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EDITOR INTRODUCTION

The 2015 Law Journal for Social Justice Symposium, "Contemporary Discrimination" focused on current concerns regarding civil rights and civil liberty. Discussions ranged from the political legislative process, resistance in enforcement of civil rights judgments, and sexual orientation employment discrimination. Panelists included politicians, scholars from diverse backgrounds, practicing attorneys and community organizers.

Drawing on broader considerations, this issue features articles analyzing an array of concerns in the criminal, civil and international tribunals. The first article, *You Have Your Whole Life in Front of You…Behind Bars*, written by Rachel Forman, beings this issue by discussing a need to ban life without parole sentences for juvenile non-homicide offenders. Inalvis M. Zubiaur, in *Death Row: Mentally Impaired Inmates and the Appeal Process*, continues the focus on sentencing by engaging concerns regarding capital punishment. Next, in *Injection and the Right of Access*, Timothy F. Brown argues for increased access to lethal injection procedures to understand its constitutionality. Shifting consideration to the civil sphere, Victor D. Lopez & Eugene T. Maccarrone raise issues about privacy, due process, public policy and the basic fairness of traffic enforcement by camera, in *Traffic Enforcement by Camera*. Beginning the focus on international concerns, *Fictitious Labeling*, by Efe Ukala, discusses "recommendations that may help curb constitutional issues resulting from deportation." Brittany Fink, in *Increase Quota, Invite Opportunities, Improve Economy*, proposes amendments to the DREAM Act that extend the path to citizenship." Katharine Villalobos then focuses on the sociology of immigration in *The Crucible*, using historical examples to discuss the War on Terror. *Falling Through the Cracks* by Marissa N. Goldberg changes the focus to international law and unique considerations of women in the drug trade industry. Finally, *Seeking Truth in the Balkans* by Erin K. Lovall and June E. Vutrano concludes the issue by discussing the role of international law in seeking justice following the wars in the Balkans. Together these articles analyze issues that raise important questions about fairness and civil rights in the domestic and international contexts.

Special thanks to the entire staff of the Law Journal for Social Justice, who helped create this edition.

Kristyne Schaaf-Olson
2014-2015 Editor-in-Chief
The Law Journal for Social Justice

FICTITIOUS LABELING: THE IMPLICATIONS IN AN IMMIGRATION CONTEXT

By Efe Ukala*

Introduction

The Supreme Court has held that deportation[1] is not punishment.[2] However, a historical review of ancient forms of punishment suggests that despite the Supreme Court's reluctance to label deportation as criminal punishment, deportation is indeed punishment. In reaching this conclusion, the definition of crime and punishment will be explored, and the different theories of punishment will be discussed to juxtapose deportation today with its ancient forms, such as ostracism, banishment, and transportation.

This article begins by discussing the theoretical framework of crime and punishment with particular consideration given to the philosophies of Émile Durkheim, Jeremy Bentham, and Michel Foucault, renowned contributors to the classic debate on the functional analysis of criminal punishment. Thereafter, Part II gives a brief history of ancient forms of punishment: ostracism, transportation, and banishment. Part III then discusses deportation jurisprudence. Part IV explores how deportation fits into the theoretical definitions of punishment and the ancient forms of punishment; it argues that deportation is within the meaning of punishment on both theoretical and historical grounds and therefore should be labeled as criminal punishment. Consequently, Part V considers the constitutional implications of labeling deportation a "civil penalty" rather than a criminal punishment. As a result of these constitutional implications, Part VI proposes recommendations that could help address these constitutional issues. Part VII concludes this article.

Before discussing deportation jurisprudence and why deportation should be labeled as punishment, it is necessary to map out the different theoretical definitions of crime and the roles of punishment. The discussion of crime and punishment illustrates that deportation aligns with

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[1] This article focuses on the deportation of lawful permanent residents. Note that the words "lawful permanent residents" and "aliens" will be used interchangeably.

[2] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

the theoretical roles of punishment in that deportation is a tool used to construct a larger social order.

I. THEORETICAL FRAMEWORKS OF CRIME AND PUNISHMENT

A. The Definition of Crime and Punishment

Black's Law Dictionary defines crime as "[a]n act that the law makes punishable,"[3] whereas punishment is "[a] sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law."[4] Although these definitions appear quite simplistic, there are competing views on the definition of crime and the characteristics of punishment.[5] Some scholars argue that punishment was created to avoid the recurrence of deviant behaviors.[6] Others posit that punishment is used as a tool to prevent members of society from engaging in certain actions, as well as to restore the individual to society after a crime has been committed.[7] Subsection B details Émile Durkheim, Jeremy Bentham, and Michel Foucault's competing theoretical definitions of crime and punishment. This article focuses on these theorists because they represent competing schools of thought. For instance, Émile Durkheim is a key exemplar of the sociological analysis of punishment;[8] Jeremy Bentham, the founder of modern utilitarianism, posits the utilitarian's definition and role of punishment;[9] whereas Michel Foucault defines punishment and the role of punishment from a genealogical lens.[10] Part I interweaves these different theoretical definitions to frame an analysis of the reasons deportation should be labeled as criminal punishment.

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[3] BLACK'S LAW DICTIONARY (9th ed. 2009).

[4] *Id.*

[5] *See,* ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Free Press ed. 1997) (1893); JEREMY BENTHAM, OF LAWS IN GENERAL (Oxford University Press 1970); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Vintage Books 2d ed., Alan Sheridan trans. 1977) (1995).

[6] *See generally* BENTHAM, *supra* note 5.

[7] *See generally* FOUCAULT, *supra* note 5.

[8] *See generally* DURKHEIM, *supra* note 5.

[9] *See generally* BENTHAM, *supra* note 5.

[10] *See generally* FOUCAULT, *supra* note 5.

B. Theoretical Framework

i. Émile Durkheim on Crime and the Social Function of Punishment

Émile Durkheim defined crime as an act that "shocks the collective" conscience of society.[11] Simply put, crime is an action that defies the moral fabric of society.[12] In contrast, Durkheim depicts punishment as a tool to help construct the social order of society.[13] According to Durkheim, punishment helps maintain solidarity, reinforces the collective conscience of society, and seeks vengeance on behalf of society.[14] Durkheim's view of punishment is best summarized by the assertion, "the law that has been violated must somehow bear witness that despite appearances it remains always itself, that it has lost none of its force or authority despite the act that repudiated it."[15] Thus, the "real function [of punishment] is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor."[16] Punishment helps members of society "strengthen one another by giving mutual assurance that they are still in unison,"[17] thereby avenging what society depicts as "outrage to morality."[18] To this end, under Durkheim's view, the community continually redefines the scope and extent to which it remains committed to executing its penal laws.

ii. Jeremy Bentham on Crime and Punishment

In contrast, Bentham argues that crime is any action that produces detrimental results to members of a community. Thus, an action that harms even one member of the community could be categorized as a crime.[19] Under this view, punishment is justifiable only if it has a positive externality in society.[20] As Bentham posits:

> Prevention ought to be the chief end of punishment as its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which

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[11] DURKHEIM, *supra* note 5.
[12] *See id*.
[13] *See id*.
[14] *See id*.
[15] ÉMILE DURKHEIM, MORAL EDUCATION 166 (2002).
[16] DURKHEIM, *supra* note 5, at 63.
[17] *Id*.
[18] *Id*. at 47.
[19] *See* BENTHAM, *supra* note 5.
[20] *See id*.

> would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.[21]

Hence, under Bentham's view, punishment does not serve as revenge or vengeance.[22] Rather, punishment serves as a deterrent; a rehabilitative and preventive tool preventing others from committing the same offense.[23] Put alternatively, Bentham depicts punishment as an effective means of controlling human behavior because it deters crime.[24] As a deterrent, punishment also inflicts fear among the members of society, reminding them that antisocial behaviors affect the peace and order of the community.[25] In sum, under Bentham's view, punishment not only deters a particular offender from committing a criminal act but also deters other members of society from violating the law.[26]

iii. Michel Foucault on Crime and Punishment

In a third vein, Michel Foucault defines crime as any act that breaches regulations established by the government,[27] whereas punishment serves to cure individuals who act contrary to government-imposed regulations.[28] For Foucault, punishment quenches morally sick individuals' thirst to commit future crimes.[29] As Foucault posits, "the power to punish is not essentially different from that of curing or educating,"[30] the purpose of

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[21] JOHN BOWRING, THE WORKS OF JEREMY BENTHAM 396 (1838).
[22] *See* BENTHAM, *supra* note 5.
[23] *See id*.
[24] *See id*.
[25] *See id*.
[26] *See id*.
[27] *See* FOUCAULT, *supra* note 5.
[28] *See id*.
[29] *See id*.
[30] *Id.* at 303.

punishment is to "strike the soul rather than the body."[31] Thus, under Foucault's view, punishment is an educative and rehabilitative tool.

Despite these competing theories, it is reasonable to conclude that crime could be defined as any action that defies the moral fabric of society and punishment serves as a sanction for the violation of a crime or for engaging in unpopular behavior. Against this backdrop, Part II applies these theoretical frameworks to the use of ostracism, transportation, and banishment, which have been widely recognized as forms of punishment. Such analysis is necessary because these historical forms of punishment have a striking similarity to deportation, helping illustrate why deportation should be labeled as punishment.

II. BRIEF HISTORY OF THE ANCIENT FORMS OF PUNISHMENT

This section presents a brief introduction to ostracism, transportation, and banishment, which is relevant to understanding the idiosyncrasies of why deportation is punishment. Subpart A presents a detailed introduction to the practice of ostracism in ancient Greece, shedding light on how ostracism served as a tool to punish individuals who engaged in certain behavior. Subpart B discusses transportation in eighteenth century Britain and its use as punishment for certain deviant actions. Subpart C gives a brief history of banishment in early American colonies, explaining how it was used as a method of punishing certain individuals in society. Subparts A, B, and C apply the theoretical framework of crime and punishment mapped out in Part I of this article. This Section concludes that ostracism, transportation, and banishment fit into the theoretical definitions of punishment.

A. Ostracism in Greece

Ostracism, practiced in Athens, Greece in the sixth century, B.C., was a method of eliminating or ousting criminals, and political threats from society, through a democratic process.[32] To determine who was to be ostracized or barred from leadership, members of society engaged in a two-part vote.[33] First, members of society voted on whether expulsion was

[31] *Id*.

[32] *See generally* SARA FORSDYKE, EXILE, OSTRACISM, AND DEMOCRACY: THE POLITICS OF EXPULSION IN ANCIENT GREECE (2005).

[33] *See id.* at 146.

necessary.[34] Second, if expulsion was deemed necessary, members of society would determine who should be expelled.[35]

If at least 15% of the population voted in favor of ostracism, the senate would determine whether "the state of the Republic was menacing enough to call for such an exceptional measure."[36] If the senate answered its inquiry in the affirmative, the individual was ostracized for ten years—forced to cut all ties to family and friends in the community.[37]

Ostracism was generally used as a tool to oust "dangerous" individuals,[38] and to curb the elite's abuse of power.[39] Some scholars argue that ostracism discouraged "ambitious elites from trying to seize power by force."[40] Others argue that ostracism was used as a tool to oust individuals who were deemed dangerous to society because it was "design[ed] . . . [by] the legislator . . . shortly before the elections in order to prevent a dangerous candidate from being elected general."[41] To support this position, scholars in the second school of thought cite examples such as the ostracism of Hyperbolus, an Athenian politician,[42] who was arguably ostracized "not from fear of his influence or position, but because he was a rascal and a disgrace to the city."[43]

Consequently, ostracism was used as a tool of negative preference in ancient Greece to oust deviants or unpopular individuals such as politicians, who were perceived as threats to the stability of the governmental institution, or the most dangerous individuals.[44] This meant that individuals who were already scorned in society and had no chance of

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[34] *See id*.

[35] *See id*. at 148.

[36] *See* GEORGE GROTE, A HISTORY OF GREECE: FROM THE TIME OF SOLON TO 403 B.C. 94 (2001).

[37] *See id*. at 146-52.

[38] *See* Antony E. Raubitschek, *The Origin of Ostracism*, 55 AM. J. ARCHAEOLOGY 221, 221-26 (1951).

[39] *See generally* FORSDYKE, *supra* note 32.

[40] *Id*.

[41] Raubitschek, *supra* note 38, at 224.

[42] THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR., ch. XXV (Richard Crawley trans., Project Gutenberg 2004), *available at* www.gutenberg.org/files/7142/7142.txt.

[43] *See Id*.

[44] Lionel Pearson, *Party Politics and Free Speech in Democratic Athens*, 7 GREECE & ROME 41, 43-45 (1937) (noting that the most unfavorable yet successful politicians and generals in ancient Greece were ostracized).

assuming leadership roles did not face ostracism[45] and such individuals did not have a chance of being ostracized.[46]

Ostracism fits into the theoretical framework of crime and punishment discussed in Part I. Although ostracism was not associated with any particular crime, it is reasonable to conclude that the crimes associated with ostracism were: (1) the abuse of power and (2) being a dangerous influence on society. Alternatively, individuals who engaged in the abuse of power or those deemed dangerous to members of society were ostracized because of their negative influence on society. In sum, the ostracized individual's action defied the moral fabric of society, thereby, necessitating that such individual be removed from society: ostracism.

Ostracism falls within the definition and role of punishment posited by Bentham: it served as a social deterrent. By ousting an individual, the community or the government sent a strong signal not only to the ousted individual but also to members of the community that certain actions would not be condoned. Consequently, members of the community were reminded of the acceptable norms of society through the ostracism of others.

Further, under Foucault's model, ostracism was rehabilitative because it gave the ostracized individual the opportunity to start a new reformed life. Through ostracism, the individual was implicitly given an opportunity to be "cured" of the desire to abuse power and be a dangerous influence to society. Ostracizing an individual from his place of residence for a period of time arguably allows the individual to reflect on his deviant behavior and "cure" himself of it so as to prepare for a successful reintegration into society. The motive to cure the deviant is implied by the fact that an ostracized individual was permitted to keep his belongings,[47] and was allowed to return after the ten-year period elapsed.[48] Upon return, the ostracized individual's citizenship was restored.[49] Thus, ostracism was rehabilitative.

In addition, ostracism was used to construct the social order of society by preventing the most dangerous in society from taking power, thereby helping to maintain solidarity in society. This role of punishment echoed Durkheim's philosophy on punishment. In light of these differing

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[45] W. Robert Connor & John J. Keaney, *Theophrastus on the End of Ostracism*, 90 AM. J. PHILOLOGY 313, 313 (1969) (*quoting* 3 PLUTARCH'S LIVES 249 (T.E. Page et al. eds., Bernadotte Perrin trans., G.P. Putnam's Sons 1932) (1916)).

[46] *See id*.

[47] *See* FORSDYKE, *supra* note 32, at 148.

[48] *See id*. at 149.

[49] *See id*. at 148.

theoretical views, it is reasonable to conclude that ostracism was indeed punishment.

B. Transportation in Eighteenth Century England

Transportation was to England as ostracism was to Greece.[50] In England, transportation, established in Britain through the enactment of the Transportation Act of 1718 (hereinafter, the "Transportation Act"),[51] was used to deter individuals from engaging in actions that shamed the community.

Unlike ostracism in Greece, transportation explicitly targeted particular offenses.[52] The main objective of the Transportation Act was to combat the increased crime rate in Britain.[53] As a result of its explicit goal, transportation was a popular method of punishment and subsequently became the second worst penalty for a criminal act—the first being the death penalty.[54] As J. M. Beattie observed: "transportation . . . became the dominant punishment for noncapital felonies after 1718, and certainly for men, the normal consequence of conviction for a property crime [even petty larceny] for which they were not liable to be hanged."[55] In the eighteenth century alone, approximately 50,000 individuals convicted of a crime were transported to other colonies.[56] Approximately 70% of convicted felons were transported to other colonies whereas approximately 16% were hanged.[57] In fact, transportation became a popular method of punishment and was depicted as a "royal pardon" for an offense that would have otherwise warranted death by hanging.[58] Convicted individuals were transported to American colonies, the Caribbean, Australia, and so forth.[59]

As with ostracism in ancient Greece, an individual was transported for a specific period of time.[60] However, all transportation sanctions were not

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[50] *See* A ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775 vii (1990) (noting that "transportation" was a synonym for banishment).

[51] *See* WILLIAM HOLDSWORTH, 11 A HISTORY OF ENGLISH LAW 569 (1938).

[52] *See generally* WILFRID OLDHAM, BRITAIN'S CONVICTS TO THE COLONIES (1990).

[53] *See* EKIRCH, *supra* note 50, at 1.

[54] *See id*.

[55] J.M. BEATTIE, CRIME AND THE COURTS OF ENGLAND 1660-1800, 512 (1986).

[56] EKIRCH, *supra* note 50, at 139.

[57] *See id*.

[58] *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 38-41 (1983).

[59] *See* BEATTIE *supra* note 55, at 472-73.

[60] *See* OLDHAM, *supra* note 52, at 12.

equal. For example, people convicted of clergiable[61] offenses faced a transportation sentence of seven years, whereas, those who knowingly bought or received stolen goods faced a transportation sentence of fourteen years.[62] Regardless of the varying transportation sentences, a transported individual was banned from returning to England until he or she had completed his or her sentence.[63] Returning prior to the conclusion of a transportation sentence was punishable by death. [64] Thus, transportation removed individuals who were perceived as dangerous to society; those whose actions shocked the society's collective conscience.[65] Ousting such individuals implied that society was freed from the individual's future delinquent behavior.

Simultaneously, transporting a deviant also deterred other members of society from committing the same offenses so as not to face such harsh punishment: being severed from family and friends. The preface of the Transportation Act captured this purpose by stating transportation was necessary because the current punishment for "robbery, larceny and other felonious taking and stealing of money and goods, [did] not prove effectual to deter wicked and evil-disposed persons from being guilty of the said crimes."[66] Thus, the Transportation Act promised relief for delinquent actions and falls squarely within Bentham's definition of punishment.

Transportation not only prevented individuals from engaging in deviant acts, but also rehabilitated and stroked the soul of individuals with "wicked and evil-disposed" ways. Presumably, an ousted individual was forced to reflect on his deviant behavior and rehabilitate himself before

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[61] An offence was accorded the "benefit of a clergy" if the guilty individual was able to recite the first lines of Psalm 51— the "Neck Verse." *See* LEE A. RITSCHER, THE SEMIOTICS OF RAPE IN RENAISSANCE ENGLISH LITERATURE 8-9 (2009) (explaining the notion of clergyable offenses). It was called the "Neck Verse" because a guilty individual, who would have been subject to capital punishment, was spared and subject to transportation if the individual proved that he was able to read the relevant bible verse—in other words, proving that he was a member of the clergy.

[62] *See id*.

[63] *See id*.

[64] *See id*; *See also* PETER LINEBAUGH, THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY 153 (1992) (discussing the case of James White who was convicted of stealing tobacco from two individuals in February 1722 and was sentenced to transportation to the American colonies. He was given a seven-year transportation sentence with forced labor. However, during his transportation to America, Mr. White escaped and returned to England before serving his full sentence. Upon his premature return, Mr. White was found to have violated the Transportation Act and was hung).

[65] *See* BEATTIE *supra* note 55, at 503.

[66] *See id*.

returning to England or else face the possibility of alienation. At the time, transportation gave individuals who were alienated from Britain an opportunity to start a new life, often in the "new land" of America.[67]

C. Banishment in Early American Society: Sowing the Seeds of Deportation

Like transportation, banishment was used systematically in early America as a social engineering tool. The philosophy of using banishment as a form of punishment was exemplified by its use to punish dissidents in early American communities; these individuals were perceived as traitors.[68] For example, beginning January 1, 1777, Virginia banished alien merchants who refused to profess loyalty to Virginia and who "continued to profess allegiance to an enemy nation."[69] Similarly, on September 16, 1777,

> County [the State of Georgia] created inquisition committees, consisting of twelve members, each whom examined the loyalty of any male over twenty-one years of age called before the committee; subscribing to oaths of allegiance to Georgia and abjuration of George III and having two or more 'friends of freedom' vouch for . . . [his] allegiance. . . . Failure to comply with the demands of an inquisition resulted in banishment, loss of property, and if returning, death.[70]

As in Georgia and Virginia, Massachusetts enacted a Banishment Act in 1778, which banished individuals who "left the state or either the United States, and joined the enemies thereof."[71] These widespread banishment practices during the Revolutionary War resulted in the banishment of 80,000 to 100,000 people from America.[72]

Not only were dissidents banished from American colonies, but Quakers were also exiled because they were perceived as traitors.[73] For example, in Pennsylvania, Quakers were punished because they posed a threat to the State during the Revolutionary War.[74] Pennsylvania feared that Quakers would aid the British army. Consequently, Quakers who

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[67] *See id*.

[68] *See generally*, HARRY M. WARD, GOING DOWN HILL: LEGACIES OF THE AMERICAN REVOLUTIONARY WAR 29 (2009).

[69] *Id.*

[70] *Id.* at 30.

[71] *Id.*

[72] *See id.* at 31.

[73] *See* WARD, *supra* note 68, at 31.

[74] *See id.*

were depicted as "dangerous to the State" were exiled to Virginia.[75] The exiled Quakers were not allowed to return to Pennsylvania until two months before the British army evacuated.[76]

Accumulating from the need to punish dissidents and traitors, and in anticipation of the war with France, Congress passed two Alien Acts, namely, the Alien Friends Acts and the Alien Enemies Acts in 1798.[77] The Alien Friends Act instilled in the President the power to expel any alien who was perceived as a threat to the security of the United States.[78] Failure to leave resulted in imprisonment and deprivation of attaining American citizenship.[79] Similarly, the Alien Enemies Act conferred on the President the power to expel an alien of an enemy country during the time of war.[80] These Acts targeted those who opposed the Federalists, the party in power at the time.[81] Thus, expulsion was used as a tool to exile individuals who were deemed a threat to the ruling party.

Consequently, banishment and expulsion were punishments associated with disloyal conduct: any action that forestalled the government's political agenda or threatened political stability. This implied definition of crime—any action that threatened political stability—is within the meaning of Durkheim's definition of crime, which is any actions that "shock the collective" conscience of society. During the Revolutionary War and the American–French crises, the collective conscience of society endorsed solidarity toward American colonies and the ruling party, respectively.

Furthermore, banishment was a severe punishment, as a banished individual was "looked upon as one having contagious political disease."[82] Although banishment does not squarely fit into Foucault's definition of punishment in that it did not necessarily cure or educate the deviant, it served as a deterrent and reinforced the collective conscience of society. In addition to reaffirming the social norm, banishment inflicted a positive externality on society because it instilled fear in citizens of the colony, deterring them from opposing the colony or becoming a British loyalist. Thus, the role of banishment during early American society fits into Durkheim and Bentham's definition of crime and punishment.

In conclusion, this Section illustrates how ostracism, transportation, and banishment fit into the theoretical framework of the definition of

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[75] *See id.* at 33.
[76] *See id.*
[77] WARD, *supra* note 68, at 34.
[78] *See id.*
[79] *See id.*
[80] *See id.*
[81] *See id*.
[82] *Id*. at 31.

crime and the role of punishment. Couched in the theoretical and historical discourse in this Part and Part I, Parts III and IV delineate deportation precedents and illustrates that deportation fits into the theoretical and historical framework of punishment.

III. THE LEGAL FRAMEWORK OF DEPORTATION

In the seventeenth century, the United States Supreme Court announced that deportation is not punishment.[83] Since then, the courts have issued opinions consistent with this ideology.[84] Thus, this Section begins by tracing how *Fong Yue Ting v. United States*, a landmark case that establishes that deportation is not punishment, shaped modern immigration jurisprudence. *Fong Yue Ting* also sets the tone for understanding why deportation should be labeled as punishment. Thereafter, Section III.B describes the judicial analysis applied in deportation cases. Part III uses this discourse to frame the discussion in order to understand why deportation should be labeled as criminal punishment.

A. Fong Yue Ting v. United States

The roots of modern deportation are embedded in *Fong Yue Ting v. United States*. In *Fong Yue Ting v. United States*, the issue was whether Congress had the right to legislate expulsion from the United States through executive orders; in other words, whether Congress had the plenary power to exclude Chinese laborers pursuant to the Chinese Exclusion Act.[85] The events giving rise to the case are as follows.

Fong, a Chinese man and resident of New York City since 1879, was arrested on the grounds that he had violated the provisions of the 1892 amendments to the Chinese Exclusion Act [hereinafter, the "Chinese Act"].[86] The Chinese Act required persons of Chinese ancestry who were physically present in the United States to obtain a certificate of residence to prove that their presence in the United States was legal.[87] All Chinese laborers were required to acquire the certificate of residence within one

[83] *Fong Yue Ting*, 149 U.S. at 730.

[84] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010) (noting that deportation is a civil penalty).

[85] *See* Fong Yue Ting, 149 U.S. 698 (1893).

[86] *Id.* at 698-704.

[87] *See* Geary Act, § 6, ch. 60, 27 Stat. 25 (repealed 1943).

year after the Chinese Act was passed.[88] Failure to have such certification resulted in a deportation order by a federal judge.[89]

Although failure to get a certificate of residence resulted in deportation, deportation could be halted if such individual could prove that at the time the law was passed he was a resident and that he had a valid reason for not attaining the certification of residence.[90] To establish such proof, the individual was required to present "at least one credible white witness."[91] As mentioned above, Fong was found without a certificate of residence and was subsequently arrested.[92] In Court, Fong argued that his arrest and detention violated the Due Process Clause of the United States Constitution and that the Chinese Act was unconstitutional.[93]

The Court concluded that Congress had plenary power to mandate deportation.[94] Justice Gray, writing for the majority, found that the "manner in which Congress . . . exercised this right in sections 6 and 7 of the act of 1892 . . . [was] consistent with the Constitution."[95] He reasoned that Congress has,

> the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.[96]

As a result of Congress' plenary power, Congress could "direct . . . any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination."[97]

Against this backdrop, the Court announced that deportation was not punishment. The Court reasoned that the Chinese Act was "in no proper sense a trial and sentence for a crime or offence"[98] and that deportation is

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[88] *See id*.

[89] *See id.* (noting that a Chinese laborer would be found to be unlawfully present in the United States if he does not possess a certificate of residence and such person "may be arrested . . . and taken before a United States judge . . . [who would] order that . . . [the individual] be deported from the United States.").

[90] *See Fong Yue Ting*, 149 U.S. at 727 (noting that valid reasons include: accidents, sickness, or other unavoidable causes).

[91] *See id*.

[92] *See id*. at 698-704.

[93] *See id*. at 703.

[94] *Id*. at 711.

[95] *Id*.

[96] *Id* at 714.

[97] *Id*. at 728.

[98] *Fong Yue Ting*, 149 U.S. at 730.

"not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."[99] The Court further noted that deportation is,

> a method of enforcing the return [of an alien] to his own country . . . [an alien who] has not complied with the conditions upon . . . which the government of the nation, acting within its constitutional authority . . . has determined that his continuing to reside here shall depend.[100]

Consequently, the Court held that deportation was not punishment and that Fong, by being deported, was not being "deprived of life, liberty, or property without the due process of law; and the provisions of the Constitution."[101] In sum, the Court concluded that Congress has plenary power over the expulsion of aliens and that the use of deportation is not as punishment for a crime.

However, Justice Brewer, in his dissent, rightly recognized that deportation is punishment and that the Chinese Act imposed a cruel and severe punishment.[102] Deportation is punishment because after an alien is arrested he is removed from his home, family, and business, and deprived of his ability to enjoy his property.[103] Deportation "places the liberty of one individual subject to the unrestrained control of another."[104]
Further, Justice Fields, in a dissenting opinion, emphatically echoed Justice Brewer's sentiments. He explained that deportation is a cruel and unusual punishment because "nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."[105] Moreover, "[i]f a banishment of the sort described [deportation] 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."[106] Thus, Justice Fields concluded that deportation is punishment.

B. Recent Deportation Cases

Despite the Court's reluctance to dub deportation as criminal punishment, recent cases and the circumstances surrounding deportation proceedings proves that deportation is punishment. First, deportation of

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[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*. at 733 (Brewer, J., dissenting).
[103] *See id.* at 740 (Brewer, J., dissenting).
[104] *Id*. at 739-40 (Brewer, J., dissenting).
[105] *Id*. at 759 (Field, J., dissenting).
[106] *Id*. at 741 (Field, J., dissenting).

lawful permanent residents is usually tied to criminal action. Second, a lawful permanent resident is subject to deportation after it is found that the alien is guilty of a certain crime or has failed to abide by a said law. Third, deportation proceedings embed the characteristics of criminal proceedings and are based on criminal statutes. These conclusory assertions are best exemplified by two recent cases, namely, *Matter of Soram*[107] and *Matter of Julio E. Velasquez*.[108] However, before delving into the details of these cases, it is imperative to outline the statute on which these recent cases are based.

i. Grounds For Deportation/Removal

Generally, an alien could be subject to removal proceedings or deportation if the alien's action falls within an action enumerated under the Immigration and Nationality Act ("INA"). Pursuant to INA § 237(a)(1)(A), an alien who is inadmissible at the time of entry into the United States is subject to deportation/removal.[109] Also, an alien in the United States is subject to removal under INA § 237(a)(1)(B), if the alien violates the INA or any other law of the United States.[110] Such United

[107] Matter of Soram, ID 3701, 25 I. & N. Dec. 378, 2010 WL 4687597 (B.I.A. 2010).

[108] Matter of Julio E. Velasquez, 25 I. & N. Dec. 278, 2010 WL 2830632 (B.I.A. 2010).

[109] *See* 8 U.S.C § 1227(a)(1)(A).

[110] *See* 8 U.S.C. § 1227(a)(1)(B), 8 U.S.C. § 1227(a)(1)(C), INA § 212(g), 8 U.S.C. § 1182(g), INA § 237(a)(1)(D), 8 U.S.C. § 1227(a)(1)(D), INA § 237(a)(1)(E), 8 U.S.C.A. § 1227(a)(1)(E), INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G); INA § 237(a)(5) (8 U.S.C. § 1227(a)(5)) (noting that an alien is subject to deportation if the alien becomes a public charge within five years of entering the United States); INA § 237(a)(4) (8 U.S.C. § 1227(a)(4)) (noting that an alien is deportable for engaging in any activity that violates any United States law related to sabotage, espionage, or laws prohibiting export of technology, goods or information that are classified as sensitive from the United States, as well as engaging in any criminal activity which endangers national security or public safety or any activity the purpose of which is to control, overthrow by force, oppose or by violence, or other unlawful means, the United State government); INA § 237(a)(4)(B) (8 U.S.C. § 1227(a)(4)(B)) (stating that an alien is subject to deportation if the alien engages or previously engaged in any terrorist activity); INA § 237(a)(4)(C) (8 U.S.C. § 1227(a)(4)(C)) (noting that an alien is subject to deportation if the Secretary of State has reasonable grounds to believe that the alien's activities or presence in the United States may have serious adverse foreign policy consequences); INA § 237(a)(4)(D) (8 U.S.C. § 1227(a)(4)(D)) (stating that persons who have engaged in genocide and Nazi war criminals are subject to deportation); INA § 237(a)(3)(A) (8 U.S.C. § 1227(a)(3)(A)) (noting that failure to report a change of address to the United States Citizenship and Immigration Services is a deportable offence unless the alien has a reasonable excuse for failing to report such change of address and failure to report was not willful); INA § 266(c) (8 U.S.C. § 1306(c)) (subjecting an alien to deportation for fraudulent statements or violation of the Foreign Agents Registration Acts); 18 U.S.C. § 1546 (noting that an

States laws include actions that constitute criminal acts under state laws. The interplay of deportation and state criminal laws is analyzed below in Sections III.B.ii and III.B.iii.

ii. Matter of Soram

In the *Matter of Soram*,[111] the Immigration Board's decision illustrates that deportation is punishment.[112] In *Soram*, the alien pled guilty to a crime of child abuse pursuant to Colo. Rev. Stat. § 18-6-401(1)(a).[113] After his guilty plea, the Department of Homeland Security initiated a removal proceeding.[114] The Immigration Judge found that the alien was subject to deportation because he was convicted of a "crime of child abuse."[115] The alien appealed to the Board of Immigration Appeals (hereinafter, "the Board").[116]

The Board affirmed the Immigration Judge's decision, finding that the alien was subject to deportation because the alien was "convicted of a 'crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment,'"[117] pursuant to 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2006).[118] The Board found that leaving a child in a manner that poses threat of

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alien is subject to deportation for the misuse of visa or fraud relating to the misuse of visa); INA § 237(a)(3)(C)(i) (8 U.S.C. § 1227(a)(3)(C)(i)) (stating that an alien is subject deportation for document fraud); 8 U.S.C. § 1305, INA § 237(a)(3)(D) (8 U.S.C. § 1227(a)(3)(D)) (stating that an alien is subject to deportation if the alien falsely represents or represented himself as a United States citizen so as to obtain benefits); INA § 237(a)(6) (8 U.S.C. § 1227(a)(6)) (subjecting an alien to deportation for voting in violation of a voting statute—local, federal, state, regulation, or ordinance, regardless of whether the alien has been convicted); INA § 237(a)(2) (8 U.S.C. § 1227(a)(2)) (noting that an alien is subject to deportation for the commission of criminal offenses).

[111] Matter of Soram, ID 3701, 25 I. & N. Dec. 378, 2010 WL 4687597 (B.I.A. 2010).

[112] *See Id.*

[113] *See id*. Section 18-6-401(1)(a) of the Colorado Revised Statutes provides that:

> A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.

[114] *See id*.

[115] *Id*.

[116] *See id*.

[117] *See* Matter of Soram, ID 3701, 25 I. & N. Dec. 378, 2010 WL 4687597 (B.I.A. 2010).

[118] *See id*.

injury to the child's life violated section 18-6-401(1)(a) of the Colorado Revised Statutes and therefore is a crime of child abuse under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2006).[119]

In finding that the alien's action fell within the meaning of a crime of child abuse under section 237(a)(2)(E)(i), the Board took judicial notice of how the Colorado courts have interpreted the term "threat of injury" under Colo. Rev. Stat. § 18-6-401(1)(a).[120] Section 18-6-401(1)(a) of the Colorado Revised Statutes reads:

> A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.[121]

The Board found that the Colorado courts have held that a violation of Colo. Rev. Stat. § 18-6-401(1)(a) requires the showing of mens rea.[122] Based on the mens rea requirement, the Colorado court found that pursuant to Colo. Rev. Stat. § 18-6-401(7)(b)(I), the alien had "knowingly or recklessly" allowed a child to be unreasonably placed in a situation that posed a threat of injury to the child's life or health.[123]

In contrast, 237(a)(2)(E)(i) of the INA, provides in part that an alien is deportable for,

> crimes of domestic violence, stalking, or violation of protection order, crimes against children [and] . . . domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.[124]

Thus, in finding that the alien's action fell within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i), the Board reasoned that "an act or omission that constitutes maltreatment of a child" under the definition of a crime of child abuse is broad enough to include endangerment-type crimes such as

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[119] *See id*.
[120] *See id*. at 383.
[121] COLO. REV. STAT. § 18-6-401(1)(a) (2014).
[122] *See* Matter of Soram, ID 3701, 25 I. & N. Dec. 378, 383, 2010 WL 4687597 (B.I.A. 2010).
[123] *See id*. at 384-86.
[124] *See* INA § 237(a)(2)(E)(i) (8 U.S.C. § 1227(a)(2)(E)(i)).

the one stipulated in the Colorado statute.[125] Consequently, the Board found that the Colorado court's finding that the alien met the "knowingly or recklessly" mens rea was consistent with the definition of a crime of child abuse under section 237(a)(2)(E)(i) of the INA.[126] Importantly, the Board noted that the purpose of Colorado's crime of child abuse statute is similar to the purpose of INA § 237(a)(2)(E)(i), which is to "to single out those who have been convicted of maltreating or preying upon children."[127] Thus, the Board found that the alien's conduct fell within the meaning of a "crime of child abuse" and thereby dismissed the alien's deportation appeal.[128]

iii. Matter of Julio E. Velasquez

Furthermore, the language of deportation opinions and the judicial analysis conducted in deportation proceedings suggest that deportation is punishment. In the *Matter of Julio E. Velasquez,*[129] the Board held that an alien was not subject to deportation because his "crime" was not within meaning of the INA. In other words, given that the alien did not commit any crime that was within the language of the INA, he was not subject to punishment—deportation.

In the *Matter of Julio E. Velasquez*, at issue was "whether the offense of misdemeanor assault and battery of a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated categorically qualifie[d] as a crime of domestic violence within the meaning of section 237(a)(2)(E) of the Act, 8 U.S.C. § 1227(a)(2)(E) (2006)."[130] In the *Matter of Julio E. Velasquez* the alien was convicted of assault and battery of a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated.[131] Consequently, he was sentenced to 10 days imprisonment.[132] Thereafter, the Department of Homeland Security initiated a removal proceeding on grounds that the alien's conviction was a categorical crime of domestic violence.[133] Upon appeal, the Board noted that a crime of violence was within the meaning of the INA. The

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[125] *See id*. at 383-84.
[126] *See id.* at 385-86.
[127] *Id.* at 383-84.
[128] *See id*. at 378.
[129] Matter of Julio E. Velasquez, 25 I. & N. Dec. 278, 278, 2010 WL 2830632 (B.I.A. 2010).
[130] *See id.*
[131] *See id.* at 279.
[132] *See id*.
[133] *See id*.

applicable section, 18 U.S.C. § 16 (2006), states that a crime of violence is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[134]

In contrast, 18.2-57.2(A) of the Virginia Code Annotated, provides that any "person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor."[135] However, given that punishment for assault and battery under the Virginia statute does not exceed one-year imprisonment, under Federal law, the alien committed a felony.[136] As such, the Board held that "because the Virginia statute reache[d] conduct that . . . [could not] be classified as 'violent force,' the respondent's offense . . . [was not] categorically a 'crime of violence' and thus . . . [could not] be classified as a categorical crime of domestic violence for purposes of section 237(a)(2)(E) of the Act."[137] Consequently, the Board found that the alien's offense did not constitute a felony under federal law.[138]

Next, the Board determined whether the alien's offense had "an element [of] the use, attempted use, or threatened use of physical force against the person or property of another under § 16(a)."[139] In defining the term "assault and battery," the Board reviewed the definition as applied in Virginia criminal law and Supreme Court cases.[140] The Board chose a definition of violent felony based on that dictated by the Supreme Court because its similarity to 18 U.S.C. § 16(a).[141] In applying the Supreme Court's definition of violent felony, the Board concluded that

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[134] *See id*. at 280 (citing 18 U.S.C. § 16 (2006)).

[135] *Id*. at 280.

[136] *See id.* at 280 (citing 18 U.S.C. §§ 3559(a)(5), (6) (2006)).

[137] *Id*.

[138] Matter of Julio E. Velasquez, 25 I. & N. Dec. 278, 280, 2010 WL 2830632 (B.I.A. 2010).

[139] *Id*.

[140] *See id.* (citing *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005) which states that an assault occurs "when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm *or* engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim," and battery is "the actual infliction of corporal hurt on another . . . willfully or in anger, whether by the party's own hand, or by some means set in motion by him." *Zimmerman v. Commonwealth*, 585 S.E.2d 538, 539 (Va. 2003)).

[141] *Id*. at 281 (citing *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265 (2010)

> the "physical force" necessary to establish that an offense is a "crime of violence" for purposes of the Act must be "violent" force, that is, force capable of causing physical pain or injury to another person. The key inquiry is not the alien's intent for purposes of assault, but rather whether battery, in all cases, requires the intentional use of "violent force." An offense cannot therefore be classified as a "categorical" crime of violence unless it includes as an element the actual, attempted, or threatened use of violent force that is capable of causing pain or injury. The crime of assault and battery in Virginia does not contain such a requirement.[142]

As a result, the Board held that the alien's offense was not within the meaning of a crime of domestic violence under section 237(a)(2)(E) of the Immigration Act.[143] The Board remanded the case to the Immigration Judge to determine whether the alien's offense constituted a categorical crime of violence under the INA.[144]

Relying on this judicial framework, Part III discusses the legal analysis in deportation cases, juxtaposing the theoretical ideologies of punishment as well as historical forms of punishment. Part III concludes that deportation is criminal punishment in that it fits within the meaning of the theoretical definition of punishment and closely parallels ostracism, transportation, and banishment; concepts that have been widely accepted as forms of punishment.

IV. THREE TALES: ONE CONCLUSION

A. Theoretically, Deportation is Punitive

This Part draws from the three cases discussed in Part III to argue that deportation is criminal punishment. First, for a lawful permanent residence to be deportable, the alien must have committed a crime within the meaning of a statute. In determining whether a lawful permanent resident's action is within the meaning of the applicable statute, the court

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which held that "in order to constitute a 'violent felony' under the relevant provisions of the Armed Career Criminal Act ('ACCA'), the level of 'physical force' required for a conviction must be '*violent'* force—that is, force capable of causing physical pain or injury to another person.").

[142] *Id*. at 283.

[143] *See id*. at 283.

[144] *See id*. (refusing to affirm the Immigration Judge's finding that the alien was subject to deportation on grounds that he was in the United States without being admitted and was convicted of a crime of domestic violence).

examines whether the alien's conduct satisfies the generic definition of crime under the statute—both state and federal.[145] The lawful permanent resident has the burden of proving that state statute creates an offense outside the generic definition of a listed crime in a federal statute. However, determining whether a,

> State statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a State statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the State courts in fact did apply the statute in the special (nongeneric) manner for which he argues.[146]

Thus, deportation bears a close nexus to criminal cases and is a sanction triggered by the commission of a crime enumerated in a state or federal statute. Simply stated, deportation is an extension of the criminal process.

Moreover, crimes, as defined in these deportation cases, fall within the theoretical framework of Durkheim, Bentham, and Foucault. As discussed in Part III, the actions that are defined as crime, thereby warranting deportation, are actions that were perceived as shocking to the collective conscience of society, likely to create negative externality, and actions that breached government regulation. Thus, Part III evidences that the actions that subject a lawful permanent resident to deportation could be defined as a crime within the meaning of the theoretical frameworks of Durkheim, Bentham, and Foucault.

The cases reviewed in Part III also illustrate that deportation is punishment. First, deportation is the consequence of engaging in a dictated prohibited offence or, arguably, an action that shocks the collective conscience of society: crime. Second, deportation serves a social function of cleansing society of deviant aliens, thereby fitting into Durkheim's role of punishment. Third, deportation arguably incapacitates a lawful permanent resident from committing more crimes within United States borders because it removes aliens who defy the moral fabric of society from the United States. Thus, deportation seeks vengeance for society.

Deportation of deviant lawful permanent residents also serves as a deterrent: a role of punishment posited by Bentham. By deporting aliens

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[145] *See, e.g.*, Matter of Velazquez-Herrera, 24 I. & N. Dec. 503, 514-15 (B.I.A. 2008).

[146] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

who have committed a particular crime, the entire immigrant community is alerted to the consequence of engaging in such actions, thereby deterring others from committing such crimes, or at the very least, from being caught after committing such crimes. Furthermore, deportation "strikes the soul rather than the body."[147] Deportation strikes the soul in that deported lawful permanent residents are alienated from family and friends, and arguably, lose all emotional support needed to nourish their daily lives.[148] The emotional trauma associated with deporting a lawful permanent resident is best illustrated in the recent deportation of a lawful permanent resident who had resided in the United States since he was three years old, he states: "I feel like I'm stuck in a perpetual nightmare. I can't seem to adjust to this life [in Mexico]."[149] It is evident that such severances are emotionally tasking. Thus, deportation also falls within Foucault's framework of punishment.

In sum, theoretically, deportation fits squarely into the definition and roles of punishment posited by Durkheim, Foucault, and Bentham, thereby leading to the conclusion that deportation is indeed punishment.

B. Historically, Deportation is Punitive

Even if one argues that the theoretical frameworks of crime and punishment are too tangential to be applicable to deportation, deportation also parallels the ancient forms of punishment discussed in Part II— ostracism, transportation, and banishment— as widely accepted forms of punishment. Deportation echoes the characteristics of ostracism, transportation, and banishment, because of one common factor: exclusion from the community on grounds that the individual committed a crime or engaged in an action on which society frowns. Like banishment, ostracism, and transportation, a lawful permanent resident is subject to deportation as a result of engaging in (1) a criminal offence, (2) an action that violates a statute, or (3) an action that shocks the conscience of society: arguably, crimes of moral turpitude.[150]

The effects of deportation are similar to those of ostracism, transportation, and banishment. Like ostracism, transportation, and banishment, a deported lawful permanent resident is ousted from the

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[147] *See* FOUCAULT, *supra* note 5, at 303.

[148] *See, e.g.*, Kevin Sullivan, *Deported Veterans: Banished for Committing Crimes after Serving in the U.S. Military*, THE WASHINGTON POST, August 12, 2013, http://articles.washingtonpost.com/2013-08-12/politics/41333669_1_u-s-marine-u-s-citizens-immigration (deporting a lawful permanent resident after he served a four-year sentence in an Arizona prison for possessing marijuana for sale).

[149] *See id.*

[150] *See* Part III.B, *supra*.

community, which the alien has deemed as home for a period of time. Although ostracism and banishment did not differentiate between aliens and citizens, the lack of such differentiation is immaterial in finding that banishment and ostracism have striking similarities to deportation. Indeed, ostracism, banishment, and transportation have been generally accepted as punishment.[151] Therefore, the Court's reluctance to label deportation as criminal punishment is a judicial fiction. As succinctly surmised by Judge Bauer:

> How can deportation of an alien legally residing in the United States be considered anything but punishment? The . . . [alien] stands to lose his residence, livelihood, and most importantly, his family. Certainly if the same thing occurred to a United States citizen a court would not hesitate to call it punishment—moreover, cruel and unusual punishment.[152]

As hinted by Judge Bauer, the Court's reluctance to label deportation as criminal punishment has daunting constitutional implications.[153] Consequently, Part V examines the grave constitutional implications of current judicial labeling.

V. IMPLICATIONS OF CURRENT JUDICIAL LABELING

This Section explores the practical reality of the fictitious labeling that deportation is a "civil sanction" and concludes that such misplaced labeling results in numerous constitutional violations. Such constitutional violations include cruel and usual punishment and double jeopardy violations. However, before delving into the constitutional implications of labeling deportation as a civil sanction, it is imperative to discuss the constitutional safeguards protecting aliens. Accordingly, Subpart A explores the constitutional protections afforded to aliens. Thereafter, Subparts B and C build on the constitutional framework of Subpart A by analyzing the Double Jeopardy and Cruel and Unusual Punishment Clauses in the context of deportation. This Section concludes that deportation of criminal lawful permanent residents violates the Double Jeopardy and Cruel and Unusual Punishment Clauses.

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[151] *See* Part II, *supra*.

[152] Lieggi v. U.S. Immigration & Naturalization Serv., 389 F.Supp. 12, 17 (N.D. Ill 1975), rev'd 529 F.2d 530 (7th Cir. 1976); *see also Padilla*, 559 U.S. at 364 (noting that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.").

[153] *See id*.

A. Constitutional Safeguards for Legal Permanent Residents

As early as 1886, the Supreme Court held that resident aliens are entitled to the protection of the equal protection clause of the Fourteenth Amendment.[154] In 1896, in *Wong Wing v. United States*, one of the seminal cases regarding the constitutional protections afforded to aliens, the Supreme Court articulated that the provisions of the Fifth Amendment applies to all persons within the United States.[155] The Court noted, "*all persons* within the territory of the United States are entitled to the protection guaranteed by those amendments [Sixth and Fifth]."[156]

Decades later, in *Kwong Hai Chew v. Colding*, the Supreme Court further held that lawful permanent residents fall within the meaning of "persons."[157] The Court dictated:

> It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law. . . [A lawful permanent resident's] status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.[158]

Subsequently, in *Plyler v. Doe*, the Court noted that despite an alien's

> status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.[159]

Thus, lawful permanent residents are guaranteed some constitutional protection.[160] Consequently, Subparts B and C delve deeper into some constitutional implications of deporting criminal lawful permanent residents.

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[154] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (noting that the Fourteenth Amendment is "universal in application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.").

[155] Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[156] *Id.* (emphasis added).

[157] Kwong Hai Chew v. Colding, 344 U.S. 590, 596-601 (1953).

[158] *Id.*

[159] *See* Plyler v. Doe, 457 U.S. 202, 201 (1982) (striking down a State statute that prohibited children of documented immigrants access to public education on grounds that undocumented immigrants are entitled to constitutional protection).

[160] *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Plyler v. Doe, 457 U.S. 202 (1982); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

B. The Double Jeopardy Clause

Given that, generally, the Double Jeopardy Clause does not apply to civil sanctions,[161] the judicial fiction that deportation is a civil penalty and not criminal punishment has shielded deportation from double jeopardy analysis, thereby, leading to the violation of the Double Jeopardy Clause. Put alternatively, the judicial label of deportation as a civil sanction and not criminal punishment has mooted the issue of Double Jeopardy Clause violations. However, building on the conclusion that deportation is criminal punishment, this Subpart concludes that, as a result of the fictitious notion that deportation is not criminal punishment, Double Jeopardy violations resulting from deportation are overlooked.

i. Double Jeopardy Clause Jurisprudence

Lawful permanent residents are entitled to constitutional protections under the Fifth Amendment.[162] The Double Jeopardy Clause of the Fifth Amendment provides in part that "[n]o person shall . . . *be twice put in* jeopardy of life or limb" for the same offence.[163] In *Hudson v. United States*, the Supreme Court established a two-prong test to examine whether the Double Jeopardy Clause has been violated.[164] In examining whether the Double Jeopardy Clause has been violated, the court set forth the following analysis:

> [1] [whether] a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. [2] Even in those cases where the legislature has indicated an intention to establish a civil penalty . . . [the court must] further [determine] whether the statutory scheme was so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty.[165]

In making the latter determination, the court may consider the seven-factor test established in *Kennedy v. Mendoza-Martinez*,

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[161] Breed v. Jones, 421 U.S. 519 (1975); United States v. Halper, 109 S. Ct. 1892, 1902 (1989); United States v. Hudson, 879 F. Supp. 1113 (W.D. Okla. 1994) rev'd, 92 F.3d 1026 (10th Cir. 1996) aff'd, 522 U.S. 93, 118 S. Ct. 488 (1997).

[162] *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Plyler v. Doe, 457 U.S. 202 (1982); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[163] U.S. CONST. amend. V. (emphasis added); *see also* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (noting that the Double Jeopardy Clause protects individuals from "multiple punishments" for the same offense).

[164] *See* Hudson v. United States, 522 U.S. 93, 99 (1997).

[165] *See id.*

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[166]

Nonetheless, the *Kennedy* factors only serve as guideposts. Thus, the *Kennedy* factors "must be considered in relation to the statute on its face . . . [as] only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[167] Subparts ii, iii, iv, and v, apply the *Hudson* and *Kennedy* tests to the deportation context. Relying on the legal framework of *Hudson*, this Subpart concludes that deportation is cruel and unusual punishment.

ii. The First Prong of the Hudson Test: The Statutory Construction

As dictated in *Hudson*, in determining whether the Double Jeopardy Clause has been violated, the first step in determining whether "a particular punishment is criminal or civil is, at least initially, a matter of statutory construction."[168] Thus, the first step in this analysis is to review the relevant legislative history.

Notwithstanding the judicial label that deportation is a "civil sanction," the legislative history of the Immigration Reform and Immigrant Responsibility Act (IRIRA) of 1996 is littered with references to Congress' punitive intent. As the Senate report noted,

> While there is a continuing debate in our Nation concerning what to do about crime and criminals, a consensus seems to exist regarding criminal aliens. That is, there is just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals without importing more.[169]

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[166] *Id.* (internal quotation marks omitted) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

[167] *Id.* at 100.

[168] *Id.* at 99.

[169] S. REP. NO. 104-48, at 6 (1995).

Similarly, prior to the enactment of the IRIRA, the legislative history indicates that Congress intended for deportation to be punitive.[170] Representative Lamar Smith articulated,

> Too few criminal aliens are being deported today. . . . Americans should not have to tolerate the presence of those who abuse both our immigration and criminal laws. Criminal aliens should be on the fast track out of the country. This bill addresses the concerns of the American people by giving the INS and prosecutors tools they need to expedite the deportation of criminal aliens.[171]

As such, the IRIRA expanded the definition of aggravated felony under INA § 101(a)(43) to include aggravated felonies and crimes such as perjury and money laundering.[172] Commission of such crimes subjects an alien to deportation even after serving a prison sentence.[173]

Indeed, subjecting a criminal lawful permanent resident to deportation after completing a prison sentence is not a mere happenstance—it was intended by Congress. As Representative Anthony C. Beilenson noted,

> [T]he Federal Government, through the INS, needs to do a much better job of identifying deportable aliens and *beginning proceedings against them while these aliens are still in custody.* Although the majority of these criminal aliens are eligible for immediate deportation from prison, the INS rarely takes action against them. This has to change. *Bluntly put, an alien who has been convicted of a criminal act in this county and has served his or her term in jail or prison should not be allowed to remain here.* It is an outrage that these prisoners can be allowed to return to the streets rather than to be deported immediately.[174]

Thus, a cursory review of the legislative history, arguably, leads to the conclusion that Congress intended that deportation be punitive. As such, the legislative history is trenched with inferences that Congress intended for deportation to serve as a social engineering tool—an instrument used to disinfect society of villainous aliens.[175] Thus, a cursory review of the

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[170] 141 CONG. REC. E 330 (statement of Rep. Lamar S. Smith).

[171] *See id*.

[172] INA § 237(a)(2)(A)(iii); INA § 212(a)(9)(A)(i).

[173] *See id*.

[174] *Criminal Aliens: Hearing on H.R. 723, H.R. 1067, H.R. 1279, H.R. 1459, H.R. 1496, H.R. 2041, H.R. 2438, H.R. 2730, H.R. 2993, H.R. 3302, H.R. 3320 (Title IV), H.R. 3860 (Titles II, V, VI), H.R. 3872, and H. Con. Res. 47 Before the Subcomm. on Int'l Law, Immigration, & Refugees of the H. Comm. on the Judiciary*, 103d Cong. 117, 204 (1994) (statement of Rep. Anthony C. Beilenson) (emphasis added).

[175] *See id*.

legislative history, arguably, leads to the conclusion that Congress intended for deportation to be punitive.

iii. The Second Prong of the Hudson Test: The Kennedy Factors

However, "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute,"[176] the *Kennedy* factors must be applied to determine whether the sanction has a punitive effect. This Subpart, therefore, applies the *Kennedy* factors to the deportation framework and concludes that deportation passes the 7-pronged *Kennedy* test.

Deportation satisfies the first prong of the *Kennedy* test as it involves restraint. Justice Field observed in *Fong Yue Ting*, that deportation constitutes an affirmative disability because it entails ousting an individual "from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."[177] Evidencing the restraint imposed on deported aliens and their families, a family member of a deported alien reported, "the separation is still a bitter pill to swallow. . . . I have to wait at least 10 years before I can be with my husband again. It does frustrate me."[178] Deportation also involves physical restraint because the alien is usually deported after serving a prison sentence and is also restricted from reentering the United States for a specified time period.[179]

The second Kennedy factor is met, as fully discussed in Part IV. Part IV concluded that although deportation has not been historically labeled as punishment, deportation is the modern equivalent of ostracism, banishment, and transportation, all depicted as punishment. Deportation satisfies the third prong of the *Kennedy* test. As the analysis in Part III.B illustrates, deportation of lawful permanent residents occurs only after finding a scienter.[180] The fourth *Kennedy* factor is met because, as already

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[176] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963).

[177] *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting).

[178] Federico Martinez, *Deportation Breaks Apart Families in Ohio, Across Nation: Immigration Reform may come too Late for 200,000 Separated in 2-year Period*, THE BLADE, April 15, 2013, *available at* http://www.toledoblade.com/local/2013/04/14/Deportation-breaksapart-families-in-Ohio-across-nation.html.

[179] INA § 212 (a)(9)(A)(i), 8 U.S.C. § 1182 (stating that: "Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 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."),

[180] The central element of deportable offenses are crimes of moral turpitude and aggravated felonies.

fully detailed in Part II, deportation promotes the traditional aims of punishment—retribution and deterrence. More succinctly stated by the Supreme Court, "[t]he purpose of deportation is . . . to put an end to a continued violation of the immigration laws."[181]

Similarly, deportation satisfies the fifth element of the Kennedy factors: the action to which deportation is applied is already a crime. As detailed in Part III.B, a lawful permanent resident becomes deportable usually after the alien has committed a crime. As the Supreme Court recently acknowledged, "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context."[182]

Deportation also meets the "excessive in relation" seventh element enumerated in the *Kennedy* factors. First, removing a lawful permanent resident from a place where the alien calls home has been perceived as the severest of punishments.

> Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel. . . . 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, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked—if a 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.[183]

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[181] *See* Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).

[182] *Padilla*, 559 U.S. at 366.

[183] *Fong Yue Ting*, 149 U.S. at 755 (Field, J., dissenting).

Recently, the Supreme Court articulated that "noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult."[184] Consequently, the practical reality is that lawful permanent residents who commit a crime are subjected to "the harsh consequences of deportation."[185]

In sum, applying the *Kennedy* factors to deportation illustrates that deportation has a punitive effect. As discussed above, deportation involves: (1) restraint, (2) a crime, (3) finding a scienter, (4) deportation promotes the traditional aims of punishment such as deterrence and retribution, and (5) deportation applies to criminal acts. Furthermore, the cases discussed in Part III, coupled with the theoretical framework laid out in Part I, establish that deportation has a punitive effect. On historical grounds, deportation bears striking similarities to ostracism, transportation, and banishment, all of which have generally been accepted as having punitive effects. Thus, the statutory scheme of deportation "is so punitive . . . in effect, as to transform what . . . [may have been] intended as a civil remedy into a criminal penalty."[186] In other words, despite the fact that deportation has not been historically labeled as punishment, the substantive weighing of the *Kennedy* factors indicates that deportation is indeed punitive. Also, as discussed in Subpart iv, deportation also meets the seventh *Kennedy* factor—it is excessive in relation to the alternative purpose assigned.

iv. Deportation Often Leads to Double Prosecution

The plain reading of the constitutional text suggests that deportation violates the Double Jeopardy Clause because it subjects criminal lawful permanent residents to two prosecutions for the same offence. The first prosecution being the court proceedings associated with the criminal act, and the second being the deportation proceeding resulting from the criminal offence.

As illustrated by the Board's decision in Part IV, before a lawful permanent resident is deported, the alien is first convicted of a crime in federal or state court.[187] Upon the completion of the federal or state court criminal case during which the lawful permanent resident is convicted, the second proceeding is commenced: the deportation proceeding[188]. Indeed, the deportation proceeding is based on the criminal conviction in the

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[184] *Padilla*, 559 U.S. at 366.
[185] *Id.*
[186] Hudson v. United States, 522 U.S. 93, 99 (1997).
[187] *See* Part IV, *supra*.
[188] *See id.*

federal or state court. During that deportation proceeding, the government aims to establish that (1) the individual is not a United States citizen and (2) the individual has committed a crime. If these two elements are established, the lawful permanent resident is subject to deportation pursuant to the Immigration and Nationality Act.[189] Thus, the lawful permanent resident facing deportation is subjected to two prosecutions for one offence: the criminal action. This is so because a lawful permanent resident is subject to two different court proceedings for the same offence. In the criminal proceeding, the alien's guilt is determined and sentencing is determined.[190] Thereafter, based on the INA, the immigration court determines whether the crime committed falls within the crimes enumerated in the INA and, if it does, the alien will be subject to deportation upon the completion of the criminal sentence.[191]

Thus, deportation of lawful permanent residents for criminal offenses violates the Double Jeopardy Clause because (1) deportation meets the *Kennedy* and *Hudson* tests, and (2) deportation leads to at least two separate prosecutions for one crime. Given that a criminal lawful permanent resident subjected to deportation is "*twice put in* jeopardy of life or limb" [192] for the same offence, the next Subpart examines the constitutionality of deportation as punishment.

C. Cruel and Unusual Punishment

Before presenting the analysis of whether deportation of criminal lawful permanent residents violates the cruel and unusual punishment clause of the Eighth Amendment, it is imperative to discuss cruel and unusual punishment jurisprudence. Thus, this Subpart begins by discussing Eighth Amendment jurisprudence then turns to an exploration of deportation in the Eighth Amendment context. In applying Eighth Amendment judicial framework, this Subpart concludes that deportation of criminal lawful permanent residents is cruel and unusual punishment.

i. The Historical Roots of Cruel and Unusual Punishment

The Eighth Amendment states in pertinent part that "cruel and unusual punishment [shall not be] inflicted."[193] Accordingly, in *Weems* v. *United*

[189] *See id*.
[190] *See id*.
[191] *See id*.
[192] U.S. CONST. amend. V. (emphasis added).
[193] U.S. CONST. amend. VIII.

States,[194] the Supreme Court articulated that "punishment for crime should be graduated and proportioned to [the] offense."[195] In building on the legal framework of *Weems*, a plurality of the Supreme Court, in *Trop v. Dulles*, held that the denationalization of an American citizen, who had abandoned his Army unit for one day during wartime, was cruel and unusual punishment.[196]. In reaching this conclusion, the Court reasoned:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [A]ny technique outside the bounds of traditional penalty is constitutionally suspect.[197] [Further, denationalization results in] the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys . . . the individual['s] . . . political existence that was centuries in the development.[198]

Relying on the analytical framework of *Weems*, *Trop*, and its progeny, coupled with the notion that the Eighth Amendment "is not static" but draws "its meaning from the evolving standards of decency that mark the progress of a maturing society,"[199] the Supreme Court formulated the current Eighth Amendment jurisprudence.

ii. Current Legal Framework of Cruel and Unusual Punishment

The Supreme Court enunciated two traditional frameworks for determining when punishment violates the Eighth Amendment. The first traditional framework applies to a length of incarceration sentence and the second traditional framework applies to categorical cases.

a. The Length of Sentence Framework

The origins of the legal framework for determining whether the length of a defendant's sentence violates the Eighth Amendment can be traced to

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[194] Weems v. United States, 217 U. S. 349, 367 (1910).

[195] *Id.*, at 367-68 (noting that the interpretation of the Eighth Amendment is "not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.").

[196] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[197] *Id.* at 102.

[198] *Id.* at 100.

[199] *Id.* at 101.

Harmelin v. *Michigan*.[200] At issue in *Harmelin* was whether a sentence of life imprisonment without parole for a conviction of possessing 672 grams of cocaine was unconstitutionally cruel and unusual under the Eighth Amendment.[201] The Court held the said sentence did not violate the Eighth Amendment because "the legislature 'has the power to define criminal punishments without giving the courts any sentencing discretion.'"[202]

In reaching this holding, the *Harmelin* Court established a two-prong test to determine when a length of sentence is cruel and unusual.[203] In the first line of analysis, the court must determine whether "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[204] If the court responds affirmatively, then the court proceeds to the second step.[205] During the second line of analysis, the court then compares the defendant's sentence: (a) to the sentences received by "other [offenders] in the same jurisdiction"[206] and (b) with "the sentence[] imposed for commission of the same crime in other jurisdictions."[207] If, upon concluding the second inquiry, the court finds the defendant's sentence is grossly disproportionate, the sentence violates the Eighth Amendment.[208] Regardless of this two-pronged analysis, the Court noted strong deference is given to legislatures because fashioning proportional criminal sentences falls within the legislature's jurisdiction.[209]

b. The Categorical Proportionality Analysis Framework

The second traditional framework involves categorical challenges to a particular sentencing practice. The categorical approach has been historically applied in death penalty cases but has most recently been applied to non-death penalty cases, as observed in *Graham v. Florida.*[210]

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[200] Harmelin v. Michigan, 501 U.S. 957, 1005 (1991).

[201] *See id.*

[202] *Id.* at 1006 (Kennedy, J., concurring in part and concurring in judgment) (quoting Chapman v. United States, 500 U.S. 453, 467 (1991)).

[203] *See id*. at 1005.

[204] *Id.*

[205] *See id.*

[206] *Id.* at 1004-05 (citation omitted).

[207] *Id.*

[208] *Id.* at 1005.

[209] *Id.* (Kennedy, J., concurring in part); *accord* Graham v. Florida, 560 U.S. 48, 60 (2010). *But see* Solem v. Helm, 463 U.S. 277, 303 (1983) (holding a defendant's sentence of life imprisonment without parole for uttering a no account check violated the Eighth Amendment).

[210] Graham v. Florida, 560 U.S. 48 (2010).

The categorical proportionality analysis employs a two-pronged test.[211] In the first line of analysis, the court applies the "objective indicia of society's standards, as expressed in legislative enactments and state practice"[212] to determine whether there is a national consensus against the defendant's sentence. In the second line of analysis, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,"[213] the Court exercises its independent judgment and determines whether the defendant's punishment violates the Eight Amendment. In exercising its independent judgment, the Court considers factors such as whether the sentence furthers legitimate penological goals and the culpability of the offender.[214] If the Court analysis meets the two elements discussed above, the Court finds that the punishment is cruel and unusual.

However, given that the categorical proportionality analysis is applied to both death penalty and non-death penalty cases involving a specific population, a discussion of how the Court applies the categorical approach analysis is relevant to the dialogue of whether deportation fits within this framework. Thus, Subparts 1 and 2 discuss *Atkins v. Virginia*,[215] a death penalty case, and *Graham v. Florida*,[216] a non-death penalty case.

1. Atkins v. Virginia

In *Atkins*, the issue was whether imposing a sentence of capital punishment on a mentally challenged individual violated the Eighth Amendment.[217] The Supreme Court, upon applying the categorical analysis, held that imposing the death penalty on the mentally ill defendant constituted cruel and unusual punishment.[218] Under the first prong of the categorical analysis—the objective indicia analysis—the *Atkins* Court noted,

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[211] Prior to *Graham*, the categorical approach was applied mainly to death penalty cases. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (barring the death penalty for mentally challenged individuals); Roper v. Simmons, 543 U.S. 551 (2005) (barring the death penalty for juveniles younger than eighteen); Enmund v. Florida, 458 U.S. 782 (1982) (barring the death penalty for felony murder).

[212] *Graham*, 560 U.S. at 61 (citing *Roper*, 543 U.S. at 572).

[213] *Id.*

[214] *See id.*

[215] Atkins v. Virginia, 536 U.S. 304 (2002).

[216] *Graham*, 560 U.S. at 48.

[217] *Atkins*, 536 U.S. at 304.

[218] *Id.*

> [T]he large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating . . . such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures . . . address[ing] the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States . . . allow[ing] the execution of mentally retarded offenders, the practice is uncommon.[219]

Under the second prong of the subject analysis, the Court examined the penological goals of the punishment, retribution and deterrence, and noted that,

> [O]ur death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976), . . . identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it is 'nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S., at 798 . . . Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.[220]

Based on the foregoing analysis, the Court held that execution of mentally challenged criminals is cruel and unusual punishment and therefore, prohibited by the Eighth Amendment.[221]

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[219] *Id.* at 315-16.
[220] *Id.* at 318-19.
[221] *See id.*

2. Graham v. Forida

In contrast, in *Graham*[222] the issue was whether sentencing a juvenile to serve a life sentence without parole for armed robbery during his probation was cruel and unusual punishment.[223] The Court applied the categorical approach in reaching its holding.

Under the object indicia of national consensus, the Court noted,

> [T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. Federal law also allows for the possibility of life without parole for offenders as young as 13.[224]

Thereafter, the Court engaged in its independent analysis and surmised,

> [P]enological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.[225]

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[222] Graham v. Florida, 560 U.S. 48 (2010).
[223] *Id.*
[224] *Id.* at 62 (internal citations omitted).
[225] *Id.* at 74-75.

Also, the *Graham* Court heavily relied on the status of the defendant—a juvenile—and reasoned that states should "give [juvenile] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[226] "For juvenile offenders, who are most in need of and receptive to rehabilitation . . . the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident."[227] Thus, the *Graham* Court held life sentences without parole for juvenile offenders for non-homicide offenses violated the Eighth Amendment.[228] Together, the analytical framework of *Atkins*, *Graham*, and *Harmelin*, paves the way for a discussion of whether deportation is cruel and unusual punishment.

iii. Is Deportation Cruel and Unusual Punishment?

Given that the Supreme Court has noted that deportation is a "civil penalty" and not criminal punishment, the Court has not enunciated a framework for determining whether deportation is cruel and unusual punishment. Thus, this Subpart analyzes deportation under existing Eighth Amendment jurisprudence and concludes deportation of lawful permanent residents is cruel and unusual punishment.

a. Deportation and the Cruel and Unusual Punishment Framework

Although the Supreme Court has established two analytical frameworks for Eighth Amendment challenges—a framework for challenging a defendant's length of sentence and a framework for categorical cases—neither of these frameworks fit squarely into deportation cases. Deportation is not, in a narrow sense, a length of time sentence. In the same light, deportation does not fit into the categorical proportionality analysis. However, between the two, deporting a lawful permanent resident is more analogous to a length of time sentence. This is because, depending on the crime committed, a lawful permanent resident when deported could be banned from entering the United States from ten years to indefinitely.[229]

Although deportation applies to a class of offenders who have committed a range of crimes, deportation does not fit into the categorical

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[226] *Id.* at 79 (reasoning that "a categorical rule gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform").

[227] *Id.* at 74 (internal citation omitted).

[228] *Id.*

[229] *See* 8 U.S.C. § 1182 (a)(9)(A).

proportionality analysis for two reasons. First, in applying the categorical proportionality analysis, the Court examines the uniqueness of the offenders.[230] For example, in applying the categorical proportionality analysis to *Atkins* and *Graham*, the Court observed that children are constitutionally different from adults and the mentally ill are constitutionally different from the general offender population.[231]

However, aliens subjected to deportation are a mixture of different categories of offenders; thus, unlike *Graham* and *Atkins* and their progeny, aliens are not a special subset of the general offender population. The only distinguishable factor between legal permanent residents and the general offender population is alienage, which arguably, is not sufficient to warrant a "constitutionally different" label. Second, federal immigration law determines whether an alien should be deported.[232] Thus, states do not dictate when a legal permanent resident should be deported. Therefore, there are no state statutes to help inform the Court of the national consensus on deportation. Hence, deportation is not akin to the death penalty or a life sentence without the possibility of parole for a specific group of offenders, which are based on state statutes.[233]

Thus, the categorical proportionality analysis is not an appropriate test to determine whether deportation is cruel and unusual punishment for the general lawful permanent resident population, with the exception of specific subgroups such as children and those who are mentally ill. Accordingly, the issue of whether deportation is cruel and unusual punishment will be analyzed under the *Harmelin* test: the test applied for a length of time sentence.[234]

1. First Prong of Harmelin: The Inference of Gross Disproportionality

Deporting criminal lawful permanent residents from a place they have called home leads to an inference of gross disproportionality.[235] As Justice Field observed in his dissent in *Fong Yue Ting*,

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[230] *See Graham*, 560 U.S. at 61.

[231] *See Atkins*, 536 U.S. at 318-19; *Graham*, 560 U.S. at 74-75.

[232] *See supra* Part III B(i).

[233] *See Fong Yue Ting*, 149 U.S. at 730 (noting that deportation involves returning an alien, who fails to comply with the conditions upon which he is admitted to the United States, to his own country).

[234] Deporting a lawful permanent resident is analogous to sentencing a defendant for a length of time. An alien could be deported from the United States from ten years to indefinitely, depending on the crime the alien commits.

[235] *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting).

> [Deportation] is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. . . . [I]f a banishment of the sort described 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.[236]

Similarly, in *Bridges v. Wixon*,[237] Justice Douglas noted in dicta:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. *That deportation is a penalty—at times a most serious one—cannot be doubted.* [238]

Thus, deportation of criminal lawful permanent residents leads to an inference of gross disproportionality. This conclusion leads to the second line of analysis, which compares the lawful permanent resident's punishment to the punishment of other offenders in the same and other jurisdictions.

2. Second Prong of Harmelin: The Comparison

Comparing a lawful permanent residence's sentence—deportation—to the sentence received by other offenders in the same jurisdiction and other jurisdictions reaffirms the inference of gross disproportionality. For example, if a lawful permanent resident and a United States citizen commit an aggravated felony, the lawful permanent resident and the United States Citizen are both likely to serve prison sentences. Indeed, the legislature has already deemed such prison sentence proportionate to the crime under the sentencing guidelines. Thus, at first blush, the United States citizen and the lawful permanent resident are subjected to a "proportional sentence."

Nonetheless, after the lawful permanent resident serves the "proportional sentence," the lawful permanent resident is subject to deportation, which as discussed, is criminal punishment.[239] As such, the lawful permanent resident receives an additional punishment upon the

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[236] *See id.*

[237] Bridges v. Wixon, 326 U.S. 135 (1945).

[238] *Id.* at 154 (emphasis added).

[239] Sullivan, *supra* note 148 (The lawful permanent resident was deported after he served a four-year sentence in an Arizona prison for possessing marijuana for sale).

completion of the first "proportional sentence," whereas, the punishment of the citizen has long ended. Thus, the lawful permanent resident receives a disproportionate punishment compared to citizen offenders in the same and other jurisdictions.

Indeed, as discussed, *supra*, the *Harmelin* test accords great deference to the legislature. However, such deference cannot be accorded in this analysis because, although Congress may have had a punitive intent, Congress did not establish deportation as a sentencing scheme. Consequently, Congress never made a substantive penological analysis to determine whether deportation is an appropriate "sentence." As such, legislative deference cannot be accorded here.

Nonetheless, deportation meets the two-prong test enunciated in *Harmelin*. Thus, labeling deportation as a "civil sanction" inevitably leads to lawful permanent residents being subjected to cruel and unusual punishment, contrary to the spirit of the Eighth Amendment.[240] Accordingly, failure to acknowledge deportation as cruel and unusual punishment is a judicial fiction.[241]

VI. IS THERE A LIGHT AT THE END OF THE TUNNEL?

Despite pitfalls in the current legal framework of deportation, this article does not stand for the proposition that deportation should be abolished. Rather, this article suggests deportation should be labeled as criminal punishment. Recognizing that deportation is criminal punishment and not a civil sanction would help curb double jeopardy violations, cruel and unusual punishment violations, and all other constitutional violations.

A possible solution to remedying these constitutional violations might be to deport an alien immediately after the conclusion of the criminal case, before the alien serves a prison sentence. In so doing, the alien is only tried and punished once for an offence. This suggestion does however have its shortcomings. Although this recommendation may minimize the double jeopardy problem, it may raise equal protection concerns as well as cruel and usual punishment issues. Moreover, it may deprive victims the opportunity to ensure their assailants are adequately punished. However, if this recommendation is adopted, it is important that foreign countries cooperate with the United States to ensure deported aliens are adequately reprimanded. Furthermore, a cost-benefit analysis would need to be conducted to ensure the cost of deporting all aliens would not exceed the

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[240] U.S. CONST. amend. VIII (stating "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[241] *See, e.g.*, Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (finding deportation is not a cruel or unusual punishment).

benefits of other viable options. Despite the pitfalls of this suggested method, this method presents a platform to develop an alternative for curing the problems associated with the current standards for deportation.

Another solution is to merge the criminal and immigration proceedings into one, thereby minimizing the double jeopardy problem. This might entail reviving the Judicial Recommendations Against Deportation [hereinafter, "JRADs"], repealed in 1990, which merged criminal proceeding with the deportation proceeding so the alien faces one trial.[242] The JRAD helped curb constitutional violations in that the JRAD authorized a "judge who convicted an alien of a crime involving moral turpitude to issue a binding recommendation that the conviction not trigger deportation."[243] However, before a recommendation was issued, the state and the prosecuting authorities were given an opportunity to be heard.[244] After such hearing, the presiding judge issued a JRAD.[245] The JRAD, however, had to be issued by the sentencing court.[246]

Thus, the JRAD helped resolve the double jeopardy problem because if an alien was convicted of a crime that would have automatically resulted in deportation, the judge hearing the criminal matter could issue a binding recommendation that the alien not be deported.[247] In so doing, the JRAD also tackled the issue of cruel and unusual punishment. The JRAD also eliminated *ex post facto* issues in that the crime for which the alien was convicted could not be applied in the future as a reason for deportation.[248]

However, the JRAD was criticized on grounds it afforded aliens more due process than that granted to citizens. For example, Senator Simpson observed that through the JRAD, the United States was "in a situation in deportation where the deportees had more due process than did an American citizen."[249] Assuming this statement is true, the goal would be to afford citizens and aliens the same treatment and not to afford aliens more protection than citizens.

CONCLUSION

In sum, this article concludes that deportation should be labeled as criminal punishment. The precedential labeling of deportation as a civil

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[242] *See* 8 U.S.C. § 1251(b) (1986) (repealed 1990).
[243] *See id.*
[244] *Id.*
[245] *Id.*
[246] Janvier v. United States, 793 F.2d 449, 451 (2d Cir. N.Y. 1986).
[247] 8 U.S.C. § 1251(b) (1986) (repealed 1990).
[248] *See id.*
[249] *See* 136 CONG. REC. S17, 109 (Oct. 26, 1990) (statement of Senator Alan Simpson).

sanction or the hint by the Supreme Court that deportation may be criminal punishment shields the constitutional issues associated with deportation from being tackled. As this article establishes, aliens faced with deportation are subject to double jeopardy violations and cruel and usual punishment, which are contrary to the spirit of the Constitution. Thus, it is imperative for the judiciary to label deportation as criminal punishment. Such labeling may open doors to further discussions regarding reforming substantive and procedural deportation laws to minimize constitutional violations.