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DEPORTATION OF ALIENS FOR CONVICTIONS BASED UPON POSSESSION OF MARIJUANA

ALAN LEE*

THE RECENT ADVENT OF DECRIMINALIZATION for adjudications based upon possession of small amounts of marijuana has focused much attention upon the harsh immigration consequences of such adjudications for the permanent resident alien. Under section 241(a)(11) of the Immigration and Nationality Act (INA),¹ an alien convicted of possession of marijuana is deportable, and only limited means of relief are available. Due to its severity, however, the section has not been viewed with favor by the courts or the Board of Immigration Appeals,² and the result in recent years has been the increased use of a number of ploys either to evade the wording of the section or to grant discretionary relief. It is the purpose of this Article to demonstrate that neither the current mood of the country nor the history of section 241(a)(11) justifies the application of its present severe penalties to the simple possession of marijuana. Section 212(a)(23) of the INA,³ the counterpart to section 241(a)(11) used in exclusionary proceedings before the alien legally acquires permanent residence or entry into the country, will also be discussed when applicable. The principal focus will be upon section 241(a)(11), however, since the inequity is greatest when the alien is deported after he has broken many ties with his native country and adopted this land as his own.

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¹ Immigration and Nationality Act § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970) provides that:

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who . . . (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marijuana, any salt derivative or preparation of opium or coca leaves or isopecaine or any addiction-forming or addiction-sustaining opiate.

² Created by Congress, the Board of Immigration Appeals is a quasi-judicial body within the Department of Justice which adjudicates cases involving the immigration and nationality laws. It is comprised of a chairman and four other members appointed by the Attorney General and serving at his discretion. Three members at all times constitute a quorum of the Board, and except as modified or overruled by the Board or the Attorney General, decisions rendered by the Board are binding and serve as precedents in all proceedings involving the same issue or issues. See 8 C.F.R. § 3.1 (1977).

I. PRACTICAL REASONS AGAINST DEPORTATION FOR POSSESSION OF MARIJUANA

In light of the increasingly liberal attitude across the country toward marijuana possession, it is anomalous that the immigration laws still demand that an alien convicted of possession solely for personal use be deported. The mood of the country is strongly in favor of lighter sanctions for those convicted of possession of marijuana, and ten states have already decriminalized possession of small amounts for personal use.⁴ The National Institute of Drug Abuse (NIDA) has estimated that twenty-one percent of adult Americans or thirty-five million had tried marijuana by 1976 with eight percent or thirteen million smoking it regularly,⁵ and a Gallup poll taken in 1977 showed that twenty-four percent of the adult American population had tried marijuana at least once.⁶ The Harris poll indicates that approximately one-half of the country favors its decriminalization; higher NIDA estimates show that 86.3 percent of adult Americans favor no imprisonment for first offenders, with 3.8 percent holding no opinion and only 31.6 percent favoring some type of incarceration for

⁴ The following is an overview of state penalties for possession of marijuana: ALASKA STAT. § 17.12.110(e) (1975) provides a civil fine of \$100 for possession of any amount in private for personal use, and for possession of less than one ounce in public; CAL. HEALTH & SAFETY CODE § 11357(b) (West Supp. 1977) treats possession of one ounce or less as a misdemeanor punishable by \$100 fine; COLO. REV. STAT. § 12-22-412(a) (Supp. 1976) treats possession of not more than one ounce as a Class 2 petty offense and imposes a \$100 fine; ME. REV. STAT. tit. 17-A, § 1106 and tit. 22, § 2383 provide a civil fine of not more than \$200 for possession of a usable amount of marijuana not exceeding 1.5 ounces; MINN. STAT. ANN. § 152.15(5) (West Supp. 1978) treats possession of 1.5 ounces as a petty misdemeanor punishable by \$100 fine and possibility of participation in a drug education program for first offenders with increased penalties for second offenders; MISS. CODE ANN. § 41-29-139 (1972) states that conviction of first offenders for possession of one ounce or less is an offense punishable by fine of not less than \$100 nor more than \$250 with increased sanctions for repeat offenders; N.Y. PENAL LAW § 221.05 (McKinney Supp. 1978) treats possession of 25 grams or less by first offenders as a violation punishable by fine of \$100; N.C. GEN. STAT. § 90-95(d)(4) (Supp. 1977) treats possession of one ounce or less as a misdemeanor punishable by fine not exceeding \$100 with possible increased penalties for repeat offenders; OHIO REV. CODE ANN. § 2925.11 (Page Supp. 1977) treats amounts of less than 100 grams as constituting a minor misdemeanor punishable by \$100 fine; 1977 Or. Laws, ch. 745, § 15(4) (effective July, 1978) treats possession of less than one ounce as a violation punishable by a \$100 fine. All fines recounted here are the maximum allowed by statute and the term "decriminalized" is used loosely to describe those states which have reduced the penalty for possession to the status of fines. It is not intended to signify that all of these states consider possession of small amounts to be a civil and not criminal act, since some of the states have reduced the penalty while keeping the criminal label. The effect of such labeling, and the possible ramifications of the distinction between civil and criminal sanctions, is more fully explored in the text accompanying notes 71-79 *infra*.

South Dakota had decriminalized possession of one ounce or less in 1976 by terming it a petty offense punishable by civil fine, but legislation in 1977 increased the offense to a Class 2 misdemeanor punishable by 30 days imprisonment in a county jail or a \$100 fine, or both. S.D. COD. LAWS ANN. § 22-42-6 (Special Supp. 1977).

⁵ April 1976 survey presented in Nonmedical Use of Psychoactive Substances (NIDA Publication, Washington, D.C. 1976). Results were also reported in NATIONAL GOVERNORS' CONFERENCE CENTER FOR POLICY RESEARCH AND ANALYSIS, MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES, pt. I, at 13 (1977), and 123 CONG. REC. S13,432 (daily ed. Aug. 3, 1977).

⁶ Gallup poll of April 1-4 (1977), reported in 123 CONG. REC. S9030 (daily ed. June 7, 1977).
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repeat offenders.⁷ Organizations supporting decriminalization include the American Bar Association, American Medical Association, American Public Health Association, National Committee on Marijuana and Drug Abuse (Shafer Commission), and the National Council of Churches.⁸ In addition, many bills are pending in the Ninety-fifth Congress which are designed to effect this relief on the federal level.⁹

The lighter sanctions now urged in the state and federal legislatures have greatly de-emphasized the onus on possession of marijuana. Unfortunately for many aliens, lighter criminal penalties have also tended to lull the alien into pleading guilty rather than contesting the charge. At the present time, an alien is deportable even if the state considers the offense of possession of marijuana a misdemeanor,¹⁰ and unless the alien or his attorney is aware of the immigration consequences he may plead guilty because the penalty is less than the cost of contesting the issue in court. The alien may then realize his mistake upon receipt of an Immigration Service order to show cause why he should not be deported. At this point his plea cannot generally be withdrawn, since the case has passed

⁷ Harris poll results were reported in 122 CONG. REC. S1097 (daily ed. Feb. 17, 1976). NIDA poll results were reported in Nonmedical Use of Psychoactive Substances, *supra* note 5, at 114, and MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES, *supra* note 5, pt. I, at 35.

⁸ Survey reported in 40 CONSUMER REPORTS 265-66 (Apr. 1975), *updated in* Marijuana: The Facts (NORML newsletter, Jan. 1976).

⁹ Currently awaiting action are H.R. 432, H.R. 2997, H.R. 4736, H.R. 4737, and S. 601, which provide that private possession of one ounce or less of marijuana in a private or public place for use and not with intent to distribute, transfer, or sell is punishable only by a civil fine of not more than \$100, and that such acts "shall not constitute crimes against the United States and such person shall not be subject to arrest or suffer any disadvantage or disability except that specified in this section." President Carter endorsed the view presented in these bills in his August 2, 1977 message to Congress on Drug Abuse Policy. See 123 CONG. REC. E5075 (daily ed. Aug. 2, 1977). A more radical bill, H.R. 10055, would use a civil fine not only for possession of less than one ounce, but also for distribution of not more than one ounce of marijuana to any person if the distribution is not a transfer for value or sale. Presently the most advanced legislation for decriminalization is contained in S. 1437, the successor to controversial S. 1 which proposes to modernize the Federal Criminal Code. S. 1437 as of this date has passed in the Senate and is pending in the House, and provides that possession of 30 grams or less of marijuana is an infraction for which a person cannot be arrested, but only issued a summons. A fine of \$100 is assessed for possession of 10 grams or less, and a \$500 fine is levied for possession of 11 to 30 grams provided the offender was convicted twice before of an offense relating to marijuana under federal, state, or local law. Whether passage of S. 1437 will aid aliens on the theory that federal decriminalization indicates a changed congressional policy toward marijuana, and thus that aliens should not be deported for possession, is debatable. S. 1437 is a comprehensive revision of federal law, and has so far touched upon certain sections of the Immigration and Nationality Act relating to deportation without allowing relief to aliens convicted of possession of marijuana under section 241(a)(11).

Senator Cranston of California has dealt specifically with section 241(a)(11) in S. 158, which states that relief shall be granted to an alien who is deportable by reason of not more than one conviction for possession of marijuana or for distribution of a small amount of marijuana for no remuneration. In addition, H.R. 7667, introduced by Representatives Holtzman of New York and Dodd of Connecticut, goes a step further in providing that aliens are not excludable under section 212(a)(23) who are convicted of possession or of conspiring to possess or distributing marijuana for no remuneration; nor would they be deportable under section 241(a)(11) if they have been convicted of distributing or conspiring to distribute marijuana for no remuneration, or have been convicted of selling or conspiring to sell marijuana.

¹⁰ The Service has recently relaxed its policy of deporting all possessors regardless of

from the jurisdiction of the trial court and ignorance of the collateral consequences of the guilty plea is no bar to its acceptance.¹¹

II. HISTORICAL BACKGROUND

The legislative history clearly shows that Congress, in passing the precursors to section 241(a)(11), was concerned with the trafficking of drugs rather than possession for personal use. As originally introduced in 1930 the first restrictive measure, House Bill 3394,¹² included possessors and users on its list of deportable aliens,¹³ but bitter opposition arose to their inclusion before final passage of the bill and both "possession" and "use" were finally deleted.¹⁴

In 1940 an attempt to deport all violators of the Marijuana Tax Act

amount. Operating Instruction 242.1(a)(28) (issued April 27, 1977) allows the regional commissioner discretion to decide whether deportation proceedings are appropriate in cases in which lawful permanent resident aliens are convicted of possessing not more than 100 grams of marijuana:

Unless prior approval has been received from the regional commissioner, no order to show cause shall be issued in the case of an alien who is a lawful permanent resident of the United States and whose deportability is based on section 241(a)(11) as one having been convicted of possession, importation or distribution of marijuana for no remuneration: Provided further, that in the case of a conviction for distribution without remuneration, the alien has been convicted of only one such offense.

It should be noted that this relief is not mandatory, however, and that possession of small amounts of marijuana may still serve as the basis for deportation at the discretion of the Service. By the wording of the instruction, it is also not applicable to aliens not in lawful permanent resident status.

¹¹ See note 137 *infra*.

¹² H.R. 3394, 71st Cong., 2d Sess. (1930).

¹³ H.R. 3394, 71st Cong., 2d Sess. (1930) provided in part:

That any alien who . . . shall violate . . . any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, possession, use, sale, exchange, dispensing, giving away, transportation, importation or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in the manner provided in section 19 and 20 of the Act of February 5, 1917. . . .

¹⁴ The Act of February 18, 1931, ch. 224, 46 Stat. 1171 (repealed 1952) stated that: any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this act) who, after the enactment of this act, shall be convicted for violation of or conspiracy to violate any statute of the United States . . . taxing . . . the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of . . . marijuana . . . shall be taken into custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917. . . .

The floor discussion indicates that the possessor was of no interest to Congress:

Mr. O'Connor of New York. Reserving the right to object, the gentleman's amendment goes somewhat in the direction I had in mind. The criminal the gentleman is trying to get at is the distributor.

Mr. Fish. The dealer and peddler; yes.

Mr. O'Connor of New York. But there is still in the bill a matter which I object to, "possession."

Mr. Fish. But that would not make any difference unless the man is a dealer or peddler. That is excepted.

Mr. O'Connor of New York. But this point has not been covered. The bill reads "except an addict." I could imagine an alien child, not any addict, having this stuff in its possession, somewhat innocently, or not criminally guilty, and yet he could be deported. The gentleman does not want that.

Mr. Fish. I certainly do not.

of 1937,¹⁵ including possessors, was defeated. The initial wording of the legislation, the Alien Registration Act of 1940,¹⁶ had been amended to provide for deportation of any violators of the Act,¹⁷ but the wording of the statute as finally enacted was much milder in tone and did not make every conviction under the Act a ground for deportation.¹⁸ Shortly thereafter, the Board clarified the legislative intent of the Alien Registration Act with respect to possessors by taking note of the difference between the initial and final drafts of the bill, and determined that Congress had not intended to punish the alien convicted of possession under the deportation statute.¹⁹ The Board thought especially pertinent a Senate subcommittee hearing in which Senator Danaher adverted to the severity involved in making any violation of the Marijuana Tax Act a deportable offense.²⁰

This same wording, excluding possession as a ground of deportation, was preserved intact in the Immigration and Nationality Act of 1952. The only significant change was that drug addicts were made subject to deportation.²¹ Not until 1956 did Congress add language to the INA which made an alien's conviction for violation of a law relating to the illicit possession of "narcotic drugs" a ground for exclusion or depor-

Mr. O'Connor of New York. Why does the gentleman not leave out the possession and simply make it seller.

Mr. Fish. I am willing to strike out the word "possession."

Mr. Johnson of Washington. I wish the gentleman would do that. The entire House is unanimous on this. We want to get the big fellow.
72 CONG. REC. 12367 (1930). See also *Matter of V*, 1 I. & N. Dec. 62 (Bd. Imm. App. 1941) for most of this account.

¹⁵ Ch. 553, 50 Stat. 551 (repealed) provided in part: (a) Persons in general — It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by sec. 2590(a) to acquire or otherwise obtain any marijuana without having paid such tax.

¹⁶ Ch. 439, tit. II, § 21, 54 Stat. 673 (repealed).

¹⁷ The wording of the bill in this form was quoted in *In re V*-, 1 I. & N. Dec. 161, 163 (Bd. Imm. App. 1941). Deportation was imposed upon:

any alien, who at any time after entry, has been convicted of a violation of or conspiracy to violate any narcotics law of the United States or of any State, Territory, insular possession, or of the District of Columbia, or of a violation of the Marijuana Tax of 1937, or has been lawfully committed to a public or private institution as a habitual user of narcotic drugs.

¹⁸ Alien Registration Act of 1940, ch. 439, tit. II, § 21, 54 Stat. 673 (repealed).

¹⁹ *In re V*-, 1 I. & N. Dec. 160 (Bd. Imm. App. 1941).

²⁰ Senator Danaher. But granting that we include as a deportable offense a violation of a State law, are you going to do it, as you say in line 13, at any time after entry, and make it a more drastic deportable offense, for instance, than in the case of a fellow who is guilty of a highway robbery?

Mr. Shaughnessy. That is true, Senator Danaher. There has been considerable objection to it, because, like the discussion we had on Titles I and II, the man may have lived here for so long, and he would be deportable on his first offense . . .

Senator Danaher. In other words, let me rephrase it: some of the most serious felonies for which deportation may ensue require that they be committed within five years after entry, or deportation will not follow?

Mr. Shaughnessy. That is correct, Senator.

Senator Danaher. Well, that is outrageous.

The Alien Registration Bill: Hearings on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary, 76th Congress, 3d Session 33 (1940), cited in In re V-, 1 I. & N. Dec. 161, 163 (Bd. Imm. App. 1941).

²¹ Immigration and Nationality Act of 1952, ch. 477, tit. II, § 241(a)(11), 66 Stat.

tation.²² Even here, the scanty legislative history indicates that the intent of the House Ways and Means Committee was to eliminate trafficking as opposed to personal use.²³

After the 1956 amendments the courts proved reluctant to interpret the language of the statute broadly, and the Ninth Circuit in a pair of decisions, *Hoy v. Mendoza-Rivera*²⁴ and *Hoy v. Rojas-Gutierrez*,²⁵ upheld the aliens' contentions that marijuana was not included in the term "narcotic drugs" as it appeared in the amended statute. In response to these decisions, Congress passed the 1960 amendments bringing section 241(a)(11) to its modern form.²⁶

²² Act of July 18, 1956, ch. 629, tit. III, § 301(b), 70 Stat. 575 (amending Immigration and Nationality Act § 241(a)(11) (subsequently amended 1960)).

²³ The Committee concluded its report in the following words:

Drug addiction is not a disease. It is a symptom of mental or psychiatric disorder. Because contact with a drug is an essential prerequisite to addiction, the elimination of drug servility on the part of addicted persons can best be accomplished by the removal from society of the illicit trafficker. It is to this end that your committee has taken favorable action on H.R. 11619.

H.R. REP. NO. 2388, 83d Cong., 2d Sess., reprinted in [1956] U.S. CODE CONG. & AD. NEWS 3274, 3281.

²⁴ 267 F.2d 451 (9th Cir. 1959).

²⁵ 267 F.2d 490 (9th Cir. 1959).

²⁶ Act of July 14, 1960, Pub. L. No. 86-648, § 9, 74 Stat. 504 (amending Immigration and Nationality Act § 241(a)(11)). Legislative history presented in [1960] U.S. CODE CONG. & AD. NEWS 3134-35. It should be noted that although the legislative intent in 1960 was clearly to deport possessors, the major premises underlying Congress' decision to incorporate possession of marijuana into section 241(a)(11) have been substantially disproved. In the Senate Report accompanying the Act, the Judiciary Committee expressed fears that marijuana would prove to be a stepping-stone to harder drugs and spur youth on to more violent crimes. S. REP. NO. 1651, 86th Cong., 2d Sess., reprinted in [1960] U.S. CODE & AD. NEWS, 3124, 3135.

However, the Second Annual Report of the National Institute of Mental Health on Marijuana and Health stated that there is no evidence that the use of marijuana causes experimentation with other illicit drugs and that marijuana use does not appear to have a causal role in the commission of crimes. SECOND ANNUAL REPORT OF THE NATIONAL INSTITUTE OF MENTAL HEALTH ON MARIJUANA AND HEALTH (Feb. 11, 1972). The National Commission on Marijuana and Drug Abuse, an official body established by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, also came to similar conclusions. The Commission observed that the stepping-stone theory avoids the real issue and has no basis in fact, and that rather than inducing violent or aggressive behavior, marijuana actually inhibited the expression of aggressive impulses by pacifying the user. NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, FIRST REPORT: MARIJUANA: A SIGN OF MISUNDERSTANDING 71-72, 87-88 (1972). See the prepared statements of Lester Grinspoon, M.D., Associate Professor of Psychiatry, and James B. Bakalar, Lecturer in Law, Harvard Medical School, in *Decriminalization of Marijuana under Federal Law: Hearings Before the Select Committee on Narcotics Abuse and Control*, 95th Cong., 1st Sess. 371-73 (1977) for similar conclusions.

Although the National Institute of Drug Abuse now appears to be concerned with the effects of continuous hard use, an aspect which was not of importance to the Senate Judiciary Committee, two recent studies conducted by the New York Academy on Chronic Cannabis and the Center for Studies of Narcotics and Drug Abuse have indicated that chronic use of marijuana does not seem to be accompanied by serious consequences. Report of the New York Academy of Sciences Conference, reprinted in 122 CONG. REC. S2622 (daily ed. Mar. 2, 1976); Report of the Center for Studies of Narcotics and Drug Abuse of the National Institute of Mental Health, reprinted in 121 CONG. REC. H6495 (daily ed. July 9, 1975). In addition, a federally funded study of long term users (17.5 years average time of use) of extremely strong marijuana in Jamaica, which has proven to be the most influential albeit controversial project to date concerning the long term effects of heavy marijuana use, has shown no evidence of violence, psychosis, pov-

An alien is currently subject to deportation if he has been convicted at any time of a violation of law relating to the illicit possession of marijuana. The statute is retroactive in effect, in that deportability has been upheld for convictions occurring before possession of marijuana became a basis for deportation.²⁷ No distinctions are drawn between traffickers and possessors of small amounts,²⁸ and violators are not eligible for voluntary departure.²⁹ Once conviction for possession has occurred, neither governmental pardons nor court recommendations against deportation bar the Immigration Service from instituting deportation proceedings, although such measures are effective to stop deportation orders based on convictions for murder, rape, or other assorted crimes involving moral turpitude.³⁰ It has been suggested that Congress has receded from its earlier harsh position with the adoption in 1970 of 21 U.S.C. § 844 which reduces the penalty for simple possession from a mandatory term of at least five and up to twenty years to a maximum term of one year for possession with a possibility of expungement for first offenders. The cases which have touched upon the legislative history of section 844, however, are in disagreement.³¹ On the whole the avenues of relief are small, and it has been aptly stated that once the machinery of the law has been set in motion, administrative and judicial authorities are powerless to stop it, however much they may wish.³²

erty, mental deterioration, apathy, or indolence. V. RUBIN & L. COMITAS, *GANJA IN JAMAICA* (The Hague, Mouton & Co., 1975).

²⁷ *Marcello v. Bonds*, 349 U.S. 302, *rehearing denied*, 350 U.S. 856 (1955); *Rassano v. INS*, 377 F.2d 971 (7th Cir. 1967); *Gardos v. INS*, 324 F.2d 179 (2d Cir. 1963).

²⁸ *In re Amiet*, 14 I. & N. Dec. 146 (Bd. Imm. App. 1972).

²⁹ Immigration and Nationality Act § 244 (e), 8 U.S.C. 1254(e) (1970) states:

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

See also In re Chang, Interim Dec. No. 2550 (Bd. Imm. App., Jan. 18, 1977).

³⁰ Immigration and Nationality Act § 241 (b), 8 U.S.C. § 1251(b)(1970).

It should be noted, however, that although this section expressly denies relief through executive pardon or recommendation of the sentencing judge to violators of section 241(a)(11), the legislative intent of that section as applied to marijuana is unclear since section 241(b) was passed in 1956, and because prior to 1960 section 241(a)(11) did not apply to offenses involving marijuana. *See text at notes 24-26 supra*. While the inclusion of marijuana convictions in 1960 did reflect a judgment that such offenses would be a basis for deportation, the legislative history of that amendment does not suggest a specific congressional intent that expungement of a marijuana conviction should be completely disregarded for deportation purposes. *See S. REP. No. 1651, 86th Cong., 2d Sess., reprinted in [1960] U.S. CODE CONG. & AD. NEWS 3124.*

³¹ *See In re Andrade*, 14 I. & N. Dec. 651 (Bd. Imm. App. 1974), in which the Solicitor General expressed his view of a changed congressional policy in a letter to the Immigration Service. *But see Kolios v. INS*, 532 F.2d 786 (1st Cir. 1976), *cert. denied*, 429 U.S. 884 (1976), in which the court stated that it would not expand the significance of the 1970 amendments in light of their specificity.

³² *Oliver v. INS*, 517 F.2d 426 (2d Cir. 1975).

III. STATUTORY REQUIREMENTS FOR DEPORTATION

The most productive method available to the alien to obviate the harshness of section 241(a)(11) is to avoid the wording of the section. Since the 1960 amendments, successful attacks on the statutory meaning have centered around the requirements of illicitness, possession or violation of any law or regulation relating to possession, and conviction. All three requisites must be met before deportation proceedings can take effect. One overall factor favoring the alien is that section 241(a)(11) has been strictly construed by the courts on the rationale that deportation is a harsh penalty — the equivalent of banishment.³³

A. *Illicitness*

The issue of illicitness was discussed in *Lennon v. INS*.³⁴ Ex-Beatle John Lennon had been convicted of possession of marijuana in England. He later entered the United States on a temporary non-immigrant visa, and attempted to adjust his status to that of a permanent resident alien.³⁵ The Service denied his application under section 212(a)(23), the exclusionary counterpart to section 241(a)(11). In the Board proceeding,³⁶ Lennon was found to be deportable based on his excludibility under section 212(a)(23), but the Second Circuit vacated the order on appeal, pointing out that "illicitness" implies guilty knowledge, and since British law considers guilty knowledge irrelevant in possession cases the conviction could not stand as a basis for denying adjustment of status.³⁷ The court based its opinion on the logic that if "illicit" merely meant "unlawful" the use of the term would be redundant, noting that harsh sanctions should not be used where moral culpability is lacking.³⁸

The Board had also recognized the validity of the "illicitness" argu-

³³ *Costello v. INS*, 376 U.S. 120 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Haller v. Esperdy*, 397 F.2d 211 (2d Cir. 1968); *Brancato v. Lehman*, 239 F.2d 663 (6th Cir. 1956).

³⁴ 527 F.2d 187 (2d Cir. 1975). See also Annot., 32 A.L.R. FED. 521 (1977).

³⁵ Adjustment of status may be granted under section 245, 8 U.S.C. § 1255 (1970), as amended by Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-541, 90 Stat. 2703, to change the legal posture of an alien already in the country from non-immigrant to permanent resident at the discretion of the Attorney General. The requirements for eligibility are that the alien must have been inspected, and admitted or paroled into the United States; that he must be eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and that an immigrant visa is immediately available to him at the time that his visa is filed. Excludable classes under this section are alien crewmen, aliens admitted in transit without a visa under section 212(d)(4)(c), and under the 1976 amendments aliens other than immediate relatives as defined in section 201(b) who continue in or accept unauthorized employment prior to filing an application for adjustment of status. However, note that nothing precludes these classes from going abroad and reapplying for a visa there. Under the 1976 amendments, the ban against adjustment of status for natives of the Western Hemisphere was removed.

³⁶ *In re Lennon*, Interim. Dec. No. 2304 (Bd. Imm. App., July 10, 1974).

³⁷ *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975). See also Annot., 32 A.L.R. FED. 538 (1977).

³⁸ *Lennon v. INS*, 527 F.2d 187, 193 (2d Cir. 1975). See also Annot., 32 A.L.R. FED. 538 (1977).

ment, and based its finding of Lennon's excludability on the belief that a person entirely unaware that he possessed an illicit substance would not have been convicted in an English court.³⁹ Since *In re Lennon*, the Board has rejected overtures from the Service to reconsider its position on this issue,⁴⁰ and in 1977 expressly adopted the holding of *Lennon v. INS* as a rule of general applicability.⁴¹

The Lennon case, however, should not be looked upon as the key to invalidation of all foreign convictions as a basis for exclusion or deportation. It did not touch upon questions of foreign convictions per se, but only upon foreign convictions based on laws which do not require the element of guilty knowledge. There is clear authority to the effect that foreign convictions may be used as grounds for deportation purposes.⁴² Placing the *Lennon* case in perspective, it can be seen that it creates a narrow exception in the interpretation of the word "illicit" when the foreign statute requires no mens rea for conviction.⁴³ Within the scope of *Lennon*, then, the major argument will revolve upon whether or not the foreign law falls in this category.

B. Possession or Violation of Any Law or Regulation Relating to Possession

The second requirement of section 241(a)(11) is that, with regard to marijuana, there must at least exist an offense for either possession or violation of any law or regulation relating to possession. Five major rulings have clarified the scope of these words.

In *In re Amiet*,⁴⁴ an alien convicted of unlawful possession of marijuana for personal use in 1970 argued that the deportation statute applied only to convictions based upon possession for trafficking purposes. Rejecting Amiet's claims, the Board pointed out that the legislative history of

³⁹ *In re Lennon*, Interim Dec. No. 2304 (Bd. Imm. App. July 10, 1974).

⁴⁰ *In re Pasquini*, Interim Dec. No. 2496 (Bd. Imm. App., June 9, 1976), *aff'd*, 557 F.2d 536 (5th Cir. 1977); *In re Awadh*, Interim Dec. No. 2519 (Bd. Imm. App., Aug. 23, 1976).

⁴¹ *In re Wolf*, Interim Dec. No. 2561 (Bd. Imm. App., Mar. 2, 1977).

⁴² See *In re Gardos*, 10 I. & N. Dec. 261 (Bd. Imm. App. 1963), *aff'd*, 324 F.2d 179 (2d Cir. 1963); *In re Romadia-Herros*, 11 I. & N. Dec. 772 (Bd. Imm. App. 1966); *Brice v. Pickett*, 515 F.2d 153 (9th Cir. 1975). See also *In re Pasquini*, Interim Dec. No. 2496 (Bd. Imm. App., June 9, 1976), in which the Board upheld a deportation order based upon a conviction for possession of marijuana in the Bahamas. Distinguishing *In re Lennon*, the Board noted that under Bahamaian law guilty knowledge is essential to conviction, since the statute, chapter 223, section 25(5) of the Statute Law of the Bahamas, states that a person is guilty if the drug is found in his possession or kept in a place other than a place prescribed for storage or keeping of such drug "unless he can prove the same was deposited there without his knowledge or consent."

⁴³ In *In re Awadh*, Interim Dec. No. 2519 (Bd. Imm. App., Aug. 23, 1976) the Board further defined the limits of its stance in *In re Lennon*, holding that when the respondent was convicted on a guilty plea of possession of marijuana in violation of the Canadian Narcotic Control Act, CAN. REV. STAT., ch. N-2, § 3(1) (1970), he was amenable to deportation since the case law interpreting the Canadian Narcotic Control Act indicated that scienter or guilty knowledge is required for conviction. The case was thus distinguished from *In re Lennon*, although the wording of both statutes was essentially the same.

⁴⁴ *In re Amiet*, Interim Dec. No. 2461 (Bd. Imm. App. 1972).

the 1960 amendments proved otherwise, and that a reading as urged by Amiet which equated illicit possession with trafficking would render the word "traffic" meaningless.⁴⁵

Castaneda de Esper v. INS,⁴⁶ *Varga v. Rosenberg*,⁴⁷ and *In re Schunck*,⁴⁸ on the other hand, represent attempts to narrow the scope of deportable offenses. In *Esper*, the Sixth Circuit held that an alien was not deportable upon conviction of misprison of felony — concealment of information relating to a conspiracy to possess narcotics — because misprison of felony was not a crime "relating to the illicit possession of or traffic in narcotic drugs." The Board has subsequently expressed concurrence in this view by stating that the crime of concealment with respect to felony possession of marijuana with intent to distribute is not a deportable offense because concealment is a criminal offense separate and distinct from the crime concealed.⁴⁹

In *Varga*, the alien had been convicted under section 11721 of the California Health and Safety Code for using or being under the influence of narcotics. The court relied on a state court case for the proposition that another person could administer narcotics to the user without the user ever having been in possession. Since Congress was more concerned with traffickers than with users, and since *Varga* at the point of use was hardly in a position to traffic in the drug or to have possession which would give him such dominion and control as to include the power of disposition, the court concluded that he could not be deported under section 241 (a)(11).⁵⁰ The Service has since acquiesced in the *Varga* result,⁵¹ thereby effectively overruling prior Board opinions to the contrary.⁵² In the same vein as *Varga* and *Esper*, the Board has ruled in *In re Schunck*⁵³ that an alien is not subject to deportation when he is merely caught in the same room in which marijuana is being used.

This same leniency has not been adopted when a conviction for attempted possession is involved,⁵⁴ however, and in *Bronsztejn v. INS*⁵⁵ the Second Circuit reluctantly concluded that since the INA requires only that a conviction "relate" to the illicit possession of marijuana, the court was bound by the clear language of the statute and could not classify the crime of attempted possession as some sort of general offense.⁵⁶ The

⁴⁵ *Id.* at 147.

⁴⁶ 557 F.2d 79 (6th Cir. 1977).

⁴⁷ 237 F. Supp. 282 (S.D. Cal. 1964).

⁴⁸ 14 I. & N. Dec. 101 (Bd. Imm. App. 1972).

⁴⁹ *In re Velasco*, Interim Dec. No. 2601 (Bd. Imm. App., July 25, 1977).

⁵⁰ *Varga v. Rosenberg*, 237 F. Supp. at 284, 285.

⁵¹ *In re Sum*, 13 I. & N. Dec. 569 (Bd. App. 1970).

⁵² The Board had held to the contrary in *In re Fong*, 10 I. & N. Dec. 616 (Bd. Imm. App. 1964), and *In re H—U—*, 7 I. & N. Dec. 533 (Bd. Imm. App. 1957).

⁵³ *In re Schunck*, 14 I. & N. Dec. 101 (Bd. Imm. App. 1972).

⁵⁴ *Bronsztejn v. INS*, 526 F.2d 1290 (2d Cir. 1975); *United States v. Rosenson*, 291 F. Supp. 874 (E.D. La. 1968), *aff'd*, 417 F.2d 629 (5th Cir. 1969), *cert. denied*, 397 U.S. 962 (1969); *In re G—*, 6 I. & N. Dec. 353 (Bd. Imm. App. 1954).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1293.

court distinguished *Varga* by pointing out that *Varga's* conviction was based upon use rather than attempted possession, and that the latter offense is sufficiently related to the power of disposal to come within the statute.⁵⁷

The requirement that a narcotics conviction must at least involve possession or violation of any law or regulation relating to possession permits the practitioner with sufficient bargaining position to plead his client to a lesser, nondeportable offense.⁵⁸ However, the practitioner should carefully evaluate the state laws to avoid being caught in a morass of incorrect procedure, as occurred in *In re Tucker*.⁵⁹ In *Tucker* the California Superior Court granted the defendant a release pursuant to the state expungement statute, section 1203.4 of the California Penal Code,⁶⁰ set aside the guilty verdict, and allowed him to plead guilty to a general offense. The Board held that this procedure was ineffective to bar deportation. By its very terms, section 1203.4 had empowered the court to expunge the conviction from the record only for certain limited purposes, and in the Board's view could not be used to confer upon the court the jurisdiction to substitute a plea of guilty for another offense in the same code.⁶¹ The Board concluded that the correct motion should have been made under section 1181(6) of the California Penal Code, which pro-

⁵⁷ *Id.*

⁵⁸ It should be noted, however, that the practitioner in California can no longer plead his client down to charges of being under the influence of marijuana or being at a site where marijuana is being used. These offenses were eradicated in California by the passage of Senate Bill 95 in 1975, which also decriminalized the use of small amounts of marijuana. See also CAL. HEALTH & SAFETY CODE §§ 11365, 11550 (West Supp. 1977). However, it is possible that other measures, including the disorderly conduct charge, may be substituted in California. In other jurisdictions which have preserved these offenses in some form for cases in which marijuana is involved, they can be used as lesser offenses to prevent deportation.

⁵⁹ Interim Dec. No. 2394 (Bd. Imm. App., June 10, 1975).

⁶⁰ CAL. PENAL CODE § 1203.4 (West Supp. 1977) provides:

Discharged probationer; change of plea or vacation of verdict; dismissal of charge; release from penalties and disabilities; certificate of rehabilitation and pardon; application; pleading prior conviction in prosecution for subsequent offenses

(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant shall be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; . . . the court shall thereupon dismiss the accusations of information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted. The probationer shall be informed, in his probation papers, of this right and privilege and his right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusations or information dismissed.

vides for modification by vacating a finding of guilt and reducing the charge to a lesser included offense without a new trial.⁶²

C. Conviction

In addition to illicitness and possession or any offense relating to possession, section 241(a)(11) requires a conviction. Prior to 1940 sentencing was also needed,⁶³ but the words "and sentenced" were eliminated in that year.⁶⁴ The Board and courts in dealing with the conviction aspect have most frequently focused upon the following questions: what constitutes a conviction for deportation purposes, when does a conviction become final, and what is the effect of an expungement on the conviction.⁶⁵ Each of these aspects of "conviction" will be examined in detail in the following discussion.

What Constitutes a Conviction?

It is unquestioned that a conviction is triggered by a finding of guilt or by a guilty plea.⁶⁶ It has also been unanimously upheld that a *nolo contendere* plea is sufficient to establish deportability, though aliens have objected on the ground that since a guilty judgment following such a plea cannot be used in a subsequent unrelated civil proceeding, it should not be used in a deportation proceeding.⁶⁷ This argument has been rejected on the theory that a conviction may be noticed for deportation purposes since the existence of the conviction, not the facts underlying it, is the only relevant issue.⁶⁸

Conviction of a misdemeanor as well as a felony relating to possession has been deemed sufficient for deportation,⁶⁹ the Board in *Matter of*

⁶² *Id.* at 3. The Board also recognized the appropriateness of a writ of error coram nobis to withdraw the guilty plea following the expungement procedure when its requirements for eligibility are satisfied. The current use of the writ is more fully discussed in the text at notes 134-40 *infra*.

⁶³ Act of Feb. 18, 1931, ch. 99, 46 Stat. 1171 (repealed).

⁶⁴ The Alien Registration Act of 1940, ch. 439, § 21, 54 Stat. 673 (repealed). The legislative history of the 1940 amendments does not disclose any specific discussion as to the reasons behind the change from "convicted and sentenced" to "convicted." See *The Alien Registration Bill: Hearings Before a Subcommittee of the Senate Judiciary Committee*, 76th Cong., 3d Sess. (1940); H. R. REP. NO. 1976 (1940), reprinted in 86 CONG. REC. 8340, 9029 (1940). But see *Arellano-Flores v. Hoy*, 262 F.2d 667 (9th Cir. 1958), in which the Ninth Circuit decided merely on the basis of the changed statutory language that only conviction and not sentencing is required.

⁶⁵ See Annot., 26 A.L.R. FED. 709 (1976) for discussion of this area.

⁶⁶ The Ninth Circuit added in *Buchowiecki-Kortkiewica v. INS*, 455 F.2d 972 (9th Cir. 1972) that a congressional classification permitting an alien's plea of guilty to possession of marijuana to be the basis of deportation is not without rational basis.

⁶⁷ See *Ruis-Rubio v. INS*, 380 F.2d 29 (9th Cir. 1967), cert. denied, 389 U.S. 944; *Qureshi v. INS*, 519 F.2d 1174 (5th Cir. 1975); *In re Fortis*, 14 I. & N. Dec. 576 (Bd. Imm. App. 1974); *Chu v. Cornell*, 247 F.2d 929 (9th Cir. 1957), cert. denied, 355 U.S. 892; *In re W-*, 5 I. & N. Dec. 759 (Bd. Imm. App. 1954).

⁶⁸ See cases cited in note 67 *supra*.

⁶⁹ *In re Bronshtein*, Interim Dec. No. 2376 (Bd. Imm. App., Nov. 26, 1974), aff'd, 526 F.2d 1290 (2d Cir. 1975); *In re Varagianis*, Interim Dec. No. 2537 (Bd. Imm. App., Oct. 4, 1976); *People v. Superior Court (Giron)*, 114 Cal. Rept. 596, 526 P.2d 636 (1974).

*Bronsztein*⁷⁰ stating that under the very terms of section 241(a)(11), no distinction is made between conviction of a felony and conviction of a misdemeanor. However, this does not cover the situation presented in states which have decriminalized possession of marijuana, and have made the offense punishable merely by fine. The issue as yet unresolved in these states is whether a conviction can exist without the onus of imprisonment or the labelling of the offense at least a misdemeanor. The case law is inconclusive, and the INS has shown reluctance to litigate this point by electing not to pursue those cases in which only small amounts of marijuana are at stake.⁷¹

In reply to this writer's query whether a conviction lies in states like Oregon in which there is no arrest and the penalty is the equivalent of a traffic ticket, the General Counsel of the Immigration Service suggested that *In re McDonald & Brewster*⁷² be examined in determining the issue.⁷³ In that case, the Board ruled that two aliens who possessed six marijuana cigarettes when they attempted to enter the United States were not excludable under section 212(a)(23) although one of them paid a fine in mitigated forfeiture under 19 U.S.C. § 1595(a), since this was a civil sanction and not a criminal conviction.⁷⁴ The Board noted that the criminal penalties for importation of marijuana are set forth in 21 U.S.C. § 960(a) and (b).⁷⁵ In view of *McDonald & Brewster*, it would appear that in states in which possession of marijuana involves only civil sanctions, no

⁷⁰ Interim Dec. No. 2376 (Bd. Imm. App., Nov. 26, 1974).

⁷¹ See Operating Instructions 242.1(a)(28), *supra* note 10. However, the fact that the Service does not energetically pursue aliens adjudged guilty of possession of small amounts does not moot further discussion of this issue, since the Service's policy is purely elective and regional commissioners retain the option to approve deportation. Neither does the probable non-forwarding of many records to the Service in decriminalized states because of a lack of institutionalization moot the issue, since the Service is not solely dependent upon the reporting practices of the states as its source of information. But a problem which the Service may encounter in obtaining records in decriminalized states after somehow obtaining news of the adjudication is that the record-keeping procedure for possession may provide for no records or for mandatory destruction of such records after a period of time. Thus, it is possible that, as in a case in which the court seals the record, the Service will be advised by state authorities that no record of conviction exists. See *In re Lima*, Interim Dec. No. 2490 (Bd. Imm. App. Apr. 16, 1976). The full effect of a state's so advising, however, was not totally resolved in *In re Lima*, since the case was decided on other grounds.

⁷² Interim Dec. No. 2353 (Bd. Imm. App., Mar. 13, 1975).

⁷³ Letter of reply from Sam Bernsen, General Counsel, on file at Cleveland State University, Cleveland-Marshall College of Law Library.

⁷⁴ 19 U.S.C. § 1595(a) (1970) provides:

Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in . . . or subsequent transport of any article which is being or has been introduced or attempted to be introduced into the U.S. contrary to law . . . shall be seized and forfeited together with its tackle, apparel, furniture, harness or equipment.

⁷⁵ The Board rejected the government's theory that the defendants were also excludable under § 212(a)(27) as aliens seeking to enter the country principally or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States. The Board concluded that while importation for personal use might be prohibited by law, it was not an activity inimical to the internal security of the country.

conviction within the meaning of the deportation law can exist.⁷⁶ This situation is currently manifested in the statutes of Alaska, Maine, New York, and Oregon. Both Alaska and Maine utilize a "civil" sanction, while New York and Oregon employ the noncriminal "violation."⁷⁷ The practitioner, however, should be wary of relying too much on this interpretation. It is not altogether clear whether the Board's decision in *McDonald & Brewster* was based upon the fact that it was dealing with federal and not state law, in which case the government's objection that state laws interfere in a federal field is not present,⁷⁸ or whether the Board decided that no civil sanctions, federal or state, can serve as the basis for deportation. Only further decisions will determine the parameters of the ruling, but the general tone of *McDonald & Brewster* indicates the dominance of the latter interpretation.⁷⁹

⁷⁶ For a general background of the use of the civil sanction in marijuana reform legislation, see MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES, *supra* note 5 at pt. II, pp. 72-73. See also *Decriminalization of Marijuana under Federal Law: Hearings Before the Select Committee on Narcotics Abuse and Control*, 95th Cong., 1st Sess. 13, 62-63 (1977).

⁷⁷ ALASKA STAT. § 17.12.110(e)(1975) declares that possession of all amounts for private use not in a public place is punishable by a "civil" fine not to exceed \$100. ME. REV. STAT. tit. 17-A, § 1106 and tit. 22, § 2383 provide that possession of a usable amount but not more than 1.5 ounces is a "civil violation" for which a forfeiture of not more than \$200 may be adjudged. N.Y. PENAL LAW § 221.05 (McKinney Supp. 1978) and 1977 Or. Laws, ch. 745, § 15(4) (effective July, 1978) use the term "violation" to describe possession of small amounts. Violations are not criminal in either state; the term violation is generally used to describe acts such as vehicle offenses, parking tickets, and violations of construction regulations. In Oregon, the term is expressly defined as a civil penalty under section 161.565 of the new law. In the preamble to the new law in effect in New York, the legislature stated that "arrests, criminal prosecutions and criminal penalties are inappropriate for people who possess small quantities of marijuana for personal use."

The National Governors' Conference Center for Policy Research and Analysis has listed Alaska, Maine, Oregon, and South Dakota as the only states which have removed the criminal label. See MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES, *supra* note 5, pt. I at 111. However, it is apparent that this listing was compiled before the recent changes in law in South Dakota, New York, Mississippi, and North Carolina since the new penalty structure of these states is not reflected in the work. *Id.* at 98-104. South Dakota can no longer be listed among the decriminalized states, however, since a possibility of imprisonment for possession is currently in effect. S. D. COD. LAWS ANN. §§ 22-42-6 and 22-6-2 (Special Supp. 1977). Neither North Carolina nor Mississippi can be considered to employ only civil sanctions. North Carolina considers possession of small amounts a misdemeanor, N.C. GEN. STAT. § 90-95(d)(4) (Supp. 1977), while Mississippi terms it an "offense," MISS. CODE ANN. § 41-29-139 (1972), which is defined under the code as meaning any violation of law liable to punishment by criminal prosecution, *id.* § 1-3-37.

⁷⁸ The government has successfully contended that immigration laws should be controlled by federal criteria and not state laws in order to avoid the vagaries of differing state statutes. However, it has been an equally well-maintained proposition that a conviction under state law is required in order to set the federal deportation process in motion. See note 93 *infra*. It is debatable whether these two divergent positions come in conflict in cases like *McDonald & Brewster* since federal and not state laws were at issue, and a narrow interpretation would confine the case to its facts.

⁷⁹ Looking ahead, if this interpretation is accepted and a civil sanction is not sufficient to deport, the issue may then revolve around the definition of what is "civil." In addition to the four states mentioned in the above discussion which have abandoned the criminal label, see note 77 *supra*, the other states which have decriminalized possession of varied amounts of marijuana have given different terms to the offense while meting out similar punishment. The National Organization for the Reform of Marijuana Laws (NORML)

When Does a Conviction Become Final?

Although the requisite substantiveness of the word "conviction" may be fulfilled, the conviction will not prove sufficient for deportation unless the element of finality is present. The Seventh Circuit pointed out the need for finality in *Will v. INS*:⁸⁰

The parties have not cited, nor have we found, anything of significance in the legislative history of the Act casting light on the precise concept Congress sought to embody by the use of the term "convicted" in Section 241(a)(11). However, it appears clear from the Supreme Court's decision in [*Pino v. Landon*] and from past administrative interpretation that the Section contemplates a conviction which has attained a substantial degree of finality.⁸¹

In *Pino v. Landon*, the Supreme Court had held in a per curiam decision that finality was not present when an alien was convicted and, after being placed on probation for one year under a special Massachusetts procedure, had his sentence revoked and the case placed on file. The "on file" status meant that the case remained on the records of the court, and could theoretically be recalled and sentence imposed after a subsequent offense. The alien had argued before the First Circuit that, in that

designates a higher percentage of "civil" states than these four. It cannot be said that NORML's statistics are wrong, since there is currently no bright line between civil and criminal sanctions.

The National Governors' Conference Center for Policy Research and Analysis has recognized this fact in *MARIJUANA: A STUDY OF STATE POLICIES AND PENALTIES*, *supra* note 5, pt. II at 74, and recommends a functional rather than labelling approach by observing whether important factors such as incarceration, custody, or a record exist. Using this approach, it can be seen that Alaska, Maine, and Oregon are free from any of these measures. New York provides for increased punishment of repeat offenders within a three year period, but it is highly debatable whether the measure is enforceable, the charge is non-criminal in character and one charged under the section would not be fingerprinted or photographed, with the result that there would be no record of a conviction at the Division of Criminal Justice Services, the state's central repository of criminal records. See Practice Commentary to McKinney's Consolidated Laws of New York, Penal Law § 221.05.

Among the other decriminalized states, only North Carolina and certain portions of Ohio have yet to implement citation procedures in place of full custody arrest, only North Carolina has not provided some form of relief from the stigma of a permanent conviction record, and only North Carolina, Minnesota, and Mississippi allow a possibility of incarceration for repeat offenders. See note 4 *supra*. It is clear that the similarities in treatment among the decriminalized states outweigh the differences, and an effective argument could therefore be raised that possession of small amounts in most of the decriminalized states is only a civil offense.

Furthermore, if a civil sanction is not sufficient to deport, it can be argued in states which have not yet loosened their penalty structures to the point of decriminalization that selective deportation, attributable solely to the state in which the alien is tried, offends the guarantees of equal protection. Doubtlessly, this threat of lack of uniformity was of concern to the Service in the promulgation of Operating Instruction 242.1(a)(28), which restricts the prosecution of deportations in minor marijuana-possession cases. See note 10 *supra*.

⁸⁰ 447 F.2d 529 (7th Cir. 1971).

⁸¹ 447 F.2d at 531.

event, he could appeal from the sentence and secure a trial de novo in the Massachusetts Superior Court.

Following the lead of the Supreme Court in *Pino*, the Board has found no finality when the imposition of sentence by virtue of state law is postponed from day to day and term to term until further order of the court.⁸³ This is in contrast to situations in which the sentence is suspended either by the passing of sentence and the suspension of its execution, or by a suspension of the imposition of sentence through probation.⁸⁴

Even in situations in which sentence has not been suspended until further order of the court, the finality of conviction can at least be postponed through the path of direct appeal. It was firmly established by the Seventh Circuit in *Will*⁸⁵ that so long as a direct appeal is pending, it is sufficient to negate the finality of conviction regardless of the extremely questionable likelihood of success on appeal.⁸⁶ However, the court did draw distinct boundaries on what would qualify as a direct appeal. A blurring of the term would substantially undermine the process of deportation for conviction, since the ingenious deportee could by a succession of post-conviction proceedings postpone the finality of judgment. Therefore, a motion in arrest of judgment was designated a direct appeal, while a post-conviction petition and writ of error coram nobis were seen as attacks of a collateral nature which would not affect the finality of the conviction.

The Sixth Circuit has taken the same position in *Aguilera-Enriquez v. INS*⁸⁷ by stating that not only a conviction but also a sentence and exhaustion of procedures for direct appeal are necessary before the requirement of finality is met.⁸⁸ The circuit court found finality despite the alien's argument that his motion to withdraw a guilty plea under Rule 32(d) of the Federal Rules of Criminal Procedure was in the nature of a direct appeal. The court reasoned that a guilty plea waives objection to the government's pre-trial conduct, as well as the right to direct appeal, and draws the final curtain on a criminal proceeding.⁸⁹ The court added that before sentencing under Rule 32(d) a motion to withdraw a guilty

⁸³ *In re Johnson*, 11 I. & N. Dec. 401 (Bd. Imm. App. 1965); *In re O—*, 7 I. & N. Dec. 539 (Bd. Imm. App. 1957); *In re J—*, 7 I. & N. Dec. 580 (Bd. Imm. App. 1957).

⁸⁴ *In re Johnson*, 11 I. & N. Dec. 401, 402 (Bd. Imm. App. 1965). The weight of case law states that an order of probation is conclusive evidence that there has been a conviction for at least some state purpose. *Velez-Lozano v. INS*, 463 F.2d 1305 (D.C. Cir. 1972); *Gonzalez de Lara v. United States*, 439 F.2d 1316 (5th Cir. 1971); *Arellano-Flores v. Hoy*, 262 F.2d 667 (9th Cir. 1958), *cert. denied*, 362 U.S. 921 (1959); *In re R— R—*, 7 I. & N. Dec. 478 (Bd. Imm. App. 1957). The Ninth Circuit in *Arellano-Flores v. Hoy* has reasoned that the change in wording from "convicted and sentenced" to "convicted" in 1940 indicates congressional intent that only conviction and not sentencing is required for conviction, and therefore an order of probation rather than incarceration would not afford relief to the deportee.

⁸⁵ *Will v. INS*, 477 F.2d 529 (7th Cir. 1971).

⁸⁶ *Id.* at 533.

⁸⁷ 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

⁸⁸ 516 F.2d at 570.

⁸⁹ *Id.* at 571.

plea can be heard before the conviction is entered, but once sentencing is complete the conviction is final for deportation purposes.⁹⁰

The finality requirement has even reached the area of foreign convictions. In *Marino v. INS*,⁹¹ the Second Circuit held that finality was not present when an Italian tribunal found that the crime had been extinguished by Presidential amnesty and refused to hear the alien's appeal. The alien had not accepted the amnesty, but was precluded from appealing the decision against his will. The court was of the opinion that had Marino accepted the amnesty, the acceptance would have operated as a waiver of his right to direct appellate review.⁹²

What Is the Effect of Expungement on the Conviction?

Relief from deportation can currently be sought under either state or federal expungement statutes, depending upon whether the alien is under state or federal charges. State acts have consistently been the source of controversy in deportation proceedings because of conflicting policies in this area of immigration law. In the interests of uniformity, the government has attempted to do away with the vagaries of state law. However, it has consistently been recognized that the state must consider that a conviction exists for some purpose before the alien is deportable.⁹³ Prior to *In re A-F*,⁹⁴ the Board had held that aliens were not deportable whose convictions had been expunged by the state, on the theory that the state through this procedure was serving notice that it did not consider that a conviction existed for any purpose.⁹⁵ But in *In re A-F*, the Attorney General declared that he did not believe that the term "convicted" could be regarded as flexible enough to permit an alien to take advantage of a technical expungement, which was the product of a state procedure in which the merits of the case and its validity had no place.⁹⁶ The Ninth Circuit concurred that with this assessment in *Garcia-Gonzalez v. INS*,⁹⁷ and subsequent decisions have generally followed suit.⁹⁸

⁹⁰ *Id.* This case illustrates the prevalent concept that suspension of sentence and probation do not prevent deportation. Here the alien pleaded guilty to possession of cocaine, receiving a suspended sentence and probation. The court disallowed his motion for withdrawal of plea on grounds that sentencing had been completed and the conviction was final.

⁹¹ 537 F.2d 686 (2d Cir. 1976).

⁹² 537 F.2d at 692.

⁹³ *In re Johnson*, 11 I. & N. Dec. 401 (Bd. Imm. App. 1965); *In re Pikkarainen*, 10 I. & N. Dec. 401 (Bd. Imm. App. 1963); *In re L—R—*, 8 I. & N. Dec. 269 (Bd. Imm. App. 1959); *In re O—*, 7 I. & N. Dec. 539 (Bd. Imm. App. 1957); *In re J—*, 7 I. & N. Dec. 580 (Bd. Imm. App. 1957).

⁹⁴ 8 I. & N. Dec. 429 (Bd. Imm. App. 1959).

⁹⁵ *In re D—*, 7 I. & N. Dec. 670 (Bd. Imm. App. 1958); *In re S—R—*, 7 I. & N. Dec. 495 (Bd. Imm. App. 1957); *In re H—*, 6 I. & N. Dec. 619 (Bd. Imm. App. 1955); *In re O—T—*, 4 I. & N. Dec. 265 (Bd. Imm. App. 1951).

⁹⁶ 8 I. & N. Dec. at 446.

⁹⁷ 344 F.2d 804 (9th Cir. 1965), *cert. denied*, 382 U.S. 840 (1965).

⁹⁸ *Kolios v. INS*, 532 F.2d, 786 (1st Cir. 1976) *cert. denied*, 429 U.S. 884 (1976); *Tsimbidy-Rochu v. INS*, 414 F.2d 797 (9th Cir. 1969); *Cruz-Martinez v. INS*, 404 F.2d 1198 (9th Cir. 1968), *cert. denied*, 394 U.S. 955 (1969); *Brownrigg v. INS*, 356 F.2d 877

There are indications that a new trend is developing, however. Both the Second Circuit and the Board have signalled that state expungement statutes may be given more effect in the future. In *Rehman v. INS*,⁹⁹ the Second Circuit held that because the alien's conviction for possession of marijuana was accompanied by a state certificate of relief from disabilities, and since full expungement of a federal conviction would have been available in an analogous case, the alien was not convicted within the meaning of the statute.¹⁰⁰ Thus, under the *Rehman* rule it appears that whenever a state expungement statute has a federal counterpart, the state statute will be given effect.¹⁰¹

In addition, relief may be possible when the state expungement statute attaches absolutely no remaining stigma on the alien. In the Board adjudication in *Rehman*, the Board indicated its uncertainty as to this issue by closely examining the disabilities remaining after conviction before concluding that, since *Rehman* was barred from holding public office in the state and evidence of his conviction could be used as a basis for an exercise of discretion by state authorities in connection with licensing, he had been convicted in the eyes of the state.¹⁰² The requirement that the state must consider that a conviction exists in relation to state expungement statutes was thrown very much in doubt by the sweeping language of *In re A-F* and subsequent rulings.¹⁰³ The Board has further shown its concern with this point in *In re Cruzado*¹⁰⁴ by stating that, even under the Louisiana statute involved, the conviction could still be used by the state in a proceeding to subject the party to subsequent prosecution as a multiple offender, and in *In re Varagianis*¹⁰⁵ by remarking that it was clear under New Hampshire law that the conviction still remained for various state purposes.

Federal expungement statutes have also been the subject of much discussion, but on the whole the federal statutes have enjoyed more respect than their state brethren. There are currently three federal provisions which have been proposed to stop deportation proceedings: 18 U.S.C. § 502, The Federal Youth Corrections Act; 18 U.S.C. § 4216, an analogous section which invokes section 5021 remedies; and 21 U.S.C. § 844 which erases convictions for first offenders in simple possession cases.¹⁰⁶

(9th Cir. 1966); *Kelly v. INS*, 349 F.2d 473 (9th Cir. 1965), *cert. denied*, 382 U.S. 932 (1965); *In re Espinosa-Rodriguez*, Interim Dec. No. 2391 (Bd. Imm. App., June 2, 1975); *In re Rehman*, Interim Dec. No. 2448 (Bd. Imm. App., Nov. 17, 1975); *In re Cruzado*, 14 I. & N. Dec. 513 (Bd. Imm. App. 1973).

⁹⁹ 544 F.2d 71 (2d Cir. 1976).

¹⁰⁰ *Id.* at 74-75.

¹⁰¹ See 45 FORDHAM L. REV. 1247 (1977).

¹⁰² *In re Rehman*, Interim Dec. No. 2448 (Bd. Imm. App., Nov. 17, 1975). This potential issue was not discussed by the Second Circuit, since it was assumed that *Rehman* was susceptible to discretionary, though not automatic, forfeitures, and a rigid interpretation of the word "conviction" would have subjected him to deportation.

¹⁰³ See note 98 *supra*.

¹⁰⁴ 14 I. & N. Dec. 513 (Bd. Imm. App. 1973).

¹⁰⁵ Interim Dec. No. 2537 (Bd. Imm. App., Oct. 15, 1976).

¹⁰⁶ For an enlightening discussion of this area, see Note, *The Impact of Expungement Relief on Deportation of Aliens for Narcotics Convictions*, 65 GEO. L.J. 1325 (1977).

The Federal Youth Corrections Act precludes the deportation of aliens who were under the age of twenty-one at the time of conviction if sentence is passed under the Act. Similar state acts are now being given similar effect. However, the road to recognition was difficult, and until *Mestre Morera v. INS*¹⁰⁷ in 1972, it had been held under the umbrella of *In re A-F-* that the setting aside of a conviction under the Act would not bar deportation proceedings. In *Mestre Morera*, the First Circuit ruled that a marijuana conviction in United States courts which is subsequently set aside under the Federal Youth Corrections Act is not a basis for deportation. The court concluded that the Act "clearly contemplates more than a technical erasure; it expresses a Congressional concern which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions."¹⁰⁸

Following *Mestre Morera*, the Immigration Service, the Board, and the federal courts found themselves in a perplexing situation: would they adopt the First Circuit's position, and if they did, would they respect only the federal and not the state expungement acts on the ground that to do otherwise would subject the conviction issue to the vagaries of state law? On the other hand, to respect one and not the other would produce the anomalous situation in which deportability would depend upon whether the alien was tried in a federal or state court. The Ninth Circuit resolved the problem by stating in *Andrade-Gamiz v. INS*¹⁰⁹ that prior caselaw in the circuit had already anticipated *Mestre Morera* and rejected its holding. Conversely, the Board adopted the intermediate position of respecting federal but not state expungements.¹¹⁰ Finally, the Immigration Service solved the problem by publicly adopting, on the recommendation of the Solicitor General, the position that marijuana violators treated as youth offenders under state laws would be dealt with in the same manner as such offenders under federal law.¹¹¹ Currently, then, an expungement under either state or federal youth correction acts serves as a bar to deportation.¹¹²

The effect of 18 U.S.C. § 4216 is to provide that any adult offender under twenty-six years of age at the time of conviction can in the discretion of the court be sentenced under the Federal Youth Corrections Act. Thus, this section raises the age limit under which a drug offender can qualify for the youth expungent statute. 21 U.S.C. § 844 (b)(1) pro-

¹⁰⁷ 462 F.2d 1030 (1st Cir. 1972).

¹⁰⁸ *Mestre Morera v. INS*, 462 F.2d at 1032.

¹⁰⁹ No. 73-474 (9th Cir. Aug. 15, 1973), *aff'g*. *In re Andrade*, 14 I. & N. Dec. 364 (Bd. Imm. App. 1973).

¹¹⁰ *In re Zingis*, 14 I. & N. Dec. 621 (Bd. Imm. App. 1974.)

¹¹¹ *In re Andrade*, 14 I. & N. Dec. 651 (Bd. Imm. App. 1974). See *In re Lima*, Interim Dec. No. 2490 (Bd. Imm. App., Apr. 16, 1976). See also Operating Instruction 242.1(a) (27).

¹¹² In a recent case, *United States v. McMains*, 540 F.2d 387 (8th Cir. 1976), the court narrowed its interpretation of the effect of the Federal Youth Corrections Act (FYCA) by declaring that it does not erase the record of conviction. However, the court's ruling should not have great repercussions in the field of immigration since the Service has abandoned the prosecution of youth offenders under the FYCA. See note 111 *supra*.

vides that the conviction of any first offender for simple possession of marijuana can be expunged at the discretion of the trial court, and the discharge or dismissal is not to be deemed a conviction for purposes of the disqualifications or disabilities imposed by law upon the conviction of a crime. In one of the two decisions which have squarely considered this section, the Second Circuit in *Rehman v. INS*¹¹³ stated explicitly that the section is applicable to immigration cases. The court concluded that if Rehman had been tried on federal charges rather than New York state charges he would most likely not have been deportable, because under section 844 he would have had no conviction for which he could be deported. In the second case, the Board in *In re Werk*¹¹⁴ declared that a conviction which has been expunged under the first offender provisions of section 844(b)(1) may not be used as a basis for deportability under section 241(a)(11).¹¹⁵

An important question in this area is whether the order of the court amounts to an expungement or an acquittal. An acquittal automatically removes the grounds for deportation, while an expungement in most cases does not. The Board has tended to draw a sharp distinction, and in *In re O'Sullivan*¹¹⁶ ruled that when the trial court granted a motion for a new trial after conviction and sentence, and then dismissed the charges upon the motion of the assistant prosecutor without setting out reasons for its actions, the effect was an acquittal barring deportation. In *In re Cruzado*,¹¹⁷ the Board reaffirmed its distinction between expungement and acquittal by opining that in *O'Sullivan* the procedure used was not pursuant to a directive of state statute for all like cases, while in *Cruzado* the setting aside of the conviction was done under a state expungement statute which automatically awarded good behavior.

IV. ALTERNATE FORMS OF RELIEF

As illustrated above, the most certain route of success in avoiding deportation under section 241(a)(11) is through the evasion of its statutory requirements. Nonetheless, when the requirements of "illicitness," "possession of or violation of any law or regulation of any law or regulation relating to possession," and "conviction" have been fulfilled, aliens have sought alternate relief in four ways: a) direct attacks on the constitutionality of section 241(a)(11); b) post-conviction attacks of a collateral nature; c) appeals for discretionary relief under the suspension of deportation provisions of section 244(a)(2) of the INA or the waiver of

¹¹³ 544 F.2d 71 (2d Cir. 1976). See text accompanying note 99 *supra*.

¹¹⁴ Interim Dec. No. 2589 (Bd. Imm. App., May 28, 1977).

¹¹⁵ *In re Werk* effectively overrules *In re Amiet*, 14 I. & N. Dec. 146 (Bd. Imm. App. 1972) in which the Board refused to extend section 844 relief to proceedings under section 241(a)(11). The Service in *Werk* did not contest the use of 21 U.S.C. § 844(b)(1) in deportation settings, and has recently agreed to extend the first offender provision to exclusionary proceedings under section 212(a)(23). See *In re Haddad*, Interim Dec. No. 2594 (Bd. Imm. App., June 28, 1977).

¹¹⁶ 10 I. & N. Dec. 1294 (Bd. Imm. App. 1963).

¹¹⁷ 14 I. & N. Dec. 513 (Bd. Imm. App. 1973).

excludability provisions of section 212(c); or d) a private bill for relief.

A. *Direct Constitutional Attacks upon section 241(a)(11)*

Direct attacks on the constitutionality of section 241(a)(11) have by and large failed. The plenary power of Congress in the field of immigration has limited the rights of aliens to gain meaningful review when the power of Congress is directly challenged, and the Supreme Court in recent rulings has refused to deny this power even while alluding to the fact that alienage is now considered a suspect classification for purposes of equal protection.¹¹⁸

An equal protection challenge specifically directed against section 241(a)(11) in 1976 was quickly dismissed by the Second Circuit on the familiar ground that the power of Congress to regulate the admission and expulsion of aliens is plenary and, absent patent abuse, is not subject to judicial scrutiny.¹¹⁹ An eighth amendment argument that deportation for possession of marijuana constitutes cruel and unusual punishment was upheld by an Illinois district court in *Lieggi v. United States*,¹²⁰ but overturned on appeal without opinion.¹²¹ The chances of prevailing on this theory seem slim in light of recent decisions in other circuits respecting the rule that, despite severe consequences, deportation is not

¹¹⁸ Aliens have generally been successful in those cases in which the states and not Congress have attempted to curb benefits or rights. See *Graham v. Richardson*, 403 U.S. 365 (1971) (state welfare laws denying benefits to aliens not residents for certain number of years held violative of equal protection); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (New York's flat prohibition against hiring of aliens in the civil service violative of equal protection); *In re Griffiths*, 413 U.S. 717 (1973) (membership to state bar limited to citizens deemed unconstitutional); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico statute permitting only U.S. citizens to practice as private civil engineers held unconstitutional); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (New York statute barring certain residents from state financial assistance for higher education struck down on equal protection grounds); *Lefkowitz v. C.D.E. Enterprises, Ltd.*, 429 U.S. 1031 (1977) (decision of lower court which invalidated statute giving U.S. citizens employment preference in public works construction summarily affirmed); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) (Virginia statute prohibiting federally licensed vessels owned by nonresidents from catching fish anywhere in the Commonwealth struck down as unconstitutional).

When the power of Congress is challenged, however, the Court has affirmed the principle established in earlier cases, such as *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), *The Chinese Exclusion Case*, 130 U.S. 581 (1889), and *Galvan v. Press*, 347 U.S. 522 (1954), that Congress has wide discretion over the field of immigration. In *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court rejected a constitutional challenge to sections 101(b)(1)(D) and 101(b)(2) which deny immigration benefits to the natural father of an illegitimate child while granting them to its natural mother; in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court declared that Congress possessed the power to condition an alien's eligibility for medicare benefits on continuous residence in the U.S. for a five year period and admission for permanent residence; and in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) the Court skirted the issue where the federal civil service commission hired only U.S. citizens and natives of Samoa by ruling that the case represented a faulty agency regulation rather than the exercise of congressional power.

¹¹⁹ *Guan Chow Tok v. INS*, 538 F.2d 36 (2d Cir. 1976).

¹²⁰ 389 F. Supp. 12 (N.D. Ill. 1975).

¹²¹ *Lieggi v. INS*, 529 F.2d 530 (7th Cir.), cert. denied, 429 U.S. 839 (1976).

criminal punishment and therefore not within the eighth amendment's prohibition.¹²²

The Second Circuit in *Oliver v. INS*¹²³ considered both eighth amendment and due process arguments, and although rejecting both on legal grounds, expressed the sentiment that the severity of punishment for narcotics offenses may conflict with the due process clause of the fifth amendment. The court pointed out that an alien convicted of the deportable offense of possession would not be deportable if the crime for which he was convicted was one involving other acts of moral turpitude, provided that the crime was not committed within five years after entry. Even if the crime led to deportation, the alien would be saved from deportation under section 241(b)¹²⁴ if he obtained a pardon, or if the sentencing court recommended to the Attorney General within thirty days of sentencing that the alien not be deported.¹²⁵ However, the court finally rejected the due process argument on the ground that the validity of distinctions drawn by Congress with respect to deportability is not a proper subject of judicial concern.¹²⁶

It is apparent that on the basis of a long line of cases respecting the plenary power of Congress in the administration of immigration law, the practitioner should not rely upon suits directly challenging the constitutionality of section 241(a)(11) when suitable alternatives are available.¹²⁷

B. Collateral Post-Conviction Proceedings

As discussed in the *Will* case,¹²⁸ a direct appeal immediately stays deportation, while collateral proceedings such as motions of habeas corpus and writs of error coram nobis do not. This rule reflects the well-founded fears of the courts that if collateral proceedings had such effect, the finality of judgment could be postponed for years through a series of post-conviction motions.¹²⁹ Collateral proceedings, however, are not entirely without value. They may be effective if the alien has not yet been deported and litigation is pending, since the alien can apply to the Service

¹²² *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carreon-Hernandez v. Levi*, 543 F.2d 637 (8th Cir. 1976), cert. denied, 430 U.S. 957 (1977); *Oliver v. INS*, 517 F.2d 426 (2d Cir. 1975).

¹²³ 517 F.2d 426 (2d Cir. 1975).

¹²⁴ See note 30 *supra*.

¹²⁵ *Oliver v. INS*, 517 F.2d at 428. See note 30 *supra*.

¹²⁶ The position taken by the Second Circuit is consistent with the Supreme Court's stand on due process attacks on immigration laws as expressed in *Mathews v. Diaz*, 426 U.S. 67 (1976), *Galvan v. Press*, 347 U.S. 522 (1954), *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

¹²⁷ Compare, however, Justice Marshall's heated dissent in *Fiallo v. Bell*, 430 U.S. 787 (1977) on the basis of faulty agency interpretation rather than the more convenient congressional power argument, for signs of growing unrest in the Supreme Court over the plenary power of Congress.

¹²⁸ See note 80 *supra*.

¹²⁹ See text accompanying notes 85-87 *supra*.

for a stay of deportation pending the outcome of the proceeding even if the order to show cause arrives before final resolution of the issue.¹³⁰

Substantively, there has been recent movement in the California state court system involving the withdrawal of guilty pleas by aliens for possession of marijuana when the pleas were made in ignorance of the deportation consequences. In *People v. Superior Court (Giron)*,¹³¹ the California Supreme Court found that when the defendant attempted to withdraw his ignorant plea after being placed on probation, the trial court retained jurisdiction of the matter and could liberally withdraw the plea under California Penal Code section 1018, which allows withdrawal of pleas before judgment for good cause shown,¹³² because an order granting probation under California state law is not considered a judgment except for purposes of appeal.¹³³ The supreme court then held that although a court has no mandatory duty to inform aliens of the deportation consequences of a guilty plea, it was within the trial court's discretion to allow withdrawal, taking into consideration such material matters with which an accused was confronted, and as to which he made erroneous assumptions, when he entered his guilty plea.

A California appellate court in *People v. Wiedersperg*¹³⁴ has extended the supreme court's liberal allowance of vacation of an ignorant guilty plea to a charge of possession to situations in which there has been a judgment, and in which the California expungement procedure¹³⁵ has been employed. The court stated that the trial court retained jurisdiction of the case because the expungement under California state law did not

¹³⁰ C.F.R. § 243.4 (1976). See also *Jay v. Boyd*, 351 U.S. 345 (1956); *Aguillera-Enriquez v. INS*, 516 F.2d 565 (6th Cir.), cert. denied, 423 U.S. 1050 (1976).

¹³¹ 114 Cal. Rptr. 596, 523 P.2d 636 (1974). See Note, *Lawful "Impermanent" Residence: Deportation Without Warning for Minor Drug Offenses*, 26 HASTINGS L.J. 1299 (1974).

¹³² Penal Code section 1018 provided in pertinent part: "On application of the defendant at any time before judgment the court may . . . for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Since *Giron*, it has been amended to read "for a good cause shown." However, the California Supreme Court has stated that the amendment was not a further liberalization of the section, that it was without substantive significance, and that good cause must still be shown by clear and convincing evidence. *People v. Cruz*, 12 Cal. 3d 562, 526 P.2d 250 (1974).

¹³³ It may be argued by the Service that the use of the lenient prejudgment standard of section 1018 was inappropriate in *Giron*, and that the stricter standard for withdrawal of pleas should have been employed because the conviction had already become final for purposes of immigration law. It is established that if the conviction is recognized for any purpose by the state, it is final for immigration law purposes, see note 93 *supra*, and in *Giron* the probation order was recognized by the state as final for purposes of appeal. It is also established that an order of probation is a conviction sufficient for deportation. See note 84 *supra*.

The Service may further argue that there was no basis for the California court's action in federal law since FED. R. CRIM. P. 32(d) allows liberal withdrawal of pleas only before imposition of sentence has been suspended. The validity of such a challenge is debatable, however, since it can be argued that the state is not really contesting the finality of the probation order, but is only vacating the basis for deportation; whichever means it chooses to accomplish this is strictly a matter for state courts to decide, and the Service exceeds its jurisdictional bounds in attempting to interfere with the California Supreme Court's interpretation of procedural state law.

¹³⁴ 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975).

erase the conviction, and certain disabilities remained with the alien after expungement. The alien could therefore attack the conviction through a writ of error coram nobis, which lies to vacate or correct a judgment when no other remedy is available, and directs its force against the lawfulness of the original judgment and proceeding. A California writ of error coram nobis may only be granted if the petitioner has shown that the newly discovered facts did not go to the merits tried, that the facts upon which he relied were not known to him and could not in the exercise of due diligence have been discovered at any time substantially earlier than the time of his motion for the writ, and that some fact existed which without negligence on his part was not presented to the court at the trial on the merits and which would have prevented the rendition of the judgment if presented. Nonetheless, the *Wiedersperg* court was quite liberal in accepting as conclusive of these requirements a sworn affidavit of nondiscoverable facts, based substantially upon evidence that the defendant had been in the country since the age of ten and had no outward appearance of being foreign born, and upon declarations from *Wiedersperg's* attorney that the sentencing judge would not have imposed the sentence had he known of the consequences.¹³⁶

Thus, it is apparent that the California state courts, through the use of post-conviction collateral procedures, currently allow liberal withdrawal of guilty pleas on charges of possession of marijuana when the alien was unaware of the consequences of his plea. If the petition for withdrawal is made during probation, *Giron* grants the trial court discretion to use the liberal state policy of withdrawal before judgment. If made after expungement, the plea may be vacated provided the lenient requirements of a writ of error coram nobis are fulfilled.

It should be noted that the Service did not choose to challenge either case, and it is too early to tell whether either holding will stand up in the future against full scrutiny in light of the confused history of collateral post-conviction attacks in immigration proceedings, and in light of the accepted concept that an alien is not constitutionally entitled to know the deportation consequences of his plea before acceptance.¹³⁷

The theory behind post-conviction collateral proceedings in immigration law is that such proceedings erase the judgment of conviction and nothing remains to form the basis of deportation.¹³⁸ However, the majority view adopted by the Board, and by the Second, Ninth, and

¹³⁶ *People v. Wiedersperg*, 44 Cal. App. 3d at 553, 118 Cal. Rptr. at 756-57.

¹³⁷ It is overwhelmingly recognized that an alien is not entitled to be made aware of the collateral consequences of his plea before acceptance, since a judge cannot be expected to set out the full range of collateral consequences or even to anticipate what those collateral consequences are. *United States v. Briscoe*, 432 F.2d 1371 (D.C. Cir. 1970); *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954); *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975); *Nunez-Cordero v. United States*, 533 F.2d 73 (1st Cir. 1976); *United States ex rel Durante v. Holton*, 228 F.2d 827 (7th Cir. 1956); *Fruchtman v. Kenton*, 531 F.2d 946 (9th Cir. 1976); *Matter of Fortis*, 14 I. & N. Dec. 576 (Bd. Imm. App. 1974); *Matter of Marin*, 13 I. & N. Dec. 497 (Bd. Imm. App. 1970); *Joseph v. Esperdy*, 267 F. Supp. 492 (S.D.N.Y. 1966).

¹³⁸ *Pino v. Nicolls*, 215 F.2d 237 (1st Cir., *rev'd on other grounds*, 349 U.S. 901 (1954)).

District of Columbia Circuits, focuses upon the motive for the collateral proceeding. Under this view, when the record is opened to add nunc pro tunc amendments recommending against deportation, the tardy recommendations are void as clear attempts to circumvent the immigration laws.¹³⁹ Decisions like *Giron* and *Wiedersperg* may be challenged on the grounds that the vacation of a guilty plea based upon ignorance of deportability is, like a tardy recommendation, made solely for the purpose of evading the deportation consequences. The outcome, though, is questionable at this time. The Third, Sixth, and Seventh Circuits have taken a more mechanical approach, looking to state procedure and not motive in determining whether post-conviction collateral motions will be given effect,¹⁴⁰ and it is certainly arguable that the vacation of an ignorant plea is not as plain an attempt to evade the immigration laws as a reopening of the record to add a late recommendation.

The second basis for challenge — that an alien is not entitled to be informed of the collateral consequences, including deportation, of his plea before acceptance — will perhaps not be contested by the Service if other state courts word their judgments in the same manner as the courts of California. The California courts did not address the issue as one of constitutional magnitude, but instead left it in the discretion of the trial court directed to the promotion of justice to withdraw the plea.

Currently, then, the alien may be able to obtain relief from a guilty

¹³⁹ *Velez-Lozano v. INS*, 463 F.2d 1305 (D.C. Cir. 1972); *United States ex rel Piperkoff v. Esperdy*, 267 F.2d 72 (2d Cir. 1959); *United States ex rel Klonis v. Davis*, 13 F.2d 630 (2d Cir. 1926); *Haller v. Esperdy*, 397 F.2d 211 (2d Cir. 1968); *Marin v. INS*, 438 F.2d 932 (9th Cir.), *cert. denied*, 403 U.S. 923 (1971); *Matter of S—*, 9 I. & N. Dec. 613 (Bd. Imm. App. 1962).

¹⁴⁰ The Third Circuit has taken a mechanical approach in *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963), focusing not on motive but on the completeness of the state procedure in stating that when the judgment of conviction is set aside along with the indictment with which the alien was charged, nothing is left upon which to base the order of deportation. The court contrasted this situation with the finding of deportability by the Second Circuit in *United States ex rel Piperkoff v. Esperdy*, 267 F.2d 72 (2d Cir. 1959), in which there was a new trial in the same cause after the original judgment was vacated. One commentator has noted that the distinction drawn by the Third Circuit on whether the original indictment was also dropped is strained, and that it was clear that the court did not approve of the Second Circuit's harsh conclusion. See Note, *Lawful "Impermanent" Residence: Deportation Without Warning for Minor Drug Offenses*, 26 HASTINGS L. J. 1299, 1325 (1974). A more mechanistic approach seems to have been taken by the Seventh Circuit in *Cruz-Sanchez v. INS*, 438 F.2d 1087 (7th Cir. 1971), in which the court boldly stated without distinguishing motive or abandonment of indictment that vacation entitles the alien to reconsideration by the Board. The Sixth Circuit apparently has followed the Seventh Circuit's lead by stating in *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976), that if one is successful in reversing the judgment and sentence, no conviction can remain for deportation purposes.

This approach, with its lack of concern over motive or dismissal of the original indictment or information, has apparently been unconsciously assumed by the California state court system in both *Giron* and *Wiedersperg*. The California courts in both cases did not dwell upon whether the original information was dismissed, although such was the case in *Wiedersperg*, nor did they contemplate the implications of the motive of evading the deportation consequences. There is currently no common answer to these approaches. Because of the clear difference between giving credence to the state court procedure or looking behind it for the motive involved, uniformity will probably not be attained in the near future, and resolution of the problem will vary from jurisdiction to jurisdiction.

plea through the use of favorable court procedures in California and other states with similar procedures after probation or expungement if he was unaware of the deportation consequences at the time he entered his plea to possession of marijuana, though this position may be open to challenge by the Service.

*C. Discretionary Relief Under Sections 244 (a)(2)
and 212(c) of the INA*

Discretionary relief is an open avenue to the alien, but provides many uncertainties since judicial review is limited to those cases in which the immigration judge's action was arbitrary, capricious, or an abuse of discretion.¹⁴¹ There are currently two provisions which afford this type of relief: suspension of deportation under section 244(a)(2), and waiver of excludability under section 212(c).

Section 244(a)(2) has extremely rigorous eligibility standards and is inapplicable in a great majority of cases. The section provides that the Attorney General may in his discretion suspend deportation for a conviction, including a conviction under section 241(a)(11), if the alien has been physically present in the United States for a continuous period of not less than ten years following the commission of the deed constituting the ground for deportation, proves that during all of such period he has been and is a person of good moral character, and is a person whose deportation would in the opinion of the Attorney General result in exceptional and extremely unusual hardship upon the alien, or upon a spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.¹⁴² In addition, if the suspension of deportation is approved by the Attorney General, it must also win the approval of Congress before the suspension is final.¹⁴³ Although section

¹⁴¹ *Jarecha v. INS*, 417 F.2d 220 (5th Cir. 1969); *Chen v. Foley*, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968); *Castillo v. INS*, 350 F.2d 1 (9th Cir. 1965); *Cubillo-Gonzalez v. INS*, 352 F.2d 782 (9th Cir. 1965).

¹⁴² This section differs from section 244(a)(1), 3 U.S.C. § 1254(a)(1) (1970), which allows more accessible means to suspension of deportation for crimes other than those of an aggravated nature under section 244(a)(2). Violators of section 241 other than those convicted of misconduct involving subversives, criminals, narcotics violators, prostitutes, registration violators, and violators of certain statutes relating to national defense are eligible for relief under section 244(a)(1) if they have been physically present in the United States for a continuous period of at least seven years immediately preceding the date of the application, prove that during all of such period they were and are persons of good moral character, and are persons whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the aliens, or to their spouses, parents, or children if they are citizens of the United States or aliens lawfully admitted for permanent residence. Note that section 244(a)(1) provides that the alien must be present in the country for seven years before the application, while section 244(a)(2) states that the alien must be present for ten years after the deed before he can be considered for this type of relief. This fact alone makes section 244(a)(2) relief impossible for many people who are deported by the Service soon after the conviction. Also note that the degree of hardship required under section 244(a)(1) is "extreme", while that required in section 244(a)(2) is both "exceptional" and "extremely unusual".

¹⁴³ Once the suspension is approved by the immigration subcommittees, however, it is generally rubber-stamped through both Houses, and it has been aptly said that the Houses of Congress "rely upon the recommendations of the judiciary committees, which in turn rely upon the views of their immigration subcommittees." 2 C. GORDON &

244(a)(2) relief is available, it applies to only a limited number of aliens who fit its rigid requirements for eligibility.

A more effective form of discretionary relief is provided through waiver of excludability under section 212(c). It should be noted that this relief is not available to illegal aliens, but only to permanent residents who have entered the country lawfully. Under this section, "aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [the exclusion provisions] of this section."¹⁴⁴ Section 212(c) was originally intended to cover only aliens seeking entry, "but experience in administration demonstrated a need to apply it also to afford relief for aliens in the United States."¹⁴⁵ The section currently applies to deportation proceedings under the rationale that the relief is granted nunc pro tunc, and therefore cures the ground of deportability.¹⁴⁶

The key elements of eligibility for section 212(c) relief prior to the landmark ruling of *Francis v. INS*¹⁴⁷ in 1976 were a temporary visit abroad not under an order of deportation, lawful permanent residence, and an unrelinquished domicile of seven consecutive years.

In *Francis*, the Second Circuit attacked the requirement of a temporary sojourn from the country. The alien in *Francis* had been convicted of possession of marijuana and had not left the country. The Board found him ineligible for section 212(c) consideration on this basis.¹⁴⁸ The alien argued that the statute as so applied created two classes of aliens, identical in every respect except that members of one class had departed and returned to this country at some point after they became deportable. The Second Circuit agreed that the Board's interpretation denied equal protection of the laws as guaranteed in the fifth amendment, and held that even under the minimal scrutiny test applicable in this case, the distinction as drawn by Board policy was not rationally related to a legitimate purpose of the statute.¹⁴⁹ The Second Circuit took great pains to state that it was not challenging the power of Congress in the enactment of the immigration laws,¹⁵⁰ but was merely in disagreement with the Board's interpretation of section 212(c).¹⁵¹ Since *Francis v. INS*, the Board has elected to withdraw from its contrary position.¹⁵²

H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f)(4) (1976); Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 343 (1956).

¹⁴⁴ Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(a) (1970).

¹⁴⁵ C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 7.4(a) (1977).

¹⁴⁶ *In re G— A—*, 7 I. & N. Dec. 274 (Bd. Imm. App. 1956). See also *Vissian v. INS*, 548 F.2d 325 (10th Cir. 1977); *Francis v. Ins*, 532 F.2d 268 (2d Cir. 1976); *In re Silva*, Interim Dec. No. 2532 (Bd. Imm. App., Sept. 10, 1976).

¹⁴⁷ 532 F.2d at 268.

¹⁴⁸ *In re Francis*, No. A12-081-215 (Bd. Imm. App., Aug. 15, 1974).

¹⁴⁹ *Francis v. INS*, 532 F.2d at 273.

¹⁵⁰ See discussion on unsuccessful constitutional challenges in text accompanying notes 118-27 *supra*.

¹⁵¹ *Francis v. INS*, 532 F.2d at 272-73.

¹⁵² See *In re Silva*, Interim Dec. No. 2532 (Bd. Imm. App., Sept. 10, 1976).

The remaining elements of eligibility are lawful permanent residence and lawful unrelinquished domicile of seven consecutive years. These requirements have not been affected by decisional law,¹⁵³ except for a 1977 clarification of the interplay between "permanent residence" and "lawful unrelinquished domicile" by the Second Circuit in *Lok v. INS*.¹⁵⁴ Lok arrived in the United States in 1959, overstayed his nonimmigrant status, and avoided detection until 1965, at which time he was ordered deported and given the privilege of voluntary departure. His deportation was subsequently delayed through a succession of private bills introduced in Congress and, during the interim, he became eligible for immediate relative status through marriage to an American citizen. In order to apply for his visa, Lok, who was still under voluntary departure status, embarked for Hong Kong in 1971. Special permission for re-entry was granted and Lok returned as a permanent resident in that year. One year later, he pleaded guilty to possession of narcotics and was ordered deported after sentence. Lok argued that he was eligible for section 212(c) relief, but the Board stated that the seven-year period of domicile required by section 212(c) must follow lawful admission for permanent residence, and since Lok did not have a seven year period following lawful admission for permanent residence he could not qualify for section 212(c) consideration.¹⁵⁵ On appeal, the Second Circuit disagreed with this conclusion, pointing out that it is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence.¹⁵⁶

The effect of the ruling is to broaden the purview of section 212(c) relief to include all aliens who have established a lawful unrelinquished domicile for seven years in the United States, whether the seven years occur before or after the alien has become a permanent resident.¹⁵⁷

D. Private Legislation

The private relief bill is a last desperate gesture used by aliens to

¹⁵³ In *Guan Chow Tok v. INS*, 538 F.2d 36 (2d Cir. 1976), the Second Circuit affirmed the validity of the seven year qualification period, and in *Carrasco-Favela v. INS*, 563 F.2d 1220 (5th Cir. 1977), the Fifth Circuit affirmed a Board decision that the seven years were not fulfilled when the alien attained permanent residence in 1960, returned to Mexico in 1970 to live with his wife, a native and citizen of Mexico, and commuted daily to work in El Paso, Texas, for three of the four years preceding his 1974 arrest for importation of marijuana. The court found as other facts indicative of Carrasco-Favela's intent to give up his domicile and remain indefinitely in Mexico that he returned in 1970 to a house purchased before his 1968 marriage, that his wife did not apply for an immigration visa until 1972, four years after their marriage and two years after their return to Mexico, and that his 1974 return to the United States was involuntary.

¹⁵⁴ 548 F.2d 37 (2d Cir. 1977).

¹⁵⁵ The Board holding is set forth in *Lok v. INS*, 548 F.2d at 39.

¹⁵⁶ *Id.* at 40.

¹⁵⁷ However, it should be noted that the Second Circuit remanded the case to the Board for determination of whether the alien's seven years was lawful or not. The alien had urged that either the Service's failure to enforce the 1965 order of deportation legalized his stay or that his marriage to an American citizen in 1968 marked the beginning of his lawful stay of seven years. However, the court denied his first theory under the authority of *Chim Ming v. Marks*, 505 F.2d 1170 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975), and merely stated as to his second that the issue was best left to the initial determination of the Board.

forestall deportation when all other steps have failed. Its introduction does not automatically forestall deportation proceedings, however, it will act as a stay once the Judiciary Committee of either the House of Representatives or the Senate has requested a departmental report.¹⁵⁸ It is literally the last available measure, since it will not be considered if an administrative remedy exists or court proceedings are pending for the purpose of altering the alien's status.¹⁵⁹

To obtain this type of relief, the alien must persuade a member of the House of Representatives or Senate that he has a meritorious claim. Upon introduction by the legislator, the bill is referred to the Judiciary Committee of the House of Congress in which it was introduced.¹⁶⁰ It is then transferred to a subcommittee for consideration.¹⁶¹ At this stage, the practitioner is usually given the opportunity to present the alien's story and to submit new evidence.¹⁶² Committee action is usually decisive and, if the Committee reports the bill favorably, the parent House usually gives a rubber stamp approval.¹⁶³

The chances of success through private legislation, however, are almost nonexistent. From a high of 1227 private bills passed in the Eighty-fourth Congress, the number in the Ninety-second and Ninety-third Congresses and the first session of the Ninety-fourth have dwindled to sixty-two, sixty-three, and sixteen respectively.¹⁶⁴ Correspondingly, legislators have been less willing to sponsor private bills, and the number of bills introduced has dropped from 7293 in the Ninetieth Congress to 2866 in the Ninety-first, 1085 in the Ninety-third, and 701 in the first session of the Ninety-fourth Congress.¹⁶⁵

V. CONCLUSION

The history of section 241(a)(11) does not support its present harsh sanctions when simple possession of marijuana is concerned. At the present time, when marijuana use is so widespread and tolerated and a number of states have either decriminalized or are contemplating the decriminalization of possession of small amounts of marijuana, deportation of aliens for the offense is inequitable. On the federal level, bills have currently been introduced which would either decriminalize possession of varied amounts or specifically provide for relief of aliens caught in these circumstances. To an alien who stands accused of an offense involving possession, however, this is a small consolation when deportation proceedings are imminent. To prevent deportation, he must explore the avenues of relief which are currently open to him. If a find-

¹⁵⁸ C. GORDON & H. ROSENFELD, *IMMIGRATION LAW & PROCEDURE* § 7.12(c) (1971).

¹⁵⁹ *Id.* § 7.12(b).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 1973 INS Ann. Rep. 139.

¹⁶⁵ *Id.*

ing of guilt seems inevitable, the alien should attempt before judgment to have the charge reduced to one of a non-deportable nature. If this is not done and judgment is entered, he should base his defense, if any exists, upon a federal expungement act or its state equivalent if he is able to persuade the court to sentence him under such an act, or upon statutory construction of section 241(a)(11)'s requirements for deportation which include at least possession or a violation relating to possession, knowledge of the possession, and a conviction which is final. These are the most certain grounds for blocking deportation. Regardless of the existence of these grounds, however, the alien should also prepare a plea for discretionary relief under either section 244(a)(2) or section 212(c) if he is so eligible, since such a plea may prevail despite the failure of other defenses. Postconviction attacks of a collateral nature may also be attempted when applicable, but with the attendant risk that the alien may be deported before resolution of the issue. Finally, direct attacks on the constitutionality of section 241(a)(11) should only be attempted in the absence of another effective defense, in view of the overwhelming discretion enjoyed by Congress in the administration of immigration laws. Private legislation, which is the last resort, should not be relied upon to prolong the alien's stay in the country in view of the past record of such bills.

The courts, especially the Second Circuit, are to be commended for having recently made available to the alien many of the avenues of relief outlined above. In the future, courts should continue to interpret section 241(a)(11) narrowly as applied to possession of marijuana. To this end, they should liberally dispense discretionary relief under section 212(c) and the first offender and youth expungement acts when applicable, and should, if the opportunity presents itself, listen favorably to an argument that a civil fine for possession of marijuana cannot be a "conviction" sufficient to support an order of deportation. Conviction implies a crime, and when a civil fine is imposed the state is serving notice that it does not consider the act to be worthy of criminal sanction.

Ultimately, the final action must lie with Congress, since the courts can render only limited relief within the confines of the statute. It is hoped that in light of the present changing attitudes toward possession and the inequity of imposing deportation upon aliens for what is not even considered a crime in some states, Congress will soon amend section 241(a)(11) to provide relief from deportation for aliens convicted of possession of marijuana.