

# **MATTER OF ROLDAN: EXPUNGEMENT OF CONVICTION AND THE ROLE OF STATES IN IMMIGRATION MATTERS**

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## INTRODUCTION

A state trial judge is faced with an offender. This person is young, has a clean record, has lived and worked in the community for many years, and has a family to support. The offense is not serious. The judge may have a variety of sentencing options, including a combination of suspended sentence, deferred adjudication, probation without judgment, supervised probation, jail time, or a variety of other means to impose a punishment proportional to the infraction. The judge may wish to consider the nature of the behavior and its context, the person's record, the likelihood of re-offense, how the sentence will affect the offender's family, various community interests, the judge's own case load and other limitations or priorities of the state criminal justice system. It is unlikely that the judge would choose as punishment to exile the offender from the country, force him to give up a home and business, and possibly permanently separate the offender from his family. Yet, despite the array of sentencing options, whatever sentence the judge imposes and the record of the conviction may have that exact effect, if the offender is not a citizen of the United States.

Today, conviction of a criminal act may affect a noncitizen's immigration status and have severe consequences, including removal<sup>1</sup> and a temporary or permanent bar to reentry.

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1. Removal is the term used in the Immigration and Nationality Act (INA) to describe proceedings to remove aliens from the United States. Such proceedings include both deportation (for aliens who were lawfully admitted to the United States, but are no longer eligible to stay, covered by INA § 237(a), 8 U.S.C. § 1227(a) (Supp. V 1999)) and inadmissibility grounds (for aliens who are ineligible to make a legal entry, covered by INA § 212(a), 8 U.S.C. § 1182(a) (Supp. V 1999)). Aliens who are in the United States without having made a legal entry are considered to be seeking admission, *see* INA § 235, 8 U.S.C. § 1225 (Supp. V 1999), and are afforded fewer constitutional and procedural protections. This Note will

Recent immigration legislation has shown an increasing resolve on the part of Congress to broaden the sweep of immigration laws in order to expel from the United States "criminal aliens,"<sup>2</sup> a term that has come to mean almost any alien convicted of criminal activity, including crimes that may not have been removable offenses<sup>3</sup> at the time that they were committed.<sup>4</sup> Changes to the Immigration and Nationality Act (INA) in 1996 expanded the categories of crimes that can serve as grounds for removal and at the same time reduced procedural safeguards and avenues for relief once a record of conviction exists. Thus, how exactly the term "convicted" is defined and interpreted in the context of immigration proceedings can be determinative of whether an alien will be able to remain in the United States or be removed.

Until 1996, case law established the broad parameters of what would stand as a conviction. A landmark 1988 decision, *Matter of Ozkok*,<sup>5</sup> established a three-prong test for determining whether a conviction was considered to be final for immigration purposes. The test looked at 1) whether the alien had been found guilty or had entered a plea of guilty; 2) whether some form of punishment had been imposed; and 3) whether a judgment or adjudication of guilt could be entered if the person violated probation or conditions without further proceedings regarding the person's guilt or innocence of the original charge.<sup>6</sup>

Based on that decision, subsequent cases by the Board of Immigration Appeals (BIA) and federal circuit courts estab-

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focus primarily on the effect of a criminal conviction as a deportation ground, but it is important to note that convictions also affect admissibility, which may also implicate grounds for removal as well as several forms of relief from removal.

2. "It's outrageous that Americans should be asked to put up with crimes from individuals from other countries who have been graciously granted the unique right to live here," stated Allen Kay, spokesman for U.S. Rep. Lamar Smith (R. Tex.), head of House Judiciary immigration subcommittee. Patrick J. McDonnell, *Criminal Past Comes Back to Haunt Some Immigrants*, L.A. TIMES, Jan. 20, 1997, at A1, available in 1997 WL 2174638.

3. A removable offense refers to a criminal offense that will provide grounds to remove an alien from the United States if a conviction is entered.

4. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. V 1999).

5. 19 I. & N. Dec. 546 (BIA 1988).

6. See *id.* The final prong of the test was intended to eliminate inconsistencies that resulted from different state ameliorative provisions, some of which withheld a determination of guilt until completion or violation of some probationary period. See *id.* at 550-51.

lished that a variety of state rehabilitative procedures used to expunge convictions could be used to avoid the immigration effects of criminal convictions.<sup>7</sup> Additional case law determined that an alien charged with a drug offense could avoid deportation if he had been prosecuted under the Federal First Offender Act (FFOA)<sup>8</sup> or an exact state counterpart to it.<sup>9</sup> Later cases broadened this approach to allow an alien to avoid deportation if he could show that he met the requirements for the FFOA and had been accorded some rehabilitative treatment under a state statute.<sup>10</sup>

This changed in 1996, however, when the Immigration and Nationality Act was amended to include a statutory definition of conviction for federal immigration purposes. The new statutory definition modified the *Ozkok* test to include only two issues: whether there had been a plea or finding of guilt and whether some kind of punishment had been imposed.<sup>11</sup> Based on the change and an interpretation of Congress's intent, the BIA in *Matter of Punu*<sup>12</sup> determined that the modification meant that Congress wished to broaden the definition of conviction to unambiguously include certain deferred adjudications. More recently, in *Matter of Roldan*,<sup>13</sup> the BIA used the same reasoning to reverse forty years of precedent and to hold that "no effect is to be given . . . to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt conviction by operation of state statute."<sup>14</sup> Further, the decision ended the exception that allowed aliens to avoid immigration conse-

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7. Examples of state rehabilitative procedures include probation without judgment, suspended sentence, withholding adjudication of guilt, and expungement of a record of conviction. If a conviction had been vacated or expunged, the INS could not use it as a basis to remove the alien or deny other immigration benefits. *See, e.g., In re Luviano*, Int. Dec. 3267 (BIA 1996).

8. *See* 18 U.S.C. § 3607 (1994). This act allows first time drug offenders to be placed on a program of probation without entering a judgment of conviction. If probation is not violated, the proceedings are dismissed. The statute provides that such a disposition shall not be considered a conviction "for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(b) (1994).

9. *See In re Deris*, 20 I. & N. Dec. 5 (BIA 1989).

10. *See Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994); *In re Manrique*, 21 I. & N. Dec. 58 (BIA 1995).

11. *See* INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (Supp. V 1999).

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

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

14. *In re Roldan*, Int. Dec. 3377 (BIA 1999).

quences if they were eligible for federal first offender status, even if they were prosecuted under state drug laws.<sup>15</sup>

This note argues that the decision in *Roldan* interpreted the statutory definition of "conviction" more broadly than was necessary, to the particular detriment of immigrants whose expunged convictions may now retroactively subject them to removal. The note highlights policy arguments that call for preserving a role for state rehabilitative action, such as expungements, in criminal convictions of aliens. Part I provides an overview of the major types of criminal convictions that trigger removal or denial of other immigration benefits. Part II reviews the development of the definition of conviction for immigration purposes up to the 1996 statutory definition. Part III provides a summary of the *Roldan* case and decision. Finally, Part IV describes policy arguments that support preserving the pre-*Roldan* treatment of expungements and other state rehabilitative procedures.

Part IV focuses on the role that states and state actors already play in immigration matters. While immigration control is considered to be the domain of the federal government,<sup>16</sup> the roles of federal and state authorities are inevitably intertwined, particularly where immigration law overlaps with traditional areas of state power, such as law enforcement. State law helps define criminal offenses that may trigger immigration consequences. Furthermore, states do most of the work and carry a great deal of the costs of prosecuting and incarcerating criminal aliens. In addition, recent changes to the INA give an increased role to state actors in enforcement of immigration policy, eroding the traditional federal exclusivity over immigration matters. As a result of this increasingly mixed system, it may be impossible to achieve one of the underlying concerns animating the *Roldan* decision—uniform application of immigration law. Ending the discretionary power of states to mitigate immigration consequences through expungements or other rehabilitative measures does not remove inequities from the system; rather, it interferes with the realization of

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15. *See id.* This part of the decision was recently overruled by the 9th Circuit Court of Appeals in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

16. *See* discussion *infra* Part IV.A.

other valid state interests and cuts off another avenue for review of individual circumstances in removal decisions.<sup>17</sup>

## I. IMMIGRATION CONSEQUENCES FOR CRIMINAL CONVICTIONS UNDER THE INA

This Part identifies basic immigration laws and relevant enforcement agencies. In addition, this Part discusses the most serious categories of crimes with immigration consequences, including crimes involving moral turpitude, aggravated felonies, and controlled substance offenses, as well as the role of state law in defining these offenses.

### A. *Immigration Law and Enforcement Agencies*

The primary legislative tool in the regulation and implementation of immigration policy is the Immigration and Nationality Act.<sup>18</sup> The current version of the statute reflects the increasing emphasis on removing criminal aliens from the United States, an effort that has received particular attention in the last decade.<sup>19</sup> Major legislative actions over the last few years have been enacted with an eye toward expanding the number and types of crimes that subject the alien to removal and toward “establishing uniformity in treatment and minimizing individual discretion.”<sup>20</sup>

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17. The removal of discretion and consideration of individual merits in the deportation process is one of the major criticisms of the current INA, and it is an issue that has an impact far beyond the state expungements of conviction, the focus of this article. See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

18. 8 U.S.C. § 1101–1537 (Supp. V 1999).

19. See Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 272 (1997). This effort seems to have originally been aimed at cracking down on undocumented aliens who committed crimes. Rep. Michael Patrick Flanagan (R. Ill.) declared, “[i]t is simply astounding to me that we are paying to feed and house a huge prison population that shouldn’t even be in the United States.” *GOP Response Backs House Crime Bill*, WASH. POST, Mar. 10, 1996, at A17, available in 1996 WL 3068172. However, the scope of the legislation that was ultimately enacted had a far greater impact and has resulted in the removal of many long term permanent residents whose criminal convictions were far behind them.

20. Pilcher, *supra* note 19, at 272.

Congressional efforts to crack down on criminal aliens began in earnest with the Anti-Drug Abuse Act of 1988,<sup>21</sup> which introduced the category of "aggravated felonies" and their attendant consequences.<sup>22</sup> Subsequent acts, including the Immigration Act of 1990,<sup>23</sup> the Immigration and Technical Corrections Act of 1994,<sup>24</sup> the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>25</sup> and, most notably, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>26</sup> expanded the types of crimes that could implicate an individual's immigration status and reduced procedural safeguards and forms of relief available to criminal aliens.<sup>27</sup>

The INA vests the Attorney General with the power to enforce immigration laws and to remove aliens who have no legal right to be in the country.<sup>28</sup> This power is delegated to the agents of the Immigration and Naturalization Service (INS), which includes immigration agents, trial attorneys, and border patrol. The adjudicative agency for immigration proceedings is

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21. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

22. The term "aggravated felony" is not defined in the INA except by reference to a list of crimes that fall into this category. These crimes are not necessarily felonies. See discussion *infra* Part I.B.2.

23. Immigration Act of 1990, Pub. L. No. 100-649, 104 Stat. 4978.

24. Immigration and Naturalization Technicality Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305.

25. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

26. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

27. Much of this legislation arose out of a concern about rising immigration levels and crime rates. See McDonnell, *supra* note 2, at A1. A perception that aliens, in particular undocumented immigrants, were committing crimes at unusually high rates because of lax enforcement was enhanced by the 1996 presidential campaign. See *Dole to Push Tough Immigration Stand in California Swing*, L.A. TIMES, Oct. 26, 1996, at A1, available in 1996 WL 12749859 (quoting the candidate as saying "[W]e have all these new people coming into America, rushing through the immigration process. And we find out [the criminal element] may be as high as 10%."). The Clinton Administration also made control of illegal immigration and expulsion of criminal aliens a high priority. See Tom Kenworthy, *Clinton to Press Ouster of Illegal Immigrants Charged with Crimes*, WASH. POST, May 7, 1995, at A4, available in 1995 WL 2092513. But see Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1944 (2000) (noting that the rise in incarceration rates among aliens was probably a result of mandatory sentencing practices and the overall rise in incarceration rates).

28. See INA § 237(a), 8 U.S.C. § 1227(a) (Supp. V 1999).

the Executive Office of Immigration Review (EOIR),<sup>29</sup> which includes Immigration Judges and the Board of Immigration Appeals.<sup>30</sup> Typically, if the INS seeks to remove an alien, a hearing is held before an Immigration Judge (IJ) in an Immigration Court. The purpose of the hearing is to determine whether the individual is an alien and whether he is inadmissible or deportable.<sup>31</sup> A decision from the IJ can be appealed to the Board of Immigration Appeals, a fifteen member appointed panel that serves as the appellate body to the Immigration Court. Under some conditions, an unfavorable decision by the BIA may then be appealed to a federal court of appeals. However, the INA prohibits federal court review of a final removal order against an alien deportable under most of the crime-related deportation grounds.<sup>32</sup> Throughout all the proceedings, the alien has certain procedural rights, including the right to be represented by counsel.<sup>33</sup> Various forms of relief are available to prevent removal; however, certain criminal convictions may preclude eligibility for relief from removal or other benefits.<sup>34</sup>

## *B. Major Categories of Crimes with Immigration Consequences*

### 1. Crimes Involving Moral Turpitude

Crimes involving moral turpitude have long been a basis for keeping aliens out of the country.<sup>35</sup> Under the current INA,

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29. The EOIR is also a division within the Department of Justice but is separate from the INS.

30. See generally Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisted*, 11 GEO. IMMIGR. L. J. 507, 521 (1997).

31. See INA § 240(a), 8 U.S.C. § 1229(a) (Supp. V 1999).

32. See INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. V 1999).

33. See INA § 240 (b)(4), 8 U.S.C. § 1229a(b)(4) (Supp. V 1999).

34. For example, conviction of aggravated felony, crime of moral turpitude, or controlled substance offense precludes an alien from establishing "good moral character," see INA § 101(f), 8 U.S.C. § 1101(f) (Supp. V 1999), a statutory prerequisite to several immigration benefits including naturalization, see INA § 316; 8 U.S.C. § 1427 (Supp. V 1999), voluntary departure, see INA § 240B; 8 U.S.C. § 1229c (Supp. V 1999), and cancellation of removal, see INA § 240A; 8 U.S.C. § 1229b (Supp. V 1999).

35. The term "moral turpitude" first appeared in 1891. See Act of Mar. 3, 1891, § 1, 26 Stat. 1084. It was made a deportation ground in the Immigration Act of 1917. See generally C. GORDON, S. MAILMAN, & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 71.05[1][a] (rev. ed. 1998).

an alien may be deported for a single conviction of a crime of moral turpitude if it is punishable by a sentence of one year or longer.<sup>36</sup> In addition, an alien who commits two or more crimes of moral turpitude "not arising out of a single scheme of criminal misconduct" is also deportable, regardless of the possible length of punishment.<sup>37</sup> Moral turpitude is not defined in the statute, nor has it been satisfactorily explained in other contexts. One attempt at description is as follows:

conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.<sup>38</sup>

Case law has developed a number of types of crimes that generally fall under this category.<sup>39</sup> However, it is important to note two points about convictions for crimes of moral turpitude. First, the length of the sentence that may be imposed may be a determining factor in whether the conviction will trigger removal. This is important because if the offense falls under state statute, the length of sentence that may be imposed can vary from state to state. Thus, a conviction for a crime involving moral turpitude in one state may trigger deportation, while conviction of a crime under the same facts in another state may not. Second, a critical factor in determining whether a particular crime involves moral turpitude depends on how the offense is defined in the statute, i.e., whether the elements of the crime as defined by statute include a showing of an evil or immoral state of mind. Again, state statute will play an important role in determining whether a conviction will trigger de-

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36. See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. V 1999).

37. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (Supp. V 1999).

38. *In re Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996) (citations omitted).

39. For example, crimes against persons that involve moral turpitude are murder, manslaughter involving recklessness, and kidnapping. See GORDON ET AL., *supra* note 35, § 71.05[1][d][iii] at 71-142-43. "Simple assault or assault and battery do not involve moral turpitude." See *id.* at 71-143. However, assault with intent to rob or kill does include an element of moral turpitude. See *id.* at 71-144. For summaries, see, e.g., *id.*; DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES, 6.2 & app. E (1995).

portation. For example, in Pennsylvania, passing bad checks is not a crime of moral turpitude, because a conviction does not require proving any elements of *mens rea*; in Georgia, on the other hand, the elements of the crime include a requirement that the defendant had an intent to defraud (thus it is a crime of moral turpitude).<sup>40</sup> Variations in state statutes may have a tremendous effect over whether an alien's criminal conviction will trigger removal.

## 2. Aggravated Felony

Perhaps the most severe consequences of criminal activity are visited upon those aliens convicted of "aggravated felonies." Although this is not a new category, the 1996 IIRIRA and AEDPA greatly expanded the number of crimes included in this category, and removed most avenues of relief from deportation as a result of conviction. The current statute includes a number of offenses, including murder, trafficking in controlled substances, money laundering, certain crimes of violence, theft offenses with a term of imprisonment of one year, involvement in child pornography, involvement in prostitution, various types of fraud, tax evasion, document fraud, obstruction of justice, and failure to appear for service of sentence.<sup>41</sup>

Aggravated felonies need not be actual felonies, and the INA does not define the term "aggravated." The range of offenses that may fall into this category is extraordinarily broad, capturing minor theft offenses as well as murder. The recent amendments to the INA severely reduced the number of procedural protections and significantly increased the harshness of consequences to an alien with an aggravated felony conviction.<sup>42</sup> In deportation proceedings, an alien convicted of an aggravated felony is ineligible for most forms of relief,<sup>43</sup> including asylum.<sup>44</sup> Furthermore, the statute also authorizes a much

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40. See Susan L. Pilcher, *supra* note 19, at 312-13.

41. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. V 1999).

42. See generally Terry Coonan, *Dolphins Caught in Congressional Fish-nets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 593-605 (1998).

43. See generally Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317 (1997).

44. See INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (Supp. V 1999). This is particularly troubling, as an alien facing persecution in his home country may have few options. There are other forms of relief available to such an alien, such

more abbreviated form of removal proceeding for aggravated felons who are not lawful permanent residents,<sup>45</sup> denying them even the opportunity for a hearing before an Immigration Judge.<sup>46</sup> Aggravated felons who have been removed are permanently barred from reentering the United States.<sup>47</sup>

Perhaps one of the most significant effects of the 1996 amendments with respect to aggravated felonies is the retroactive application of the statute to any previous conviction for a crime that falls within the category.<sup>48</sup> This means that a lawful permanent resident who may have committed an offense twenty years ago, an offense that was not a deportable offense at the time, is now subject to removal.<sup>49</sup> In addition, aliens who received deferred adjudications, which traditionally worked to avoid deportation consequences of criminal convictions, now find that they are removable.

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as the Convention Against Torture, but asylum has traditionally been the main mechanism for protecting aliens from returning to their home countries to face possible persecution.

45. Lawful permanent residents (LPRs), or aliens with "green cards," are generally afforded more procedural and substantive protections in immigration matters; however, even LPRs have little recourse if convicted of an aggravated felony.

46. See INA § 238(b), 8 U.S.C. § 1228 (b) (Supp. V 1999).

47. See INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (Supp. V 1999).

48. The statute provides that the aggravated felony categories apply "regardless of whether the conviction was entered before, on, or after September 30, 1996." INA § 101(43)(U), 8 U.S.C. § 1101(43)(U) (Supp. V 1999). At the time of publication, new legislation had been introduced in Congress to at least partially repeal the retroactive effect of the 1996 laws. See *Limited Retroactivity Reform Continues to be Delayed in the Senate*, 19 IMMIGR. L. TODAY 619 (2000).

49. Retroactive application of a deportation ground has passed constitutional muster. The Supreme Court in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), found no *ex post facto* violation in applying a deportation ground retroactively to behavior that could not trigger deportation at the time it occurred. The defendant in that case had been a member of the Communist Party in the 1920s and 1930s, but had ceased his membership prior to the enactment of legislation that made such affiliation a ground for deportation. The Court determined that the *ex post facto* clause applies only to criminal proceedings, not to civil proceedings such as deportation. *Id.* The traditional view that deportation is not punishment, and thus does not fall under such constitutional constraints as the Double Jeopardy Clause, the Eighth Amendment's prohibition on cruel and unusual punishment, and the *ex post facto* clause has been strongly criticized. See generally Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 5 BENDER'S IMMIGR. BULL. 475 (2000) (reviewing recent Supreme Court jurisprudence on non-criminal sanctions that qualify as "punishment," thus meriting increased constitutional safeguards). See also Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

Again, how a crime is defined in a statute, which may differ from state to state, may be critical in determining whether it falls within the aggravated felony category. While some aggravated felonies are defined by reference to federal statute,<sup>50</sup> other offenses are defined generally<sup>51</sup> or by reference to the sentence imposed.<sup>52</sup> Offenses defined in terms of sentence imposed may also be subject to variations among individuals and across states. This is because under the 1996 amendments, a suspended sentence has the same effect as a sentence actually served in prison.<sup>53</sup> Thus, where discretion is possible, a state may choose to achieve its criminal justice goals by imposing a long suspended sentence, rather than a shorter sentence that is actually served or probation.<sup>54</sup> As a result, the same behavior could result in a conviction that counts as an aggravated felony in one state but not another. In criminal proceedings, what charges are filed and how the offense is defined can play a critical role in whether an alien will subsequently face removal and permanent exclusion from the United States.

### 3. Controlled Substance Offenses

Another category of crime with severe immigration consequences is drug offenses. An alien is deportable if she is convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana.<sup>55</sup> Under some circumstances, a single drug offense may be considered an aggravated felony, with all of the attendant consequences of such a conviction.<sup>56</sup> Even if it is not considered an aggravated felony, conviction of a drug of-

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50. See, e.g., INA § 101(a)(43)(D), 8 U.S.C. § 1101(a)(43)(D) (Supp. V 1999) (defining money laundering by reference to sections 1956 and 1957 of Title 18).

51. See, e.g., INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M) (Supp. V 1999) (including as an aggravated felony an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000").

52. See, e.g., INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (Supp. V 1999) (defining a theft offense with a sentence of one year as an aggravated felony).

53. See INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (Supp. V 1999).

54. See Morawetz, *supra* note 17, at 1942-43.

55. See INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. V 1999).

56. See *In re L-G-*, Int. Dec. 3254 (BIA 1995).

fense renders an alien ineligible for cancellation of removal,<sup>57</sup> adjustment of status,<sup>58</sup> and voluntary departure.<sup>59</sup>

Currently, virtually any offense relating to controlled substances can trigger removal. However, prior to *Roldan*, an alien who met certain criteria was able to avoid deportation under the FFOA<sup>60</sup> or under any state rehabilitative statute that provided for expungements, when the alien met the criteria for federal first offender status.<sup>61</sup>

### C. *Removal of Judicial Discretion and Review of Individual Circumstances*

Another important development of recent immigration legislation is the virtual elimination of discretion and a role for the judiciary in the removal process. Until 1990, a mechanism known as Judicial Recommendation Against Deportation (JRAD) allowed a sentencing judge in a criminal proceeding involving an alien to issue a binding order that the conviction could not be used as grounds to remove the alien.<sup>62</sup> This allowed a sentencing judge, with an understanding of the facts and equities of the individual case, to consider the interests of all involved and impose a sentence without worrying about the collateral immigration effects. Even before the 1996 amendments, deportation decisions by Immigration Judges involved both a finding of deportability and, for some aliens, a consideration of the equities, facts, and circumstances of the case in order to determine whether deportation was appropriate.<sup>63</sup>

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57. See INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (Supp. V 1999). This procedure allows certain lawful permanent residents who have been in the country for at least seven years to avoid removal. It also allows certain other aliens who have been in the country for ten years to avoid removal and adjust to permanent resident status.

58. See INA § 245; 8 U.S.C. § 1255 (Supp. V 1999). Adjustment of status is a procedure whereby an alien can attain lawful permanent resident status while in the United States and thus avoid removal under certain circumstances.

59. See INA § 240B; 8 U.S.C. § 1229c (Supp. V 1999). This is an important mechanism that allows an alien to leave the country without removal proceedings and the bar to reentry that accompanies a removal order.

60. 18 U.S.C. § 3607(a) (1994).

61. See *In re Manrique*, 21 I. & N. Dec. 58 (BIA 1995). This part of the *Roldan* decision was recently overruled by the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

62. See, e.g., *United States v. Koziel*, 954 F.2d 831 (2d Cir. 1991).

63. See *Morawetz*, *supra* note 17, at 1938-39.

Under current law, the sentencing judge has almost no role in the removal decision,<sup>64</sup> and removal is almost automatic for many aliens with certain criminal convictions. Furthermore, there is virtually no judicial review of a deportation order based on a criminal conviction.<sup>65</sup> Again, this is important, as an alien convicted of a crime many years ago may suddenly be deemed deportable due to the change in laws; under current law, there would be no review of the decision outside of the Department of Justice.<sup>66</sup> Given that the statute and procedures for deportation based on criminal activity are highly mechanical and formalistic, the complete lack of review means that there is little consideration of individual circumstances and other important factors in the removal process.

## II. DEFINITION OF CONVICTION IN THE IMMIGRATION CONTEXT

A record of “conviction,” as defined for immigration purposes, thus may in itself determine whether an alien meets the grounds for removal and whether relief will be available, including consideration of the individual circumstances of the case. Therefore, how a conviction is defined is very important. This Part reviews the evolution of the definition of “conviction” up to the 1996 INA amendments.

### A. Pre-1996 Definitions

Until 1996, the definition of “conviction” was created by case law. Central to definitions in all cases was the principle that federal law, not state law, defines conviction for immigration purposes.<sup>67</sup> Another early requirement was that a conviction had to be “final” in order to trigger deportation.<sup>68</sup> A conviction was considered final if no further proceedings were

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64. The JRAD was eliminated in the Immigration Act of 1990. See Pub. L. No. 100-649, 104 Stat. 4978.

65. See INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. V 1999).

66. For a review of constitutional concerns, see generally M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525 (1997).

67. See, e.g., *White v. INS*, 17 F.3d 475 (1st Cir. 1994).

68. See *Pino v. Landon*, 349 U.S. 901 (1955).

available on the issue of guilt or innocence of the original charge and no further appeals were available.<sup>69</sup> However, this definition was inadequate when ameliorative judicial procedures were involved, such as deferred adjudications or expungements. This was due to the great variety among the states in methods of mitigating the consequences of conviction. For example,

some state statutes provide for an initial adjudication of guilt upon a finding, admission, or noncontesting of guilt, but contain procedures variously termed as setting aside, annulling, vacating, cancellation or expungement of the original adjudication of guilt, which removes subsequent state consequences for the misconduct upon satisfactory completion of a probationary period . . . . Other states have implemented the same rehabilitative policy objectives by enacting statutes which simply defer or withhold adjudication of guilt, allowing for a final dismissal or discharge of proceedings upon satisfaction of the terms of probation.<sup>70</sup>

Out of a concern for more uniformity, the Board of Immigration Appeals in *Matter of Ozkok* developed a three-prong test to determine, in cases where judgment of guilt was withheld, whether an alien had been convicted for immigration purposes.<sup>71</sup> Under *Ozkok*, a conviction was effective for immigration purposes if the following elements were met:

- (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 restitu-

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69. See, e.g., *Martinez-Montoya v. INS* 904 F.2d 1018 (5th Cir. 1990). An early test to determine whether a conviction was final included the following elements:

there has been a judicial finding of guilt; the court takes action which removes the case from the category of those which are . . . pending for consideration by the court — the court orders the defendant fined, or incarcerated, or the court suspends the imposition of sentence; the action of the court is considered a conviction by the state for at least some purpose.

*In re L—R—*, 8 I. & N. Dec. 269 (BIA 1959).

70. *In re Roldan*, Int. Dec. 3377 (BIA 1999).

71. See *In re Ozkok*, 19 I. & N. Dec. 546 (BIA 1988).

tion, 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 non-essential 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 court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.<sup>72</sup>

In developing this definition, the BIA was concerned about eliminating variations among state procedures for ameliorating criminal convictions, while still keeping the element of finality.<sup>73</sup> *Ozkok's* definition was applied by federal circuit courts in several decisions involving a variety of sentencing approaches. These courts held the definition of conviction to include probation without judgment,<sup>74</sup> suspended sentence,<sup>75</sup> and withholding adjudication of guilt and sentence or probation.<sup>76</sup>

The *Ozkok* test simplified determinations of whether an expunged conviction or deferred prosecution under various state statutes were effective for immigration purposes. The third prong of the test, however, still left room for different outcomes in various states, depending on whether the imposition of a judgment of guilt would be automatic or would require another proceeding if the alien violated the conditions of his probation.<sup>77</sup>

One general exception to the *Ozkok* test and other definitions of "conviction" was drug offenses that fell under the purview of the FFOA,<sup>78</sup> which specifically provides that a disposition under the statute is not to be considered a conviction.<sup>79</sup> Under the FFOA, a person who has not previously been convicted of any controlled substance offense, and has not already been accorded first offender status, can be put on probation without a judgment of conviction.<sup>80</sup> Following successful com-

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72. *Id.*

73. *See id.*

74. *See Yanez-Popp v. INS*, 998 F.2d 231 (4th Cir. 1993).

75. *See Wilson v. INS*, 43 F.3d 211 (5th Cir.), *cert. denied*, 516 U.S. 811 (1995).

76. *See Chong v. INS*, 890 F.2d 284 (11th Cir. 1989).

77. *See, e.g., Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990).

78. 18 U.S.C. § 3607 (1994).

79. *See* 18 U.S.C. § 3607(b) (1994).

80. The full text of the provision is as follows:

pletion of probation, the court may then dismiss the proceedings without entering a judgment of conviction.<sup>81</sup> Such a disposition "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose."<sup>82</sup> In addition, if the person is under twenty-one years of age, all records of the disposition are expunged, including the record of arrest and institution of criminal proceedings.<sup>83</sup>

The adoption of the FFOA exception in immigration law developed through a series of BIA and federal court decisions. In the 1950s, it was established that expunged state drug convictions should still be a basis for deportation.<sup>84</sup> However, when the BIA considered the Federal Youth Corrections Act (FYCA), the predecessor to the FFOA, it held that the FYCA represented a policy concern for giving youthful offenders a second chance, and thus decided that such expunged convictions should not provide a basis for deportation.<sup>85</sup> Later, the BIA held that dispositions pursuant to the FFOA were also in-

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(a) Pre-judgment probation.—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection; the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

See 18 U.S.C. § 3607(a) (1994).

81. See *id.*

82. 18 U.S.C. § 3607(b) (1994).

83. See 18 U.S.C. § 3607(c) (1994).

84. See *In re A-F*—, 8 I. & N. Dec. 429, 445-46 (BIA 1956).

85. See *In re Zingis*, 14 I. & N. Dec. 621 (BIA 1974). The BIA was influenced by the First Circuit's decision in *Mestre Morera v. United States INS*, 462 F.2d 1030 (1st Cir. 1972), which noted that Congress's intent in enacting the Federal Youth Corrections Act was to afford juvenile offenders an opportunity to atone for their youthful indiscretions.

effective for immigration purposes,<sup>86</sup> as were convictions expunged or set aside under a state law that was determined to be equivalent to the FFOA.<sup>87</sup> This line of cases reached a high point with *Matter of Manrique*,<sup>88</sup> where the BIA extended the exception to any state prosecution where the offender would have been eligible for FFOA treatment.<sup>89</sup> Under *Manrique*, a state conviction for a drug offense was ineffective for immigration purposes under the following circumstances:

- (1) The alien [was] a first offender, i.e., he [had] not previously been convicted of violating any federal or state law relating to controlled substances.
- (2) The alien [had] pled to or been found guilty of the offense of simple possession of a controlled substance.
- (3) The alien [had] not previously been accorded first offender treatment under any law.
- (4) The court [had] entered an order pursuant to a state rehabilitative state statute under which the alien's criminal proceedings [had] been deferred pending successful completion of probation or the proceedings [had] been or [would] be dismissed after probation.<sup>90</sup>

*Manrique* provided a federal standard for dealing with a narrow category of criminal offenses, and allowed for leniency in immigration proceedings.

### B. Adoption of Statutory Definition of Conviction

In 1996, Congress adopted a statutory definition of conviction that eliminated the third prong of the *Ozkok* test.<sup>91</sup> The INA now provides that conviction means either a formal adju-

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86. See *In re Werk*, 16 I. & N. 234 (BIA 1977). The BIA concluded that the FFOA "is for first offenders the equivalent of the Federal Youth Corrections Act." *Id.* at 235.

87. See, e.g., *In re Deris*, 20 I. & N. Dec. 5 (BIA 1989).

88. See *In re Manrique*, 21 I. & N. Dec. 58 (BIA 1995). The decision in *Manrique* was influenced by the Ninth Circuit's decision in *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994), in which the court determined that it was irrational, thus an equal protection violation, to base a deportation order on a conviction that was expunged pursuant to a broad state rehabilitative statute, but not on a state statute that was an exact counterpart to the FFOA, where the offender met the requirements of the FFOA in both cases.

89. See *id.*

90. *Id.* at 64.

91. See INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (Supp. V 1999).

dication of guilt of the alien entered by a court, or if adjudication has been withheld, where:

- (1) 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
- (2) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.<sup>92</sup>

Interpreting this statutory change in *Matter of Punu*, the BIA decided that this change, along with express language of congressional intent, meant that deferred adjudications were now to be considered convictions for immigration purposes, regardless of their finality.<sup>93</sup> The BIA referred to congressional materials stating that the new statutory definition "broadens the definition of conviction for immigration law purposes to include all aliens who have admitted to or been found to have committed crimes. This will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudications."<sup>94</sup>

### III. *MATTER OF ROLDAN*: FURTHER EXPANSION OF THE DEFINITION OF CONVICTION

The BIA addressed the issue of expunged convictions in *Matter of Roldan*.<sup>95</sup> Mauro Roldan Santoyo was a citizen of Mexico, who had pled guilty in 1993 to possession of more than three ounces of marijuana, a felony violation of the Idaho Code.<sup>96</sup> In 1994, the state trial court in the case withheld adjudication of the judgment, sentenced him to three years of probation and imposed fines.<sup>97</sup> His probation included restrictions on his use of alcohol and restrictions on the people with whom he could associate, as well as ninety days confinement at the discretion of his probation officer.<sup>98</sup> As a result of this action, he was placed in deportation proceedings.<sup>99</sup> In response to a

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92. *Id.*

93. *See In re Punu*, Int. Dec. 3364 (BIA 1998).

94. *See id.* (quoting H.R. REP. NO. 104-879 (1997)).

95. *See Int. Dec. 3377* (BIA 1999).

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

motion in Idaho state court in March 1995, Roldan was granted early release from probation and dismissal of the charge in accordance with the withheld judgment.<sup>100</sup> The guilty plea was vacated pursuant to section 19-2604(1) of the Idaho Code.<sup>101</sup> Roldan then argued to the Immigration Court that since his conviction had been removed by the state court, he was no longer deportable.<sup>102</sup> In an April 1995 decision, the Immigration Judge disagreed, finding the conviction met the three prongs of the *Ozkok* test, thus making it a conviction for immigration purposes.<sup>103</sup> Roldan appealed to the Board of Immigration Appeals.<sup>104</sup> By the time the case reached the BIA, the statutory definition of conviction had been enacted.

After reviewing the history of the definition of conviction, the majority opinion looked to the policy concerns underlying the statutory change to the definition of conviction, specifically, the concern for uniformity.<sup>105</sup> The majority determined that by excising the third prong of the *Ozkok* definition, Congress made clear its intent to have a definition that did not require reference to state statutes to determine at what point final judgment of guilt is imposed—i.e., before or after a probationary period.<sup>106</sup> The opinion went on to cite the “Joint Explanatory Statement,” which states that the new definition “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 the purposes of the immigration laws.”<sup>107</sup> The BIA decided that Roldan was convicted under the statutory definition of “conviction.”<sup>108</sup> The opinion then looked to how the statutory change should affect expunged convictions generally, and the broad policy-based approach carved out for first offenders in *Matter of Manrique*.<sup>109</sup>

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100. See Int. Dec. 3377 (BIA 1999).

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. See Int. Dec. 3377 (BIA 1999).

106. See *id.* The BIA stated that the new definition “eliminat[es] the need to refer to the vagaries of the states’ ameliorative statutes in order to determine if an alien has been convicted.” *Id.*

107. See *id.* (quoting H.R. Conf. Rep. No. 104-828 at 224 (1996)).

108. See *id.*

109. *In re Manrique* 21 I. & N. Dec. 58 (BIA 1995).

### A. *State Rehabilitative Statutes Generally*

The BIA determined that congressional intent, as demonstrated by the language of the statute and the Joint Explanatory Statement, was for an alien to be considered convicted for immigration purposes upon the original finding or confession of guilt, combined with the imposition of some punishment.<sup>110</sup> The BIA further noted that Congress "clearly does not intend that there be different immigration consequences accorded to criminals fortunate enough to violate the law in a state where rehabilitation is achieved through the expungement of records . . . rather than in a state where the procedure achieves the same objective simply through deferral of judgment."<sup>111</sup> The new approach, the BIA continued, would give effect to Congress's desire to implement a uniform federal approach by removing the need to look at the rehabilitative statutes of the various states.<sup>112</sup> As further support for this position, the opinion cited the case of *Garberding v. INS*,<sup>113</sup> in which the Ninth Circuit reasoned that the focus should be on the alien's misconduct, rather than the breadth of a state's rehabilitative statute.<sup>114</sup> The majority additionally noted that when Congress intended state law to control in defining when a conviction exists for federal purposes, it has expressly said so.<sup>115</sup> The BIA thus determined that no effect should be given to any state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of

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110. See *Matter of Roldan*, Int. Dec. 3377 (BIA 1999).

111. *Id.*

112. See *id.*

113. 30 F.3d 1187 (9th Cir. 1994). The court in *Garberding* held that as an equal protection matter, an alien who met the requirements of the FFOA should be allowed to fall under its protection, regardless of whether the state rehabilitative statute was an exact counterpart to the FFOA.

114. See *id.* The court noted "[h]ad [the defendant] Garberding possessed her marijuana in Michigan, Virginia or Wisconsin, she would not have been subject to deportation. . . . [D]istinguishing Garberding for deportation because of the breadth of Montana's expungement statute, not because of what she did, has no logical relation to the fair administration of the immigration laws or the so-called 'war on drugs.'" *Id.* at 1191.

115. See *Matter of Roldan*, Int. Dec. 3377 (BIA 1999).

guilt or conviction by operation of a state rehabilitative statute.<sup>116</sup>

### *B. Federal First Offender Act Exception*

The BIA then looked at how these issues affected the decision in *Matter of Manrique*,<sup>117</sup> which extended the FFOA<sup>118</sup> treatment to aliens prosecuted under state law.<sup>119</sup> The BIA noted that this exception evolved from case law in the absence of any explicit direction from Congress.<sup>120</sup> The BIA reasoned that since the fourth prong of *Manrique* required that the alien be afforded a deferred proceeding under state law, and the statutory definition precluded such deferrals, *Manrique* was no longer effective.<sup>121</sup> The majority noted that Congress did not provide any exceptions for aliens accorded rehabilitative treatment under state law and that the INA reflects “the prevailing congressional policy of strict treatment toward criminal aliens in deportation proceedings.”<sup>122</sup> Therefore, no state rehabilitative actions, including those for first-time drug offenders, should be given effect.<sup>123</sup> The BIA did not directly address whether a disposition pursuant to the FFOA itself would still be given effect.

### *C. The Dissents*

There were two strongly worded dissents to the BIA’s decision. Board Member Gustavo D. Villagelui agreed that Roldan was convicted under the statutory definition, but disagreed that all convictions that were vacated or expunged would fall under the scope of the new definition. This dissent focused mainly on the express legislative history of the statutory definition. Villagelui argued that the history “does not evince any congressional intent to alter the way this BIA has treated va-

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116. *See id.* It is important to note that the decision does not address the situation where the conviction or judgment of guilt has been vacated pursuant to an appeal or other procedure on the merits. *See id.*

117. *See In re Manrique* 21 I. & N. Dec. 58 (BIA 1995).

118. 18 U.S.C. § 3607(a) (1994).

119. *See* discussion *supra* Part II.A.

120. *See In re Roldan*, Int. Dec. 3377 (BIA 1999).

121. *See id.*

122. *Id.*

123. *See id.*

cated convictions or nonnarcotics convictions that have been expunged pursuant to [state rehabilitative action],” and thus the BIA’s interpretation was far broader than the intent of Congress.<sup>124</sup> Villagelui argued that the intent of Congress in removing the third prong of *Ozkok* was merely to address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon an alien’s future good behavior, a situation that might escape the reach of *Ozkok*.<sup>125</sup> Furthermore, the dissent argued that by reading the statutory language so broadly, the BIA violated a long-established principle of statutory construction that provides that ambiguities in immigration laws should be interpreted in the light most favorable to the alien because of the drastic consequences of a deportation order.<sup>126</sup> Finally, Villagelui noted that this decision reversed a long history of giving effect to expunged and vacated convictions.<sup>127</sup>

The second dissent, by Board Member Lory Diana Rosenberg, focused additionally on the effect of superseding *Manrique*, which allowed aliens eligible for Federal First Offender Act status to avoid immigration consequences, even if prosecuted under state law. Rosenberg argued that Roldan would not have been considered convicted for immigration purposes if he had been prosecuted under the FFOA, as it was a congressionally mandated exception to convictions generally.<sup>128</sup> She further argued that rehabilitative statutes should not be treated generically, and state actions similar to the FFOA should be given effect since Congress expressed its intent not to characterize such a first offense as a conviction for any purpose.<sup>129</sup> In addition, by applying a federal standard to a state proceeding, the FFOA provides the kind of uniformity sought by Congress and immigration officials.<sup>130</sup> Rosenberg noted that repeal by implication is disfavored, and that these two statutes are consistent with each other—i.e., it would not be inconsistent with the INA provisions to continue to give effect to state

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124. *In re Roldan*, Int. Dec. 3377 (BIA 1999) (Villagelui, dissenting).

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See In re Roldan*, Interim Decision 3377 (BIA 1999) (Rosenberg, dissenting).

130. *See id.*

rehabilitative actions for youthful and first time offenders in a limited immigration context.<sup>131</sup> Rosenberg's dissent also argued that the erasure of a disposition under the FFOA was not even technically an "expungement of conviction" and thus the decision in *Manrique* should not be affected by the *Roldan* disposition.<sup>132</sup>

#### D. Partial Overrule by the Ninth Circuit Court of Appeals

The Ninth Circuit in *Lujan-Armendariz v. INS*<sup>133</sup> recently reversed the *Roldan* decision as it relates to first time drug offenses expunged under state law, where offenders meet the requirements of the FFOA. The court did not overrule the BIA in its decision concerning other types of state expungements or vacations of conviction, but did express doubts over whether Congress truly intended to change the general rule that a conviction subsequently vacated or set aside pursuant to state rehabilitative actions should not serve as the basis for deportation.<sup>134</sup>

The court noted that the BIA's treatment of expunged convictions generally and the *Matter of Manrique* FFOA exception developed from two different lines of case law and policy decisions. The FFOA, the court noted, "constitutes a broad Congressional effort to afford protection to first time drug possessors against the harsh consequences that follow from a drug conviction."<sup>135</sup> In order for the BIA's ruling in *Roldan* to be correct, the 1996 statutory definition of conviction would have to be construed as a repeal of the FFOA. The court determined that the FFOA was not repealed,<sup>136</sup> but rather remained as a narrow exception to "conviction" as defined in the INA.<sup>137</sup> Thus, since the FFOA was not repealed, an expungement of conviction pursuant to a state rehabilitative statute, where the

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131. *See id.*

132. *See id.*

133. 222 F.3d 728 (9th Cir. 2000).

134. *See id.* at 745.

135. *Id.* at 743.

136. *See id.* The court found no explicit repeal, and also determined that there was no implied repeal due to irreconcilable conflict. The court stated that "[i]rreconcilable conflict will not be found merely because two statutes compel different results in a particular case." *Id.* at 744.

137. *See id.* at 744.

offender met the requirements of the FFOA, was also ineffective as a basis for deportation.<sup>138</sup>

#### IV. THE *ROLDAN* DECISION IN LIGHT OF STATE PARTICIPATION IN IMMIGRATION MATTERS

In addition to the issues mentioned by the dissents in *Roldan*—statutory construction, reversal of established case law, and an unnecessary expansion given the lack of statutory conflict—as well as the doubts expressed by the Ninth Circuit in *Lujan-Armendariz*, there are a number of policy arguments for allowing state expungements and other post conviction remedies to avoid the effects of convictions for immigration purposes. States are playing an increasing role in immigration matters, an area that has traditionally been exclusively the domain of the federal government.<sup>139</sup> This growing role provides a rationale for giving effect to state judiciary decisions in serious immigration matters such as removal.

First, since states may carry a large cost of law enforcement for immigrant criminal activity, including the costs of prosecuting and incarcerating criminal aliens, it is reasonable that the states should have the ability to fashion remedies that would increase efficiency in law enforcement proceedings. In addition, Congress has given the states and state judicial systems a greater role in enforcing immigration law, including removal, as well as authority in other immigration related matters such as the distribution of public benefits;<sup>140</sup> the logical corollary is that state interests, such as avoiding costs of supporting an alien's family after a wage earner is removed, or keeping immigrant labor in the state, should also play a role in that process.<sup>141</sup> While one of the goals of the INA and the

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138. See *id.* at 749. This conclusion was based on the court's own previous decisions in *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994), and *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994). These cases together stand for the proposition that it is irrational and a violation of an alien's equal protection rights to give effect to federal expungement law but not identical state counterparts. See *id.* at 738.

139. See, e.g., Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994).

140. See *id.*

141. There is an argument that it would violate the Supremacy Clause if the state action was considered a direct regulation of immigration. See Annette M. Toews, *Citizenship Considerations in Minnesota Criminal Justice and the Su-*

*Roldan* decision is to provide more uniformity in the application of immigration law, the nature of the mixed system as it exists makes this difficult. Given that federal exclusivity is diminishing and complete uniformity may be difficult to achieve, it would be appropriate to allow a role for state action in immigration matters by giving effect to expungements and other rehabilitative measures. Finally, the recent reforms to the INA have eliminated almost all forms of discretion and review of individual circumstances in the removal process. Expungements and other rehabilitative actions would allow a sentencing judge with familiarity with the facts of the case to create a sentence that gives effect to state interests and individual circumstances. This very limited discretionary role would allow for greater consideration of individual equities in certain cases and renew a role of the judiciary in immigration matters.

A. *Traditional Exclusivity of the Federal Government in Immigration Matters and Immigration Federalism*

Immigration has traditionally been the exclusive domain of the federal government. The Supreme Court has long recognized Congress's plenary power to control borders and related immigration matters.<sup>142</sup> Although recent scholarship recognizes that throughout the early part of this country's history states did play a much larger role in immigration matters,<sup>143</sup> the states have largely been precluded from making or enforcing immigration policy.<sup>144</sup>

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*premac y of Federal Immigration Law*, 25 WM. MITCHELL L. REV. 1245 (1999). However, if indeed Congress did not intend to change the long-standing rule that convictions expunged pursuant to state rehabilitative actions should not serve as a basis for removal, such an exception would not be considered a frustration of congressional intent with respect to immigration policy in general.

142. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

143. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

144. See generally Toews, *supra* note 141. Toews discusses the importance of two constitutional concerns in particular when states participate in immigration matters. See *id.* One is the Supremacy Clause; as the power to regulate immigration is vested in the federal government, state action that frustrates Congress's purpose is preempted. See *id.* at 1258. The other is the Equal Protection Clause, which may be implicated when states make distinctions based upon citizenship. See *id.* at 1261.

One of the main doctrinal supports for this arrangement is the exclusive power of Congress in foreign relations and national security. Controlling borders was considered a national security issue, and thus the domain of the federal government.<sup>145</sup> Further justification for federal exclusivity came from the idea that if a single state enacted immigration legislation that angered the government of another country, the United States as a nation would suffer harm if that country chose to retaliate.<sup>146</sup> Later cases have confirmed the notion that consistency in dealing with foreign powers is necessary, and the appropriate body for setting out consistent immigration policy is the Congress of the United States.<sup>147</sup> Outside of the foreign relations context, the Supreme Court has also reaffirmed federal exclusivity under traditional preemption notions, particularly with respect to state laws that have the effect of discriminating on the basis of alienage.<sup>148</sup>

Recent scholarship challenges the idea that federal exclusivity should continue in its traditional form.<sup>149</sup> One line of argument is based on changes in the world that undermine some of the assumptions upon which federal exclusivity rests. For example, in the modern global economy, states inevitably play a larger role in dealing with foreign nations.<sup>150</sup> Additionally, this approach presumes that foreign governments recognize that the policies of one state do not necessarily represent the United States as a whole and thus responses will only be directed at that state.<sup>151</sup>

At the same time that the rationale for federal exclusivity is eroding, the reality of such exclusivity is changing as well. As discussed in Parts B and C, *infra*, states are already playing a role in immigration matters, through their criminal justice systems and their role in defining crimes that will trigger removal, as well as direct and indirect enforcement of immigra-

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145. See *Chae Chan Ping*, 130 U.S. at 581.

146. See *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

147. See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

148. See *Truax v. Raich*, 239 U.S. 33 (1915); *Graham v. Richardson*, 403 U.S. 365 (1971).

149. See, e.g., Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Spiro, *supra* note 139.

150. See Spiro, *supra* note 139.

151. See *id.*

tion law. Within this context, then, it is appropriate to consider the possibility of giving greater effect to state actions that may indirectly affect immigration matters such as removal decisions.

*B. Costs to State Law Enforcement and the Judiciary*

1. Coordination Difficulties Between Law Enforcement and the INS

Calculating the exact costs of criminal activity by aliens is extremely difficult, as there are few reliable statistics even as to the numbers of crimes committed by aliens. It is estimated that the number of aliens who are eligible for removal because of criminal activity has increased tenfold since 1980.<sup>152</sup> Traditionally, the sole power to deport has been granted to the Immigration and Naturalization Service, through removal proceedings that are entirely separate from criminal adjudication. The INS may apprehend and institute proceedings against an alien after release from incarceration in a state or federal facility. Thus, the entire financial burden of apprehending, prosecuting, and incarcerating criminal aliens falls on traditional state and federal law enforcement and judicial institutions, at a cost estimated as high as \$6.5 billion annually.<sup>153</sup>

The result of the traditional arrangement between law enforcement agencies and immigration officials has been a great deal of inefficiency and tremendous human cost. Effective removal of criminal aliens depends on coordination between the agencies responsible for determining the criminal status of aliens, and the INS, who has exclusive control over the process of removal. However, local law enforcement and judicial systems may have very different priorities than the INS,<sup>154</sup> and neither

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152. See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 374 (1999).

153. See *id.* at 383.

154. See *id.* at 374. An attempt in California that would give the Los Angeles police the power to question persons solely to determine immigration status met with great resistance from police. See Hugo Martin, *Suit Challenges Police Policy on Reporting Illegal Immigrants*, L.A. TIMES, May 11, 1996, at 4, available at 1996 WL 5268173. Officers who were interviewed stated that their workload was already large enough and they would prefer to leave immigration enforcement to the INS; they also cited concerns that such a practice would decrease

may have sufficient resources to effectively identify, apprehend, and detain criminal aliens until removal proceedings are concluded. There is no centralized source of information available to local law enforcement that could be used to identify arrestees who may already be removable for previous immigration violations.<sup>155</sup> Nor is there an effective system of coordinating and tracking aliens through their prosecution and sentencing, especially if the sentence does not include incarceration.<sup>156</sup> State law enforcement and judicial officials may not know the intricacies of immigration law, thus making the job of assisting the INS in finding and apprehending deportable criminal aliens all the more difficult.<sup>157</sup>

## 2. Disproportionate Effect on State Resources

The numbers of aliens in the United States are not evenly distributed; rather, a few states have disproportionately high numbers of legal and undocumented immigrants.<sup>158</sup> As a result, costs of criminal activity are also concentrated in a few states.<sup>159</sup> In the early 1990s, Florida<sup>160</sup> and later other states<sup>161</sup> filed suit against the federal government to recover the costs dealing with illegal immigration, including education, health care, and incarceration of criminal aliens who should never have been able to enter the country.<sup>162</sup>

Although the lawsuits were unsuccessful, the increased awareness and political attention to the problems of illegal immigration and criminal aliens prompted Congress to take action.<sup>163</sup> Rather than focusing on improving the effectiveness of the INS, the changes to the law in the 1990s, culminating in the 1996 IIRIRA, took the cheaper and harsher route of ex-

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trust in the community and could lead to an increase in unreported crime and non-cooperation among aliens. *See id.*

155. *See* Schuck & Williams, *supra* note 152, at 403.

156. *See id.* at 406.

157. *See id.* at 397.

158. *See* Spiro, *supra* note 139, at 124. The states with the highest concentrations of undocumented aliens are California, Arizona, Florida, Texas, and New York. *See id.*

159. *See* Schuck & Williams, *supra* note 152, at 423.

160. *See* Chiles v. United States, 874 F. Supp. 1334 (S.D. Fla. 1994).

161. California, Texas, Arizona, and New Jersey also filed lawsuits. *See generally* Schuck & Williams, *supra* note 152, at 448.

162. *See id.*

163. *See id.*

panding classifications of crimes that would trigger removal while eliminating procedural protections.<sup>164</sup> As a result, the provisions of the current INA allow little consideration of years of good behavior and productive investment in the country, and often no consideration of facts of specific cases, as with automatic removal for aggravated felonies.<sup>165</sup>

The changes wrought by the reforms to the INA, however, still leave the costs of arresting, prosecuting, and incarcerating criminal aliens largely to the states. Furthermore, the changes may add more burdens to the states, both financial and non-financial. For example, if a conviction for a particular crime will trigger removal, an alien may have a great incentive to make use of all procedural safeguards in the criminal justice system, including pushing matters all the way to trial in order to gamble on the possibility of an acquittal. This will continue to add to the cost of adjudicating guilt in the criminal justice system, as the possibilities for relieving the consequences of conviction have largely been eliminated in removal proceedings.

In addition, the removal of an alien may be highly disruptive to families and communities in the state. Many long term residents have citizen-children born in the United States, or family members who are naturalized citizens. Removal may leave a family without a provider or source of support. Because of citizenship laws of other countries, the family may not be able to join the person who has been removed. Alternatively, an entire family may have to leave the United States, leaving

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164. *See id.* at 457.

165. For numerous examples of aliens caught by the retroactive application of the aggravated felony provisions, see Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589 (1998). Coonan describes, for example, the case of Gabriela Dee, a Canadian who holds a Ph.D. and has contributed hundreds of hours as a volunteer. Dee received a misdemeanor conviction in 1985 for attempting to help her Israeli boyfriend sneak into the country. That conviction now falls under the aggravated felony definition, and Dee was found deportable. *See id.* at 591. Coonan also recounts the case of a twenty-six year old refugee from Vietnam who works two part-time jobs while finishing a college degree. While he was in high school, he was involved in a fight and was given a two year suspended sentence. This conviction now makes him deportable as an aggravated felon. *See id.*

jobs, community, and a role in the economy and civil life.<sup>166</sup> This imposes other costs on the state.

If an expunged criminal conviction could effectively avoid immigration consequences, as was the case prior to the *Roldan* decision, the state judiciary would have a flexible tool to help increase efficiency in the system and make decisions in specific cases with a consideration of state interests and individual circumstances. Expungements often rely on post-conviction good behavior or provide other mechanisms to ensure that offenders who show potential for rehabilitation can avoid serious consequences for past mistakes. Keeping the traditional role of expungements would allow increased efficiency by offering incentives to criminal aliens to abbreviate judicial proceedings, while still allowing for the removal of aliens who cannot stay on a rehabilitative program.

### C. *State Participation and Uniformity in Immigration Matters*

In addition to the fact that states are bearing a disproportionate cost of dealing with failure of immigration enforcement and criminal alien activity, one of the main rationales for federal exclusivity, uniformity of approach in immigration matters, is already being undermined. In part, this is due to the way that the INA defines criminal activity that will trigger removal—i.e., by reference to state statute or sentence. This is also due to Congress's recent delegations of authority to the states in immigration-related matters, including direct enforcement of immigration law.<sup>167</sup> It would be consistent with the trend of allowing states to enforce immigration law to also give effect to state law that happens to mitigate immigration consequences, even if that results in a lack of uniformity among states in dealing with criminal aliens. There is even an argument that this could be beneficial. Allowing expungements to be effective in avoiding immigration consequences would give states the opportunity to fashion remedies that could serve a

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166. See Morawetz, *supra* note 17, at 1950–51 (discussing the impact of the 1996 laws on families and noting the contradiction between these laws and historical emphasis on family unity reflected in U.S. immigration law).

167. See generally Spiro, *supra* note 139.

number of interests, including state economic and criminal justice goals, such as rehabilitation.

First, states already play a role in immigration matters relating to criminal aliens, in that state law may define the offense that triggers deportation. Although one of the main goals of the *Roldan* decision is ensuring uniformity in the approach to convictions, variations in state law still determine whether an alien's criminal conviction will result in deportation. As discussed in Part I, many of the criminal classifications that trigger deportation are described by reference to state statute or criminal sentence, thus a conviction on the same facts in different states may or may not result in deportation.

Additionally, in the 1996 amendments to the INA, Congress provided for direct involvement by state and local authorities in arresting and removing aliens eligible for removal. This could include removal for criminal activity, or for other grounds such as illegal entry or status. Specifically, Congress gave judges in federal criminal cases the power to issue deportation orders concurrently with, and sometimes as part of, a sentence for criminal activity, through a mechanism called "judicial removal."<sup>168</sup> There has been some question as to whether this power will actually be exercised, given heavy caseloads at the federal district court level.<sup>169</sup> Another provision in this section allows parties to a federal criminal proceeding to stipulate to the entry of a judicial order of deportation.<sup>170</sup> There is a possibility that Congress intended to create a similar procedure in state proceedings as well.<sup>171</sup> This is evidenced by a provision in the INA referring to "any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law."<sup>172</sup> Should states choose to exercise this power, there is a possibility that some states would use it more vigorously than others, again resulting in a lack of uniformity.

Furthermore, the 1996 Act included several provisions that empower local law enforcement to aid in the enforcement of

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168. See INA § 238(c), 8 U.S.C. § 1228(c) (Supp. V 1999).

169. See Daniel M. Kowalski, *Sentencing Options for the Deportable Non-Citizen*, 8 FED. SEN. REP. 286, 287 & n.10 (1996).

170. See INA § 238(c)(5), 8 U.S.C. § 1228 (c)(5) (Supp. V 1999).

171. See Pilcher, *supra* note 19, at 274.

172. INA § 276(b)(4), 8 U.S.C. § 1326 (Supp. V 1999).

immigration law.<sup>173</sup> Traditionally, if a law enforcement officer believes that a suspect is an undocumented alien, the officer calls an INS or Border Patrol agent, who then questions the individual and makes a determination.<sup>174</sup> If the federal agent determines that the alien is in illegal status, local law enforcement will detain or transport the alien for the INS, who will then initiate removal proceedings.

The INA now allows for greater participation by local law enforcement in immigration enforcement. One provision allows local law enforcement officers to become INS agents, provided that there is an agreement between the state and the Attorney General.<sup>175</sup> The law enforcement officer would be subject to the direction and supervision of the Attorney General<sup>176</sup> and be required to undergo some training, including basic immigration law.<sup>177</sup> Another provision provides that in the event of a massive influx of aliens, the Attorney General may authorize any state or local law enforcement officers to act as immigration officers.<sup>178</sup> Again, it is unclear whether local law enforcement will choose to take on the tasks of immigration enforcement in addition to their regular duties;<sup>179</sup> nonetheless, Congress is clearly signaling its intent to allow greater state participation in such matters.

This delegation of authority to local and state judicial and law enforcement agencies means that there already exists the possibility that states can, at their discretion, pursue a policy of stricter enforcement of immigration law. It is logical, then, to also encourage other mechanisms, such as rehabilitative actions like expungements, to allow states to exercise discretion to give effect to other goals. At least one commentator argues that this variation among states could be advantageous.<sup>180</sup>

Professor Peter Spiro has proposed a model of immigration federalism that incorporates two major ideas with respect to such variation among states. One is the idea of "steam valve"

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173. See generally D.L. Hawley, *The Powers of Local Enforcement to Enforce Immigration Laws*, IMMIGR. BRIEFINGS, June 1999.

174. See *id.* at 3.

175. See INA § 287(g), 8 U.S.C. § 1357(g) (Supp. V 1999).

176. See INA § 287(g)(3), 8 U.S.C. § 1357(g)(3) (Supp. V 1999).

177. See Hawley, *supra* note 173, at 5.

178. See INA § 103(a), 8 U.S.C. § 1103(a) (Supp. V 1999).

179. See Martin, *supra* note 154.

180. See Spiro, *supra* note 139.

federalism.<sup>181</sup> Spiro argues that if a state harboring extreme anti-alien sentiments is allowed to enact restrictive immigration measures at the state level—such as California’s Proposition 187—it will keep that state from pushing its agenda at the national level.<sup>182</sup> The corollary to this is what Spiro calls “competitive federalism.”<sup>183</sup> Spiro notes that other states may have an interest in attracting immigrants for political or economic reasons.<sup>184</sup> Thus, these states may want to create policies in areas such as public benefits<sup>185</sup> that are more favorable to immigrants.

These ideas are consistent with allowing mechanisms within the state criminal justice system, such as expungements, to play a role in immigration matters. States that want to focus on rehabilitation would be able to give effect to that desire. Furthermore, such mechanisms would fit into larger policy objectives at the state level, such as attracting more immigrant labor for local industry.

## CONCLUSION

The *Roldan* decision removes a useful tool for ameliorating the consequences of criminal convictions for aliens, especially those with long residences and extensive ties to the country. By overturning a long line of cases that permit expunged convictions to be ineffective for immigration purposes, the decision in *Roldan* goes beyond what is called for in the statutory definition of conviction. In particular, by discarding the policy exception to state proceedings for first time offenders eligible for relief under the Federal First Offender Statute, the BIA made clear its intent to give no effect to any state rehabilitative actions intended to mitigate the consequences of criminal activity.

This approach is flawed and unnecessarily extreme in its breadth. The failures of immigration enforcement and the as-

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181. *See id.* at 1628.

182. *See id.* at 1635.

183. *See id.* at 1639.

184. *See id.* at 1640.

185. *See id.* at 1627. For example, Congress in the Personal Responsibility Act delegated responsibility for federal welfare to the states; it also gave states the discretion to make independent determination on the eligibility of legal resident aliens. *See id.* at 1637.

sociated costs are not due to overuse of rehabilitative mechanisms, such as expungements. Congress's goal of removing dangerous criminal aliens from the United States can still be achieved without making virtually any criminal conviction a basis for removal. Allowing state rehabilitative mechanisms to be effective for mitigating immigration consequences recognizes the legitimate interest states may have in making their criminal justice systems efficient and effective. In addition, giving effect to such actions, while perpetuating variation among states, also allows states to pursue policies that are in the interest of their citizens and aliens alike. Finally, giving states and state judiciaries an opportunity to make individualized determinations of whether criminal activity should invariably result in removal will allow for fuller and more considered removal decisions, and will provide a check on the blanket policy approach of the current law.