Lawful Impermanent Residence: Deportation without Warning for Minor Drug Offenses

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Deportation of lawfully admitted permanent residents of the United States for drug offenses has been statutorily permitted for more than fifty years.\(^1\) Conviction for simple possession of marijuana, however, has provided a basis for banishment for only fifteen years.\(^2\) As an increasing number of legislative bodies move toward decriminalization of possession of marijuana for personal use,\(^3\) the disproportionate nature of the additional federal deportation consequence has become increasingly apparent.

Among the hundreds of congressionally determined grounds for expulsion,\(^4\) mere possession stands out as one of the most trivial transgressions for which an alien can be deprived of continued residence in this country. Moreover, a certain degree of inconsistency permeates the law: while the Immigration and Naturalization Service, (the Service), a division of the Justice Department, is ridding the country of aliens convicted for possession, the Drug Enforcement Agency, another law enforcement arm of the Justice Department, has declared its utter lack of interest in persons known to be only in possession.\(^5\)

Unlike aliens found deportable for other criminal conduct,\(^6\) drug possessions present the peculiar situation of a federal government that accuses millions of aliens of this same offense daily, while simultaneously harboring millions who are known to be only in possession.

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1. Act of May 26, 1922, ch. 212, 42 Stat. 596. Prior to 1952, however, deportation on the basis of narcotics violations was provided for in tax and other legislation rather than directly as part of a comprehensive body of immigration law. See generally 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 4.17, at 4-125 (rev. ed. 1974) [hereinafter cited as Gordon & Rosenfield]
4. Over 20 years ago, one commissioner of immigration speculated that there existed at that time in excess of 700 distinct grounds for deportation. Hearings Before the Senate Appropriations Comm. on Dept of Justice Appropriation for 1954, 83d Cong., 1st Sess. 250 (1953). This number is continually subject to fluctuation, mostly upward, as more crimes are found to involve moral turpitude the conviction of which may lead to deportation. See 8 U.S.C. § 1251(a)(4) (1970).
offenders are virtually precluded from obtaining relief from expulsion. No distinction is made between the international traffickers and peddlers in heroin and other "hard" drugs at whom the law was initially aimed and the youthful transferees and users who are the victims of

(1970). This portion of the deportation section of the act renders any alien convicted of one or more crimes involving moral turpitude immediately subject to the deportation laws. See generally GORDON & ROSENFIELD, supra note 1, §§ 4.12-.14e.

7. In Matter of V-, 1 I.&N. Dec. 160 (Board of Immig. App. 1941). In Matter of V-, the court cited passages from the Congressional Record as indicating the express view of the legislators "that the guiding purpose of the Act . . . was to provide for the deportation of the distributor of narcotics rather than the receiver." Id. at 161-62. The Board recited the following: "House Report No. 1373 (71st Cong., 2d sess.) stated that: 'The main purpose of this bill is to permit the Government to deport the alien smugglers and those aliens higher up in the big international rings who are worse than murderers.' [H.R. REP. No. 1373, 71st Cong., 2d Sess. 2 (1930).]

"On July 2, 1930, Representative Fish suggested an amendment to the bill excepting the addict who was not a dealer or a peddler. Thereupon the following colloquy resulted:

"[Mr. O'Connor:] '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:] '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:] '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.'

"[Mr. O'Connor:] '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:] '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).]

"Before final passage, however, both the word 'possession' and 'use' were omitted. [Id. at 12453.]

". . . . In the course of the hearings on House bill 5138 before the Senate subcommittee, Senator Danaher adverted to the severity involved in making any violation of the Marihuana Tax Act of 1937 a deportable offense. Particularly pertinent is the following discussion at page 33 of the report containing a transcript of these hearings:

"[Senator Danaher:] 'But granting we include as a deportable offense a violation of 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 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. While it is not retroactive, there is no time limit against his deportation. I think other witnesses will object to that provision of the section because of the drastic nature, in that there is no
these harsh measures today. It is the failure to draw such valid distinctions which consistently generates many of the most troublesome problems and the least supportable results in our immigration law.  

Although most problems involving immigration law are properly resolved in administrative proceedings or in the federal courts charged with their review, a newer development, largely unforeseen by Congress, has arisen in a third arena—the state criminal tribunal. It is this forum in which most deportable convictions occur. It is, therefore, the source to which the Service must look to provide a basis upon which deportation proceedings may be instituted.

By approaching the dilemma of the alien-defendent charged with a deportable drug offense primarily from the point of view of the integrity of the administration of the state's criminal justice system, the Supreme Court of California in *People v. Superior Court (Giron)* neatly avoided potential collision with the federal deportation scheme. In a unanimous decision, authored by Chief Justice Wright, the supreme court held that lack of awareness of the deportation consequence at the time of entering a guilty plea to a charge of possession of marijuana could, as a matter of law, constitute good cause for vacating the plea.

Although the court, in agreement with other appellate courts,
declined to find a judicial duty to disclose the federal deportation law to an alien who is considering pleading guilty, the Giron court did depart from all reported precedents in two particular respects. First, the court's enlightened result, even though vulnerable, will save one alien from the trap set for him when he entered an ignorant plea. Giron may eventually be deported if convicted on the merits, but he will not be banished as a result of his illusory bargain. Secondly, the court's reasoning includes a commendable unwillingness to be controlled by the standard "collateral consequences" rubric which has uniformly mesmerized other courts confronted with this problem in the past. Instead of merely focusing on the federal source of the added post-conviction sanction, the supreme court approached the problem from the perspective of the alarming outcome to the uninformed alien. Thus, the court was willing to vacate the guilty plea irrespective of whether the added sanctions were "criminal or civil, direct or consequential." Yet the difficulties of the decision should not be overlooked. As is inherent in any decision couched in terms of discretion rather than entitlement, it affords scant protection for numerous other aliens who will fall victim to the peculiarly predatory and invisible application of the law. While fair process was the undoubted goal in Giron, isolated instances of even the most commendable and generous extensions of grace can never substitute for available safeguards which should be erected around a definable and recurring set of circumstances from which there is no other humane relief presently provided in law.

This note will suggest an alternative approach which both accommodates the present overly stringent federal immigration law and protects the values inherent in fair process. In calling for what has been aptly termed in analogous contexts a "judicially declared rule of criminal procedure," the writer will show that such has been the preferred remedy in other similar situations in California involving especially


11. 11 Cal. 3d at 797, 523 P.2d at 639, 114 Cal. Rptr. at 599.
12. See notes 120-22 & accompanying text infra.
14. 11 Cal. 3d at 797, 523 P.2d at 639, 114 Cal. Rptr. at 599.
burdensome side effects of criminal convictions. The suggested rule is that an alien be made aware on the record by some cautionary statement that his plea of guilty will render him subject to federal deportation.

People v. Superior Court (Giron)

Jose R. Giron is a lawfully admitted permanent resident of the United States. He is a native and citizen of El Salvador who came to this country with his family in 1966 at the age of 14. In 1970, Giron was arrested and charged with felonious possession of marijuana. After pleading not guilty, Giron was offered the opportunity to withdraw the original plea and to plead guilty to a misdemeanor charge. In return, the prosecutor promised to recommend probation. Giron agreed to the bargain.

After accepting Giron's substituted plea, the trial judge referred the case to the probation department and the cause was continued on the court's calendar for sentencing. On November 5, 1970, the trial court ordered that the imposition of sentence be suspended and placed Giron on probation for three years.

On June 11, 1971, the United States Immigration and Naturalization Service served Giron with an order to show cause charging that he was subject to deportation pursuant to section 241(a)(11) of the Immigration and Nationality Act on the basis of his California

17. See notes 88-110 & accompanying text infra.
18. 11 Cal. 3d at 795, 523 P.2d at 638, 114 Cal. Rptr. at 598. One question not raised in Giron is how it happened that neither the judge nor the prosecutor was aware of the deportation consequence. A trial judge is required to consider the contents of the probation report before sentencing the defendant. See CAL. PEN. CODE § 1203(a) (West Supp. 1974). Giron had only been in this country a few years, a fact which should have been obvious from his report which, in accordance with the statute, included a "prior history and record of the person." Id.

Furthermore, California law requires arresting officials to notify the Service upon arrest of persons for specified drug offenses if the individual apprehended is suspected of being an alien. See CAL. HEALTH & S. CODE § 11369 (West Supp. 1974). Apparently state officials do not inform the alien or his counsel that the immigration authorities have been notified of his arrest.

19. Immigration & Nationality Act of 1952, § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970) provides: "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or
conviction. On August 27, 1971, Giron returned to the trial court where his motion to withdraw his guilty plea and to have his order of probation vacated was granted. The basis for the motion to vacate his guilty plea was his ignorance of the deportation consequence at the time he agreed to the misdemeanor conviction and probationary status in exchange for his concession of guilt.20

The people appealed. The court of appeal reversed and held that ignorance of the collateral federal consequence of a plea in a state court could not, as a matter of law, constitute good cause for invalidating that plea.21 The California Supreme Court overturned the court of appeal, thereby upholding the trial court's exercise of discretion:

When, as here, the accused entered his plea without knowledge of or reason to suspect severe collateral consequences, the court could properly conclude that justice required the withdrawal of the plea . . . .22

In so holding, the supreme court clearly rejected, but neglected to discuss, the middle court's reversal of the trial court's decision. While such a failure is not necessarily noteworthy in all cases, when the lower appellate court's conclusion appears to coincide with virtually all of the federal and state authority on the question, an otherwise rather innocuous affirmation of an exercise of discretion takes on increased interest. The decision can be seen to signal at least a modest shift in judicial satisfaction with and sensitivity to the federally dictated but unrevealed deportation possibility flowing from a state conviction.

Although the court of appeal in Giron failed to distinguish the facts of the case from those of the related federal holdings it cited as controlling, there do exist distinctions which merit consideration. First, the court cited United States v. Sambro,23 in which the District of Columbia Circuit decided that the misapprehension by an alien and his counsel of the likelihood of deportation did not require a finding of abuse of discretion in the trial court's denial of a motion to withdraw the alien's guilty plea. The case is similar to a very recent California case, People v. Flores,24 cited by the California Supreme Court in Giron, in which the alien-defendant merely miscalculated the risk of deportation,25 and his conviction was upheld. In contrast, Giron was

preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate . . . ." See generally Holzman, Narcotics Convictions and the Alien, 50 Interpreter Releases No. 42, at 277 (Oct. 8, 1973).

20. 11 Cal. 3d at 795-96, 523 P.2d at 638, 114 Cal. Rptr. at 598.
22. 11 Cal. 3d at 798, 523 P.2d at 639-40, 114 Cal. Rptr. at 599-600 (emphasis added).
23. 454 F.2d 918 (D.C. Cir. 1971).
25. Id. at 486-87, 113 Cal. Rptr. at 273.
totally unaware even of the existence of the possibility of deportation. Secondly, the court of appeal in Giron quoted with approval the reference in Sambro to the United States Supreme Court's decision in Brady v. United States.26 There, in the Sambro court's view, the Supreme Court by implication drew a distinction between direct and other consequences of a guilty plea.27

Apparently the California court of appeal failed to consider the fact that Giron's plea was vacated before sentencing in accordance with the appropriate pre-sentence standard set forth in section 1018 of the Penal Code.28 Brady, however, had announced a standard for testing the voluntariness of pleas attacked after sentencing.29 Generally by then the state is likely to have gained a greater interest in protecting its convictions from postponed challenges for the practical reason that the prosecution's position will suffer irreparable prejudice due to the natural dissipation of its evidence over time. In fact, a far more lenient pre-sentence standard was outlined in Kercheval v. United States30 some forty-three years before Brady. The Supreme Court there held that any fair and just reason will serve to support a withdrawal before sentencing.31

Aside from a single footnote reference to the trial court's specific authority32 to grant Giron's motion to vacate, the supreme court in effect downplayed the dual aspect of the post-conviction vacation remedy and

27. 110 Cal. Rptr. at 706.
28. Penal Code section 1018 provides: "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." The legislature has further instructed that "[t]his section shall be liberally construed to effect these objects and to promote justice." CAL. PEN. CODE § 1018 (West 1970).
29. The distinction was discussed in Judge Bazelon's dissent in United States v. Sambro, 454 F.2d 918, 924, 925-27 (D.C. Cir. 1971), where he explained the two separate standards which are followed in the federal courts. See Fed. R. Crim. P. 32(d); ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 2.1 (Approved Draft, 1968). See also D. Newman, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 36 (1966).
30. 274 U.S. 220 (1927). The less demanding Kercheval pre-sentence standard is the correct measure in Giron's situation. The decision by the court of appeal in the Giron case does not appear to be based on a wholly consistent rationale, for the reason that in one part of the decision the court pointed out that the trial court mistakenly relied upon an old California case involving a post-sentence writ of coram nobis, People v. Savin, 37 Cal. App. 2d 105, 98 P.2d 773 (1940), while in another part of the opinion the court itself relied on the holding in United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971), which also incorrectly resorted to the post-sentence guide in a pre-sentence situation. Compare 110 Cal. Rptr. at 705, with id. at 706.
31. 274 U.S. at 224.
upheld the trial court's action without elaborating on its reasons for doing so. The rub here is the court's use of broad language to dispense with these mundane distinctions without replacing the standards discarded. This approach frequently sounds better than it wears. Therefore, the failure of the California Supreme Court to define a workable standard addressed to the problem of the alien threatened with federal deportation for his state guilty plea conviction of possession of marijuana only serves to obfuscate further the posture to be taken by trial courts in the future. Granting that the pre-sentence/post-sentence distinction is flimsy when so central a matter as the right to remain in the United States is at stake, the plain need for an approach better suited to the gravity of the deportation threat is presented. The result of the court's incomplete treatment of the problem in Giron is that each alien's alleged ignorance must be examined by trial courts in the future to see whether in the circumstances, considering all relevant factors, the alien's ignorance merits the favorable exercise of the court's inherent discretion. This is invariably a difficult assignment. It could have been avoided altogether had the supreme court simply declared that justice demanded the vacation of the ignorant plea and the establishment of a rule of disclosure, rather than enshrouding its conclusions in traditional terms of a limited power of appellate review.

Furthermore and perhaps farthest from the contemplation of the court, the decision is dangerously susceptible to an attempt by the Service, to convince the federal courts, as it has in the past, to refuse to give effect to state court orders which modify convictions solely to avoid the federal sanction. That is, in basing its decision on the discretionary power of the court and, further, in expressly limiting the justification for vacating the plea to a single ground which is within a strictly federal domain, the court may have unwittingly invited a challenge to the trial court's exercise of discretion on the ground that it had, in fact, none to exercise. Worse, it could be claimed that the trial court lacked jurisdiction to vacate the guilty plea absent an assertion by the California Supreme Court that an alien has a constitutional due process right to be informed of the deportation consequence before pleading guilty.

A less vulnerable alternative than either Giron's "exercise of discretion" basis, or the concededly difficult "constitutionally commanded" rationale, bound to invite federal review, is the imposition of a mandatory duty of disclosure of the deportation threat. The judicial declaration of a cautionary statement rule is well within a state supreme court's

33. See notes 120-22 & accompanying text infra.  
34. See notes 115-17 & accompanying text infra.
competence. Moreover, the establishment of a rule of criminal procedure acknowledging the additional adversity visited upon the alien only after California exacts its penalty, need not embrace any particular posture toward the rationality of the federal event. Rather, a state court could properly conclude that Congress did not intend that an alien be tricked into suffering the calamitous consequence of deportation, even though once fairly found guilty of a narcotics offense Congress chose to afford him little opportunity for relief from expulsion.

The Federal Power to Expel for Narcotics Offenses

The exclusively congressional power to expel forcibly any or all aliens, whether long settled or illegally present in the United States, is viewed as an incident of sovereignty. Because the Supreme Court has rigidly refused to review the rationale for even one ground for expulsion, our deportation law has achieved awesome and unique pro-

37. From the first, federal legislation pertaining to the regulation of immigration to the United States has included distinctions drawn on the basis of classes of persons deemed undesirable as American residents. The first laws restricting the admission of persons intending to work while in this country were addressed to Chinese laborers only. See Act of May 6, 1882, ch. 126, 22 Stat. 58. In fact, the exclusion provisions reflected the rampant racism toward Asiatic persons typical of that period. See, e.g., Oyama v. California, 332 U.S. 633, 650-74 (1948) (Murphy J., concurring). See also Gordon, Our Wall of Exclusion Against China, 3:3 LAWYERS GUILD REV. 7 (1943); Gordon, The Racial Barrier to American Citizenship, 93 U. PA. L. REV. 237 (1945); Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases, 68 YALE L.J. 1578, 1587-89 (1959); Yankwich, Social Attitudes as Reflected in Early California Law, 10 HASTINGS L.J. 250, 257-64 (1959).

The Supreme Court upheld what came to be known as the Chinese Exclusion Act in Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1899). The absolute right to bar entry to all aliens, or any class of non-Americans, was accepted as an incident of sovereignty. Id. at 609. According to all the cases, the power to exclude persons for any reason Congress should select belongs exclusively to the federal legislature and cannot be challenged by the judicial branch. See, e.g., Klein-dienst v. Mandel, 408 U.S. 753, 765-67 (1972); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892).

Undoubtedly encouraged by this broad acknowledgement of the power to prevent entry, Congress proceeded to enact additional legislation, initially directed only at the Chinese, declaring that all of the laws already passed were to continue in force for 10 more years, and imposing a duty on all Chinese aliens to apply for a certificate of resident status within one year of the passage of the act on pain of expulsion for failure to effect the required registration. See Act of May 5, 1892, ch. 60, § 6, 26 Stat. 25. This requirement survives to this day, and an alien is rendered deportable for failure

The validity of the registration provision, including the deportation penalty for a post-entry illegal act by a person who had entered with the consent of Congress, was challenged in Fong Yue Ting v. United States, 149 U.S. 698 (1893). The Supreme Court held the expulsion provision to be constitutionally permissible and valid. The majority perceived this provision as merely the logical and necessary extension of the exclusion power. The court gave its approval to the exercise of this inherent and inalienable right to expel through executive officers alone, without any judicial intervention or role in effectuating an order of deportation. See id. at 713-14.

The fact that the deportation section operated to allow expulsion of two distinct classes, those having originally secured an entirely legal entry, and those having entered in disregard of the law, did not disturb the majority, a fact acknowledged in later decisions. See, e.g., Wong Wing v. United States, 163 U.S. 228, 234-35 (1896). An alien was an alien for the immigration law's purposes, and no alien, short of attaining the status conferred by citizenship, could obtain a firm and final foothold here however he had come originally and regardless of how long he had lawfully lived in this country.

Justices Field and Brewer in their dissents in Fong Yue Ting worried that the law's deportation provision for resident aliens signalled a substantial departure from American precedent. See 149 U.S. at 737 (Brewer, J., dissenting) id. at 755, 756-57 (Field, J., dissenting). Justice Brewer also felt the law was in violation of international legal principles. See id. at 736 (Brewer, J., dissenting). The fact that Congress could decide to keep every alien out was no license for Congress to impose any condition it could come up with on an alien's entry. It was predicted in the dissenting opinion by Justice Brewer that the notion that Congress could put terms on an already established privilege to remain would be picked up and expanded upon in the future. See id. at 743-44 (Brewer, J., dissenting). This was precisely what transpired a few years thereafter.

The first class of persons declared deportable for post-entry transgressions was that of women found engaging in prostitution. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 899, as amended, Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 264. The original notion of safeguarding work opportunities for laboring citizens was thereby expanded to include protecting the morals of society in general. In contrast to expulsion based on grounds warranting initial refusal of admission, the law pertaining to prostitutes allowed deportation despite an entirely legal entry. Furthermore, unlike the illegal entrant who had a right to remain if not discovered within one year of entry, the prostitute could be summarily expelled regardless of her period of residence. Today there exists no general statute of limitations on the federal government's right to deport persons. In a very few specific situations there exist five-year periods of limitation, measured from entry, during which period the deportation triggering offense or conduct must have occurred. See 8 U.S.C. §§ 1251(a)(3), (4), (8), (13), (15) (1970). The Service, however, is not obligated by law to bring a proceeding within this period. See generally Maslow, Recasting Our Deportation Law: Proposals For Reform, 56 COLUM. L. REV. 307, 325-27 (1956).

The way was thus well-paved for the seemingly unbounded expansion of the grounds upon which the Secretary of Labor (and now the Service) could act to remove resident aliens. Morals grounds for removal proved popular with the congressmen. The Immigration Act of 1917 added many new bases for banishment. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889. It was not until 1922, however, that aliens were subject to expulsion for narcotics law violations alone. The Narcotics Drugs Import & Export Act, Act of May 26, 1922, ch. 202, 42 Stat. 596, provided for the arrest and deportation of any alien convicted and sentenced for a single violation of its provisions. Id. § 2, 42 Stat. 596. Deportation was to be carried out in accordance with the manner prescribed in the Act of 1917. A similar law was passed in 1931 with one alteration to the effect that deportable violations must occur after the law's enactment. See Act of Feb. 18,
portions. The courts have satisfied themselves solely with containing its more destructive wanderings, but only by regulating its procedural aspects, hardly hampering the Service in its assigned role as Guardian of the Gate.

The courts and the commentators broadly assert that aliens enjoy constitutional due process. This assertion is generally true when an alien seeks civil relief or is tried for his criminal conduct. Nonetheless, the anomaly of banishment shows the precariousness of these pronouncements of due process; in a deportation proceeding an alien enjoys only congressional due process. It may properly be questioned, for example, how much consolation can be taken from assurances as to the assistance of counsel, where, in the case of deportable criminal


40. The term is a popular designation frequently found in secondary authorities. See, e.g., Zaccardi, 1973-74 IMMIGRATION & NAT. RPTR. 39, 42.


43. An alien enjoys no right to appointed counsel at government expense. E.g., Van Dijk v. Immigration & Nat. Serv., 440 F.2d 798 (9th Cir. 1971); Aalund v. Marshall, 323 F. Supp. 1380 (E.D. Tex. 1971), aff'd on other grounds, 461 F.2d 710 (5th Cir. 1972); In re Raimondi, 126 F. Supp. 390, 394 (N.D. Cal. 1954). 8 C.F.R.
transgressions involving drugs, counsel has no role save to admit deportability. At a deportation hearing following conviction for a drug offense, no determination is made whether the particular alien is a person deserving of consideration for continued residence despite his crime.\textsuperscript{44} Reasons which could be considered to justify a decision not to deport might include the existence of a dependent family, the fact of a steady employment record, particular contributions to the community, or any other hardship factor in the alien's life situation.\textsuperscript{46}

Under the present law,\textsuperscript{48} deportation for possession of marijuana § 242.16(c) (1974) requires only that the alien must be advised "of his right to representation, at no expense to the Government, by counsel of his own choice . . . ." See generally Gordon, Right to Counsel in Immigration Proceedings, 45 MINN. L. REV. 875 (1961); Comment, Deportation and the Right to Counsel, 11 HARV. INT. L. J. 177 (1970).

\textsuperscript{44} The only provisions in the immigration law which are available to the deportable drug offender are found in section 212(c) of the act, 8 U.S.C. § 1182(c) (1970), and section 244(a)(2) of the act, 8 U.S.C. § 1254(a)(2) (1970). Both forms of relief are discretionary. Statutory eligibility must be established before the favorable exercise of discretion can be considered. The former statute applies to resident aliens who are seeking reentry after a temporary absence abroad and are returning to a previous domicile in the United States of at least seven years duration. The latter provision applies only to those aliens who have resided in the United States for a continuous period of at least 10 years and can demonstrate "exceptional and extremely unusual hardship." For further discussion, see Kramer, Remedies and Relief in the Immigration and Nationality Act, 50 INTERPRETER RELEASES No. 33, at 233, 237 (1973).


\textsuperscript{46} In 1952, the present omnibus Immigration and Nationality Act was passed over a presidential veto and amid widespread disapproval of many of its excessively exacting measures. A number of newspapers carried strongly worded editorials urging President Truman to veto the 1952 Act. Numerous commentators and various civil rights groups denounced the act in colorful, no-nonsense terms. Much of this criticism was read into the Congressional Record. See 98 CONG. REC. S791-98 (1952). One provision which received an especially critical response in the media and elsewhere was the drug addiction ground for deportation. \textit{Id}. This basis for expulsion is applicable even though no criminal offense is committed and despite subsequent rehabilitation. Also, for the first time, the drug offense basis for deportation was directly integrated into one body of immigration law. See 8 U.S.C. § 1251(a)(11) (1970).

In Marcello v. Bonds, 349 U.S. 302 (1955), the Supreme Court had the opportunity to consider the new drug offense provision. Although the alien in that case had come to this country as an infant some 44 years before, and despite the fact that the drug offense conviction for which the law directed his deportation was not a ground for expulsion when he was admitted nor when he was convicted, the Court held his deportation constitutional, pointing to Congress's "particularly broad discretion in immigration matters," \textit{Id}. at 311, and thereby taking refuge behind the political question doctrine. Justice Douglas dissented, asserting that the failure to demonstrate some connection between the 1938 Marijuana Tax Act violation for which the alien had paid his prescribed criminal penalty, and his present desirability as a resident, amounted to impermissible additional punishment which the ex post facto provision of the Constitution was designed to prevent. He suggested that deportation on the bare record of one 14 year old conviction, ignoring the alien's present life situation and his contributions to his community, was repugnant to constitutional safeguards. Justice Douglas felt that characteriza-
or any other deportable drug offense is virtually automatic. If an alien is convicted of murder, robbery, rape, or any deportable offense other than a drug offense, he may move the criminal court to recommend

tion of deportation as anything other than punishment was anomalous in view of the Court's previous decisions which had applied the ex post facto clause to cases involving civil sanctions which were of a sufficiently serious nature to be regarded as punishment. See id. at 320 (Douglas, J., dissenting).

In the following two decades few serious obstacles were presented to interfere with the congressional exercise of plenary legislative power over immigration policy. The federal courts endeavored to adhere to a posture of strict construction and resolution of doubts in favor of the alien, since this approach was thought to be consonant with the Supreme Court decisions involving deportation, for example, Barber v. Gonzalez, 347 U.S. 637, 642-43 (1954); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); and Delgado v. Carmichael, 332 U.S. 388, 391 (1947). Congress immediately responded with amendments designed to close judicially discovered loopholes. Compare United States ex rel. Robinson v. Day, 51 F.2d 1022, 1023 (7th Cir. 1931), with United States ex rel. Cassetta v. Watkins, 73 F. Supp. 399, 401 (S.D.N.Y. 1947). Thus when it was held that the 1952 Act did not cover possession other than for the purpose of sale, Mow v. McGrath, 101 F.2d 982 (9th Cir. 1939), Congress passed amendatory language expressly aimed at ending technical evasion by the courts. See Act of July 18, 1956, ch. 629, § 301, 70 Stat. 575. Then when California federal courts refused to include marijuana in the term “narcotic drugs” in the Act of 1956 in Hoy v. Rojas-Gutierrez, 267 F.2d 490 (9th Cir. 1959), and Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959), Congress hurriedly passed legislation in 1960 making it unavoidably clear that conviction for simple possession of marijuana is a deportable offense. See Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504. This act was held to be retroactive in Gardos v. Immigration & Nat. Serv., 324 F.2d 179 (9th Cir. 1963). The result is that today any alien, no matter how long he might have lived here, and no matter how exemplary his record of residence is, can be deported for virtually any drug offense, committed at any time, in any place. This precise proposition had been condemned as outrageous 20 and 30 years before on the floor of the Senate and stricken forthwith. See note 7 supra.

There do exist a few decisions which may be worth noting because they can be read as evidence of general judicial distaste for the harsh result to a resident alien in the unyielding application of the stringent deportation law. For example, in Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964), the court held that a conviction for use of drugs was not a conviction for possession because once the drug is taken the power to dispose of it is exhausted. The court acknowledged that Congress had dispensed with any distinction between possession for sale and possession for any other reason, but reasoned that this was really only intended to lighten the government’s evidentiary burden. Where under circumstances in which the government could not on any theory or factual showing demonstrate the alien’s purpose or ability to pass the drug ingested on to another, it was held that neither the language of the statute nor the intent of Congress reached this particular drug offense.

The Board of Immigration Appeals has held that the offense of being present in a place where drugs were known to be used was not a deportable offense. Matter of Schunck, Interim Dec. No. 2137 (Board of Immig. App. 1972). In these circumstances the alien was only an innocent bystander, and, the Board reasoned, Congress could not have intended to deport a person in this sort of situation. These decisions appear to present the possibility in a plea bargaining situation of the alien giving a guilty plea to a lesser included or a reasonably related drug offense in order to avoid being charged with a deportable offense. Should California trial courts demonstrate a willingness to follow the California Supreme Court’s lead in Giron and vacate guilty pleas which have
against his deportation and the judge’s word will bind the federal government absolutely.\textsuperscript{47} Narcotics convictions provide the one glaring exception to this unique possibility in the law for state courts to share the otherwise exclusively federal field. The federal statute precludes the Service from giving any effect to a judicial attempt to aid an alien who is illegally involved with drugs or marijuana.\textsuperscript{48} Moreover, there is no possibility of a state executive pardon.\textsuperscript{49} The courts have also held that expungement of an alien’s criminal record on fulfillment of the terms of probation, which has been recognized as eliminating entirely the basis for deportation for even the most heinous crimes,\textsuperscript{50} is ineffective to erase the conviction of a drug offense.\textsuperscript{51} Unlike the statutory preclusion of judicial recommendation or pardon, the courts have based the no expungement conclusion solely on congressional intent as gleaned from the other strict provisions relating to deportation for drugs.\textsuperscript{52}

Theoretically deportation is not regarded as a criminal sanction.\textsuperscript{53} Instead, it is euphemistically termed only the means by which an alien

\textsuperscript{49} \textit{Id.}; see, e.g., Kwai Chiu Yuen v. Immigration & Nat. Serv., 406 F.2d 499 (9th Cir.), \textit{cert. denied}, 395 U.S. 908 (1969).
\textsuperscript{50} Kelly v. Immigration & Nat. Serv., 349 F.2d 473, 474 (9th Cir.) (Ely, J., dissenting), \textit{cert. denied}, 382 U.S. 932 (1965).
\textsuperscript{52} E.g., Garcia-Gonzalez v. Immigration & Nat. Serv., 344 F.2d 804 (9th Cir.), \textit{cert. denied}, 382 U.S. 840 (1965) (approving the attorney general’s position in Matter of A. F., 8 I. & N. Dec. 429 (Att’y Gen. 1959), which had overruled 15 years of effective expungement of narcotics offenses).
is removed or returned following a violation of a condition placed by Congress on his right to remain.\textsuperscript{54} As a result, the ex post facto clause\textsuperscript{56} and the constitutional provision proscribing cruel and unusual punishment\textsuperscript{56} are inapplicable. If an alien wishes to challenge the constitutionality of a state or federal statute the violation of which may lead to deportation, his deportation hearing is not the appropriate forum in which to do so.\textsuperscript{57} If he concedes that conviction would, without more, require expulsion, but claims that his conviction was defective, he must return to the trial court for relief. His criminal record, if regular on its face, is irrebutably presumed valid for deportation purposes.\textsuperscript{58} If he was convicted after trial and has perfected his right of appellate review, he has reached the end of the road. If he was convicted on his plea of guilty, however, and can make a showing of ignorance of the deportation possibility, the \textit{Giron} decision means he has a chance of convincing the criminal forum to abandon its prior acceptance of his plea.

\textbf{The Alien’s Right to be Forewarned}

Elementary concern for fair treatment of the accused following a guilty plea includes the recognition of a judicial duty to assure that the defendant is apprised of the nature of the charge against him and of the consequences of his choice to forego a trial on the merits. While it is well established that a trial judge must inform the defendant of the possible direct penalties of pleading guilty in order for the plea to be valid,\textsuperscript{59} more recent appellate decisions demonstrate that the courts will also invalidate pleas entered in ignorance of consequences which, though technically indirect, have the effect of increasing or aggravating the punishment exacted.

\textsuperscript{54} See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). See also Bagajewitz v. Adams, 228 U.S. 585, 591 (1913) ("[Deportation] is simply a refusal by the Government to harbor persons whom it does not want.").
\textsuperscript{56} Tsimbidy-Rochu v. Immigration & Nat. Serv., 414 F.2d 797 (9th Cir. 1969); Burr v. Immigration & Nat. Serv., 350 F.2d 87, 91 (9th Cir. 1965), cert. denied, 383 U.S. 915 (1966).
\textsuperscript{57} Matter of Gardos, 10 I. & N. Dec. 261, 263 (Board of Immig. App.), aff’d, 324 F.2d 179 (2d Cir. 1963).
\textsuperscript{58} E.g., Rassano v. Immigration & Nat. Serv., 377 F.2d 971, 974 (7th Cir. 1967); United States ex \textit{rel.} Zaffarano v. Corsi, 63 F.2d 757, 758 (2d Cir. 1933); Weedin v. Moy Fat, 8 F.2d 488, 488-89 (9th Cir. 1925), \textit{cert. denied}, 271 U.S. 667 (1926); United States ex \textit{rel.} Mylius v. UhI, 210 F. 860 (2d Cir. 1914); cf. Fiswick v. United States, 329 U.S. 211, 221-22 (1946).
Federal Cases Involving Collateral Consequences

With the exception of the District of Columbia Circuit,\(^{60}\) and possibly the Fifth Circuit,\(^{61}\) the federal courts view ineligibility for parole as a consequence of sufficient magnitude to render involuntary a guilty plea made in ignorance thereof; such a determination entitles the defendant to have the judgment of conviction vacated and to plead anew.\(^{62}\) The reasoning behind this rule is the recognition that the average defendant presumes the availability of parole.\(^{63}\) Therefore, he has a right to a cautionary statement when his reasonable supposition is incorrect. Most of these decisions involve convictions resulting from federal narcotics law violations for which there is no parole available. Despite the purely statutory nature of the collateral consequence, the majority of courts which have considered the issue have had little difficulty in perceiving the seriousness to the accused of the no-parole factor in his decision to plead guilty. In reality, the *mandatory* sentence to which he is subjected without relief is increased contrary to his expectations.\(^{64}\)

The applicability of no-parole cases to the problem involved in accepting the guilty plea of an alien to an offense which renders him deportable, without warning him of this fact, seems clear. An alien who ignorantly pleads guilty is deceived as surely as the offender who is unaware of the unavailability of parole. Freedom on fulfillment of the conditions of the alien-defendant’s probation carries a necessary connotation of the freedom to be free, but the threat of deportation effectively precludes fulfillment of that promise.

Deportation is a legislatively dictated consequence of an alien’s conviction of a narcotics offense. It can reasonably be assumed that this factor would play a central role in his contemplation of the alternatives with which he is faced\(^{65}\) in responding to a drug possession accusation.

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62. *See, e.g.*, Otero-Rivera v. United States, 494 F.2d 900, 903 (1st Cir. 1974); Moody v. United States, 469 F.2d 705, 708 (8th Cir. 1972); Paige v. United States, 443 F.2d 781, 783 (4th Cir. 1971); United States v. Smith, 440 F.2d 521, 526 (7th Cir. 1971); Bye v. United States, 435 F.2d 177, 179 (2d Cir. 1970); Harris v. United States, 426 F.2d 99, 101 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433, 437 (10th Cir. 1970); Berry v. United States, 412 F.2d 189, 192-93 (3d Cir. 1969); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964).
63. *E.g.*, Bye v. United States, 435 F.2d 177, 181 (2d Cir. 1970); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964).
The seriousness of the drug charge might otherwise appear to be far less substantial, especially where probation is offered in exchange for his plea. Furthermore, the deportation consequence, like the parole ineligibility consequence, is entirely foreseeable to the trial court at the time the alien pleads guilty. This is not a situation in which the accused is claiming a right to be informed about developments which may occur after he is convicted and about which the court cannot conceivably be prepared to instruct him. An example of the latter type of case might be the treatment the accused could expect to receive once in the hands of prison officials, or the type of physical facilities in which he will be imprisoned.

Another collateral consequence which, if unknown to an accused at the time of acceptance of his guilty plea, will render the plea infirm is a statutory requirement that a sentence imposed by a federal court will not begin to run until the defendant is delivered into the custody of federal officials.66 The Ninth Circuit held in United States v. Myers67 that the impact of the federal statute must be made known to the defendant when at the time of his guilty plea and sentencing in federal court he was known to be in the custody of state authorities because of separate charges under state law.

The Myers decision indicates that the court is willing to impose a duty of disclosure upon the judiciary under circumstances which place a defendant in a position of vulnerability, when pleading, because of his particular status. The effect of the statute is to increase greatly the possible length of the defendant's punishment; his plea is infirm because he has a right to know this fact when he is deciding how to plead. Here, the impact of the federal statute, itself a collateral consequence, depends as well on the existence of an additional collateral fact: the defendant's being in state custody. Nonetheless the Myers court concluded that the defendant must be made aware in the federal forum of the indirect consequence to him of having to serve his state sentence fully before commencing his federal sentence with no credit for time served in the former facility.68

This decision gives support to the proposition that an alien's plea to a state drug charge is involuntary where he remained ignorant of the possibility of additional federal punishment. It is the alien's status

67. 451 F.2d 402 (9th Cir. 1972).
68. It is interesting to note that at the time of Myers's guilty plea in federal court he was not yet convicted of any state offense. Thus the impact of the federal statute upon his period of imprisonment was not certain. Yet the court reasoned that his status as a person already in the custody of state authorities rendered him sufficiently vulnerable to the effect of the federal statute as to invalidate his plea entered in ignorance of this factor. See 451 F.2d at 405.
as a noncitizen which automatically alters the tenor of the occasion on which he pleads.

Similarly, it is widely recognized that the impact of a recidivist statute must be made known to a defendant where the increased sentence to which he is subject is a consequence of his particular status as a prior convict. Again the courts do not dispose of the defendant's claim of a judicial duty either to examine him directly or at the least to ascertain whether he is aware of the additional burden if convicted, by terming the consequence to the defendant merely the result of a collateral determination. Rather the focus is as it should be on the realities for the accused, not on the fact that the criminal court itself did not impose the consequence in question.

It is clear that the courts in these cases have not felt constrained to comment on the collateral or indirect nature of the unanticipated consequence claimed to invalidate the plea. Nor have the courts perceived any necessity to pass on the propriety of the congressional determination that a federal narcotics offender is ineligible for parole, that a federal defendant is not entitled to begin his federal sentence until he actually arrives at a federal facility, or that multiple offenders must pay an increased penalty for their criminal transgressions. Rather, the cases reflect a rational willingness to accept the seriousness to the unwitting defendant of his own ignorance. The analysis is functional rather than theoretical.

Although the Supreme Court of California got this far in *Giron*, the California court did not adopt the remedy generally employed by the federal courts following their acknowledgment of the severity of the unknown consequence. While the federal courts conclude that the court's mandatory role should be enlarged to alleviate the asserted infirmity in the defendant's position when pleading, the decision in *Giron* is grounded in the sound exercise of the trial court's discretion on a case by case basis. In other words, every alien rendered deportable by his uninformed plea will be forced to contest the voluntariness of that plea.

The Second Circuit held adversely to the alien on the question raised in *Giron* in *United States v. Santelises*. The court suggested that since some possibility existed that deportation would not follow the alien's non-drug conviction, the federal consequence was not inevitable and, therefore, the court's failure to warn of the deportation law did not render the plea invalid. This decision appears to mean that the

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69. See, e.g., CAL. PEN. CODE § 969 (West 1970); Jenkins v. United States, 420 F.2d 433, 437-38 (10th Cir. 1970).
70. 11 Cal. 3d at 798, 523 P.2d at 639, 114 Cal. Rptr. at 599.
71. 476 F.2d 787 (2d Cir. 1973).
72. Id. at 790.
court did not view the alien as being sufficiently prejudiced by his ignorant plea to require withdrawal.

There are several valid responses to this contention. First, deportation is all but inevitable. While it may theoretically be true that the Service retains discretion on the threshold question of whether to bring deportation charges, an alien should not unknowingly be subjected to this threat. Moreover, the decisions clearly indicate that other courts do regard the deportation provisions as mandatory where a violation of a drug law is concerned.

Secondly, actual deportation is a clear and dire risk of the alien's plea, and his vulnerability to this drastic result is established with absolute certainty. Analogously the right of an accused to be informed of the maximum term to which he could be sentenced cannot be defeated by a general contention that he may not actually receive the stiffest penalty. The very notion that a guilty plea, to be freely and fairly offered, necessitates a full understanding of the serious consequences of the plea presupposes prejudice to the person pleading without the forewarning. Since due process demands that a defendant be adequately prepared to make an intelligent assessment of the important factors in his final decision on how to plead, the fulfillment of this requirement necessarily means that the defendant have that information prior to pleading.

Finally, deportation is added punishment of a most drastic nature. Practically viewed, it is the maximum penalty to which an alien can be subjected. Therefore when a court can foresee that an alien may incur the risk of deportation, it must undertake to see that he is cautioned prior to the acceptance of his guilty plea. If the court fails to explain the deportation consequence, or to see that it has been explained, the alien entering his guilty plea has been denied due process of law and he should be entitled to have his plea invalidated.

The Alien-Defendant's Entitlement to Equal Protection

In Giron the California Supreme Court declined to view the alien-defendant's predicament when he pleads guilty to a drug charge, un-

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73. See generally GORDON & ROSENFIELD, supra note 1, § 5.1.
74. See, e.g., Arias-Uribe v. Immigration & Nat. Serv., 466 F.2d 1198, 1199-2000 (9th Cir. 1972).
76. Following his plea he is a deportable alien, and remains such for his entire lifetime unless he is eventually naturalized. There is no statute of limitations, so an alien convicted of possession of even a single marijuana cigarette could be deported at any time.
aware of the federal deportation pitfall, as requiring invalidation of the conviction on the alien's subsequent motion to vacate his plea. Yet the same court has extended the right to this form of relief to numerous classes of defendants found to suffer similarly onerous collateral consequences following convictions secured by blind pleas.

There is no question that a state's decisional law may be invalid as violating a person's right to equal protection under the Fourteenth Amendment, just as surely as its statutory law may be found infirm for this reason. Moreover it is settled that a state may not constitutionally deny to one group of persons privileges extended to other classes of persons demonstrably deserving similar treatment absent a foundation in reason for the differentiation. This is true even if the state could have declined initially to afford any persons the particular privilege. Once the benefit is bestowed it must be dispensed equally.

The alienage of an individual has been specifically held not to provide a basis for a state's attempt to draw a distinction between potential beneficiaries of various privileges. Although the cases so holding have arisen in a civil context, the same reasoning is all the more compelling in the criminal context.

Therefore, the question arises whether California can constitutionally deny to a defendant, who happens to be a permanent resident alien rather than a citizen, the same shelter which it has provided in comparable situations found to warrant the establishment of obligatory rules of criminal procedure. If it can be shown that California fails to accord similar treatment to all persons subject to its criminal justice system, the state's practice must be changed in order to pass constitutional muster.

California's approach to the resident alien charged with a drug of-

79. See 11 Cal. 3d at 797, 523 P.2d at 639, 114 Cal. Rptr. at 599.
80. See notes 88-110 & accompanying text infra.
85. See notes 83-84 supra.
fense which may render him deportable falls short of the standard which the state has set for citizen-defendants who similarly might suffer burdensome collateral consequences following their convictions. The state has determined that where, at the point of pleading guilty, the defendant is unaware of severe additional consequences certain to occur which will render the plea invalid, the defendant will be permitted to replead to the criminal charges.

California Cases Holding Collateral Consequences Too Onerous To Be Ignored

While the California Supreme Court has not yet expressly accepted the view that a defendant should be permitted to withdraw his guilty plea before sentencing unless the prosecutor can show prejudice to the government,86 the court has stated that California courts prefer to err on the side of caution when accepting guilty pleas rather than to emphasize mere expediency when reviewing the defendant's understanding of the nature and consequences of his plea.87 In a number of situations analogous to that of the alien facing deportation as a result of a narcotics conviction, California courts have required vacation of a guilty plea offered in ignorance of a variety of collateral consequences.

The California Supreme Court held in *In re Birch*88 that the failure to advise the accused of a statutory requirement of lifelong registration as a sex offender on conviction of certain sex offenses89 constituted reversible error. The court reasoned that the “unusual and onerous nature” of the registration statute, “following inexorably from conviction,” gave rise to the court's duty to inform the defendant of the requirement.90 The decision rested partially on the absence of counsel,91 but the court also referred to the inadequacy of the record of conviction to support the plea when challenged on the separate ground of ignorance of the registration requirement.92 The *Birch* decision establishes that the trial court itself has the responsibility of ascertaining on the record whether the accused is aware of the collateral registration consequence.93

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89. CAL. PEN. CODE § 290 (West Supp. 1974).
90. 10 Cal. 3d at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216.
91. *Id.* at 318-21, 515 P.2d at 14-16, 110 Cal. Rptr. at 214-16.
92. *Id.* at 321, 515 P.2d at 16, 110 Cal. Rptr. at 216.
93. *Id.*
In *In re Leyva*, another case involving a conviction for a serious sex offense, the court of appeal held that the accused is to have his guilty plea vacated if he demonstrates that at the point of pleading he was unaware that he could be committed for an indefinite term of treatment following a mandatory hearing to determine whether he was a "mentally disordered sex offender." The decision characterized the indefinite period of treatment consequence as amounting in reality to a possible life commitment which the defendant was agreeing to unwittingly. The court concluded that if the defendant were able to demonstrate the truth of the allegation of ignorance, his plea would be void, thereby removing the jurisdictional prerequisite to the activation of the Mentally Disordered Sex Offender Act. The significance of this case to the present discussion rests in the willingness of the court to consider independently the seriousness of a technically indirect, statutorily provided, effect of a conviction which was otherwise valid in all respects. Since it was the ignorant plea which triggered the hearing, the court accepted the responsibility of informing the defendant of the statute's operation. Likewise, in the deportation context, when a guilty plea will activate the expulsion provision, the trial court should be charged with the duty of disclosing the statute's impact.

In the recent case of *In re Yurko*, the California Supreme Court held that a defendant had the right to have his guilty plea set aside where he was not aware that an admission of prior convictions could effect the penalty which could be imposed for the offense charged. The court found "by a parity of reasoning" to the United States Supreme Court's decision in *Boykin v. Alabama*, as construed by the California Supreme Court in *In re Tahl*, that the same criteria that governed the acceptance of guilty pleas, including the requirement of an on the record disclosure of the specific constitutional rights waived, should apply in the situation of the accused who is asked to admit allegations of prior felony convictions. The court reasoned that the severity of the additional consequences made possible by the accused's admission, including the possibility of the defendant being adjudged an habitual criminal, required the establishment of a "judicially declared

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95. Id. at 406, 87 Cal. Rptr. at 266.
98. 395 U.S. 238 (1969). *Boykin* held that there must be a specific waiver by the defendant of his constitutional rights when the court accepts his guilty plea.
100. 10 Cal. 3d at 863, 519 P.2d at 565, 112 Cal. Rptr. at 517.
rule of criminal procedure”¹⁰¹ that the defendant be admonished on the record regarding (1) the “specific constitutional protections waived by an admission of the truth of an allegation of prior felony convictions, and (2) those penalties and other sanctions imposed as a consequence of a finding of the truth of the allegation.”¹⁰² The added burdens discussed by the court include foreclosure of the possibility of parole,¹⁰³ extension of the term of imprisonment to life incarceration,¹⁰⁴ and the increased time which must be served before the defendant is eligible for parole.¹⁰⁵ In view of the availability to the accused of a trial as a matter of right to determine the factual issues raised by his denial of prior convictions, his admission of the existence of a prior criminal record actually entails a waiver of the same constitutionally protected rights which are given up when a person pleads guilty.¹⁰⁶ Therefore failure to be advised on the face of the record of these waivers invalidates the inadvertent admission.

In In re Yurko, the court rejected older cases¹⁰⁷ which had approached the admission of prior convictions as “merely allowing a determination of a ‘status’ which can subject an accused to increased punishment.”¹⁰⁸ While recognizing the technical accuracy of the distinction between admission of the status of felon and admission of guilt to a criminal charge, the court found it without substance where the admission amounts to an unprotected foregoing of an important right, and an unwitting invitation of added penalties.¹⁰⁹

The case presents a situation analogous to that suffered by an alien admitting guilt to a deportable offense unaware of the applicable immigration law. It is his status as an alien which provides the basis for the added penalty. By confessing his criminality he simultaneously waives in ignorance his extremely important right to remain in this country. He too will be subjected to enormously increased punishment, a “life sentence of banishment,”¹¹⁰ because of his status.

The California and federal cases above demonstrate that despite the desirability of general discretion in the trial court to consider any reason which a defendant might offer to justify the withdrawal of a guilty plea, the courts have found that specific sets of circumstances

¹⁰¹. Id. at 864, 519 P.2d at 565, 112 Cal. Rptr. at 518.
¹⁰². Id. at 860, 519 P.2d at 563, 112 Cal. Rptr. at 515.
¹⁰⁴. Id. § 644 (West 1970).
¹⁰⁵. Id. §§ 3046-48.5.
¹⁰⁶. 10 Cal. 3d at 863, 519 P.2d at 565, 112 Cal. Rptr. at 517.
¹⁰⁸. 10 Cal. 3d at 862, 519 P.2d at 564, 112 Cal. Rptr. at 516.
¹⁰⁹. See id.
merit the imposition of rules to guide all future judicial responses to similar claims. The rationale is that because conviction of certain offenses automatically carries penalties beyond the sentence directly imposed, a defendant should be forewarned of the unanticipated consequence. The courts in these cases have not attempted to differentiate between the indirect or direct nature of the added burden, but rather they have granted relief when the asserted external consequence appears to be virtually automatic, reasonably substantial, and in the nature of punishment. Deportation, accurately described, consists of precisely these factors.

Resolution by Judicial Declaration

It has long been held that a defendant must be informed of the maximum sentence which he may receive as a result of a guilty plea. The sentence of banishment on being convicted is the maximum penalty suffered by an alien for simple possession and should be known to him when he is considering how to plead. Failure to disclose the drastic deportation sanction to an alien charged with a narcotics offense as minor as mere possession renders his plea infirm, if not in the constitutional sense, at least in the sense of the enlightened administration of criminal justice. A reviewing court undoubtedly enjoys greater flexibility in assessing the voluntariness of a guilty plea when it can rest its rejection of the plea upon a finding of a manifest injustice requiring vacation, rather than having to reach the same result based upon a denial of constitutional due process. Thus the setting down of mandatory guidelines for the acceptance of guilty pleas seems to have been the preferred remedial mode of correcting recurring situations involving ignorant pleas. Another notable advantage in setting a state standard, beyond greater elasticity in the actual election to shelter uninformed


112. See, e.g., Marvel v. United States, 380 U.S. 262 (1965), vacating and remanding 335 F.2d 101 (5th Cir. 1964); United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972); Combs v. United States, 391 F.2d 1017 (9th Cir. 1968).


115. See, e.g., Pilkington v. United States, 315 F.2d 204, 209 (4th Cir. 1963). Both courses of action assure the individual added protection.

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pleas, is the resulting insulation from federal review.117

Since it can be expected that the state courts will continue to be approached by resident aliens who realize their error in foregoing a trial only after being served with orders to show cause why they should not be deported for their convictions, it seems that the legitimate concern of the state in maintaining the finality of guilty plea convictions can best be served by an obligatory disclosure rule regarding the expulsion sanction. Certainly the added protection afforded the alien is well warranted in view of the severity of the deportation sanction. Moreover, since Congress has selected the outcome of a state criminal proceeding as the event which subjects the alien to the deportation threat,118 the state court should be able to require that its process be entirely fair to the alien by disclosing the deportation possibility.

The result in Giron will understandably encourage more aliens to assert their ignorance, thereby requiring the courts to deal repeatedly and unnecessarily with the same question despite the lack of guidance provided in Giron. Finally, it might properly be argued that the court itself should be informed of the deportation consequence so that it might better evaluate the alien's entire situation for the purpose of deciding whether to accept a guilty plea at all. Or the court might in its wisdom determine to reduce the charge in the case of a first offender like Giron to a nondeportable drug offense in view of the disproportionate nature of the punishment which the federal legislature has dictated.119

The Problem of Possible Preemption

An important and potentially disturbing question not considered by the California Supreme Court in Giron is the propriety of a state court's setting aside a guilty plea solely on the ground that the defendant was ignorant of a federal consequence of his state conviction. In a few cases similar to Giron, the immigration authorities have successfully attacked subsequent orders modifying state criminal proceedings which were allegedly intended to thwart the federal deportation scheme. In this series of decisions involving attempts by state courts to effect

117. California courts can require a more stringent standard for guilty plea convictions than do the federal courts. The California Supreme Court has expressed this view, stating that: "[W]e are not precluded from adopting for California a more exacting standard than is minimally required by the federal Constitution, whether to afford greater assurance of the validity of convictions, to protect more fully defendants' rights, or to anticipate future constitutional developments." In re Tahl, 1 Cal. 3d 122, 132 n.5, 460 P.2d 449, 456 n.5, 81 Cal. Rptr. 577, 584 n.5 (1969).


nunc pro tunc amendments to the records of criminal proceedings for
the purpose of repairing the courts' failure to recommend against de-
portation at the time of sentencing, or within thirty days thereafter, the
federal courts have held the amendments ineffective for deportation
purposes.  

These federal courts, reviewing the state court records on appeal from a final order of deportation, have strictly construed the statutes empowering criminal courts to recommend against deportation.

These decisions indicate a concern of federal courts to prevent any interference by state courts in the deportation process beyond that which is statutorily mandated. This concern was particularly evident in the Second Circuit's decision in United States ex rel. Piperkoff v. Esperdy\(^\text{121}\) denying a tardy recommendation any effect. The court refused to allow resort to a post-conviction proceeding "in the nature of coram nobis" to remedy the original judgment's omission of a recommendation against deportation. In Piperkoff the trial court purported to vacate the alien's conviction altogether, depriving it of finality for any purpose. It was held, however, that insofar as the state court had issued its extraordinary writ with the plain intent of evading the effect of the Service's subsequent order of deportation, it could have no effect on the alien's otherwise valid conviction; thus, he remained deportable as charged.\(^\text{122}\)

Where a state court attempted to avoid the deportation by vacating the conviction, however, including dismissal of the accusatorial instrument, the Third Circuit held, in Sawkow v. Immigration & Naturalization Service,\(^\text{123}\) that the original conviction could not provide a basis for deportation; the court distinguished those cases in which the proceedings were merely reopened to add the recommendation against deportation.\(^\text{124}\) It further distinguished the Second Circuit's decision in Piperkoff denying a late recommendation any effect. In the Piperkoff case, the Third Circuit reasoned, the criminal court had by its later order to vacate merely allowed the alien to reassume the position of one who, although accused, has not yet entered a plea.\(^\text{125}\) Where a judgment of conviction has been set aside along with the indictment by which the defendant is charged, there exists nothing in the nature of a foundation for the order of deportation.\(^\text{126}\)

\(^\text{120.}\) See, e.g., Velez-Lozano v. Immigration & Nat. Serv., 463 F.2d 1305, 1307-08 (D.C. Cir. 1972); Marin v. Immigration & Nat. Serv., 438 F.2d 932, 933 (9th Cir. 1971); United States ex rel. Piperkoff v. Esperdy, 267 F.2d 72, 74-75 (2d Cir. 1959); United States ex rel. Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926); cf. Haller v. Esperdy, 397 F.2d 211, 214 (2d Cir. 1968).

\(^\text{121.}\) 267 F.2d 72 (2d Cir. 1959).

\(^\text{122.}\) Id. at 75.

\(^\text{123.}\) 314 F.2d 34 (3d Cir. 1963).

\(^\text{124.}\) Id. at 37 n.3.

\(^\text{125.}\) Id. at 37.

\(^\text{126.}\) Id.
The distinction articulated by the court in Sawkow seems strained.\textsuperscript{127} It is clear that the Third Circuit did not approve of the Second Circuit's harsh conclusion. The court qualified its holding, however, by explaining that the Service's threshold concession of the state court's power to issue the order of vacation foreclosed the federal court from entertaining any argument to limit the effect of the state action for federal deportation purposes.\textsuperscript{128} Absent an allegation that the criminal court exceeded the bounds of its jurisdiction or misused its discretion it would be assumed that its order should be completely effective in all respects.

Although Giron's criminal proceedings were not simply reopened to add something to the record, as in Piperko\textsuperscript{f}, the information by which he was charged was not simultaneously set aside with the plea, as in Sawkow. Giron remained accused of the crime of possession. The trial court merely substituted his not guilty plea for the guilty plea which was withdrawn, and calendared his case for trial. In this situation there may be nothing to prevent the Service from arguing that the state court's action amounted both to an improper exercise of its jurisdiction and to a bad faith exercise of its asserted discretion. The state court might appear to be accomplishing indirectly a species of substantive review of the grounds for deportation where the Supreme Court of the United States has repeatedly declined to examine directly the rationality of congressionally selected grounds for deportation. It seems plausible that unless the state court asserted a constitutional basis for its action, or at the very least asserted a self-imposed rule of procedure dictated by its desire to protect the integrity of its own criminal justice system, an alien would remain vulnerable in the federal forum. A state cannot, through an exercise of its discretion, avoid federal expulsion for no reason other than its desire to do so. A state cannot pass on the question of deportation in any way whatsoever save by express congressional authority to do so.\textsuperscript{129}

Several responses to this potential jurisdictional problem do exist. First, there may not really be any conflict between state action and fed-

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\item \textsuperscript{127} Subsequent federal decisions have failed to make the Third Circuit's distinction between a complete vacation and an incomplete vacation based on whether the indictment or information had also been abandoned. Thus the Seventh Circuit has held without elaboration that a vacation of judgment entitled the alien to reconsideration by the Board of Immigration Appeals. See Cruz-Sanchez v. Immigration & Nat. Serv., 438 F.2d 1087 (7th Cir. 1971).
\item \textsuperscript{128} 314 F.2d at 37.
\item \textsuperscript{129} See, e.g., Graham v. Richardson, 403 U.S. 365, 376-80 (1971); Hines v. Davidowitz, 312 U.S. 52, 62-68 (1940); Truax v. Raich, 239 U.S. 33, 42 (1915); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Purdy v. Fitzpatrick, 71 Cal. 2d 566, 456 P.2d 649, 79 Cal. Rptr. 77 (1969); Mackenzie v. Hare, 165 Cal. 776, 134 P. 713 (1913); Ex parte Ah Cue, 101 Cal. 197, 35 P. 556 (1894); Lin Sing v. Washburn, 20 Cal. 534 (1862); Pople v. Lopez, 81 Cal. App. 199, 253 P. 169 (1927).
\end{itemize}
eral law. A conflict exists only if one assumes that Congress intended to lay a trap for the unwary alien-defendant pleading guilty to a deportable crime. Rather, it is more reasonable to assume that when an occasion actually arises in which a specific warning is needed to avoid misleading an uninformed alien, Congress intended that the federal immigration laws should not be enforced so as to work an undue hardship. Thus, in *Moser v. United States*,\(^1\) the Supreme Court held that a resident alien could not be assumed to be aware that his election not to serve in the armed forces would preclude him from eligibility for naturalization, where the surrounding circumstances led him to believe otherwise. In that case the alien was misled by his correspondence with the Swiss government regarding the consequences of his decision not to serve.\(^2\) The language of the decision does not include any express notion of estoppel, but it is clear that the Service was in effect bound by the actions of another governmental body. This case can be read to allow a modest amount of flexibility in the enforcement of a clear provision of the Immigration and Nationality Act where the alien is misled by authoritative-appearing information. The reasoning of the case is applicable to Giron’s situation in which the state prosecutor, under color of authority, offered him the opportunity to trade an admission of guilt for freedom on probation. Thus, Giron’s dealings with the state affirmatively misled him. Unless it is to be assumed that Congress intended that he be tricked into the dire consequence of federal expulsion by way of his bargain with the state, it seems the state could rationally require that an alien be informed of the deportation consequence before it accepts his plea.

Secondly, the crucial feature of the federal deportation scheme providing for expulsion for drug offenses is the underlying state conviction. Congress designated the state’s finding of guilt as the event which triggers the federal consequence. Therefore, it is arguable that unless Congress expressly qualifies its reliance on the state’s criminal system, a state’s inclusion of particular rules of procedure must be respected.\(^3\) Such has been the view in respect to the notion of finality of a conviction sufficient to support an order of deportation.\(^4\)

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2. \(^{131}\) 341 U.S. at 46.

3. \(^{132}\) See *United States v. Hocket*, 487 F.2d 270, 271-72 (9th Cir. 1973); *Holzapfel v. Wyrsch*, 259 F.2d 890, 891 (3d Cir. 1958). During discussion of the recommendation against deportation provision when the Immigration Act of 1917 was being debated in the House of Representatives, one congressman observed that by enacting that provision the Congress was “imposing a duty on a State court judge . . . making him pro tanto, pro tempore, a Federal official . . . giving his acts possibly as an individual a Federal effect . . . .” 53 CONG. REC. 5170 (1916) (remarks of Congressman Bennett).

4. \(^{133}\) Although the notion of *finality* is inherent in the concept of a conviction
larly, should California decide to impose a rule of criminal procedure which realistically recognizes California's statutorily provided role in the federal plan, it should be accepted by the enforcement arm of the federal government unless and until Congress demonstrates its disapproval.

Thirdly, even if a state's procedural rule does intrude in a field considered to be occupied by the federal government, the nature of the intrusion must be examined. If the overlap does not prejudice the congressional scheme in the sense of frustrating the legitimate aim of the federal law, it should be upheld if the state also has a legitimate interest. Thus while discretionarily vacating a guilty plea to a state charge on a case by case basis may effectively halt the Service's move to expel the alien because of his conviction, it is a haphazard and thus inherently unfair means of accomplishing a just result. By contrast, the establishment of a disclosure rule giving notice of the federal law in the course of the state's proceeding assures fair process while in no way hindering the ultimate effectiveness of the deportation law for conviction. In reality a rule mandating the issuance of a cautionary statement would enhance the integrity as well as the efficacy of the immigration law, because the rule would reduce collateral assaults based on ignorance of a material fact.

Lastly, the argument that a state court has no jurisdiction or power to vacate a guilty plea because an alien-defendant was ignorant of the possibility of deportation can only be based on the theory that Congress enjoys plenary legislative power over immigration matters and has which will serve to support an order of deportation, the Board of Immigration Appeals has held that if a conviction is final for any single state purpose, it is sufficiently final for federal deportation purposes. See, e.g., Matter of Johnson, 11 I. & N. Dec. 401, 404 (Board of Immig. App. 1965); Matter of L-R-, 8 I. & N. Dec. 269 (Board of Immig. App. 1959).

In Pino v. Landon, 349 U.S. 901 (1955), rev'd per curiam Pino v. Nicolls, 215 F.2d 237 (1st Cir. 1954), the Supreme Court rejected the First Circuit's view that the Service can deport persons whose convictions are not final for state purposes. However, the Court did not specifically disapprove of the lower federal court's opinion that the term "conviction" as used in the deportation statute was to be federally defined, and thereby freed from the vagaries and nuances of state criminal laws. See 215 F.2d at 243; accord, Will v. Immigration & Nat. Serv., 447 F.2d 529, 531 (7th Cir. 1971); Garcia-Gonzalez v. Immigration & Nat. Serv., 344 F.2d 804, 807 (9th Cir.), cert. denied, 382 U.S. 840 (1965); Gutierrez v. Immigration & Nat. Serv., 323 F.2d 593, 596-97 (9th Cir. 1963). But the Court did reverse for the reason that the Massachusetts conviction was not final for any purpose from the state's perspective. It appears therefore that the Supreme Court regards the state's view of its convictions and criminal procedures as a more important if not determinative factor for immigration purposes than the general desirability of national uniformity in enforcing the deportation law.

134. But cf. Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974), in which the court asserted: "To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact
not delegated any of that power to state courts. But this theory ignores
the independent interest of the state in protecting persons presumed
innocent until fairly found guilty. The theory is also outweighed by
the interest of the vulnerable alien-defendant in pleading guilty only
if he is fully aware of the consequences.

The argument favoring the invalidity of a state's attempt to find
for itself a limited role in the area of deportation law would also appear
to be defective for its implied assumption that the alien was guilty of
the crime with which he was charged. But that assumption has no
place in the determination of what procedural fairness requires.
Furthermore if in fact the alien's conviction was defectively accom-
plished, then he remains entitled to a trial to determine his guilt or in-
ocence, as the case may be. If, as has been pointed out by the Su-
preme Court elsewhere, the alien is unfairly convicted by his own un-
informed guilty plea, and his conviction is allowed to stand nonetheless,
he has lost the only real opportunity he has to avoid deportation.
That conviction record will not be examined again in his deportation
hearing for fairness of process. Thwarting the federal plan for expell-
ing "undesirable" aliens is really not the objective when a court is con-
fronted with the individual's threatened deportation on the basis of a
state court conviction which the alien-defendant claims is procedurally
infirm but which, nonetheless, provides unimpeachable evidence of de-
portability. The true goal is to provide fair process to the alien ac-
cused of a deportable drug offense.

Conclusion

The alien-defendant should be informed of the deportation conse-
quence prior to the court's acceptance of his guilty plea to a crime for
which he can be subsequently expelled from the United States. Courts
cannot justifiably assume a protective attitude toward some persons who,
having pleaded guilty, face severe additional post-sentence hazards,
while neglecting to afford the same sort of shelter to other "less visible"
persons capable of identification as a class. When it becomes evident
that one group of persons is almost invariably punished more severely
than all other persons similarly subject to state criminal charges, that
class must be provided equal regard under the law. Aliens form a class
viewed as inherently suspect and entitled to Fourteenth Amendment
protection. In a nondeportation setting, such as a state criminal forum,
there is little remaining doubt that aliens must be treated as citizens

that even Congressional plenary power is subject to Constitutional limits." Id. at 1031,
citing United States v. Thompson, 452 F.2d 1333, 1338 (D.C. Cir. 1971).
136. See id. at 221-22.
137. See id.
are treated. The California Supreme Court has concluded that persons who are subject on conviction to added burdens of a penal nature deserve an increased solicitude when caught unaware of the nature or the consequences of their waiver of important rights. Aliens, because of their status alone, face a drastically different outcome on conviction for minor criminal transgressions than do citizens. Therefore, a judicially declared rule of criminal procedure should be established to the effect that a trial court must ascertain on the record whether an alien-defendant charged with a drug offense is aware of the possibility of deportation before that court can accept a valid guilty plea. Such a rule would simultaneously serve three legitimate purposes: 1) it would provide the same type of protection which has been afforded other defendants in selected sets of similar, recurring circumstances, 2) it would serve to relieve the state of future assaults on guilty plea convictions because of the defendant's ignorance of the deportation consequence, and 3) it would ultimately enhance the efficacy as well as the integrity of the federal immigration law by eliminating an element of deceit which presently infects the law.

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138. See cases cited note 82 supra.
139. See notes 87-110 & accompanying text supra.
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