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Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation

Nancy Hollander

DEFENDING THE CRIMINAL ALIEN IN NEW MEXICO: TACTICS AND STRATEGY TO AVOID DEPORTATION

NANCY HOLLANDER*

> [W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean mean what they say.[1]

The United States Immigration and Nationality Act defines an alien as "any person not a citizen or national of the United States."[2] This definition of an alien includes those people who have never become citizens and those who have lost their citizenship through expatriation[3] or denaturalization.[4]

According to the latest Immigration and Naturalization Service (INS) Annual Report, there are approximately 18,000 legal aliens living in New Mexico.[5] The number of illegal aliens is probably considerably greater. It can be assumed that some of these people will find themselves facing criminal charges in New Mexico. The purpose of this paper is to acquaint the criminal defense attorney with sufficient immigration law to defend an alien. The stakes are often high. The alien criminal defendant faces the possibility of jail, as well as deportation if convicted of certain crimes. For someone who has family in this country, or who has lived in the United States since childhood, this could have devastating consequences. It is not unheard of for an alien who has lived forty-nine of his fifty years in the United States to suddenly find himself about to be deported to a country where he has no friends, no relatives and does not even speak the language.[6] There is no statute of limitations on deportation; it can come many years after the alien first becomes deportable. Although it is possible to legally return to the United States after

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*Member, New Mexico Bar. B.A., University of Michigan, 1965; J.D., University of New Mexico School of Law, 1978.

1. Yuen Sang Low v. Attorney Gen. of the United States, 479 F.2d 821 (9th Cir.), *cert denied*, 414 U.S. 1039 (1973).

2. 8 U.S.C. § 1101(a)(3) (1976).

3. 8 U.S.C. § 1481 (1976); United States *ex rel.* Wrona v. Karnuth, 14 F. Supp. 770 (D.N.Y. 1936).

4. 8 U.S.C. § 1451 (1976); Costello v. Immigration & Nat. Serv., 376 U.S. 120 (1964).

5. 1976 Imm. & Nat. Serv. Ann. Rep. 143.

6. In United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926), the defendant, who had spent most of his life in the United States, was twice convicted of burglary, served prison sentences for both crimes and was then ordered deported to Poland where he knew no one and could not speak the language.

being deported, it requires a specific waiver of excludability from the Attorney General.[7]

This paper will discuss the strategy to be followed in situations where an alien might become deportable as a result of specific criminal activity and what steps can be taken to avoid deportation. The problem usually arises in connection with legal aliens who would not otherwise be deportable; however, this paper will also discuss the problems concerning illegal aliens charged with crimes not necessarily related to immigration laws. It should be noted that many of these same situations will result in exclusion from the United States or in denial of naturalization, but those topics are beyond the scope of this paper.[8]

The Immigration and Nationality Act lists eighteen grounds upon which an alien can be deported.[9] These are called CINSS (pronounced "sins") by INS. The initials stand for criminals, immorals, narcotics users and abusers, subversives and smugglers.[10] This paper shall discuss only those grounds for deportation which involve proof of criminal activity or convictions. These grounds for deportation can be divided into three categories: 1) crimes involving moral turpitude;[11] 2) crimes involving narcotics;[12] and 3) several miscellaneous crimes including prostitution,[13] the smuggling of aliens into the United States,[14] and certain weapons violations.[15] These are the grounds most commonly encountered in New Mexico and the ones which defense attorneys need to understand if they are to avoid the deportation of their clients. The tactics and remedies differ with each category; therefore, each will be discussed separately.

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7. 8 U.S.C. § 1182(a)(16) (1976).

8. The grounds for exclusion are listed in 8 U.S.C. § 1182(a) (1976). The requirements for naturalization are in 8 U.S.C. § 1427(a) (1976). Two particularly noteworthy provisions precluding naturalization are defined in 8 U.S.C. § 1101(f)(7) (1976) and (f)(8) (1976). Good moral character as required for naturalization is precluded if an alien is confined to a penal institution for 180 days or more as a result of a conviction or he is convicted of murder.

9. 8 U.S.C. § 1251(a) (1976). The excludable persons listed in the statute but outside the scope of this paper include those aliens who are excludable at the time of entry, enter without inspection, become public charges, fail to comply with the Alien Registration Act, are members of any class considered "subversive" by INS or are considered "undesirables" by INS.

10. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).

11. 8 U.S.C. § 1251(a)(4) (1976).

12. 8 U.S.C. § 1251(a)(11) (1976).

13. 8 U.S.C. § 1251(a)(12) (1976).

14. 8 U.S.C. § 1251(a)(13) (1976).

15. 8 U.S.C. § 1251(a)(14) (1976).

CRIMES INVOLVING MORAL TURPITUDE

> Just think of the Ten Commandments. That's the rule of thumb that I use; if it's in the Ten Commandments it's probably a crime involving moral turpitude.[16]

This is the category which is the most numerous—and the most hopeful—in terms of avoiding deportation. This section of the statute[17] is divided into two parts and can be easily charted as follows:

PART I	*PART II*
An alien shall be deported if	An alien shall be deported if
1. convicted of a crime,	1. convicted of two crimes not arising out of a single scheme of criminal misconduct, regardless of whether or not in a single trial,
2. involving moral turpitude,	2. involving moral turpitude,
3. committed within five years of entry,	3. committed any time after entry,
4. and sentenced to confinement or confined,	4. regardless of the nature of the sentence,
5. in a prison or corrective institution,	5. regardless of where confined,
6. for one year or more	6. regardless of length of sentence.

The definition of what is a crime and what is moral turpitude is the same regardless of which part of the statute is called into play. First of all the alien must have been convicted of a *crime.* Juvenile delinquency is not considered a crime for deportation purposes[18] thus, a person adjudicated under the New Mexico Children's Code[19] will not be deportable regardless of the nature of the crime. However, if a juvenile is prosecuted as an adult the mere fact that he is a minor will not exempt him from deportation proceedings resulting from his conviction.[20] Sometimes it may be possible to arrange a plea bargain[21] where the juvenile pleads guilty in Children's Court as an alternative to facing charges as an adult. This will defeat deportation.

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16. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).
17. 8 U.S.C. § 1251(a)(14) (1976).
18. *In re* T–, 6 I. & N. Dec. 835 (1955); *In re* C–M–, 5 I. & N. Dec. 327 (1953).
19. N.M. Stat. Ann. § § 32-1-1 to 48 (1978).
20. *In re* C–M–, 9 I. & N. Dec. 487 (1961); *In re* P–, 8 I. & N. Dec. 517 (1960).
21. All plea bargains in New Mexico are subject to the requirements of Rule 21 of the New Mexico Rules of Criminal Procedure, N.M. R. Crim. P. 21 (1978), Rule 44 of the N.M. Rules of Procedure for the Children's Court, or if in Federal Court to Rule 11 of the Federal Rules of Criminal Procedure.

For deportation purposes a conviction must be final, with finality based on a federal standard.[22] The federal courts may look to state procedure to determine whether the conviction is considered final by the state, but state law is not binding on their determination.[23] If a conviction is later expunged it will be considered *void ab initio* and will not be considered for purposes of deportation under this section.[24]

> For deportation purposes, a conviction exists where the following elements are all present: 1) there has been a judicial finding of guilt, 2) the court takes action which removes the case from the category of those which are (actually, or in theory) pending for consideration by the court– the court orders the defendant fined, or incarcerated or the court suspends sentence, or the court suspends imposition of sentence, 3) and the action of the court is considered a conviction by the State for at least some purposes.[25]

In misdemeanor cases it is sometimes possible to request that a case be "taken under advisement" with all action postponed. As this does not remove the case from the court's further consideration it will not be considered a final conviction for deportation purposes. A conviction which is on direct appeal is not final and deportation cannot be ordered until the appeal process has terminated.[26] Other possible avenues of escape regarding finality will be considered when discussing sentencing which varies depending on whether one is concerned with Part I or Part II of the statute.

Next it is necessary to analyze what is meant by moral turpitude. Unfortunately, this is easier said than done. A few generalizations can be made, however. The length of the sentence is not determinative of whether or not a crime is considered one of moral turpitude.[27] It also does not matter what the state courts think as the determination of which crimes involve moral turpitude is always a federal question.[28] A definition first put forth in *In re Henry*[29] and frequently cited with approval[30] states that

22. Pino v. Landon, 349 U.S. 901 (1955); Will v. Immigration & Nat. Serv., 447 F.2d 529 (7th Cir. 1971); Burr v. Immigration & Nat. Serv., 350 F.2d 87 (9th Cir. 1965), *cert. denied,* 383 U.S. 915; Gutierrez v. Immigration & Nat. Serv., 323 F.2d 593 (9th Cir. 1963).

23. *In re* O–, 7 I. & N. Dec. 539 (1957), relying on United States v. Acri, 348 U.S. 211 (1955) and Jerome v. United States, 318 U.S. 101 (1943).

24. Sawkow v. Immigration & Nat. Serv., 314 F.2d 34 (3d Cir. 1963); *In re* C–, 8 In. & N. Dec. 611 (1960); *In re* G–, 7 I. & N. Dec. 171 (1956).

25. *In re* L–R–, 8 I. & N. Dec. 269, 270 (1959).

26. Will v. Immigration & Nat. Serv., 447 F.2d 529 (7th Cir. 1971).

27. United States v. Carrollo, 30 F. Supp. 3 (W.D.Mo. 1939).

28. Mercer v. Lence, 96 F.2d 122 (10th Cir.), *cert. denied,* 305 U.S. 611 (1938); Wyngaard v. Rogers, 187 F. Supp. 527 (D.D.C. 1960), *aff'd,* 295 F.2d 184 (D.C. Cir.), *cert. denied,* 368 U.S. 926 (1961).

29. 15 Idaho 755, 99 P. 1054 (1909).

30. United States v. Smith, 420 F.2d 428 (5th Cir. 1970); Wing v. United States, 46 F.2d 755 (7th Cir. 1931).

> [Moral turpitude is] an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.[31]

As that definition or any other equally vague statement[32] is not likely to give much guidance, one must look at specific crimes which have been held to be those involving moral turpitude.[33]

In the Tenth Circuit, the crimes of indecent liberties,[34] larceny,[35] passing of counterfeit obligations[36] and conspiring to defraud[37] have all been held to be crimes of moral turpitude. Other jurisdictions have held that robbery,[38] arson[39] and forgery[40] involve turpitude, as do most major crimes against the government such as counterfeiting,[41] perjury[42] and bribery.[43] However, false statements not amounting to perjury,[44] possession of stolen property,[45] breaking and entering (provided intent to commit a crime of moral turpitude is not implicit in the crime),[46] and carrying a concealed deadly weapon[47] do not involve turpitude. Most regulatory crimes such as violations of liquor laws,[48] gambling laws,[49] tax laws,[50] immigration laws[51] or narcotics laws[52] have been held not to involve turpitude. Most major sex crimes such as rape[53] and at-

31. Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931).

32. Attempts to challenge the vagueness of the designation "moral turpitude" as unconstitutional have not been successful. *See,* Jordan v. De George, 341 U.S. 223 (1951); Chu v. Cornell, 247 F.2d 929 (9th Cir.), *cert. denied,* 355 U.S. 892 (1957).

33. For a complete discussion of which crimes do or do not involve moral turpitude see Gordon & Rosenfield, Immigration Law and Procedure § 4.14; Wexler and Neet, *The Alien Criminal Defendant: An Examination of Immigration Law Principles For Criminal Law Practice,* 10 Crim. L. Bull. 289 (1974).

34. Petsche v. Clingan, 273 F.2d 688 (10th Cir. 1960).

35. Bufalino v. Irvine, 103 F.2d 830 (10th Cir. 1939).

36. *Id.*

37. Mercer v. Lence, 96 F.2d 122 (10th Cir.), *cert. denied,* 305 U.S. 611 (1938).

38. Meyer v. Day, 54 F.2d 336 (2d Cir. 1931).

39. Johnson v. Pepe, 28 F.2d 810 (2d Cir. 1928); *In re* S–, 3 I. & N. Dec. 617 (1949).

40. Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931).

41. Volpe v. Smith, 289 U.S. 422 (1933); Allessio v. Day, 42 F.2d 217 (2d Cir. 1930).

42. Boraca v. Schlotfeldt, 109 F.2d 106 (7th Cir. 1940).

43. Sollazzo v. Esperdy, 285 F.2d 341 (2d Cir. 1961).

44. Hirsh v. Immigration & Nat. Serv., 308 F.2d 562 (9th Cir. 1962); *In re* S–, 2 I. & N. Dec. 353 (1045); *In re* G–, 1 I. & N. Dec. 73 (1941).

45. *In re* K–, 2 I. & N. Dec. 90 (1944).

46. *In re* M–, 2 I. & N. Dec. 721 (1946).

47. Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926).

48. Iorio v. Day, 34 F.2d 920 (2d Cir. 1929).

49. *In re* G–, 10 I. & N. Dec. 719 (1964).

50. *In re* S–, 9 I. & N. Dec. 688 (1962).

51. *In re* G–, 1 I. & N. Dec. 73 (1941), but may be deportable under 8 U.S.C. § 1251(a) (1976).

52. ,Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926), but may be deportable under 8 U.S.C. § 1251(a)(11) (1976).

53. Wing v. U.S., 46 F.2d 755 (7th Cir. 1931).

tempted assault with intent to commit rape involve turpitude,[54] but Mann Act violations[55] and obscenity[56] do not. Murder is invariably a crime involving turpitude as is voluntary manslaughter,[57] but involuntary manslaughter is not.[58]

Most aggravated crimes are said to inherently include turpitude whereas the same crime in its unaggravated form may not. Thus, assault with intent to kill is a crime of moral turpitude,[59] but simple assault and battery is not.[60] However, one court has held that aggravated assault and battery did not involve moral turpitude.[61]

The distinction made between aggravated and unaggravated crimes makes plea bargaining a particularly important tool for avoiding deportation. Frequently, aggravated crimes can be reduced by a plea of guilty to the same crime in its unaggravated form. The unaggravated crime probably will not involve turpitude; therefore, deportation will be defeated. The important thing is to avoid a plea of guilty to a crime of moral turpitude. The alien will not be deported on the basis of the crime with which he was charged, only that for which he is convicted. Furthermore, it is the nature of the crime that determines whether or not it is a crime involving moral turpitude, not the particular circumstances which led to this conviction.

> Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral.[62]

With a little creativity an attorney should be able to secure a plea agreement to a lesser offense which definitely excludes moral turpitude. If this is not possible the alien must weigh not only the probabilities of going to jail but also the probabilities of deportation when deciding whether or not to plead guilty to an offense.

At this point, one must look separately at Part I of this statute.

54. *In re* B–, 10 I. & N. Dec. 730 (1964).
55. *In re* R–, 6 I. & N. Dec. 444 (1954).
56. *In re* D–, 1 I. & N. Dec. 190 (1942).
57. De Lucia v. Flagg, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1962); Pillisz v. Smith, 46 F.2d 769 (7th Cir. 1931); Allessio v. Day, 42 F.2d 217 (2d Cir. 1930).
58. Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929); *In re* S–, 10 I. & N. Dec. 28 (1962).
59. Clark v. Orabona, 59 F.2d 187 (1st Cir. 1932); Shladzien v. Warden, 45 F.2d.204 (E.D. Pa. 1930).
60. Ciambelli v. Johnson, 12 F.2d 465 (Mass. 1926); *In re* S–, 9 I. & N. Dec. 688 (1962).
61. Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928); *but see, In re* S–, 9 I. & N. Dec. 688 (1962) for the more common view that atrocious assault and battery did involve moral turpitude.
62. Robinson v. Day, 51 F.2d 1022 (2nd Cir. 1931).

For, in order to be deportable as a result of a conviction for *one* crime involving moral turpitude, that crime must have been committed within five years after entry into the United States. Entry is defined in the Immigration and Nationality Act as "any coming of an alien into the United States whether voluntary or otherwise . . ."[63] Aliens who are in the United States legally but not admitted as permanent residents always "enter" each time they cross the border into the United States. The Act provides that aliens admitted as permanent residents will not be regarded as having made an entry "if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary."[64] Therefore, a permanent resident may or may not "enter" the United States when he crosses a border, depending on his intent at the time.

In *Rosenberg v. Fleuti,*[65] the leading case on this issue, a permanent resident of many years spent only a few hours in Mexico, but this was enough to provoke INS into initiating deportation proceedings against him.[66] In *Fleuti* the Supreme Court construed the intent exception in the Act[67] to mean "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."[68] The Court listed three factors to be considered in making this determination: 1) the length of time the alien is absent from the United States, 2) the purpose of the visit, and 3) whether the alien must procure travel documents in order to make the trip.[69]

The lower federal courts have added other factors. In *Lozano-Giron v. INS,*[70] the Seventh Circuit suggested that the effect of uprooting caused by deportation, how long the alien had been a permanent resident and to where he would be deported were factors to consider.[71] In that case the Court concluded that a departure in order to get married was meaningfully interruptive of an alien's

63. 8 U.S.C. § 1101(a)(13) (1976); For a detailed discussion of the meaning and judicial interpretation of this section see Comment, 13 San Diego L. Rev. 192 (1975).
64. 8 U.S.C. § 1101(a)(13) (1976).
65. 374 U.S. 449 (1963).
66. The Plaintiff, a Swiss national, had been continuously in the United States for several years but upon his return from a two hour visit to Mexico deportation proceedings were begun on the basis that he was excludable because he was a homosexual.
67. 8 U.S.C. § 1101(a)(13) (1976).
68. 374 U.S. at 462.
69. *Id.* at 462.
70. 506 F.2d 1073 (7th Cir. 1974).
71. *Id.* at 1079.

status as a permanent resident and his re-entry constituted an "entry" for purposes of deportation.[72]

In *Munoz-Casarez v. INS*[73] the Ninth Circuit concluded that a one month vacation trip to Mexico constituted an "entry" upon return. The court stated that "[i]t is not abandonment of residence that constitutes a return to this country an 'entry.' It is a departure, which is 'meaningfully interruptive' of residence."[74] However, in *Zimmerman v. Lehmann*[75] the Seventh Circuit found that a one week vacation trip did not constitute an entry on return and stated that "[f]rom the fact that he took his family on a harmless innocent vacation trip to Canada, it would border on the absurd to ascribe to him an intention of impairing his status as a permanent resident of this country."[76]

The purpose of the trip has also raised some interesting questions in cases where the alien has committed a crime while out of the United States. Some cases have held that when the intent to commit the crime was formed after the alien had already innocently departed from the United States, a short visit might not constitute an entry upon return.[77] Other cases have held that it made no difference when the intent was formed if the alien committed a crime, which would make him excludable, during the time he was absent from the United States, his re-entry would be an "entry" for deportation purposes.[78]

Therefore, even though an alien may be lawfully admitted for permanent residence and may have lived in the United States for many years, if he crosses a border, even for a very short time, his return may constitute an "entry" as of that date. Any trips outside the United States, no matter how short or how innocent, must be considered by the attorney when attempting to determine whether or not the alien has resided in the United States for five years prior to committing the crime charged. It is important to know when he

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72. *Id.* at 1080.

73. 511 F.2d 947 (9th Cir. 1975).

74. *Id.* at 949.

75. 339 F.2d 943 (7th Cir.) *cert. denied,* 381 U.S. 925 (1965).

76. 339 F.2d at 949; A comparison of these two cases shows the conflict in interpretation of *Fleuti.* In *Munoz-Casarez,* the plaintiff had been admitted for permanent residence in 1956. In 1969 he made a one month visit to Mexico to visit relatives, including a sister who was ill. In 1970 he was convicted of voluntary manslaughter of his former wife. In *Zimmerman,* the plaintiff had been a permanent resident for 39 years when he took his family to Canada for a vacation. He was determined to be excludable by INS because he had claimed falsely to be a United States citizen upon his return from Canada. Perhaps it was really the nature of the crime that made the difference, murder being much more serious than perjury.

77. Vargas-Banuelos v. Immigration & Nat. Serv., 466 F.2d 1371 (5th Cir. 1972).

78. Palatian v. Immigration & Nat. Serv., 502 F.2d 1091 (9th Cir. 1974).

went, where he went, the purpose of the trip and what actually occurred during the trip that might have been illegal. The alien's ties to this country should also be considered. Look for factors which tend to show that he intended to return, such as any family he left in the United States, an on-going job, property—anything that tends to show that he did not intend his residence in the United States to be "meaningfully interrupted" by his trip abroad.

The next requirement of Part I is that the alien must be "either sentenced to confinement or confined therefore."[79] The INS Board of Appeals construed this language for the first time in *In re V.*[80] and held that

> [W]e do not believe that the suspension of the imposition of sentence . . . satisfies the requirement of the first part of section 241(a)(4). The deportation law does not make an alien deportable who is sentenced to 'probation' for a year or more, it requires that he be sentenced to confinement. This has not been done where there has been a suspension of the imposition of sentence.[81]

In New Mexico in any case other than a first degree felony or possibly certain cases involving firearms, the judge has the discretion to defer the imposition of sentence[82] rendering a conviction inapplicable for deportation purposes under Part I of the statute. It is also possible to seek probation and release under a deferred sentence in federal court on any case not punishable by death or life imprisonment.[83] However, a suspended sentence is still considered a sentence and will satisfy the requirement of the statute.[84] Obviously, if the deferred sentence or probation is revoked and a sentence imposed, the statute will have been satisfied.

The important thing to remember is that a conviction which is

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79. 8 U.S.C. § 1251(a)(4) (1976); *See also* Legomsky, *The Alien Criminal Defendant: Sentencing Considerations,* 15 San Diego L. Rev. 105 (1977).

80. 7 I. & N. Dec. 577 (1957).

81. *Id.* at 578.

82. N.M. Stat. Ann. § 31-20-3 (1978). "Upon entry of a judgment of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either:

A. enter an order deferring the imposition of sentence; . . ."

N.M. Stat. Ann. § 31-18-4 (1978). "A. When a separate finding of fact by the court or jury shows that a firearm was used in the commission of: . . .

(2) any crime constituting a felony other than a capital felony, the court shall not suspend the first one [1] year of any sentence imposed." There have been no appellate decisions interpreting whether or not this section also applies to deferred sentences.

83. Fed. R. Crim. P. 32.

84. Velez-Lorenzo v. Immigration & Nat. Serv., 463 F.2d 1305 (D.C. Cir. 1972); Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959); *In re* M—, 6 I. & N. Dec. 346 (1954).

sufficiently final for deportation purposes in general,[85] will not be considered sufficiently final for deportation under Part I of this section if *imposition* of sentence has been suspended.

For deportation under Part I of the statute the confinement involved must be in a "prison or correctional institution."[86] All jails meet this requirements as does the United States Public Health Service Hospital.[87] However, confinement or a sentence to confinement for the sole purpose of securing treatment for the defendant may not satisfy the statute. In *Holzapfel v. Wyrsch,*[88] although the petitioner was sentenced to jail under the New Jersey Sex Offenders Act and his sentence was suspended, deportation was denied. As a condition of his probation he was to receive outpatient treatment. The Third Circuit held that

> Although the sentence was penal in form, in substance it merely provided for a series of psychiatric treatments. The coercive effect of the suspended sentence was intended to insure the participation of the appellee in the outpatient medical care. The penal element in this legislation is so unquestionably secondary that the humanitarian nature of the Act should not be subverted by any formalistic interpretation of its provisions.[89]

Commitment to the Attorney General for treatment under the Federal Youth Corrections Act also has been held *not* to be a sentence to imprisonment,[90] as has commitment to a mental institution.[91]

The final requirement for deportation under Part I of the statute is that the sentence must be for "one year or more."[92] In *Petsche v. Clingan*[93] the Tenth Circuit held that it made no difference that the respondent had only served seven months of his sentence. He had been sentenced to a maximum possible term of ten years; therefore, his sentence had been for more than one year.

> In deportation cases it has been held that when the maximum imprisonment possible for the offense is more than one year an indeterminant sentence is for a year or more even though no term is

85. See text accompanying note 25, *supra.*
86. 8 U.S.C. § 1251(a)(4) (1976).
87. United States *ex rel.* Abberante v. Butterfield, 112 F. Supp. 324 (E.D. Mich. 1953), *aff'd per curiam,* 212 F.2d (6th Cir. 1954).
88. 259 F.2d 890 (3rd Cir. 1958).
89. *Id.* at 893.
90. *In re* V–, 8 I. & N. Dec. 360 (1959).
91. *In re* K–, 3 I. & N. Dec. 48 (1947).
92. 8 U.S.C. § 1251(a)(4) (1976).
93. 273 F.2d 688 (10th Cir. 1960); *See also,* Burr v. Edgar, 292 F.2d 593 (9th Cir. 1961).

> mentioned in the sentence. The rule applies even though the period of actual confinement is for less than one year because § 241(a)(4) applies when there is either sentnece or confinement for a year or more.[94]

Plea bargaining may allow the alien to avoid fulfilling this final requirement for deportation under Part I. If he is charged with a crime punishable by more than one year in jail, it might be possible to plead to a misdemeanor punishable by less than a year in jail. This will solve his immediate deportation problem. There is, however, a risk involved. If the crime the alien pleads guilty to is a crime involving moral turpitude, this conviction may later permit deportation if he is convicted a second time.

Part II of the statute is much more all encompassing than Part I. For purposes of Part II date of entry is irrelevant. A situation could arise where an alien was convicted of a crime involving moral turpitude six years after entry so that at that time he was not deportable under Part I of the statute. However, twenty years later, if he is convicted of a second crime involving moral turpitude, he will become deportable under Part II. It makes no difference whether sentence is suspended or imposition of sentence is suspended, either one is sufficiently final to come within Part II.[95] The length of the sentence is also immaterial.[96] Even two convictions for the petty offense of disorderly conduct may be sufficient grounds for deportation.[97]

The important issue in Part II of this section is whether or not the crimes were part of a single scheme of criminal misconduct.[98] It is the government's burden to prove that two separate crimes were not part of a single scheme,[99] and all doubts must be resolved in favor of the alien.[100] In a tax evasion case involving two consecutive years

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94. 273 F.2d at 691; In July 1979, the New Mexico Definite Sentencing Act will take effect, eliminating many questions in this area. S. 1437, 95th Cong., 1st Sess. (1977), the new revision of the U.S. Criminal Code, also contains a definite sentencing act.

95. *In re* O–, 7 I. & N. Dec. 539 (1957).

96. *In re* P–, 8 I. & N. Dec. 424 (1959).

97. In Babouris v. Esperdy, 269 F.2d 621 (2nd Cir. 1959), *cert. denied,* 362 U.S. 913 (1960), the alien was twice convicted of disorderly conduct which, under New York law, was an offense not even considered a crime. This made no difference; since it fit the federal definition of a crime of moral turpitude the length of sentence or the pettiness of the crime was immaterial.

98. 8 U.S.C. § 1251(a)(4) (1976); *See also* Appleman, *"Single Scheme of Criminal Misconduct" in Immigration Cases,* 25 Fed. B. J. 396 (1965).

99. Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959); Zito v. Moutal, 174 F. Supp. 531 (N.D. Ill. 1959); *In re* C–, 9 I. & N. Dec. 524 (1962).

100. Fong Haw Tan v. Plelan, 333 U.S. 6 (1948); Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959); Jeronimo v. Murff, 157 F. Supp. 808 (S.D.N.Y. 1957).

the INS Board of Appeals held that the government had met its burden where there were two counts and the alien did not take the stand to refute what the Board considered obvious—that these were two separate crimes.[101] *In Khan v. Barber*[102] the Ninth Circuit in another tax evasion case stated that "[i] n the absence of all evidence to the contrary, complete crimes committed on differing dates or in differing places are considered separate and different crimes and support separate charges."[103]

In *Wood v. Hoy*,[104] however, the Ninth Circuit found that an alien convicted of two counts of robbery was not deportable even though each robbery involved separate victims on separate days. The court noted that the convictions were for robberies involving the same group of four codefendants and committed within a couple of days of each other. In that case the court found the government had not met its burden because the defendant stated that both were part of a single scheme and the government elicited no contrary testimony. The court went on to say that a single scheme of criminal misconduct is different from a single criminal act and had Congress intended to include all separate acts, it would have said so in the statute.[105]

One court has laid down some guidelines which are instructive in attempting to make the determination of what constitutes a single scheme of criminal misconduct.

> Other evidentiary facts may convincingly establish a single scheme. The initial formulation of the same subsisting fundamental object and purpose; the utilization of precisely the same methods and procedures in each of a series of successive situations to accomplish the original objective; the continuously interacting relationship and activities of the same persons who originated and launched the project; the victimizing of the same person through all of the acts—such evidentiary facts may, in the aggregate, demonstrate the existence of a single criminal enterprise, project and undertaking.[106]

The fact that the alien is tried in one trial is immaterial if in fact he is

101. *In re* C—, 9 I. & N. Dec. 524 (1962).
102. 253 F.2d 547 (9th Cir.) *cert. denied*, 357 U.S. 920 (1958).
103. *Id.* at 549. In Costello v. Immigration & Nat. Serv., 311 F.2d 343 (2nd Cir.), *rev'd on other grounds*, 376 U.S. 120 (1964), the Second Circuit also found two counts of tax evasion to be two schemes.
104. 266 F.2d 825 (9th Cir. 1959).
105. *Id.* at 830.
106. Jeronimo v. Murff, 157 F. Supp. 808, 815 (S.D.N.Y. 1957).

being tried for separate offenses not arising out of one criminal scheme.[107]

STATUTORY REMEDIES FOR AVOIDING DEPORATION RESULTING FROM CONVICTIONS FOR CRIMES INVOLVING MORAL TURPITUDE

The Pardon

The immigration and Nationality Act provides that convictions for crimes involving moral turpitude will be inapplicable in certain situations. The first such situation is "in the case of any alien who has subsequently to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states . . ."[108]

Once an alien has been unconditionally pardoned, those convictions can no longer be the subject of any deportation proceedings against him.[109] The pardon, however, must be full and unconditional without either conditions subsequent or conditions precedent.[110] It is permissible for the pardon to be granted for the express purpose of avoiding deportation so long as there are no conditions attached to it.[111]

Furthermore, although the statute says that the pardon must come from the President or the Governor of a state, pardons by mayors for convictions of city ordinances have been upheld[112] as have pardons by State Boards of Pardons, provided they are "the supreme authority in the State."[113] A mere application for a pardon is not sufficient to terminate deportation hearings or even to require a stay of deportation while the pardon is being considered.[114]

One final rather discouraging note is required on the subject of

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107. In Fitzgerald *ex rel.* Miceli v. Landon, 238 F.2d 864 (1st Cir. 1956), the alien was tried in one trial on two charges. One was indecent assault and the other was that of being a lewd, wanton and lascivious person. Although the second charge could have resulted from the same incident as the first, the court said that it involved not an incident but a type of person; therefore, they were not part of a single scheme.

108. 8 U.S.C. § 1251(b)(1) (1976).

109. *In re* G–, 3 I. & N. Dec. 808 (1949); furthermore, the Attorney General cannot later attempt to show that the pardon was the result of fraud or misrepresentation if the State has not chosen to contest it, Taran v. United States 266 F.2d 561 (8th Cir. 1959). Also, the pardoned conviction cannot be used as the basis for subsequent exclusion from the United States, *In re* H– & Y–, 3 I. & N. Dec. 236 (1948).

110. *In re* D–, 7 I. & N. Dec. 476 (1957); *In re* C–, 5 I. & N. Dec. 630 (1954).

111. *In re* L–, 6 I & N. Dec. 355 (1954).

112. *In re* C–R–, 8 I. & N. Dec. (1958).

113. *In re* D–, 7 I. & N. Dec. 476 (1957).

114. United States *ex rel.* Vermiglio v. Butterfield, 223 F.2d 804 (6th Cir. 1955).

pardons. In *Lehmann v. United States ex rel. Carson*[115] the United States Supreme Court ordered an alien deported who had been a permanent resident for forty years. He had entered the United States in 1919 and in 1936 had been convicted of two counts of blackmail for which he served several years in prison. In 1945 he was granted a pardon on condition that he commit no further offenses. Under the then existing Immigration and Nationality Act of 1917 aliens could not be deported if pardoned regardless of conditions. However, in 1952 the Act was amended and the phrase "full and unconditional" was added. In 1956 Mr. Carson was ordered deported because his conditional pardon no longer fit within the statutory remedy.

This case is a good example of the fact that INS often does not initiate deportation proceedings until many years after the alien has become deportable. The alien may lose his green card (permanent resident card) and go to apply for a new one at which time he will be fingerprinted, alerting INS to the conviction. There may also be an article in the newspaper on his release from jail. Jails also routinely notify INS of aliens if they discover them while serving time.[116] An alien who is technically deportable may wish to pursue a pardon just for the purpose of avoiding future problems with INS.

The Recommendation Against Deportation

The second statutory source of relief from deportation for aliens convicted of crimes involving moral turpitude is the recommendation against deportation.[117] This is an extremely important remedy to understand because it can save an otherwise hopeless situation.[118] The statute has two requirements: the recommendation must be given within thirty days after first imposition of judgment or sentence and notice must be given to INS, to the State and to the prosecution.[119] Each requirement must be strictly adhered to or the recommendation will not be effective to stop the deportation proceedings.[120]

The question of what constitutes "first" entry of judgment or first imposition of sentence is based on a federal standard.[121] The sen-

115. 353 U.S. 685 (1957).

116. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).

117. 8 U.S.C. § 1251(b)(2) (1976).

118. Many lawyers are not even aware of this remedy. Appleman, *The Recommendation Against Deportation*, 58 A.B.A.J. 1294 (1972).

119. 8 U.S.C. § 1251(b) (1976).

120. Marin v. Immigration & Nat. Serv., 438 F.2d 932 (9th Cir.) *cert. denied*, 403 U.S. 923 (1971); United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d (2nd Cir. 1959); *In re* B., 7 IN 227 (1956).

121. United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d 72 (2nd Cir. 1959); United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2nd Cir. 1926).

tencing court has absolutely no power to enlarge the thirty day time limit even if the judge, the lawyer and the defendant were all totally ignorant of the remedy at the time of sentencing, nor can the judge enter a *nunc pro tunc* order after the thirty day period has passed.[122]

The notice requirement must also be strictly complied with in order to make the recommendation effective.[123] It should be noted that the Board of Immigration Appeals has held that defense counsel may give this notice and it is a good idea not to rely on the court.[124] Notice is sufficient to INS if given to the District Director in the area where the sentencing court is located at least five days prior to the court hearing.[125] For aliens sentenced in New Mexico, notice should be served on the INS District Director in El Paso.

If the sentencing judge agrees to make the recommendation against deportation, assuming the time limit and notice requirements have been met, the recommendation is *absolutely* binding on the Attorney General. He can never initiate deportation proceedings on the basis of the crime or crimes involved.[126] Any judge is competent to make the recommendation and it should be freely sought even from magistrates sentencing for misdemeanors involving moral turpitude.

The recommendation can also be used as part of a plea bargain. The alien can agree to plead guilty in exchange for a timely recommendation against deportation. Under the New Mexico Rules of Criminal Procedure, the defendant has the right to withdraw his plea if the judge does not approve the bargain.[127] In all probability, if the alien has enough equities on his side to convince the judge to make

122. Marin v. Immigration & Nat. Serv., 438 F.2d 932 (9th Cir.) *cert. denied,* 403 U.S. 923 (1971); United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2nd Cir. 1926); *See also* the cases cited in C. Gordon & H. Rosenfield, Immigration Law and Procedure § 4.15b. 4-148 n. 26 (1966).

123. United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d 72 (2nd Cir. 1959); *In re* W–, 9 I. & N. Dec. 1 (1960); *In re* I–, 6 I. & N. Dec. 426 (1954).

124. 8 C.F.R. § 241.1 (1978) "The notice shall be transmitted . . . by the court, a court official, or by counsel for the prosecution or the defense."; *In re* P–, 8 I. & N. Dec. 689 (1960). In *In re* M–G–, 5 I. & N. Dec. 531 (1954), the attorney for the defense sent a letter to the court near the end of the 30 day time limit requesting the recommendation, but the judge was on vacation and did not give the notice until after the time period. The recommendation was held invalid. However, in Haller v. Esperdy, 397 F.2d 211 (2nd Cir. 1968), the trial court took responsibility for notifying INS then failed to do so, and the Second Circuit held that the recommendation would not be defeated if INS was given a chance to present its position to the court.

125. 8 C.F.R. § 241.1 (1978); if less than five days notice is received, it will still be considered due notice if INS has time to prepare, otherwise it will not, thus voiding the recommendation.

126. Velez-Lozano v. Immigration & Nat. Serv. 463 F.2d 1305 (D.C. Cir. 1972); Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968).

127. N.M. R. Crim. P. 21 (1978).

the recommendation, INS will probably not oppose it. The most important consideration is whether or not the alien has family in the United States who are citizens or permanent residents because the INS does not like to split up families.[128]

Since the recommendation will be lost if not timely made, it should be requested even if the alien is charged with only one crime and it has been more than five years since his last entry into the United States. This will protect him in case he is convicted of a second crime involving moral turpitude at some later date because the first conviction cannot be used to deport the alien uunder Part II of the statute.

There is, however, one caveat. INS might never learn of the conviction but for the fulfilling of the notice requirement for a recommendation against deportation. If the alien is not sentenced to jail, if there are no newspaper accounts of the crime or if only a petty offense is involved, chances are good that INS will never discover the conviction. On the other hand, it might be discovered years later when it will be too late to try to avoid deportation. Probably, all things considered, the recommendation should always be sought but the risk of putting INS on notice should not be entirely overlooked.

The harsh consequences of failing to consider this remedy cannot be overemphasized. In an oft-quoted case, Judge Learned Hand said:

> At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.[129]

Judge Hand then ordered the defendant deported because the recommendation against deportation had not been timely made by the sentencing court.

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128. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).
129. United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630-31 (2nd Cir. 1926).

TACTICS: CRIMES INVOLVING MORAL TURPITUDE

To summarize, the following questions should be asked whenever an attorney has an alien client with the possibility of a conviction for a crime involving moral turpitude.

1. Is it a crime? Consider the possibility of adjudication as a juvenile.

2. Is it a crime involving moral turpitude? Consider the possibility of a plea bargain to a crime not involving turpitude.

3. When was the last entry into the United States? If entry has been within five years investigate facts that will show he did not meaningfully interrupt his permanent residence. The most important fact is probably that he has family in the United States from whom he would not intend to be permanently separated.

4. If the crime charged involves a sentence of more than one year consider requesting a deferred sentence or consider a plea bargain to a crime which carries a sentence of less than one year. Remember this applies only to convictions under Part I; under Part II, length or type of sentence is immaterial.

5. If there is a possibility of confinement to a treatment center consider arguing that this is in fact treatment and not punishment. Or, if in federal court, consider commitment to the Attorney General under the Federal Youth Corrections Act. Again, either of these will defeat deportation only under Part I.

6. If there has been a conviction which falls within either Part I or Part II of the statute, there are still other possible remedies:

a. Finality–if the conviction is on direct appeal or has been "taken under advisement" it is not sufficiently final for deportation purposes.

b. Pardon–attempt to secure a full and unconditional pardon which will defeat deportation.

c. Recommendation against deportation–request the recommendation remembering to adhere to the strict time and notice requirements. If secured, the recommendation will defeat deportation attempts.

d. Expungement–if the conviction is expunged it will probably not be applicable for deportation purposes.

e. Suspension of deportation–this remedy will be discussed under the heading of Narcotics although it applies to this section as well.

f. Deferred status–this remedy will be discussed at the end of this paper. It is a little used remedy but should be considered as a last resort.

NARCOTICS OFFENSES

It is in the area of narcotics offenses that the immigration laws are the most severe and the most irrational. The applicable statute provides that an alien is deportable if he

> 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 marihuana, 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, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;[130]

Possession of one joint of marijuana may lead to deportation, whereas a conviction for first degree murder may not.[131] Date of entry is absolutely irrelevant; the statute applies indiscriminately no matter how long the alien has been legally in the United States.[132] The statute even applies retroactively to those convicted of narcotics offenses, or determined to have been narcotics addicts prior to its enactment, when these were not deportable offenses.[133]

The statute makes narcotics addicts deportable whether or not they have ever been charged with or convicted of a narcotics offense. The mere status of being an addict makes one deportable.[134] A person is determined to be an addict based on a federal standard.[135] The courts have looked at length of drug use and circumstances surrounding drug use to determine whether or not one is an addict.[136] Merely being a user of drugs does not bring one within

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130. 8 U.S.C. § 1251(a)(11) (1976).

131. "For example, if both crimes were committed more than five years after entry, the murderer would not be deportable. The marijuana offender would be, however, for no time requirement is imposed on such a charge." Legomsky, *The Alien Criminal Defendant: Sentencing Considerations,* 15 San Diego L. Rev. 105, 130 N. 169 (1977).

132. 8 U.S.C. § 1251(a)(11) (1976), "at any time after entry . . ."

133. Tugade v. Hoy, 265 F.2d 63 (9th Cir. 1959).

134. 8 U.S.C. § 1251(a)(11) (1976), "is, or hereafter at any time after entry has been, a narcotic drug addict. . . ."

135. The definition of addict used by the courts is that found in 42 U.S.C. 201(k) (1970), "[A]ny person who habitually uses any habit-forming narcotic drugs so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction." *See also In re* B., 6 INS 374 (1954).

136. *In re* T–, 8 I. & N. Dec. 523 (1960).

the statute; the INS must bear the burden of proving that the alien is actually an addict and not a mere user of drugs. In fact even the alien's admission that he is an addict is not necessarily sufficient evidence. Medical reports and evaluations are usually necessary to make this finding.[137]

Although it would appear relatively easy for INS to find and deport narcotics addicts, these cases are actually quite difficult because of the evidentiary problems involved in getting confidential medical reports. Also, INS simply does not have enough investigators to go out looking for addicts.[138] Furthermore, it is illegal in New Mexico for any law enforcement officer to conduct surveillance of a drug rehabilitation program for the purpose of obtaining names or other information concerning persons seeking assistance at such a facility.[139]

The statute makes one deportable for virtually every conceivable conviction for a narcotics offense or regulation including petty misdeamenors and possession of marijuana.[140] In reality most petty offenses are never discovered by INS if there is no publicity to alert their investigators and the alien does not end up in jail.[141]

Furthermore, since the definition of what is a narcotic is based on a federal standard, if the complaint or indictment does not specify the exact substance involved, it may be possible to defeat deportation.[142] At least one court has held that being under the influence of narcotics does not compel deportation because it is neither possession, nor trafficking, nor addiction.[143]

Finality of a conviction for the purposes of this statute is the same

137. *In re* F–S–C–, 8 I. & N. Dec. 108 (1958). In this case the alien had previously admitted that he was an addict, but at his hearing he denied being an addict. The Board held that his hospital records were confidential since he had been a voluntary patient at a drug rehabilitation hospital and had not released them. Therefore, the government was not able to meet its burden, as the Board held that his admission alone was not sufficient to create a prima facie case that he was in fact an addict. However, in *In re* T–, 8 I. & N. Dec. 523 (1960), hospital records were admitted to show amount of frequency and amount of use which was sufficient evidence of addiction.

138. During ten years one investigator had never seen an adict deported solely on grounds of addiction. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).

139. N.M. Stat. Ann. § 30-31-1D (1978).

140. Van Dijk v. Immigration & Nat. Serv., 440 F.2d 798 (9th Cir. 1971), sale of one marijuana cigarette; Will v. Immigration & Nat. Serv., 447 F.2d 529 (7th Cir. 1971), possession of marijuana; *In re* Romardia–Herreros, 11 I. & N. Dec. 772 (1966), possession of marijuana; *In re* McClendon, 12 I. & N. Dec. 233 (1967), possession of demerol; *but see In re* Abreu-Semino,, 12 I. & N. Dec. 755 (1968), LSD is *not* classified as a narcotic drug.

141. Interview with INS Investigator, Albuquerque, N.M., (Mar. 27, 1978).

142. *In re* Paulus, 11 I. & N. Dec. 274 (1965). In this case the alien was convicted of selling narcotics in California, but the record was silent as to what narcotic it was. There could be no deportation because what might have been defined as a narcotic in California might not be a narcotic under federal law.

143. Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964).

as that for Part II of the moral turpitude statute. Any conviction, after direct appeals are exhausted[144] is considered final unless imposition of sentence has been postponed.[145] In other words, anything is final unless the case has been "taken under advisement." For petty misdemeanors this is a possibility and should be requested from the sentencing judge.

Expungement of a conviction may or may not affect its use under this section. The older cases all held that expungement had no effect.[146] However, in a recent Second Circuit case, the court held:

> [W]here mandatory deportation would frustrate the purposes of a state's relief statute, and federal law provides for erasure of federal convictions under circumstances identical to those of the case at issue, it seems to us that the state's leniency policy can be respected without fear of undermining enforcement of federal deportation laws. States' freedom to remove persons from the ambit of deportation would extend no further than where Congress itself has gone for federal crimes.[147]

In that case the alien was convicted of possession of marijuana and given a $100 fine. He was also given a "Certificate of Relief from Disabilities" to become effective after one year. The court noted that had this been a federal conviction he would have had relief from deportation. He could have been sentenced under the Federal Youth Corrections Act[148] or, as a first offender, his sentence might have been postponed so that his conviction would not have had the necessary finality to make him deportable.[149] If a state conviction has been expunged, therefore, it may now be possible to prevent deportation if, had it been a federal conviction, relief from deportation would have been available.

STATUTORY REMEDIES FOR AVOIDING DEPORTATION RESULTING FROM CONVICTIONS FOR CRIMES INVOLVING NARCOTICS

Statutory relief from deportation is severely limited for narcotics offenses. The section dealing with narcotics is specifically exempted

144. Will v. Immigration & Nat. Serv. 447 F.2d 529 (7th Cir. 1971).

145. *In re* J–, I. & N. Dec. 580 (1957); *In re* G–, 12 I. & N. Dec. 806 (1968), suspension of imposition of sentence is a final judgment.

146. *E.g.*, Garcia-Gonzales v. Immigration & Nat. Serv. 344 F.2d 804 (9th Cir.), *cert denied*, 382 U.S. 840 (1965); Brownrigg v. Immigration & Nat. Serv., 356 F.2d 877 (9th Cir. 1966). Both of these cases involved convictions under California law where, after a successful period of probation, the defendant was allowed to change his plea of guilty to not guilty and his conviction was expunged.

147. Rehman v. Immigration & Nat. Serv., 544 F.2d 71, 75 (2nd Cir. 1976).

148. *In re* V–, 8 I. & N. Dec. 360 (1959).

149. *In re* L–R–, 8 I. & N. Dec. 269, 270 (1959).

from the relief of a pardon or a recommendation against deportation.[150]

There is one possible statutory remedy but it requires meeting extremely rigorous qualifications. This is the suspension of deportation. This remedy is only available if the alien has been physically present in the United States continuously for at least ten years. The alien must also show that he has been a person of good moral character during that entire time and that his deportation would result in exceptional and extreme hardship to himself or to members of his family who are permanent residents or citizens.[151] Actually, this remedy is of little value to the criminal defense attorney who is representing the alien at the time he is being charged with the crime. It would only be available ten years later, if at all.[152]

Deferred status[153] is another possible remedy for an alien facing deportation because of a narcotics conviction. It is a little used and little known remedy which is generally handled as an internal matter within INS. In fact, until rock-singer John Lennon initiated a Freedom of Information suit to discover INS procedures, the INS actually denied the existence of the program.[154] Deferred status is reserved for those cases where an alien is clearly deportable, but countervailing humanitarian concerns weigh against deportation. Factors might include the age of the alien, the separation of family which would result from deportation, or physical or mental infirmities. Deferred status has been granted to aliens who have committed crimes involving moral turpitude, narcotics offenses and other crimes.[155] In

150. "The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section." 8 U.S.C. § 1251(b) (1976); *Ex Parte* Robles-Rubio, 119 F. Supp. 610 (N.D. Calif. 1954).

151. 8 U.S.C. §'1254(a)(2) (1976).

152. A recent case has interpreted a section of the Act dealing with exclusion to also apply to deportation. In Francis v. Immigration & Nat. Serv. 532 F.2d 268 (2nd Cir. 1976), the court held that a classification under 8 U.S.C. § 1182(c) (1976) which distinguishes between aliens who had temporarily departed from the United States and those who had not was a denial of equal protection. The statute provided relief from exclusion for certain aliens provided they had lived in the United States during the seven years prior to a temporary departure and the court held that this same relief must, therefore, be available to aliens who had resided in the United States for seven years and had not ever departed. As a result of this decision, an alien was found entitled to apply for discretionary relief to remain in the country one year after a conviction for possession of marijuana since he had lived continuously in the United States for seven years prior to his conviction. This position has since been adopted by the Board of Immigration Appeals in *In re* Silva, I. & N. Dec. # 2532, Sept. 10, 1976.

153. Until recently this remedy was called Non-Priority Status.

154. Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act.*, 14 San Diego L. Rev. 42, 43 (1976).

155. *Id.* at 51.

one particularly interesting case the alien had a criminal record which included convictions for auto theft, rape, burglary, possession of narcotics and numerous other offenses. However, deferred status was granted based on several years of good behavior subsequent to these convictions and the fact that he had married and had strong family ties in this country.[156]

This remedy is the exception and not the rule, but it is a possibility in a case where it can be argued that humanitarian factors outweigh deportation. If placed on deferred status, the alien is essentially in a state of "limbo." If he has a permanent resident card it will be taken away from him and he will be given a special form of identification. INS investigators will continue to check on his status at regular intervals, and he can be deported if the situation changes. Should the alien ever voluntarily leave the United States, he will in effect be deporting himself as he will be excludable on return and the deferred status will cease to have effect.[157]

OTHER CRIMES

There are three other classifications of criminal activity which can result in deportation:[158] crimes involving prostitution,[159] crimes involving the smuggling of aliens into the United States,[160] and crimes involving certain weapons.[161] The statute makes aliens deportable who are or have been prostitutes, procurers, or managers of houses of prostitution, or persons who are or have been involved with organized vice or "other immoral place[s]."[162] A conviction for prostitution or other related activities is not required.[163] In fact a conviction alone may not be sufficient evidence to meet the test required for deportation under this section. This statute requires the evidence be "reasonable, substantive and probative."[164] The most important factor to consider is that a single act of prostitution is not

156. *Id.* at 53.

157. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).

158. See note 9, *supra* for those crimes not discussed in this paper.

159. 8 U.S.C. § 1251(a)(12) (1976).

160. 8 U.S.C. § 1251(a)(13) (1976).

161. 8 U.S.C. § 1251(a)(14) (1976).

162. 8 U.S.C. § 1251(a)(12) (1976) is the section which makes persons involved with prostitution deportable. That section includes the classes of persons who are excludable as being prostitutes under 8 U.S.C. § 1182(a)(12) (1976).

163. Marlowe v. Immigration & Nat. Serv. 457 F.2d 1314 (9th Cir. 1972); *In re* G–, 5 I. & N. Dec. 559 (1954).

164. Marlowe v. Immigration & Nat. Serv. 457 F.2d 1314, 1315 (9th Cir. 1972); *In re* Dolhancey, 11, I. & N. Dec. 375 (1965). However, evidence of deportability must always be "clear, convincing and unequivocal." Woodby v. Immigration & Nat. Serv. 385 U.S. 276 (1966).

sufficient evidence that an alien is a prostitute, even if supported by a conviction.[165] The courts and the Board of Immigration Appeals have interpreted the statutory phrase, "aliens who are prostitutes,"[166] to mean "a pattern of behavior or deliberate course of conduct . . . rather than a casual or isolated act."[167] It does not matter when or where the prostitution activity took place. In one case a woman was found deportable after she admitted that prior to her entry into the United States she had been a prostitute in a country where prostitution was legal.[168]

Evidence of a pardon may be sufficient to avoid deportation if there is no independent evidence of prostitution activities other than the record of conviction. If the alien had admitted to being a prostitute, a pardon would not lead to avoidance of deportation.[169]

The section of the statute allowing deportation of an alien found to be smuggling aliens requires that the prohibited act be committed within five years after entry.[170] A conviction is not required although it can make proof problems easier for the INS.[171] Although the conviction may establish the illegal activity, the INS must also prove that the activity was done "knowingly and for gain."[172] Gain can include more than the mere payment of money. The paying of expenses for gasoline[173] and the rendering of services[174] have been held sufficient to satisfy the "for gain" requirement of the statute. "[T]he anticipation of profit, no matter how small brings the respondent within the deportation provisions."[175] However, if the alien smuggles an illegal alien into the country for humanitarian reasons, such as to help members of his family, and he neither receives nor expects money or services for his endeavor, he will not be deportable under this section.[176]

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165. *In re* T–, 6 I. & N. Dec. 474 (1955).

166. 8 U.S. C. § 1182(a)(12) (1976).

167. Schoeler v. Immigration & Nat. Serv. 306 F.2d 460 (2nd Cir. 1962) *citing* 22 C.F.R. § 419(a)(2) (Supp. 1960); *See also*, Mirabal-Balan v. Esperdy, 188 F. Supp. 317 (S.D.N.Y. 1960), where the same rule was held to apply for procuring.

168. *In re* G–, 5 I. & N. Dec. 559 (1954).

169. *In re* S–, 7 I. & N. Dec. 370 (1956).

170. 8 U.S.C. 1151(a)(13) (1976).

171. *In re* Payan, 14 I. & N. Dec. 58 (1972); *In re* J–T–, 6 I. & N. Dec. 823 (1955).

172. 8 U.S.C. § 1251(a)(13) (1976); Reyes v. Neelly, 228 F.2d 609 (5th Cir. 1956).

173. *In re* B–G–, 8 I. & N. Dec. 182 (1958).

174. Gallegos v. Hoy, 262 F.2d 665 (9th Cir.), *cert. denied,* 360 U.S. 935 (1958).

175. *In re* P–G–, 7 I. & N. Dec. 514, 517 (1957).

176. *In re* G–M–, 5 I. & N. Dec. 93 (1953). In this case the alien was found not deportable even though he brought his niece into his home to work as a domestic after he had helped her illegally cross the border. The court found that his interest was not for gain but out of a desire to help her family and that he would not have hired a housekeeper had she not come, nor did her services in any way provide a profit for him.

The weapons conviction section of the statute imposes no time limits on entry but does require a conviction.[177] The mere fact of the conviction is sufficient to make an alien deportable under this section; therefore, no sentence is required.[178] However, the section is limited to convictions for possession or carrying automatic or semi-automatic weapons or sawed-off shotguns.

The statutory remedies of a pardon or a recommendation against deportation are not available for any of the above three classes of criminal activity,[179] nor is voluntary departure allowed.[180] The remedies of suspension of deportation and deferred status would be available to those aliens subject to deportation because of criminal activity involving prostitution, smuggling of aliens, and weapons.

ILLEGAL ALIENS

Illegal aliens[181] present different problems for the defense attorney by virtue of the fact that they are already deportable. When an illegal alien is arrested, if he has no drivers licence and no other papers, chances are quite good that INS will be notified by the arresting authority when he is booked. At that time INS will usually put an immediate "hold" on him until they have time to conduct an interview.[182] This hold will prevent his release from jail even if he could have been bonded out on the initial charge.

If an illegal alien is convicted of a crime which does not in itself make him deportable, he is still eligible for voluntary departure. The government will pay the costs of this departure if he is under an INS hold.[183] This frequently happens in New Mexico. Illegal aliens who are charged with driving violations, assaults or other petty crimes which do not fit into any of the categories discussed above are allowed voluntary departure at government expense to the nearest border town unless they have a history of several illegal entries or there is some other reason to foreclose voluntary departure.[184]

177. 8 U.S.C. § 1251(a)(13) (1976).

178. *In re* Rodriguez, 14 I. & N. Dec. 176 (1974); a guilty judgement following a *nolo* plea constitutes a conviction under this section, Ruis-Rubio v. Immigration & Nat. Serv. 380 F.2d 29 (9th Cir.), *cert. denied,* 389 U.S. 944 (1967).

179. 8 U.S.C. § 1251(b) (1976); Ten v. Immigration & Nat. Serv. 307 F.2d 832 (9th Cir.), *cert denied,* 371 U.S. 968 (1962); *In re* C–F–, 11 I. & N. Dec. 529 (1966).

180. 8 U.S.C. § 1254(e) (1976); *In re* Cortez v. Immigration & Nat. Serv. 395 F.2d 965 (5th Cir. 1968).

181. This discussion focuses on illegal aliens from Mexico. Although there are probably some illegal aliens from other countries in New Mexico their numbers are minimal.

182. Authority for this temporary hold comes from 8 U.S.C. § 1357 (1976). INS often puts the hold on illegal aliens over the telephone. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).

183. 8 U.S.C. § 1252(g) (1976).

184. Interview with INS Investigator, Albuquerque, N.M. (Mar. 27, 1978).

Aliens who have a history of illegal entries will be issued an order to show cause and detained until they have had or have waived a deportation hearing. They might still be eligible for voluntary departure. However, if the voluntary departure is granted at a deportation hearing and is at government expense, the Attorney General's wavier will still be required for re-entry.[185] An alien granted voluntary departure at his own expense or at government expense prior to the initiation of deportation proceedings, or an alien granted voluntary departure at his own expense at a deportation hearing is not precluded from applying for legal re-entry at some future date and no waiver or waiting period is required.

It is sometimes possible to talk the District Attorney into dismissing minor charges since the illegal alien will be leaving the country anyway. If that is not possible and the alien is convicted, the attorney should request that the sentence be no longer than the time it takes for INS to provide transportation out of the country.[186] In these situations it is often to the alien's advantage to plead guilty so that he will not have to spend time in jail waiting for a trial.

When an illegal alien is charged with an offense which will make him deportable if convicted the situation is quite different. Any alien, legal or illegal, who is convicted of a crime involving moral turpitude, a narcotics offense or any of the other offenses discussed above is statutorily excluded from seeking the discretionary relief of voluntary departure.[187] If there is an INS hold, it will be continued until the criminal proceedings have been finalized. If there is a conviction, an order to show cause will be issued and a date for a deportation hearing will be set. Remember, even a conviction for a petty offense such as shoplifting (crime involving moral turpitude) or possession of marijuana prevents any possibility of voluntary departure if it fits within one of the categories discussed in this paper. After the alien has served his sentence he will be sent to an INS Service Processing Center which will remarkably resemble a jail. He will be held there until he either has or waives a deporation hearing. If it turns out that he is not within one of the categories excluded from seeking voluntary departure, it might be granted but if it is at government expense he will need an Attorney General's waiver to return legally. If his conviction does fall within one of these categories, he will be deported.

If an illegal alien intends to wait for trial on his charges and wishes to have bond set he must demand an order to show cause and a

185. 8 U.S.C. § 1182(17) (1976).

186. In Albuquerque the INS bus take illegal aliens to Juarez approximately once a week. In outlying areas of the state the buses run less frequently.

187. 8 U.S.C. § 1254(e) (1976).

deportation hearing.[188] He will probably have to pay the bond set by the court plus an additional bond set by INS. In reality, most illegal aliens do not have money for bond and will spend this time in jail. Situations which result in deportation should be avoided both to prevent spending time in jail (INS Service Processing Center) and to prevent exclusion barring future re-entry. Every effort should be made to get the alien out from under any category of crime which precludes voluntary departure through dismissal of charges, plea bargaining or, if a crime involving moral turpitude, the recommendation against deportation.

CONCLUSION

The purpose of this paper has been to acquaint lawyers in New Mexico with the necessary elements of immigration law to protect the rights of aliens charged with crimes in this country. Although every possible situation has not been covered, hopefully the information provided will give criminal defense attorneys the expertise to prevent the tragic consequences of "exile, a dreadful punishment, abandoned by the common consent of all civilized peoples."[189]

188. The alien's attorney must advise INS who will then issue an Order to Show Cause and will normally set a bond. 8 U.S.C. § 1252(a) (1976) is the provision providing for bond.

189. United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2nd Cir. 1962).