NEW YORK STATE
BAR ASSOCIATION

A report from the **Committee on Immigration Representation, Committee on Legal Aid, and Committee on Mandated Representation**

October 2021

Approved by the New York State Bar Association House of Delegates on October 30, 2021

Memorandum

From: Shayna Kessler and Hasan Shafiqullah, Co-Chairs, NYSBA Committee on Immigration Representation
Robert Dean, Chair, NYSBA Committee on Mandated Representation
Adriene Holder and Sally Curran, Co-Chairs, NYSBA Committee on Legal Aid
David Louis Cohen, Chair, NYSBA Criminal Justice Section

To: Andrew Brown, NYSBA President

Date: September 15, 2021

Re: Request to adopt American Bar Association Resolution 103B, calling for the United States Attorney General to use the Attorney General certification process to address certain administrative law decisions that subject people with prior contact with the criminal legal system to immigration law consequences that are unlawful and inconsistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations.

The Committee on Immigration Representation, the Committee on Mandated Representation, the Committee on Legal Aid, and the Criminal Justice Section recognize that there are grave consequences for noncitizens who have had prior contact with the criminal legal system, whether that contact resulted in a criminal conviction. The merger of criminal legal and immigration systems has caused a cascade of consequences, resulting in the disparate treatment of immigrants who have contact with the criminal legal system. This interplay between the criminal and immigration systems disproportionately impacts Black immigrants and other immigrants of color, who are also disproportionately arrested, convicted, and sentenced more harshly than white people.[1] These immigration consequences of criminal legal contact can include mandatory civil detention and deportation, inability to obtain lawful permanent residency or citizenship, and ineligibility for protection based upon persecution, torture, domestic violence, human trafficking, and more.[2]

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[1] See, e.g., Carl Lipscombe, Juliana Morgan-Trostle, and Kexin Zheng, The State of Black Immigrants: Black Immigrants in the Mass Criminalization System, NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 20 (2016) ("while Black immigrants make up only 7.2% of the unauthorized population in the U.S., they make up over 20% of all immigrants facing deportation on criminal grounds"); Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community, Southeast Asia Resource Action Center 3 (Oct. 2016) ("while 29% of other immigration deportations are based on old convictions, 78% of Southeast Asian American immigrants are in deportation proceedings because of old criminal convictions"

[2] See 8 U.S.C. 1227(a)(2), INA 237(a)(2); 8 U.S.C. 1182(a)(2), INA 212(a)(2) (deportability, inadmissibility, and relief ineligibility grounds based on prior certain prior convictions and findings of criminal conduct); 8 U.S.C. 1229b(a)(3), INA 240A(a)(3) (aggravated felony bar to cancellation of removal); 8 U.S.C. 1226(c), INA 236(c) (conviction-based civil detention); 8 U.S.C. 1158(b)(2)(A)(ii), INA 208(b)(2)(A)(ii); 8 U.S.C. 1231(b)(3)(B)(ii), INA 241(b)(3)(B)(ii) (particularly serious crime bar to asylum an withholding of removal); 8 U.S.C. 1254a(c), INA 244(c) (criminal bars to Temporary Protected Status); 8 U.S.C. 1154(a)(1), INA 204(a)(1); 8 U.S.C. 1101(f), INA 101(f) (criminal bars to lawful permanent residence and cancellation of removal under VAWA); 8 U.S.C. 1255(h), INA 245(h) (criminal bars to lawful permanent residence for abused, neglected, and abandoned special immigrant juveniles); 8 U.S.C. 1326(b), INA 276(b) (enhanced federal sentences in immigration-related prosecutions for unlawful reentry into the United States); 8 U.S.C. 1427(a)(3), INA 316(a)(3); 8 U.S.C. 1101(f), INA 101(f) (criminal disqualification—in some instances, permanent—from naturalization eligibility).

The deep entanglement of the criminal and immigration systems should be resolved through federal legislative reform that disentangles the two systems. Until that reform is enacted, the U.S. Department of Justice ("DOJ") has an opportunity to significantly limit the harsh and unfair consequences that noncitizens face after contact with criminal law enforcement by revisiting a body of administrative opinions that wrongly interpret immigration law. Through the certification process, the U.S. Attorney General can use his authority to review and address prior harmful Board of Immigration Appeals and Attorney General decisions that adversely impact people in immigration proceedings.[3] These prior decisions have resulted in hundreds of thousands of people subjected to detention and deportation, separating families and destabilizing communities.[4] Nevertheless, they are unfounded, based upon interpretations of the law that misconstrue congressional intent.

In its Resolution 103B and the accompanying report and recommendations, the American Bar Association documents the body of administrative law decisions that improperly subject noncitizens – predominantly noncitizens of color – to harsh and unintended immigration consequences.[5] There, they call upon the U.S. Attorney General to withdraw prior opinions and certify to himself the following several matters for reconsideration. First, they call for the Attorney General to issue an opinion affirming that immigration authorities should defer to the intent of the convicting jurisdiction when that jurisdiction vacates, expunges, or otherwise eliminates or modifies a conviction. Likewise, immigration authorities should give full authority to newly enacted sentencing reforms that a local jurisdiction applies retroactively for the purpose of mitigating immigration consequences. Second, when criminal court documents are incomplete or unavailable, noncitizens should nevertheless remain eligible for discretionary immigration relief. Third, under the categorical approach to analyzing penal law provisions, the express language of a statute of prior conviction should be sufficient to establish the "least-acts-

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[3] For an overview of the Attorney General's referral policy, *see* Alberto R. Gonzalez & Patrick Glen, *Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L.Rev. 841 (2016). Only four Attorney General opinions were issued during the eight years of the Obama Administration, sixteen during the eight years of the Bush Administration. By contrast, fifteen were issued in the immigration context during the four years of the Trump Administration: *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (limiting continuances); *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018) (limiting administrative closure); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (limiting termination); *Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018) (limiting asylum particular social groups (PSG) based on domestic violence and some other grounds); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (limiting asylum PSG based on family unit); *Matter of Negusie,* 28 I&N Dec. 120 (A.G. 2020) (eliminating duress exception to persecutor bar to asylum and withholding of removal); *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (introducing de novo review of asylum to second-guess IJ fact-finding; tightening PSG requirements); *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019) (undermining immigration effect of vacatur of criminal convictions); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (denying bond hearings for individuals subject to expedited removal); *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020) (criminal convictions); *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020) (Convention Against Torture); *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020) (asylum persecutor bars); *Matter of R-A-F-*, 27 I&N Dec. 778 (A.G. 2020) (Convention Against Torture); *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) (good moral character); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (asylum); *Matter of J-J-G-, 27 I&N Dec. 808 (BIA 2020)* (exceptional and extremely unusual hardship standard).

[4] See Human Rights Watch, A Price Too High: US Families Torn Apart by Deportations for Drug Offenses (June 16, 2015); Race Forward, Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System (2011).

[5] American Bar Association Resolution 103B, Adopted by the House of Delegates Feb. 22, 2021, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103b-midyear-2021.pdf

criminalized," without a further "realistic probability" showing.[6] This would ensure that people with criminal convictions are not precluded from eligibility for immigration relief based upon an improper analysis of the elements of the crime of conviction. Fourth, they call for the recission of decisions that establish criminal bars to asylum and withholding of removal that improperly limit asylum eligibility.

While federal legislative reform is needed to address the unfairly harsh impact of the interplay between the criminal and immigration legal systems, the ABA has outlined key steps that the DOJ can take immediately to reduce this harm. NYSBA should add its support to the establishment of administrative law that comports with congressional intent and sound policy.

The NYSBA Committees on Immigration Representation, Mandated Representation, and Legal Aid, and the Criminal Justice Section, urge NYSBA to adopt the ABA Resolution 103B, and to join the many other voices calling for an end to the harsh and unfair immigration consequences of criminal legal system engagement.

[6] For an overview of the categorical analysis, *see* Katherine Brady, "How to Use the Categorical Approach Now," (Immigrant Legal Resource Center, Dec. 2019) https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf

New York State Bar Association
Committee on Immigration Representation,
Committee on Mandated Representation,
Committee on Legal Aid,
And Criminal Justice Section
Proposed Resolution

WHEREAS, the New York State Bar Association (NYSBA) has long supported and encouraged measures to foster equity and racial justice for immigrants and all New Yorkers; and

WHEREAS, in the past, NYSBA has actively promoted and participated in efforts to provide immigrants in New York and nationwide with access to justice by promoting access to legal representation through the establishment of a committee specifically for that purpose, support for policies that invest in universal representation, and through partnerships with the Liberty Defense Project and;

WHEREAS, numerous provisions of immigration law impact people who have had contact with the criminal legal system; and

WHEREAS, the United States Department of Justice ("DOJ") has the authority to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and wrongfully expand the application of the criminal provisions of the immigration laws and which improperly interpret the immigration laws; and

WHEREAS, Improper DOJ administrative opinions have caused hundreds of thousands of disproportionately Black people and other people of color to be civilly detained, deported, denied immigrations status, and criminally incarcerated; and

WHEREAS, the American Bar Association has adopted a resolution calling for the United States Attorney General to limit the immigration law impacts of criminal legal system engagement by utilizing the "certification process to withdraw certain Attorney General opinions and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations, and which uphold . . . well-settled legal concepts;" and

WHEREAS, immigration detention and enforcement poses grave risks to immigrant New Yorkers, particularly immigrant New Yorkers who are people of color; and

WHEREAS, NYSBA believes that an immigration system that is welcoming and inclusive will benefit all New Yorkers;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby urges the United States Department of Justice to use the Attorney General certification process to withdraw the Attorney General opinions delineated in American Bar Association Resolution 103B and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations.

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 22, 2021

RESOLUTION

RESOLVED, That the American Bar Association recommends the United States Department of Justice use the Attorney General certification process to withdraw certain Attorney General opinions and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations, and which uphold the following well-settled legal concepts:

1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:

    a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;

    b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and

    c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.

2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.

3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.

4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

REPORT

Numerous provisions of U.S. immigration laws attach immigration consequences to prior criminal arrests, convictions, and essentially any interaction with a domestic or international penal system. The list of possible immigration consequences is vast: mandatory deportation, including of lawful permanent residents; mandatory civil detention pending removal proceedings; ineligibility for lawful permanent residence through family members and through employment; ineligibility for asylum, withholding of removal, and Temporary Protected Status; ineligibility for status under the Violence Against Women Act, Trafficking Victims Protection Reauthorization Act, and Victims of Trafficking and Violence Prevention Act; sentencing enhancement in federal criminal prosecutions; and denial of naturalization.[1] The American Bar Association ("ABA") has long criticized the excessive integration of the immigration and criminal systems in the United States, and continues to strongly urge Congress to enact and the President to sign immigration reform legislation that substantially reduces the range and severity of immigration consequences of criminal system interactions.[2] In this Resolution, however, the ABA focuses on actions that may be properly taken by the United States Department of Justice ("DOJ") to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and substantially, but wrongfully, expand the application of the criminal provisions of the immigration laws. These decisions improperly interpret the immigration laws in violation of congressional intent, often in violation of U.S. treaty obligations, and have resulted in hundreds of thousands of people civilly detained, deported, denied immigrations status, and criminally incarcerated.[3] Moreover, these decisions have had a disproportionately harsh and discriminatory impact on Black, Latino, and Asian immigrant communities.[4]

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[1] *See* 8 U.S.C. 1227(a)(2), INA 237(a)(2); 8 U.S.C. 1182(a)(2), INA 212(a)(2) (deportability, inadmissibility, and relief ineligibility grounds based on prior certain prior convictions and findings of criminal conduct); 8 U.S.C. 1229b(a)(3), INA 240A(a)(3) (aggravated felony bar to cancellation of removal); 8 U.S.C. 1226(c), INA 236(c) (conviction-based civil detention); 8 U.S.C. 1158(b)(2)(A)(ii), INA 208(b)(2)(A)(ii); 8 U.S.C. 1231(b)(3)(B)(ii), INA 241(b)(3)(B)(ii) (particularly serious crime bar to asylum an withholding of removal); 8 U.S.C. 1254a(c), INA 244(c) (criminal bars to Temporary Protected Status); 8 U.S.C. 1154(a)(1), INA 204(a)(1); 8 U.S.C. 1101(f), INA 101(f) (criminal bars to lawful permanent residence and cancellation of removal under VAWA); 8 U.S.C. 1255(h), INA 245(h) (criminal bars to lawful permanent residence for abused, neglected, and abandoned special immigrant juveniles); 8 U.S.C. 1326(b), INA 276(b) (enhanced federal sentences in immigration-related prosecutions for unlawful reentry into the United States); 8 U.S.C. 1427(a)(3), INA 316(a)(3); 8 U.S.C. 1101(f), INA 101(f) (criminal disqualification—in some instances, permanent—from naturalization eligibility).

[2] ABA Resolution 06M300 (urging congressional and executive actions to reduce the immigration impacts of the criminal system); ABA Resolution 12M101F (opposing "amendments" to the immigration laws that further expand the definition of "conviction").

[3] *See* Human Rights Watch, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses* (June 16, 2015); Race Forward, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (2011).

[4] *See, e.g.*, Carl Lipscombe, Juliana Morgan-Trostle, and Kexin Zheng, *The State of Black Immigrants: Black Immigrants in the Mass Criminalization System*, NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 20 (2016) ("while Black immigrants make up only 7.2% of the unauthorized population in the U.S., they make up over 20% of all immigrants facing deportation on

This resolution and accompanying report address the following legal questions that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability: 1) the meaning of the statutory term "conviction" in immigration law, when and whether it encapsulates criminal court dispositions that have been given post-conviction relief treatment by the adjudicating court, and the related questions of when and whether immigration law recognizes modifications to prior criminal sentences and retroactive sentencing reform laws, 2) proper application of the Supreme Court's categorical approach in immigration adjudications, and the improper and unfair restrictions on immigration relief where noncitizens cannot supply the immigration adjudicator with specific criminal record documents that are unavailable, 3) proper application of the Supreme Court's categorical approach in immigration adjudications, and specifically how immigration adjudicators identify the elements of a prior conviction for purposes of categorical comparison, and 4) the "particularly serious crime" bar to asylum and withholding of removal and the improper framework the DOJ has developed for making that determination. For each of these issues, this report provides legal and factual background, and a specific recommendation for the revised legal standards and rules the DOJ should establish through the adjudicative rulemaking functions of the Board of Immigration Appeals ("BIA") and the United States Attorney General ("AG") through the certification process.[5]

First, this resolution recommends that the AG certify to himself[6] the question of the scope of the definition of the statutory term "conviction"[7] in the Immigration and Nationality Act ("INA"), and issue a decision[8] holding that for purposes of the INA, the "conviction" definition does not include past offenses that have been eliminated by the adjudicating jurisdiction through expungement, rehabilitation, prospective and retroactive decriminalization of previously criminal conduct, or the court's desire to alleviate immigration hardships. The BIA already correctly recognizes that prior convictions

criminal grounds"); *Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community*, Southeast Asia Resource Action Center 3 (Oct. 2016) ("while 29% of other immigration deportations are based on old convictions, 78% of Southeast Asian American immigrants are in deportation proceedings because of old criminal convictions").

[5] The ABA recommends that for any legal issues addressed through the AG certification power, the certification process provide: 1) notice to the public of the AG's intent to certify the case and issue to herself, 2) identification of the specific legal questions the AG intends to review, 3) an opportunity for public comment and briefing prior to issuance of any final decision, and 4) release of the underlying decision(s) in the case. *See* ABA Resolution 19A121A.

[6] At the time this resolution and report were drafted, the Attorney General was William Barr.

[7] 8 U.S.C. 1101(a)(48)(A), INA 101(a)(48)(A).

[8] By statute and regulation, the BIA and AG may issue administrative opinions that "serve as precedents in all proceedings involving the same issue or issue." 8 C.F.R. 1003.1(g)(2)-(3). *See also* ABA Resolution 19A121A, at pg 1 of the Report.

vacated for legal defect in the underlying proceeding fall outside the INA statutory term "conviction."[9]

"Under our federal system, the States possess primary authority for defining and enforcing the criminal law."[10] Pursuant to this "usual constitutional balance between the States and the Federal Government," the states have developed multiple legal mechanisms for modifying and often ultimately eliminating a conviction for all purposes as part of the criminal adjudication process.[11] These measures have become absolutely crucial as the criminal legal and incarceration systems have ballooned over the past 40 years.[12] For most of the modern immigration era, the DOJ's administrative opinions generally recognized modifications and expungements of adjudicating jurisdictions, regardless of whether the reason for the modification or expungement was for underlying legal defect, demonstrated rehabilitation, satisfaction of sentencing requirements, or alleviating immigration hardships.[13] *See Matter of G-*, 9 I&N Dec. 159, 169 (BIA 1960, AG 1961) ("an expungement of" a noncitizen's "conviction under section 1203.4 of the California Penal Code withdraws the support of that conviction from a deportation order");[14] *Matter of Luviano-Rodriguez*, 21 I&N Dec. 235 (BIA 1996) (en banc), *rev'd on other grounds*, 23 I&N Dec. 718 (AG 2005); *Matter of F-*, 1 I&N Dec. 343 (BIA 1942); *Matter of Ozkok*, 19 I&N Dec. 546, 550 (BIA 1988) ("a conviction for a crime involving moral turpitude may not support an order of deportation if it has been expunged"); *Matter of O-T-*, 4 I&N Dec. 265 (BIA 1951) (same). Reinstating, strengthening, and rendering these decisions internally consistent will give effect to this history of decisional law that created the legislative backdrop for Congress codifying the "conviction" definition in 1996, and will respect the federalist balance between state and federal regulation of criminal

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[9] *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

[10] *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted).

[11] *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also 50-State Comparison Judicial Expungement, Sealing, and Set-Aside*, Restoration of Rights Project, http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

[12] *See* John F. Pfaff, *The Growth of Prisons: Toward a Second Generation Approach* (2007), http://ssrn.com/abstract=976373; The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-.

[13] *See* James A.R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. Mich. J.L. Reform 915, 915 (2003) ("For most of the twentieth century, a non-citizen was generally not subject to removal on the basis of a criminal conviction which had been expunged by the state that rendered the conviction.").

[14] In *Matter of G-*, the AG declined to recognize expungements in immigration cases with respect to prior narcotics convictions. The AG's distinction between narcotics and non-narcotics convictions and the effect of expungement was based on differences in the statutory scheme that have since been superseded. Under the current INA, the statutory definition of "conviction" applies to all provisions within the INA that use the term "conviction," including the provisions that attach deportability, inadmissibility, and relief ineligibility to controlled substance offenses. *See* 8 U.S.C. 1227(a)(2)(B)(i), INA 237(B)(2)(i); 8 U.S.C. 1182(a)(2)(A)(i), INA 212(a)(2)(A)(i).

and immigration law.[15] This interpretation also avoids equal protection violations by eliminating severe immigration consequences that disproportionately impact people of color protected by antidiscrimination laws.[16] Through the certification and re-decision process, the AG should rescind *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), and *Matter of Marroquin-Garcia*, 23 I&N Dec. 705 (2005), and in their place issue an opinion adopting the holding in the BIA's prior decision in *Matter of G-*, 9 I&N Dec. 159 (BIA 1960, AG 1961).

As a related matter, with respect to the immigration consequences of prior criminal sentences, this resolution further recommends the AG rescind *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (AG 2019). *Matter of Thomas & Matter of Thompson* overruled the BIA's prior decisions in *Matter of Song*, 23 I&N Dec. 173 (BIA 2011), and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), which, for immigration purposes, recognized sentencing modifications by the sentencing/conviction jurisdiction. The Board's precedents in *Song* and *Cota-Vargas* properly understood the history of immigration law recognizing sentencing modifications.[17] The two decisions also appropriately protected the federalist balance where states determine the penalties for violations of their criminal laws. For these reasons, *Thomas/Thompson* should be withdrawn. Similarly, the BIA's decision in *Matter of Velasquez-Rios* fails to recognize California's retroactive sentencing reform law for immigration purposes. In 2015, California followed several states by reforming its sentencing laws to reduce the sentencing maximum on misdemeanor offenses.[18] Under *Velasquez-Rios*, the BIA will not give effect to the portion of the California law that retroactively alters the sentencing maximum on all prior misdemeanor convictions. The decision fails to appropriately adhere to settled principles of federalism.[19]

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[15] *See* Lauren-Brooke Elsen, Brennan Center for Justice, *Criminal Justice Reform at the State Level: Most incarcerated people in America are held in state and county facilities. That is why state reform is so crucial.* (Jan. 2, 2020), https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level.

[16] *See Washington v. Davis*, 446 U.S. 229, 239 (1976) ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."). *See also* Karla McKanders, *Immigration and Blackness*, 44 Human Rights 20 (2019) ("America's history of immigration policies has traditionally operated to the exclusion of immigrants of color.").

[17] *See, e.g.*, *Matter of H-*, 9 I&N Dec. 380, 383 (BIA 1961); *Matter of Martin*, 18 I&N Dec. 226, 227 (BIA 1982).

[18] California Penal Code 18.5(a).

[19] "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012). *See also Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal citation omitted) ("respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action").

Second, this resolution recommends that the AG certify to himself the categorical approach legal question of whether a removable noncitizen is eligible for relief where the available components of the *Taylor/Shepard*[20] "record of conviction" do not reveal whether the noncitizen was convicted of the relief-disqualifying prong of the statute, and issue an opinion adopting the legal interpretations of the Circuit Courts of Appeals in *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc), and *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008). To the extent that *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009), is inconsistent with the reasoning of these federal courts, the AG should overrule *Almanza-Arenas* on this legal question. The Supreme Court developed the categorical approach because of its "constitutional, statutory, and equitable" underpinnings. *Mathis v. U.S.*, 136 S. Ct. 2243, 2256 (2016). For these reasons, the Supreme Court created a presumption that a person was convicted of the least-acts-criminalized under a statute of conviction.[21] At least three Courts of Appeals, including the First, Second, and Ninth Circuits[22], apply this presumption in holding that unless a statute of conviction or the conviction documents that are lawfully reviewable under the categorical or modified categorical approach prove with certainty that the noncitizen was convicted of a relief-disqualifying offense, the least-acts-criminalized presumption remains undisturbed and the noncitizen may apply for relief. Through *Almanza-Arenas* and the rule it endorses, the Board has improperly abandoned the least-acts-criminalized presumption in cases where the "record of conviction" is reviewable, but it does not reflect conviction under the relief-qualifying or relief-disqualifying prong of the statute of conviction. As these Circuit Courts of Appeals have found, this rule violates the Supreme Court's instructions on how immigration adjudicators are to apply the categorical and modified categorical approaches. In addition, as a practical and equitable matter, this holding has hugely disproportionate impact on noncitizens who are people of color and overrepresented in the criminal legal system, and on noncitizens who are detained,[23] indigent, not English-proficient,[24] or mentally and physically disabled,[25] as these

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[20] *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

[21] *See Moncrieffe v. Holder*, 559 U.S. 184 (2013).

[22] *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc); *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008).

[23] According to one study, only 14 percent of detained noncitizens in removal proceedings are represented by counsel. *See* Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Penn. L. Rev. 1, 33 (2015). ICE detained almost 50,000 noncitizens on a given day in 2019, of which 36 percent, or over 17,000 detainees, had criminal convictions. *See* Transactional Records Access Clearinghouse, Syracuse University, Growth in ICE Detention Fueled by Immigrants With No Criminal Conviction (Nov. 2019), https://trac.syr.edu/immigration/ reports/583/.

[24] Eighty-nine percent of noncitizens (or 162,923 individuals in all) proceeded in a language other than English for immigration court cases completed in Fiscal Year 2018. *See* Executive Office for Immigration Review, U.S. Department of Justice, Statistics Yearbook, https://www.justice.gov/eoir/ file/1198896/download (data compiled for fiscal year 2018), at pg 18.

[25] "[U]p to 60,000 detained individuals with some type of mental illness face deportation each year." Fatma E. Marouf, *Incompetent But Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 Hastings L.J. 929, 937 (2014). These individuals suffer from cognitive delays, schizophrenia, bipolar disorder, or post-traumatic stress disorder. *Id.* At 936. This population struggles to

populations lack the resources to obtain complete conviction records from courts around the United States, often from cases that took place many years prior, and often in criminal courts far from the location of detention and removal proceedings.

Third, this resolution recommends that the AG certify to himself a related categorical approach question of how immigration adjudicators identify the least-acts-criminalized under a statute of conviction for purposes of the categorical comparison, and in doing so rescind *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019); *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014); and *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016), and replace them instead with an opinion adopting the decisions of the Circuit Courts of Appeals in *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Chavez-Solis v. Lynch*, 803 F.3d 10004 (9th Cir. 2015); and *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017). In a 2007 categorical approach case before the Supreme Court, the justices used the phrase “realistic probability” to deny a litigant’s argument that a person can be convicted for “aiding and abetting” under California law for conduct that is beyond the federal requirements for accessory liability.[26] The Court rejected the use of “legal imagination” for identifying the least-acts-criminalized under a statute of prior conviction. The Board, through *Navarro Guadarrama* and *Ferreira*, has wrongfully interpreted the “realistic probability” and “legal imagination” language to fail to recognize conduct that convicting jurisdictions explicitly legislate as covered by a statute of conviction. Through *Mendoza Osorio*, the Board has further improperly restricted the methodology for identifying the least-acts-criminalized by refusing to recognize documents from actual arrests and prosecutions for conduct that does not trigger immigration consequences. The Board’s rule, rejected by a majority of Courts of Appeals, including the First, Second, Third, Fourth, Ninth, and Tenth Circuits (and adopted by the Fifth Circuit in a sharply divided en banc opinion)[27], requires that a noncitizen (or federal defendant) produce evidence of prosecutions for conduct that does not trigger immigration consequences, even where the statute of conviction explicitly covers that conduct. This rule runs contrary to the Supreme Court’s jurisprudence on the categorical approach, which has never applied the realistic probability in this manner. This rule causes the same equitable and practical flaws discussed above, by disproportionately impacting and disadvantaging noncitizens of color who are overrepresented in the criminal system, and on noncitizens who are detained, indigent, not English proficient, or mentally and physically disabled, all of whom face nearly insurmountable barriers to making the kind of evidentiary showing the Board now requires.

Fourth, this resolution recommends the AG, through the certification power, rescind three BIA decisions that bar immigration adjudicators from granting asylum and

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participate in their cases. *See generally* Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System* (2010).

[26] *Gonzales v. Duenas Alvarez*, 549 U.S. 183 (2007).

[27] *Swaby v. Yates*, 847 F.3d 62 (1st 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Singh v. Attorney General*, 839 F.3d 273 (3d Cir. 2016); *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015); *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017). *But see U.S. v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

withholding of removal, and replace them with administrative decisions that comply with U.S. treaty obligations as incorporated into statutory immigration law.[28] This resolution recommends rescission of *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); and *Matter of Y-L-*, 23 I&N Dec. 270 (AG 2002), which establish a framework that is in violation of U.S. treaty obligations for determining whether a person has been convicted of a "particularly serious crime" barring asylum or withholding of removal. These decisions should be replaced with an administrative opinion requiring that a "particularly serious crime" be an "offence" that is "a capital crime (murder, arson, rape, armed robbery, etc.)"[29] or "a very grave punishable act."[30] International law scholars, who are recognized experts in international refugee conventions and their treatment under U.S. law, all agree that this is the correct interpretation of the statutory term "particularly serious crime."[31]

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Through this resolution and accompanying report, the ABA provides a framework for the DOJ to correct a flawed body of administrative law that—without proper statutory or constitutional authority, and at times in violation of international law—has led to hundreds of thousands of people detained, deported, excluded, and denied immigration protections and status based on prior criminal arrests and convictions. This resolution would restore faith in federal agencies and in the rule of law, prevent continued discriminatory harm against communities of color, and facilitate the fair and proper functioning of the immigration system of the United States.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
February 2021

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[28] "[T]he United Nations Protocol Relating to the Status of Refugees … provided the motivation for the enactment of the Refugee Act of 1980." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987). *See also Cardoza-Fonseca*, 480 U.S. at 432-433 (citing "the abundant evidence of an intent to conform the definition of "refugee" and federal asylum law to the United Nation's Protocol to which the United States has been bound since 1968").

[29] Atle Grahl-Madsen, Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (1963), ¶9.

[30] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1, ¶ 155 (1979, re-edited Jan. 1992).

[31] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); Atle Grahl-Madsen, Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (1963); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992).

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Wendy S. Wayne

1. Summary of Resolution(s). This resolution and accompanying report address the following legal matters that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability:

    1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:

        a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;

        b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and

        c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.

    2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.

    3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.

    4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

2. Approval by Submitting Entity. Yes

3. Has this or a similar resolution been submitted to the House or Board previously? No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

19A121A "Recommends that the Executive Office for Immigration Review amend 8

C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process.”

06M300 "That the American Bar Association urges Congress to restore authority to state and federal sentencing courts to waive a non-citizen’s deportation or removal based upon conviction of a crime, by making a “judicial recommendation against deportation” upon a finding at sentencing that removal is unwarranted in the particular case; or, alternatively, to give such waiver authority to an administrative court or agency"
"That the American Bar Association urges states, territories, and the federal government to expand the use of the pardon power to provide relief to noncitizens otherwise subject to deportation or removal on grounds related to conviction, where the circumstances of the particular case warrant it"

09A113 "That the American Bar Association supports legislation, policies, and practices that pre-serve the categorical approach used to determine the immigration consequences of past criminal convictions...”

06M101F "That the American Bar Association supports legislation, policies, and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regardless of the custody or detention status of the individual.... That the American Bar Association urges that provisions of the Immigration and Nationality Act that are determined to be ambiguous be construed in favor of the use of rehabilitative problem-solving courts. That the American Bar Association opposes interpretations of, and amendments to, the Immigration and Nationality Act that classify participation in, or the entry of a provisional plea upon commencement of a drug treatment or other treatment program offered in relation to problem-solving courts or other diversion programs as a “conviction” for immigration purposes"

06M107C "... the American Bar Association urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include...the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal."

20M117 " urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law"

The policy proposal would complement and support existing policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudications system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.

9. Disclosure of Interest. (If applicable) No known conflict of interest exists.

10. Referrals.

Criminal Justice Section
Administrative Law Section
Labor and Employment Law
Center for Human Rights
International Law Section
StC on National Security
Judicial Division
Civil Rights and Social Justice

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Meredith A. Linsky, Director, Commission on Immigration, 1050 Connecticut Ave NW, Suite 400, Washington, DC 20036, tel 202-662-1006, meredith.linsky@americanbar.org.

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.) Wendy S. Wayne, Chair, Commission on Immigration, CPCS Immigration Impact Unit, 21 McGrath Highway, Somerville, MA 02143, tel. 508-641-9209, wwayne@publiccounsel.net.

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution and accompanying report address the following legal matters that are germane to the often life-altering impacts that an individual noncitizen's past contact with a criminal legal system can impose on immigration status and immigration stability:

1. A criminal disposition should be interpreted as intended by the convicting jurisdiction, with respect for the balance between federal and state concerns, including as follows:

    a. A criminal conviction that has been vacated, expunged, or otherwise eliminated by the convicting jurisdiction is no longer a conviction for immigration purposes;

    b. A criminal sentence that has been modified by the sentencing jurisdiction will be recognized as modified and given full effect for immigration purposes; and

    c. A state's decision to reform its criminal and sentencing laws and to apply those reforms retroactively will be recognized and given full effect for immigration purposes.

2. Noncitizens remain eligible for discretionary immigration relief where criminal court record documents are incomplete or unavailable.

3. Under the categorical approach, as defined by federal appellate courts, the express language of a statute of prior conviction is sufficient to establish the least-acts-criminalized, without a further "realistic probability" showing.

4. Criminal bars to asylum and withholding of removal must comport with U.S. treaty obligations as incorporated into statutory immigration law.

2. Summary of the Issue that the Resolution Addresses

Numerous provisions of U.S. immigration laws attach immigration consequences to prior criminal arrests, convictions, and essentially any interaction with a domestic or international penal system. The larger solution is for Congress and the President to issue immigration reform legislation that substantially reduces the range and severity of immigration consequences of criminal system interactions. In the absence of that, this proposal focuses on actions that may be properly taken by the United States Department of Justice ("DOJ") to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and substantially, but wrongfully, expand the application of the criminal provisions of the immigration laws. These decisions improperly interpret the immigration laws in violation of congressional intent, often in violation of U.S. treaty

obligations, and have resulted in hundreds of thousands of people civilly detained, deported, denied immigrations status, and criminally incarcerated.

3. Please Explain How the Proposed Policy Position Will Address the Issue

For each of these issues, this report provides legal and factual background, and a specific recommendation for the revised legal standards and rules the DOJ should establish through the adjudicative rulemaking functions of the Board of Immigration Appeals and the AG through the certification process.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

There are no minority views of which we are aware.