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Deportation of Aliens for Criminal Convictions

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Aliens convicted of crimes in the United States or in some other country prior to their arrival in the United States are disadvantaged by the Immigration and Nationality Act of 1952[1] (hereinafter referred to as the Act). Under the provisions of the Act, aliens convicted of a crime in some other country may be excluded from admission to the United States, and resident aliens convicted of a crime in the United States may be deported.[2]

The effect of criminal convictions on the foreign-born in general is beyond the scope of a single article. Consequently, this article will be limited to a discussion of the problems which criminal convictions in the United States pose for resident aliens. We will attempt to clarify the question of who may be deported, the concept

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1. 8 U.S.C. 1101 *et seq.* (1952).

2. Prior to the turn of the century, the exclusion of so-called "undesirables" and the deportation of those who evaded exclusion were regarded as different sides of the same coin. Since 1910, however, the deportation statutes have been expanded to apply to aliens who may have entered properly but who engaged in certain proscribed activities after entry. Thus, deportation did in fact become the punishment for engaging in certain conduct. *See* 1 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, 4.1a. *See also* Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien; the Pre-1917 Cases (part one)*, 68 YALE L.J. 1578 (1959).

of a crime involving moral turpitude, and the question of what relief is possible from deportation for the commission of a crime.

Within the context of the possible relief from deportation for the commission of a crime, we will also examine those avenues of relief which are unavailable to aliens convicted of narcotics violations. In addition, we will analyze the current situation regarding the effect which expungement of narcotics convictions may have on an alien's liability to deportation.

The underlying social policy with respect to the deportation of aliens is that deportation is not punishment,[3] but the sovereign right of the government to refuse to harbor persons it does not want.[4]

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3. Due process in deportation was smashed on the rock of judicial decision in 1893, never to be put together again. The pattern for future expulsion was set in Fon Yue Ting v. U.S., 149 U.S. 698 (1953), in which the Court held for the first time that deportation was not a punishment for crime but merely an administrative process of the return of unwelcome and undesirable alien residents to their own countries. *See* Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien (part one), supra* note 2. Bugajewitz v. Adams, 228 U.S. 585 (1913); *Ex parte* Bridges, 326 U.S. 135 (1945); Harisiades v. Shaugnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); Bridges v. United States, 346 U.S. 209 (1953); Spinella v. Esperdy, 188 F. Supp. 535 (S.D.N.Y. 1960); United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972); United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972). Although deportation is not formally a criminal punishment, a person who has lived in the United States for many years would probably be caused great personal harm. Thus, deportation is certainly materially punishment since it may involve depriving a person of his livelihood and his deep personal relationships. The courts have recognized this in Tan v. Phelan, 333 U.S. 6 (1948); Barber v. Gonzalez, 347 U.S. 637 (1954); Bonetti v. Rogers, 356 U.S. 691 (1958); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958); Hoy v. Mendoz-Rivera, 267 F.2d 451 (9th Cir. 1959); Hoy v. Rojas-Gutierrez, 267 F.2d 490 (9th Cir. 1959); McLoed v. Peterson, 283 F.2d 180 (3rd Cir. 1960); Sawkow v. INS, 314 F.2d 34 (3rd Cir. 1963); Rosenberg v. Fleuti, 374 U.S. 449 (1963); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Costello v. INS, 376 U.S. 120 (1964); Burr v. INS, 350 F.2d 87 (9th Cir. 1969), *cert. denied*, 383 U.S. 915 (1965); De Lucia v. INS, 370 F.2d 305 (7th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967); Cortez v. INS, 395 F.2d 965 (5th Cir. 1968); Tsimbidy-Rochu v. INS, 414 F.2d 797 (9th Cir. 1969); Rodriguez-Romero v. INS, 434 F.2d 1022 (9th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971) and continue to assert the traditional view. For an excellent discussion of this question *see* Note, *Resident Alien and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566 (1963).

4. Ekiu v. U.S., 142 U.S. 651 (1892); Fong Yue Ting v. U.S., 149 U.S. 698 (1893); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); *see also* Note,

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The grounds for deportation may be grouped under four headings.

1. *Technical.* An alien may be deported who—

A. Was excludable by law at the time of entry;[5]

B. Entered the United States without inspection, or in a manner contrary to law;[6]

C. Has failed to comply with the registration provisions of the statute;[7]

D. Was admitted as a non-immigrant and failed to comply with the non-immigrant status;[8]

Resident Aliens and Due Process, supra note 3; Hesse, *The Constitutional Status of Lawfully Admitted Resident Alien: The Inherent Limit of the Powel to Expel (part two)*, 69 YALE L.J. 261 (1969); Boudin, *The Settlers Within our Gates*, 26 N.Y.U.L.R. 266 (1951). For a short summary of the sorts of aliens deemed undesirable by the Act and subject to deportation therefore *see Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643 (1953).

5. 8 U.S.C. 1251(a)(1); Pierropoulos v. Shaughnessy, 239 F.2d 784 (2nd Cir. 1957); Lehmann v. Carson, 353 U.S. 685 (1957); Lehmann v. Sciria, 248 F.2d 519 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958); Leon v. Murff, 250 F.2d 436 (2nd Cir. 1957); *In re* P., 7 I. & N. Dec. 258 (1956); Cavallaro v. Lehmann, 264 F.2d 237 (6th Cir. 1959); De Lucia v. Flagg, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1961); *In re* Sarkissian, 10 I. & N. Dec. 109 (I.D. 1253, 1962); Rosenberg v. Fleuti, 374 U.S. 449 (1963); Yanez-Jacques v. INS, 440 F.2d 701 (5th Cir. 1971); Itzocovitz v. Selective Service Local Board No. 6, 447 F.2d 888 (2nd Cir. 1971); Fambino v. INS, 419 F.2d 1355 (2nd Cir. 1970), *cert. denied*, 399 U.S. 905 (1970). In 1952 the statutes of limitation regarding deportation were retroactively rescinded. Thus, an alien cannot escape deportation for being excludable even if he entered prior to 1952. Such retroactivity has been upheld in Lehmann v. Carson, 353 U.S. 685 (1957); Cavallaro v. Lehmann, 264 F.2d 237 (6th Cir. 1959); De Lucia v. Pilliod, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1961).

6. 8 U.S.C. 1251(a)(2); Barber v. Hong, 254 F.2d 382 (9th Cir. 1958); Bukta v. Zurbrick, 50 F.2d 593 (6th Cir. 1931); Natali v. Day, 45 F.2d 112 (2nd Cir. 1930); *In re* O., 1 I. & N. Dec. 617 (1943); *In re* V.T., 2 I. & N. Dec. 213 (1944). The burden of proof as to the time, place and manner of entry is upon the resident alien. *See* Goncalves-Rose v. Shaughnessy, 151 F. Supp. 906 (S.D.N.Y. 1957).

7. 8 U.S.C. 1251(a)(5). Under the provisions of 8 U.S.C. 1306(c), an alien may be deported for making a false statement in an alien registration application. *See In re* K.B.N., 9 I. & N. Dec. 50 (1960); *In re* S., 9 I. & N. Dec. 599 (I.D. 1202, 1962); Calvo-Ahumada v. Rinaldi, 435 F.2d 544 (3rd Cir. 1970). An alien may also be deported for violating 8 U.S.C. 1305, which requires annual address reporting. *See* Fong v. INS, 308 F.2d 191 (9th Cir. 1962); Patsis v. INS, 337 F.2d 733 (8th Cir. 1964). The constitutionality of this provision has been upheld in Czapkowski v. Holland, 220 F.2d 436 (3rd Cir. 1955), *cert. denied*, 350 U.S. 826 (1955). *See also In re* V.R., 9 I. & N. Dec. 340 (1960).

8. 8 U.S.C. 1251(a)(9); Feretic v. Shaughnessy, 221 F.2d 262 (2nd Cir.

E. Entered from a foreign contiguous territory on a non-signatory line;[9]

F. Has participated prior to entry, at the time of entry, or within five years of entry, for gain in the smuggling of aliens into the United States;[10]

G. Was involved in a fraudulent marriage to obtain entry into the United Stated.[11]

2. *Public Charge.* An alien may be deported who—

A. Became institutionalized at public expense because of a mental disorder which existed prior to entry;[12]

B. Became a public charge within five years of entry from causes not affirmatively shown to have arisen after entry.[13]

1955); Si v. Boyd, 243 F.2d 203 (9th Cir. 1957); *In re* Liu, 10 I. & N. Dec. 111 (I.D. 1232, 1962); Foundoulis v. Lehmann, 255 F.2d 104 (6th Cir. 1958); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959); Ntovas v. Ahrens, 276 F.2d 483 (7th Cir. 1960), *cert. denied*, 364 U.S. 826 (1960); Fugiana v. Barber, 261 F.2d 709 (9th Cir. 1958), *cert. denied*, 354 U.S. 924 (1959); Wei v. Robinson, 246 F.2d 739 (7th Cir. 1957), *cert. denied*, 355 U.S. 879 (1957); *In re* A., 6 I. & N. Dec. 762 (1955); *In re* B., 6 I. & N. Dec. 234 (1954); Yap v. INS, 318 F.2d 839 (7th Cir. 1963); *In re* S., 8 I. & N. Dec. 574 (1960); Earle v. U.S., 254 F.2d 384 (2nd Cir. 1958); *In re* W.K.W., 9 I. & N. Dec. 235 (1961); *In re* T., 9 I. & N. Dec. 239 (1961); Morales v. INS, 311 F.2d 715 (7th Cir. 1962); *In re* Davis, 10 I. & N. Dec. 441 (I.D. 1317, 1964); *In re* H.C.C. 4 I. & N. Dec. 36 (1950); *In re* H., 6 I. & N. Dec. 458 (1954); *In re* Okamoto, 10 I. & N. Dec. 456 (I.D. 1321, 1964); *In re* Arao, 13 I. & N. Dec. 156 (I.D. 1944, 1969); *In re* Velanira-Gonzalez, 11 I. & N. Dec. 610 (1966); *In re* Wong, 11 I. & N. Dec. 704 (1966); Pilapil v. INS, 424 F.2d 6 (10th Cir. 1970); *In re* Martinez, 14 I. & N. Dec. (I.D. 2024, 1970); Londons v. INS, 433 F.2d 635 (2nd Cir. 1970).

9. 8 U.S.C. 1251(a)(10) (1952).

10. 8 U.S.C. 1251(a)(13) (1952). Deportation does not depend on criminal conviction but may be invoked upon proof of the proscribed conduct in an administrative hearing. *See In re* Dubbiodi, 191 F. Supp. 65 (E.D. Va. 1961). *See also* Navarette v. Landon, 223 F.2d 234 (9th Cir. 1955); Pimental-Navarro v. Del Guercio, 256 F.2d 877 (9th Cir. 1958); Gallegos v. Hoy, 262 F.2d 665 (9th Cir. 1958), *cert. denied*, 360 U.S. 935 (1958); *In re* R.D., 2 I. & N. Dec. 758 (A.G. 1947); *In re* Vargas-Banuelos, 13 I. & N. Dec. 810 (1971).

11. 8 U.S.C. 1251(c). The statutory basis for deportation is 8 U.S.C. 1182(19); Sideropolous v. INS, 357 F.2d 642 (6th Cir. 1966); Kokkinis v. District Director, 429 F.2d 766 (2nd Cir. 1970); *In re* O., 13 I. & N. Dec. 503 (1970).

12. 8 U.S.C. 1251(a)(3) (1952). This provision was added in 1952 but does not appear to be substantially different from the earlier 8 U.S.C. 1251(a)(8).

13. 8 U.S.C. 1251(a)(8) (1952). *See In re* B., 3 I. & N. Dec. 323 (A.G. 1948) for some examples of state services an alien may accept without

3. *Political.* An alien may be deported who—

A. Is or has been at any time after entry a member of any of the following classes of aliens:

1. Anarchists;[14]

2. Advocates of opposition to all organized government or members of any organization advocating such a doctrine;[15]

3. Member of the Communist Party of the United States or any organization affiliated with it;[16]

4. Advocates of the economic, international and governmental doctrines of world communism or members of any organization advocating such doctrines;[17]

5. Members of any organization registered or required to be registered pursuant to 50 U.S.C. 786, unless they did not know that they were members of a Communist organization;[18]

6. Advocates of the violent overthrow of the Government, political assassination, sabotage or members of any organization advocating such doctrines;[19]

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thereby becoming a public charge. It is interesting to note that public assistance accepted as the result of physical ailment contracted after entry does not subject the alien to deportation. *See* Foley v. Ward, 13 F. Supp. 915 (D.C. Mass. 1936); Graham v. Richardson, 403 U.S. 365 (1971), precluding states from denying aliens welfare benefits assisting such aliens who become public charges for causes arising after entry are not deportable.

14. 8 U.S.C. 1251(a)(6)(A) (1952). The best treatment of the use of immigration laws for the suppression of dissent can be found in PRESTON, ALIENS AND DISSENTERS (Harvard University Press, 1963). *See also* Hesse, *The Constitutional Status of the Lawfully Admitted Resident Alien (part one)*, *supra* note 2. A good, but brief account of the historical development of restrictions against "subversives" can be found in GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, *supra* note 2. For cases involving anarchists *see* Guiney v. Bonham, 261 F. 582 (9th Cir. 1919); Lopez v. Howe, 259 F. 401 (2nd Cir. 1919); *In re* D.M., 6 I. & N. Dec. 726 (1955).

15. 8 U.S.C. 1251(a)(6)(B) (1952).

16. 8 U.S.C. 1251(a)(6)(C) (1952). The constitutionality of this provision of the Act was upheld in Galvan v. Press, 347 U.S. 522 (1954), and most recently in Kleindienst v. Mandel, 408 U.S. 753 (1972). However, in Rowoldt v. Perfetto, 355 U.S. 115 (1957), the court restricted application of the provision to aliens who had "meaningful association: with the Communist Party." *See* Niukkanen v. McAlexander, 362 U.S. 390 (1960); Williams v. Mulcahen, 253 F.2d 709 (6th Cir. 1957), *cert. denied*, 356 U.S. 946 (1957); Schleich v. Butterfield, 253 F.2d 932 (6th Cir. 1958); MacKay v. McAlexander, 268 F.2d 35 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1959); Diaz v. Barber, 261 F.2d 300 (9th Cir. 1958); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

17. 8 U.S.C. 1251(a)(6)(D) (1952); *In re* J., 5 I. & N. Dec. 509 (1953).

18. 8 U.S.C. 1251(a)(6)(E) (1952).

19. 8 U.S.C. 1251(a)(6)(F) (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952). In Sykes v. Webb, 307 F.2d 905 (7th Cir. 1962) such case re-

7. Producers or distributors of printed matter advocating any of the above-mentioned doctrines;[20]

8. Members of any organization that produces or distributes printed matter advocating any of the above-mentioned doctrines;[21]

B. Is engaged in "subversive" activities or knowingly joins a "subversive" organization.[22]

C. Was convicted within five years of entry of violating Title I of the Alien Registration Act of 1940,[23] which prohibits advocating the violent overthrow of the Government as well as anti-war activities in the military;

D. Was convicted at any time of two such violations;[24]

E. Has been convicted of certain wartime violations where the Attorney General makes a finding that the alien is considered an "undesirable resident" by reason of such conviction.[25]

4. *Morals.* An alien may be deported who—

A. Engages in prostitution, pandering or other forms of commercialized vice;[26]

B. Has been convicted of importation of aliens for the purpose of prostitution or other immoral purposes.

It should be clear from the foregoing that the conduct of aliens

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versed a deportation order against a member of the Socialist Worker's Party on grounds that there was no substantial evidence that the Socialist Worker's Party advocates the violent overthrow of the government.

20. 8 U.S.C. 1251(a)(6)(G) (1952); Georgian v. Uhl, 271 F. 676 (2nd Cir. 1921), *cert. denied,* 256 U.S. 701 (1921); Tisi v. Tod, 264 U.S. 131 (1924); Vojewvic v. Current, 11 F.2d 683 (2nd Cir. 1926).

21. 8 U.S.C. 1251(a)(6)(H) (1952).

22. 8 U.S.C. 1251(a)(7) (1952), which specifies the proscribed conduct by reference to 8 U.S.C. 1182(a)(27) and (29).

23. 8 U.S.C. 1251(a)(15) (1952). The statutes referred to in this subsection are now 18 U.S.C. 2385 and 2387.

24. 8 U.S.C. 1251(a)(16).

25. 8 U.S.C. 1251(a)(17); Eichenlaub v. Watkins, 338 U.S. 521 (1948); *In re* S., 5 I. & N. Dec. 425 (1953).

26. 8 U.S.C. 1251(a)(12) (1952), which, in part, specifies the proscribed conduct by reference to 8 U.S.C. 1182(a)(12). Expulsion does not depend on conviction. *See* Greene v. INS, 313 F.2d 148 (9th Cir. 1963), *cert. denied,* 374 U.S. 828 (1963); *In re* G., 5 I. & N. Dec. 559 (1954); *In re* V., 6 I. & N. Dec. 743 (1955).

is far more circumscribed than that of citizens. This is consistent with the underlying social policy regarding the status of resident aliens.[28] Even the term "alien" (and especially the term "illegal alien") connotes such a degree of strangeness as to be dehumanizing and tends to reinforce the attitude that such people are residents in the United States at the pleasure of the government.[29]

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27. 8 U.S.C. 1251(a)(18) (1952), which specified the proscribed conduct by reference to 8 U.S.C. 1328. *See* Spadaro v. Nabors, 229 F.2d 190 (5th Cir. 1956).

28. *Supra* note 2.

29. *Supra* note 2. The implication is clearly that the "inalienable rights" which the Constitution was intended to protect are not the rights of aliens residing in the United States. This implication is inconsistent with the Lockean concepts embodied in the Bill of Rights and the Fourteenth Amendment to the Constitution. The language of these Amendments express the view that certain rights are universal, i.e., inherent in every person, and that the Government, although limited in the scope of its protection of these rights by the national boundaries, does not differentiate between persons residing within those boundaries. In short, the argument that Congress has the absolute power to enact legislation affecting the lives, liberty and property of resident aliens is incompatible with the philosophical ideals put forth as justification for the struggle for independence. There is a rather interesting contradiction in the case law on this question. On one hand, it is well established that the power to expel aliens belongs to the *political* branches of government and, as such, may be accomplished entirely through executive officers with only the opportunity of judicial review as Congress may see fit to permit. *Supra* note 4. *See also* Pilapil v. INS, 424 F.2d 6 (10th Cir. 1970), *cert. denied*, 400 U.S. 908 (1970); Carlson v. Landon, 342 U.S. 524 (1952); *In re* Yin, 167 F. Supp. 828 (S.D.N.Y. 1958); MacKay v. Turner, 283 F.2d 728 (9th Cir. 1960); Fleming v. Nestor, 363 U.S. 603 (1960). In Marcello v. Bonds, 349 U.S. 302 (1955), the court held that the ex post facto clause of the Constitution does not apply to deportation legislation. This principle was reasserted in Mulcahen v. Catalonotte, 353 U.S. 692 (1957); Lehmann v. Carson, 353 U.S. 685 (1957); Fuentes-Torres v. INS, 344 F.2d 911 (9th Cir. 1965), *cert. denied*, 382 U.S. 846 (1965). In Niukkanen v. Boyd, 148 F. Supp. 106 (D.C. Or. 1956), *aff'd* 241 F.2d 938 (9th Cir. 1957), *cert. denied*, 355 U.S. 905 (1957), the court held the provision of the Act making past membership in the Communist Party grounds for deportation did not consitute an unconstitutional bill of attainder. The provisions of the Act making "subversive" activities and membership in "subversive" organizations grounds for deportation does not constitute an abridgement of First Amendment rights was asserted in *Ex parte* Bridges, 49 F. Supp. 292 (D.D.C. 1943), *rev'd on other grounds*, 326 U.S. 135 (1945); Harisiades v. Shaughnessy, 342 U.S. 580 (1952). *See supra* note 3 and note 14; Van Dijk v. INS, 440 F.2d 798 (9th Cir. 1971). On the other hand, the courts have held that the Constitutional safeguards of due process and equal protection apply to aliens as well as citizens against arbitrary federal or state action with respect to criminal offenses, security in their homes and property, equal employment opportunities, civil litigation and administrative proceedings. *See* Yick Wo v. Hopkins, 118 U.S. 365 (1886); Wong Wing v. U.S., 163 U.S. 228 (1896); Truax v. Raich, 239 U.S. 33 (1915); Ng Fung Ho v. White, 259 U.S. 276 (1922); Chew v. Colding, 344 U.S. 590 (1953). *See also* 18 U.S.C. § 242, 42 U.S.C. § 1981. For a good summary of the rights of aliens and restrictions thereon *see* GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, *supra* note 2, at §§ 1.34a-1.46; Note, *Resident Aliens*

II

There are three provisions of the Act pertaining to the deportation of resident aliens for criminal convictions.

> An alien may be deported who—
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> 1. Has been convicted at any time after entry of possession or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;[30]
>
> 2. Has been 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 a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;[31]
>
> 3. Is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation of opium, coca leaves, heroin, marijuana, or any sale derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate.[32]

Since the unlawful possession of weapons provision is not at the present time a matter of great concern, we shall turn immediately to the problems arising from the provisions of the Act pertaining to crimes involving moral turpitude and narcotics.

There are several accepted definitions of the term *crime.* A crime may be defined as a "positive or negative act in violation of penal law; an offense against the State,"[33] or "those wrongs which the government notices as injurious to the public and pun-

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and Due Process, supra note 3; Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien (part two), supra* note 4; Boudin, *The Settler Within our Gates, supra* note 4, at 269, for a discussion of the reasoning underlying the government's historic attempts to ground plenary authority for *expulsion* on its plenary authority for *exclusion.*

30. 8 U.S.C. 1251(a)(14) (1952).
31. 8 U.S.C. 1251(a)(4) (1952).
32. 8 U.S.C. 1251(a)(11) (1952).
33. 4 BLACKS LAW DICTIONARY 444.

ishes in what is called a 'criminal proceeding' in its own name,"[34] or "any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public."[35] The second and third definitions might be called idealistic in the sense that they describe the reality contained in the first definition from the point of view of the moral ideal to which that reality is supposed to conform.

A violation of penal law which is not considered a crime in a particular local jurisdiction does not preclude its classification as a crime for deportation purposes.[36] However, when the local law recognizes the status of "juvenile offender," a violation of penal law by a minor so recognized is not regarded as a crime for said purposes.[37]

With respect to a single crime involving moral turpitude committed within five years after entry, it appears that conviction must be followed by the imposition of a sentence for deportation purposes.[38] Thus, it seems that suspension of the imposition of sentence in such cases renders an alien immune to deportation.[39] However, an alien may be deported when a sentence is actually imposed but its execution is suspended.[40]

Setting aside the problems arising out of federal and state expungement statutes to be discussed later,[41] the "multiple crime" provision of the Act presents a further difficulty with respect to suspension of sentences. It seems that, in contrast with the con-

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34. *Id.*

35. *Id.*

36. *In re* G., 7 I. & N. Dec. 520 (1957); Babouris v. Esperdy, 269 F.2d 621 (2nd Cir. 1959); *In re* C.R., 8 I. & N. Dec. 59 (1958); *In re* P., 8 I. & N. Dec. 424 (1959).

37. *In re* C.M., 5 I. & N. Dec. 327 (1953); *In re* T., 6 I. & N. Dec. 835 (1955); C.F.R. 42.91(a)(9)(v), 4191(a)(9)(iv). However, when the local law treats an alien youth as an adult, he may be deported regardless of his age. *See* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1954); Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962); *In re* P., 8 I. & N. Dec. 517 (1960); *In re* C.M., 9 I. & N. Dec. 487 (1961). Where local law does not recognize the status of "juvenile offender," an alien youth will not be deported if he satisfies the current standards for treatment as a juvenile offender. *See* Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958).

38. *In re* L.R., 7 I. & N. Dec. 318 (A.G. 1957); *In re* J., 7 I. & N. Dec. 580 (1957); *In re* L.R., 8 I. & N. Dec. 269 (1959).

39. *In re* V., 7 I. & N. Dec. 242 (1956).

40. Arrelano-Flores v. Hoy, 262 F.2d 667 (9th Cir. 1958); Fells v. Garfinkel, 158 F. Supp. 524 (W.D. Pa. 1959); *In re* D., 8 I. & N. Dec. 99 (1958); *In re* M.D., 9 I. & N. Dec. 172 (1961); *In re* M., 6 I. & N. Dec. 346 (1954); *In re* R.R., 7 I. & N. Dec. 478 (1957).

41. *Infra*, Section III.

viction for a single crime, an alien convicted of multiple crimes involving moral turpitude may be deported even if the imposition or the execution of the sentence is suspended.[42]

The multiple crimes provisions of the Act limits deportability to those aliens whose multiple criminal convictions did not arise out of a *single scheme* of criminal misconduct.[43] Since deportability under this provision of the Act is almost certain, it is not surprising to find a great deal of litigation on the meaning of *single scheme* of criminal misconduct.

In *Jeronimo v. Murff*,[44] the court held that the words "a single scheme of criminal misconduct" must be construed according to their usual meaning in common language since they are not defined in the law. The court itself provided a formula, albeit algebraic, for legally construing the ordinary language meaning of the expression. The formula defines *single scheme* in terms of the fundamental purpose and object of the acts, the methods and procedures, the relationships and activities of the organizers of the project, and the victims of the acts.[45] Consistent with the common language requirement laid down in *Jeronimo*, the court in *Barrese v. Ryan*[46] held that the subjective declaration of the alien on the question of his scheme of conduct is not decisive of whether that conduct manifests a single scheme. Finally, the court held in *Zito v. Moutal*[47] that criminal acts which are part of a single and on-going criminal project are part of a single scheme of misconduct, notwithstanding their separation in time.

The basis for the above-cited decisions seems to be judicial notice

42. *In re* O., 7 I. & N. Dec. 539 (1957).
43. *Supra* note 31.
44. 157 F. Supp. 808 (S.D.N.Y. 1957). The court found that convictions for six different acts of bribery, larceny and conspiracy arose out of a single scheme of criminal misconduct.
45. *Id.*, at 815.
46. 203 F. Supp. 880 (D.C. Conn. 1962) which reversed *In re* B., 9 I. & N. Dec. 211 (1961) on the grounds that identity of time and purpose was too narrow a criterion for a single scheme of conduct. The Barrese court held that operation of a liquor business without paying the required federal tax for two years was a single scheme of criminal misconduct and therefore not ground for deportation.
47. 174 F. Supp. 531 (N.D. Ill. 1959); *In re* F.G., 8 I. & N. Dec. 447 (1959), which held that several false statements made on several occasions to continue receiving unemployment arose from a single scheme of criminal misconduct.

of the intent of Congress to provide aliens convicted of crimes with a second chance.[48] Such an interpretation would be consistent with *Glaros v. INS*[49] in which the court held that a letter from the trial judge stating the convictions arose out of a single scheme of criminal misconduct did not require re-opening of the deportation hearing where the record clearly showed two separate offenses.

An alien may not be deported for any and all criminal misconduct. The provisions of the Act enumerate certain criminal offenses which are grounds for deportation, and the general criminal convictions provision limits the grounds for deportation to criminal offenses involving the moral turpitude. The concept of *moral turpitude* is perhaps the most perplexing concept in the Act.

The Act does not define the term *moral turpitude*, which made its first appearance in the Immigration Act of 1917.[50] Although the term is inexact, it has been held to be sufficiently definite to meet constitutional requirements.[51]

The fundamental difficulty in attempting to establish an objective definition of the term *moral turpitude* is the requisite presupposition of a moral community. In a society in which the interests of one community may be antagonistic to those of another, no single standard of morality is applicable to the members of both. In such a situation it might be possible to define moral concepts relative to the needs of each community, but no higher standard applicable to all persons in both communities could even be conceived without begging the question in favor of the interests of one or the other. Such conflicting moralities cannot be rationally reconciled. The conflict can only be viewed as social or political in the broad sense, and the only resolution possible is the social dominance of one system of morality over the other.

It is not difficult to establish a legal definition of the term *moral turpitude* provided the definition is relative to the interests and needs of the community which controls the state apparatus. Such a definition would not last for all time, of course, since those interests and needs undergo continuous change; but a case-by-case examination of judicial decisions on moral turpitude would provide the social scientist with a fairly accurate picture of the interests and material needs of the dominant community.

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48. Nason v. INS, 394 F.2d 223 (2nd Cir. 1968), *cert. denied*, 393 U.S. 830 (1968). Compare with Costello v. INS, 311 F.2d 343 (2nd Cir. 1962), *rev'd*, 376 U.S. 120 (1962).

49. 434 F.2d 685 (5th Cir. 1970).

50. Section 1, Immigration Act of March 4, 1891, 26 Stat. 1084.

51. Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957), *cert. denied*, 355 U.S. 892 (1957); Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971).

Although judicial constructions of the term *moral turpitude* are often so abstract as to be almost valueless as criteria of deportability,[52] two generalizations may be made with respect to crimes involving moral turpitude. First, where moral turpitude is found, it is inherent in the violation or offense and not dependent upon the particular circumstances involved.[53] Second, crimes involving moral turpitude are not, as a class, identical with felonies as a class.[54] On the contrary, moral turpitude is not involved in all felonies, and some misdemeanors are considered crimes involving moral turpitude.

A case-by-case examination of findings of moral turpitude does not appear to reveal any discernible pattern apart from classification according to types of crimes.[55] However, it might be argued that such an examination does reflect the central role which the concept of evil intent plays in the thinking of the dominant moral community. Where evil intent is built into the description of the crime, that is, where the description of the crime entails evil intent, there is always a finding of moral turpitude.[56] In other words,

52. United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958); Pino v. Nicolls, 119 F. Supp. 122 (D.C. Mass. 1954), *aff'd*, 215 F.2d 237, (1954), *rev on other grounds*, 349 U.S. 901 (1955).

53. United States *ex rel.*, Sollazzo v. Esperdy, 187 F. Supp. 753 (S.D.N.Y. 1960), *aff'd*, 285 F.2d 341 (1961), *cert. denied*, 366 U.S. 905 (1960); Forbes v. Brownell, 149 F. Supp. 848 (D.D.C. 1957); Ablett v. Brownell, 240 F.2d 625 (D.D.C. 1957); Guarino v. Uhl, 107 F.2d 399 (2nd Cir. 1939).

54. United States *ex rel.*, Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929); Gonzales v. Barber, 207 F.2d 398 (9th Cir. 1953), *aff'd*, 347 U.S. 637 (1954).

55. A good classification can be found in 1 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, *supra* note 2, at 4.14a; Crimes against the person, sexual crimes and crimes involving family relationship; crimes against property; crimes against the authority of the government.

56. *In re* T., 3 I. & N. Dec. 641 (1949). This becomes clear when we consider that murder, voluntary manslaughter, and kidnapping have been held to involve moral turpitude, while involuntary manslaughter and assault (except with intent to kill, rob, rape, or inflict bodily injury) have been held not to involve moral turpitude. De Lucia v. Flagg, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1962); *In re* S., 9 I. & N. Dec. 496 (1961); *In re* Abi-Rached, 10 I. & N. Dec. 551 (1964); Vidal y Planas v. Landon, 104 F. Supp. 384 (S.D. Cal. 1952); *In re* Szegedi, 10 I. & N. Dec. 28 (1962); *In re* C.M., 9 I. & N. Dec. 487 (1961); *In re* B., 5 I. & N. Dec. 538 (1953); *In re*. J., 2 I. & N. Dec. 477 (1946); *In re* C., 5 I. & N. Dec. 370 (1953); *In re* Z., 5 I. & N. Dec. 383 (1953); *In re* P., 5 I. & N. Dec. 444 (1953); *In re* Beato, 10 I. & N. Dec. 730 (1964); *In re* P., 7 I. & N. Dec. 375 (1956);

where conviction of a crime by its very description says something about the character of the person convicted, there is always a finding of moral turpitude. Where a statute covers a number of offenses, an alien may be deported only if on a minimum reading the statute prohibits conduct inherently involving moral turpitude.[57]

Yet where evil intent is not obvious from the description of the crime but can be established by reference to the act upon which the criminal charge was based, or by reference to the purpose of that act, there may be a finding of moral turpitude.[58] That is,

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In re S., 8 I. & N. Dec. 344 (1959). The courts have held that rape, adultery, abortion, bigamy and lewdness involve moral turpitude, while fornication without compulsion does not involve moral turpitude. Fitzgerald v. Landon, 238 F.2d 864 (1str Cir. 1956); *In re* Z., 7 I. & N. Dec. 254 (1956); *In re* M., 9 I. & N. Dec. 452 (1961); *In re* Z., 3 I. & N. Dec. 168 (1948); Gonzalez-Martin v. Landon, 203 F.2d 196 (9th Cir. 1953), *cert. denied*, 345 U.S. 998 (1953); *In re* W., 4 I. & N. Dec. 401 (1951); *In re* A., 5 I. & N. Dec. 546 (1953). *In re* H., 7 I. & N. Dec. 616 (1957); *In re* R., 6 I. & N. 444 (1954). With respect to property, any crime involving fraud involves moral turpitude. The courts have held that arson, blackmail, forgery, robbery, larceny, receiving stolen goods knowingly, burglary, and extortion, *inter alia*, involve moral turpitude. *In re* S., 3 I. & N. Dec. 617 (1949); Lehmann v. Carson, 353 U.S. 685 (1957); United States *ex rel.*, Dentico v. Esperdy, 280 F.2d 71 (2nd Cir. 1960); Abbenante v. Butterfield, 112 F. Supp. 324 (E.D. Mich. 1953); *In re* F., 6 I. & N. Dec. 783 (1955); *In re* M., 9 I. & N. Dec. 132 (1960); *In re* S., 9 I. & N. Dec. 688 (1962); Glammario v. Hurney, 311 F.2d 285 (3rd Cir. 1962); Quilodram-Grau v. Holland, 232 F.2d 183 (3rd Cir. 1956); Orlando v. Robinson, 262 F. 2d 850 (7th Cir. 1959), *cert. denied*, 359 U.S. 980 (1959); Wyngaard v. Kennedy, 295 F.2d 184 (D.D.C. 1961), *cert. denied*, 368 U.S. 926 (1961); Wadman v. INS, 329 F.2d 812 (9th Cir. 1964); *In re* V.D.B., 8 I. &. N. Dec. 608 (1960); *In re* Z., 7 I. &. N. Dec. 253 (1956); *In re* A., 7 I. &. N. Dec. 626 (1957); *In re* R., 1 I. &. N. Dec. 540 (1943); *In re* F., 3 I. & N. Dec. 361 (1949); *In re* G.T., 4 I. &. N. Dec. 446 (1959). Clearly involving fraud, and thus, evil intent are such crimes against the authority of government as counterfeiting, perjury, and willful evasion of taxes and using the mails to defraud. United States *ex rel.*, Schlimmgen v. Jordan, 164 F.2d 633 (7th Cir. 1947); *In re* G., 4 I. & N. Dec. 17 (1950); *In re* K., 7 I. & N. Dec. 78 (1956); United States *ex rel.*, Alvares-Flores v. Savoretti, 205 F.2d 544 (5th Cir. 1953); *In re* F., 7 I. & N. Dec. 386 (1957); Chanan Din Kahn v. Barber, 253 F.2d 547 (9th Cir. 1958), *cert. denied*, 357 U.S. 920 (1957); Costello v. INS, 311 F.2d 343 (2nd Cir. 1953), *rev'd on other grounds*, 376 U.S. 120 (1964).

57. Forbes v. Brownell, 149 F. Supp. 848 (D.D.C. 1957); *In re* N., 8 I. & N. Dec. 466 (1959).

58. For example, disorderly conduct, and incest are not always crimes involving moral turpitude and child abandonment is only held to be such when it is willful and leaves the child destitute. Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959), *cert. denied*, 362 U.S. 913 (1959); Hudson v. Esperdy, 290 F.2d 879 (2d Cir. 1961), *cert. denied*, 368 U.S. 918 (1961); *In re* G., 7 I. & N. Dec. 520 (1957); *In re* Z., 2 I. & N. Dec. 316 (1945); *In re* H., 7 I. & N. Dec. 301 (1956); *In re* R., 4 I. & N. Dec. 192 (1950); *In re* S., 2 I. & N. Dec. 553 (1946); *In re* E., 2 I. & N. Dec. 134 (1944); *In re* Y., 3 I. & N. Dec. 544 (1949); *In re* B., 2 I. & N. Dec. 617 (1946); Moral turpitude

where conviction of a crime by its very description says nothing about the character of the person convicted, but knowledge of the act upon which the criminal charge was based leads one to form such a judgment, there may be a finding of moral turpitude. A finding of moral turpitude in such cases rests upon the connection between the crime and the acts involved. Where such acts by their very description entail evil intent, there is a finding of moral turpitude; where they do not, none is found.

Although addiction to narcotic drugs is not *per se* a crime, an alien who is a drug addict may be deported.[59] The government's attitude toward narcotics violations is underscored by the setting out of convictions for drug offenses in a separate subsection of the Act[60] as grounds for deportation until 1960 when the Act was amended specifically to include them.[61]

The provision of the Act with respect to narcotics violations does not make either imposition of sentence or confinement a necessary condition for deportation. Yet there is a great deal of controversy about what constitutes a conviction for the purpose of deportation.

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is not involved in unlawful entry unless the purpose of such entry is to commit a crime involving moral turpitude. *In re* M., 9 I. & N. Dec. 132 (1960); De Bernardo v. Rogers, 254 F.2d 81 (D.D.C. 1958); Tahir v. Lehmann, 171 F. Supp. 589 (N.D. Ohio 1958), *aff'd per curiam*, 264 F.2d 892 (1958). Even possession of stolen property where knowledge is not required for conviction and passing bad checks are held not to involve moral turpitude since they do not necessarily involve evil intent. *In re* K., 2 I. & N. Dec. 90 (1944); *In re* B., 3 I. & N. Dec. 278 (1948); *In re* Bailie, 10 I. & N. Dec. 679 (1964).

59. 8 U.S.C. 1251(a)(11) (1952). An alien convicted of being under the influence of narcotics, however, is not deportable. Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964). For a comparison of Varga with the issues raised in the case of rock singer John Lennon, *see* Wildes, *The United States Immigration Service vs John Lennon: The Cultural Lag*, 40 BROOKLYN L.R. 279 (1973). It has also been held that being convicted of violating CAL. HEALTH & SAFETY CODE § 11556, being in a place where narcotics are being used or smoked with knowledge thereof, is not a conviction upon which deportation may be based. *In re* Schunck, — I. & N. Dec. — (I.D. 2137, 1972). On the other hand, conviction of violating CAL. HEALTH & SAFETY CODE § 11557, maintaining a place for the purpose of unlawfully selling, giving away, or using narcotics has been held to be a conviction upon which deportation may be based. *In re* Martinez-Gomez, — I. & N. Dec. — (I.D. 2138, 1972).

60. 8 U.S.C. 1251(a)(11) (1952).

61. § 9, Act of July 14, 1960, P.L. 86-648, 74 Stat. 504.

III

Not every alien convicted of a crime involving moral turpitude or even narcotics is deported. The Act specifically exempts from deportation aliens convicted of a crime involving moral turpitude who have been pardoned[62] or who have been granted judicial recommendation against deportation.[63] These exemptions, however, do not apply to aliens who are drug addicts or who have been convicted of a narcotics drug offense.[64]

With respect to convictions of crimes involving moral turpitude, the pardon must be full and unconditional[65] and must be granted by the President or a Governor.[66]

There is some controversy over whether other instruments have the legal effect of a pardon. There are several such instruments ranging from parole to amnesty and including commutation of sentence. Neither parole nor commutation of sentence has the effect of a pardon,[67] but amnesty does have such effect.[68] Where a state's procedure for the restoration of civil rights has the essential features of a pardon, an alien will not be deported.[69]

A conviction will not be set aside, however, where an alien's guilty plea was based on assurance of counsel that he would not be deported.[70]

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62. 8 U.S.C. 1251(b)(1) (1952).

63. 8 U.S.C. 1251(b)(2). The recommendation may only be issued by the sentencing court for the first conviction of a crime involving moral turpitude and must be issued within thirty days after the imposition of sentence after notice to the Immigration and Naturalization Service. When such a recommendation is timely issued, the Attorney General has no discretion in the matter and the alien may not be deported. However, failure to obtain such a recommendation through ignorance of the pertinent provision of the statute does not prevent deportation. Marin v. INS, 438 F.2d 932 (9th Cir. 1971), *cert. denied*, 403 U.S. 923 (1971). Several attempts to obtain such a recommendation *nunc pro tunc* in order to prevent deportation have failed. United States *ex rel.*, Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926). There have even been some attempts made to bar deportation by a writ of *coram nobis* vacating the sentence and then reimposing it with the appropriate recommendation against deportation. These attempts have also failed. United States *ex rel.*, Piperfoff v. Esperdy, 267 F.2d 72 (2d Cir. 1959); *In* re L., 8 I. & N. Dec. 389 (1959); *In re* B., 8 I. & N. Dec. 686 (1960); *In re* S., 9 I. & N. Dec. 613 (1962).

64. 8 U.S.C. 1251(b)(2) (1952).

65. 8 U.S.C. 1251(b)(1) (1952).

66. *Id.*

67. *In re* J., 6 I. & N. Dec. 562 (1956).

68. *In re* B., 7 I. & N. Dec. 166 (1956).

69. *In re* G., 4 I. & N. Dec. 73 (1950); *In re* S., 5 I. & N. Dec. 10 (1953).

70. United States v. Parrino, 212 F.2d 919 (2d Cir. 1954), *cert. denied*, 348 U.S. 840 (1954); People v. Giron, 35 Cal. App. 3d 354 (1973). In an interesting dissenting opinion in Parrino, Justice Frank took issue with the

A conviction may be set aside under the provisions of the Federal Youth Corrections Act,[71] or, in California, under the provisions of the Youth Authority Act.[72] The purpose of the Youth Corrections Act is to bridge the gap between the treatment of juvenile offenders[73] and that of others convicted of a crime in the usual manner as provided by law. It is intended to make available for the discretionary use of federal judges a system for the sentencing and treatment of youth offenders by permitting the substitution of correctional rehabilitation for retributive punishment.[74]

Youth offenders, in contrast to juvenile delinquents, are tried in a criminal proceeding and convicted of a crime punishable by imprisonment. At time of sentencing, the court may sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to the Youth Corrections Act until discharged by the Youth Correction Division rather than imposing

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two main premises used by the court to reach its decision. The same premises appear later in the Giron decision. In Justice Frank's words: "I cannot believe that 'no manifest injustice' exists merely because the sentence of banishment for life was not imposed directly by the judge." United States v. Parrino, at 924. Second, he argued that a misunderstanding due to grossly erroneous advice of counsel, short of unprofessional conduct, is sufficient to show manifest injustice when the issue is not lack of due process but permission to go to trial. The California Supreme Court, in People v. Superior Court *ex rel.*, Giron, 11 Cal. 3d 793, 114 Cal. Rptr. 596, 523 P.2d 636 (1974), without mentioning the earlier case of People v. Giron, *supra*, held that it was not an abuse of discretion for the court to allow a defendant to withdraw his plea of guilty where through inadvertence he was unaware of the collateral effect of a marijuana possession plea on his immigration status. The court allowed the plea to be withdrawn during a period in which proceedings were suspended. This marks a departure, in California at least, to the 9th Circuit's consistent rulings that where a defendant receives suspended proceedings, the court's judgment is final for immigration purposes. Renewed litigation in this area may be expected in the near future.

71. 18 U.S.C. § 5001 *et seq.*

72. California Welf. & Inst. Code, Sections 1700 *et seq.* (West 1970).

73. 18 U.S.C. § 5031 *et seq.*, which defines a "juvenile" as a person who has not attained his eighteenth birthday, and which establishes the special proceedings against juveniles charged with violating a law of the United States that is not punishable by death or life imprisonment.

74. U.S. v. Lane, 284 F.2d 935 (9th Cir. 1960); Briscoe v. U.S., 246 F. Supp. 818 (D.C. Del. 1965), *aff'd*, 368 F.2d 214 (3d Cir. 1966); Coats v. Markley, 200 F. Supp. 668 (D.C. Ind. 1962); White v. Reid, 126 F. Supp. 867 (D.C.D.C. 1954); Abernathy v. U.S., 418 F.2d 288 (5th Cir. 1969). The distinction between persons under 18 as juveniles and those between 18 and 22 as youth offenders has been held to be reasonable. Guidry v. U.S., 317 F. Supp. 1110 (E.D. La. 1970), *aff'd*, 433 F.2d 968 (5th Cir. 1970).

the penalty of imprisonment otherwise provided by law.[75] If the court finds that the youth offender may not derive "maximum benefit" from such treatment during the six year period after his conviction, it may authorize such treatment for any further period rather than imprisonment.[76] Of course, the court may determine that the youth offender does not need commitment and so may suspend the imposition or execution of sentence while placing the youth offender on probation.[77] It may, in any event, determine that the youth offender will not benefit from the discretionary treatment and sentence him under any other applicable penalty provision of the law.[78] The court may order the youth offender committed to the custody of the Attorney General for observation in order to determine whether he will benefit from the treatment.[79]

When a youth offender is unconditionally discharged by the Youth Correction Division before the maximum sentence imposed upon him by the court, the conviction is automatically set aside.[80] If the youth offender has been placed on probation, the court may discharge him from probation prior to the expiration of his maximum period of probation and thereby automatically set aside his conviction.[81]

It is now well established that an alien youth offender convicted of a crime involving moral turpitude who is committed to the Youth Correction Division pursuant to the Youth Corrections Act is not subject to deportation when his discharge by the Youth Correction Division automatically sets aside his conviction.[82] The question persists, however, whether such setting aside of a conviction for a narcotics offense removes the conviction as the basis for deportation of an alien youth offender.

In *Mestre-Morero v. INS*[83] the court held that where an alien was sentenced upon conviction for a narcotics violation, he could not be deported on the basis of that conviction after receipt of certificate that his conviction has been set aside pursuant to the Youth Corrections Act.

Two factors make the *Mestre-Morero* decision significant. First, it was the position of the Immigration and Naturalization Service

75. 18 U.S.C. 5010(b).
76. 18 U.S.C. 5010(c).
77. 18 U.S.C. 5010(a).
78. 18 U.S.C. 5010(d).
79. 18 U.S.C. 5010(e).
80. 18 U.S.C. 5021(a).
81. 18 U.S.C. 5021(b).
82. *In re* Nagy, 12 I. & N. Dec. 623 (1968).
83. 462 F.2d 1030 (1st Cir. 1972).

in that case that narcotics offenders are excluded from the provisions of the Youth Corrections Act.[84] Whereas, in *Harnandez-Valensuela v. Rosenberg*, one of a series of earlier deportation cases in the Ninth Circuit, the court had held an alien sentenced for a narcotics violation under the Youth Corrections Act deportable immediately although there was a possibility of his ultimately receiving a certificate of discharge setting aside his conviction.[85]

The purpose of the California Youth Authority Act[86] and similar state statutes is to more effectively protect society by substituting for retributive punishment the training and treatment toward the correction and rehabilitation of young persons found guilty of public offenses. The California statute follows the Federal Youth Corrections Act in limiting the application of its provisions to persons under 21 at the time of the apprehension[87] who have been convicted

84. The Immigration and Naturalization Service sought to distinguish Mestre-Morero from Nagy on the theory that Congress in enacting a separate provision for the deportation of aliens convicted of narcotics violations and excluding such aliens from the ameliorations of deportability provision of the statute has enunciated a strong national policy of deportation of aliens involved in the narcotics trade which should not be subordinated to a technical erasure of a conviction. The court disagreed. It held that the Youth Corrections Act contemplates more than just a technical erasure and expresses a strong Congressional concern that young offenders be given an opportunity to "atone for their youthful indiscretions . . . free of all taint of a conviction." At 1032. It further held that had Congress intended to exclude youth offenders convicted of narcotics violations from the provisions of the Youth Corrections Act, it would have said so.

85. Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962). The alien argued that his conviction did not have the requisite finality for deportation pursuant to 8 U.S.C. 1251(a)(11). In this he relied on Pino v. Landon, 349 U.S. 901 (1955), which, *per curiam, rev'd* Pino v. Nicolls, 215 F.2d 237 (1st Cir. 1954). The Hernandez-Valensuela court held that sentence under the Youth Corrections Act, as imposed upon an adjudication of the alien's violation of the laws of the United States. Once the time for appeal has passed, the adjudication of guilt becomes final. Although the sentence carries with it the possibility of "congressional grace," such possibility in no respect affects the present fact of guilt. As if to underline the moralistic tone of its argument, the court invoked 8 U.S.C. 1251(b) as strongly suggestive of Congressional intent to exclude narcotics offenders from any amelioration of deportation. Referring to the Hernandez-Valensuela decision in Garcia-Gonzales v. INS, 344 F.2d 804 (9th Cir. 1954), the court somewhat qualified its stance by saying that the alien involved in that case had not in fact been discharged. For the other recent cases *see infra* note 104. *See also The Futile Forgiveness: Basing Deportation on an Expunged Narcotics Conviction*, 114 U. PA. L. REV. 372 (1966).

86. CAL. WELF. & INST. CODE § 1700 (West 1970).

87. CAL. WELF. & INST. CODE § 1731.5(a).

of a public offense in a criminal proceeding.[88] This has the effect of excluding juvenile offenders, since proceedings in juvenile court are not criminal proceedings as that term is used in the Youth Authority Act.[89]

The statute further restricts the application of its provisions to young persons who are not sentenced to death, life imprisonment, imprisonment for 90 days or less, the payment of a fine or who defaults in payment thereof and is subject to more than 90 days imprisonment under the judgment.[90] A young person not granted probation or whose probation was revoked and terminated is not eligible for commitment to the Youth Authority.[91] The Youth Authority may refuse to accept a person committed to it pursuant to the Youth Authority Act if it does not believe that the person can be "materially benefited" by its treatment or if it does not have adequate facilities to provide such care.[92]

When a person has been committed to the Youth Authority it may do the following:

(1) Permit him his liberty under supervision and upon such conditions as it believes conducive to law-abiding conduct;[93]

(2) Order his confinement under such conditions as it believes best designed for the protection of the public;[94]

(3) Order reconfinement or renewed release under supervision as often as conditions indicate to be desirable;[95]

(4) Revoke or modify any order except an order of discharge as often as conditions indicate to be desirable;[96]

(5) Modify an order of discharge if conditions indicate that such modification is desirable and when such modification is to the benefit of the person committed to the authority;[97]

(6) Discharge him from its control when it is satisfied that such discharge is consistent with the protection of the public.[98]

A person convicted of a misdemeanor and committed to the Youth

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88. *Id.*, § 1731.5.
89. *Id.*, § 1731.
90. *Id.*, § 1731.5(b).
91. *Id.*, § 1731.5(c) and (d).
92. *Id.*, § 1731.5.
93. CAL. WELF. & INST. CODE § 1766(a)(1).
94. *Id.*, § 1766(a)(2).
95. *Id.*, § 1766(a)(3).
96. *Id.*, § 1766(a)(4).
97. *Id.*, § 1766(a)(5).
98. *Id.*, § 1766(a)(6).

Authority is automatically discharged after a two-year period of control or when he reaches his 23rd birthday, whichever occurs later; unless an order for further detention has been made by the committing court.[99] A person convicted of a felony and committed to the Youth Authority is automatically discharged when he reaches his 25th birthday unless an order for further detention has been made by the committing court.[100]

There is a significant difference between the discharge provision of the California Youth Authority Act and the same provision of the Federal Youth Corrections Act. Whereas the Youth Corrections Act provides for an automatic setting aside of the conviction upon discharge, the Youth Authority Act provides that every discharged person may petition the court which committed him to set aside his conviction, dismiss the accusation or information against him, and release him from all penalties and disabilities resulting from the offense or crime for which he was committed.[101]

The Ninth Circuit, in a number of cases, has held that the setting aside of a narcotics conviction pursuant to those provisions of the Youth Authority Act which pertain to the possibility of expungement (pursuant to the provisions of the California Penal Code)[102]

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99. *Id.*, § 1770.
100. *Id.* § 1771.
101. *Id.*, § 1772. This is quite different from 21 U.S.C. 844 and California Penal Code § 1000 *et seq.*, the so-called "diversion" statutes which provide for a probationary period absence of finding of guilt or conviction and for "sealing the entire matter on satisfactory completion of said probation." No cases have interpreted the consequences of either Penal Code § 1000 or 21 U.S.C. 844 for immigration purposes.
102. California Penal Code § 1203.4 (amend. 1971) is similar to § 1772 of the California Welfare and Institutions Code. It says: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his pleas of guilty or plea of nolo contendere and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted. . . ."

does not reverse the conviction as a basis for deportation.[103]

In *Garcia-Gonzales*,[104] the most significant of the cases referred to above, the court summarized its previous decisions on matters relating to the effects of setting aside narcotics convictions pursuant to California law. The decision contained six major points.

First, under California law, disposition of a case involving an alien narcotics offender pursuant to section 1203.4 of the California Penal Code is a conviction for the purpose of deportation pursuant to 8 U.S.C. 1251(11).[105]

Second, when a *citizen* is found guilty of a narcotics offense and committed to the Youth Authority pursuant to Section 1772 of the California Welfare & Institutions Code, it is a conviction within the meaning of the statute requiring a convicted narcotics offender to register before departing from or entering into the United States.[106]

Third, Section 1772 of the California Welfare & Institutions Code and Section 1203.4 of the California Penal Code are so similar as to have the same function and effect.[107]

Fourth, the retention of some control over the final disposition of a probationer's criminal record by the California courts pursuant to California law does not entail such control that a finding that the probationer was convicted by that court is precluded.[108]

Fifth, under the decision of the California courts relating to Sec-

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103. Padilla-Patrida v. INS, 462 F.2d 619 (9th Cir. 1972); de la Cruz-Martinez, 344 F.2d 804 (9th Cir. 1965), *cert. denied*, 382 U.S. 840 (1965); Brownrigg v. INS, 356 F.2d 877 (9th Cir. 1966); Kelly v. INS, 349 F.2d 473 (9th Cir. 1965), *cert. denied*, 382 U.S. 932 (1965); Ramirez-Villa v. INS, 347 F.2d 985 (9th Cir. 1965), *cert. denied*, 382 U.S. 908 (1965); Zabanazad v. Rosenberg, 306 F.2d 861 (9th Cir. 1962); Wood v. Hay, 266 F.2d 825 (9th Cir. 1959); Arvellano-Flores v. Hay, 262 F.2d 667 (9th Cir. 1958), *cert. denied*, 362 U.S. 921 (1960). A recent Fifth Circuit Court decision on this question takes the same position as the Ninth Circuit Court. Gonzales de Lara v. U.S., 439 F.2d 1316 (5th Cir. 1971).

104. 344 F.2d 804 (9th Cir. 1961) is important because it provided the court with the opportunity to reach a decision on the precise question of whether an alien whose guilty plea was withdrawn and the information about him dismissed after completing probation for a narcotics conviction pursuant to California Penal Code § 1203.4 is subject to deportation under 8 U.S.C. § 1251(a)(11). In so doing, the court carefully distinguished the question posed by Garcia-Gonzales from questions presented in previous cases.

105. *Id.*, at 807 citing Wood v. Hay, 266 F.2d 825 (9th Cir. 1959).

106. *Id.*, at 807 referring to 18 U.S.C. § 1407 and citing Adams v. U.S., 299 F.2d 327 (9th Cir. 1962) wherein the court cited Arrellano-Flores v. Hay, 262 F.2d 667 (9th Cir. 1958), *cert. denied*, 362 U.S. 921 (1960), in which it held that 18 U.S.C. § 1407 does not incorporate all of the "niceties" and "nuances" of state laws on the subject of conviction.

107. *Id.*, at 807.

108. *Id.*, at 807.

tion 1203.4 of the California Penal Code, that section does not in fact wipe out a conviction for all purposes.[109]

Sixth, Section 1772 of the California Welfare & Institutions Code and Section 1203.4 of the California Penal Code do not in any sense "wipe out" or "expunge" a conviction, but rather reward the convict for good behavior during probation by releasing certain penalties and disabilities.[110]

It is instructive to contrast the effect of expungement of non-narcotics convictions pursuant to California law with the effect of expungement of narcotics convictions. In *In re Ibarra-Obando*[111] the Attorney General reviewed the decision of the Board of Immigration Appeals affirming the decision of the Special Inquiry Officer terminating deportation proceedings against an alien convicted of petty theft. The conviction was "expunged" pursuant to Section 1203.4 of the California Penal Code. The Special Inquiry Officer and the Board of Immigration Appeals both found that the alien, as a consequence of said expungement, was not convicted of a crime for the purpose of deportation under 38 U.S.C. 1251(a)(4). The Attorney General in affirming the Board's decision, reaffirmed Attorney General Rogers' finding in *In re G.*,[112] notwithstanding the court's contention in *Burr v. INS*[113] upon which the Service relied. The Attorney General in *In re G.* upheld the finding of the Board that a conviction expunged pursuant to Section 1203.4 of the California Penal Code does not afford the basis for deportation under 8 U.S.C. § 1251 except for narcotics convictions as spelled out in *In re A.F.*[114]

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109. *Id.*, at 807; note 3, citing cases establishing exceptions to the removal of disabilities granted by § 1203.4.

110. *Id.*, at 808.

111. 12 I. & N. Dec. 576 (1967).

112. 9 I. & N. Dec. 159 (1960).

113. 350 F.2d 87 (9th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966). Burr was an alien whose conviction for issuing insufficient funds checks with intent to cheat and defraud, a crime involving moral turpitude, was expunged pursuant to California Penal Code 1203.4. Although the case involved complicated questions not directly related to the question of the effect of such expungement on deportation, the court held that Burr could not rely on *In re G.*, 9 I. & N. Dec. 159 (1960), for relief since 8 U.S.C. 1251(a)(4), upon which deportation is barred is a federal statute intended to have a uniform application not dependent on the "niceties" and "nuances" of a state procedure.

114. 8 I. & N. Dec. 429 (1959). This case came on originally as a motion

Prior to *In re A.F.*, the Board of Immigration Appeals had consistently held that a conviction expunged under California law does not afford the basis for deportation under 8 U.S.C. § 1251(a)(11),

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to the Board of Immigration Appeals for reconsideration of an appeal from a decision of a Special Inquiry Officer directing the alien's deportation. The request for reconsideration followed upon the alien's suit for judicial review entitled Arrelano-Flores v. Hay, 262 F.2d 667 (9th Cir. 1958) and petition for writ of certiorari for the United States Supreme Court. After an adverse ruling by the United States Court of Appeals for the Ninth Circuit, the petition was denied. A motion for reconsideration was denied, but the Service requested that the case be referred to the Attorney General for review of the Board's decision. The Board ruled that an alien may be deported even though there is a possibility that at some future date he might be able to secure expungement for his conviction under the law of the state where the conviction occurred. However, the Board reaffirmed, by way of contrast, its decision in the case of *In re* D., 7 I. & N. Dec. 670 (1958) that an alien is not deportable on the basis of a conviction which has been expunged. The Service's request for reconsideration stemmed not from its disagreement with the deportation of Arrellano-Flores, but with the apparent anomaly that an alien may not be deported for the same crime after the conviction has been expunged. In the final review by the Board on September 1, 1959, affirming the Board's September 14, 1956, and June 24, 1959 decisions and submitting the matter to the Attorney General for review as requested by the Service, the Board said,

> A situation similar to the foregoing is present in every deportation under 8 U.S.C. 1251(a)(4) predicated on conviction for a crime involving moral turpitude. There, deportation is lawful if the alien is deported before he can secure a pardon for the crime, but if a deportation proceeding is instituted and the alien then obtains a pardon during the pendency of the proceeding, he cannot thereafter be deported on the basis of the pardoned crime. *In re* A.F., *supra*, at 439.

In its final motion on the question of deportation in *In re* A.F., the Service contended that an alien convicted of a crime which rendered him deportable continues to be deportable on the basis of that conviction even after the court has set aside the conviction pursuant to California Penal Code 1203.4. The Board answered this contention as follows:

> In a case where the conviction is expunged under section 1203.4 of the California Penal Code, the plea of guilty is withdrawn or the verdict of guilty is set aside and there upon the accusation or information against the defendant is dismissed. If the Supreme Court was unable to find finality of conviction in Pino v. Landon, *supra*, where only the sentence was revoked, we do not understand how the Service can maintain that there is a finality of conviction in a case under Section 1203.4 where the verdict of guilty is set aside and the accusation is dismissed. In such a case, not only is there no finality of conviction, but there is, in contemplation of law, no conviction whatsoever. In re A.F., *supra*, at 432.

The Service also contended that when a conviction is set aside pursuant to Section 1203.4, it ceases to exist for some purposes. The Board answered this contention as follows:

> Section 1203.4 specifically provides that upon the Court's dismissal of the accusations or information against the defendant, he 'shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.'

The comprehensive language which was used does not indicate that the conviction ceases to exist only for some purposes. *In re* A.F., *supra*, at 436. It is clear from the Service's argument that it was specifically concerned

the narcotics offenses provision of the Act. However, in *In Re A.F.*, the Attorney General ruled that expungement of narcotics convictions had no effect on deportation proceedings brought under 8 U.S.C. § 1251(a)(11).[115]

The Board, in *In re Ibarra-Obando*,[116] held that judicial precedent subsequent to the Attorney General's holding in *In re G.* do not support a basis for abandoning the rule stated by the Attorney General in *In re G.*

Further, the Attorney General specifically rejected the *Burr* court's contention that deportation is a federal question concerning which there should be no distinction between narcotics and non-narcotics convictions expunged pursuant to California law, and refused to reconsider the Attorney General's ruling in *In re G.* as

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with the narcotics convictions. That concern was answered by the Board as follows:

> The Congress did not define 'convicted' nor does that Statute (8 U.S.C. 1251(a)(11)) contain any language which the Service seeks to ascribe to Congress. The question under 8 U.S.C. 1251(a)(11) is simply whether an alien has been 'convicted' of any narcotics offenses mentioned therein and whether there is a finality of conviction in accordance with Pino v. Landon, *supra*. We have held that spondent was convicted and that he is deportable. Where the record of conviction has been expunged, as in *In re* D., *supra*, it is our considered opinion that the expunged conviction cannot support an order of deportation. *In re* A.F., *supra*, at 438.

115. The Attorney General, in affirming the order of the Board dismissing the alien's appeal and denying his petition for reconsideration, handed down the opinion on the question of narcotics convictions that became precedent for future deportation cases.

> However, it is my view that for the purpose of 1241(a)(11) it is immaterial that pursuant to a state statute like 1203.4 of the California Penal Code or 1772 of the Welfare and Institutions Code the verdict of guilty has been set aside and the criminal charge dismissed. I, therefore, disagree with the Board that in such cases there is no conviction whatever to support an order of deportation. I limit my disagreement to the precise issue presented—namely, a deportation proceeding brought under § 1241(a)(11) as it may be affected by state laws of the nature of the California statutes considered herein. *In re* A.F., *supra* at 445.

The Attorney General based this opinion on a "clear national policy" regarding narcotics offenses and the claim that to follow the Boards' view would make deportation depend upon the "vagaries" of state law. The Attorney General's decisions in *In re* A.F., and *In re* G., were cited with approval by the Ninth Circuit in Garcia-Gonzales v. INS, *supra*, 344 F.2d 804, 810 (9th Cir. 1961), specifically the court agreed with the Attorney General as to the interest of Congress in aliens convicted of offenses mentioned in § 1251(a)(11).

116. 12 I. & N. Dec. 576, 582 (1967).

requested by the Service.[117]

The issue that emerges here was clearly posed in *In re Andrade*.[118] On the assumption that the purpose and effect of the Federal Youth Corrections Act and the California Youth Authority Act are the same, counsel argued that *Mestre-Morero* provides precpedent for removing an expunged narcotics conviction as the basis for deportation. The Board rejected this argument on the ground that deportation is a function of federal rather than state law. In the Board's words:[119]

> It would be anomalous for a federal action, based upon a state conviction, to be controlled by how a state may choose subsequently to treat the matter. It is the fact of state conviction, not the matter of state punishment for that conviction, that is crucial (citing *Garcia-Gonzales v. INS*). Moreover, it is clear from the legislative history of the Federal Youth Corrections Act that Congress intended a "youth offender" would not have a continuing criminal record if conviction was set aside pursuant to 18 U.S.C. § 5021. But Congress made it equally clear that this was a federal law binding only in the federal court and excluding any state action.

The Board, in dismissing the appeal from a deportation order, cited *In re Andrade* and concluded that the *Mestre-Morero* doctrine does not apply to state expungements.

The subsequent history of *In re Andrade* is a case study in litigation on matters in dispute between federal courts of appeal. The Ninth Circuit Court ruled against *Andrade-Gamiz* holding that *Mestre-Morero* is not the law of the Ninth Circuit.[120] The alien applied to the United States Supreme Court for a writ of certiorari, and the Board suddenly reversed its decision[121] and petitioned the United States Supreme Court to dismiss the matter as moot. The United States Supreme Court[122] granted certiorari, dismissed the petition for dismissal, reversed the decision of the Ninth Circuit Court, and vacated the judgment of the court in the matter. The Supreme Court held that *Mestre-Morero* is the law of the land on the effect of expungement of narcotics convictions and, as such, is applicable to convictions expunged pursuant to the California Youth Authority Act.

In general terms, the question we have been considering is whether a federal agency must look to a state statute in making

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117. *Id.*, at 590.
118. 13 I. & N. Dec. (I.D. #2205), decided by the Board May 31, 1973, but recently reversed.
119. *Id.*, at 3.
120. Andrade-Gamiz v. INS, 94 S. Ct. 1986 (9th Cir. 1973).
121. *In re* Andrade-Gamiz, 40 L. Ed. 2d, Mo. 3, 555 (1974).
122. Andrade-Gamiz v. INS, Slip Opinion #73-5694, April 29, 1974.

a decision pursuant to a federal statute. When we examine the concrete situation of a deportation proceeding based on a narcotics conviction, the question becomes more complex. We must consider whether the Board has the power to entertain a collateral attack on the judgment of a criminal court, whether the court's power to modify an order through a writ of *coram nobis* is effective to prevent the action of a federal agency, and whether there is a *consistent* policy regarding the effect of orders of the court subsequent to the original conviction on an alien's liability for deportation.

Our opinion is that persuading the court to accept an affirmative answer to the general question we have been considering may not be a fruitful endeavor. However, the prospects for intervention of the court in preventing the deportation of an alien where a narcotics conviction has been set aside are now quite good.

The Ninth Circuit Court used the term "technical erasure" to refer to the setting aside of a narcotics conviction pursuant to Section 1203.4 of the California Penal Code. The use of this term in the contents of the decisions suggest that the court accepted the Board's judgment of deportability based on guilt. What the Board is really saying in such cases is "We know he is guilty of the narcotics offense, so he must be deported regardless of the 'technical erasure' of his conviction." It would be worth litigating the question whether such reasoning contradicts the long held principle that in deciding whether an alien is deportable the immigration authorities cannot go behind the judicial record to determine the guilt or innocence of the alien.[123]

We found earlier that the writ of *coram nobis* is effective to prevent deportations in another way.[124] Generally, in the absence of a showing that the court lacked jurisdiction, an order to vacate a conviction by writ of *coram nobis* will prevent deportation.[125]

The cases of *Sirhan* and *Rodriguiz-Rodriguiz*[126] are particularly

123. Mylusis v. Uhl, 210 F. 860 (2d Cir. 1914).
124. *Supra* note 63.
125. Freislinger v. Smith, 41 F.2d 707 (7th Cir. 1930); Joseph v. Esperdy, 267 F. Supp. 492 (S.D.N.Y. 1966); Doss v. State of North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966); Vasquez v. Vasquez, 109 Cal. App. 280, 240 P.2d 319 (1952); *In re* O'Sullivan, 10 I. & N. Dec. 320 (1963); *In re* H., 9 I. & N. Dec. 460 (1961); *In re* G., I. &.. N. Dec. 562 (1956); Sawkow v. INS, 314 F.2d 34 (3d Cir. 1963); U.S. v. Shapiro, 222 F.2d 836 (7th Cir. 1955).
126. *In re* Sirhan, *et al.*, 13 I. & N. Dec. 592 (1970). The deportation cases

worth noting with respect to the effect on deportation of an order changed by writ of *coram nobis*. In *Sirhan* and *Rodriguiz-Ridriguiz*, the Board found that the courts

> . . . acted without knowledge that they could have entered an order which would have saved the respondent from deportation—a disability stemming from the punishment inflicted and not intended by the courts. It appears to us that the power to correct this omission existed.[127]

The decision of the Board in *Sirhan* and *Rodriguiz-Rodriguiz* provides a precedent for dealing with another sort of case frequently encountered in the practice of immigration law. An alien is "picked up" by federal narcotics authorities but turned over to state authorities for prosecution. Had the alien been prosecuted in a United States Court and committed to the Attorney General pursuant to the Youth Corrections Act, he might be immune from deportation. Under present conditions there is only slight hope of preventing his deportation even if he is committed to the Youth Authority pursuant to the California Youth Authority Act. It may, however, be possible to persuade the court to vacate the conviction and return the matter to the federal authorities to deal with as they see fit.[128]

The entire area of liability to deportation for criminal convictions is complicated by the lack of a consistent policy regarding the effect of subsequent orders of the court on the original conviction. As we have seen, some orders are held to be effective in preventing deportation while others are held to be ineffective for this purpose.

In the matter of *Sirhan, et al.*, the Board said:[129]

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decided under that caption were Sirhan, Rodriguiz-Rodriguiz and Talavaro-Arrendondo. The cases were tried separately before different special inquiry officers, but considered jointly by the Board. Sirhan and Rodriguiz were convicted of violation of marijuana laws in a Californa Superior Court. They were then charged in a deporation proceeding with being deportable by reason of said conviction. The court then vacated the conviction and certified the aliens as wards. A person treated as a juvenile is not considered a person convicted of a crime. The change in Sirhan was made by a judge other than the one who entered the original order on a motion to vacate made by counsel. In Rodriguiz, the court vacated the conviction on its own motion.

127. *Id.*, at 598.

128. The question of double jeopardy does not arise here. An accused in a criminal case who is interested in having a conviction vacated may be tried again on the same or another indictment, for the offense of which he was convicted even if he has served time under the original sentence. People v. Stratton, 136 Cal. App. 201, 28 P.2d 695 (1934); Jones v. Nash, 264 F.2d 610 (8th Cir. 1959). Further, where a conviction is vacated and the proceedings are remanded to the juvenile authorities (which are not considered criminal courts), the doctrine of double jeopardy does not apply. People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953).

129. *In re* Sirhan, *et al.*, 13 I. & N. Dec. 592 (1970) at 599. The Board

> Pointing to the fact that a conviction (the finding of guilt) exists independently of a sentence (the imposition of punishment), the Service's representative contends that the vacating of a sentence has no effect on the existence of a conviction and permits the conviction, where it is for a narcotics offense, to support an order of deportation under Section 1251(a)(11) of the Act. It is sufficient answer to say that in *Sirhan* and *Rodriguiz* where narcotics violations occurred, the court vacated the convictions; no conviction exists.

In *Talvero*[130] the Board saw no reason to decide the question of the effect of a modification of sentence and ordered no change on the basis for the termination of deportation proceedings against the alien. Since *Talavero* was a case involving a non-narcotics conviction, expungement of the conviction provided the basis for termination of deportation proceedings.

We have already discussed the plenary power of the federal government with respect to matters pertaining to aliens.[131] Notwithstanding that aliens are not afforded the protection of certain constitutional rights because deportation is not considered to be punishment,[132] the inescapable conclusion is that there are exceptions to the plenary power of the federal government. It would seem wholly consistent with such exceptions that convictions set aside pursuant to state statutes not provide the basis for deportation under Section 1251(a)(11) of the Act. Section 1251(a)(4) and 1251(a)(11) provide for deportation of an alien based on *convictions* and not *offenses*. An alien charged with rape who pleads guilty to a charge of simple assault cannot be deported under Section 1251(a)

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distinguished Sirhan and Rodriguiz from the precedent Ninth Circuit Court decisions in deportation cases supported by narcotics convictions. The Board held that expungement is a state process which removes most of the disabilities imposed by the state on a convicted person, but where a conviction is vacated no conviction exists.

130. *Id.* Telavero was the third case to be decided under the joint caption. Talavero was convicted in a California Superior Court in 1966 for issuing a check without sufficient funds. In May he was sentenced to imprisonment for one year. The sentence was suspended. Subsequently, the court modified the sentence to make the term of imprisonment less than a year. The conviction was expunged in May 1969. Although the Service took issue with the effect of the modified order as removing the conviction for the purpose of deportation, it accepted that question as moot because the subsequent expungement removed the conviction as the basis for deportation. However, the Service asked that the deportation proceedings be terminated on the ground that they were improvidently begun.

131. *Supra* note 29.

132. *Supra* note 3 and note 14.

(4) of the Act.[133] By parity of reasoning, an alien whose conviction has been set aside pursuant to a state statute suffers deprivation of due process and equal protection if he is deported. There simply is no conviction to provide the basis for deportation, especially where the state statute has the same purpose as the Federal Youth Corrections Act.[134] It is transparently clear that a conviction set aside pursuant to the Youth Corrections Act provides no more basis for deportation than a conviction vacated by writ of *coram nobis.* No conviction exists in such cases. Consequently, any state statute having the same purpose as the Federal Youth Corrections Act should be effective in removing the conviction as the basis for deportation.

We have already commented on the differences between the Youth Corrections Act and the Youth Authority Act, on the one hand, and California Penal Code § 1000 *et. seq.* on the other.[135] In the light of *Andrade-Gamiz* and *Mestre-Morero*, we suggest that a coherent national policy regarding deportation of aliens for narcotic drug convictions is now emerging.

21 U.S.C. § 844 is a federal statute which clearly expresses the intent of Congress to ameliorate the consequences of conviction for simple possession of controlled substances by providing for conditional discharge and expunging records of a first offense without adjudication of guilt.[136] Congress has not amended 8 U.S.C. § 1251

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133. *Supra* note 29.

134. It appears from Andrade-Gamiz v. INS Slip Opinion #76-3-5694, April 29, 1974, that Mestre-Morero is the law of the land. It will be interesting to see what the United States Supreme Court decides in cases where the convictions were set aside pursuant to Section 1203.4 of the California Penal Code. Consistency warrants a decision identical with Andrade-Gamiz since Section 1203.4 of the California Penal Code has the same purpose as Section 1772 of the California Welfare and Institutions Code.

135. *Supra* note 101.

136. 21 U.S.C. § 844 provides in part that (b) (1) "If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this subchapter or subchapter II of this chapter, or any other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, if found guilty of a violation of subsection (a) of this section after trial, or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require for violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal un-

(b) (providing that exemptions from deportation for aliens convicted of a crime do not apply to aliens who have been convicted of a narcotic drug offense) to include aliens falling under the provisions of 21 U.S.C. § 844. The inference we make is that despite efforts of the Service to the contrary, there has been a general loosening of the national policy with respect to mere possession of marijuana.

It should not be possible to prevent the deportation of an alien whose conviction of mere possession of a controlled substance has been expunged pursuant to 21 U.S.C. § 844, or a youth corrections type of commitment on the basis of *Mestre-Morero* in the context of this emerging national policy.

CONCLUSION

In this article we have not attempted to provide an exhaustive commentary on the question of the effect of criminal convictions on the status of aliens. We have instead tried to touch on some of the general issues involved in the deportation of aliens for "un-

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der this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications of disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person. (2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of the law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose."

desirable" conduct and some of the specific issues involved in the deportation of aliens on the basis of criminal convictions for offenses involving moral turpitude or narcotic drugs.

It has been our contention that the rationale for the difference between the treatment of aliens convicted of drug offenses and those convicted of other offenses is unreasonable. This rationale, as we have seen, is the alleged Congressional mandate for a "tough" policy toward drug offenders. It now appears that no such mandate can be put forth as justification for the outrageous treatment of young aliens who have adapted well to the culture of their American contemporaries.

We have tried to argue that the fundamental problem underlying the treatment of all aliens by the Service and by the Courts is the abstract assumption that deportation is not punishment. This undemocratic assumption comports neither with the principles upon which the United States was founded nor with reality.

However, absent a drastic change in the constitutional protections afforded aliens, it is likely that aliens convicted of crimes will be protected from deportation only by the prevailing social attitudes towards those crimes as reflected in the latest legislative mandate. Unfortunately, aliens, like other disenfranchised groups in the community, are the last to obtain a legislative response to the changing social milieu around them. This is why the Immigration and Nationalities Act requires of an alien a sexual morality proper to the late nineteenth century, political views proper to the early nineteenth century, and attitudes toward the use of marijuana proper to the mid-twentieth century.