (1) they are not substantially overinclusive or underinclusive to serve legitimate political ends; and (2) they apply to those holding elective office or important nonelective executive, legislative, and judicial positions who "participate directly in the formulation, execution, or review of broad public policy"[79] and "perform functions that go to the heart of representative government."[80] For example, California's requirement that peace officers—or any governmental position having the powers of a peace officer—be United States citizens is constitutional. These positions are part of the "sovereign's power to exercise coercive force over the individual"[81] and "symbolize this power of the political community over those who fall within its jurisdiction."[82] Also, states may require that public school teachers be either United States citizens or lawful permanent residents who have declared their intention to become United States citizens.[83] Public school teachers fulfill a basic governmental obligation of educating youth and influencing them about the government, the political process and values necessary for our political system.[84] However, states may not bar non-citizens from competitive civil service government positions that are not one of these essential roles in the political functioning of the state.[85] Likewise, a state may

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sistance for higher education violates the Equal Protection Clause of the United States Constitution); Plyler v. Doe, 457 U.S. 202, 226 (1982) ("The State may borrow the federal classification. . . . But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to "the purposes for which the state desires to use it.") (citation omitted).

77. *See Plyler*, 457 U.S. at 223. The Court did not review the state action under the highest suspect classification review because undocumented non-citizens are not a suspect class and public education is not a fundamental right. *See id.* at 223.

78. *See Bernal*, 467 U.S. at 221.

79. *Id.* at 221-22 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

80. *Bernal*, 467 U.S. at 222.

81. Cabell v. Chavez-Salido, 454 U.S. 432, 445 (1982).

82. *Id.* at 447.

83. *See* Ambach v. Norwick, 441 U.S. 68, 80-81 (1979).

84. *See id.* at 78.

85. *See* Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973).

not require a loyalty oath in which all public employees, regardless of type or nature of job, swear that they are citizens of the United States and the state.[86]

Regarding undocumented or illegal aliens, the United States Supreme Court has stated that intermediate scrutiny is appropriate:

> We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class . . . has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See *De Canas v. Bica*, 424 U.S. 351, 96 S. Ct. 433, 47 L.Ed2d 43 (1976).[87]
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> . . . . At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. . . . Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.[88]

While virtually all state action examined by the United States Supreme Court regarding immigration issues have "disadvantaged" non-citizens or given preference to citizens, state action which gives preferential treatment to non-citizens over citizens also would be

86. *See* City of Orlando v. Florida, 751 F. Supp. 974, 976 (M.D. Fla. 1990).
87. *Plyler*, 457 U.S. at 219 n.19.
88. *Id.* at 220.

subject to the Equal Protection Clause.[89] The Equal Protection Clause is an individual and personal right[90] and is available regardless of the person's background.[91]

Under equal protection analysis, it becomes apparent that states cannot treat criminal non-citizens more leniently than citizens without violating the Equal Protection Clause. First, we need to consider the type of distinction made and the state's interest in this distinction.[92] If the distinction involves a suspect classification or a fundamental right, the state's interest must be compelling and the distinction must be necessary and precisely tailored to further this compelling interest.[93] If the distinction does not involve a suspect classification or a fundamental right, the citizenship or alienage classification must be rational and further a substantial state interest or be substantially related to an important government objective.[94]

Courts have not yet squarely decided this issue. Therefore, we do not know with a certainty at this time what type of equal protection scrutiny courts would apply to citizenship or alienage distinctions of criminal defendants. It appears, though, that the states would need to demonstrate a compelling interest for providing a benefit to a non-citizen which they deny to a citizen.

Regardless of which level of judicial equal protection scrutiny applies, states simply do not have a lawful interest in preventing the deportation of non-citizens, and this distinction fails under all levels of scrutiny. This is an immigration determination that is in the exclusive domain of the federal government.

Again, a purported state interest in distinguishing between criminal defendants because of their citizenship is to presumably ensure the just and fair punishment for the offense. The rationale of this interest continues with the statement that non-citizens, by virtue of federal law, may be deported because of their crime and/or the punishment imposed (the type and length of sentence). Therefore, the state punishment must be less (no convic-

89. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 289-90 (1978).

90. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (holding that state action enforcing racially biased property covenants is invalid under the Fourteenth Amendment). The Supreme Court also recognized judicial action as state action within the meaning of the Fourteenth Amendment. *See id.*

91. *See Bakke*, 438 U.S. at 290-91.

92. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 223-24 (1982).

93. *See id.*

94. *See id.*

tion, lighter sentence, or later vacating the conviction) to ensure that the non-citizen is not treated more harshly than the citizen is by a later deportation. Deportation may be harsher than the criminal punishment and state criminal court judges may not believe that deportation is warranted as punishment for the conviction.

Fundamentally, this argument boils down to the state judge deciding that a non-citizen should remain in the United States. The state is disagreeing with the operation of federal immigration laws and the distinctions that Congress has made in the terms and conditions of a non-citizen's residence in this country. This is, fundamentally, not a legitimate or legal concern for a state. Therefore, this state interest is not, and cannot be, compelling or substantial.

Moreover, the collateral consequences of a conviction go far beyond potential immigration consequences. Convictions may affect current and future employment, public benefits, credit, licensing, volunteer opportunities and more.[95] A prior conviction may also determine how severely a person is punished when sentenced for a future crime.[96] To grant amelioration of a criminal conviction to a non-citizen and not to a citizen, based upon citizenship, disadvantages and penalizes United States citizens. United States citizens are not afforded equal protection of the laws.

IV. FEDERAL IMMIGRATION TREATMENT OF CRIMINALS

The first federal immigration law dealing specifically with criminals was enacted on March 3, 1875.[97] This law prevented the entry of "person[s] who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration . . . ."[98] Seven years later, Congress provided, "[t]hat all foreign convicts except those convicted of political offenses, upon arrival, shall be sent back to the nations to which they belong and from whence they came."[99] After these initial general statements of which crimi-

95. *See infra* notes 218-232 and accompanying text (including a non-exhaustive list of collateral consequences of convictions in Minnesota).

96. *See* MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § II.B (1998)

97. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (1875).

98. *Id.*

99. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882).

nals are inadmissible to the United States, Congress became more specific in 1891 and added the concept of "crimes involving moral turpitude,"[100] beginning what now is a detailed listing of criminal behavior in the immigration laws. Congress excluded, or made inadmissible, from the United States: "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude . . . ."[101]

Since the late 1800s, immigration laws have greatly expanded. In 1952, federal immigration laws were overhauled into the basic Immigration and Nationality Act from which we have been operating since with amendments and changes.[102] Since 1952, steady and

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100. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (1891). Crimes involving moral turpitude are, generally, crimes involving deceit and fraud; crimes which are inherently morally reprehensible and intrinsically wrong; crimes which are "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of* Franklin, 20 I. & N. Dec. 867, 868 (BIA 1994) (citations omitted).

101. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (1891).

102. Regarding criminal convictions, in 1952, a person was not allowed to enter the United States if:

> (1) they had been convicted of a crime involving moral turpitude (with the exception of someone who only committed one crime while under 18 "and more than 5 years has elapsed since commission of the crime or release from prison");
> (2) they had been convicted of two or more offenses (other than purely political offenses) for which the aggregate sentences to confinement actually imposed were five years or more; and
> (3) they had been convicted of, "a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate . . . ."

Immigration and Nationality Act of 1952, ch. 477, § 212(a)(9), (10), (23), 66 Stat. 163 (1952). A person was deportable under the Immigration and Nationality Act of 1952 if:

> (1) they were "convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for one year or more;"
> (2) they were convicted of "two crimes involving moral turpitude, at any time after entry, not arising out of a single scheme of criminal misconduct, regardless of whether confined for the crimes";

constant amendments have been made to the Immigration and Nationality Act, most notably in the 1980s and 1990s.[103] These

(3) they were convicted of violating any provision of the Act entitled, "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes";
(4) they were convicted of a violation of 18 U.S.C. § 1546;
(5) they, at any time, were "convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction – forming or addiction sustaining opiate;"
(6) they were convicted at any time after entry of "possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;"
(7) they have been convicted of violating the Alien Registration Act of 1940 (once within five years of entry or at any time if convicted more than once);
(8) they have been convicted of various violations of the United States Code pertaining to foreign relations, explosives, wartime related criminal acts, military violations, enemy acts, threats against the President, certain trade and commerce violations; and
(9) they have been convicted of bringing in or harboring an alien for purposes of prostitution.

Immigration and Nationality Act of 1952, ch. 477, § 241(a)(4), (5), (11), (14), (15), (16), (17) & (18), 66 Stat. 163 (1952).

103. There have simply been too many pieces of legislation affecting the immigration laws to list here. This includes not only direct amendments to the Immigration and Nationality Act, but also amendments to other federal laws dealing with appropriations, staffing of the Department of Justice, enforcement activities, and treatment of and benefits for aliens. However, a few major pieces of legislation in this time period include: the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Immigration Amendments of 1988, Pub. L. No. 100-658, 102 Stat. 3908 (1988); the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) as amended by Pub. L. No. 102-583, 106 Stat. 4914 (1992); the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); and the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 130004, 108 Stat. 1796 (1994).

The Committee on the Judiciary of the House of Representatives reports approximately 157 pieces of legislation, either amending the Immigration and Nationality Act or otherwise affecting aliens, were enacted into law from 1979-1994

amendments have added more grounds for preventing someone's entry into the United States and for deporting them from the United States.[104] Not all grounds of inadmissibility or deportability are criminally related.[105] Not all criminally related grounds require a conviction.[106]

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during the 96th Congress through the 2d session of the 103rd Congress. *See* IMMIGRATION AND NATIONALITY ACT WITH NOTES AND RELATED LAWS, 104TH CONG., BRIEF HISTORY OF UNITED STATES IMMIGRATION POLICY 625-40 (1995). This averages out to approximately 19.6 enactments per year.

104. There are also federal crimes related to immigration matters contained in Titles 18 and 28 of the United States Code. This article deals with the civil administrative immigration laws—not the federal criminal immigration related laws.

105. Immigration and Nationality Act § 212(a), 8 § U.S.C. §§ 237(a), 1182 & 1227(a) (1994 & Supp. IV 1999).

106. Some of the criminally related grounds of inadmissibility which do not require a conviction are: illegal reentry after deportation (Immigration and Nationality Act § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1994 & Supp. IV 1999)); admission of having committed a crime involving moral turpitude or a controlled substance (Immigration and Nationality Act § 212(a)(2), 8 U.S.C. § 1182(a)(2) (1994 & Supp. IV 1999)); coming to engage in prostitution related activities (or has within the last 10 years) or unlawful commercialized vices (Immigration and Nationality Act § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D) (1994 & Supp. IV 1999)); reason to believe a person is a drug trafficker (Immigration and Nationality Act § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C) (1994 & Supp. IV 1999)); knowing or reasonably believing that a person will engage in espionage, sabotage, or violate export prohibitions (Immigration and Nationality Act § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A) (1994 & Supp. IV 1999)); reasonably believing a person is or is likely to engage in any terrorist activity (Immigration and Nationality Act § 212 (a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (1994 & Supp. IV 1999)); participation in Nazi persecutions or genocide (Immigration and Nationality Act § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E) (1994 & Supp. IV 1999)); fraudulently seeking visas, entry or other immigration benefits (Immigration and Nationality Act § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (1994 & Supp. IV 1999)); alien smuggling (Immigration and Nationality Act § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E) (1994 & Supp. IV 1999)); engaging in polygamy in the United States (Immigration and Nationality Act § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (1994 & Supp. IV 1999)); international child abductors (Immigration and Nationality Act § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C) (1994 & Supp. IV 1999)); unlawfully voting on the local, state or federal level (Immigration and Nationality Act § 212(a)(10)(D), 8 U.S.C. § 1182(a)(10)(D) (1994 & Supp. IV 1999)); or falsely claiming United States citizenship (Immigration and Nationality Act § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (1994 & Supp. IV 1999)).

Examples of criminally related grounds of deportation which do not require a conviction are: if inadmissible under Immigration and Nationality Act § 212 at the time of admission or adjustment of status to lawful permanent resident (Immigration and Nationality Act § 237(a)(1), 8 U.S.C. § 1227(a)(1) (1994 & Supp. IV 1999)); alien smuggling (Immigration and Nationality Act §237(a)(1)(E), 8 U.S.C. § 1227(a)(1)(E) (1994 & Supp. IV 1999)); engaging in marriage fraud (Immigration and Nationality Act § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (1994 & Supp. IV 1999)); being a drug abuser or addict (Immigration and Nationality Act § 237 (a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (1994 &

Regarding criminal activity, Congress has changed the grounds of inadmissibility and deportability. They have modified the waivers for these grounds and restricted other forms of relief from deportation.[107] Congress has also tried to speed up the deportation process of criminals by holding deportation proceedings in prisons as well as having a more expeditious administrative deportation proceeding for certain criminals who do not qualify for relief from deportation.[108]

Supp. IV 1999)); violating certain protection orders (Immigration and Nationality Act § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii) (1994 & Supp. IV 1999)); falsely claiming United States citizenship (Immigration and Nationality Act § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D) (1994 & Supp. IV 1999)); engaging in espionage, sabotage, export violation activities (Immigration and Nationality Act § 237(a)(4)(A)(i), 8 U.S.C. § 1227(a)(4)(A)(i) (1994 & Supp. IV 1999)); engaging in criminal activity which endangers public safety or national security (Immigration and Nationality Act § 237(a)(4)(A)(ii), 8 U.S.C. § 1227(a)(4)(A)(ii) (1994 & Supp. IV 1999)); engaging in the unlawful opposition to the United States Government (Immigration and Nationality Act § 237(a)(4)(A)(iii), 8 U.S.C. § 1227(a)(4)(A)(iii) (1994 & Supp. IV 1999)); engaging in terrorist activities (Immigration and Nationality Act § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (1994 & Supp. IV 1999)); engaging in Nazi persecution or genocide (Immigration and Nationality Act § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D) (1994 & Supp. IV 1999)); and unlawfully voting on the local, state, or federal level (Immigration and Nationality Act § 237(a)(6), 8 U.S.C. § 1227(a)(6) (1994 & Supp. IV 1999)).

107. The most recent, major pieces of legislation in this regard are: the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), as amended by the International Narcotics Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914 (1992); the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

108. These provisions are now codified in the Immigration and Nationality Act § 238 and 8 U.S.C. § 1228 (1994 & Supp. IV 1999). In 1986, Congress authorized the Attorney General to begin deportation proceedings as expeditiously as possible following a criminal conviction. *See* Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603 § 701, 100 Stat. 3359, 3445 (1986). Two years later, Congress expanded on this and provided for "expedited deportation proceedings for aliens convicted of aggravated felonies." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7347, 102 Stat. 4181 (1988). These provisions form the basis of the Institutional Hearing Program ("IHP") in which the Attorney General conducts deportation hearings in certain state and federal prisons while an alien is incarcerated on a criminal sentence. The purpose behind this provision is to have the immigration proceeding completed by the time the non-citizen is released from state or federal custody. By doing this, the Attorney General can deport non-citizens immediately upon release from criminal custody, instead of having to take them into federal immigration custody and begin the deportation hearing at that point.

Administrative deportation refers to a process in which the INS District Director may issue an order of deportation for certain non-citizens who are not lawful permanent residents, are convicted of crimes and do not have any relief

A. *The Intersection of Federal Immigration and State Criminal Laws*

Federal immigration law and state criminal laws have intersected throughout our history. Some grounds of deportation under federal law are, and have been, based upon a criminal conviction by a state. Historically, if a state did not consider a person to be "convicted" under state law for at least one purpose, the non-citizen may not be deportable for that conviction. Also for many years, federal immigration law specifically allowed state criminal courts to make judicial recommendations against deportation. This recommendation, if properly made in accordance with statute and regulations, including an opportunity for the federal government to be present and to present evidence, prevented the use of the convictions for certain immigration purposes. Finally, certain state pardons for crimes would erase the conviction for certain immigration purposes.[109]

Over the last century, however, Congress has restricted states' roles in immigration matters. For instance, Congress has now enacted a federal definition of "conviction" in the immigration laws.[110] Regardless of whether a state considers a person "convicted" for state purposes, so long as the action meets the federal definition, a non-citizen may be considered "convicted" under federal law. Over the years, Congress has restricted the authority of the states to issue judicial recommendations against deportation.[111] Now, Congress has entirely eliminated this authority.[112] Concerning pardons, Congress has refused to recognize legislative pardons and has reduced

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from deportation. This provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 1796 (1994).

109. *Matter of* G—, 9 I. & N. Dec. 159, 161 (BIA 1960; Att'y Gen. 1961). "[A] judicial recommendation against deportation or a pardon (whether legislative or executive) barred deportation proceedings based on the conviction of crime." *Id.* (citing Act of Feb. 5, 1917, ch. 29, 39 Stat. 874, 889 (1917)). "No distinction was made between narcotic and nonnarcotic violations." *Id.*

110. *See* Immigration and Nationality Act § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (1994 & Supp. IV 1999).

111. "Section 241(b) of the Immigration and Nationality Act eliminated the legislative pardon as a bar to deportation proceeding. *Matter of* R—, 5 I. & N. Dec. 612. In 1956, an amendment to section 241(b) provided that a judicial recommendation against deportation or an executive pardon should not apply to an alien convicted of a narcotic offense (Act of July 18, 1956)." *Matter of* G—, 9 I. & N. Dec. 159, 161 (BIA 1960; Att'y Gen. 1961).

112. *See* Immigration and Nationality Act § 505, 8 U.S.C. §1535 (1994 & Supp. IV 1999) (eliminating the judicial recommendations against deportation, previously found at Immigration and Nationality Act § 241(b)).

the recognition of executive pardons to fewer types of convictions.[113] In fact, in the federal criminal realm, Assistant United States Attorneys must have the express concurrence of the INS before they may agree not to deport a non-citizen.[114]

Along with restricting and reducing states' roles in preventing deportation, Congress has increased states' roles in working with the Department of Justice to facilitate deportation. For instance, Congress now allows states to voluntarily assist the Attorney General in the investigation, apprehension and detention of non-citizens. In these situations, state officers are trained in federal law, must adhere to federal law, and must operate under the direction and supervision of the Attorney General.[115] Congress mandated that the Attorney General provide twenty-four-hour, daily investigative resources to state and local authorities to determine whether criminals are non-citizens.[116] The Attorney General must designate and train officers to liaison with federal, state and local law enforcement, correctional agencies, and courts regarding the arrest, conviction and release of non-citizens charged with aggravated felonies. The Attorney General must also assist state courts in identifying non-citizens unlawfully in the United States pending criminal prosecution.[117] Certainly, Congress did not contemplate assisting states in identifying criminal non-citizens so that the states could help them escape federal immigration law. Congress has enacted a law facilitating information sharing with the INS of peoples' immigration status. Specifically, this law prohibits any federal, state or local government or government official from prohibiting or restricting any government entity or official from maintaining information on, sending information to or receiving information from the INS regarding someone's immigration status.[118] Actually, Congress is concerned that the INS receive prompt notice of convictions. If states wish to receive federal grants for law enforcement under 42 U.S.C. § 3751, the states must establish a plan to provide, free of charge and within thirty days of conviction, notice of the

113. *See supra* note 111 and accompanying text.

114. *See* 28 C.F.R. § 0.197 (1998).

115. *See* Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (1994 & Supp. IV 1999).

116. *See* Immigration and Nationality Act § 236(d)(1)(A), 8 U.S.C. § 1226(d)(1)(A) (1994 & Supp. IV. 1999).

117. *See id.*

118. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C § 642, 110 Stat. 3009-546 (1996).

conviction of a non-citizen to the INS. The states must also provide certified convictions records to the INS within thirty days of a request.[119]

The Attorney General now may reimburse states for the incarceration costs of certain criminal non-citizens, as well as relieve the state from its incarceration responsibilities by assuming federal custody of the criminal.[120] Congress has declared that not fewer than ten full-time active duty INS agents will be allocated to enforce the immigration laws in each state.[121]

In this century, we have seen Congress restricting states' roles in preventing a non-citizen's deportation while increasing states' roles in facilitating a non-citizen's deportation. Let us now take a closer look at this development of congressional intent and federal immigration law in the context of state convictions.

B. Definition of "Conviction"

It may seem at first blush a rather simple matter to apply federal immigration law to criminals. Many grounds for inadmissibility and deportability clearly state that if someone has been convicted of a certain type of crime, the ground of inadmissibility or deportability applies. It has not, however, been that easy.

One of the primary difficulties was that until 1996, Congress had not defined "conviction" in the Immigration and Nationality Act. Without a federal statutory definition, the BIA was left to fashion a definition for themselves.

Historically, the BIA looked to the laws of the state in which the person was "convicted." The general analysis the BIA developed was that a conviction existed if: (1) there was a judicial finding of guilt; (2) the case was no longer "pending" (the court ordered a fine, incarceration, or suspended a sentence); and (3) the state considered the person to be "convicted" for at least one pur-

119. *See* 42 U.S.C. §§ 3753(a)(11), 3751 (1994 & Supp. III 1997). Congress enacted the Criminal Identification Technology Act of 1998, Pub. L. No. 105-251, 112 Stat. 1870 (1998), to facilitate interstate criminal justice identification, information, communications and forensics. This specifically provides for the exchange of criminal history records for immigration and naturalization matters. *See* Criminal Identification Technology Act, Pub. L. No. 105-251, § 217, 112 Stat. 1870, 1878 (1998).

120. *See* Immigration and Nationality Act § 241(i), 8 U.S.C. § 1231(i) (1994 & Supp. IV 1999).

121. *See* Immigration and Nationality Act § 103(f), 8 U.S.C. § 1103(f) (1994 & Supp. IV 1999).

pose.[122] This analysis grew out of years of intellectual wading through varying state criminal procedures. Each state had different procedures and many had deferred adjudication statutes of varying natures.[123] In order to determine whether a conviction and/or sentence existed which may be required to establish a ground for deportation, the BIA examined the sufficiency of state expungements,[124] suspension of the imposition of a sentence,[125] sus-

122. *See Matter of* Seda, 17 I. & N. Dec. 550, 552 (BIA 1980) (citing *Matter of* Robison, 16 I. & N. Dec. 401 (BIA 1963)).

123. *See Matter of* R— R—, 7 I. & N. Dec. 478, 484 (BIA 1957). The Board held that a conviction for a crime involving moral turpitude existed for immigration purposes under Texas law when a non-citizen pled and was adjudicated guilty, was sentenced to three years imprisonment but the execution of the sentence was suspended in lieu of three years probation. *See id.* Upon release from probation, the non-citizen, under Texas law, may be discharged and the conviction expunged. Until this happens, however, the non-citizen has been convicted and is deportable for the crime. *See Matter of* G—, 7 I. & N. Dec. 171, 174 (BIA 1956) (holding that under Massachusetts law, a non-citizen found guilty and sentenced to hard labor, but whose execution of sentence was suspended and placed on probation, and then six months later the complaint was dismissed, was not deportable on the basis of the conviction because the conviction was not "final"). *See also Matter of* H—, 6 I. & N. Dec. 619, 623 (BIA 1955; Att'y Gen. 1955) (explaining that good moral character may be found when a crime involving moral turpitude under the California deferred adjudication statute is expunged).

124. *See Matter of* O—T—, 4 I. & N. Dec. 265 (C.O. 1951). The California deferred adjudication statute was examined in reference to a petty theft conviction. *See id.* at 266. The non-citizen was sentenced to 90 days in jail, 60 days suspended if he did not commit other crimes in the next two years. *See id.* at 265. Later, the plea of guilty was withdrawn and the case dismissed. *See id.* However, by this time, California courts had held that for some purposes under state law, an expungement under this law did not erase a conviction. *See id.* at 265-66. However, the INS Central Office noted that a federal district court nevertheless held that an expungement under California law erases a conviction for naturalization purposes. *See id.* at 268; *see also In re* Ringnalda, 48 F. Supp. 975 (S.D. Cal. 1943). In *In re* Paoli, 49 F. Supp. 128 (N.D. Cal. 1943), the court held that while an expungement under California law may erase the conviction for naturalization purposes, the underlying conduct could be considered in determining good moral character. The INS Central Office then, citing an apparent disagreement between the state and federal courts later held that, "[a]ccordingly, no change appears to be warranted in the present view of the Service to the effect that in cases such as in the instant one the charges are not sustained." *Matter of O— T—*, 4 I. & N. Dec. at 268.

The lack of a federal definition of "conviction" and the struggle to define "conviction" for immigration purposes came to a head in *Matter of* A—F—, 8 I. & N. Dec. 429 (BIA 1959). In this case, the BIA upheld the deportation of a non-citizen who had been convicted in California for dealing in marijuana. *See id.* at 438. The non-citizen was found guilty, the proceedings were suspended, he was placed on five years probation and as a condition of the probation, he served one year in a county jail. *See id.* at 442. The issue, which was then presented to the Attorney General, was an apparent conflict between this decision and an earlier decision. *Compare Matter of* D—, 7 I. & N. Dec. 670 (BIA 1958) with *Matter of* A—F—,

pension of the execution of a sentence, and whether jail time as a condition of probation was a sentence to imprisonment.[126]

Even so, states continually developed new criminal procedures and the BIA's definition of conviction became outdated. For instance, depending upon the state criminal procedures, non-citizens in different states who were guilty of the same criminal behavior may not be treated the same under the immigration laws. The BIA found this unacceptable. For example, as the Board stated in *Matter of Ozkok*:[127]

> [A]lien A, who has been found guilty of a narcotics violation by a jury or judge, and who was placed on probation, fined, and even incarcerated as a special condition of

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8 I. & N. Dec. 429, 438-39 (BIA 1959, Att'y Gen. 1959). The main struggle was in defining conviction in the absence of a federal definition. *See Matter of A—F—*, 8 I. & N. Dec. at 444. The Attorney General upheld the order of deportation. *See id.* at 446. Regarding the conflict with *Matter of D—*, 7 I. & N. Dec. at 674, that once a drug conviction was set aside and dismissed under state law it could not support deportation, but until that time it could, the Attorney General overruled the BIA. *See id.* In short, the Attorney General found clear congressional policy "that Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction." *Matter of A—F—*, 8 I. & N. Dec. at 445. This holding was followed in *Matter of* Kelly, 10 I. & N. Dec. 526 (BIA 1964) and *Matter of* Tsimbidy-Rochu, 13 I. & N. Dec. 56 (BIA 1968). This Attorney General ruling was limited to narcotic convictions and not extended to crimes involving moral turpitude. *See Matter of G—*, 9 I. & N. Dec. 159 (BIA 1960; Att'y Gen. 1961); *Matter of* Gutnick, 13 I. & N. Dec. 672 (BIA 1971). This ruling has also been followed in case of a "correction of sentence" with a subsequent dismissal without a discussion of the reason behind the "correction." *See Matter of* Ibarra-Obando, 12 I. & N. Dec. 576 (BIA 1966; Att'y Gen. 1967). *See also Matter of* Wong, 12 I. & N. Dec. 721, 723 (BIA 1968). The Board determined that a plea of guilty to a drug charge, suspended pronouncement of judgment, two years probation, and subsequent withdrawal of plea and dismissal, is a conviction for immigration purposes. *See id.* In California, a plea of guilty was considered conviction. *See id.* at 724.

125. *See Matter of* Johnson, 11 I. & N. Dec. 401, 408 (BIA 1965) (holding that a stay of imposition of sentence under Washington law is considered a conviction for at least one purpose under Washington law and is, therefore, a conviction for immigration purposes).

126. *See Matter of F—*, 1 I. & N. Dec. 343, 348 (BIA 1942). A California conviction for a crime involving moral turpitude under section 1203.4 of California statutes does not support deportation under the Immigration Act of 1917, which requires a sentence to imprisonment for a term of one year of more. *See id.* The non-citizen was sentenced to one year at the county jail but that was a term of probation—not a sentence to imprisonment. *See id.* Also, section 1203.4 allows for later setting aside of guilt and dismissal of proceedings—even though the conviction may be used in a subsequent criminal proceeding. *See id.*

127. 19 I. & N. Dec. 546 (BIA 1988).

probation, but who has no right to appeal and is subject to automatic entry of a judgment upon violation of probation, would not be considered "convicted" under our three-pronged test because there has been no judicial adjudication of guilt. On the other hand, we would find a conviction in the case of alien B, who pleaded nolo contendere to the same charge, but whose sentence was deferred with no other penalty imposed, so long as the state also considered him convicted for some purpose.[128]

To overcome this different treatment, which was the result not of different criminal behavior but of different states' criminal procedures, the BIA revisited and revised its definition of conviction in *Matter of Ozkok*:

> As in the past, we shall consider a person convicted if the court has adjudicated him guilty or has entered a formal judgment of guilt. . . .
>
> . . . .
>
> Where adjudication of guilt has been withheld, however, further examination of the specific procedure used and the state authority under which the court acted will be necessary. As a general rule, a conviction will be found for immigration purposes where all of the following elements are present:
>
> (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
>
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and
>
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the

128. *Id.* at 550-51.

> court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.[129]

The BIA recognized that "[t]he procedures vary from state to state and include provisions for annulling or setting aside the conviction, permitting withdrawal of the plea, sealing the records after completion of a sentence or probation, and deferring adjudication of guilt with dismissal of proceedings following a probationary period."[130]

Congress, however, grew dissatisfied with this definition of conviction developed by the BIA. It became apparent that this definition, although an improvement, still did not adequately apply to varying state criminal ameliorative provisions. Congress was frustrated that aliens who were clearly guilty of criminal activity were escaping the reach of the federal immigration laws, partly as a result of differences in state laws. In 1996, Congress finally defined "conviction" for immigration purposes:

> 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.[131]

Now, for the first time, the Immigration and Nationality Act contains a uniform federal definition of "conviction" and it is clear that Congress is focusing on the criminal act, i.e., indications of guilt and some punishment by the state. The expressed congressional intent behind the new definition of "conviction" is:

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129. *Id.* at 551-52.

130. *Id.* at 550. The BIA also reaffirmed that, generally speaking, the Attorney General will not recognize expungements of drug convictions, but will recognize a state expungement of a crime involving moral turpitude. *See id.* at 552. The BIA did not discuss the issue of federal supremacy when the reason for the expungement was to enable the non-citizen to avoid federal immigration law.

131. Immigration and Nationality Act § 101(a)(48), 8 U.S.C. § 1101(a)(48) (1994 & Supp. IV 1999).

> This section deliberately broadens the scope of the definition of "conviction" beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok*, 19 I & N Dec. 546 (BIA 1988). As the Board noted in *Ozkok*, there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered "convicted" have escaped the immigration consequences normally attendant upon a conviction. *Ozkok*, while making it more difficult for alien criminals to escape such consequences, does not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien's future good behavior .... This new provision ... clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws.[132]

But aside from whether a state judicial action meets the definition of conviction, what about those cases in which a state court helps a non-citizen escape deportation by vacating a conviction, entering a new, more favorable order or changing the sentence imposed?

C. *Judicially Escaping the Immigration Laws*

Before and after this federal definition of "conviction," non-citizens who believed that they will be considered "convicted" for immigration purposes sought relief from the criminal courts by asking to have their convictions ameliorated under different provisions, e.g., expungements, changed sentences, withdrawal of guilty pleas, vacations of convictions, writs of *audita querela* and writs of *coram nobis*. Private immigration practitioners have long sought to

132. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 828, 104th Cong., 2d Sess. 224 (1996), 142 CONG. REC. H10841-02 (1996 WL 539315). *See also generally Matter of* Punu, Int. Dec. 3364 (BIA 1998) (using this new federal definition of "conviction," the BIA held that deferred adjudications under Texas law were "convictions" under the Immigration and Nationality Act); *Matter of Roldan*, Int. Dec. 3377, 19-20 (BIA 1999). The new statutory definition of conviction includes state rehabilitative statutes. *See id.* A conviction still exists for immigration purposes notwithstanding the operation of a rehabilitative statute purporting to erase the conviction. *See id.*

educate criminal defense attorneys on the immigration consequences of criminal actions so that better criminal pleas may be made and post-conviction relief obtained.[133] These actions directly raise the issues of whether or what kind of post-conviction relief is available and, if so, the supremacy of the federal immigration laws. The BIA's treatment of state post-conviction actions has varied with the explicitness of federal law on the issue.

For instance, when states had authority under federal law to make judicial recommendations against deportation, the BIA refused to recognize vacations of convictions to cure defective recommendations or to order one when it was not properly done in the first place.[134] The BIA distinguished between the state court's jurisdiction to vacate the conviction and enter the judicial recommendation of deportation order with the effect of the action under federal immigration law.[135] While conceding that the state court presumably had the authority to vacate the conviction and resentence the non-citizen under the state law in question, the BIA did not recognize the date of the resentencing for purposes of triggering the time in which the court could properly issue a judicial recommendation against deportation ("JRAD").[136] In other words, the judicial recommendation against deportation must have been made properly after the initial sentencing and, if not, a court cannot resentence the non-citizen in order to "cure" the failure to

133. *See generally, e.g.,* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (Norton Tooby ed., 1998); CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE (Matthew Bender ed., 1998); MARIA BALDINI-POTERMIN, DEFENDING NON-CITIZENS IN MINNESOTA COURTS: A SUMMARY OF PROVISIONS OF IMMIGRATION LAW AND CLIENT SCENARIOS (Immigration Law Center of Minnesota, 1998).

134. *See Matter of* B—, 8 I. & N. Dec. 686, 688 (BIA 1960). *See also Matter of* P—, 9 I. & N. Dec. 293, 295 (Att'y Gen. 1961); *Matter of* S—, 9 I. & N. Dec. 678, 682-83 (BIA 1962). In *Matter of* S—, the non-citizen was convicted in federal district court of tax evasion and tax fraud. *See* 9 I. & N. Dec. at 679. He was sentenced to three years imprisonment and payment of a $10,000 fine. *See id.* at 680. He paid the fine, served one year and was paroled. *See id.* After his release on parole, the federal district court allowed him to withdraw his plea of nolo contendere. *See id.* He pled nolo contendere and was sentenced to one day. *See id.* This new sentencing was sought so that the alien could now apply for a judicial recommendation against deportation. *See id.* at 681. Aside from the judicial recommendation against deportation issue, the BIA noted that the federal district court had the authority to resentence the alien and that they are bound by the new sentence. *See id.* The new sentence, in fact, did not sustain the ground for deportability that required a year or more. *See id.* at 682.

135. *See generally Matter of S—*, 9 I & N. Dec. at 682-83.

136. *See id.* at 681.

properly make a recommendation against deportation. The BIA said in this situation that the state courts have attempted to "invade an area to which Congress has seen fit to erect or impose a federal standard in regard to recommendations against deportation as provided in section 241(b) of the Immigration and Nationality Act. We find that in intruding into this federal area, the court's action was ineffective . . . ."[137] Federal courts of appeal agreed that state attempts to "cure" the absence of a JRAD are invalid.[138] "To allow the state court's action to be effective would be to permit the court to do indirectly what it could not do directly, and to circumvent the federal standard."[139]

Federal courts have also highly criticized attempts to use writs of *coram nobis* and *audita querela* to avoid deportation. As the Second Circuit Court of Appeals held:

> The state prosecuting officials would normally have no interest in opposing such a vacation and reentry, since it in no way affects the liability of the prisoner under state law, and as here they consequently would have no interest in appealing even an apparently erroneous employment of a state coram nobis or habeas corpus proceeding for this purpose.
>
> Conversely, the United States and its officers are concerned in these cases solely with the administration of [U.S.C.] § 1251, and they have no interest in the merits or propriety of coram nobis or habeas corpus proceedings as they affect the underlying conviction. The result of the adoption of relator's contention here would therefore be to vest in the substantially uncontrolled discretion of the trial courts of the states the power to avoid the careful time limitations of [U.S.C.] § 1251(b), in plain conflict with the manifest intention of Congress.[140]

Non-citizens in both federal and state courts have applied for writs of *coram nobis* and *audita querela* in order to vacate their criminal convictions to avoid deportation or to be able to apply for an

137. *Id.*

138. *See, e.g.,* Zaitona v. INS, 9 F.3d 432, 436, 37 (6th Cir. 1993); United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d 72 (2d Cir. 1959); *but see* Sawkow v. INS, 314 F.2d 34, 37 (3d Cir. 1963).

139. *Zaitona,* 9 F.3d at 437.

140. *Esperdy,* 267 F.2d at 75; *but see Sawkow,* 314 F.2d at 34.

immigration benefit. These writs are similar. A writ of, "coram nobis . . . attack[s] a judgment that was infirm at the time it was rendered for reasons that later came to light. Audita querela . . . attack[s] a judgment that was correct when rendered but later was rendered infirm by matters arising after is rendition."[141] A writ of *audita querela* is used "to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise."[142] To date, six federal circuit courts of appeal have looked at the availability of these writs to vacate a criminal conviction for the purpose of erasing the conviction for immigration purposes. All six courts of appeal have held that it cannot be done; these are not writs of equity.[143]

Particularly interesting is that a few of these courts mention the concern that granting such a writ would violate the separation of powers between the executive immigration authority and the role of the judiciary.[144] Since these cases involved federal convictions, as opposed to state convictions, the supremacy issue was not involved. However, the courts did discuss their concern regarding separation of powers. For example, the *Reyes* court stated:

> When a court vacates an otherwise final conviction because the defendant faces deportation, the court tends to usurp the power of Congress to set naturalization and deportation standards and the power of the INS to administer those standards in each individual case, as well as the power of the executive to prosecute criminal offenses. Similarly, in such instances the "pure equity" version of audita querela to some extent trenches upon the power

141. Doe v. INS, 120 F.3d 200, 203 n.4 (9th Cir. 1997).

142. United States v. Holder, 936 F.2d 1, 3 (1st Cir. 1991).

143. *See* United States v. Ayala, 894 F.2d 425, 428-29 (D.C. Cir. 1990); *Holder*, 936 F.2d at 5; United States v. LaPlante, 57 F.3d 252, 253 (2d Cir. 1995); United States v. Reyes, 945 F.2d 862, 866 (5th Cir. 1991); United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993); Jimenez v. Trominski, 91 F.3d 767, 768 (5th Cir. 1996); United States v. Johnson, 962 F.2d 579, 581-82 (7th Cir. 1992); *Doe*, 120 F.3d at 204; Beltran-Leon v. INS, 134 F.3d 1379, 1380 (9th Cir. 1998). Compare lower court decisions United States v. Salgado, 692 F. Supp. 1265, 1269 (E.D. Wash. 1988) and United States v. Ghebreziabher, 701 F. Supp. 115, 117 (E.D. La. 1988) (granting writs of *audita querela* to erase the convictions for immigration purposes). *Salgado* and *Ghebreziabher* were roundly criticized by the courts of appeals as misconstruing the writ of *audita querela*.

144. *See, e.g., Reyes*, 945 F.2d at 866; *Johnson*, 962 F.2d at 582; *Doe*, 120 F.3d at 204.

> and discretion of the President to pardon. Absent a clearer statutory or historical basis, an Article III court should not arrogate such power unto itself. We, too, operate under the law. Reyes' argument that it is unfair to deport him solely on the basis of an isolated conviction properly belongs in other fora, not the courts.[145]

The *Johnson* court explained:

> We have a delicately balanced system – one that depends on a separation of powers. In this instance, Congress is vested with the power to enact immigration legislation, including deportation standards. The executive is empowered to prosecute criminal offenses. Vacating a valid conviction through the purely equitable use of audita querela amounts to an end run around properly enacted immigration legislation and essentially rewrites § 241(a)(11) of the Act, which provides for deportation of an alien convicted of a violation of the Controlled Substances Act. The courts may not tinker with this balance without sufficient statutory, or even historical, authority. Requiring a legal defect as a prerequisite to relief via audita querela assures us that the writ will not disturb this fine balance.[146]

The separation-of-powers concern expressed by these courts applies with equal force to state action. Moreover, these concerns are fundamentally similar to the preemption and supremacy concerns. In short, courts are making decisions that are not their decisions to make.

The issue before these courts of appeal was the appropriateness of granting a writ to vacate a federal criminal conviction. But what happens when a state court grants a writ of *audita querela* and the non-citizen argues in immigration court that the conviction no longer exists? The Ninth Circuit Court of Appeals, in *Beltran-Leon v. INS*,[147] recently ruled that the writ of *audita querela* granted by a state court does not erase the conviction for immigration purposes.[148] In a short decision, the court held that a writ of *audita que-*

145. *Reyes*, 945 F.2d at 866.
146. *Johnson*, 962 F.2d at 582.
147. 134 F.3d 1379 (9th Cir. 1998).
148. *See id.* at 1380-81. The BIA decision is an unpublished decision. However, it is apparent from the Ninth Circuit decision that the BIA refused to recog-

rela could only issue for legal defects in the conviction or sentence and not for equities or gross injustice. In this case, the non-citizen sought the writ "solely in order to prevent deportation and the subsequent hardship to himself and his family. Therefore, the state court's writ of *audita querela* did not remove the legal basis of Beltran-Leon's conviction for purposes of application of federal law."[149] The Ninth Circuit noted that although a state (not federal) court issued the writ, the same principles apply.[150]

In the area of state courts attempting to cure defective judicial recommendations, the lack of state court authority to take such actions has been relatively clear. The BIA has not hesitated in deciding that the state actions should not be recognized for federal immigration purposes. But in reviewing state judicial actions other than "curing" defective judicial recommendations against deportation, the Department of Justice has had a more difficult time.

In the last fifty years of its administrative case law, the United States Department of Justice has examined the supremacy issue only a few times, and not at great length. This could be for several reasons. The issue may not have been raised or properly framed. The facts and reasons underlying the judicial action may not have been clear. The BIA has been hesitant to find that a criminal court acted for the sole purpose of helping an alien escape the reach of federal law.[151] Yet, perhaps most significantly, the BIA was acting in an area intermingled with state law. It acted, at the time of these decisions, without a federal definition of "conviction." And, as previously mentioned, the Immigration and Nationality Act in fact conferred the authority upon states to make "judicial recommendations against deportation."[152] Congressional intent had not been as

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nize the state writ of *audita querela*. *Cf. Matter of* C—, 8 I. & N. Dec. 276, 277-79 (BIA 1959) (recognizing a state grant of a writ of *coram nobis* as effective after the date the writ was granted); *Matter of* Sirhan, 13 I. & N. Dec. 592, 598 (BIA 1970) (opining that a state court would have the authority under a writ of *coram nobis* to vacate a conviction when deportation was not originally contemplated). The continued viability of these old decisions is now sharply drawn into question.

149. *Beltran-Leon*, 134 F.3d at 1380-81.

150. *See id.* at 1380 n.1.

151. *See, e.g., Matter of* O'Sullivan, 10 I. & N. Dec. 320, 330 (BIA 1963); *Matter of Sirhan*, 13 I. & N. Dec. at 599.

152. The Immigration and Nationality Act of 1952, ch. 477, § 241(b)(2), 66 Stat. 163 (1952) provides that:

> The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . (2) if the court sentencing such alien for such crimes shall make, at the time of first im-

fully developed or expressed as it has been in the last twenty years. The Department of Justice may well have been unsure where to draw the line when it was deciding these cases. As a result, the Department of Justice focused on the legal authority of the state court in taking the action more than on the next issue of whether the action, although proper under state law, is preempted by federal law.

But even within the historical context of a larger state role in immigration matters, the Department of Justice has recognized federal supremacy of immigration laws. In 1959, the Attorney General refused to recognize state court actions expunging drug convictions because congressional intent at that time was not to have non-citizens escape immigration law based upon expungements of drug convictions.[153] The Attorney General limited this ruling to expungements of drug convictions and did not extend it to expungements of crimes involving moral turpitude because, in 1961, "there [was] no Congressional signpost pointing in the opposite direction . . . ."[154] In other words, the Attorney General found congressional intent to be clearly intolerant of non-citizens who commit drug crimes, but not as clearly intolerant for other crimes.

Perhaps the most thorough written exploration conducted by the BIA on this issue was *Matter of O'Sullivan*.[155] In *Matter of O'Sullivan*,[156] the Board held that a Michigan vacation of conviction and granting of a new trial erased a drug conviction for federal immigration purposes.[157] The Board held it would recognize the

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posing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested States, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

Id.

153. *See Matter of A—F—*, 8 I. & N. Dec. 429, 445-46 (BIA 1959, Att'y Gen. 1959) ("Congress did not intend that aliens convicted of narcotic violations should escape deportation because the State affords a procedure authorizing a technical erasure of the conviction.").

154. *Matter of G—*, 9 I. & N. Dec. 159, 169 (BIA 1960, Att'y Gen. 1961). The BIA refused to recognize a vacation of a crime involving moral turpitude. *See id.* at 162. After the Board rendered its decision, the Attorney General reversed the Board. *See id.* at 169.

155. 10 I. & N. Dec. 320 (BIA 1963).

156. *See id.*

157. *See id.* at 322. This vacation of a drug conviction is distinguished from the

vacation so long as the state court had jurisdiction to vacate the conviction and there was not a contrary overriding national standard based upon an overriding national interest:

> Whatever on this record the requirements of full faith and credit may be, it is evident the action of the trial court may be disregarded, as the Service urges, only if the court exceeded it [sic] power under state law, or if its action, regardless of whether proper under state law, is ineffective in the federal proceedings, because of a federal standard based upon overriding national interest. It is also evident that if the action of the trial court is given effect the deportation proceedings no longer have any basis.[158]

The Board found that: (1) there was insufficient evidence that the state court entered its order solely to defeat federal immigration laws; (2) there was insufficient evidence that the state court lacked jurisdiction to enter the order; and (3) there was not, directly or indirectly, an overriding federal standard, although the Board acknowledged a strong national interest.[159] The Board stated:

> Reading *Matter of A—F—* in the light of these three recent cases under section 241(b) of the Immigration and Nationality Act presents a strong argument that any judicial action to set aside a narcotic conviction solely for the purpose of enabling avoidance of deportation would be ineffective. To hold otherwise might permit a court to do by indirection what it could not do directly. The law is far from clear here on the federal question, however.[160]

The Board concluded in *Matter of O'Sullivan* however, for the reasons mentioned above, that "[i]nsofar as these matters are in doubt the doubts should be resolved in favor of the respondent."[161]

In the mixture of these cases recognizing federal supremacy were administrative cases that did not thoroughly analyze or ad-

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expungement of a drug conviction (which the Attorney General does not recognize). *See Matter of A—F—*, 8 I. & N. Dec. at 445-46.

158. *Matter of O' Sullivan*, 10 I. & N. Dec. at 322.

159. *See id.* at 330.

160. *Id.* at 329.

161. *Id.* at 330.

dress the supremacy issues. These decisions concerned actions by the state court that did not merely resentence a criminal to the same sentence and then purport to grant a judicial recommendation against deportation. Rather, these cases concerned state courts imposing new sentences that would not render a criminal deportable from the United States under the Immigration and Nationality Act.

One of the earliest reported cases in the Immigration and Nationality Act Decisions was *Matter of P—*,[162] a case decided not by the BIA, but by the INS Central Office. The non-citizen was convicted of armed robbery and sentenced to prison for twenty to forty years in Michigan.[163] At the time of the conviction, the criminal court was unaware that the non-citizen criminal defendant could be deported because of the criminal conviction.[164] The non-citizen served twelve years in prison and was released on parole.[165] After his release, he filed a motion for a new trial to erase the conviction in order to avoid deportation.[166] The court granted the motion.[167] He pled guilty, the court accepted the plea, placed him on probation for sixty days and the court entered a judicial recommendation against deportation.[168] Regardless of this recommendation against deportation, the new sentence alone did not render the criminal deportable. In other words, the criminal court need not have entered the recommendation.

In recognizing this vacation of conviction and new order, the INS Central Office held in 1948 that it was within the authority of criminal court to do so. "[I]t is clear the alien seeks to escape deportation by invoking a novel procedure. At the retrial he again pleaded guilty to the original charge, the only new factors presented being the allegations of his good conduct. Nevertheless, . . . the respondent is not now deportable."[169]

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162. 3 I. & N. Dec. 187 (C.O. 1948).
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.* at 187-88.
168. *See id.* at 188.
169. *Id.* at 188. In support of its decision, the INS Central Office cited to an apparently now unreported BIA decision. *See id.* (citing *Matter of C—*, 56090/576 (BIA Jan. 8, 1944)). "'While it has been the view of this Service that such proceedings on the part of courts for the apparent purpose of defeating deportation is irregular, such cases have not been contested, or if so, without success.'" *Id.* at 189. *Matter of C—* was referred to the United States District Court for the Southern Dis-

Nine years later, in *Matter of V—*,[170] the BIA recognized state action on a conviction that eliminated the immigration consequences for the conviction.[171] In this case, the state court vacated the original sentence (which imposed a sentence but suspended its execution) and entered a new sentence (which suspended the imposition of sentence).[172] There was no discussion of the reasons for resentencing.

In 1961, the BIA continued to recognize state court action vacating a conviction and providing a new trial, conviction and sentence that did not render the criminal deportable from the United States.[173] The BIA distinguished this case from that of a court seeking to cure a defective judicial recommendation against deportation, and noted that the Attorney General only refuses to recognize state actions erasing drug convictions.[174] Since this conviction was for breaking and entering and not for a drug crime, and the state had the authority to vacate the conviction and have a new trial and new sentence, the BIA recognized the state action.[175] Once again, however, the state court did not discuss the underlying reason for a

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trict of New York. In an unreported decision, the district court held that a conviction set aside and vacated would not sustain deportability. *See id.* at 189. The court explained:

> The Service questioned the correctness of Judge Conger's decision and on August 30, 1940, recommended to the Solicitor General that an appeal be taken. The principal argument made was that the proceedings subsequent to the imposition of the original sentence was invalid because the respondent was not present at the subsequent proceedings as required under Michigan law. However, it seems to have been conceded that had the respondent personally attended such proceedings, the superseding judgment would be effective. On September 17, 1940, the Acting Solicitor General directed that no appeal be taken.

Id. at 190. Please note, with subsequent changes to the INA, this criminal would remain deportable with the amended sentence. *See* INA §§ 237(a)(2)(iii) and 101(a)(43)(A).

170. 7 I. & N. Dec. 577 (BIA 1957).

171. *See id.*

172. *See id.* at 578.

173. *See Matter of* H—, 9 I. & N. Dec. 380 (BIA 1961).

174. *See id.* at 381-82.

175. *See id.* at 381. The BIA also cited favorably to the early INS Central Office decision of *Matter of P—*, which recognized new criminal sentencing actually changing the sentence imposed. *See id.* at 382; *see also Matter of* P—, 3 I. & N. Dec. 187, 188 (C.O. 1948). The BIA also cited favorably to *Matter of C—*, 8 I. & N. Dec. 276, 279 (BIA 1959), in which the BIA recognized a state grant of a writ of *coram nobis* as effective after the date the writ was granted.

new trial.

The BIA once again considered state court action vacating convictions and imposing new sentences in 1970.[176] After deciding that the state court had the authority under state law to take the action, the BIA, without discussion, simply rejected the argument of supremacy and preemption.[177] The BIA did add, however, that it found insufficient evidence that the state court acted to defeat federal law. "[W]e do point out that while the inference can be drawn that the court here was motivated by a desire to remove the aliens from liability to deportation, it is possible that other considerations entered into their deliberations."[178]

In keeping with its view that state action taken without authority under state law will not be recognized for federal immigration purposes, the BIA, in 1961 and 1975, refused to recognize a Michigan state court action vacating a conviction and a California court action setting aside a guilty verdict and allowing a non-citizen to plead to a lesser offense.[179] In these cases, the courts lacked jurisdiction under its state law to take the actions, regardless of the reason for the state action.[180]

Four years later, in *Matter of Kaneda*,[181] the BIA again dismissed a supremacy argument.[182] The BIA examined whether they should recognize the state dismissal of criminal proceedings in light of the argument that the state court judge appeared to have taken this criminal action to allow the non-citizen to escape deportation.[183] The state order explained that the charges were dismissed for de-

176. *See Matter of* Sirhan, 13 I. & N. Dec. 592, 594 (BIA 1970).

177. *See id.* at 599 (citing *Matter of* O'Sullivan, 10 I. & N. Dec. 320 (BIA 1963)).

178. *Id.*

179. *See Matter of* H—, 9 I. & N. Dec. 460, 462-63 (BIA 1961); *Matter of* Tucker, 15 I. & N. Dec. 337, 340 (BIA 1975).

180. *Matter of H—*, 9 I. & N. Dec. at 462-63; *Matter of Tucker*, 15 I. & N. Dec. at 340.

181. 16 I. & N. Dec. 677 (BIA 1979).

182. *See id.* at 679. The non-citizen was arrested for possessing 4,448 grams of marijuana. *See id.* at 678. He pled guilty to possession of marijuana and was sentenced to 12 months confinement in a county jail with four months suspended. *See id.* Three months later, the criminal court rescinded the sentence, placed him on probation and provided that once the jail term was completed, the case would be dismissed pursuant to the Virginia first offender statute. *See id.* The case was subsequently dismissed. *See id.* The BIA first examined whether, in accordance with its policy to honor dismissal of cases under state first offender statutes that are counterparts to the Federal First Offender Statute, the conviction supported deportability. *See id.* at 678-79. The Board held that the Virginia statute was a counterpart and that the dismissal would be effective. *See id.* at 679.

183. *See id.*

portation purposes.[184] The INS appeared to frame the criminal dismissal order as being essentially a judicial recommendation against deportation and, therefore, not valid for drug convictions. The INS also argued that the criminal court lacked jurisdiction to enter the subsequent order.[185]

In rejecting these arguments, the BIA simply stated:

> We have held that where a conviction is revoked and the charge dismissed by a trial judge that conviction cannot be used to sustain a finding of deportability. . . . We have also specifically held that when the Service claims that a trial judge lacked authority to dismiss a criminal charge after a conviction, such lack of jurisdiction must be affirmatively shown. Here the Service has submitted no evidence that the trial judge lacked jurisdiction under Virginia law to rescind the respondent's conviction. Furthermore, the prosecution has not challenged the trial judge's rescission and dismissal of the charges which also indicates that the trial judge's actions were proper.[186]

Unfortunately, this cursory treatment of the supremacy issue did not fully address the issue as framed in the cited cases, nor did it further the administrative case law in this area. The BIA only addressed the issue of whether the state court had authority to take the action under state law. The BIA stopped short of examining supremacy and preemption, which would involve an analysis of ever-evolving congressional intent and regulation in the federal immigration laws.

More recently, in 1996, the BIA held that a firearms conviction expunged under a California deferred adjudication statute erases the conviction for immigration purposes.[187] There was no discussion of evading immigration laws as being the purpose behind the expungement.[188] Therefore, there was no discussion of the supremacy issue. Despite changes in federal and state law since 1959, the majority felt bound by the Attorney General's decision in *Matter of A—F—*,[189] which limited the Attorney General's refusal to recog-

184. *See id.*
185. *See id.* at 679-80.
186. *Id.* (citations omitted).
187. *See Matter of* Luviano-Rodriguez, Int. Dec. 3267 (BIA 1996).
188. *See id.*
189. *See id.* (citing *Matter of* A—F—, 8 I. & N. Dec. 429 (BIA 1959, Att'y Gen.

nize expungements to drug conviction expungements.[190] However, the dissent by Board Members Hurwitz and Vacca did broach the supremacy issue.[191]

Since Congress federally defined "conviction" in 1996, the BIA has been applying this definition. In doing so, the BIA is changing its administrative caselaw. First, in *Matter of Punu*,[192] the Board held that a deferred adjudication under Texas law (in which after a plea of guilty or nolo contendere, a court may defer proceedings without adjudicating guilt and place the defendant on probation) is a conviction under federal immigration law.[193] Second, in *Matter of Roldan*,[194] the Board overruled *Matter of Luviano-Rodriguez*[195] (their 1996 firearms expungement decision) and held that a conviction exists for immigration purposes notwithstanding a state rehabilitative statute which "purports to abrogate what would otherwise be considered a conviction."[196] The BIA stated:

> We also note that the expansive definition in section 101(a)(48)(A) of the Act is consistent with the prevailing congressional policy of strict treatment toward criminal aliens in deportation proceedings. Congress may condition the status of an alien upon the absence of a "conviction" as it chooses to define that term. . . .
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> . . . .
>
> An alien who has been the beneficiary of a state rehabilitative statute may continue to be subject to a severe

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1959)).

190. *See id.*

191. *See id.* In dealing with the supremacy issue, the dissent used the term "federalism" and spoke of the changes in immigration law and the definition of "conviction" since the 1961 Attorney General's decision in *Matter of G—*. *See id.* (citing *Matter of* G—, 9 I. & N. Dec. 159, 169 (BIA 1960, Att'y Gen. 1961)). The dissent also explored California law and explained that this expungement provision had eroded over the years and that under state law, it did not erase a conviction for many purposes. *See id.* This dissent appears to be the fullest written exploration of supremacy since the early 1960s. *See id.* It is important to note that this decision was issued before Congress created the federal definition of conviction in the Immigration and Nationality Act in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See supra* note 101 and accompanying text.

192. Int. Dec. 3364 (BIA 1998).

193. *See id.*

194. Int. Dec. 3377 (BIA 1999).

195. Int. Dec. 3267 (BIA 1996).

196. *Matter of Roldan*, Int. Dec. 3377 at 21.

> consequence for his misconduct, that of deportation from this country; whereas a citizen accorded similar rehabilitative treatment after the same misconduct may be able to avoid any further consequences of his conviction. However, section 101(a)(48) of the Act does not impose a more severe standard of conduct on aliens than is imposed on citizens of our country. The conduct this respondent has admitted would be a violation of the controlled substance statute for aliens and citizens alike. An alien is subject to additional consequences as a result of this misconduct. However, the different treatment of aliens seeking the hospitality of our country is precisely the subject of the body of laws codified in the Immigration and Nationality Act.[197]

However, the BIA did not, in *Matter of Roldan*, address vacations of convictions or rehabilitative statutes operating to vacate a conviction on its merits or for grounds relating to a violation of a statutory or constitutional right in the underlying criminal proceeding.

What about vacations of convictions entered to assist a non-citizen to avoid deportation? The Board has not yet addressed this issue since the 1996 definition of conviction. To be consistent, however, the BIA should not recognize these vacations of convictions. Otherwise, the non-citizen who was initially granted the benefit of a state rehabilitative statute will be considered convicted, while the non-citizen who was not, but later succeeded in vacating the conviction to avoid deportation, will not be considered convicted. This is plainly untenable, aside from the supremacy and preemption issues.

What lessons are learned from this historical review of Department of Justice administrative opinions? It is apparent that the Department of Justice recognizes federal supremacy of immigration law. When the Immigration and Nationality Act specifically recognized a role for the states and specifically prescribed their actions in the context of judicial recommendations against deportation, the Department of Justice did not recognize post-conviction actions taken by states to avoid federal law. However, outside of the judicial recommendation against deportation area, the Department of Justice has been unsure of where to draw the line between ap-

197. *Id.* at 19-20.

propriate state action regarding convictions and the supremacy of federal law, which was, at the time of virtually all of these decisions, more dependent upon state law. On the one hand, the Department of Justice held that state action taken solely to defeat immigration law is not acceptable. On the other hand, the Department of Justice has been hesitant to find that states had acted solely to defeat federal law.

Additionally, BIA decisions do not consistently or adequately address or analyze this issue. In several decisions, the BIA merely examines the authority of the state court to act under state law without proceeding on to the issues of supremacy and preemption. Also, during these years, Congress had not yet acted to express its clear intent and purposes regarding convictions under the Immigration and Nationality Act. Therefore, the Department of Justice was left to its own devices without congressional "signposts."[198]

The legal landscape in 1999 is vastly different from when the Department of Justice was previously examining the supremacy of federal immigration law in regard to state actions taken to defeat it. The congressional "signposts" found lacking in 1961 are now posted and clearly marked. The United States Supreme Court has set forth a clear preemption test. Federal law regarding convictions for immigration purposes and the treatment of criminal aliens is well developed and does not depend upon the vagaries of state law, as in the past. The time has come for the Attorney General to thoroughly address the supremacy issue and preserve federal immigration authority as the BIA has begun to do after Congress federally defined "conviction." Otherwise, immigration enforcement is left to uncontrolled state court judges who operate outside and in disregard of federal immigration law. Legitimate state police powers simply do not authorize such action.

V. MINNESOTA CRIMINAL JUSTICE

Aside from the federal preemption and equal protection concerns involved in state court vacations of convictions to prevent a non-citizen's deportation, two main state issues arise. First, these court orders now appear to disregard Minnesota Supreme Court precedent. Second, these court orders appear to be inconsistent with uniform and non-discriminatory treatment of criminal defendants.

198. *See Matter of G—*, 9 I. & N. Dec. at 169.

A. *Minnesota Supreme Court Precedent*

Minnesota law allows a criminal defendant, after sentencing, to move the criminal court to withdraw a guilty plea and have the conviction vacated if necessary to correct a manifest injustice. Accordingly, Minnesota Rule of Criminal Procedure 15.05 states:

> Subd. 1. To Correct Manifest Injustice. The court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice. Such a motion is not barred solely because it is made after sentence. If a defendant is allowed to withdraw a plea after sentence, the court shall set aside the judgment and the plea.
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> Subd. 2. Before Sentence. In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.
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> Subd. 3. Withdrawal of Guilty Plea Without Asserting Innocence. The defendant may move to withdraw a plea of guilty without an assertion of not guilty of the charge to which the plea was entered.[199]

These decisions are left to the sound discretion of the court. However, as the statute provides, a "manifest injustice" must exist for withdrawal of a guilty plea after sentencing.[200] It is only before

199. MINN. R. CRIM. P. 15.05, subds. 1–3.

200. *See* Chapman v. State, 282 Minn. 13, 16-17, 162 N.W.2d 698, 700-01 (1968). The Minnesota Supreme Court has determined that:

> [A] judgment of conviction based upon a plea of guilty should not be vacated without the strongest of reasons if the effect of such vacation will be to seriously prejudice or bar proceedings by the state due to changes in evidentiary circumstances occurring between the time the plea of guilty was accepted and the time when the case will be tried on the merits if the judgment of conviction is, in fact, vacated and the plea of guilty annulled. A plea of guilty cannot be used as a tactical device to frustrate the prosecution . . . . Subject to these restraining considerations, we have frequently held in effect that an application to withdraw a plea of guilty is addressed to the sound discretion of the trial court and should be

sentencing when a court may allow withdrawal of a guilty plea when it is "fair and just" to do so.[201]

The Minnesota Supreme Court has issued three decisions in which it clearly states that there is no "manifest injustice" warranting post-conviction withdrawal of a guilty plea and vacation of conviction because of immigration-related reasons.[202] In these decisions, the Minnesota Supreme Court addressed three immigration-related situations that do not constitute manifest injustices warranting post-conviction relief. First, federal immigration consequences of criminal convictions are collateral, not direct, consequences of the convictions.[203] Therefore, guilty pleas made in ignorance of possible federal immigration consequences are still knowing, voluntary and intelligent.[204] Second, because federal immigration consequences are collateral to a conviction, there is no duty for a criminal defense attorney to inform the defendant of federal immigration law.[205] Because no duty exists, there is no ineffective assistance of counsel in the absence of this advice.[206] Third, the Min-

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> granted whenever necessary to correct a manifest injustice . . . . We have refused to order vacation of a plea of guilty when manifest injustice has not been demonstrated.

Id. at 700-03 (citations omitted). Under Minnesota law, manifest injustices exist when:

> (1) the court lacked jurisdiction to enter the order;
> (2) the defendant did not have the proper mental capacity to plead guilty;
> (3) the prosecution did not fulfill an agreement which induced the plea;
> (4) the defendant did not understand the nature and elements of the charged offense and the consequence of the plea;
> (5) the defendant had a "clear and grave" misunderstanding of the admissibility of illegally obtained evidence; and
> (6) the defendant made statements at the time of the plea which were inconsistent with the plea and negated an essential element of the crime.

Id. at 702-03.

201. *See id.* at 703.

202. *See* Alanis v. State, 583 N.W.2d 573, 575-76 (Minn. 1998); Barragan v. State, 583 N.W.2d 571, 572-73 (Minn. 1998); Berkow v. State, 583 N.W.2d 562, 563-64 (Minn. 1998).

203. *See Alanis,* 583 N.W.2d at 575-76; *Barragan,* 583 N.W.2d at 572-73; *Berkow,* 583 N.W.2d at 563-64.

204. *See Alanis,* 583 N.W.2d at 575-76; *Barragan,* 583 N.W.2d at 572-73; *Berkow,* 583 N.W.2d at 563-64.

205. *See Alanis,* 583 N.W.2d at 575-76; *Barragan,* 583 N.W.2d at 572-73; *Berkow,* 583 N.W.2d at 563-64.

206. *See Alanis,* 583 N.W.2d at 575-76; *Barragan,* 583 N.W.2d at 572-73; *Berkow,*

nesota Supreme Court held that deportation alone is not a manifest injustice warranting post-conviction relief in a state criminal proceeding.[207]

Since the Minnesota Supreme Court has ruled that none of these immigration-related reasons are a "manifest injustice", and since a "manifest injustice" is required for withdrawing a guilty plea and vacating a conviction after sentencing, there appears to be no discretion left for the trial courts to find that these situations constitute a "manifest injustice." Therefore, courts may no longer find that these immigration-related reasons constitute a manifest injustice warranting post-conviction relief. Orders granting post-conviction relief for immigration-related reasons are in apparent disregard of and in direct conflict with Minnesota Supreme Court case law.

B. Uniform Treatment of Minnesota Criminal Defendants

Fundamentally, the State of Minnesota tries to be fair and non-discriminatory in its treatment of criminals. This goal is stated in the rules of criminal procedure[208] and in the sentencing guide-

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583 N.W.2d at 563-64.

207. *See Alanis*, 583 N.W.2d at 575-76; *Barragan*, 583 N.W.2d at 572-73; *Berkow*, 583 N.W.2d at 563-64.

208. *See* MINN. R. CRIM. P. 1.02. That rule reads:

> Purpose and Construction:
> These rules are intended to provide for the just, speedy determination of criminal proceedings without the purpose or effect of discrimination based upon race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, handicap in communication, sexual orientation, or age. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Id. According to recently adopted comments on Rule 1:

> It is further the express purpose of these rules that they be applied without discrimination based upon the factors stated in Rule 1.02. The factors are the same as those set forth in Chapter 363 of the Minnesota Statutes forbidding discriminatory practices in employment and certain other situations except that those handicapped in communication are added to the list of those protected against discrimination. Minn. Stat. §§ 611.31–611.34 (1992). The Minnesota Supreme Court Task Forces on Gender Fairness and Racial Bias have studied and documented gender and racial bias in the legal system. Their reports issued June 30, 1989 and May, 1993 respectively contain recommendations to address these problems. See 15 Wm. Mitchell L. Rev. 827 (1989) (gender fairness re-

lines.[209] Essentially, the guidelines presume sentences for crimes and list factors that may and may not be considered in departing from the presumptive sentence.[210]

The goals of these guidelines are to have uniform punishment for the same criminal behavior, not to base the punishment on certain characteristics of the criminal or to discriminate unfairly against certain defendants.[211] Therefore, sentencing decisions are not to be made because of a person's race, sex, occupation, impact of sentencing on a profession or occupation, employment history,

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port) and 16 Hamline L. Rev. 477 (1993) (racial bias report). Any recommendations in those reports concerning the Rules of Criminal Procedure have been reviewed carefully and appropriate revisions have been made in these rules.

MINN. R. CRIM. P. 1.04 cmt. Rule 1 (1999).

209. *See* MINNESOTA SENTENCING GUIDELINES COMMISSION, SENTENCING PRACTICES: HIGHLIGHTS AND STATISTICAL TABLES FELONY OFFENDERS SENTENCED IN 1993 1 (Feb. 1995).

The stated goals of the Minnesota Sentencing Guidelines are:

> (1) To promote uniformity in sentencing so that offenders who are convicted of similar types of crimes and have similar types of criminal records are similarly sentenced;
> (2) To establish proportionality in sentencing by emphasizing a "just deserts" philosophy. Those offenders who are convicted of serious violent offenses (even with no prior record), those who have repeat violent records, and those who have more extensive nonviolent criminal records are recommended the most severe penalties under the guidelines;
> (3) To provide truth and certainty in sentencing;
> (4) To enable the legislature to coordinate sentencing practices with correctional resources; and
> (5) To better assure public safety.

Id.; see also MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § I (1998), providing that:

> The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history. Equity in sentencing requires (a) that convicted felons similar with respect to relevant sentencing criteria ought to receive similar sanctions, and (b) that convicted felons substantially different from a typical case with respect to relevant criteria ought to receive different sanction.

Id.

210. *See id.* at 2-37.

211. *See* MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § II.D (1998).

employment at the time of the offense or sentencing, educational background, living arrangements, length of residence or marital status.[212]

While citizenship status is nowhere listed in the Minnesota Rules of Criminal Procedure[213] or Minnesota Sentencing Guidelines, the Minnesota Rules of Criminal Procedure do apply without regard to national origin. National origin generally refers to the country from which someone or someone's ancestors came without regard to present citizenship.[214] Yet is not citizenship a factor much like those listed which do not justify departures, e.g., national origin, race, sex, length of residence? Citizenship has nothing to do with the criminal behavior. Rather it is a fundamental characteristic of the offender, much like national origin, race, sex and length of residence. Given that most United States citizens cannot realistically change their citizenship, this characteristic is so fundamental that it is indistinguishable from the characteristics that our state has declared should not be determinative of sentencing.

As the comments to the sentencing guidelines acknowledge, it is impossible to reward people possessing a factor without penalizing those without that factor.[215] If we reward non-citizens with lighter sentences to help them avoid deportation, then we penalize United States citizens who do not face deportation. The same criminal behavior results in different state punishment only be-

212. *See id.* § II.D(1)(a)-(d).

213. Immigration warnings have been recently added to the criminal plea procedures. *See infra* notes 235-236 and accompanying text.

214. *See* BLACK'S LAW DICTIONARY 1025 (6th ed. 1990).

215. *See* MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § II.D cmt. 101:

> The Commission believes that sentencing should be neutral with respect to offenders' race, sex, and income levels. Accordingly, the Commission has listed several factors which should not be used as reasons for departure from the presumptive sentence, because these factors are highly correlated with sex, race, or income levels. Employment is excluded as a reason for departure not only because of its correlation with race and income levels, but also because this factor is manipulable—offenders could lessen the severity of the sentence by obtaining employment between arrest and sentencing. While it may be desirable for offenders to obtain employment between arrest and sentencing, some groups (those with low income levels, low education levels, and racial minorities generally) find it more difficult to obtain employment than others. *It is impossible to reward those employed without, in fact, penalizing those not employed at time of sentencing.*

Id. (emphasis added).

cause of one fundamental characteristic difference of the offender, i.e., one criminal is not a United States citizen and the other is a citizen. This clearly contradicts the stated purpose of the Minnesota Sentencing Guidelines to have uniform punishment for the same criminal behavior. Moreover, as we explored earlier in this article, it is the federal government, not the state government, that determines whether a non-citizen should be deported. The state has no legitimate interest in preventing a non-citizen's deportation, nor in levying or maintaining harsher criminal penalties against United States citizens.

C. *Minnesota Rules of Criminal Procedure*

Although citizenship has not previously been addressed in the Minnesota Rules of Criminal Procedure, this has recently changed. Minnesota Rule of Criminal Procedure 15.01, Acceptance of Plea; Questioning Defendant; Felony and Gross Misdemeanor Cases, sets forth questioning which the court must make before accepting a plea of guilty.[216] The defendant is questioned on many issues involved in the criminal proceeding, including: the legal and factual nature of the charges, whether the defendant was fully advised by counsel, the right to a jury trial, the presumption of innocence, the procedures of a criminal trial and waivers of these rights and procedures, the sentences which must and may be imposed, the defendant's guilt or innocence, the defendant's mental condition, and any promises or threats made to the defendant.[217]

Failing to understand the nature and consequences of the plea has been generally limited to the direct consequences of the plea in the criminal proceeding. For instance, failing to understand the nature or seriousness of the charge[218] or defendant's legal position and constitutional rights under the facts and law applicable to the case.[219] Nowhere in this questioning have issues related to collateral consequences of a conviction been included.

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216. *See* MINN. R. CRIM. P. 15.01.

217. *See id.*

218. *See* State v. Jones, 267 Minn. 421, 427, 127 N.W.2d 153, 157 (1964) (holding defendant's testimony at the time of the plea did not reflect guilt of the charged crime); *see also* State v. Bohall, 280 Minn. 1, 2, 157 N.W.2d 845, 846 (1968) (finding that defendant had adequate mental capacity to understand the essential elements of the crime and consequences of the plea); State v. Hamilton, 280 Minn. 21, 22, 157 N.W.2d 528, 529 (1968) (holding that defendant questioned extensively and thoroughly at time of plea understood his plea).

219. *See* State v. Roberts, 279 Minn. 319, 321, 156 N.W.2d 760, 762 (1968).

Collateral consequences of a conviction, both state and federal, are numerous. The type of consequences and their length depend upon the number and nature of the convictions. For example to name just a few collateral consequences, convictions may result in disqualification from: voting,[220] holding office,[221] removal from certain elected offices,[222] public and private employment,[223] reemployment benefits,[224] credit,[225] small corporate offering registration,[226] game licensing,[227] commercial or non-commercial driving licensing,[228] ability to drive a school bus,[229] possessing firearms,[230] public assistance,[231] retail liquor licensing,[232] affiliation with or licensing by the departments of human services and health licensees (foster care, home care, etc.),[233] and the right to travel abroad.[234]

Despite all of these collateral consequences, and others that are not listed in this article, the rules of criminal procedure have recently been amended to include only one warning of one collateral consequence. This warning is for non-citizens that their plea may have collateral immigration consequences. Specifically, the Minnesota Rules of Criminal Procedure provide that, effective to all criminal actions commenced or arrests made after 12:00 a.m. on January 1, 1999, before a court can accept a plea of guilty, the court must question the defendant:

10. Whether defense counsel has told the defendant and

220. *See* MINN. CONST. art. VII, § 1.
221. *See* MINN. CONST. art. VII, § 6.
222. *See* MINN. CONST. art. VIII, § 2.
223. *See* MINN. STAT. § 147.091 (1998) (physicians); MINN. STAT. § 156.081 (1998) (veterinarians); MINN. STAT. § 326.336 (1998) (employees of private detectives and protective agent license holders); Kim v. State, 434 N.W.2d 263 (Minn. 1989) (private employment).
224. *See* MINN. STAT. § 268.095, subd. 4 (1998).
225. *See* A.B. & S. Auto Serv., Inc. v. South Shore Bank, 962 F. Supp. 1056 (N.D. Ill. 1997) (holding no unlawful discrimination under the Equal Credit Opportunity Act for consideration of arrest record). Moreover, the Small Business Administration regulations require consideration of criminal records in connection with their loans. *See id.* at 1057.
226. *See* MINN. STAT. § 80A.115, subd. 3 (a)(2) (1998).
227. *See* MINN. STAT. § 97A.421 (1998).
228. *See* MINN. STAT. §§ 171.165, 171.17, 171.171-174, 171.18 (1998).
229. *See* MINN. STAT. §§ 171.321, 171.3215 (1998).
230. *See* MINN. STAT. § 242.31 (1998).
231. *See* MINN. STAT. § 256.98, subd. 8 (1998).
232. *See* MINN. STAT. § 340A.402 (1998).
233. *See* MINN. STAT. § 631.40, subd. 3 (1998); MINN. STAT. § 144A.46 (1998).
234. *See* United States v. Banda, 1 F.3d 354, 355-56 (5th Cir. 1993).

the defendant understands:

. . . .

c. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.[235]

A similar provision now is also included for misdemeanor cases.[236]

The comment to Rule 15 also is amended to read:

The inquiry required by paragraph 10.c. of Rule 15.01 and by paragraph 2 of rule 15.02 concerning deportation and related consequences is similar to that required in a number of other states. See, e.g., California, Cal. Penal Code § 1016.5; Connecticut, Conn. Gen. Stat. Ann. § 54-1 j; Massachusetts, Mass. Gen. Laws Ann. ch. 278, § 29D; New York, N.Y. Crim. Proc. Law § 220.50 (7); Ohio, Ohio Rev. Code Ann. § 2943.031; Oregon, Or. Rev. Stat § 135.385; Texas, Tex. Code Crim. Proc. Ann. art. 26.13; and Washington, Wash. Rev. Code Ann. § 10.40.200. In the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress extensively amended the Immigration and Nationality Act and greatly expanded the grounds for deportation of non-citizens convicted of crimes. Consequently, many non-citizens pleading guilty to felony charges and even to a number of non-felony charges will subject themselves to deportation proceedings. The consequences of such proceedings will often be more severe and more important to the non-citizen defendant than the consequences of the criminal proceedings. It is therefore appropriate that defense counsel advise non-citizen defendants of those consequences and that the court inquire to be sure that has been done.

The requirement of inquiring into deportation and immigration consequences does not mean that other un-

235. MINN. R. CRIM. P. 15.01.
236. *See* MINN. R. CRIM. P. 15.02 (amending para. 2).

anticipated non-criminal consequences of a guilty plea will justify later withdrawal of that plea. See Kim v. State, 434 N.W.2d 263 (Minn. 1989) (unanticipated employment consequences).[237]

The only collateral consequence warning now provided under Minnesota law does not pertain to all defendants, but only to non-citizen defendants. While immigration consequences are deemed collateral from the conviction, as are many other consequences, this one consequence, not affecting United States citizens, is singled out for favorable treatment. The commentary specifically notes that unanticipated employment consequences do not warrant a withdrawal of a guilty plea. In other words, United States citizens must live with all of the unanticipated collateral consequences of their convictions. Non-citizens do not. And, similar to non-citizens, these collateral consequences may "often be more severe and more important" to the United States citizen "than the conse-

237. MINN. R. CRIM. P. 15 cmt. (1998). As to the obligation of defense counsel in such situations, see ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2 (2d ed. 1982). *ABA Standards for Criminal Justice* 14-3.2 provides:

> (a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.
> (b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.

ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2. The commentary to this rule states in part:

> The standard also recognizes the need for counsel to advise the defendant on other considerations "deemed important by defense counsel or the defendant." Many collateral consequences may follow conviction, such as the loss of civil rights, court-martial or disqualification from the armed services, loss of or ineligibility for licenses granted by the state, use of the conviction in a subsequent civil case, and even deportation or expatriation. Where from the nature of the case it is apparent that these consequences may follow (as where the charge concerns defendant's operation of licensed premises) or where the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences.

Id. at 14-3.2 cmt. (citations omitted).

quences of the criminal proceedings."[238] Yet, we do not warn citizens of any collateral consequences of their criminal convictions.

This revision opens the door to many issues. The fundamental reasons non-citizen criminals usually give to justify a vacation of their convictions for immigration-related reasons are that they did not understand the immigration consequences, the federal law has changed, or that they knew of the consequences but that the application of federal law is a manifest injustice. None of these reasons pertains to their guilt or innocence, their misunderstanding of the criminal process, or their rights in the criminal process. These reasons fundamentally concern federal law, not state law, which are collateral consequences to the conviction.

Now that this warning is provided, is it contemplated that a non-citizen receiving erroneous advice of potential immigration consequences will be allowed to withdraw their guilty plea? Does this mean that if federal immigration laws change, a non-citizen will be able to seek withdrawal of a guilty plea? The collateral consequences of convictions for United States citizens may also change over time since they entered a plea of guilty to a crime. United States citizens, however, are not even warned of all of the collateral consequences of their convictions and cannot change their plea because of changed collateral consequences. Regarding all of these other collateral consequences, non-citizen defendants also are not warned nor can they change their plea because of them. Yet, Minnesota now has selected one collateral consequence, federal immigration law, as deserving of a warning. The application and scope of this new provision must be addressed. It appears, however, to give unwarranted favorable treatment to one group of criminal defendants based upon a reason that is not a legitimate concern for a state.

Finally, we must also realize that when a conviction is vacated, it is not considered a part of the defendant's criminal history when being sentenced for a future crime. Once again, the United States citizen lives with the crime but non-citizens who win vacations of convictions do not.[239]

238. MINN. R. CRIM. P. 15 cmt. (1998).
239. *See* MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § II.B (1998).

VI. CONCLUSION

Minnesota criminal justice should operate without regard to citizenship status. Whether a non-citizen incurs immigration consequences because of their criminal activities and convictions is a concern for the federal, not state, government. Disagreements with federal immigration law should be addressed to federal congressional representatives who enacted the immigration laws. State laws should not be used by individuals who disagree with federal law to intentionally contravene the will of Congress. United States citizens should not receive harsher criminal penalties or live with a conviction on their record when non-citizens, by virtue of playing the federal system against the state system, do not. These actions run afoul of the Supremacy and Equal Protection Clauses of the United States Constitution. They also run afoul of the Minnesota goals of uniform treatment of criminals. In a nutshell, this type of state action should not be done and should not be recognized by federal law.