STARTING OVER: THE IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY AND REHABILITATION

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I.
INTRODUCTION

The Immigration and Nationality Act (INA) does not distinguish between children and adults in almost all of the provisions it sets forth, and the same triggers initiate grounds for removability and inadmissibility[1] regardless of an individual's age. In fact, the only place in the entire INA that makes specific reference to age is in the provision for Special Immigrant Juvenile Status (SIJ),[2] which provides a particular form of relief for undocumented immigrant youth who have been abused or neglected. Despite the juvenile law system's growth in the last century that allows for the distinct treatment of juveniles and adults in the criminal context,[3] immigration law has only inconsistently made such adjustment.

The breadth of knowledge across disciplines that led to the creation of the juvenile justice system is just as compelling and important in the immigration context as in the criminal context; indeed both systems of law impose serious, life-altering consequences on their subjects. However, youth who are adjudicated,[4] whether under their states' juvenile justice laws or criminal laws, are at risk of suffering serious immigration consequences as a result.

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1. Under the INA, the term "inadmissible" refers to a noncitizen who has not yet been admitted to the U.S. who is ineligible to receive a visa or be admitted to the U.S. based on various grounds of inadmissibility. *See* INA § 212(a), 8 U.S.C § 1182(a) (2012). The term "removable" refers to a noncitizen who has been admitted to the U.S., but can be removed, i.e. deported, based on various grounds of removal. *See* INA § 237(a), 8 U.S.C § 1227(a) (2012).

2. INA § 101(a)(27)(J)(i), 8 U.S.C § 1101(a)(27)(J)(i) (2012).

3. For an explanation of the development of a separate system of juvenile law, *see infra* Part II.

4. For purposes of this article, I will use the term "juvenile adjudications" to refer to any adjudication rendered against a minor. This includes adjudications of juvenile delinquency or adjudications under any state's juvenile justice statute, which may use the term delinquency,

Most juveniles have a chance to prove to the state that they have been rehabilitated through provisions within the juvenile justice statutes allowing for expungement or other erasure of their record, intended by legislatures to provide youth with the opportunity of a fresh start, free from "all taint"[5] of their past bad act. However, the promise of a fresh start is not truly fulfilled for noncitizen juvenile offenders. Such expungements are not recognized in the immigration context, and an expunged adjudication will trigger all of the same immigration consequences as the original. This is an unacceptable result, especially in the context of juveniles, because it disregards the core underpinnings of the juvenile justice system that children who commit a bad act are not beyond hope, that they have a greater capacity for rehabilitation than their adult counterparts, and that they are altogether less culpable.[6] By refusing to recognize expungements in the immigration context, the underlying intent of state legislatures in enacting juvenile rehabilitative provisions is frustrated, and noncitizen children are denied the true meaningful opportunity at rehabilitation to which the Court says they have a constitutional right.

This article will begin by providing an overview of the juvenile justice system in this country and its underlying rationale in Part II. In Part III it will then explore the state of immigration law as it interacts with juvenile adjudications and the ways in which such adjudications can implicate immigration consequences. Next it will explore, in Part IV, the treatment of expunged records and rehabilitative statutes generally in the immigration context. Finally, in Part V, it will argue that in the case of juveniles, expungement of records pursuant to juvenile rehabilitative statutes must be honored in the immigration context. This is necessary both because the legislative intent underlying such statutes requires it, and because it is constitutionally required in order to give juveniles a true opportunity for rehabilitation.

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juvenile offender, youthful offender, or yet some other phrase. These adjudications may or may not be considered "convictions."

5. *In re* Andrade, 14 I. & N. Dec. 651, 653 (B.I.A. 1974) (citing Morera v. INS, 462 F.2d 1030, 1032 (1st Cir. 1972)). In this case, the BIA (Board of Immigration Appeals) withdrew an order of deportation against an individual who had been convicted of a simple marijuana offense under California state law, and which was expunged pursuant to California's youthful offender statute. In so doing, the B.I.A. analogized this California expungement scheme to a Federal youthful offender statute. The same analogy can readily be drawn with statutes of any state that provides such a rehabilitative scheme for youthful offenders. *Id.* at 654.

6. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (2012) (holding that sentences mandating life in prison without the possibility of parole for juvenile offenders is unconstitutional). *See also* Part II, *infra*, for further discussion of the juvenile justice system and the importance of the fundamental differences between juveniles and adults as discussed in *Miller*.

II.
THE ORIGINS OF JUVENILE JUSTICE

The creation of a juvenile justice system in this country was founded on the unique differences that distinguish children from adults. Because youth are "less culpable for conduct and more easily rehabilitated given their stage of development,"[7] the juvenile justice system of the twentieth century developed around the goals of rehabilitation and reintegration.[8] Although the juvenile justice system has gone through changes since its inception, rehabilitation remains a stated goal of most state juvenile statutes.[9]

The origin of this separate system for juvenile justice is attributed to the Progressive movement of the late nineteenth century, which responded to the social problems caused by the rapid industrialization of that era.[10] Central to this movement's take on juvenile justice reform were the ideas that "young offenders were misguided children rather than culpable wrongdoers, and that the sole purpose of state intervention was to promote their welfare through rehabilitation."[11] Beginning with Illinois in 1899, each state began passing juvenile justice acts that focused on rehabilitation rather than retribution and employed procedures separate and apart from those employed in adult criminal matters. [12]

By the mid-twentieth century, a shift began within the juvenile justice system, in which greater procedural safeguards were mandated for juvenile proceedings in contrast to the "indeterminate, informal procedures to make discretionary, individualized treatment decisions" that characterized the juvenile justice system born of the Progressive movement.[13] Beginning with *In re Gault*

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7. Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. L. & SOC. CHANGE 63, 84–85 (2011).

8. *See* Rights and Rehabilitation in the Juvenile Courts, 67 COLUM. L. REV. 281, 282 (1967) ("The founders of the juvenile court system sought, above all, to further the rehabilitation of youthful offenders.") (citing Kent v. United States, 383 U.S. 541, 554 (1966)); Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 500 (2009) ("The progressive vision inspired the creation of separate juvenile courts to shield youthful offenders from the harsh treatment of the criminal system to which they had been subject in the past, and the new courts aimed to oversee these offenders' correction, helping them to grow into productive and law-abiding adults.") (citing ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 137–45 (1969)).

9. 1 SUBST. CRIM. L. § 1.7 (2d ed.) ("The typical juvenile delinquency statute indicates more or less specifically that juvenile delinquency proceedings are designed not for the punishment of the offender but for the salvation of the child.").

10. Kim Taylor-Thompson, *Children, Crime, and Consequences: Juvenile Justice in America: States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 146 (2003).

11. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804–05 (2003).

12. Taylor-Thompson, *supra* note 10, at 147.

13. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 970–71 (1995).

in 1967, the Court held that such procedural protections as the right to notice, counsel, and confrontation, as well as the right against self-incrimination must extend to juveniles in delinquency proceedings.[14] Subsequently, the Court extended additional procedural protections to juveniles that brought juvenile proceedings closer to adult criminal proceedings than they had ever been since the juvenile justice system began.[15]

This shift signaled a recognition that juvenile delinquency, although separate from the adult criminal justice system, is nonetheless a serious matter with significant consequences that requires procedural safeguards. However, this does not signify a shift away from the underlying rationale of juvenile justice. The Supreme Court continues, even within the past decade, to reaffirm this underlying rationale, the idea "that children are different from adults and that those developmental differences are of constitutional dimension."[16] In *Roper v. Simmons*, the Supreme Court determined that capital punishment was unconstitutional when imposed on juveniles.[17] In making this determination, the Court noted the three main differences between children and adults as supported by scientific and sociological studies. First, "[a] lack of maturity and under-developed sense of responsibility are found in youth more often than in adults and are more understandable among the young," resulting in "impetuous and ill-considered actions and decisions."[18] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[19] Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[20] These psychological and sociological differences between juveniles and adults should inform the way young people are treated in the legal system, because they indicate that juveniles are less culpable then adults and have greater capacity for change. The Court in *Roper* acknowledged that juveniles "have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment" and "a greater possibility exists that a minor's character deficiencies will be reformed."[21]

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14. 387 U.S. 1, 33–57 (1967).

15. *See, e.g.*, *In re* Winship, 397 U.S. 358, 368 (1970) (requiring the burden of proof in juvenile delinquency proceedings to be "beyond a reasonable doubt" rather than lower standards of proof); Breed v. Jones, 421 U.S. 519, 531 (1975) (extending the protection of the double jeopardy clause of the Fifth Amendment to prevent a youth convicted in a juvenile court from being prosecuted in adult court for the same offense).

16. Robin Walker Sterling, *"Children are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1022 (2013) (referencing the Court's decision in Miller v. Alabama, 132 S. Ct. 2455 (2012)).

17. 543 U.S. 551, 575 (2005).

18. *Id.* at 569 (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

19. *Roper*, 543 U.S. at 569 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1978)).

20. *Id.* at 570.

21. *Id.*

In *Graham v. Florida*, the Court held that juveniles could not be sentenced to life imprisonment without parole for non-homicide offenses.[22] In so deciding, it reinforced its support for "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds."[23] A few years later, the Court decided that mandatory sentences of life without parole were unconstitutional when imposed on juveniles in *Miller v. Alabama*, recognizing that "science and social science supporting *Roper's* and *Graham's* conclusions have become even stronger."[24] Thus, the Supreme Court affirms the fact that youth are particularly more receptive to rehabilitation than their adult counterparts, and that this fact is determinative in the analysis of the constitutionality of penalties imposed on juveniles.

With an understanding of the origins of a separate system of juvenile justice, it can next be seen how this system interacts with immigration law. The next section explores the ways in which minors involved in the juvenile justice system can suffer potentially serious immigration consequences as a result.

III.
JUVENILE DELINQUENCY IN IMMIGRATION LAW

Today, every state and the federal government has provisions by which juveniles who commit crimes may be charged as juvenile offenders, in a separate system than their adult counterparts, with a separate set of rules and distinct consequences.[25] Depending on the age of the juvenile and the nature of the crime committed, states may also choose to bypass juvenile court entirely and charge the juvenile as an adult.[26]

Juvenile adjudications of any type can have significant consequences in the immigration context. Notably, adjudications could trigger U.S. Immigrations and Customs Enforcement (ICE) to place an individual in removal proceedings. Under the INA, many grounds for removability or inadmissibility are triggered by convictions,[27] and others are triggered by conduct alone, regardless of

22. Graham v. Florida, 560 U.S. 48, 74 (2010).

23. *Id.* at 68.

24. Miller v. Alabama, 132 S. Ct. 2455, 2464 n.5 (2012).

25. For examples of various states' juvenile justice statutes, see, *e.g.*, GA. CODE ANN. § 15-11-470 (2015); COLO. REV. STAT. § 19-2-102 (2015); 705 ILL. COMP. STAT. 405/5-101 (2007); IOWA CODE § 232.8 (2014); MO. REV. STAT. § 211.011 (2010); N.M. STAT. ANN. § 32A-2-2 (2009). For the federal juvenile justice statute, *see* Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 (2012).

26. Some factors that have been considered by state courts in determining whether to transfer a juvenile's case to adult court include: age, gravity of the offense, criminal sophistication, amenability, and likelihood that rehabilitation will be completed within the juvenile court's jurisdiction. Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 797–800 (2000).

27. For example, aggravated felonies (defined at INA § 101(a)(43), 8 U.S.C § 1101(a)(43) (2012)) INA § 237(2)(A)(iii), 8 U.S.C. § 1227(2)(A)(iii) (2012), firearms or destructive devices

conviction.[28] Once an individual is in removal proceedings, a juvenile adjudication could also be the factor that bars her from being granted the relief sought, often asylum or cancellation of removal.[29] Such adjudications can also have immigration consequences for individuals who make affirmative applications on their own behalf, such as for adjustment of status, asylum, or Deferred Action for Childhood Arrivals (DACA).[30]

How, then, do adjudications of juveniles, whether tried within the state's separate juvenile justice system or as an adult, interact with the relevant provisions of the INA? This section will explain the ways in which juveniles experience immigration consequences in each scenario, whether tried as an adult, as a juvenile, or in proceedings that appear to be a hybrid of the two.

The general rule in American immigration law is that adjudications of juvenile delinquency are not convictions for purposes of immigration law,[31] so they do not trigger conviction-based grounds of removability or inadmissibility. Meanwhile convictions of juveniles tried as adults carry all of the implications that they would for any other adult. This general rule flows from the definition of "conviction" under the INA, as seen through its current formulation in the INA alongside the legislative history leading up to this definition. Therefore, an understanding of the INA's definition of "conviction" is the best starting point for understanding the immigration implications of juvenile adjudications.

A. Definition of Conviction under the INA

The current definition of "conviction" under the INA came into being with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This act provided a statutory definition for

offenses, INA § 237(2)(C), 8 U.S.C. § 1227(2)(C) (2012), crimes of moral turpitude, INA § 237(2)(A)(i), 8 U.S.C. § 1227(2)(A)(i) (2012), and domestic violence/stalking/child abuse offenses, INA § 237(2)(E), 8 U.S.C. § 1227(2)(E) (2012), all trigger immigration consequences only upon conviction for such offense.

28. For example, conduct showing someone to be a trafficker in controlled substances or a drug abuser or addict, to have violated a domestic violence order of protection, to have used fraudulent documents for immigration purposes, and to have engaged in alien smuggling, triggers immigration consequences upon evidence of such conduct, even without a corresponding conviction. *See infra* Part III.C.1 for a discussion of specific conduct-based triggers.

29. Examples of forms of relief from removal include Cancellation of Removal, INA § 240A, 8 U.S.C. § 1229b (2012); Asylum, INA § 208, 8 U.S.C. § 1158 (2012); and Withholding of Removal, INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

30. Examples of immigration statuses that individuals can proactively apply for include Adjustment of Status (to become a permanent resident), INA § 245, 8 U.S.C. § 1255 (2012); Asylum, INA § 208, 8 U.S.C. § 1158 (2012); and DACA, *see* Memorandum from Janet Napolitano, Sec'y, DHS, to David V. Aguilar, Acting Comm'r, CBP, Alejandro Mayorkas, Dir., USCIS, and John Morton, Dir., ICE, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf.

31. *In re* Devison, 22 I. & N. Dec. 1362, 1373 (B.I.A. 2000).

"conviction" to be used in immigration proceedings,[32] which was then incorporated into the INA. That section of the INA reads:

"The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[33]

This current definition was Congress's first attempt at a statutory definition of "conviction" in the immigration context. Prior to this, the definition of "conviction" for immigration purposes was derived from case law. For many years, the Board of Immigration Appeals (BIA)'s definition was "a fluid one" as the BIA "struggled for more than 50 years to reconcile its definition with the increasing numbers of state statutes providing ameliorative procedures affecting the 'finality' of a conviction under state law."[34] This approach created a lack of uniformity within immigration law, allowing different immigration consequences to attach to the same criminal conduct because of the "vagaries of state law."[35] Prior to IIRIRA, the BIA attempted to create uniformity by setting forth a comprehensive definition of "conviction" for immigration purposes in *Matter of Ozkok*.[36] This definition contained three prongs; the first two are mirrored above in the INA definition that followed several years later, while the third prong stated:

> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding his guilt or innocence of the original charge.[37]

The third prong of the *Ozkok* definition still left a lack of uniformity because it prevented an original finding of guilt from being a "conviction" for immigration purposes if that finding were suspended or conditioned upon future

32. IIRIRA § 322(c), 110 Stat. 3009-629 (1996).

33. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2012).

34. *In re* Roldan-Santoyo, 22 I. & N. Dec. 512, 515 (B.I.A. 1999).

35. *Id.* at 516 (citing *In re* Ozkok, 19 I. & N. Dec. 546, 551 n.6 (B.I.A. 1988)).

36. *In re* Ozkok, 19 I. & N. Dec. 546, 550 (B.I.A. 1988). While the BIA had attempted to define "conviction" previously, such as in *In re* A.F., 8 I. & N. Dec. 429 (B.I.A. 1957), it struggled to find a definition that would achieve a degree of uniformity among states.

37. *In re Ozkok*, 19 I. & N. Dec. at 552.

good behavior under a particular state's law.[38] Eight years later, Congress enacted the statutory definition in effect today, retaining the first two prongs of the *Ozkok* definition but removing the third prong altogether. Courts described Congress' intent to broaden the definition of conviction and ensure that individuals did not "escape[] the immigration consequences normally attendant upon a conviction."[39] By removing this prong, Congress intended that "even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws."[40] Congress reiterated this intent when incorporating the IIRIRA definition into the INA, stating that the broader definition "will make it easier to remove" non-citizens found to have committed crimes.[41]Under Congress's current definition, a non-citizen is considered convicted "based on an initial finding or admission of guilt coupled with the imposition of some punishment," regardless of what state procedures might affect that initial finding later on.[42]

B. Juveniles Charged and Tried as Adults

The immigration consequences for juveniles who have committed crimes derive largely from this statutory definition of conviction. All states have provisions by which juveniles' cases may be transferred to adult court.[43] There are three mechanisms to transfer juveniles to adult court: judicial waiver, prosecutorial discretion, or statutory exclusion (legislative or automatic waiver).[44] Judicial waiver provisions allow transfer at the judge's discretion, based on certain specific criteria. Depending on the provisions for judicial waiver that exist in a given state, the court's authority to waive a case may be discretionary or mandatory, or, in some instances, presumptive.[45] . Prosecutorial discretion establishes concurrent jurisdiction and gives prosecutors the authority to choose whether to file a case in juvenile or criminal court.[46] Under legislative waivers, state legislatures, "exclude certain categories of offenses and/or

38. *In re* Roldan-Santoyo, 22 I. & N. Dec. at 518 (citing H.R. Conf. Rep. No. 104-828, at 224 (1996) ("Joint Explanatory Statement")); *see also In re* Punu, 22 I. & N. Dec. 224, 227 (B.I.A. 1998) (citing to the same).

39. *In re* Punu, 22 I. & N. Dec. at 227 (quoting "Joint Explanatory Statement").

40. *Id.*

41. *In re* Punu, 22 I. & N. Dec. at 227 (quoting H.R. Rep. No. 104-879, at 123 (1997) ("Report on the Activities of the Committee on the Judiciary")).

42. *In re* Roldan-Santoyo, 22 I. & N. Dec. at 518.

43. Kelly M. Angell, *The Regressive Movement: When Juvenile Offenders Are Treated as Adults Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 125 (2004) (citing PATRICK GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 1 (1998)); *see also* Beresford, *supra* note 26, at 793.

44. PATRICK GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 1, 4, A3 (1998).

45. *Id.*

46. Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1454 (2006).

offenders from juvenile court jurisdiction."[47] In the event that a state chooses to try a juvenile as an adult, and that individual is thereby convicted, he or she is considered convicted for INA purposes as well. The immigration consequences that will result from that conviction are the same as those that would result for any adult in the same situation.[48]

Given that the motivation for Congress's creation of a statutory definition of conviction was to in part to create greater uniformity in the approach to convictions in the immigration context,[49] this treatment of juveniles tried and convicted as adults seems to create a troubling lack of uniformity. A child who commits the same act in one state could be tried as a juvenile, while a similarly situated child in another state could be tried as an adult. The immigration consequences of these two adjudications would vary widely due to nothing more than a difference between the two states' approaches to juvenile offenders.

Nonetheless, several circuits have explicitly endorsed this view,[50] recognizing that the immigration court is entitled "to take the record as it found it, and neither it nor we are required to import separate juvenile proceedings which were not used by the [state] court."[51] The circuit courts express deference to the decisions of the state courts in supporting this approach, stating that "[n]either we nor the BIA have jurisdiction to determine how a state court should adjudicate its defendants. Once adjudicated by the state court, as either a juvenile or an adult, we are bound by that determination."[52]

This approach persists despite the existence of a federal standard for determining whether a conviction would count as a juvenile or an adult offense, found in the Federal Juvenile Delinquency Act (FJDA).[53] The FJDA provides a

47. Angell, *supra* note 43, at 133 (citing GRIFFIN, TORBET & SZYMANSKI, *supra* note 44, at 8).

48. Frankel, *supra* note 7, at 94.

49. *In re* Roldan-Santoyo, 22 I. & N. Dec. at 517 ("Congress decided that the *Ozkok* definition did not go far enough toward achieving a uniform federal approach and, with the passage of the IIRIRA, provided a statutory definition for the term "conviction," to be applied to aliens in immigration proceedings.").

50. *See, e.g.*, Garcia v. INS, 239 F.3d 409, 413–14 (1st Cir. 2001) (finding that federal courts are bound by a state's decision to charge a juvenile as an adult, and that such an adjudication is therefore a conviction for immigration purposes); Vargas-Hernandez v. Gonzales, 497 F.3d 919, 922–23 (9th Cir. 2007) (same); Savchuck v. Mukasey, 518 F.3d 119, 122 (2d Cir. 2008) (same); Singh v. U.S. Att'y Gen., 561 F.3d 1275, 1279 (11th Cir. 2009) (same).

51. *Vargas-Hernandez*, 497 F.3d at 922 (quoting Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966)).

52. *Garcia*, 239 F.3d at 413.

53. Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (2012). This Act was passed by Congress as a means for dealing with juveniles who violate federal law in a way that "remove[s] juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation." Major Emily M. Roman, *Where There's a Will, There's a Way: Command Authority over Juvenile Misconduct on Areas of Exclusive Federal Jurisdiction, and the Utilization of Juvenile Review Boards*, 2015 ARMY L. 35, 37 (quoting United States v. Male Juvenile E.L.C., 396 F.3d 458 (1st Cir. 2005)). However, juveniles are prosecuted by state courts rather than federal even when federal laws are at issue, unless one of three factors is present: the state cannot or will not accept jurisdiction over the

standard by which state proceedings are evaluated to determine whether or not they result in juvenile delinquency adjudications or convictions,[54] and it also provides a standard for determining whether or not a juvenile prosecuted under foreign laws has a "conviction" for immigration purposes.[55] Nonetheless, courts have refused to use the FJDA as the ultimate standard for evaluating state delinquency adjudications or convictions of juveniles: "The plain language of the statute forbids us from adopting such a standard. If Congress had wanted the INS to follow the FJDA at all times, it would have so stated."[56]

C. Juveniles Tried Under State Juvenile Delinquency Proceedings

Just as the definition of "conviction" in the INA plays a large role in understanding the immigration consequences for juveniles tried as adults, so it plays a role in understanding the immigration consequences for juveniles tried under a state's juvenile delinquency proceedings. Such proceedings have traditionally been treated as distinct from adult criminal proceedings in the context of immigration law. Even after the enactment of IIRIRA and the statutory definition of conviction that came with that Act, the BIA maintained that "[w]e have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."[57] Although arguments could be made that juvenile delinquency adjudications along with their attendant penalties imposed on those found to be delinquent could satisfy (i) and (ii) of INA § 101(a)(48)(A), the BIA determined that juvenile delinquency remains a separate and distinct type of proceeding that results in the assignment of a particular "status" rather than a finding of guilt or innocence.[58] Given the long history of BIA decisions endorsing this distinction prior to the enactment of IIRIRA,[59] the BIA in *Devison* found that Congress could not have intended to include juvenile delinquency in its definition of conviction:

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matter, the state does not have adequate services or programs to address the needs of juveniles, or the juvenile is charged with a crime of violence or drug trafficking crime in which there is substantial federal interest. *Id.* (citing 18 U.S.C. § 5032 (2012)).

54. *In re* Devison, 22 I. & N. Dec. 1362, 1366 (B.I.A. 2000) (citing *In re* De La Nues, 18 I. & N. Dec. 140 (B.I.A. 1981), and *In re* Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (B.I.A. 1999) ("We have also held that standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime.")). For examples of how this standard is used to evaluate state juvenile proceedings, see Part III.D.

55. *In re* Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (B.I.A. 1981); *In re* De La Nues, 18 I. & N. Dec. at 142.

56. *Garcia*, 239 F.3d at 413–14.

57. *In re Devison*, 22 I. & N. Dec. at 1365 (citation omitted).

58. *Id.* at 1366.

59. *See id.* at 1365 (listing prior B.I.A. decisions, dating back to 1944, and asserting the distinction between a delinquency adjudication and a criminal conviction).

> Presumably, Congress was aware of our long-established policy and of the FJDA provisions that maintain a distinction between juvenile delinquencies and criminal convictions. There is no record of an effort or intention on the part of Congress to include acts of juvenile delinquency in this new definition of the term "conviction."[60]

While this distinction limits the immigration consequences for individuals adjudged juvenile delinquents, it by no means shields them from all such consequences. Juvenile delinquency adjudications can directly cause serious adverse immigration consequences in three ways. First, although some grounds of inadmissibility and removability under the INA are triggered by convictions, others are triggered by bad acts or conduct alone.[61] Second, many forms of relief contained in the INA are discretionary.[62] Any evidence of bad conduct could be considered by a judge and factored into an adverse discretionary decision. Finally, adjudications of juvenile delinquency can result in an individual being held in immigration detention.[63]

1. Conduct-Based Grounds of Removal and Inadmissibility

The INA contains a number of penalties that are triggered by conduct alone. This list includes drug trafficking,[64] human trafficking,[65] being a drug addict or abuser,[66] prostitution,[67] making false claims of citizenship or using false documents,[68] the smuggling of undocumented persons,[69] having a mental or physical disorder along with associated harmful behavior that may pose a threat to the individual or others,[70] and violations of a domestic violence order of

60. *Id.* at 1369.

61. Frankel, *supra* note 7, at 90. *See infra* Part III.C.1 for a discussion of specific conduct-based triggers.

62. Many forms of immigration relief specifically call for the judge to use her discretion in rendering a decision. *See, e.g.*, INA § 240A, 8 U.S.C § 1129b (2012) (cancellation of removal); INA § 240B, 8 U.S.C § 1229c (2012) (voluntary departure); INA § 245, 8 U.S.C § 1255 (2012) (adjustment of status); INA § 236(a), 8 U.S.C § 1226(a) (2012) (granting bond for immigration detention).

63. WASHINGTON DEFENDER ASSOCIATION'S IMMIGRATION PROJECT, PRACTICE ADVISORY FOR JUVENILE DEFENDERS REPRESENTING NONCITIZENS 6 (Oct. 2011), http://www.defensenet.org/immigration-project/immigration-resources/Juvenile%20Offender%20Practice%20Guide%20-%20AB%2010-28-11.pdf.

64. INA § 212(a)(2)(C), 8 U.S.C § 1182(a)(2)(C) (2012).

65. INA § 212(a)(2)(H), 8 U.S.C § 1182(a)(2)(H) (2012); INA § 237 (a)(2)(F), 8 U.S.C § 1227(a)(2)(F) (2012).

66. INA § 212(a)(1)(A)(iv), 8 U.S.C § 1182(a)(1)(A)(iv) (2012); INA § 237(a)(2)(B)(ii), 8 U.S.C § 1227(a)(2)(B)(ii) (2012).

67. INA § 212(a)(2)(D), 8 U.S.C § 1182(a)(2)(D) (2012).

68. INA § 237(a)(3)(D), 8 U.S.C § 1227(a)(3)(D) (2012).

69. INA § 237(a)(1)(E), 8 U.S.C § 1227(a)(3)(E) (2012).

70. INA § 212(a)(1)(A)(iii), 8 U.S.C § 1182(a)(1)(A)(iii) (2012) (where the disorder or associated behavior may pose a threat to the property, safety, or welfare of the individual or others;

protection.[71] For any of these conduct-based triggers, charges and adjudications of juvenile delinquency can be used as evidence of the triggering conduct or condition.[72]

Because of these particularities of the INA, certain juvenile delinquency adjudications can result in severe immigration consequences, even though they are not considered "convictions" for purposes of the INA. A paradox arises when one considers the contours of the conduct-based grounds. Children who receive juvenile delinquency adjudications for violent crimes or theft, for example, will face no per se bar to lawful immigration status. On the other hand, a child with an adjudication "for possession for selling marijuana, and other seemingly less serious conduct can pose a complete bar to almost any avenue to lawful status."[73]

Perhaps the most common, and problematic, of the conduct-based grounds of removability or inadmissibility for juveniles is that based on involvement in drug trafficking. The language of the INA states that: "Any alien who the consular officer or the Attorney General knows or has reason to believe (i) is or has been an illicit trafficker in any controlled substance . . . , or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so, . . . is inadmissible."[74]

The "reason to believe standard" does not require a conviction, but rather requires only "reasonable, substantial, and probative evidence" that an individual has engaged in drug trafficking.[75] Courts have found evidence such as police reports, testimony from police, and juvenile delinquency adjudications to supply the requisite "reason to believe."[76] Thus, although adjudications under juvenile or youthful offender statutes are not treated as convictions for immigration purposes, an individual's "status as a youthful offender is not sufficient to insulate [him] from the Federal immigration law requirements for a person seeking adjustment of status."[77] The "'reason to believe' language evidences a

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or where the individual previously had such a disorder and the behavior is likely to recur). For more information about which disorders and behaviors fit the criteria for deportation, see CENTERS FOR DISEASE CONTROL AND PREVENTION, TECHNICAL INSTRUCTIONS FOR PHYSICAL OR MENTAL DISORDERS (2013), http://www.cdc.gov/immigrantrefugeehealth/pdf/mental-health-cs-ti.pdf.

71. INA § 237(a)(2)(E)(ii), 8 U.S.C § 1227(a)(2)(E)(ii) (2012).

72. Frankel, *supra* note 7, at 90–91 (citing *In re* Rico, 16 I. & N. Dec. 181, 184 (B.I.A. 1977)).

73. WASHINGTON DEFENDER ASSOCIATION'S IMMIGRATION PROJECT, *supra* note 63 at 8–9.

74. INA § 212(a)(2)(C), 8 U.S.C § 1182(a)(2)(C) (2012).

75. *In re* Rico, 16 I. & N. Dec. at 184–86 (holding that a criminal conviction is not necessary to be excludable as an illicit trafficker in drugs, and that the burden of proof in an administrative finding of excludability is "reasonable, substantial, and probative evidence"); *In re* Favela, 16 I. & N. Dec. 753 (B.I.A. 1979) (same).

76. WASHINGTON DEFENDER ASSOCIATION'S IMMIGRATION PROJECT, *supra* note 63 at 10 (citing *In re* Favela, 16 I. & N. Dec. at 756 and *In re* Rico, 16 I. & N. Dec. at 185–86).

77. Neptune v. Holder, 346 F. App'x 671, 672 (2d Cir. 2009) (internal quotations omitted).

clear Congressional intent not to limit inadmissibility . . . to those who have been charged or convicted of [a drug trafficking] offense. Rather it ties inadmissibility to the act of drug trafficking, irrespective of whether that conduct was ever charged as a criminal offense or not."[78]

2. Juvenile Delinquency Adjudications in Discretionary Findings of Immigration Judges

Even when the conduct underlying a juvenile delinquency adjudication does not immediately trigger a conduct-based ground of removal or inadmissibility, it can still have direct and adverse consequences in the immigration context by influencing an immigration judge's discretionary decision-making.[79]

Provisions of the INA that set forth a discretionary form of relief could be characterized as "an act of administrative *grace*,"[80] as opposed to other forms of relief that are mandatory. As such, it is the judge's role to make a determination, given all the information before her, as to whether the individual merits such an act of grace. Any evidence of poor moral character or bad conduct can weigh against such a finding, regardless of whether or not such conduct resulted in an actual conviction. In determining whether it was appropriate for an immigration judge to weigh an individual's juvenile offense against her in her application for adjustment of status, the Second Circuit in *Wallace v. Gonzales* said: "Because the purpose of adjustment of status is to provide worthy aliens with special relief, we see no reason to prevent an IJ or the BIA from considering an applicant's anti-social conduct – whether leading to a conviction, a Youthful Offender Adjudication, or no legal judgment whatsoever – as an adverse factor in evaluating an application for discretionary relief."[81] The *Wallace* court relied on evidence of a BIA practice of allowing juvenile adjudications to be factored into discretionary relief in this way.[82]

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78. *Id.* at 673 (alteration in original) (internal quotations omitted).

79. *See supra* note 62 for examples in the INA calling for judges to make discretionary decisions.

80. Wallace v. Gonzales, 463 F.3d 135, 138 (2d Cir. 2006).

81. *Id.* at 139.

82. *See id.* ("BIA practice suggests that the Board believes juvenile offenses not counting as 'convictions' under the immigration law may nonetheless be considered when determining whether an alien merits discretionary relief."). In this analysis, the Wallace court cites *In re* Mendez-Moralez, 21 I. & N. Dec. 296, 301 (B.I.A. 1996) (stating that factors relevant to a grant of discretionary relief include "the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country") and *In re* Morales-Castillo, 2005 WL 3802090 (B.I.A. Dec. 8, 2005) (finding "the underlying basis for the [juvenile] respondent's authorized confinement to be a significant adverse factor" (alteration in original)). Several additional BIA cases have continued to follow this pattern in the years since *Wallace*. *See, e.g.*, *In re* Martinez-Velarde, No. A099 621 646 – SAL, 2010 WL 2224586, at 1 (B.I.A. May 10, 2010) (finding that the IJ "was not prohibited from considering a youthful offender adjudication in evaluating the request for discretionary relief," and that therefore the IJ "properly considered the nature of the adjudication in question and properly weighed the positive and negative factors")

3. Impact of Juvenile Delinquency Adjudications on Immigration Detention

The final adverse consequence of a finding of juvenile delinquency occurs in the setting of immigration detention. When immigrant children are apprehended by either U.S. Customs and Border Protection or ICE, a decision must be made regarding the care and custody of that child. Three alternatives are presented: the child could be kept in ICE custody, released to family, or transferred to the Office of Refugee Resettlement (ORR).[83]

When a child is taken into ICE custody, ICE is supposed to determine whether he or she is "accompanied" or "unaccompanied." "Unaccompanied alien child" is defined by the Homeland Security Act as a child without lawful immigration status, who is under the age of 18, and who is without a parent or guardian in the U.S. willing or able to provide custody for the child.[84] All unaccompanied children are supposed to be transferred to ORR custody within 72 hours, while all accompanied children are supposed to be released to their family.[85] This requirement arose out of the Flores Settlement Agreement, which laid out in detail the requirements for minors taken into custody by immigration authorities.[86]

However, in practice it is not uncommon for ICE to either hold unaccompanied children in custody longer than the allowed 72 hours, or to refuse to release accompanied children to their families.[87] In both instances, this violation generally occurs with children who have juvenile delinquency records or a criminal history.[88] While the Flores Settlement does provide that a minor may remain in ICE custody longer than the prescribed 72 hours if she has been convicted of a crime or adjudicated delinquent, it also specifically notes that this does not apply if the offenses were petty or isolated offenses not involving violence against a person or carrying or using a weapon. Despite this guidance on when a minor's history of crimes or delinquency can be used to detain her in ICE custody longer, in practice it appears that juveniles with a history of

(citations omitted); *In re* Medina, No. A92 061 433, 2008 WL 1924548, at 1 (B.I.A. Mar. 31, 2008) (same); *In re* Taha el Kherbaoui, No. A98 344 707- SEAT, 2007 WL 2825138, at 1 (B.I.A. Aug. 28, 2007) (same).

83. Frankel, *supra* note 7, at 74.

84. Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(g)(2) (2012).

85. Frankel, *supra* note 7, at 75 (citing Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(a) (2012) and Trafficking Victims Protection Reauthorization Act § 235(b)(3), 8 U.S.C. § 1232(b)(3) (2012)).

86. Flores Settlement Agreement, Case No. CV 85-4544-RJK(Px), http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749. This settlement agreement originally applied to the Immigration and Naturalization Service (INS), but has been extended to apply to DHS and ORR after to dissolution of the INS. *See* Flores Settlement Agreement and DHS Custody, Lutheran Immigration and Refugee Service, http://lirs.org/wp-content/uploads/2014/12/Flores-Family-Detention-Backgrounder-LIRS-WRC-KIND-FINAL1.pdf, at 1–2.

87. Frankel, *supra* note 7, at 75.

88. *Id.*

criminal convictions or juvenile delinquency are in fact detained beyond 72 hours much more broadly.[89] Moreover, the Homeland Security Act itself makes no such exception for children with juvenile delinquency or criminal histories.[90] Thus, detaining minors who have a record of juvenile delinquency appears to be unlawful in certain circumstances,[91] even though studies reviewing the treatment of unaccompanied children in immigration proceedings have shown that it happens with some frequency.[92]

D. State Juvenile Proceedings that Blur the Line

Unfortunately, the clear-cut rule described in Parts B and C above – that juveniles tried in state court as adults have convictions for immigration purposes, and those tried as juvenile delinquents do not – is not always as clear-cut as it seems. Each state has its own statute regarding the treatment of juvenile offenders, and these statutes operate under varying mechanisms and names. These statutes may use "juvenile delinquency" or "youthful offender" in their titles, but a closer look at their elements is required to determine whether it corresponds to a juvenile delinquency statute in the way that the BIA envisioned in *Devison* and, accordingly, that Congress envisioned in the FJDA. Some state statutes, upon closer inspection, have elements of both juvenile delinquency and adult criminal convictions, making their appropriate classification slightly more obscure.[93]

In *Devison*, the seminal case outlining the approach courts take in analyzing specific state statutes of this sort, the BIA happened to be evaluating a New York state law.[94] In that case, the respondent was adjudicated as a youthful offender under New York Criminal Procedure Law § 720.35.[95] The Board concluded that the FJDA was the appropriate standard to measure the New York

89. *See* Juvenile Protocol Manual, posted January 2006, available at https://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf. Here, guidance given for complying with the Flores Settlement Agreement states in Section 4.1.3 that juveniles who are "an escape risk, criminal, or delinquent" may be held longer than 72 hours, without any guidance as to limitations on the types of criminal convictions or delinquency adjudications that may be used to elongate detention.

90. Homeland Security Act of 2002 § 462(a), (g)(2), 6 U.S.C. § 279(a), (g)(2) (2006); Trafficking Victims Protection Reauthorization Act § 235(b)(3), 8 U.S.C. § 1232(b)(3) (2008).

91. Frankel, *supra* note 7, at 75 (internal citations omitted).

92. *See* NATIONAL IMMIGRANT JUSTICE CENTER, FACT SHEET: CHILDREN DETAINED BY THE DEPARTMENT OF HOMELAND SECURITY IN ADULT DETENTION FACILITIES (2013), https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL_0.pdf (finding that from 2008 – 2012, more than 1,300 minors were detained by DHS in adult detention facilities in violation of the Flores Settlement Agreement).

93. Michigan's Youthful Trainee Act and Washington D.C.'s Youth Rehabilitation Act are two such examples, discussed further later in this section. *See infra* text accompanying notes 102–11.

94. *In re* Devison, 22 I. & N. Dec. 1362, 1363 (2000).

95. N.Y. CRIM. PROC. LAW § 720.35 (McKinney 2011)

statute against, with the most important characteristic being that "[t]he FJDA makes it clear that a juvenile delinquency proceeding results in the adjudication of a status rather than conviction for a crime."[96] Importantly, this "status" cannot be revoked nor can it ripen into an actual conviction contingent on future actions or inactions by the juvenile offender.[97] In other words, "the youthful offender finding is static, because it cannot be changed or withdrawn as a result of subsequent behavior."[98] By contrast, other states possess youthful offender statutes that treat the juvenile as convicted, but offer the opportunity for that conviction to be erased given the completion of certain requirements by the juvenile, or, alternatively, defer the conviction of the juvenile as long as the juvenile refrains from committing further offenses during a probationary period. Statutes of this sort will generally be considered convictions for purposes of immigration law, despite the misleading name of the statute as a "youthful" or "juvenile" offender statute.[99]

Thus, to determine the immigration consequences for a juvenile offender in any particular state, the specific elements of that state's statute must be measured against the FJDA and the standard delineated in *Devison*. The juvenile offender statutes of many states have failed this test [100] meaning that children in those states who are adjudicated as juvenile offenders will suffer immigration consequences to the same degree as any adult convicted under comparable criminal statutes.

For example, in *Uritsky v. Gonzales*,[101] the petitioner was designated a "youthful trainee" under Michigan's Youthful Trainee Act.[102] Michigan's statute operates by assigning a status of youthful trainee to juveniles who plead guilty to certain criminal offenses. In so doing, the court does not enter a judgment of conviction, but retains discretion during the probationary period to "revoke that status at any time . . . ."[103] If the status is so revoked, "an adjudication of guilt is entered, and a sentence is imposed."[104]

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96. *In re* Devison, 22 I. & N. Dec. at 1366 (emphasis added).

97. In fact, the language of N.Y. CRIM. PROC. LAW § 720.35(1) begins with the statement: "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense."

98. *In re* Devison, 22 I. & N. Dec. at 1372 (citing People v. Mervin, 462 N.Y.S.2d 544 (N.Y. Sup. Ct. 1983); People v. Gary O'D., 461 N.Y.S.2d 65 (N.Y. App. Div. 1983).

99. *See infra* Part IV for a discussion of why statutes that operate under this mechanism are considered to result in convictions for immigration purposes.

100. For example, Michigan's Youthful Trainee Act, Washington D.C.'s Youth Rehabilitation Act, and South Carolina's Youth Offender Acts have all been found to result in convictions for purposes of the INA. *See infra* text accompanying notes 102–11. For South Carolina's Youthful Offender Act, see Cole v. United States AG, 712 F.3d 517, 524 (11th Cir. 2013) (holding that a conviction under the South Carolina Youthful Offender Act is a conviction for purposes of the INA).

101. 399 F.3d 728 (6th Cir. 2005).

102. MICH. COMP. LAWS §§ 762.11–.16 (2011).

103. *Uritsky*, 399 F.3d at 734; MICH. COMP. LAWS § 762.12 (2011).

104. *Uritsky*, 399 F.3d at 734.

Uritsky's deportation depended on whether this statutory scheme was determined to be more like the juvenile delinquency scheme in the FJDA or more like an adult criminal conviction subject to expungement or deferred adjudication. Agreeing with the Board of Immigration Appeals, the Sixth Circuit found the above-named characteristics – namely that the criminal action is not vacated until the youthful trainee completes her probation, and that a judge can revoke the youthful trainee status at any time – sufficiently distinct from the FJDA.[105] Therefore, Uritsky was considered "convicted" for purposes of the INA.[106]

The petitioner in *Badewa v. Attorney General of the United States.*[107] faced a similar predicament as Uritsky. Badewa was ordered removed after being adjudicated under Washington D.C.'s Youth Rehabilitation Act.[108] Under that statute, a court may set aside – not expunge – the juvenile conviction if the "juvenile's post-offense conduct has persuaded the court to terminate his sentence."[109] Likewise, the juvenile's original sentence "may be reimposed if he or she fails to satisfy parole or sentence conditions."[110] These characteristics, the Third Circuit found, clearly distinguished the D.C. Youth Rehabilitation Act from the New York youth offender statute and the FJDA and placed it squarely in the same category as the Michigan statute at issue in *Uritsky*. Therefore, Badewa's adjudication was considered a conviction for purposes of the INA.[111]

IV.
REHABILITATIVE STATUTES IN IMMIGRATION LAW

Juvenile offender statutes that have been found to result in criminal convictions, rather than findings of juvenile delinquency, such as those discussed in Part III.D, hint at a broader generalization about what counts as a conviction in the immigration context. Most juvenile offender statutes include among their purposes the goal of rehabilitation, as do many statutes pertaining to adults. Often, this is achieved through the possibility of expungement or erasure of the record. The words used may vary – expunge, dismiss, cancel, vacate, discharge, or otherwise remove a determination of guilt – but the purpose of the statutes are the same, to rehabilitate a juvenile convicted of a crime by giving her the opportunity at a fresh start, without the stigma associated with a past offense. In

105. *Id.* at 731.

106. *Id.* at 735; *see also In re* V-X-, 26 I. & N. Dec. 147 (B.I.A. 2013) (finding the Michigan Youthful Trainee Act to result in a conviction for immigration purposes and declining a request to reconsider the holdings in *Devison* and *Uritsky*).

107. 252 F. App'x 473 (3d Cir. 2007).

108. D.C. CODE § 24-901 (2001).

109. *Badewa*, 252 F. App'x at 477 (quoting United States v. McDonald, 991 F.2d 866, 871 (D.C. Cir. 1993)).

110. *Id.*

111. *Id.*; *see also* Dung Phan v. Holder, 667 F.3d 448 (4th Cir. 2012) (considering the same D.C. youthful offender statute and arriving at the same conclusion as the Third Circuit in Badewa).

contrast to the general rule that juvenile delinquency adjudications are not considered convictions for purposes of the INA, the general rule for expunged convictions is that they are convictions for purposes of the INA, despite the fact that they have technically been erased from the record.[112]

This Part will examine the treatment of such rehabilitated convictions in the immigration context, by looking at why this rule arose in the context of the INA as well as the exceptions to it. Understanding the general treatment of expungements generally in the immigration context will then allow greater understanding of the argument in the final section, that expungements made pursuant to juvenile justice statutes should be honored in the immigration context.

A. General Rule for Expunged Convictions as "Convictions" Under the INA

The question of what happens in the immigration context when a state conviction is later expunged has led to a variety of answers throughout the years.113 However, as with the question of juvenile delinquency, the inclusion of a statutory definition of conviction in the INA with the enactment of IIRIRA prompted an answer from the BIA. In *In Re Roldan-Santoyo*, the BIA established the general rule that "[o]nce an alien is subject to a 'conviction' as that term is defined at section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure."114

The development of this rule revolved around the intent of Congress in enacting the statutory definition of "conviction" in IIRIRA, as discussed in Part III.A. Congress was concerned with the way in which the Matter of Ozkok definition allowed noncitizens to avoid immigration consequences for criminal offenses, noting that "[t]hroughout the decades of struggling with the increasing numbers of state rehabilitative statutes and their varying methods of avoiding the

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112. *See In re* Roldan-Santoyo, 22 I. & N. Dec. 512 (B.I.A. 1999).

113. The Ninth Circuit in Nunez-Reyes v. Holder, 646 F.3d 684, 688 (9th Cir. 2001) provides an account of the "ever-changing" answer to that question.

114. *In re Roldan-Santoyo*, 22 I. & N. Dec. at 512. It is important to note that this rule only applies to erasure of the original record for purposes of rehabilitation; to the contrary, if the original determination of guilt is vacated "based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes." *In re* Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003). For circuits endorsing this rule, *see* Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006) (reversing *In re* Pickering on other grounds but supporting the BIA's proper statement of law); Murillo–Espinoza v. INS, 261 F.3d 771 (9th Cir. 2001) (the court gives deference to BIA's application of this rule while still acknowledging the possibility of alternative interpretations of 101(a)(48(A)); Herrera-Inirio v. INS, 208 F.3d 299 (1st Cir. 2000); Sandoval v. INS, 240 F.3d 577 (7th Cir. 2001) (reversing BIA's decision finding Sandoval deportable because of its failure to sufficiently show that the modification of Sandoval's conviction was not based on defects in the underlying criminal proceeding).

state consequences of a conviction by either deferring or erasing the recording of judgment, aliens have generally been allowed to escape immigration consequences for their criminal misconduct once the conviction has been 'expunged.'"115 Under a rule allowing expungement to be given effect in the immigration context, similarly situated offenders would receive different immigration treatment depending on variance among state laws. This is a result, the BIA concluded, that Congress could not have intended: "Congress clearly does not intend that there be different immigration consequences accorded to criminals fortunate enough to violate the law in a state where rehabilitation is achieved through the expungement of records. rather than in a state where the procedure achieves the same objective simply through deferral of judgment."[116] By excising the third prong from the *Ozkok* definition, Congress explicitly removed the possibility of subsequent expungements having any effect on the existence of a conviction for purposes of the INA.[117] This made "the determination of whether an alien is convicted for immigration purposes be fixed at the time of the original determination of guilt, coupled with the imposition of some punishment."[118]

B. Historical Account of Exceptions to the General Rule for Expunged Convictions Under the INA

While immigration courts continue to rely upon this general rule for the treatment of expungements in analyzing state statutes and the nature of the convictions that flow from them,[119] there is precedent for straying from this rule. Before the BIA decided *Roldan*, there was an exception for individuals with marijuana convictions treated as "youth offenders" by state statute,[120] as well as for state expungements of controlled-substance convictions for individuals with no prior offenses.[121] Even after *Roldan*, although most circuits that addressed the issue followed the BIA decision in *Roldan*, the Ninth Circuit declined to follow it for twelve years.[122]

Before the BIA's decision in *Roldan* (and the enactment of IIRIRA, which prompted that decision), the BIA adopted exceptions to the rule for expunged convictions in *Matter of Andrade* and *Matter of Werk*. In the former, it was determined that marijuana convictions of youth offenders expunged pursuant to state youth offender statutes similar to the Federal Youth Corrections

115. *In re Roldan-Santoyo*, 22 I. & N. Dec. at 519.

116. *Id.* at 521.

117. *Id.* at 522.

118. *Id.* at 521.

119. For example, this is the rule that the courts were relying upon in analyzing various state youth offender statutes in *supra* Part III.D.

120. *In re* Andrade, 14 I. & N. Dec. 651 (B.I.A. 1974).

121. *In re* Werk, 16 I. & N. Dec. 234 (B.I.A. 1977).

122. Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000), overruled by Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011).

Act would no longer be treated as convictions for immigration purposes.[123] Interestingly, the BIA reached this conclusion at the urging of the Solicitor General and the INS.[124]This decision was based in large part on the presumed intent of Congress in enacting the Federal Youth Corrections Act with an expungement provision. In the Solicitor General's memo, he relied on the BIA's own description of legislative intent, stating, "[Congress] clearly contemplates more than a 'technical erasure;' it expresses a Congressional concern that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions."[125] The Federal Youth Corrections Act was clearly intended to give youth "a second chance, free of *all* taint of a conviction."[126]

The BIA adopted a similar exception a few years later in *Matter of Werk*, whereby controlled-substance convictions of first time offenders expunged pursuant to the federal rehabilitative statute found at 21 U.S.C. § 844(b)(1) or its state counterparts would not carry immigration consequences.[127] Although 21 U.S.C. § 844(b)(1) was repealed in 1984, a similar statute was enacted in its place with the Comprehensive Crime Control Act of 1984, also known as the Federal First Offender Act.[128] The BIA continued to apply the rule in *Werk* to simple possession of controlled-substance convictions expunged under the Federal First Offender Act and its state counterparts.[129]

While the above exceptions gave effect to the intent of Congress in enacting such rehabilitative statutes, *Roldan* effectively held that these rules were no longer good law after Congress defined "conviction" with IIRIRA.[130] Nonetheless, not all circuits agreed with this determination by the BIA. In *Lujan-Armendariz v. INS*, the Ninth Circuit maintained that first offenders with controlled-substance convictions expunged under the Federal First Offender Act or its state counterparts would not be considered convicted for immigration purposes even after the enactment of IIRIRA.[131] The language of 18 U.S.C.A. § 3607 appears clear in its scope, explaining that an expunged disposition "shall not be considered a conviction for the purpose of a disqualification or a disability

123. *In re Andrade*, 14 I. & N. Dec. at 654. In this case, the BIA extended this rule for marijuana offenders with expunged convictions under the Federal Youth Corrections Act set forth in Mestre Morera v. U.S. Immigration & Naturalization Serv., 462 F.2d 1030 (1st Cir. 1972), to marijuana offenders with expunged convictions under any comparable state youth offender statute.

124. *See In re Andrade*, 14 I. & N. Dec. at 654–60 for a copy of the advisory memorandum from the Solicitor General.

125. *Id.* at 656 (Solicitor General memo) (quoting *Mestre Morera*, 462 F.2d at 1032).

126. *Id.*

127. *In re Werk*, 16 I. & N. Dec. at 236.

128. 18 U.S.C. § 3607 (2012).

129. *See In re Deris*, 20 I. & N. Dec. 5, 11 (B.I.A. 1989) (applying the rule in Werk to the new Federal First Offender Act, but pointing out that such an exemption from immigration consequences applies only to simple possession offenses and not to any more serious drug offenses).

130. *See supra* Part III.A.

131. Lujan-Armendariz v. INS, 222 F.3d 728, 749 (9th Cir. 2000).

imposed by law upon conviction of a crime, or *for any other purpose*."[132] With such a clear intention to give expungements the effect of total erasure for any purpose whatsoever, this should include immigration purposes. Nevertheless, the Ninth Circuit held out with this exception for only twelve years. In 2011, that circuit reevaluated its opinion in *Lujan-Armendariz* and reversed it, in conformity with the BIA and the eight other circuits to consider the issue.[133]

V.
REFORMING THE APPROACH OF THE IMMIGRATION SYSTEM TOWARD ADJUDICATIONS OF JUVENILES

Legislatures have a very specific purpose in mind when they enact rehabilitative provisions in their criminal or juvenile statutes. Unsurprisingly, that purpose is to rehabilitate offenders, to provide them with a fresh start. Rehabilitation is achieved in part by allowing offenders' records to be expunged or erased as a means of allowing them to start over, free from the taint of their conviction. The current law declining to honor that expungement in the immigration context negates the purpose and effect of such rehabilitative statutes by denying individuals the ability to start over in one of the most fundamental ways – forcing them to leave. In the case of juveniles with convictions or adjudications expunged pursuant to juvenile offender statutes, this failure not only negates the statutes' purpose, but also violates the rights of juveniles who have successfully completed the rehabilitative requirements of their state's juvenile offender laws.

The taint of a conviction can have devastating consequences in areas of employment, housing, education, and government benefits, to name a few; equally devastating, if not more so, are the potential immigration consequences for an offender. When deportation is at stake, the potential outcome could not be more serious; the Supreme Court has long noted that deportation "deprives [the individual] of liberty" and "may result also in loss of both property and life; or of all that makes life worth living."[134] For children, deportation can result in separation from parents and family in the United States, and forced return to a country foreign and unknown. That such consequences should be excluded from the types of consequences rehabilitative statutes are intended to ameliorate is problematic. Because of the unique characteristics of juveniles,[135] this failure to honor rehabilitative expungements is even more problematic in the context of juvenile offenders, and the argument for giving full rehabilitative effect to those provisions in juvenile offender statutes is even stronger. As the Solicitor General noted in his memo, "[e]xpungement statutes concerning youth offenders, perhaps

132. 18 U.S.C. § 3607(b) (2012) (emphasis added).

133. Nunez-Reyes v. Holder, 646 F.3d 684, 689 (9th Cir. 2011).

134. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

135. See Part II for a discussion of those unique characteristics of juveniles recognized by the Court and underlying the foundation of the juvenile justice system in this country.

even more than other expungement laws, reflect a policy of providing a clean start which would be virtually negated if deportation under federal law were still a consequence of an expunged [state conviction] of a youth."[136]

A. Rehabilitative Juvenile Offender Laws Should be Given Effect in the Immigration Context

Although certain states' juvenile offender laws have been determined to render convictions rather than adjudications of juvenile delinquency for purposes of the INA,[137] these statutes' rehabilitative provisions allowing for a juvenile's conviction to be expunged should be given full recognition in the immigration context. The scientific and sociological findings discussed by the Court in *Roper*, *Graham*, and *Miller* make the use of rehabilitative provisions in juvenile offender statutes particularly compelling. Statutes that provide for the possibility of expungement of juvenile offenses for the purpose of giving juveniles a fresh start free from the taint of conviction are especially laudable because the scientific evidence as discussed in case law precedent shows that such efforts at rehabilitation will actually achieve the goal of rehabilitation. As most juveniles develop, their "deficiencies will be reformed,"[138] and inclusion of rehabilitative provisions in juvenile offender statutes will not be for naught. Moreover, full recognition of such rehabilitation in all contexts is required to give full meaning to these state statutes as well as to abide by the constitutional mandates set forth by the Court in *Roper*, *Graham*, and *Miller*.

1. Juvenile Expungements Must be Recognized in the Immigration Context to Further the Legislative Intent Behind Juvenile Rehabilitative Provisions in State Statutes

Allowing expungements of juvenile records to be given full effect even in the immigration context is the only way to truly honor the intent of legislatures that enacted juvenile offender statutes containing such rehabilitative measures. Courts prior to the enactment of IIRIRA have recognized this, stating that "[t]he clear purpose for the automatic setting aside of a youthful offender's conviction if he responds satisfactorily to treatment . . . is to relieve him not only of the usual disabilities of a criminal conviction, but also to give him a second chance free of a record tainted by such a conviction."[139] Allowing a youthful offender's conviction to render immigration consequences in spite of an expungement would completely disregard this purpose, for such consequences are often serious enough to amount to a "complete deprivation of a second chance."[140] It would make little sense to presume that Congress, "without any reference to

136. *In re Andrade*, 14 I. & N. Dec. at 658 (Solicitor General memo).
137. *See supra* Part III.D.
138. *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).
139. *Mestre Morera*, 462 F.2d at 1032.
140. *Id.*

such an intent, meant in [the juvenile offender statute] to provide for setting aside a conviction for some purposes but not for others."[141]

Indeed, competing case law and legislative history exist on both sides. The case law since the enactment of IIRIRA endorses the rule that expunged convictions must remain convictions for purposes of the INA.[142] Nevertheless, the case law finds that adjudications of juveniles can be treated differently for purposes of the INA.[143] And just as there is strong legislative history supporting the view that Congress intended expunged convictions to be viewed as convictions under the INA,[144] no less noteworthy is the legislative history that legislatures enacting juvenile offender laws intended for expungements to erase the youth's record *for all purposes*.[145] As the BIA has recognized, "[t]here is simply no evidence that when Congress enacted a statutory definition of the term 'conviction,' it intended to thwart the federal and state governments from acting as parens patriae in providing a separate system of treatment for juveniles."[146]

Given this competing case law and legislative history, the question becomes, which side should prevail? To honor the legislative intent of both sides, juvenile expungements must be recognized in the immigration context. This would not violate the general rule that immigration law falls within the federal purview. It would also not be inconsistent with precedent to have a juvenile exception to the current rule that expunged convictions remain convictions for purposes of the INA. Finally, the rule of lenity in the immigration context requires that this competing ambiguity be resolved in favor of the noncitizen juvenile.

To begin with, state legislative intent in the juvenile justice context can and should be weighed against federal legislative intent in the immigration context. Although immigration is an area of unique federal authority, it is

141. *Id.*

142. *See In re Roldan-Santoyo*, 22 I. & N. Dec. at 524.

143. *See In re Devison*, 22 I. & N. Dec. at 1365–66 (finding that adjudications of juvenile delinquency are not convictions for purposes of the INA).

144. *See In re Roldan-Santoyo*, 22 I. & N. Dec. at 518 (quoting "Joint Explanatory Statement") ("This new provision, by removing the third prong of *Ozkok*, clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws.").

145. *See* Federal First Offender Act, 18 U.S.C. § 3607(b) (2012) (stating that expunged convictions "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose"). For examples discussing the intent of various state legislatures, *see, e.g.*, State v. Fletcher, 974 A.2d 188, 194 (Del. 2009) ("The underlying purpose of allowing expungement is to afford a juvenile the opportunity of starting life 'anew' once having reached the age of majority and otherwise having come within the compliance requirements of the [expungement] statute."); *In re* J., 353 N.Y.S.2d 695, 697 (N.Y. Fam. Ct. 1974) ("[T]he Legislature has determined that society is best served by establishing juvenile proceedings. The purpose of juvenile proceedings is to help juveniles. The procedures are to be protective, not punitive. . Since the within order of expungement will protect respondent from future discrimination and hardship [it is] in furtherance of the purposes of the Family Court Act.") (citations omitted).

146. *In re Devison*, 22 I. & N. Dec. at 1373–74.

intricately bound to state law. The grounds for inadmissibility and removability found throughout the INA refer to violations of state laws. As the Solicitor General advocated, "[i]n the context of deportation, it is unquestionable that state law has a role to play, in that certain convictions for violation of state law are grounds for deportation, and pardons by governors may bar a state conviction from being so used."[147] Especially in the realm of juvenile justice, federal law and state law are even more closely bound to each other. Federal law actually defers to state law as the preferred means for prosecuting juveniles.[148] Under *Devison*, the BIA established the FJDA as the litmus test for determining what types of adjudications are juvenile delinquency adjudications, and therefore are not convictions under the INA. But the FJDA by its own terms encourages prosecution of juveniles under state law, even when violation of federal law is at issue.[149] Given that the FJDA as enacted by Congress professes this preference for state procedures to prosecute juveniles, it is reasonable to give preference to the intent of the state legislatures who enacted those state procedures as well.

One can heed the intent of the state legislatures in this way by recognizing rehabilitative measures in state juvenile justice laws and still not disrupt the rule that expunged convictions remain convictions for purposes of the INA. It has become a well-accepted refrain that youth is a special state of being that allows for, and even requires, exceptions to be made to general rules. The Supreme Court has consistently made determinations about the appropriateness of legal penalties based on youth.[150] The BIA has also acknowledged that juvenile adjudications can and must be viewed differently than analogous criminal convictions of adults.[151]

Likewise, until the enactment of the statutory definition of "conviction" in IIRIRA, courts also had a history of making exceptions to the general rule for the treatment of expunged convictions under the INA.[152] In *Roldan-Santoyo*, the BIA decided that the Congressional intent underlying that enactment weighed more heavily than the legislative intent underlying the various state and federal juvenile justice laws. However, faced with these conflicting arguments on both sides, it would not have been unreasonable to come out the other way; indeed,

147. *In re Andrade*, 14 I. & N. Dec. at 657 (Solicitor General memo).

148. *See* Roman, *supra* note 53, at 36 ("In the context of juvenile misconduct, the federal government recognizes a policy of abstention from the prosecution of juveniles in federal court.") (citing CHARLES DOYLE, CONG. RESEARCH SERV. RL 30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 3 (2004) and United States v. Juvenile Male, 864 F. 2d 641, 644 (9th Cir. 1988)).

149. 18 U.S.C. § 5032 (2012); *see also* Roman, *supra* note 53, at 36 ("The continuing basic premise of federal juvenile law is that juvenile matters, even those arising under federal law, should be handled by state authorities whenever possible.") (quoting DOYLE, *supra* note 148, at 3).

150. *See supra* Part II, discussing *Roper*, *Graham*, and *Miller*.

151. *See In re Devison*, 22 I. & N. Dec. at 1373 (affirming that adjudications of juvenile delinquency or youthful offender status are not criminal convictions for purposes of immigration law).

152. *See supra* Part IV.B.

the concurring opinion in *Roldan-Santoyo* did precisely this, motivated in large part by the rule of lenity applied to immigration law. The tension between both sides of compelling case law and legislative history creates ambiguity, at the very least. Given the seriousness of potential immigration consequences that a noncitizen may face, the rule of lenity requires that such ambiguity be resolved in favor of the noncitizen.[153] As the concurring opinion in *Roldan-Santoyo* noted, "the majority's interpretation violates the rule of statutory interpretation that ambiguities in our immigration laws should be interpreted in a light most favorable to the alien because of the drastic consequences of a deportation order."[154] By this measure, there should be an exception to the general rule for expunged convictions in the immigration context, allowing such expungement to be given effect in the immigration context when it is done pursuant to a state or federal juvenile justice statute.

2. Juvenile Expungements Must be Recognized in the Immigration Context in Order to Give Juveniles their Constitutionally Guaranteed "Meaningful Opportunity" at Rehabilitation

The need to honor juvenile expungements in the immigration context goes beyond even the need to effectuate the legislative intent underlying juvenile justice laws. It is also necessary as a matter of constitutional right. Before imposing serious penalties on juveniles, the Court determined that states must give them a "meaningful opportunity" to show they are deserving of relief by demonstrating "maturity and rehabilitation."[155] If not given such an opportunity before imposing a penalty, then the State makes "an irrevocable judgment about that person's value and place in society . . . [that is] not appropriate in light of a [juvenile's] . . . capacity for change and limited moral culpability."[156] Such a

153. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (describing the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]") (citations omitted); INS v. Errico, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the [noncitizen]."); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of th[e] construction [proposed by the respondent] because deportation is a drastic measure and at times the equivalent of banishment or exile."). Notably, this same argument was made by the concurrence in Roldan-Santoyo as to why the majority's interpretation of the INA's definition of "conviction" was incorrect. *In re Roldan-Santoyo*, 22 I. & N. Dec. at 532.

154. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); INS v. Errico, 385 U.S. 214, 225 (1966); Barber v. Gonzalez, 347 U.S. 637, 642–43 (1954); and Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

155. *Graham*, 560 U.S. at 75. In *Graham*, the Court determined that juveniles convicted of nonhomicide offenses cannot, as a constitutional matter, be sentenced to life without parole, but rather must have a meaningful opportunity to show they are deserving of release from prison.

156. *Id.* at 74.

blanket imposition of penalties, the Court determined, would be a constitutional violation.[157]

For noncitizen juveniles, the Court's mandate in *Roper* and *Graham* is effectively euthanized; there can be no "meaningful opportunity" to be rehabilitated when the immigration system refuses to recognize rehabilitative measures earned by juveniles in state court systems. A state deeming a juvenile rehabilitated and his or her conviction expunged does not carry out the Court's mandate if that same juvenile could still be removed or excluded from the United States as a result of that now-expunged conviction. As the immigration laws stand, a noncitizen juvenile, like a juvenile sentenced to life without parole, remains permanently with "no chance for reconciliation with society, no hope,"[158] since an adjudication can lead to serious adverse immigration consequences regardless of that juvenile's maturity and reform.

The Court makes it clear that "[i]t is for [state] legislatures to determine what rehabilitative techniques are appropriate and effective."[159] Accordingly, it is up to the states to make a determination as to when these rehabilitative measures have been satisfied. When a juvenile satisfies the states' juvenile rehabilitative provisions, he has thereby proven to the state that he has gained the maturity and reform deemed adequate to warrant a fresh start. The Court does not require that all juveniles be given this fresh start; rather, it requires only that they each have a chance to earn it, and that when they do so, it actually has meaning.

B. Confidentiality in Juvenile Proceedings and Other Rehabilitative Measures Should Shield Adjudications of Juveniles from Conduct-Based Triggers in the INA

Even if neither juvenile delinquency adjudications nor expunged convictions under juvenile offender statutes were considered convictions for purposes of the INA, they can still render severe immigration consequences.[160] If judges are allowed to consider such records as evidence of underlying conduct, then these records will trigger the conduct-based consequences of the INA as well as encourage judges to make adverse discretionary findings. However, most juvenile offender statutes contain provisions regarding the confidentiality of juvenile proceedings. Much like the rehabilitative provisions discussed above, these confidentiality measures are intended to afford greater

157. In particular, the Court found that imposing the death penalty on juveniles or life without parole for juvenile nonhomicide offenders would violate both the Eighth and Fourteenth Amendments of the Constitution. *Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 82.

158. *Id.* at 79.

159. *Id.* at 73–74.

160. *See supra* Part III.C.1.

protection to juveniles and ameliorate some of the negative consequences that flow from even being associated with a delinquency proceeding.[161]

For example, New York's Family Court Act, which lays out the provisions for juvenile delinquency,[162] makes it clear that the proceedings are to remain confidential: "[N]o person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article."[163] The Act specifies certain exceptions to this rule in which such proceedings must be divulged. Specifically, juvenile delinquency proceedings must be shared with school officials if the juvenile thereafter enrolls in public or private primary or secondary school. The record of the proceeding can be shared upon request with the commissioner of mental health and certain other mental health officials. Beyond this, the Act clarifies that "[a]t no time shall such notification be used for any purpose other than those specified in this subdivision."[164]

The legislature clearly contemplated which specific exceptions to this confidentiality rule were intended, and immigration enforcement was not included within these exceptions. Moreover, an additional provision specifies that "[n]either the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or his interests in any other court."[165] As no exceptions are given, this presumably includes immigration court.

According to statutes such as the New York Family Court Act, juvenile noncitizens should not be required to divulge records of their juvenile delinquency proceedings in immigration court, nor should other individuals be able to share such records with immigration enforcement officials. Nonetheless, this is not the current practice. Rather, immigration enforcement efforts within the juvenile justice system have led to a practice of juvenile justice officials turning over court records to ICE for use in immigration proceedings.[166] This is in clear violation of many state juvenile statutes that delineate precisely when and how records of juvenile proceedings may be shared with other officials or agencies. In order to carry out the intent of legislatures in enacting confidentiality provisions in their juvenile justice laws, this practice must end,

161. *See* Frankel, *supra* note 7, at 86 (describing confidentiality provisions as "a mechanism intended to promote rehabilitation and prevent juvenile delinquency proceedings from being used against the child in the future").

162. N.Y. FAM. CT. ACT § 301.1 (Consol. 1999).

163. N.Y. FAM. CT. ACT § 380.1 (Consol. 1999 & Supp. 2015).

164. *Id.*

165. N.Y. FAM. CT. ACT § 381.2 (Consol. 1999).

166. IMMIGRANT LEGAL RES. CTR., QUESTIONS AND ANSWERS: IMMIGRATION CONSEQUENCES OF DELINQUENCY (2009), http://www.illinoislegaladvocate.org/Uploads/7786Q%20%20A%20on%20Imm%20Consequences%20of%20Delinquency1-3.pdf.

and the contents of juvenile proceedings should not be admissible as evidence against a noncitizen in immigration proceedings.

VI.
CONCLUSION

The lesson to be learned from the line of juvenile justice cases from *Roper* to *Miller* is that, simply put, youth matters in determining the appropriateness of legal penalties. This lesson is no less important in the immigration context than in the criminal context. Provisions of the INA that outline the removability and inadmissibility of noncitizens impose severe penalties just as criminal laws do,[167] yet there is no room in the INA to consider the youth of the offender and all of the attendant characteristics that come with youth when determining the appropriate outcome.

Although it is a well-established rule that adjudications of juvenile delinquency do not count as convictions for purposes of the INA, this rule does not go far enough in protecting the best interests of noncitizen juveniles who become enmeshed in the immigration system. Such adjudications can still result in serious immigration consequences, such as by triggering conduct-based grounds of inadmissibility or removability.[168] Moreover, several states' juvenile offender laws have been held to render convictions rather than adjudications of delinquency because of the particular characteristics and structures of those laws.[169] In such states, those juveniles who are benefiting from their state's creation of a separate system of juvenile justice are nonetheless being treated the same as similarly situated adults in the immigration context, subject to all of the harshness of the immigration consequences that flow from adult criminal convictions. This result contravenes the purpose of juvenile justice statutes. To remedy this, the provisions of juvenile justice laws that afford protections and opportunities for rehabilitation to juveniles must be given full effect in the immigration context. Juvenile adjudications that have been expunged pursuant to a state's juvenile justice law should not be considered convictions for purposes of the INA, and juvenile proceedings must remain confidential and not divulged to immigration authorities.

Whether rehabilitative or confidentiality provisions, juvenile justice laws reflect the scientific fact that age matters, and that juveniles have a greater capacity for change, rehabilitation, and reintegration than do adults. These scientific facts drove the Court to its determination that, as a matter of constitutional right, states must provide juveniles with a meaningful opportunity to prove that they deserve a fresh start. With the state of immigration law as it stands, this promise of a fresh start and a chance at starting life anew after the indiscretions of one's youth is an empty promise for juveniles who happen to be noncitizens.

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167. *See Padilla*, 559 U.S. at 365 ("We have long recognized that deportation is a particularly severe 'penalty.'") (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

168. *See supra* Part III.C.1.

169. *See supra* Part III.D.