

Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy

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I. Introduction

The Double Jeopardy Clause of the United States Constitution provides: “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”¹ If a refugee who has committed a deportable offense and served his sentence is subsequently deported from a place where he calls home to a place where he would face persecution, he could literally be said to have been twice put in jeopardy of life and limb. That seems to be a *prima facie* violation of the Double Jeopardy Clause of the Fifth Amendment.² This constitutional guarantee is, however, not

1. See U.S. Const., Amend. V.

2. Although initially this clause was deemed to be binding only against the Federal Government, it has later been recognized that it also applies against the several states. See *Benton v. Maryland* 39 U.S. 784, 794-95(1969). See also *Palko v. Connecticut*, 302 U.S. 319 (1937). Possibilities exist whereby the same set of conducts may violate laws of multiple sovereigns at the same time giving rise to claims of multiple prosecutions and punishments. See *United States v. Lanza*, 260 U.S. 377 (1922) (sustaining federal conviction following a state conviction for the same offense). See also *Health v. Alabama*, 474 U.S. 82 (1874) (sustaining prosecution by two states of the same defendant for the same offense.) It is important to note from the outset that the argument presented in this article regarding deportation as a second punishment holds true whether the prior conviction is for violations of state law or federal law although the double jeopardy argument might seem to be technically limited to deportation as a result of federal convictions. The two sovereigns argument could only be valid if it is conclusively

currently available to refugees for a complex set of reasons. The most fundamental reason is that deportation is deemed to be a consequence of a civil proceeding that does not necessitate constitutional guarantees attending proceedings of a criminal nature.

Although traditionally the Double Jeopardy Clause has been viewed as a procedural safeguard and a substantive limitation on criminal punishments, the constitutionality of second civil punitive sanctions has always been a subject of serious challenges. In recent decades, the Supreme Court has expressly addressed these challenges in a series of cases and consistently held that the Double Jeopardy Clause does impose substantive limitations on civil sanctions that are so punitive in nature to be considered second punishments.³

Deportation⁴ is generally considered to be a civil sanction.⁵ Notwithstanding the jurisprudential complexities involved, this article argues that the deportation of an already recognized refugee to a place where he might face persecution, pursuant to the statutory exclusion of convicted criminals, is a second punishment, and as such violates the Double Jeopardy Clause.

determined that deportation is a punishment. If that determination is made, however, the federal government would need justification to punish, and there would be none. The arguments presented in this article would make this proposition clearer.

3. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 114 (1963); *Bell v. Wolfish*, 441 U.S. 20 (1979); *United States v. Wade*, 448 U.S. 242 (1980); *United States v. Halper*, 490 U.S. 435 (1989); *Austin v. United States*, 509 U.S. 602 (1993); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *Hudson v. United States*, 522 U.S. 93 (1997).

4. The Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996 consolidated two proceedings formerly known as “deportation” and “exclusion” into a single proceeding called “removal”. See IIRIRA Pub. L. No. 104-208, Sec. 306, 110 Stat. 3009-546, 3009-607 to 612 (codified as amended at 8 U.S.C. Sec. 1242.) Although under existing law, the order to leave the United States is called “removal order,” this article uses the term “deportation” to signify the act of removing a person outside of the territories of the United States pursuant to a removal order to a place where he fears persecution. The term deportation is preferred in this article not only because it still refers to the removal of aliens who have already been admitted, which is the focus of this article but also better signifies the severity of the measure. For a discussion of the use of terminology after the IIRIRA, see STEVEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY*, 290-91 (2d ed. 1997).

5. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 730 (1893). The objection to this view predates its adoption. For example, James Madison, in his report to the Constitutional Convention is reported to have said: “[I]f banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” See Madison’s Report on the Virginia Resolutions (1800), in 4 *The Debates in the Several States Conventions on the Adoption of the Federal Constitution* at 546, 555 (Jonathan Elliot ed. 1987) cited in Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, N. 8 (2000).

Several obstacles need to be overcome to ensure that the argument is well founded in reason and constitutional jurisprudence. With this view, the second part addresses the unique status of different categories of aliens under the Constitution and establishes that refugees, as a particular category of aliens, are entitled to the full protection of the Constitution. The third part analyzes the jurisprudence of the Double Jeopardy Clause vis-à-vis quasi-criminal and civil proceedings and sanctions, and identifies the most appropriate set of tests for the determination of whether a nominal civil sanction should be considered a second punishment for purposes of the Double Jeopardy Clause. The fourth part puts the nature and consequences of deportation proceedings involving refugees into perspective and argues that deportation of refugees qualifies as punishment under the conventional jurisprudence. The fifth part provides a brief conclusion.

II. Constitutional Protection of Aliens: Do They Benefit From the Guarantees of the Double Jeopardy Clause?

Before a discussion of deportation of refugee criminals in light of the existing jurisprudential definition of punishment is offered, it is important to underscore the constitutional entitlement of different categories of aliens including refugees. It is often stated that “[i]n the exercise of its broad power over nationalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”⁶ The question that must first be answered is, therefore, to what extent are refugees entitled to the protection of the constitution? Are they ordinarily entitled to the full protection of the Fifth Amendment including the protection against Double Jeopardy? To answer these questions, this part discusses the constitutional jurisprudence pertaining to different categories of aliens and demonstrates the place of refugees in a continuum.

A. Evolution of the Jurisprudence Relating to the Constitutional Safeguards Accorded to Aliens

Before the Civil War, immigration to the United States was not only free but also encouraged.⁷ For example, a Congressional Act declared in 1868 provided that: “[T]he right of expatriation is a

6. See, e.g., *Mathews v. Daiz*, 426 U.S. 67, 79-80 (1976).

7. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987).

natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and pursuit of happiness; and . . . in . . . recognition of this principle this government has freely received emigrants from all nations, and invested them with the right of citizenship. . . .”⁸ By 1875, however, a combination of social and economic conditions prompted Congress to enact the first systematic national immigration act ever.⁹ Between 1882 and 1892 a series of Chinese exclusion acts followed.¹⁰ These acts would shape the constitutional jurisprudence relating not only to the admission and exclusion of aliens but also the constitutional entitlement of those who had already been lawfully admitted for the century that followed.¹¹ Although the progeny still persists, that was an era “when the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review.”¹²

Gradually, however, the effects of the jurisprudence of the Chinese Exclusion Era seem to be eroding. Although in the Chinese Exclusion case,¹³ the Supreme Court adopted the plenary power doctrine, which holds that Congressional determination is “conclusive on the judiciary,”¹⁴ the Court never said that the power to regulate immigration is completely without constitutional constraints.¹⁵

8. See An Act Concerning the Rights of American Citizens in Foreign States, ch. 249, 15 Stat. 223 (1868) cited in *id.* at n. 10.

9. See Henkin, *The Constitution and United States Sovereignty*, *supra* note 7 at 855. Professor Henkin suggests that some of the factors that prompted the enactment include economic depression, unemployment, growing nativism, racism, and xenophobia. See *id.* at 855-856. For a similar suggestion see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-551 (1990).

10. See Henkin, *The Constitution and United States Sovereignty*, *supra* note 7 at 855.

11. *Id.* at 861. (“[i]n new contexts, the offspring of Chinese Exclusion still reign to deny constitutional protection to many thousands of aliens against new indecencies.”)

12. *Id.* at 862.

13. The case that is commonly known as the Chinese Exclusion case is *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

14. The Supreme Court’s first attempt to define the federal government’s power to exclude aliens related to *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). In this case, the respondent came to the United States as a laborer in 1875, a time when a treaty concluded between the United States and China in 1868 seemed to have guaranteed immigration from China without restriction. *Id.* at 596. In 1880, however, a supplemental treaty allowed the United States to “regulate, limit or suspend” Chinese labor related immigration. See *id.* In 1882 a complete Chinese exclusion was effected. See *id.* at 598-99. The Chinese Exclusion of 1882 allowed those who were already in the United States to obtain a certificate for reentry purposes. The respondent in this case obtained the certificate and left the country. While attempting to reenter, however, he was told that he was excluded pursuant to a Congressional act that denied entry to those with a certificate.

In 1903, in what is commonly known as the Japanese immigrant case,¹⁶ the Court made a distinction between those seeking to get admitted to the United States and those who had already been admitted.¹⁷ In this case, the Court disallowed the deportation of a Japanese immigrant who had already entered the United States on two grounds: (1) Aliens who have already been admitted to the United States are entitled to better constitutional safeguards than those who

Id. He challenged the constitutionality of his exclusion on two grounds of which only one is relevant here, i.e., the 1888 exclusion act was unconstitutional because Congress lacked competence to enact such law. *Id.* at 603. Justice Field, writing for the majority, established that the federal government has an exclusive authority to regulate immigration and that it could do so without being subjected to judicial review. *Id.* at 604. This was the foundation of the plenary power doctrine which persists to this day. It is important to note at this juncture that this was an era when due process and equal protection concepts were in their infancy.

15. See Henkin, *The Constitution and United States Sovereignty*, *supra* note 7 at 859. Professor Henkin suggests that the Court never considered the constitutional rights of the aliens in this case because it was not raised at all and “[t]he plausible candidate, the due process clause, had not yet begun to flower.” *Id.* In 1892, however, the Court rejected challenges based on individual constitutional rights. See generally, Nishimura Eiku v. United States, 142 U.S. 651 (1892) (reaffirming unlimited congressional power over immigration). The Court also reaffirmed the same principle the following year in Fong Yue Ting v. United States, 149 U.S. 698 (1893). In *Ting*, the Court rejected a procedural due process claim by residents of the United States of Chinese origin. When Congress extended Chinese exclusion in 1892 for ten more years, it allowed Chinese persons already resident in the United States to remain; however, it required that whoever claimed to have been in the United States before the ban took effect must demonstrate such residence by producing “a credible white witness.” See 142 U.S. at 700, n. 1, Sec. 6 (“[a]nd to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act. . .”). Unable to produce “a credible white witness,” the respondents in this case argued that the requirement violated their right to procedural due process. *Id.* at 713. Relying on the plenary power doctrine, the Court held that the federal government’s power in immigration is immune from judicial review. *Id.* at 715.

16. *Yamataya v. Fisher*, 189 U.S. 86 (1903).

17. *Id.* at 101. The Court did not, however, question the plenary power doctrine. In fact it reiterated the doctrine more eloquently as: “That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.” *Id.* citing *Nishimura Ekiu v. United States*, 142 U. S. 651; *Lem Moon Sing v. United States*, 158 U. S. 538; *Wong Wing v. United States*, 163 U. S. 228, *Fok Yung Yo v. United States*, 185 U. S. 296.

seek to be admitted;¹⁸ (2) Procedural due process questions must be reviewed more carefully than pure questions of immigration law.¹⁹

From these early cases, although rudimentary, a consistent theme seems to emerge. (1) Congress's power to regulate immigration is unrestricted; (2) Aliens who have already been admitted to the territories of the United States are entitled to at least procedural due process. The emphasis seems to be on the location of the alien and the nature of the constitutional claim. As shown below, these two themes play a fundamental role in today's jurisprudence relating to the constitutional entitlement of aliens.

Even during the Chinese Exclusion era, in non-immigration related matters, the Court has consistently held that admitted aliens were entitled to a range of protections enshrined under the Fifth and Sixth Amendments.²⁰ Evidently, developments in constitutional law relating to individual rights and civil liberties outside of the immigration context increasingly conflicted with the plenary power doctrine and the progeny of Chinese Exclusion.²¹ Although a series of cases decided in the early 1950s seemed to have reinvigorated the plenary power doctrine in a very troubling way,²² in the decades that

18. *See Yamataya*, 189 U.S. at 101.

19. *Id.* at 100-101. (But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends, -not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.).

20. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (overturning a San Francisco law prohibiting persons of Chinese origin from operating a laundry service, held that States may not engage in invidious discrimination against aliens inside the territories of the United States.); *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that a judicial trial is required before an alien is subjected to a criminal punishment.).

21. The nineteenth century immigration cases are, of course, the products of the era of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

22. *See, e.g., United States ex rel. Knauff v. Shaughness*, 338 U.S. 537 (1950) (holding that the power to exclude aliens is beyond judicial review—"Whatever the procedure

followed it came under intense criticism²³ and the individual rights approach steadily gained some momentum.²⁴ For example, in *Plyler v. Doe*,²⁵ the Court struck down a State statute depriving children of undocumented immigrants from attending public school.²⁶ It held that even undocumented immigrants are entitled to constitutional protection against discrimination.²⁷

The Court also extended constitutional protection against invidious discrimination to the federal realm. In *Hampton v. Mow Sun Wong*,²⁸ the Court struck down a federal regulation that made aliens ineligible for certain types of federal employment on the grounds that it lacked rational basis for the attainment of any legitimate objective.²⁹ Moreover, in *Mathews v. Diaz*,³⁰ although the Court upheld a federal law that deprived aliens of the right to Medicare unless they had acquired permanent residency and lived in the United States for five years, it reaffirmed the fundamental notion

authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). *See also id.* at 544; and *Shaughnessy v. United States ex rel. Mezei*, 245 U.S. 206 (1953) (holding that arriving aliens, whether they held permanent residence in the United States or not, could be denied constitutional safeguards that might be available to aliens who are already in the country.).

23. *See, e.g.*, Henkin, *The Constitution and United States Sovereignty*, *supra* note 7 at 860-862 (“The doctrine that the Constitution neither limits governmental control over admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a pre-rights jurisprudence that we have proudly rejected in other respects. Nothing in our constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extra-constitutional.”) *See also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 CULB. L. REV. 1 (1984) *reprinted in* CHIN, ROMERO, SCAPERLANDA, IMMIGRATION AND THE CONSTITUTION, THE ORIGINS OF CONSTITUTIONAL LAW, Vol. I, 267 (2000) (“[t]he signs of incipient changes are abundant and unmistakable. The Courts’ almost complete deference to Congress and the immigration authorities, long a keystone of classical structure, is beginning to give way to a new understanding and rhetoric of judicial role . . .”). Professor Schuck concludes that: “Immigration is gradually rejoining the mainstream of our public law.” *Id.* at 284.

24. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down a state residency requirement for entitlement for welfare benefits.).

25. 457 U.S. 202 (1982).

26. *Id.* at 219.

27. *Id.*

28. 426 U.S. 88 (1976).

29. *Id.* at 114-116.

30. 426 U.S. 67 (1976).

that aliens are entitled to constitutional protection of due process.³¹ The Diaz Court summarized that:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . Even those whose presence in this country is unlawful, involuntary, or transitory are entitled to that constitutional protection.³²

A number of decisions rendered in the early and mid-1970s held that aliens in the territories of the United States are entitled to the protection of the Fourth Amendment³³ although the degree of the protection varies depending on the degree of ties they have with the United States.³⁴

Although the plenary power doctrine of the nineteenth century still persists, particularly in the admission and exclusion arena, the availability of constitutional guarantees to aliens of different categories is currently without dispute. The significant growth of rights based jurisprudence of the last century on the one hand, and the persistence of the plenary power doctrine in the immigration context on the other, did not allow a simple and coherent constitutional immigration law to emerge. In 1985, even if the Supreme Court had the opportunity take on the issue and reconcile the plenary power doctrine with the growing individual rights jurisprudence in *Jean v. Nelson*,³⁵ it chose not to address the constitutional issue prompting the dissent to suggest that it was a

31. *Id.* at 77-78.

32. *See* 426 U.S. at 78 citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51; *Wong Wing v. United States*, 163 U.S. 228, 238; *Russian Fleet v. United States*, 282 U.S. 481, 489.

33. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that border-patrol's warrantless search of a vehicle violated the Fourth Amendment.); *see also United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that a border-patrol stop solely based on the ethnic appearance of the occupant of a vehicle violated the Fourth Amendment.).

34. *See, e.g., United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990) (holding that the Fourth Amendment applies to aliens, however, a "substantial voluntary" attachment to the United States polity is required.).

35. 472 U.S. 846 (1985). In *Nelson*, a group of detained Haitian asylum seekers claimed that the INS detention policy discriminated against them because of their race and national origin. The Court held that the statute in question was not facially discriminatory and as such was not necessary to decide the constitutional issue.. *Id.* at 852. It remanded the case for the determination of whether the INS actually used race and country of origin as a basis for their decision. *Id.* at 857.

“disingenuous evasion.”³⁶ Currently, therefore, aliens’ constitutional guarantees depend not only on their location but also on the nature and degree of relations they have with the polity of the United States.

The *Mathews v. Diaz* Court neatly summarized the complexity involved in the contemporary jurisprudence pertaining to the constitutional protection of aliens in the following manner:

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.³⁷

No single legal authority systematically and comprehensively addresses the nature and degree of ties that are required for the various constitutional protections to apply to aliens. The following section discusses the applicability of different constitutional guarantees under different circumstances and identifies the place of refugees in a continuum with a view to demonstrating that refugees as a category of aliens are entitled to the full protection of the Constitution.

B. The Current State of the Jurisprudence

When does an alien come within the protection of the Constitution? Under existing jurisprudence, this question may best be answered in a continuum—total alienage and citizenship being on the extreme opposite sides of the equation. The answer to the two extremes is simple. The Constitution does not apply to total aliens

36. See 472 U.S. at 858 (Marshall, J. and Brennan, J. dissenting).

37. See 426 U.S. at 78-79. By way of example, the Court noted that the Constitution protects the privileges and immunities of citizens only. Amend. 14, s. 1, and, Art. IV, s 2, cl. 1. The right to vote is preserved to citizens only. Amend. 15, 19, 24, 26. Representatives are required to be citizens for seven years. Art. I, s 2, cl. 2 and Senators for nine years, Art. I, s 3, cl. 3. Moreover, the president needs to be a “natural born citizen,” Art. II, s 1, cl. 5. *Id.* n. 12. Furthermore, many federal statutes distinguish between citizens and aliens and in fact the whole of Title 8 of United States Code is predicated on the assumption of the legitimacy of distinguishing between citizens and aliens. *Id.* at 78.

without any contacts with the United States,³⁸ but it applies in full force to all citizens of the United States regardless of where they may be.³⁹ There are several categories of persons in between these two extremes.⁴⁰ The following are some of the different categories in the order of their relationship with the United States—the most attenuated connection being listed first: aliens under the custody of the United States outside of the territories of the United States, undocumented aliens at permanent ports of entry and within a limited range of the borders, refugees, and permanent resident aliens—the closest immigrant status to citizenship. The extent of the applicability of the Constitution to all of these categories of persons is a subject of

38. *See, e.g.,* Curtiss-Wright, 299 U.S. at 318 (“[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”)

39. *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633 (2004). In Hamdi, the Court suggested that for purposes of a writ of habeas corpus, the location of the detention of a United States citizen does not make a “determinative constitutional difference.” *Id.* at 524. The petitioner in this case was detained at Guantanamo Bay but was later transferred to a naval brig when it became clear that he was a United States citizen prompting the Court’s comment. He was classified as an “enemy combatant.” The term “enemy combatants” in current usage signifies United States citizens who “support forces hostile to the United States or coalition partners. . . . and who engage in an armed conflict against the United States.” *Id.* at 516. This decision seems to suggest that “enemy combatants” may have a lesser degree of constitutional protection regardless of their citizenship status. The Court first held that: “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.” *Id.* at 533. Nonetheless, the Court established a burden shifting scheme to alleviate the government’s burden of proving its allegations because of the “uncommon potential to burden the Executive at a time of ongoing military conflict.” *Id.* at 534. The burden shifting scheme provides for a presumption in favor of the government’s evidence, including hearsay evidence, with an opportunity for the citizen detainee to rebut that presumption. *Id.* at 534. Under normal circumstances, this would seem to be a violation of the principle of presumption of innocence. *See also* Rumsfeld v. Padilla, 542 U.S. 426 (2004). In this case, the court touched upon the issues of the possibility of U.S. citizens detained outside of the territories of the United States to seek a habeas remedy. It said, “As a corollary to the previously referenced exception to the immediate custodian rule . . . we have similarly relaxed the district of confinement rule when “Americans citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus.” And cited to among other cases to *Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), in which the Court allowed court-martial convicts held in Guam to sue Secretary of Defense in the District of Columbia); and also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955), in which it approved the suit by court-martial convict held in Korea against Secretary of the Air Force in the District of Columbia. *See* 542 U.S. at n. 16.

40. Non-immigrant categories covered under consular and diplomatic laws are not discussed in this article.

great controversy in relation to a wide range of matters.⁴¹ The following discussion puts the position of refugees in relation to other categories of aliens into perspective.

i. Aliens Under U.S. Custody Outside of the Territories of the U.S.

Perhaps the most attenuated link of jurisprudential significance involves aliens who have never set foot on United States soil but are under the custody of the authorities of the United States government in territories the U.S. controls. This situation was considered by the Supreme Court recently in *Rasul v. Bush*.⁴² In this case, the Court considered whether the habeas statute⁴³ provides for a right of judicial review of the legality of detention of aliens by the Executive in a territory where the U.S. does not exercise full sovereignty but an exclusive jurisdiction.⁴⁴ Answering this question in the affirmative,⁴⁵ the Court endorsed the opinion that “the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the extent and nature of the jurisdiction or dominion exercised.”⁴⁶ According to *Rasul*, therefore, aliens under

41. As pointed out in the previous sections, owing to the plenary power doctrine, Congress’s enactments distinguishing between citizens and non-citizens have, by and large, enjoyed immunity from constitutional scrutiny. For commentaries relating to the plenary power doctrine, see generally Louis Henkin, *The Constitution and the United States Sovereignty*, *supra* note 7; See also Hirishi Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 9.

42. 542 U.S. 466, 124 S.Ct. 2686, 72 USLW 4596, (2004).

43. See 28 U.S.C. Sec. 2241-2243 (2000). The habeas corpus statute provides that as long as a custodian can be reached by service of process, courts may issue a writ within their jurisdiction requiring that prisoner be brought before the issuing court for a hearing on the detainee’s claim, or requiring that he be released from custody, even if the prisoner himself is confined outside the court’s territorial jurisdiction. See 28 U.S.C.A. § 2241(a).

44. See 542 U.S. at 475. The petitioners in this case were two Australian and twelve Kuwaiti citizens who were captured during hostilities in Afghanistan and were placed under the custody of United States authorities at Guantanamo Bay along with approximately 640 non-US citizens. *Id.* at 470-471. Although the United States does not exercise full sovereignty over Guantanamo Bay, which comprises 45 square miles of territory, it has an exclusive leasehold right pursuant to an agreement signed with Cuba in 1903 and later modified in 1934. *Id.* at 471. According to the agreement, the United States’ leasehold right remains in effect “as long as the United States of America shall not abandon” it. *Id.* Cuba gets a thousand dollars per annum in exchange. *Id.*

45. See 542 U.S. at 485.

46. The Court cited to Lord Mansfield’s 1759 opinion. Quoting the opinion in *King v. Cowle*, the Court stated: “even if a territory was no part of the realm” there was “no doubt” as the court’s power to issue writs of habeas corpus if the territory was “under the subjection of the Crown.” *King v. Cowle*, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.) cited in 542 U.S. at 482. The Court added that historically “courts exercised habeas jurisdiction over the claims of aliens detained within the sovereign territory of the realm,

United States custody in a territory where the United States exercises exclusive control may petition for habeas corpus⁴⁷ in federal courts with jurisdiction over the custodian.⁴⁸ Hence, at a minimum, persons under United States custody in a territory where the United States exercises jurisdiction are entitled to a certain degree of constitutional due process. As shown in the following subsections, the level of protection increases with the degree of contacts with the United States.

ii. Undocumented Aliens at Permanent Ports of Entry

As indicated in section II (a) *supra*, more than a century of jurisprudence holds that certain protections that the Constitution accords to individuals may extend to undocumented aliens within the territories of the United States.⁴⁹ However, severe restrictions apply

as well as the claims of persons detained in the so-called “exempt jurisdiction” where ordinary writs did not run, and other dominions under the sovereign control.” (footnote omitted). *See* 542 U.S. at 482. The Court also determined that in the early days of the Republic, United States courts also followed a similar practice. It relied on three eighteenth century cases: *United States v. Villato*, 2 Dall. 370, 1 L.Ed. 419 (CC Pa. 1797) (granting habeas relief to a Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex Parte D’Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J. in circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard*, 30 F. Cas. 131 (No. 17, 810) (CC N.Y. 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens.) all cited in 542 U.S. at n. 11.

47. “Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territories subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrong doing—unquestionably describe “custody in violation of the Constitution or laws of the United States.” *See* 542 U.S. at 384 n.15 (citations omitted).

48. In *Rumsfeld v. Padilla*, the Supreme Court offered procedural guidance relating jurisdictional issues. 542 U.S. 426, n.16 (2004). There is no suggestion that the procedural guidance is limited to suits filed by U.S. citizens. *Padilla* was essentially a jurisdictional case. The Court held that the proper defendant for a habeas petition is not the Secretary of Defense but the immediate custodian. *Id.* at 447. Avoidance of forum shopping was the most important policy consideration for the Court.

49. As far back as 1896, the Supreme Court held that undocumented immigrants are entitled to constitutional protection. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the protection enshrined under the Fifth and Sixth Amendments apply to undocumented immigrants within the United States.) *See also Plyer v. Doe*, 457 U.S. 202, 210 (1982) (holding that aliens are protected by the Due Process Clause of the Fifth and Fourteenth Amendments) *see also Matthews v. Daiz*, 426 U.S. 67, 77 (1976) (holding that the Fifth Amendment protects undocumented immigrants from invidious discrimination.). *See also INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (assumes that the Fourth Amendment applies to undocumented immigrants but holds that certain protections do not apply.). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259,

particularly in the context of border protection.⁵⁰ Statutes and case law regularly treated persons who managed to enter the country, regardless of their illegal entry, more favorably than those whose attempt to enter is unsuccessful.⁵¹ Because of this long-standing distinction, some constitutional protections are not available to certain class of immigrants who seek admission into the United States.⁵²

272-73 (1990) (adding more requirements for entitlement to the benefits of the Fourth Amendment, i.e., voluntary presence in the territories of the United States and requiring substantial connections.). For commentary, see, e.g., James G. Connell, III & Rene L. Valladares, *Search and Seizure Protection for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L.REV. 1293 (1997); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 Iowa L. Rev. (1996) reprinted in CHIN, ROMERO, SCAPERLANDA, IMMIGRATION AND THE CONSTITUTION, DISCRIMINATION AND EQUALITY IN CONTEMPORARY IMMIGRATION LAW, VOL. 2, 101-167 (2000).

50. The Commerce Clause is deemed to be the primary source of authority for the Federal Government to conduct searches and seizures at the borders. U.S. Const. art. I, s. 8, cl. 3. Courts have recognized this authority in a wide variety of contexts, see, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); see also *United States v. Montoya De Hernandez*, 473 U.S. 531, 537-38 (1985). The power to search based upon suspicion less than probable cause or perhaps no cause at all may be conducted at places that are considered to be the "functional equivalent" of entry ports or borders. See *Almeida-Sanchez v. U.S.*, 413 U.S. at 272. Several Circuit Courts have expanded the concept to include, among other places, first detention centers, see, e.g., *United States v. Emmens*, 893 F. 2d 1292, 1294095 (5th Cir. 1990).

51. See, e.g., *Sale v. Haitian Center Council, Inc.*, 596 U.S. 155, 175 (1993) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after entry, irrespective of its illegality.").

52. The distinction persisted after the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and IIRIRA. However, different labels were given to different procedures with questionable constitutional implications. For example, the category of persons formerly known as "excludable," and "deportable" were replaced with the term "inadmissible aliens." The later is broader because it includes not only those detained while attempting to enter without valid credentials (excludable) but also those who have already entered illegally (deportable). Those who have entered legally are called admitted aliens regardless of their subsequent status as legal or illegal. See generally, IIRIRA, *supra* note 4. The Supreme Court has not ruled on the constitutional issue of the due process right applicable to the new category of "inadmissible" aliens. The Circuit Courts of Appeal are split on this issue. For example, in *Gonzales v. Reno*, the Court of Appeals for the Eleventh Circuit rejected a due process claim for asylum by an inadmissible alien. See 215 F. 2d 957 (11th Cir. 2000). Other circuit courts have upheld the due process rights of the category of persons formerly known as "excludables" who would constitute a part of "inadmissibles" in current parlance. See, e.g., *Augustin v. Sava*, 735 F. 2d 32 (2d Cir. 1984); *Marincas v. Lewis*, 92 F. 3d 195 (3d Cir. 1996); *Selgeka v. Carroll*, 184 F. 3d 337 (4th Cir. 1999). The IIRIRA does not change the fundamental jurisprudential split in any concrete manner.

For example, while government officials may stop vehicles and conduct questionings at permanent checkpoints without a probable cause of individualized wrongdoing,⁵³ other types of border patrols are presumably subject to the “reasonable suspicion” standard.⁵⁴

The inapplicability of certain constitutional principles to certain categories of immigrants may, however, take a more subtle form. For example, in *United States v. Brignoni-Ponce*,⁵⁵ the Supreme Court held that INS patrol agents may stop a vehicle in places other than permanent checkpoints only if there are: “specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains aliens.”⁵⁶ Measures other than brief inspections for the presence of undocumented immigrants must be based on probable cause.⁵⁷ The Court further articulated factors that might be taken into account in forming a probable cause. They include: The nature of the area where the vehicle is encountered; its proximity to the border; the officer’s experience in dealing with illegal border crossings; the driver’s conduct; and the physical situations of the vehicle, the passengers’ appearance and the pattern of the traffic.⁵⁸ The Court acknowledged that the person’s ethnic appearance is a relevant factor in forming a reasonable suspicion.⁵⁹ Nonetheless, the Court made it clear that a stop based solely on the person’s ethnic appearance is unconstitutional.⁶⁰

Another example is the Supreme Court’s decision in *INS v. Lopez-Mendoza*.⁶¹ In *Lopez-Mendoza*, the Court held that the exclusionary rule of the Fourth Amendment does not apply in

53. See, e.g., *Martinez-Fuerte*, 428 U.S. 543 (1976) (holding that probable cause is not required at permanent checkpoints.).

54. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 833 (1975).

55. 422 U.S. 873, 833 (1975).

56. *Id.* at 844.

57. *Id.* at 881-882.

58. *Id.* at 884-885.

59. See *id.* at 886-87. The Court said that even if there is a high likelihood that a Hispanic appearing person might be an undocumented immigrant, standing alone, it does not justify stopping “all Mexican-Americans to ask if they are illegal aliens.” *Id.* As such courts must consider the totality of the circumstances. *Id.* at 885.

60. *Id.* However, some recent decisions appear to undermine *Brignoni-Ponce*’s prohibition against race-based profiling. See, e.g., *Habeeb v. Castloo*, 434 F. Supp. 2d 899 (D.Mont., 2006) (holding that an officer’s reliance on appearance or ethnicity in making law enforcement related stops without more does not constitute a constitutional violation.).

61. 468 U.S. 1032 (1984).

deportation proceedings.⁶² In this case, the respondents challenged the admissibility of evidence obtained because of their arrest in violation of the fourth Amendment right.⁶³ The Court characterized deportation proceedings as “purely civil” and held that the exclusionary rule does not apply in deportation proceedings.⁶⁴ The Court applied the balancing test employed under *United States v. Janis*,⁶⁵ and concluded that the social cost of exclusion of illegally obtained evidence in deportation proceedings outweighs the benefit of deterrence.⁶⁶ It enumerated four specific reasons in support of this conclusion: (1) Deportability could be ascertained by evidence other than those obtained through illegal arrest,⁶⁷ (2) very few, if any, illegal immigrants actually challenge deportation orders based on the Fourth Amendment,⁶⁸ (3) the INS already had its own scheme of deterrence,⁶⁹ (4) the availability of civil and criminal sanctions against the agent is a sufficient deterrence.⁷⁰

On the benefits side, the Court noted that excluding such evidence would require courts “to close their eyes to on going violations of the law.”⁷¹ It would also have the effect of unduly complicating the deportation system and also that it would severely burden the administration of the immigration laws.⁷²

However, the Court did not leave its decision as categorical as it appears, it expressly noted that the decision did not, by any means, include cases where there is “good reason to believe that Fourth Amendment violations by INS officials were widespread”⁷³ and

62. *Id.*

63. *See* 468 U.S. at 1034-35. INS agents made an unauthorized entry into a store against the store owner’s objection and arrested Lopez-Mendoza and Sanchez-Sandoval. *Id.* Upon questioning, they both admitted their illegal presence in the U.S. *Id.* at 1035-1037.

64. *Id.* at 1038.

65. 428 U.S. 433 (1976) In *Janis*, the Internal Revenue Service (IRS) used evidence that state officials obtained illegally. The Court applied a cost-benefit analysis and held that the exclusionary rule is inapplicable in civil proceedings because the social cost of exclusion of valuable evidence outweighs the benefits of deterrence. *Id.* at 454.

66. *See* 468 U.S. at 1041-50. Justices Brennan and White argued that the Court’s reliance on the *Janis* cost-benefit analysis was misplaced. *Id.* at 1050-60. (White-Brennan, J. dissenting).

67. *See* 468 U.S. at 1043.

68. *Id.* at 1044.

69. *Id.*

70. *Id.* at 1045.

71. *Id.* at 1046.

72. *Id.* at 1049.

73. *Id.* at 1050.

further noted that the decision in this case did not deal with “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”⁷⁴

In *Gonzalez-Rivera v. INS*,⁷⁵ the Ninth Circuit Court of Appeals applied *Lopez-Mendoza*’s “egregious violations” exception to a race-based border patrol stop and held that the race-based stop triggered the application of the exclusionary rule of the Fourth Amendment.⁷⁶ In this case, the arresting officer testified that he stopped the vehicle because of the Hispanic appearance of the passengers, among other factors.⁷⁷ The court held that race-based stop is an egregious violation of the Fourth Amendment that warrants the exclusion of all evidence obtained because of the violation at the deportation proceeding.⁷⁸

iii. Refugees

The above two subsections discussed the degree of constitutional guarantees available to aliens with substantially lesser connections with the polity of the United States. This subsection discusses the degree of constitutional guarantees that are available for the specific class of aliens known as refugees. The discussion of the constitutional protection of refugees necessarily involves a discussion of the origins of the protections that are international in nature. This subsection makes a one paragraph digression to provide a background on the international underpinnings of the constitutional rights of refugees.

As indicated above, refugees are a specific category of aliens with specific entitlements. These entitlements emanate from

74. *Id.* at 1050-51. Although, this part of the Court’s decision is considered dictum, it is perhaps the most significant aspect of the decision. The decision in general is a plurality opinion. This segment of the decision is arguably endorsed by all justices except Chief Justice Burger.

75. *See* 22 F. 3d 1441 (9th Cir. 1994).

76. *Id.* at 1448-52.

77. The arresting officer testified that he generally stops vehicles when passengers appeared Hispanic and showed nervousness. In this case, he said that he stopped two Hispanic men, father and son, because of five reasons: (1) their Hispanic appearance, (2) their failure to acknowledge the presence of the patrol car, (3) one of the passenger’s dry mouth, (4) excessive blinking of one of them, (5) the nervous appearance of both of them. *Id.* at 1443.

78. *Id.* at 1452. For scholarly commentary, *see generally*, Victor Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: Guitterez and the Tort Law/ Immigration Law Parallel*, 35 HARV. C.R. –C.L.L. REV. 57, 65 (2000) (arguing that whenever Fourth Amendment issues arise courts should place less emphasis on the immigration status of the involved individual.).

international law. Although refugee protection has ancient origins,⁷⁹ the international law relating to the protect refugees took its current structure with the ratification in 1951 of the Convention Relating to the Status of Refugees.⁸⁰ Initially Eurocentric and temporally limited to events that took place prior to its ratification, this Convention gained universalism after the ratification of the 1967 Protocol Relating to the Status of Refugees, which the United States adhered to.⁸¹

To bring the United States into compliance with the 1967 United Nations Refugee Protocol,⁸² Congress enacted the 1980 Refugee Act.⁸³ The Protocol is a result of post-World War II human rights era.⁸⁴ As such, it could rightfully be classified as a human rights instrument.⁸⁵ Evidently, the 1980 Refugee Act has incorporated the important parts of this human rights instrument with insignificant modifications. Refugees⁸⁶ are, therefore, a special category of persons whose

79. See ATEL GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, VOL. I. 9 (1966) and *see also* extracts in KAREN MUSALO, *REFUGEE LAW AND POLICY* (2002), 3-11. For a comprehensive discussion of the background, *see generally*, PAUL WEIS, *THE REFUGEE CONVENTION OF 1951, COMMENTARY* (1995) I-IX.

80. *See generally*, Convention Relating to the Status of Refugees: 189 UNTS 150, *entry into force*: 22 April 1954. [Hereinafter the Refugee Convention].

81. United Nations Protocol Relating to the Status of Refugees, 19 U.S.T 6223; 606 U.N.T.S. 267, *entered into force* Oct. 4, 1967. It is an independent legal instrument that incorporates the 1951 Refugee Convention by reference. States could be parties to either or both instruments. The United States, for instance, is a party only to the Protocol.

82. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

83. *See* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980). Codified in scattered sections of 8 U.S.C.

84. For example, in 1948, The Universal Declaration of Human Rights (UDHR) declared: "Every one has the right to seek and enjoy in other countries asylum from persecution." *See* UDHR, GA re. 217(A)(III), UN Doc. A/810 (1948) at art. 14.

85. *See, e.g.*, JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 2-5 (1992) (arguing that international refugee instruments adopted after World War II emphasized the individual rights approach.)

86. The Refugee Convention, which Refugee Protocol incorporated, defines a refugee as a person who: "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out side the country of his nationality and is unable, or unwilling to avail himself of the protection of that country, or who, not having a nationality and being out side the country of his former habitual residence as a result of such events, is unable or owing to such fear unwilling to return to it." Convention Relating to the Status of Refugees: 189 UNTS 150, *entry into force*: 22 April 1954. at 1(A) (2). It is generally understood that recognition of one's refugee status does not make him or her a refugee but declares him or her a refugee. As such, the fact of being a refugee necessarily comes before recognition. Recognition is therefore declaratory not constitutive. *See* United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of*

protection is sanctioned by an international treaty which makes part of the laws of the United States. Accordingly, they are entitled to dual protection: Whatever protection they are entitled to under the Constitution as ordinary aliens within the territories as well as special protection under the 1980 Refugee Act.

The most fundamental protection of refugees under the 1980 Refugee Act is the mandatory prohibition against deportation to a place where they would be persecuted.⁸⁷ Under the Act, once refugees are recognized, they are entitled to a number of benefits that are designed to integrate them into the United States society.⁸⁸ These benefits include authorization to work, entitlement to travel abroad and reenter the United States,⁸⁹ family reunion,⁹⁰ and also adjustment to that of lawful permanent resident after a year of residency following the grant of asylum which may be backdated to the time of arrival.⁹¹ The permanent residency status entitles refugees to citizenship after meeting the residency requirement.

Refugees, HCR/IP/4/Eng/REV.1 Reedited January 1992, UNHCR 1979. at Para. 28. The Refugee Act adopted the definition with minor modifications. See INA Sec. 101(a)(42), 8 U.S.C. Sec. 1101(a)(42). Refugees could be recognized by the United States through two distinct procedures: the Overseas Refugee Program pursuant to INA Sec. 207, 8 U.S.C. Sec. 1157, and through Political Asylum Procedures in the territories of the United States pursuant to INA Sec. 208, 8 U.S.C. Sec. 1158. Both procedures use the same definition of a refugee but differ in many respects. For a concise discussion of the two procedures, see MUSALO, *supra* note 79 at 66-82.

87. See INA Sec. 243(h)(1) (8 U.S.C. 1253) ("The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19))// 8 U.S.C 1251// to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." In two seminal cases, the Supreme Court defined the different standards of proof that are required for the grant of asylum under section 208 and the grant of withholding of removal under section 243(h). See *INS v. Stevic*, 467 U.S. 407, 430 (1984); *INS v. Caradoza-Fonseca*. 480 U.S. 421, 439 (1987).

88. See Sec. 101 of the Refugee Act of 1980 at (b) // 8 U.S.C. 1521. Under purpose, it states: "The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for *the effective resettlement and absorption of those refugees who are admitted.*" (emphasis added).

89. See 8 U.S.C. 1158 (c)(1) ("In the case of an alien granted asylum under subsection (b) of this section, the Attorney General—(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization ; and (C) may allow the alien to travel abroad with the prior consent of the Attorney General.")

90. See, e.g., 8 C.F.R. Sec. 207.7(d) (2005) (providing that an admitted refugee may be joined by his wife and children.)

91. See 8 U.S.C. 1159 (a)(1)(A-C), (2). ("(a) Criteria and procedures applicable for admission as immigrant; effect of adjustment (1) Any alien who has been admitted to the United States under section 1157 of this title—(A) whose admission has not been

As indicated above, these are conscious efforts designed by the Refugee Act of 1980 to integrate refugees into the United States community. These measures are indeed sufficient to offer any refugee the required level of substantial relations for the Fourth Amendment and all other constitutional protections to apply.⁹² It could fairly be concluded that recognized refugees are almost always entitled to near complete constitutional protection as members of the United States community.⁹³

Regardless of such integration objective, however, a number of exceptions apply to the mandatory rule of withholding of deportation.⁹⁴ The following exception is the most relevant for purposes of this article. It states that refugee protection does not apply “[t]o any alien if the Attorney General determines that . . . the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.”⁹⁵ This provision is taken verbatim from the Refugee Convention.⁹⁶ Although it seems to have been originally designed for purposes of exclusion from admission or recognition under the 1951 Refugee Convention, it can also be used as a ground for termination

terminated by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe, (B) who has been physically present in the United States for at least one year, and (C) who has not acquired permanent resident status, shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 1225, 1229a, and 1231 of this title. (2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c) of this section) as an immigrant under this chapter at the time of the alien’s inspection and examination shall, notwithstanding any numerical limitation specified in this chapter, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien’s arrival into the United States.”).

92. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that an alien needs to have a voluntary association with and substantial relations with the polity of the United States for the Fourth Amendment to apply.).

93. See, e.g., Alexander Aleinikoff, *The United States Constitution in its Third Century: Foreign Affairs: Rights Here and There: Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862 (1989).

94. See, e.g., INA Sec. 241(a)(19), 8 U.S.C. 1251 new section 1227 (listing deportable grounds).

95. See INA Sec. 243(h)(2), 8 U.S.C. 1253.

96. See *The Refugee Convention*, *supra* note 80 at art. 33 (2).

of refugee or asylum status for crimes committed after the status has been granted under the Immigration and Nationality Act (INA).⁹⁷

In 1990 Congress amended the INA and provided that “aggravated felonies” are per se “particularly serious crimes” within the meaning of the Refugee Act.⁹⁸ Congress further elaborated the list of “aggravated felonies” under the IIRIRA in 1996.⁹⁹ Currently, crimes such as theft and perjury are sufficient to cause the deportation of a refugee provided that the term of sentence is more than a year even if the sentence is suspended.¹⁰⁰ The possibility of deportation to a place where refugees would face persecution because of the commission of crimes such as these stands out to be the most serious limitation of refugee status. As this article asks, the question remains whether it could be reconciled with the notion of refugee protection and also the protection against Double Jeopardy. Before this fundamental question is discussed, for the sake of comparison and exhaustion of the issues in the continuum, it is important to consider the constitutional protection issues pertaining to one more category of persons who presumably have better communal relations

97. See 8 USC 1158 (c)(2)(B) “Asylum may be terminated if the alien meets a condition described in subsection (b)(2) of this section)” Sub-section (b) (2) states that asylum status shall not be granted to alien “[i]f the Attorney General determines that—(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States. . . .” 8 U.S.C. 1158 (b)(2). Under special rules aggravated felonies are considered particularly serious crimes per se. The special rules state: “Conviction of aggravated felony - For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.” 8 U.S.C 1158 (b)(2)(B)(i). The BIA has recently held that a separate termination proceeding is not required. See *In Re Sejid Smriko*, 23 I. & N. Dec. 836, 840, Interim Decision (BIA) 3520, 2005 WI 3075402 (BIA) (2005) (“[A] refugee admitted as a lawful permanent resident . . . is not immunized from the grounds for removal that are applicable to all other aliens.”) (Also holding that “The consistent reference to any alien in the statutory provisions governing removal proceedings and the lack of mention of prior termination of refugee status are strong indications that aliens admitted as refugees are subject to removal proceedings without the preliminary step of terminating refugee status under Section 207(c)(4).”) See *id.* at 838.

98. See INA Sec. 101(a)(43), INA Sec. 243(h).

99. See INA Sec. 101(a)(43).

100. See, e.g., INA Sec. 101(a)(43)(G) (“A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 1 year.”).

with the United States, but who may potentially fall within the class of persons who could lose their refugee status and be deported to places where they may be persecuted.

iv. Lawful Permanent Residents

Lawful permanent residence (LPR) status is the closest immigration status to citizenship.¹⁰¹ It could invariably lead to citizenship status after a certain number of years depending on the manner of acquisition of the status. Although immigrants with LPR status have significantly better rights than all other immigration status holders, they do not have all the privileges of citizenship status.¹⁰² The two most notable limitations other than political rights are: (1) the possibility of deportation for commission of a designated class of crimes, and (2) the uncertainty surrounding their rights outside of the territories of the United States. They are discussed below.

The law that provides for the deportation of non-citizen felons does not provide any privileged status to those holding LPR status regardless of their eligibility for citizenship and the number of years they have held such a status.¹⁰³ With respect to the status of LPRs and refugees that have adjusted their status to that of LPR the BIA has recently held that: “[a] refugee who whose status has been adjusted to that of a lawful permanent resident is subject to all applicable grounds for removal and to placement in removal proceedings. This has long been the accepted understanding of the immigration law.”¹⁰⁴ As far as deportation for commission of felonies is concerned, all non-citizens are treated the same. Refugees who have adjusted to that of LPR Status are no exception.

The uncertainty about the extent of the applicability of the Constitution and laws of the United States with respect to LPRs temporarily outside the territories of the United States is a result of

101. See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (holding that the reference “person” under the Fifth Amendment includes LPRs.); see also *Bridges v. Wixon*, 326 U.S. 135 (1945) (holding that LPRs are entitled to the First Amendment right without any restrictions.) and see also *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment applies to aliens with substantial connections with the United States.).

102. See Stephen H. Legomsky, *Why Citizenship?* 35 VA. J. INT’L L. 279 (1994) (arguing that for purposes of municipal legislation, the citizen/non-citizen dichotomy should be made unnecessary.).

103. See, e.g., INA Sec. 101(a)(43).

104. See *In Re Smriko*, 23 I. & N. Dec. 836, 841 (BIA 2005) citing to *Matter of Bahta*, 22 I & N Dec. 1381, 1382 n.2 (BIA 2000); *Matter of Garcia-Alzugaray*, 19 I&N Dec. 407 (BIA 1986).

the Supreme Court's opinion in *United States v. Verdugo-Urquidez*.¹⁰⁵ In this case, the Supreme Court said that certain provision may apply to certain situations while others may not.¹⁰⁶ At issue in this case was the applicability of the Fourth Amendment for an unauthorized search conducted by U.S. officials in Mexico.¹⁰⁷ The respondent was later transferred to the U.S. and was put on trial for drug smuggling offenses. He objected to the admissibility of the evidence obtained during the unauthorized search at his Mexico home.¹⁰⁸ The Court held that constitutional protection extends only to those who are in the United States voluntarily and can demonstrate a "substantial connection" with the United States community.¹⁰⁹ The Court expressly recognized that the Fourth Amendment applied only within the United States territories.¹¹⁰ The Court, however, made a clear distinction between the texts of the Fifth and the Sixth Amendments which use the term "person" and the "accused" respectively, and the Fourth Amendment which uses the term "people."¹¹¹ According to the Court, the term "people" was deliberately used to signify "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be

105. 494 U.S. 259 (1990).

106. Chief Justice Rehnquist's plurality opinion holds that the Fourth Amendment's application extends to a more limited category of persons than the First, Fifth and Sixth Amendments. *Id.* at 265-66. The Fourth Amendment provides: "The rights of the people to be secured in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. Amend VI.

107. *See* 494 U.S. at 274-75.

108. *Id.*

109. *Id.* at 271.

110. *Id.* at 266.

111. *Id.* at 265.

considered part of the community.”¹¹² The Supreme Court never defined the set of circumstances that might meet the “substantial connection” standard for purposes of inclusion into the “people” category.

In *United States v. Barona*,¹¹³ the Court of Appeals for the Ninth Circuit suggested who might be considered the “people” under *Verdugo-Urquidez*’s test. Judge Wallace, whose dissenting opinion in *Verdugo-Urquidez* was adopted by the plurality of the Supreme Court said that he would consider two categories of persons to be included in the “people.”¹¹⁴ They are: (1) American citizens wherever they may be, and (2) LPRs within the United States.¹¹⁵ That left the question whether immigrants with an LPR status but who are temporarily outside the United States could be considered part of the “people” for purposes of the Fourth Amendment.¹¹⁶

Except for this particular question, there seems to be no doubt that, refugees who have adjusted to that of LPR status, are considered to fall under the “people” category. There is also little doubt that most admitted refugees who have not adjusted to that of LPR status would have the “sufficient connection” by virtue of their lawful existence and promises made to them under the laws discussed above. Perhaps by the time they integrate into society and have the misfortune to commit a crime, they must have developed real connections with the community and expectations to be treated just like one of such members who happened to commit a crime.¹¹⁷

112. *Id.*

113. 56 F. 3d 1087 (9th Cir. 1995).

114. *See* 56 F. 3d. at 1094.

115. *Id.*

116. *Id.* *See also* *Verdugo-Urquidez*, 856 F. 2d at 1234. In at least one vacated case, a District Court held that twelve years of illegal presence was not sufficient to establish the required sufficient connections for the Fourth Amendment to apply. *See United States v. Gutterez*, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446 (N.D. Cal. Oct. 14, 1997), cited in Victor Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants*, *supra* note 78 at 65. The defendant in this case had lived and worked in the U.S. for more than ten years, had a California drivers license, was married to a permanent resident, and also had a U.S. citizen child. *Id.* at 70. This decision was, however, vacated on the court’s own motion. *Id.* at 61

117. An empirical survey of immigrants and their involvement in crimes in North America, Europe, and Australia sponsored by the Canadian Ministry of Citizenship and Immigration concluded that the United States, Canada, and Australia, the criminality of first generation immigrants is less than the native born population. However, the study noted a much higher delinquency rate for second and third-generation immigrants. It associates this phenomenon of increasing delinquency to among other factors to poverty, cultural marginalization, and racism. *See generally*, Mathew G. Yeager, *Immigrants and*

Therefore, their lawful residence, the particular privileges under international law and national legislation discussed above coupled with their reasonable expectation of being treated just like any member of the community would make them part of “the people” for purposes of the Fourth Amendment.

If refugees are entitled to the full protection of the Fifth Amendment, including the privilege against Double Jeopardy, the next question that needs to be considered is whether or not the Double Jeopardy Clause applies outside of the context of criminal punishment or sanctions. The next part considers this issue in some detail.

III. The Prohibition Against Double Jeopardy: Does It Apply to Non-criminal Proceedings?

It is currently very well-settled that the Double Jeopardy Clause of the Fifth Amendment protects persons from three distinct types of government abuses: (1) a second prosecution for the same offense after acquittal; (2) second prosecution for the same offense after conviction; (3) multiple punishments for the same offense.¹¹⁸

Criminality: A Meta Survey (January 1996) available at <http://www.cyberus.ca/~myeager/art-1.htm>.

118. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed. 2d 656 (1969); *Illinois v. Vitale*, 447 U.S. 410, 415, 100 S.Ct. 2260, 2264, 65 L.Ed. 2d 228 (1980); *Ohio v. Johnson*, 467 U.S. 493, 498-499, 104 S.Ct. 2536, 2540, 81 L.Ed. 2d 425 (1984); *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed. 487, 57 USLW 4526, *Med & Med GD (CCH)* p 37, 847. (1989). A notable objection to the prohibition of multiple punishments comes from Justice Scalia. In his dissenting opinion in *Kurth Ranch*, Justice Scalia argued that “multiple punishments” is not a component of the Double Jeopardy Clause. He said that “To be put in jeopardy” does not remotely mean “to be punished,” so, by its terms this provision prohibits, not multiple punishments, but multiple prosecutions.” *Department of Revenue of Montana v. Kurth Ranch, et. al.* 511 U.S. 767, 796, 114 S.Ct. 1937, 1955, 62 USLW 4429, 73 A.F.T.R. 2d 94-2140. (1994). However, this view remains to be a minority view without a significant support. Although the text says harms to life or limb, the Supreme Court has consistently held that it applied to imprisonment and monetary sanctions. See, e.g., *Ex parte Lange*, 18 Wall 163, 21 L.Ed. 872 (1874); *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed. 487 (1989); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937 (1994). These prohibitions do not extend to successive prosecutions by different sovereigns based on the same conduct. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L. Ed. 2d 684 (1959) (allowing state prosecution following a federal prosecution based on the same events); *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L. Ed. 729 (1959) (allowing federal prosecution following a state prosecution based on the same events.).

More than one hundred years of jurisprudence holds that deportation proceedings are not criminal proceedings.¹¹⁹ As such, there is little controversy regarding the nature of the proceedings. The controversy, however, relates to the nature of the sanction resulting from these proceedings, namely, deportation. Although it is very difficult to find a coherent guidance regarding the evaluation of the nature and consequences of deportation, currently the immigration system operates under the assumption that deportation is a civil sanction immune from constitutional concerns relating to multiple punishments for the same offense. The most important question that needs to be answered is thus whether the assumption that deportation of refugees who commit crimes after their admission is a civil sanction is correct.

For decades, courts have struggled to draw a line between civil sanctions and outright criminal punishments. Perhaps the Supreme Court's most comprehensive analysis of current importance relating to the nature of sanctions is offered in its 1963 decision in *Kennedy v. Mendoza-Martinez*.¹²⁰ In *Mendoza*, the Court employed a multi-pronged test to determine whether a Congressional Act was penal or regulatory, which include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it is imposed only on a finding of scienter; (4) whether its imposition promotes the traditional objectives of punishment i.e., retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose could rationally be assigned to it, and (7) whether it appears to be excessive in relation to the supposed alternative purpose.¹²¹

The court concluded that these factors need to be applied "absent conclusive evidence of congressional intent as to the penal nature of a statute"¹²² or even if the label is civil, to determine if the act is so punitive as to negate the label.¹²³

At issue in this case was the constitutionality of a federal statute authorizing the loss of citizenship for departing the United States for

119. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 730 (1893).

120. 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963).

121. See 372 U.S. at 168-169.

122. *Id.* at 169.

123. *Id.*

the purpose of evading military service.¹²⁴ Mendoza-Martinez, a U.S. citizen by birth, admitted to having gone to Mexico for the sole purpose of evading military service.¹²⁵ He pled guilty to violating the Selective Training and Service Act of 1940¹²⁶ and was sentenced to a prison term of one year and one day, which he served.¹²⁷ Five years later, he was served with a warrant of arrest in deportation proceedings on the allegation that by evading service, he had lost his U.S. citizenship under Section 401(j) of the INA.¹²⁸ He challenged the constitutionality of the dual sanctions on several grounds. Relevant for purposes of this article is the Court's inquiry regarding multiple punishments for the same offense. Mendoza argued that the statute that provided for the forfeiture of citizenship without the procedural guarantees of the Fifth as well as the Sixth Amendments was unconstitutional.¹²⁹ The Court did not find it difficult to rule in his favor because it found a clear Congressional intent to punish.¹³⁰ In determining that the statute was punitive enough to warrant the procedural guarantees of the constitution, the Court relied on the legislative history rather than the seven factors it enumerated. It simply found it unnecessary to apply the seven factors. It found that "Congress plainly employed the sanction of deprivation of nationality as a punishment."¹³¹

The Supreme Court did not revisit the same issue until twenty years later. In *United States v. Ward*,¹³² the Court considered a state statute in light of the seven Mendoza factors. From the outset, the Court said that whether a statutorily defined penalty is civil or criminal is primarily a matter of statutory construction.¹³³ Hence, the

124. See Sec. 401(i) of the Nationality Act of 1940, added in 1944, 58 Stat. 746 cited in 372 U.S. at 145 (1963). ("A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for purposes of evading or avoiding training and service in the land or naval forces of the United States.")

125. 372 U.S. 147 (1963).

126. 54 Stat. 894, as amended, 50 U.S.C. App (1946 ed.) s. 311, cited in 372 U.S. 147 (1963).

127. *Id.*

128. *Id.*

129. *Id.* at 165.

130. *Id.* at 160.

131. *Id.* at 165.

132. *United State v. L.O. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.ED. 2d 742, 14 ERC 1673, 10 Envil. L. Rep. 20,477 (1980).

133. See *U.S. v. Ward*, 448 U.S. at 248.

inquiry must have two distinct steps: (1) whether, in establishing the penalizing scheme, Congress intended a preference for the civil or criminal label; and (2) where it is clear that Congress has intended a civil penalty scheme, the inquiry must focus on whether such a scheme is “so punitive either in purpose or effect as to negate that intention.”¹³⁴

At issue in *Ward* was whether the assessment of a “civil penalty” under the Federal Water Pollution Control Act (FWPCA) qualifies for protection under the Fifth Amendment which guarantees the right against self-incrimination.¹³⁵ The Court held that Congress had clearly intended to label the statute as “civil” and also that the application of the Mendoza factors did not provide the “clearest proof” that the penalty here in question is punitive either in effect or in purpose.¹³⁶

In *United States v. Halper*,¹³⁷ the Supreme Court considered the issue of whether and under what circumstances that a civil penalty qualifies as a punishment for purposes of the Double Jeopardy clause.¹³⁸ In this case, the respondent was found guilty of sixty-five

134. *Id.* at 248-249.

135. *Id.* at 244. The Statute provides in pertinent part that: “Any person in charge of a vessel or an onshore facility or an offshore facility shall as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both.” 33 U.S.C. Sec. 1321 (b)(5) cited in *id.*

136. *See id.* at 250. The District Court as well as the Court of Appeals for the Tenth Circuit had come to a different conclusion. *See id.* The Court also held that it is also not quasi-criminal under *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). *Id.* at 251. *Boyd* holds that “suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.” *Boyd v. U.S.* 116 U.S. at 634.

137. 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed. 2d 487, 57 USLW 4526, Med & Med GD (CCH) p 37, 847 (1989).

138. *See* 490 U.S. at 441. The Court reiterated that the Double Jeopardy Clause protects against three distinct types of abuses. A second prosecution after acquittal, a second prosecution after conviction and most importantly multiple punishments for the same offense. *See id.* at 440. In support of its conclusions regarding the multiple punishments, the Court said that: “The third of these protections—the one at issue here—has deep roots in our history and jurisprudence. As early as 1641, the colony of Massachusetts in its ‘Body of Liberties’ stated: ‘No man shall be twice sentenced by Civil Justice for one and the same Crime, Offence, or Trespass.’” American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910) cited in *id.* at 440.

counts of false medical claims under the Criminal False Claims Statute¹³⁹ and sixteen counts of mail fraud.¹⁴⁰ He was sentenced to imprisonment of two years and a fine of \$5,000.¹⁴¹ Thereafter, the government brought a civil action pursuant to the Civil False Claims Act¹⁴² based on the same set of facts that warranted the criminal conviction.¹⁴³ The Act prescribed remedy per violation.¹⁴⁴ Having caused sixty-five different violations, Halper was said to have been subject to a penalty of \$130,000.¹⁴⁵ The over-payment because of Halper's criminal conduct was only \$585.¹⁴⁶

The Court then considered the issue of whether and under what circumstances a civil sanction may be deemed to be a punishment for the purposes of the Double Jeopardy Clause.¹⁴⁷ It said that "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purpose that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment."¹⁴⁸ The Court noted the two most familiar objectives of punishment: retribution and deterrence.¹⁴⁹ It further stated that "[r]etribution and deterrence are not legitimate non-

The Court also said that in drafting the Double Jeopardy Clause, James Madison, focused on the issue of multiple punishments. The Court cited the initial draft as saying: "No person shall be subjected, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834) cited in *id.* It also cited to its century-old precedent which held that: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same office." *Ex parte Lange*, 18 Wall. 163, 168, 21 L.Ed. 872 (1874). *See id.*

139. 18 U.S.C. Sec. 287 cited in 490 U.S. at 437 (criminalizes "mak[ing] or present[ing]. . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent.")

140. *See* 490 U.S. at 438.

141. *Id.*

142. 31 U.S.C. secs. 3729-3731. cited in *id.* at 438. (provides for civil penalty when "[a] persons . . . (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get false or fraudulent claim paid or approved.")

143. *See* 490 U.S. at 438.

144. *Id.* at 437.

145. *Id.* at 438.

146. *Id.*

147. *See id.* at 446.

148. *Id.* at 448 (citations omitted).

149. *Id.* at 448 citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed. 644 (1963).

punitive governmental objectives.”¹⁵⁰ Relying on *Mendoza-Martinez*, the Court concluded that “[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we come to understand the term.”¹⁵¹ The Court further concluded: “[u]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.”¹⁵²

According to *Halper*, therefore, the imposition of multiple punishments is subject to the Double Jeopardy constraint.¹⁵³ Moreover, the nature of punishment is determined based primarily on the purpose it purports to achieve, i.e., whether it is intended to achieve the traditional purposes of punishment, i.e., retribution and deterrence.¹⁵⁴ The other important consideration is the proportionality of the sanction to the damage caused. On this issue, the Court said: “[t]he defendant is protected from a sanction so disproportionate to the damage caused that it constitutes a second punishment.”¹⁵⁵

In *Austin v. United States*,¹⁵⁶ the Supreme Court considered whether or not an *in rem* forfeiture was a purely civil sanction or criminal punishment for purposes of the Eighth Amendment excessive fines clause.¹⁵⁷ The Court said that the question that must be asked is not whether forfeiture under the statute¹⁵⁸ is civil or

150. *Id.* citing *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20, 99 S.Ct. 1861, 1874, n. 20 (1979).

151. *See Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. at 568 cited in 490 U.S. at 448. The court noted that the excessiveness of the civil sanction may be indicative of the civil or criminal nature of the sanction. *See id.*

152. *See* 490 U.S. at 448-449.

153. *See* 490 U.S. at 448.

154. *Id.*

155. *Id.* at 450. The Court found that the governments costs to investigate a fraud in the amount of \$585 and the penalty of \$130,000 sufficiently disproportionate to be considered a second punishment for purposes of the Double Jeopardy Clause. *See id.* at 452.

156. 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed. 488, 61 USLW 4811 (1994).

157. *See* 509 U.S. at 604. The Eight Amendment provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const., Amend. VIII. Cited in it at n. 2.

158. *See* 21 U.S.C. Sec. 881(a)(4) and (a)(7). The statute provides for the forfeiture of, among other things, “(7) All real property . . . intended to be used, in any manner or part, to commit, or facilitate the commission of , a violation of . . . punishable by more that one year’s imprisonment.” Cited in 509 U.S. at n.1.

criminal but rather whether it is punishment or not.¹⁵⁹ The Court relied on *Halper* which held that: “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we come to understand the term.”¹⁶⁰ The Court then asked the question whether at the time of the ratification of the Eight Amendment, forfeiture was “understood at least in part as punishment.”¹⁶¹ After a lengthy analysis of history¹⁶² and precedent¹⁶³ the Court concluded that forfeiture has traditionally been considered, at least in part as punishment.¹⁶⁴

The Court then looked at congressional intent. It stated that by linking the penalty with significant involvement in a criminal enterprise and exemption of innocent owners, Congress clearly intended to impose a penalty.¹⁶⁵ It then concluded that forfeiture under the provisions in question constituted punishment for the same offense and as such subject to protections under the Eight Amendment.¹⁶⁶

The Court’s analysis followed the *Mendoza-Martinez* although it did not consider all the seven factors. As the above discussion suggests, the most important factors for the Court’s consideration of the sanction as punishment were historical considerations, punitive nature, the link with culpability, and finally congressional intent of deterrence.

159. See 509 U.S. at 610.

160. See 490 U.S. at 448 cited in 509 U.S. at 610.

161. See 509 U.S. at 610-611.

162. *Id.* at 611-615.

163. *Id.* at 615-616. See, e.g., *Calero-Toledo*, 416 U.S. 663, 683 (1974); *J.W. Goldsmith, Jr. Grant Co. v. United States* 254 U.S. 505 (1921); *Dobbins’s Distillery v. United States*, 96 U.S. 395 (1878); *Harmony v. United States* 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.), 6 L. Ed. 531 91827). All cited in 509 U.S. at 615. The Court said that in all of these cases forfeiture was justified under two theories: (1) the legal fiction that the property itself was “guilty,” (2) the owner himself may be held accountable for allowing others to use his property. *Id.* The Court then concludes that: “Both theories rest, on the notion that the owner has been negligent in allowing his property to be misused and the he is properly punished for the negligence.” *Id.*

164. In so concluding, the Court stated that “forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment.” *Id.* at 618.

165. See 509 U.S. at 619. The Court said that in particular, Congress “chosen to tie forfeiture directly to the commission of drug offences.” It looked at the legislative history and found that it was considered as a “powerful deterrent.” S. Rep. No. 98-225, p. 191 (1983) cited in *id.*

166. See 509 U.S. at 622.

The same year, in *Department of Revenue of Montana v. Kurth Ranch*,¹⁶⁷ the Supreme Court again considered the meaning of “punishment” for purposes of the Double Jeopardy Clause in light of a state’s tax assessment following criminal drug convictions for the same conduct.¹⁶⁸ Although the Supreme Court had on prior occasions indicated that a tax might violate the Double Jeopardy Clause,¹⁶⁹ this case was the first time ever that it held that a tax in fact violated the Double Jeopardy Clause.¹⁷⁰ In this case, the Court considered the issue of whether a state tax imposed on the possession of illegal drugs assessed following the State’s imposition of criminal penalty for the same conduct violated the Double Jeopardy Clause.¹⁷¹

The respondents in *Kurth Ranch* pleaded guilty to drug charges and received various criminal penalties.¹⁷² Citing to *Halper*, the Court reaffirmed that labels do not control and concluded that a tax penalty is not immune from double jeopardy inquiry simply because it is a tax.¹⁷³ It further noted that a high rate of taxation or an obvious deterrent purpose would not automatically make a tax a form of punishment; however, it could be suggestive of a punitive character.¹⁷⁴ In this case, the tax was more than eight times the value of the drugs.¹⁷⁵ The Court concluded that the deterrent purpose of the drug laws was beyond question because of the following statement contained in the preamble of the statute: “[b]urdening” violators instead of “law abiding taxpayers” and “that the use of dangerous drugs is not acceptable; and that the Act is not intended to ‘give credence’ to any notion that manufacturing, selling, or using drugs is legal or proper.”¹⁷⁶

167. 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed. 2d 767, 62 USLW 4429, 73 A.F.T.R. 2d 94-2140 (1994).

168. See 114 S.Ct. at 1941.

169. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L. Ed. 917 (1938).

170. See 511 U.S. at 799.

171. See 114 S.Ct. at 1941. The State statute at issue here imposed a tax on the “possession and stage of dangerous drugs.” See Mont. Code Ann Sec. 15-25-111 (1987) cited in *id.* It imposes the tax after all state and federal fines and forfeitures have been duly satisfied. See *id.* at Sec. 15-25-111(3) cited in *id.*

172. See 114 S.Ct. at 1942.

173. See 511 U.S. at 779, 114 S.Ct. at 1946.

174. See 114 S.Ct. at 1946.

175. *Id.*

176. *Id.* at n. 18 citing to 1987 Mont. Laws., ch. 563, p. 1416.

The *Kurth Ranch* Court further noted that “the so-called tax” was conditioned on the commission of a crime.¹⁷⁷ That condition is indicative of penal and prohibitory intent rather than the collection of revenue because the tax assessment not only hinges on the commission of a crime but also it is imposed only after the taxpayer has been arrested for exactly the same reasons that would give rise to the tax obligation.¹⁷⁸ The Court distinguished these taxes from taxes with pure revenue-raising purposes that are imposed despite their adverse effect on the taxed activity.¹⁷⁹ It said the tax here is unique in yet another way: it is imposed on criminals but no others—“it departs so far from normal revenue laws as to become a form of punishment.”¹⁸⁰

Relying on *Halper*,¹⁸¹ the Court concluded that because the tax could fairly be characterized as punishment, the proceeding initiated to collect taxes is the “functional equivalent of a successive criminal prosecution.”¹⁸² The two most important considerations are, therefore, punitiveness and deterrence.

One of the two latest Supreme Court opinions relating to the constitutional meaning of punishment is contained in *Hudson v. United States*.¹⁸³ In this case, the Court overruled *Halper* and readopted its Ward-Kennedy approach.¹⁸⁴ It said that the proper inquiry must be that: (1) whether, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.”¹⁸⁵ (2) Even when such intent could be discerned, an inquiry must be made whether the statutory scheme is

177. See 114 S.Ct. at 1947, 511 U.S. at 781.

178. *Id.*

179. The Court distinguished taxes imposed on activities that the government wants to discourage but not ban. It said for example that although cigarette taxes are imposed to discourage smoking, the product benefits of revenue, employment opportunities, consumer satisfaction, etc., outweigh the banning of the product. These justifications do not exist here because the substance is banned altogether. *Id.* at 114 S.Ct. at 1947.

180. See 114 S.Ct. at 1948.

181. That the constitutional protection against second punishment has “deep roots in our history and jurisprudence.” *Halper*, 490 U.S. at 440 cited in 114 S.Ct. at 1948.

182. See 114 S.Ct. at 1948-1949. The Court did not engage in *Halper* remedial purpose analysis because it held that the state did not claim that the tax related to any cost of investigation or actual damages to the state. Even if it did, there would be no approximation since the tax applies regardless of whether the state suffered any damages or not. See *id.*

183. 522 U.S. 93 (1997).

184. *Id.*

185. See *Hudson*, 522 U.S. at 99 citing to *Ward*, 448 U.S. at 248-249.

“so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into criminal penalty.”¹⁸⁶

In determining whether the so-called civil sanction is so punitive as to be considered a criminal penalty, the inquiry must follow the seven Kennedy factors.¹⁸⁷ It added that the factors must be applied “in relation to the statute on its face,”¹⁸⁸ and also that only “the ‘clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into criminal penalty.”¹⁸⁹

In overruling *Halper*, the court said that *Halper* “elevated a single Kennedy factor—whether the sanction appeared excessive in relation to its non-punitive purpose to dispositive status.”¹⁹⁰ And reemphasized that no one factor should be viewed as dispositive.¹⁹¹

The issue in this case was whether the Double Jeopardy Clause bars a criminal prosecution based on a conduct that had already resulted in an imposition of monetary penalty and occupational debarment.¹⁹² In determining the issue, the Court engaged in the Ward-Kennedy two-part test.¹⁹³ It first considered whether Congress intended a civil sanction rather than a criminal punishment. Then it applied the Kennedy factors to determine whether there was “the clearest of proofs” that the sanction is a criminal punishment despite the label.¹⁹⁴

The Court found that there was Congressional intent to keep the sanction civil mainly because: (1) the monetary sanction has been expressly designated as “civil,”¹⁹⁵ (2) as to debarment, although there is no express language, the fact that the authority to sanction was

186. See *Hudson*, 522 U.S. at 99 citing *Ward* 448 U.S. at 248; *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956).

187. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 cited in *Hudson*, 522 U.S. at 99-100.

188. See *Hudson*, 522 U.S. at 100 citing *Kennedy*, 372 U.S. at 169.

189. See *Hudson*, 522 U.S. at 100 citing *Ward*, 448 U.S. at 249.

190. See *Hudson*, 522 U.S. at 101 citing *Kennedy*, 372 U.S. at 169.

191. See *Hudson*, 522 U.S. at 101 citing *Kennedy*, 372 U.S. at 169. The Court noted that *Halper*’s second departure was its assessment of the nature of the actual sanction rather than evaluating the “statute on its face.” 522 U.S. at 101 citing *Halper*, 490 U.S. at 447.

192. See *Hudson*, 522 U.S. at 95. Petitioners were charged in the Western District of Oklahoma with twenty-two counts of conspiracy, misapplication of bank funds, etc., under 18 U.S.C. Sec. 371, 656 and 2, and Sec. 1005. See *id.* at 97.

193. *Id.* at 103.

194. *Id.*

195. *Id.* The authority to administer the statute was granted to the “Appropriate Banking Agenc[ies]” see 18 U.S.C. Sec. 1818(e)(1)-(3) cited in *id.*

granted to an administrative agency is a *prima facie* evidence of congressional intent to make a civil sanction.¹⁹⁶

Accordingly, the Court went on applying the Kennedy factors to determine if despite the label, the sanction is so punitive as to be considered a punishment. It held: (1) neither monetary penalties nor debarment has historically been considered a criminal punishment;¹⁹⁷ (2) the sanctions do not involve “affirmative disability or restraint”—the prohibition from participating in banking activity does not remotely resemble “the infamous punishment of imprisonment;”¹⁹⁸ (3) because the penalty could theoretically be imposed even in the absence of “bad faith” there is no intent requirement as such does not depend on the finding of scienter;¹⁹⁹ (4) although the same conducts could also be regarded as criminal conducts, that fact alone is not sufficient to make the sanctions “criminally punitive;”²⁰⁰ and (5) although the sanctions could deter future conducts thus serving the traditional purpose of punishment, “the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence “may serve civil as well as criminal goals.”²⁰¹ It then concluded that the application of the Kennedy factors did not show that there is the “clearest proof” required under *Ward*.²⁰²

The Court did not engage in the evaluation of two of the seven Kennedy factors, i.e., (1) “whether an alternative purpose to which it may be connected is assigned for it;”²⁰³ and (2) whether it appears excessive in relation to the alternative purpose assigned.²⁰⁴ These factors, particularly, the proportionality inquiry, are precisely the ones that *Halper* considered dispositive.²⁰⁵ The Court in *Hudson*, however, disregarded them completely. Their relevance in the

196. See *id.* citing *Helvering v. Mitchell*, 303 U.S. 391, 402; *United States v. Specter*, 343 U.S. 169, 178 (1952) (Jackson J. Dissenting) (Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (holding that quintessential criminal punishments may be imposed only “by a judicial trial.”)

197. See *Hudson*, 522 U.S. at 104.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Kennedy*, 372 U.S. at 168-169.

204. See *id.* See also *Hudson*, 522 U.S. at 99-100, 104-105.

205. See *Hudson*, 522 U.S. at 101.

Court's analysis of the constitutional meaning of "punishment" remains unclear in light of preexisting precedent.

The Supreme Court's second latest pronouncement relating to the punitive nature of a nominal civil sanction is contained in *Kansas v. Hendricks*.²⁰⁶ Although this case mainly dealt with the nature of a proceeding rather than the nature of the sanction, the Court's analysis essentially followed the Kennedy factors to determine the criminal character of a nominally civil proceeding.²⁰⁷

The petitioner in this case challenged the constitutionality of a Kansas civil confinement statute on grounds of prohibitions against Double Jeopardy and ex post facto law.²⁰⁸ The petitioner served consecutive sentences for sexual violence.²⁰⁹ A second jury trial for the determination of his mental condition adjudged him a "violent predator."²¹⁰ The state then moved to confine him civilly according to the civil confinement statute, which he challenged.²¹¹

To determine the nature of the proceedings and the sanction, the Court employed the *Ward* two-part test: (1) whether the legislator intended a civil sanction; or (2) whether the nominally civil sanction is so punitive as to be considered a punishment.²¹² The Court in this case found a clear legislative intent to establish a civil confinement process;²¹³ however, it considered some of the Kennedy factors to determine if it passes the second *Ward* test.²¹⁴

The Court focused on four of the seven Kennedy factors: (1) whether the sanction serves the traditional purposes of punishment;²¹⁵ (2) whether the conduct to which it is attached is already a crime;²¹⁶ (3) whether it is imposed on a finding of scienter;²¹⁷ and (4) whether it

206. 521 U.S. 346 (1997).

207. *See id.*

208. *Id.* at 355.

209. *Id.*

210. *Id.* at 355-56.

211. *Id.* at 356.

212. *See United States v. Ward*, 448 U.S. 242, 248-249 (1980) cited in *id.* at 361.

213. *See* 521 U.S. at 361-62.

214. *Id.*

215. *Id.* at 362. It said that the Act's purpose is neither retributive nor deterrent.

216. *Id.* at 362. The Court said that "The Kansas Act does not make a criminal conviction a prerequisite." While it certainly looks like it is the application of this particular Kennedy factor, it is not entirely clear.

217. *See id.* at 362-63. The Court's analysis of scienter overlapped with its analysis of retribution and deterrence and interestingly considered confinement conditions as indicative of the absence of a finding of scienter. *Id.*

involves a restraint.²¹⁸ The Court answered the first two questions in the negative but the third one in the affirmative.²¹⁹ However, it held that the finding of restraint alone is not sufficient to make the sanction a punishment because if detention alone is considered a punishment then all involuntary civil confinements would be impermissible punishments.²²⁰ The Court's focus in this case was essentially on the purpose of the sanction, particularly the existence or non-existence of a retributive and deterrent purpose. It did not find either.

Much like the cases discussed above, the *Hendricks* Court does not answer the question relating to the weight that each one of the Kennedy factors must carry. However, it reaffirms the continued relevance and importance of these factors for the contemporary jurisprudence of punishment. Although the weight question remains unanswered,²²¹ a consistent theme could be identified: Ever since Kennedy was decided in 1963, the seven Kennedy factors remained relevant. The emphasis shifted from time to time; however, three important considerations appear to have always figured prominent. They could be stated in simple terms as: (1) the nature of the sanction; (2) the actual severity of the sanction; and (3) the motive behind the sanction. What could be concluded from the above rather lengthy discussion of precedent is the following: a nominally civil sanction that is sufficiently severe and motivated by the desire to punish which clearly promotes the traditional purposes of punishment, would likely be considered a punishment for purposes of the Double Jeopardy Clause. However, under current law, it appears that each challenge needs to be evaluated in light of the seven Kennedy factors, although a cumulative affirmance of all is not required.

The Supreme Court has never considered the issue of deportation in light of its contemporary punishment jurisprudence. More than a century ago, in *Fong Yue Ting v. United States*,²²² it held that deportation proceedings are civil proceedings.²²³ By 1924, it was

218. *Id.* at 363.

219. *Id.* at 361-63.

220. *Id.* at 363.

221. All the cases, discussed *supra*, that were decided after Kennedy focused on the Kennedy factors although with different emphasis. The only guidance on this question is that none of them are independently dispositive. For example, Halper was overruled because of its exclusive reliance on the "excessiveness" factor alone.

222. 149 U.S. 698, 707 (1893).

223. *Id.* at 728, 730.

an already established precedent.²²⁴ The decisions that followed simply relied on such precedent.²²⁵ This precedent is not tenable for three reasons: (1) it ignores recent developments in the jurisprudence of individual liberties;²²⁶ (2) fails to consider the increasing criminalization of the immigration law;²²⁷ and (3) it is exclusively based on an assumption that all deportations occur as a result of violations of the immigration laws of the nation.²²⁸

The following part assesses the nature and consequences of the deportation of refugee criminals in light of the jurisprudence discussed in this section. It argues that deportation of refugees who commit crimes occurs not to put an end to a continued violation of

224. See *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (holding that: "It is well settled that deportation, while it may be burdensome and severe for the alien, it is not punishment.").

225. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish.") In fact, in 1958 in *Topp v. Dulles*, the Court had said that the idea that deportation is a civil sanction is fictional. See *Topp v. Dulles*, 356 U.S. 86, 97 (1958).

226. See generally, Henkin, *The Constitution and United States Sovereignty*, *supra* note 7 (arguing that the plenary power doctrine is a result of the Chinese Exclusion era and must be revisited in light of modern developments relating to civil liberties and due process.).

227. Traditionally deportation was reserved for very serious and violent crimes; however, this trend has changed drastically over the last few decades. Compare the list of crimes in the following enactments: Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Sec. 7342, 102 Stat. 4181 (1988) (codified in scattered sections of U.S.C.) (listing crimes such as murder, trafficking in firearms and destructive devices); The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C. and 29 U.S.C.) (adding new offenses to the aggravated felony class including money laundering, and crimes of violence); Violent Crimes Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 18 U.S.C. (1994) (further adding to the list); The Immigration and Technical Correction Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994) (adding to the list further); The Anti Terrorism and Effective Death Penalty Act (AEDPA) of 1996 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (expanding the list significantly to include crimes such as document fraud and perjury or subornation of perjury, etc.) The Illegal Immigration and Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). (adding more offenses to the list but most importantly lowering the term of imprisonment for some of the offenses such as theft from five years to one year regardless of whether it is actually imposed or suspended.) For commentary see, e.g., Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Terry Coonan, *Dolphins Caught in Congressional Fishnets-Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589 (1998).

228. See *Lopez-Mendoza*, 468 U.S. at 1039. (holding that the purpose of deportation is "to put an end to a continued violation of the immigration law.") This understanding of the purpose of deportation prevailed for more than a century. See, e.g., *Fong*, 149 U.S. 689, 730 (1893).

immigration laws as it is said,²²⁹ but to penalize the so-called aliens for abusing their invitation.²³⁰

IV. Is Deportation of a Refugee Who Commits a Crime a Civil Sanction or Punishment?

A. Punishment in General

Punishment involves pain and deprivation, and as such requires justification.²³¹ Utilitarianism and retributivism have over the ages been regarded as the dominant justifications.²³² The essence of utilitarianism is complex,²³³ and is outside the scope of this article. By comparison, however, retribution appears to be increasingly the most dominant justification of punishment.²³⁴ Retributivism holds that

229. See Lopez, 468 U.S. at 1039.

230. Deportation of aliens for criminal conduct was for the first time introduced into the laws of the United States in 1917. The legislative history of the Immigration Act of 1917 suggests that Congress considered the commission of a crime by an alien as “an abuse of invitation” to the United States to reside in its territories. See Congressional Record, 53:5167-5172; see also Congressional Record, 53: 4768-816, 4841-85, 4932-62, 5023-52 & 5164-95 cited in Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L. J. 115, 149 (1999).

231. See, e.g., Kenet Greenawalt, *Punishment*, 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1336 (SANFORD H. KADISH, ED. 1983) 1336-1338 reprinted in JOSHUA DRESSLER, *CRIMINAL LAW: CASES AND MATERIALS* 21(1994) (“Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification.”); R.A. Duff, *Trials and Punishments* 1 (1986) (“It is agreed that a system of criminal punishment stands in need of some strenuous and persuasive justification . . .”); Richard Wasserstrom, *Why Punish the Guilty?*, 20 PRINCETON U. MAG. 14 (1964), reprinted in GERTRUDE EZORSKY (ED), *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT*, 328, 337 (1972) (“Punishment is an evil, an unpleasantness; it requires that someone suffer. Its infliction demands justification.”)

232. See Kenet Greenawalt, *Punishment*, *supra* note 231 at 22.

233. For example, utilitarianism asks the question whether punishment “promotes human happiness better than possible alternatives.” *Id.* It has several components, including deterrence, incapacitation, and reform. *Id.* at 25.

234. For example, James Stephen wrote in 1883 that the “[c]lose alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated that the punishment inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it . . . Love and hate, gratitude for benefits, and the desire of vengeance for injuries, imply each other as much as convex and concave.” James Fitzjames Stephen, *A History of Criminal Law of England*, reproduced in part in DRESSLER, *CRIMINAL LAW*, *supra* note 231 at 29. This theory is of course a subject of great criticism, see, e.g., Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?* 88 MICH. L. REV. 1448, 1451 (1990).

whoever committed a crime “deserves it.”²³⁵ Arguably rooted in “vengeance, bloodlust, revenge, retaliation, and an eye for an eye”²³⁶ outlook, this theory dominates today’s criminal justice system,²³⁷ notwithstanding society’s claim of gradual civility.²³⁸ Evidently, when immigrants commit crimes the retributive emotion acquires two essential forms: the feeling of vengeance for the crimes they committed which they share with the rest of the offending community, and a feeling of vengeance because of their abuse of invitation which they do not share with the rest of the offending community.²³⁹ State and federal criminal laws provide for the punishment of all offenders but federal immigration law provides for the deportation of immigrants including refugees after the penalty prescribed under the applicable law has been served. The second type of sanction, namely deportation, seems to serve the exact same purpose as the first. In 1893, in his dissenting opinion in *Fong Yue Ting v. United States*,²⁴⁰ Justice Field said:

235. See Kenet Greenwalat, *Punishment*, *supra* note 231 at 21. See also Immanuel Kant, *The Philosophy of Law*, 194-198 reproduced in DRESSLER, *CRIMINAL LAW*, *supra* note 231 at 27 (“Judicial punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.”)

236. See Russell L Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 845 (2002) citing Igor Primoratz, *Justifying Legal Punishment* 13 (1989) (“The history of the retributive view of punishment begins with the biblical and Talmudic ethical and legal ideas.”)

237. As late as 1984, the Supreme Court held that retribution is the “primary justification for the death penalty.” *Spaziano v. Florida*, 468 U.S. 447, 461062 (1984). For a similar proposition, see Mirko Bagoric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 126 (2000) (“Retributivism has been the dominant theory of punishment in the Western world for the past few decades.”) See also David Dolinko, *Retributivism, Consequentialism, and Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507, 507 (1997) cited in Christopher, *Deterring Retributivism*, *supra* note 236 at n.12 (“retributive theory is arguably the most influential philosophical justification for the institution of criminal punishment in present-day America.”).

238. Retribution relates to resentment and hatred. Professor Dressler says that “retributive hatred” is “a morally suspect emotion” because its application is not limited by personal morality. See Dressler, *Hating Criminals*, *supra* note 234 at 1462. There are, of course, strong arguments in favor of the morally justifiableness of retributive justice. See Dressler’s commentary in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (1988). See also Dressler, *Hating Criminals*, *supra* note 234. For example, Murphy argues that hatred is an element of retributive emotion is rational and permissible. *Id.* at 1458.

239. See, e.g., Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003) (arguing that a culture of control has dominated efforts in immigration reform.).

240. 149 U.S. 698, 13 S.Ct. 106 (1893).

[b]ut it can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as a punishment for an offense, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; if banishment of this sort be not punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied.²⁴¹

The following section demonstrates that deportation of refugees who commit crimes is a second punishment which merely serves a retributive purpose and as such a violation of the Double Jeopardy Clause.

B. Punishment Jurisprudence – Kennedy Factors

As indicated above, the Supreme Court's current analysis of whether a nominally civil sanction is punishment proceeds in two distinct steps: (1) Whether Congress showed a preference for one or the other label; (2) if the label is a civil sanction, whether the application of the seven Kennedy factors negate that label. This section addressed these issues.

i. Legislative Labeling

The exclusion by law of refugees or any other immigrants from a lawful status for commission of a certain class of crimes is not a new phenomenon.²⁴² What is new is the increasing criminalization of the immigration law in recent decades.²⁴³ As indicated above, even minor offenses, such as shoplifting could now result in the deportation of refugees and other categories of immigrants. The legislative labeling and intent should thus be viewed in light of this changing landscape. Because this article focuses on the deportation of refugees who have committed crimes, the most relevant piece of legislation that this

241. See *id.* at 748-749 (Field J dissenting, quoting Madison, 4 Elliot, Deb).

242. It dates at least as far back as 1917. A congressional Act excluded certain category of aliens. See note 230 *supra*.

243. See, e.g., *Miller, Citizenship & Severity*, *supra* note 239. See generally Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589 (1998).

inquiry focuses on is the 1980 Refugee Act²⁴⁴ as amended in 1996 by AEDPA²⁴⁵ and IIRIRA.²⁴⁶

No Court has ever analyzed legislative intent and labeling as it pertains to the exclusion provisions of this Act or any other relevant law for that matter. In fact, all prior inquiries involving deportation of any category of immigrants focused not on the nature of the deportation but on the nature of the proceedings. For example, in *INS v. Lopez-Mendoza*,²⁴⁷ the Supreme Court offered a comprehensive analysis of the civil nature of deportation proceedings. However, its focus was on the procedural due process aspects of the proceedings not on the substantive sanction that would ordinarily result from the proceedings.²⁴⁸ It held that “a deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.”²⁴⁹ It added that: “Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”²⁵⁰ It then concluded: “The purpose of deportation is not to punish past transgressions but rather *to put an end to a continuing violation of the immigration laws.*”²⁵¹ Where such violations do not exist because the alien has a lawful legal status, as in the case of refugees, what then is the purpose?²⁵² The answer to this question seems to be “punishment.” This issue will be discussed in more detail in this and the following sections.

244. PL 96-212, 94 Stat. 102 (1980) Codified in 8 U.S.C.1158.

245. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

246. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

247. 468 U.S. 1032, 104 S.Ct. 3479 (1984).

248. *See id.*

249. *See* 468 U.S. at 1038.

250. *Id.*

251. *Id.* at 1039 (emphasis added).

252. It might be argued that the commission of the crimes might make the lawful resident to lose his status and become in technical violation of the immigration laws, however, such general assumption cannot be valid for all types of lawful status. For example, a refugee status may only be lost under conditions specified under INA 208(b)-(c), which is essentially predicated on Art. 1 C of the Refugee Convention. (Although stated in many different ways, these grounds essentially pertain to gaining full protection from another country, and lack of continued eligibility because of a fundamental change of circumstances in the home country.)

Lopez-Mendoza relies on precedent and analyses statutes. The precedents include the Chinese Exclusion era cases²⁵³ and all of the statutes pertain to procedural due process matters.²⁵⁴ Hence, *Lopez-Mendoza* does not hold or provide guidance regarding the legislative labeling or legislative intent of any legislation as it pertains to the nature of the order and execution of deportation but only the proceeding. Certainly, it does not even consider any statutes that have any bearing on refugee status.²⁵⁵

As indicated above, the 1980 Refugee Act has its origin in the 1951 United Nations Refugee Convention and the 1967 Protocol.²⁵⁶ It amended all existing laws having any bearing on refugee protection and established “a more uniform basis for the provision of assistance to refugees.”²⁵⁷ Predicated on the Refugee Convention,²⁵⁸ the Act excluded from protection any alien who “having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of the United States.”²⁵⁹

The important question that needs to be asked under *Kennedy* is whether in enacting this provision, Congress intended to penalize

253. The most important precedents that Lopez relies on are *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) and *Bugajewitz v. Adam*, 228 U.S. 585, 591 (1913) cited in 468 U.S. at 1038. The holdings in these cases evidently fail to take recent jurisprudential and constitutional developments into account.

254. The statutes include: 8 U.S.C. Sec. 1302, 1306, 1325 (criminalizing unlawful entry and stay); 8 U.S.C. Sec. 1252(b) (providing for a hearing to continue in the absence of the respondent if he fails to appear); 8 U.S.C. Sec. 1252(b) (Shifting the burden of proving identity to the respondent); 8 U.S.C. Sec. 1252(b)(4) (providing that an order of deportation need only be based on “reasonable, substantial, and probative evidence” not a proof beyond a reasonable doubt.) All of these cited statutes pertain to procedural due process. The Court relied on them to support its conclusion that deportation proceedings are civil rather than criminal.

255. As it is evident from the Double Jeopardy jurisprudence, proceedings and the outcomes of the proceedings could be subjects of different inquiry which could produce remarkably different results. For a different view, see Javier Bleichmar, *Deportation as Punishment*, *supra* note 230 at 148 (suggesting that Lopez holds that Congress has labeled deportation as a civil sanction)

256. See Part II, Section a (iii) *supra*.

257. See The Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980) Codified in 8 U.S.C. 1158 at Preamble.

258. See Refugee Convention, *supra* note 60 at art. 33.2. (The benefits of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the country.”).

259. See Sec. 243(h)(B) of the Act; 8 U.S.C. Sec. 1253(h)(2)(B).

criminal refugees or regulate immigration? In other words, was this initially intended to be punitive or regulatory?

There are two competing interpretations of this provision particularly as it relates to the application of the factors of excludability. The important factors are conviction of a crime and danger to the community. The question is whether the two factors need to be met cumulatively or alternatively.

The official interpretation of the United Nations High Commissioner for Refugees (UNHCR) suggests that the two requirements need to be met cumulatively:

A refugee committing a serious crime in the country of refuge is subject to due process of the law in that country. In extreme cases, Article 33, Paragraph 2 of the Convention permits a refugee's expulsion or return to his former home country, if having been convicted by a final judgment of a "particularly serious crime, he constitutes a danger to the community of his country of refuge."²⁶⁰

This interpretation certainly suggests that it is a regulatory endeavor to protect the community against dangerous criminals rather than punishing the criminals themselves by subjecting them to an additional punishment of returning them to a place where they may face persecution, although that might be an unavoidable consequence.

The Board of Immigration Appeals (BIA), however, offered an entirely different interpretation of the application of the requirements for exclusion. In the matter of *Carballe*,²⁶¹ the BIA held that section 243(h)(2)(B) of the Act does not require two separate and distinct factual findings to be made for an alien to become ineligible for withholding of deportation.²⁶² It stated that: "The focus here is on the crime that was committed. If it is determined that the crime was a 'particularly serious' one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative. We do not find that there is a statutory requirement for a separate determination of dangerousness focusing on the likelihood of future serious misconduct on the part of the alien."²⁶³ The BIA

260. See UNHCR, Handbook on Procedure and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited January 1992, at 154.

261. 19 I. & N. Dec. 357 (BIA) 1986).

262. *Id.* at 360.

263. See *id.* citing *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986); *Zardui-Quintana v. Richard*, 768 F.2d 1213 (11th Cir. 1985) (Vance, J., concurring).

cited to the House Judiciary Committee's deliberation in support of this interpretation.²⁶⁴

Evidently, the BIA's interpretation of the exclusion provision is at odds with the UNHCR's interpretation of the same provision contained in the Refugee Convention. While the Convention interpretation focuses on the future danger to the community, the BIA's interpretation focuses on the crime that had already been committed. Although the distinction might appear artificial, their application could indeed produce opposite results. While under the UNHCR approach, a convicted felon who could prove that he has been reformed and is not likely to pose any further danger to the community might benefit from the withholding of deportation provision, under the BIA's approach, this person would not be able to claim the benefits regardless of any level of evidence of reform or rehabilitation. It could be concluded, therefore, that the exclusion provision under the Refugee Act is intended not only to exclude dangerous individuals for the regulatory purpose of protecting the host community but also for the purposes of penalizing the offender for his crimes. Nonetheless, this may not be a clear indication of a congressional preference of labeling the provision as punitive. Hence the argument that Congress did not intend to make deportation a result of ineligibility as it relates to this provision to be a punitive sanction may have some validity. However, the amendments that were made since the enactment of the 1980 Refugee Act, particularly AEDPA and IIRIRA have put an end to any level of doubt regarding the legislative preference of label.

To clarify the confusion relating to the exclusion provision of the Refugee Act, Congress introduced a *per se* rule in 1990.²⁶⁵ In 1996, Congress made its punitive intentions very clear when it enacted AEDPA. As the name indicates, AEDPA is an act designed to fight the crime of terrorism and provide for the effective death penalty. Congress unequivocally stated the purpose of the Act to be: "An Act to deter terrorism, provide justice for victims, provide for an effective death penalty and for other purposes."²⁶⁶ Thus it is essentially a criminal statute intended to penalize wrongdoers. A closer

264. See H.R. rep. No. 608, 9th Cong. 1st Sess. 17 (1979) cited in *id.* at 350-360.

265. See INA Sec. 101(a)(43), INA Sec. 243(h) (adding a new provision saying that aggravated felonies are *per se* "particularly serious crimes" within the meaning of the Refugee Act.).

266. See Pub. L. No. 104-132, heading, 110 Stat. 1214, heading (1996).

examination of the statute and also its legislative history clearly confirms this proposition.

Structurally AEDPA is mainly codified under Titles 18, and 8 of the United States Code which deal with crimes and criminal procedure, and aliens and nationality respectively.²⁶⁷ Content wise, among other things, it defines crimes,²⁶⁸ prescribes penalties for crimes,²⁶⁹ enhances law enforcement,²⁷⁰ establishes criminal alien identification system,²⁷¹ provides for criminal alien removal procedures,²⁷² and eliminates judicial review of final deportation orders resulting from criminal convictions.²⁷³ And it clearly states that: "An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."²⁷⁴ Such presumption works regardless of the type of immigration status that the alien may have. This statute's crime control and punitive purpose is thus very clear from its face, and of course, the label is not hidden.

267. *Id.* at table of contents. A statutes' structural placement is indicative of its nature. For example, in *Kansas v. Hendricks*, the Supreme Court said that the placement of a statute under a civil heading is indicative of legislative intent to provide for a civil remedy. *See* 521 U.S. 346, 361 (1997). In this case the in question was codified under "Care and Treatment of Mentally Ill Persons" instead of the State's criminal code. *Id.* The Court said that that is indicative of legislative intent to provide for a civil proceeding rather than a criminal one. *Id.*

268. *See, e.g.*, Pub. L. No. 104-132, heading, 110 Stat. 1214, heading (1996) at title IV(D)(440) (expanding the criminal conducts considered aggravated felonies. Additions include perjury or subornation of perjury. *See id.* at (e)(S) amending 8 U.S.C. 1101(a)(43). *See also* title III, Sec. 323 (modifying the definition of providing material support for terrorism.) and *see also* title IV, Sec. 435. This provision expands the criteria of deportation for crimes of moral turpitude. Courts have interpreted crimes of moral turpitude liberally to include conducts such as providing false information on a student loan application *see* *Kabongo v. INS*, 837 F. 2d 753, 758 (6th Cir. 1988), or heterosexual sodomy, *see* *Velez-Lonzano v. INS* 463 F. 2d 1305, 1307 (D.C. Cir. 1972). For a list of crimes that are and are not considered crimes of moral turpitude, *see* STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, 442 (1997).

269. *See, e.g.*, Pub. L. No. 104-132, heading, 110 Stat. 1214, heading (1996) at title VII, Sec. 705 (Increased penalties for certain terrorism crimes.).

270. *See, e.g., id.* at title VIII.

271. *See, id.* at title IV(D)(432).

272. *See generally id.* at title IV(D).

273. *See id.* at Sec. 440 ("Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.").

274. *See id.* at Sec. 442(c) amending INA Sec. 242(a); and 8 U.S.C. 1252(a).

Perhaps the most telling source of evidence relating to the punitive purpose of the statute, particularly as it relates to refugees who commit crimes, comes from AEDP's legislative history. The following passage from the House Judiciary Committee Report on the purpose of the passage of the bill then called H.R. 668 is instructive. It reads in pertinent part:

In considering which crimes should be designated as aggravated felonies, the Committee has also been mindful of the provisions of section 243(h) of the INA. Under that section, a person who is deportable may prevent their deportation if they can demonstrate that their life or freedom would be threatened in the country to which they would be deported. However, this defense is not available to persons who commit aggravated felonies. In proposing the amendments to the definition of aggravated felony, the Committee continues to be concerned with the fact that deportation may result in a threat to the life or freedom of some aliens. *The Committee believes, however, that the crimes defined as aggravated felonies are those that clearly demonstrate a disregard for this nation's laws. In the view of the Committee, those who choose not to abide by this nation's laws, and particularly those whose criminal activity physically harms others, have no legitimate claim to remain in the United States.*²⁷⁵

The House Judiciary Committee made its views clear that those who choose not to abide by the "nation's laws" have no legitimate claims.²⁷⁶ The use of the terms "disregard for this nation's laws" and also "who choose not to abide by this nation's laws" are all the more familiar terms associated with the desire to punish not because they committed specific acts in violation of specific criminal laws but because they chose to disregard the "nation's laws." While a particular immigrant committing an aggravated felony is guilty of one *actus reus*, relating to that felony, he is, however, guilty of two distinct *mens rea* for the same *actus reus*: The first is the *mens rea* associated with the violation of the specific criminal statute that he violated, which would be punishable according to that law, and the second is

275. See H.R. REP. 104-22, H.R. Rep. No. 22, 104TH Cong., 1st Sess. 1995, 1995 WL 56411 (Leg.Hist.) background and need for legislation, at 6 (emphasis added.).

276. It could not candidly be suggested that the usage of the term "legitimate" in this context refers to the grounds of exclusion in the Refugee Convention or INA discussed in some detail *supra*.

associated with the misfortune of violating the “nation’s laws,” which would be punished by deportation according to the immigration law.

In fact, some members did not hide the fact that they wanted to punish immigrants who violate the “nation’s laws” and punish them with deportation. Senator Toby Roth’s statement relating to the AEDPA is exemplary:

In response to these problems, I introduced legislation last Congress and again during this one that would simplify the task of sending criminal aliens home. I am gratified that through the work of Senator ABRAHAM and the Judiciary Committee, S. 1664 contains some of the provisions in my legislation, as well as some additional improvements. Among them are the following: First, the bill broadens the definition of aggravated felon to include more crimes *punishable by deportation*. Second, it prohibits the Attorney General from releasing criminal aliens from custody. Third, it requires the Attorney General to deport criminal aliens-with certain exceptions-within 30 days of the end of the aliens’ prison sentence, and mandates that such criminal aliens ordered deported by taken into custody pending deportation. Finally, it gives Federal judges the ability to order deportation of a criminal alien at the time of sentencing.²⁷⁷

277. See 142 Cong. Rec. S4592-01, S4600 (May 2, 1996). Opinions delivered by other members of Congress also suggest that deportation in the sense of the Act was generally viewed as a punishment. The following two opinions are instructive:

Representative Seastrand’s statement in support of amendment to INA 212(a)(6) relating to grounds of inadmissibility and illegal entry and immigration violations reads as follows: This amendment is going to bring honesty and integrity back to the U.S. immigration laws. Simply put, “If you don’t play by the rules, then you don’t get to play at all. No more warnings, no more slaps on the wrist. When we catch you, you’re gone.” Never again will those who break the law be rewarded with a temporary or immigrant visa. No longer will they be able to enjoy the benefits of our hardworking citizens and the ones they are entitled to. Not 1 year later, not 10 years later. “*One strike and you’re out.*” (emphasis added)

See 142 Cong. Rec. H2378-05, H2458 Another member of Congress, Representative Becerra commenting on the harshness of deportation as punishment said:

Here again we seem to see an amendment that attacks the issue with a very small perspective, with blinders, and says only to those who have crossed a border, and certainly the focus is on the southern border, and certainly it is in regard to people who look like they come from across the southern border, and its says to those individuals, “Forever more you will be denied access to this country.” Admittedly, you committed a wrong, and everyone should admit that, and that person should be punished, not only with deportation but with punishment that would require that person not be able to come into this country for a time. But this amendment goes well beyond and says never again will you set foot in this country regardless of how compelling your case is to perhaps at some point come back. At the same time while it is doing this as dramatically to this one individual, this immigrant, in denying him or her access, it says to fully 50 percent or more of those who are undocumented into this country, that they do not have to worry about this amendment because it will not apply. I think that is not only unfair treatment but unwise policy.

Senator Abraham's statement regarding the effects of IIRIRA was to the same effect: He said: "You do not shut down the borders. What you do is you say we're going to apply the criminal laws more harshly."²⁷⁸

On the occasion of the signing of the bill, President Bill Clinton, made the following statement:

This bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents and restrict a key protection for battered spouses and children. The provisions will produce extraordinary administrative burdens on the Immigration and Naturalization Service. The Administration will urge the Congress to correct them in the pending immigration reform legislation.²⁷⁹

The immigration reform legislation that the President referred to in his remarks was IIRIRA. It did not, however, correct the "ill-advised" provisions of the AEDPA but rather expanded them.

IIRIRA's crime control and punitive nature is undisputable. Not only did it add to the list of crimes previously considered to be aggravated felonies,²⁸⁰ but it also lowered the threshold penalty that may be attached for the commission of the designated class of offenses.²⁸¹

The IIRIRA maintains the per se rule, which holds that "aggravated felonies" are considered "particularly serious crimes" within the meaning of the Refugee Act.²⁸² Under IIRIRA, which represents the current state of the law, a refugee who commits a shoplifting offense and receives a suspended sentence of one year would be deportable.²⁸³ Evidently, this is a significant departure from

See 142 Cong. Rec. H2378-05, H2458-59.

278. See Lisa Zagaroli, *Senators Use Rank to Set Pet Priorities*, DET. NEWS, Mar. 23, 1997, at B5 cited in Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitutional Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 334 (2000).

279. See Presidential Statement on Anti-terrorism Bill, The White House, April 24, 1996, WL 203049.

280. See IIRIRA, *supra* note 4 at Sec. 321(a)(a), INA Sec. 101(a)(43)(A).

281. See *id.* at 321(a)(3); INA Sec. 101(a)(43)(F) & (G) (lowering the penalty from five years to one year for crimes such as theft.) See also *id.* at Sec. 440(e)(4) & (6), INA Sec. 101(a)(43)(o) & (p) (lowering the prison sentence requirement of 18 months for document fraud to 12 months.).

282. See IIRIRA, *supra* note 4 at Sec. 305, INA 241(b)(3)(B)(ii) (stating that all aggravated felonies as defined in 101(a) 43 are particularly serious crimes.).

283. See IIRIRA, *supra* note 4 at 321(a)(3), INA, Sec. 101(a)(43)(G). See also INA Sec. 241(b)(3)(B)(ii); 101(a)(43).

the requirements of the Refugee Convention, which is limited to exclusion of the most dangerous of criminals from the benefits of refugee protection.²⁸⁴ By steadily increasing the number of crimes to be regarded as felonies and prescribing deportation as an additional predicament for aliens who violate the “nation’s laws,” Congress has made its punitive intent very clear. IIRIRA’s and its predecessors’ crime control and punitive objectives are thus unmistakable.²⁸⁵

Under *Kennedy v. Mendoza-Martinez*, the punishment inquiry would ordinarily end there because Congress’s punitive intent has been established.²⁸⁶ However, despite this clear punitive intent, the immigration system currently operates under the presumption that these legislations prescribe deportation as a civil sanction not as a punishment merely because of existing precedent and tradition. The application of the seven Kennedy factors is thus necessary not only to further demonstrate Congress’s punitive intent but also to show that deportation of refugees who commit crimes is indeed a second punishment by all relevant standards of measurement.

ii. *How Do the Kennedy Factors Weigh?*

As indicated above, the seven Kennedy factors remained at all times relevant for the assessment of the punitive character of a nominally civil sanction. Although the Supreme Court never considered all of the factors relevant for all inquiries, presumably, the satisfaction of the majority of the factors would mean that a nominally civil sanction is in fact a punishment. The satisfaction of all of the seven factors would certainly mean that it is indeed punishment. This section demonstrates that the deportation of

284. The general understanding among international law scholars is that the exclusion from refugee status of those who otherwise qualify should be reserved for dangerous criminals who pose serious threat to the host country. *See, e.g.,* GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT, 221 (1989) (arguing that the exclusion clause of the Refugee Convention, must only apply to those “refugees who seriously threaten the foundation of the state or even its existence.”).

285. President Bill Clinton’s remarks at the signing of the bill support this conclusion. He said: “This bill also includes landmark immigration reform legislation that reinforces the efforts we have made over the last three years to combat illegal immigration. It strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system—without punishing those living in the United States legally, or allowing children to be kept out of schools and sent into the streets.” *See* Presidential statement on the occasion of the signing of budget and immigration bill 9/30/1996, available at 1996 WL 555150.

286. *See* 372 U.S. 144 (1963)

refugees who committed deportable crimes satisfies all the seven factors and is thus unmistakably a second punishment.

1. Does Deportation Involve Affirmative Disability or Restraint?

The most obvious sanction involving affirmative disability or restraint is imprisonment;²⁸⁷ however, the Supreme Court has over the ages considered less severe forms of sanctions as sufficiently restraining as to be considered punishments. These sanctions include prohibition to practice one's chosen vocation,²⁸⁸ and deprivation of citizenship.²⁸⁹

Deportation, as it involves refugees who commit felonies, is certainly analogous to imprisonment because of several reasons: (1) It involves the physical custody of the deportee before deportation and the forced physical removal of the individual often in handcuffs or other forms of body chains;²⁹⁰ (2) it involves the physical delivery of them to the custody of authorities who had persecuted them in the past and are likely to persecute them in the future;²⁹¹ (3) it would take them away from "all that makes life worth living,"²⁹² and (4) it would

287. See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

288. See *United States v. Lovett*, 328 U.S. 303, 316 (1964) ("legislative decree of perpetual exclusion from a chosen vocation . . . is punishment, and of a most severe type.") but see *Hudson v. United States*, 522 U.S. 93, 104 (1997) (holding that prohibition from participating in banking industry is not sufficiently severe to be considered anything "approaching the infamous punishment of imprisonment.").

289. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963). See also *Tropp v. Dulles*, 356 U.S. 86, 97-98 (1958) ("Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute. In fact, a dishonorable discharge with consequent loss of citizenship might be the only punishment meted out by a court-martial.").

290. For example, in July of 2002, reports indicated that sixty-three citizens of the Philippines deported from the United States arrived at the Manila airport in shackles—the body chains were kept on them for the entire sixteen-hour flight. See *Blanche Rivera, U.S. Action Triggers Chain Reaction in Rp*, PHILIPPINE DAILY INQUIRER, July 22, 2002, at 1 cited in *Michelle Roe Pinzon, Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, N. 20 (2003). See also *Elliot Blair Smith, Missteps Result in Deportations*, USA TODAY, July 11, 2002, at 9A (reporting the deportation of 131 individuals to Pakistan in shackles.) cited in *id.*

291. The consequence of deportation, i.e., the possibility of persecution upon arrival is an important consideration. For example, in *Kansas v. Hendricks*, the Supreme Court suggested that the conditions surrounding confinement for mental disorder were not so bad as to be considered punitive. 521 U.S. 346, 363 (1997). That means, the possibility of the opposite conditions would suggest a punitive character.

292. This last phrase is borrowed from Justice Brandeis's statement in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

invariably impose permanent restrictions on reentry,²⁹³ and (5) in ordinary terms, it would likely lead to actual imprisonment, torture, disappearance and other types of measures that the refugee had fled in the first place. Therefore, deportation of refugees does indeed involve many affirmative disabilities and restraints and as such clearly meets this first requirement.

2. Has Deportation Historically Been Regarded as Punishment?

Throughout history, banishment and exile have been used as punishment for different offenses.²⁹⁴ Historical evidence suggests that banishment was prescribed as punishment as far back as the twelfth century in England.²⁹⁵ As it had increasingly been viewed as an alternative to the death penalty, a transportation system was designed to banish offenders.²⁹⁶ It was not, however, until the seventeenth century that it became a judicially sanctioned penalty.²⁹⁷ Scholars suggest that banishment was so attractive as a form of law enforcement because it essentially achieved what the death penalty is designed to achieve albeit somewhat mercifully.²⁹⁸ One scholar commented that “[e]xecution is a simple punishment, quick, effective,

293. For example, under the IIRIRA, a person who has been removed for a conviction of a felony is permanently barred from reentering the United States for twenty years. See IIRIRA, Pub. L. No. 104-208, Sec. 301(b), INA Sec. 212(a)(9)(A)(i). (“Any alien who has been ordered removed . . . and who again seeks admission within five years of the date of such removal (or within twenty years in the case of a second or subsequent removal or *at any time in the case of an alien convicted of an aggravated felony*) is inadmissible.”) (emphasis added).

294. See Salmond, *Citizenship and Allegiance*, 17 L. Q. REV. 270, 276 (1901) cited in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) at n. 23.

295. See William Holdsworth, *A History of English Law* 569 (1938) cited in Javier Bleichmar, *Deportation as Punishment*, *supra* note 230 at 120.

296. Other factors might have also contributed for the origination of the transportation system. See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 496 (1986) cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at n. 33.

297. See, e.g., SHAW, *CONVICTS AND THE COLONIES: A STUDY OF PENAL TRANSPORTATION FROM GREAT BRITAIN AND IRELAND TO AUSTRALIA AND OTHER PARTS OF THE BRITISH EMPIRE*, 24-25 (1966) cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at 121.

298. See Beattie cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at 123. See also Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 N.E. J. ON CRIM. & CIV. CON. 455, 462 (1998) cited in Michelle Roe Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 Y.Y.U INT’L L. REV. 29 at n. 214 (suggesting that the act was designed to remove criminals from the English society.).

economical, but not merciful. Hence perhaps the resort to what seemed to many to be the next best thing—banishment.”²⁹⁹

The enactment in 1718 of a uniform Transportation Act marked the formalization of banishment as the normal punishment for some types of felonies.³⁰⁰ According to estimates, in the eighteenth century, about 50,000 convicted felons had arrived in the American colonies, which constituted about a quarter of British immigrants to colonial America.³⁰¹ Hence, at the time of the drafting and ratification of the constitution, this practice of banishment as punishment was well recognized.³⁰²

Striking similarities could be noted between banishment of felons in the eighteenth century and deportation of aggravated felons today. As prescriptions for criminal conducts, they both accomplish exactly the same objectives, punishing the offenders by sending them to locations away from all they have and ridding the society of undesirables. In fact, in 1947, the Supreme Court in *Degladdillo v. Carmichael*³⁰³ noted that “Deportation can be the equivalent of banishment or exile.”³⁰⁴ The similarity of the two measures is indeed

299. See SHAW, cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at 123.

300. See WILFORD OLDHAM, *BRITAIN’S CONVICTS TO THE COLONIES* 11 (1990) cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at 125.

301. See A. ROGER EKIRCH, *BOUND FOR AMERICA: A PROFILE OF BRITISH CONVICTS TRANSPORTED TO THE COLONIES 1718-1775*, in ERIC H. MONKKONEN (ED), *CRIME & JUSTICE IN AMERICAN HISTORY: THE COLONIES AND EARLY REPUBLIC*, 88, 92 (1991) cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at 127. It is suggested that, in fact, forty-three percent of those ordered transported were capital offenders. See EKIRCH, cited in Bleichmar at 128. See also William P. Quigly, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, n. 210 (1996) See also Christopher T. Wonnell, *Market Causes of Constitutional Values*, 45 CASE W. RES. L. REV. 399, n. 133 (1995) both cited in Michelle Roe Pinzon, *Was the Supreme Court Right? supra* note 298 at n. 212 (suggesting that the felon transportation system aided indentured servitude in America.).

302. It was of course a subject of great criticism. For example, Benjamin Franklin is reported to have condemned this practice as a member of the Constitutional Convention. See Petition of Benjamin Franklin to House of Commons (Apr. 1766), in *THE PAPERS OF BENJAMIN FRANKLIN, VOL XIII*, at 12-15 (LEONARD W. LABAREE & WILLIAM B. WILCOX EDS., 1959) cited in Bleichmar at 129. The system of transportation as punishment was eventually suspended when America declared its independence. See OLDHAM, cited in *id.* at 128.

303. 332 U.S. 388 (1947).

304. *Id.* at 391 citing to *Bridges v. Wixon*, 326 U.S. 135, 147 (1945). In *Bridges*, the Court emphasized the harshness of deportation by quoting Justice Brandeis’s now-famous statement that deportation takes away a person from “all that makes life worth living.” See 326 U.S. at 147 citing to *Ng Fung, Ho. v. White*, 259 U.S. 276, 284 (1922). In his dissenting opinion in *Boutilier v. INS* reiterated the Court’s statement in *Bridges* saying:

unmistakable. Therefore, it is fair to conclude that deportation, meaning the removal by force of a person from a place where he wants to be to a place where he does not want to be, has historically been used as a form of punishment for wrong doing.

3. Does Deportation Only Come into Play on a Finding of Scienter?

Black's Law Dictionary defines the term "scienter" as: "A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly."³⁰⁵ Deportable offenses are generally classified under two broad categories: crimes of moral turpitude,³⁰⁶ and aggravated felonies.³⁰⁷ The term "moral turpitude" is not a defined term; however, courts commonly employ the following definition: "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."³⁰⁸ An act of "baseness or vileness or depravity" certainly requires scienter. In fact, scienter seems to be a central element of the so-called acts of moral turpitude according to this definition. Perhaps the most notable seeming exception is the crime of statutory rape, which courts have classified as a crime of moral turpitude.³⁰⁹ Courts are, however, split on the question of whether *mens rea*, at least as it relates to the knowledge of the offender of the age of victim is concerned. For example, in *People v. Hernandez*,³¹⁰ the California Supreme Court recognized that statutory rape requires criminal intent.³¹¹ It said: "it is not conduct alone but

"[d]eportation is the equivalent of banishment or exile. Though technically not criminal, it practically may be." 387 U.S. 118, 131 (1967) (Douglas, J., dissenting).

305. See BLACK'S LAW DICTIONARY (8th ed. 2004).

306. See INA 212(a)(9) and 241(a)(4); 8 U.S.C. Sec. 1182(a)(9).

307. See INA 237(a)(2)(A)(iii); 8 U.S.C. Sec. 1101(a)(43). Although drug crimes constitute another broad category, most of the trafficking offenses also qualify as aggravated felonies.

308. See, e.g., *Tillinghast v. Edmead* (1929, CA1 Mass) 31 F2d 81; *United States ex rel. Ciarello v. Reimer* (1940, DC NY) 32 F Supp 797; *United States ex rel. Manzella v. Zimmerman* (1947, CA3) 71 F Supp 534; *Coykendall v. Skrmetta* (1927, CA5 Ga) 22 F2d 120; *Ng Sui Wing v. United States* (1931, CA7 Ill) 46 F2d 755; *United States v. Carrollo* (1939, CA 8 DC Mo) 30 F Supp 3; *Vidal y Planas v. Landon* (1952, CA9, Cal) 104 F Supp 384. cited in 23 A.L.R. Fed. 480.

309. See, e.g., *Pino v. London*, 349 U.S. 901 (1955); *Franklin v. INS*, 72 F. 3d 571, 588 (8th Cir.); *Ng Sui Wing v. United States*, 46 F. 2d 755, 756 (7th Cir.)

310. 393 P. 2d 673 (1964).

311. *Id.* at 675.

conduct accompanied by certain specific mental states which concerns, or should concern the law.”³¹² Three more jurisdictions have thus far followed the trend that the California Supreme Court has set with respect to the requirement of *men rea* in statutory rape cases.³¹³

As a matter of principle of criminal law, the Supreme Court in *Staples v. United States*³¹⁴ has said that, *mens rea*, as a requirement of criminal guilty is so firmly embodied in the common law that it is “the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”³¹⁵ In fact, the BIA’s own precedent suggests that the intent requirement is indeed central to the concept of crimes of moral turpitude. For example, in *Matter of B*, the BIA held that a foreign conviction for passing a bad check is not a crime of moral turpitude because the statute did not require intent to defraud.³¹⁶ Similarly, in the *Matter of Khalik*, the BIA held that passing a bad check may constitute a crime of moral turpitude where the statute requires intent to defraud.³¹⁷ Categorically speaking, in the *Matter of Awaijane*,³¹⁸ the BIA said: “Malicious intention or what is equivalent to such intention is the broad boundary between crimes involving moral turpitude and those which do not.”³¹⁹

Regardless of whether the potential deportee is in a jurisdiction where scienter is required or not, this is indeed an incidental exception very unlikely to negate the argument that ordinarily crimes of moral turpitude are crimes requiring scienter. At least that is what the definition noted above clearly suggests.

312. *Id.*

313. See Michelle R. Vanyo, *A Dereliction of Duty by the Court of Appeals of Maryland in Failing to Recognize the Mistake of Fact Defense as a Necessary Component to Guaranteeing a Defendant’s Constitutional Due Process Rights*, 59 MD. L. REV. 860, 866 (2000).

314. 511 U.S. 600, (1994).

315. *Id.* at 605 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978)).

316. See *Matter of B*, 3 I & N. Dec. 278 (1948).

317. See *Matter of Khalik*, 17 I & N. Dec. 518 (1980).

318. 14 I & N. Dec. 117 (1972).

319. See *id.* at 118. For a discussion of crimes of moral turpitude in the immigration context, see C. GORDON, *IMMIGRATION & NATIONALITY LAW*, 4.14 (1985) (major crimes against person involve moral turpitude if “evil or predatory intent”) cited in Maryellen Fullerton & Noah Kingstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Criminal Defense Attorneys*, 23 AM. CRIM. L. REV. 425, 235 (1986).

Aggravated felony, on the other hand, is a defined term comprising twenty-one categories of offenses.³²⁰ It is difficult to find any crime that is categorized as an aggravated felony under INA Sec. 101(a)(43) that does not require scienter. Although rape is listed under (43)(A), it is disputable whether statutory rape, which is a different category of crime, is included in that category. To the extent it might be argued that it is included, the argument made under crimes of moral turpitude above are equally applicable.

Except in some negligible instances, the category of crimes that would result in the deportation of a refugee require scienter. In fact, admittedly, it is their gravity or perceived depravity that made them deportable offenses in the first place. Hence it could fairly be concluded that deportation of refugees occurs upon a finding of scienter.³²¹

4. Does Deportation Promote the Traditional Aims of Punishment: Deterrence and Retribution?

Immigration control in general has increasingly become crime control sharing the same characteristics with the criminal justice system to the point where the two are sometimes indistinguishable.³²² For example, the term “aggravated felony” appears to be a criminal law concept but it is an immigration law creation which has now become an integral part of the criminal justice system.³²³ Similarly,

320. Examples include: theft, document fraud, money laundering, etc. See 8 U.S.C. Sec. 1101(a)(43).

321. For a different view on this issue see Bleichmar, *Deportation as Punishment*, *supra* note 230 at 154-154. The Supreme Court’s analysis of this factor in each one of the several cases, discussed in Part III *supra*, dealt with single statutes prescribing a particular conduct or omission. The question of whether the penalty comes into play only on a finding of scienter could easily be answered when the proscribed conduct is one or just a few. But here multiple proscriptions are involved. The existence of one possible exception should not in any way undermine the argument that scienter is indeed required in almost all of the included offenses.

322. For a thorough discussion of this proposition, see generally, Miller, *Citizenship & Severity* *supra* note 23. See also Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Hard Laws Making Bad Cases*, 113 HARV. L. REV. 1889 (2000); Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771 (2000); Helen Morris, *Zero Tolerance: The Increasing Criminalization of the Immigration Law*, 74 INTERPRETER RELEASES, 1317, NO. 33 (1997).

323. Congress introduced the concept of “aggravated felony” for the first time in 1988 through the Anti-Drug Abuse Act of 1988. The concept was limited to serious crimes such as murder, drug, firearm, and explosives trafficking. See Coonan, *Dolphins Caught*, *supra* note 243 at 592-593. See also Miller, *Citizenship and Severity: supra* note 239 at 633-634.

crimes of moral turpitude perhaps have more immigration consequences than any criminal consequences.³²⁴ Undoubtedly, deportation, as a prescription for commissions of designated class of crimes by aliens, serves the two most important purposes of criminal punishment, i.e., deterrence and retribution.

Deportation of criminal aliens serves two primary deterrent purposes: The deterrence of the commission of certain types of crimes by immigrants already in the United States, and the deterrence of the commission of certain other types of crimes by potential immigrants or those who aid them.³²⁵

Deportation as a consequence of an immigrant's commission of designated class of crimes certainly sends a clear message to the immigrant next door: That engaging in such conduct would have more severe consequences than just receiving a suspended sentence, paying some money or serving some time. Undisputedly, the addition of deportation to some other penalty for the commission of an offense makes the cumulative effect of the penalty much more severe. To the extent the degree of severity of a punishment is said to have a direct correlation with its deterrent effect, deportation as an added penalty, serves the same deterrent purpose as prescribing more term of imprisonment or more pecuniary deterrent, etc.

Congress increasingly looked to criminal law to address the problem of illegal immigration in recent decades prompting some scholars to suggest that Congress choose a method of "governing through crime."³²⁶ An important consideration for this choice is the incapacitation aspect of the measure of deportation.³²⁷ Once

324. The term "crimes of moral turpitude" was introduced for the first in the immigration law context in 1891 *See* *Jordan v. De George*, 341 U.S. 223, 229 (1951) citing Act of March 3, 1891, Stat. 1084. It continued to be an important part of the immigration law. *Id.* at n. 14. The concept is also used in many different areas such as disbarment of attorneys, revocation of medical licenses, impeachment of witnesses, etc. *Id.* at 227.

325. The third category of persons that the immigration law aims to deter is citizens who hire unauthorized aliens. Deportation is not prescribed for these offenses as they invariably involve U.S. citizens, as such the deterrent effect of the immigration law as it relates to citizens is not discussed here.

326. *See* Jonathan Simon, *Governing Through Crimes*, in *THE CRIME CONUNDRUM ESSAYS IN JUSTICE* (L. FRIEDMAN & FISCHER EDS., 1997) cited in *Miller, Citizenship & Severity*, *supra* note 239 at 618.

327. For a brief discussion of this consideration, *see* Robert A Mikos, *Enforcing State Law in Congress's Shadow*, 90 *CORNELL L. REV.* 1411, 1448 (2005). *See also* STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA*, 208-209 (1987) (suggesting deportation serves a classic purpose of punishment by incapacitating the offender.).

deported, no state has to deal with the criminality of the same alien.³²⁸ If he ever attempts to reenter, he will serve more severe penalties and will be deported again and barred from coming back forever.³²⁹ That sends a clear message.

Deportation of aliens also deters potential immigrants from breaking the law to enter the country or commit crimes after they entered. Any immigration laws that Congress enacts and any immigration reforms that it adopts are increasingly aimed at sending a message to those who might attempt to break the law to immigrate or do so thereafter.³³⁰

For example, Julie Myers, Assistant Secretary of the ICE, commenting on the establishment of a new detention facility in Texas said: "This new facility enables us to have deterrence with dignity by allowing families to remain together, while sending the clear message that families entering the United States illegally will be returned home."³³¹

Deportation also aims to deter aliens who assist others to break the law from doing so. For example, the INA provides that "any alien who knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable."³³² Under this provision, the prescribed penalty is deportation. One of the purposes is obviously deterrence. In fact, citizens are also penalized for doing the same acts but the penalty does not include deportation for obvious reasons.³³³ As

328. A number of social benefits are attributable to this measure such as lifting some burden from the criminal justice system by removing potential recidivists. *See* Mikos, *Enforcing State Law supra* note 327 at 1448-1449. For example, in the year 2003 alone, the Office of Detention and Removal (ODR) under the Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS) removed 78,000 criminal aliens from the United States. *See* <http://www.ice.gov/pi/news/factsheets/dro050404.htm> (last visited on June 14, 2006). The ICE is the largest investigative agency within the DHS. It has 15,000 employees. *See* <http://ice.gov/pi/factsheets/050505ice.htm>.

329. *See, e.g.*, INA Sec. 212(a)(9)(A)(i).

330. *See, e.g.*, 8 U.S.C. Sec. 325 (prescribing a penalty of six months imprisonment, a fine or both and deportation and prohibition for reentry for a number of years.) *see also generally* 8 U.S.C. Sec. 1227.

331. *See* U.S. Immigration and Customs Enforcement, DHS Closes Loophole By Expanding Expedited Removal to Cover Illegal Alien Families, (May 16, 2006) at <http://www.ice.gov/pi/news/newsreleases/articles/060516dc.htm> (last visited June 14, 2006).

332. *See* 8 U.S.C. Sec. 1227(a)(1)(F).

333. For example, citizens who enter into fraudulent marriages to benefit foreign nationals are subject to criminal penalties under The Immigration Reform and Control Act of 1986 (IRCA). *See* Pub. L. No. 99-603, 100 Stat. 339 (codified as amended in

deportation cannot be prescribed as a punishment for citizens who commit crimes, other forms of penalties are prescribed for aiding aliens to break the law.³³⁴ That is an additional suggestion that deportation is used as just another breed of criminal punishment.

The House Judiciary Committee Report on the purpose of the criminal deportation provisions of AEDPA, begins with the following statement: "The increasing public attention paid to our nation's immigration policies has brought to light the high number of aliens, both legal and illegal, who commit crimes while enjoying the benefits of this country."³³⁵ In fact, the sentiment reflected in this statement was exactly the sentiment that caused the introduction of the concept of assigning a higher degree of criminal guilt to those who commit crimes while being immigrants in 1917.³³⁶ The legislative history of the very first Act of Congress that introduced this concept suggests that it was necessary to hold them to a different standard than citizens because of the "abuse of their invitation."³³⁷ That is why they are punished by deportation even today.³³⁸ Thus, the measure is retributive in nature.

5. Is the Behavior to Which It Applies Already a Crime?

The answer to this query is simple. For purposes of this analysis, deportation applies precisely because of the commission of a specific type of crime designated to be deportable. Both the criminal penalty and deportation are imposed for the exact same underlying criminal conduct. Hence no further inquiry of this segment of the Kennedy test is necessary.

scattered sections of 8 U.S.C.); *see also* The Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, 10 Stat 3537 (codified as amended in scattered sections of 8 U.S.C.).

334. *Id.*

335. *See* House Judiciary Committee Report, Criminal Alien Deportation Improvements Act of 1995, Anti Terrorism and Effective Death Penalty Act of 1996, House Report No. 104-22, (Feb, 1995) at 5 (Legislative history providing the background and purpose of the AEDPA of 1996).

336. *See* Immigration Act of Feb. 5, 1917, Sec. 19, 39 Stat. 874, *see also* R.P. Hutchinson, *Legislative History of American Immigration Law, 1798-1965* (1981) both cited in Bleichmar, *Deportation as Punishment*, *supra* note 230 at 149-150.

337. *See* Congressional Record, 53: 5167-5172, cited in Bleichmar, at 150.

338. *See, e.g.*, Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 333-334 (2000). (identifying intent to punish in recent immigration laws).

6. Is There an Alternative Purpose to Which It May Rationally be Connected as Assignable?

This is the most seeming obstacle to the argument that all the seven Kennedy factors indicate that deportation is a punishment. Theoretically, there is an alternative purpose that deportation serves. For example, in the seminal case of *Lopez-Mendoza*, the Supreme Court said that: “The purpose of deportation is not to punish past transgressions but to put an end to a continued violation of the immigration laws.”³³⁹ This suggests that deportation is mainly designed to serve a remedial purpose. Multiple interrelated purposes could be assigned to this remedial purpose, most notably enforcing the nation’s immigration laws, removing undesirables and ridding the society of potentially harmful individuals.³⁴⁰

Although this proposition is true to a large extent, it contains notable fallacies. It suggests that deportation as applied to all classes of aliens serves the same purposes, i.e., “putting an end to a continued violation of immigration laws” or ridding the society of harmful individuals.

None of these alternative purposes could be validly assigned to the deportation of refugees. Firstly, refugees, by virtue of their refugee status, are in the country lawfully as such there would be no continued violation of immigration law that needs to be put to an end. They are deported not because their refugee status is terminated and they have become without valid immigration status but because of their commission of designated crimes that they are stripped of their status for the sole purpose of deportation. In fact, the BIA firmly stated that termination of refugee status before convicted refugees could be processed for deportation is unnecessary.³⁴¹

This indicates that the seeming argument that an alternative purpose may be assignable to deportation is not valid as applied to

339. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984).

340. See, e.g., *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (noting that the purpose of deportation is to remove harmful individuals from the society.) See also *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (suggesting that deportation is designed to rid the society of harmful individuals.).

341. See *In Re Sejid Smriko*, 23 I. & N. Dec. 836, 838, Interim Decision (BIA) 3520, 2005 WI 3075402 (BIA) (2005) (holding that “The consistent reference to any alien in the statutory provisions governing removal proceedings and the lack of mention of prior termination of refugee status are strong indications that aliens admitted as refugees are subject to removal proceedings without the preliminary step of terminating refugee status under Section 207(c)(4).”) (Also holding: “[A] refugee admitted as a lawful permanent resident . . . is not immunized from the grounds for removal that are applicable to all other aliens.”). *Id.* at 840.

refugees who have been recognized as such. However, the argument that ridding the society of harmful individuals as an alternative purpose may be a valid argument but does not in any way exclude the punitive character because the same could be said about all the classic forms of criminal punishment including imprisonment and the death penalty. Even if deportation is said to be a valid alternative purpose, it certainly is exceedingly excessive as it is applied to refugees. The proportionality issue is the subject of the next inquiry.

7. Is it Excessive in Relation to the Alternative Purpose Assigned?

“There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”³⁴² The Supreme Court said this in relation to loss of nationality but it is equally applicable to loss of refugee status and consequent deportation. The only difference would be that physical mistreatment and primitive torture may literally be involved when a refugee is deported to a place where he fears persecution. Refugee status is granted precisely because of a well-founded fear of these kinds of jeopardy to human well-being.³⁴³

As discussed in subsection 2 above, banishment from a place where a person calls home has always been considered among the severest of punishments. When it is applied to a refugee who has committed a crime, it is excessive per se because the refugee had already served a criminal penalty deemed proportionate to the crime. However, this Kennedy factor requires that it be weighed against the alternative purpose assigned to it. The notable alternative purpose identified in the previous subsection is ridding the society of potentially harmful individuals. The inquiry must necessarily involve the assessment of the harmfulness of each individual deemed eligible for deportation. Society often measures the harmfulness of individuals by their conducts. A person who commits murder is often viewed as a dangerous individual; however, a juvenile who commits shoplifting may not be so regarded. The criminal penalty society imposes on them varies accordingly.³⁴⁴ In fact, proportionality of

342. *Tropp v. Dulles*, 356 U.S. 86, 102 (1958). In short, the Court said, losing nationality is losing the right to have rights. *Id.* at 102.

343. *See* INA Sec. 101(a)(42), 8 U.S.C. Sec. 1101 (a)(42).

344. For a discussion of proportionality of punishment, *see generally* DRESSLER, *CRIMINAL LAW*, *supra* note 231 at 45-63.

penalties is constitutionally mandated.³⁴⁵ Theoretically, all criminal punishments are designed to fit the crime. Hence, a person who has been convicted of a crime and served the sentence imposed according to the applicable law is considered to have not only served a proportionate penalty but also reformed enough to be released into the society. Presumably, society incapacitates those who are considered to be dangerous by imprisonment or the death penalty where it applies. Deportation, however, targets a very small percentage of society's offenders because of their citizenship status, increasingly without regard to their actual dangerousness. Evidently, deportation is prescribed not for their crimes or dangerousness but because of their alienage. It is an additional punishment and as such excessive without more.

As indicated above, the deportation of refugees also has a unique dimension of excessiveness. By definition, they are sent to a place where they may face persecution, i.e., to a place where they may face a serious jeopardy to their life and limb, which may include imprisonment, torture, or death because of the reasons that caused their flight from home in the first place.³⁴⁶ The deportation of refugees is thus unique because the deporting authorities know that they are sending them back to a place where there is a real possibility that they would face persecution.³⁴⁷ Placing a person in a situation of

345. See U.S. Const. Amend. VIII. See also *Weems v. United States*, 217 U.S. 349, 371 (1910) (holding that the cruel and unusual punishment clause of the Eighth Amendment applies to greatly disproportionate punishments.) citing *O'Neil v. Vermont*, 114 U.S. 323, 339-40 (1892) (Field, J., dissenting).

346. These reasons may be one or more of the following: race, religion, nationality, political opinion, or social group. See INA Sec. 101(a)(42), 8 U.S.C. Sec. 1101 (a)(42).

347. The term "persecution" would generally mean "a threat to life or freedom" or generally serious violations of human rights. See UNHCR, Handbook on the Procedures and Criteria for the Determination of Refugee Status, HCR/IP/4/Eng/REV.1 (Reedited, Geneva, 1992 UNHCR 1979) at paras. 51-60. available at <http://www.unhcr.ch>. For a discussion of persecution in different contexts see *Djordje v. INS*, 407 F. 2d 102 (9th Cir.) See also *Pitcherskaia v. INS*, 118 f. 3d. 641 (9th Cir. 1997). The degree of risk and stand of proof in refugee status determination is a complex subject. For the purposes of this discussion, it is sufficient to note that a refugee who has been granted asylum or withholding of deportation is presumed to have a real possibility of persecution if returned. Two seminal Supreme Court cases offer a comprehensive guidance pertaining to the standards applicable to the degree and likelihood of future persecution in the discretionary grant of asylum and mandatory relief of withholding of deportation. See generally, *INS v. Stevic*, 467 U.S. 407 (1984) and *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). A related argument that might be raised here concerns the relief of withholding of deportation under the Convention Against Torture (CAT) and the implementing legislation. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. ST/HR/1/Rev.3 (1988), reprinted in Human Rights,

dire predicament where he might be detained, tortured, mistreated, and possibly killed would as a matter of commonsense make deportation excessive as compared to the alternative purpose that it could possibly serve.³⁴⁸

Therefore, the application of all the seven Kennedy factors designed to screen the punitive nature of nominally civil sanctions suggest that deportation is indeed a criminal punishment as applied against refugees.

A Compilation of International Instruments, 212, at art. 3. *See also* implementing legislation Foreign Affairs and Restructuring Act of 1998, P.L. 105-277. CAT relief is, however, available only to those refugees who could establish that they will more likely than not be tortured. The only predicament they could plead is torture and the standard of proof is higher than establishing an asylum claim under *INS v. Cardoza-Fonseca* cited above. Perhaps the great majority of refugees could not meet such a high standard. Even if they do meet the “more likely than not” standard, they may not meet the torture requirement as regular imprisonment and other forms of persecution are not covered under the definition of torture. CAT defines torture as: “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . .” *See* CAT at art. 1. While CAT relief has a broader coverage as it does not prohibit convicts from seeking the relief, it is narrower in many respects some of which are indicated above. For a comparison of CAT and Asylum relief, *see generally*, *Kamalthas v. INS*, 251 F. 3d 1279 (9th Cir. 2001).

348. It might, however, be argued that the mistreatment that the refugee may face in the hands of other sovereigns, though regrettable, is not a second jeopardy by the United States, and it is at best an unintended consequence. However, this article consistently argued that the second jeopardy or punishment is not solely the possibility of future persecution but the very act of deportation itself because it takes the refugee away from a place where he had found safety and started a life at a minimum. By definition, punishment is simply a pain or deprivation that people wish to avoid. *See* note 231 *supra*. The act of deportation itself places the refugee in a situation where he could face the feared mistreatment whether it materializes or not. Placing the refugee under such circumstances, would put him in a situation that he wishes to avoid. More importantly, the gist of this article’s argument is not to challenge the constitutionality of every conceivable execution of the immigration law authorizing the deportation of refugees who commit crimes but to show that there certainly is an unconstitutional application in many instances. For example, in 2003 alone 78,000 criminal aliens were deported. *See* <http://www.ice.gov/pi/news/factsheets/dro050404.htm> (last visited on June 14, 2006). It is obvious that some proportion of that number is refugees. It is also obvious that some proportion of the deported refugees would be subjected to persecution upon return—unless 100 percent of the evaluation of the risk in the initial refugee status determination process is said to have been wrong. Moreover, the question relating to the materialization of the feared persecution pertains only to one of the seven Kennedy factors discussed above, i.e., excessiveness. This article argues that deportation is excessive *per se* without the addition of persecution, but the possibility of persecution makes it exceedingly excessive. In fact, for the refugee involved, it is not a matter of statistics or mathematical probabilities, at least in his perception, it is often a question of life and death.

V. Conclusion

There is no gainsaying that deportation as a prescription for a refugee's commission of a specific class of crimes is a punishment. As James Madison said, "[I]f banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."³⁴⁹ Deportation is considered a civil sanction only because of a precedent that has its roots in the Chinese Exclusion era, the very nomenclature that Professor Henkin describes as an "embarrassment."³⁵⁰ It was an era "when the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review."³⁵¹

Refugees are a unique category of aliens who enjoy the dual protection of the Constitution as well as international law. Deportation of refugees who commit crimes is a second punishment for the same offense not only as a matter of statutory interpretation but also because all the tests traditionally applied to determine the punitive nature of nominally civil sanctions indicate that it is a punishment. It involves a serious disability, it has historically been considered and used as a punishment, and it is mainly applied for a commission of specific types of crimes that require scienter. It undoubtedly serves the traditional purposes of punishment and is also excessive to any alternative purpose that it may serve.

The precedent that holds that deportation is a civil sanction not only transgresses the contemporary notions of fundamental fairness and justice but also contradicts conventional jurisprudence. It is time for reconsideration. Every single deportation of a refugee who has served his penalty for a criminal conduct would put him twice in jeopardy. This kind of continued violation of the constitutional guarantee against Double Jeopardy must be put to an end. This article has attempted to provide the arguments in favor of this revision.

349. See Madison's Report on the Virginia Resolutions (1800), in 4 *The Debates in the Several States Conventions on the Adoption of the Federal Constitution* at 546, 555 (Jonathan Elliot ed. 1987) cited in Pauw, *A New Look at Deportation as Punishment*, *supra* note 338 at n. 8.

350. See Louis Henkin, *The Constitution and United States Sovereignty*, *supra* note 7 at 863.

351. *Id.* at 862.