
DEPORTATIONS, REMOVALS AND THE 1996 IMMIGRATION ACTS: A MODERN LOOK AT THE EX POST FACTO CLAUSE

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“There are those that look at things the way they are, and ask why? I dream of things that never were, and ask why not.”—Robert F. Kennedy**

I. INTRODUCTION

The United States Supreme Court should extend the Ex Post Facto Clause¹ to conviction-related deportation/removal proceedings.² In many respects, deportation can be viewed as a punishment that is more severe than confinement because removal from home, family, and country can mean permanent exile,³ in some cases to a country the deportee may have never actually known.⁴ As to the effects of deportation, Justice Brandeis stated in 1919:

** Robert Kennedy's 1968 Presidential campaign speeches paraphrasing George Bernard Shaw, available at http://www.cyber-nation/victory/quotations/authors/quotes_kennedy-robertf.html; see also Evan Thomas, *RFK's Last Campaign*, NEWSWEEK 46, June 8, 1998.

¹ U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”), art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .”).

² The power for the Supreme Court to undertake judicial review was established quite early in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (Chief Justice Marshall announced the concept of judicial review, stating that a statute in conflict with the Constitution is repugnant to the fundamental law and therefore void).

³ William R. Maynard, *An Immigration Law Primer for the Criminal Defense Lawyer*, 28 VOICE FOR THE DEFENSE 27 (April 1999) [hereinafter MAYNARD].

⁴ *E.g.*, *Marcello v. Bonds*, 349 U.S. 302 (1955) (deported alien had been in the United States since the age of three). Removing criminals from our nation serves a valid purpose; however, removal regardless of the equities involved seems arbitrary,

To deport one who so claims to be a citizen, obviously deprives him of liberty. . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation, without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.”⁵

Our Constitution similarly affords the same due process protection to permanent resident aliens.⁶

Our famous Constitution has room to grow, to develop into a document that is consistent in all respects. The Fourth Amendment refers to freedom from “unreasonable searches and seizures.”⁷ Arguably, it is not reasonable to seize an alien on the basis of a law passed in 1996 for a criminal conviction obtained in 1984. Yet American resident aliens by the thousands⁸ do not enjoy this coveted Fourth Amendment constitutional right. They are seized by federal agents and removed from the United States, forced to leave family, property and business interests behind. All this is possible since they committed a qualifying crime and because deportation is recognized as a civil proceeding.⁹ Serious issues involving procedural and substantive due process of law¹⁰ also arise once immigration agents seize aliens on the basis of the so-called “aggravated felony” convictions they received before the effective dates of the 1996 federal immigration legislation.¹¹ As a result of these extreme legislative actions, the Immigration and Naturalization Service (INS)¹² and civil rights groups urged Congress to enact legislation to restore discretion in

particularly considering that American immigration policy places a high priority on family reunification in admissions. J. Joseph Reina, *Understanding Family-Based Immigration*, STATE BAR OF TEXAS 2003 IMMIGRATION LAW COURSE, Ch. 5.1 (2003).

⁵ *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922).

⁶ *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁷ U.S. CONST. amend. IV.

⁸ *See generally* U.S. Department of Homeland Security, Office of Immigration Statistics, 2003 YEARBOOK OF IMMIGRATION STATISTICS 150 (2004) (The enforcement statistics report that 79,395 criminal aliens were removed during 2003. The yearbook can be found at www.uscis.gov, under Yearbook).

⁹ *See generally* *Marcello v. Bonds*, 349 U.S. 302 (1955); *Mahler v. Eby*, 264 U.S. 32, 39 (1924).

¹⁰ Questions as to whether an alien has received adequate notice or has been subjected to arbitrary and capricious treatment are not addressed in this article that concerns primarily the Ex Post Facto Clause.

¹¹ This legislation is the subject of this article and will be discussed thoroughly throughout the article.

¹² Currently known as the U.S. Citizenship and Immigration Services (USCIS). The USCIS is a bureau of the Department of Homeland Security. *See generally* www.uscis.gov.

federal judges in deportation matters and to provide immigrants with due process protections.¹³

The United States Supreme Court, in its service as the third branch of government, interpreted part of the congressional legislation and ruled during the 2000 term that, absent clear contrary congressional directive, aliens have a right to a federal court habeas corpus hearing.¹⁴ In addition, the Court concluded that an alien retained certain statutory privileges under the immigration laws because nothing in the 1996 immigration legislation indicated that the repeal of the privilege of discretionary relief from deportation applied retroactively.¹⁵ More recently, the Court ruled in *Stogner v. California*¹⁶ that certain enactments violate the Constitution's Ex Post Facto Clause. The writer will establish that *Stogner* strongly supports voiding the retroactive applications of the aggravated felony concept of the 1996 Immigration Acts.

Court rulings that deportation is a civil proceeding, and thus not impacted by the Ex Post Facto Clause, reminded the writer of a conflict he experienced in 1975 when he served as a rookie prosecutor in the Harris County District Attorney's Office in Houston, Texas. As a juvenile court prosecutor, the writer's duties included the termination of parental rights in cases involving child abuse. Texas procedural law classifies a parental termination proceeding as civil in nature.¹⁷ However, the result could punish the accused mother and/or father by removing the child from his parent's custody and supervision. Thus, in many respects, a termination of parental rights penalizes a parent worse than depriving them of their liberty. The consequence magnifies if the termination of their rights occurs under circumstances that raise serious due process questions, such as the lack of an attorney to defend them because of their indigent status.¹⁸

The writer accomplished such a termination in one particular case where the defendant parents, because of their poverty, could not hire a lawyer. The writer, then a father of two toddlers, empathized with the

¹³ Steve Lash, *Deportation power changes are pushed*, HOUS. CHRON., July 29, 1999, at A9.

¹⁴ See *Calcano-Martinez v. INS*, 533 U.S. 348, 350 (2001); See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

¹⁵ See *INS v. St. Cyr*, 533 U.S. 289 (2001); see Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) and Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁶ 539 U.S. 607 (2003).

¹⁷ See TEX. R. CIV. P. 308a (1990) (pertaining to suits affecting the parent-child relationship).

¹⁸ See, e.g., TEX. FAM. CODE ANN. § 107.013(a)(1) (2003) (The court shall appoint an attorney ad litem to represent the interests of an indigent parent who opposes termination of the parent-child relationship).

defendants. What would have happened if an experienced lawyer had spoken on their behalf? The writer's supervising prosecutors could have accepted an alternative, such as supervised visitation until the parents completed anger management and child-rearing counseling. A clearly adversarial proceeding probably would have aided the parents, increasing the chances that their momentarily excessive discipline would not result in a permanent punishment. However, their poverty prevented any meaningful access to the courts. They faced the State of Texas without the aid of a law.

The 1975 Texas law did not provide for court-appointed counsel to assist the indigent parents because Texas law classified parental termination litigation as a civil proceeding. The court battle placed a lawyer against two frightened civilians. The father honestly explained his disciplinary methods, at all times sincerely asserting the "best interest of the child." The mother, apparently petrified at the thought of losing her child, sat mute throughout the trial. The writer anguished over the court's decision, concluding that he had inflicted the worst punishment possible on this accused couple: the life sentence of the loss of their baby.¹⁹ The writer also then expressed the hope that some day our nation's High Court would provide indigents accused of parental neglect or abuse in a civil parental termination hearing with court-appointed counsel because termination is punitive. A few years later, the United States Supreme Court and the Texas Legislature fulfilled that prayer.²⁰

This article seeks to explain how certain retroactive statutes, albeit civil in nature, can have such punitive consequences that they should be constitutionally prohibited. The 1996 IIRIRA legislation,²¹ which replaced the term "deportation" with the concept known as "removal," represents one of those statutes that, in specific circumstances, impacts not only retroactively but also punitively.²² The writer further contends that removal, when specifically conditioned upon a prior conviction, results in a loss of liberty that triggers not only due process protections but also ex post facto prohibitions.²³ In signing one of the 1996 Immigration Acts

¹⁹ The father spanked the child for playing with a can of paint. The mother, even though she did not aid or participate in the corporal punishment, met the same penalty.

²⁰ See generally *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), following *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (the right to court-appointed counsel depends upon the dictates of "fundamental fairness" on a case-by-case basis); TEX. FAM. CODE ANN. § 107.013(a)(1) (2003) (providing for the appointment of attorney for indigent parents in termination proceedings).

²¹ 8 U.S.C. § 1101 *et seq.*

²² See 8 U.S.C. § 1227 (a)(2)(A)(iii) and § 1101 (a)(43)(A)-(U) (1999) (definition and descriptions of aggravated felonies).

²³ This article does not address the constitutionality of removals occasioned upon conduct not resulting in a conviction. 8 U.S.C. § 1227 (a) refers to non-conviction criminal-conduct grounds for removal. Included in this category are alien smuggling,

into law, President Bill Clinton noted the inherent unfairness in fighting terrorism by including regular hard-working immigrants. "This bill also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term legal residents. . . ." ²⁴ In signing one of the 1996 Immigration Acts into law, President Clinton noted the inherent unfairness of targeting hardworking immigrants in the fight against terrorism. These resident aliens came to America for a better life, to find employment and education. As the writer will later describe, the statute that the former president commented about has unyielding rules and often highly punitive deportations that separate families in the name of protecting our borders.

Finally, the paper addresses much needed reforms involving the 1996 Immigration Acts. A number of scholars, civil rights leaders, INS officials and jurists have expressed concerns about the regressive and punitive impact of the 1996 legislation, ²⁵ a situation further aggravated by the attack on the World Trade Center towers on September 11, 2001. ²⁶ For example, Anthony Lewis, a prominent columnist for the New York Times, called for reform, referring to the anti-immigrant zealotry and the need to return to the concepts of American decency. ²⁷ Other scholars have argued that the 1996 Immigration Acts, particularly the aggravated

marriage fraud, false citizenship claim, national security violations, and drug abuse and addiction.

²⁴ Statement by President William Jefferson Clinton Upon Signing S. 735 [The Antiterrorism & Effective Death Penalty Act of 1996], 142 CONG. REC. 961-3, 110 Stat. 3009-749 (1996).

²⁵ See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U.L.REV. 97 (1998); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 15 (2003). The writer prefers classification not as an immigration scholar but as a criminal law and procedure scholar on the strength of his judicial and prosecutorial experience. See also Steve Lash, *Deportation power changes are pushed*, HOUS. CHRON., July 29, 1999, at A9.

²⁶ See Edward Hegstrom, *Experts Say Immigrants Have Few Rights in Country*, HOUS. CHRON., Sept. 20, 2001, at A8.

²⁷ Anthony Lewis, *Abroad at Home; At the Heart of Liberty*, NEW YORK TIMES, June 30, 2001, at A15; see also *Immigrants Locked Up 3 Years Without Trials*, HOUS. CHRON., Apr. 2, 2001, at A15.

felony provision, violate international law.²⁸ Jurists have also noted the plethora of cases generated by this highly controversial legislation.²⁹

II. CONCERNS OVER THE IMMIGRATION ACTS IN THE AMERICAN IMMIGRANT COMMUNITY

Simon Wiesenthal, a victim of Nazi atrocities, and later active in the effort to hunt war criminals and bring them to justice, once rationalized his zeal by warning that people should always be cognizant of history to avoid its negative repetition.³⁰ Our American history unfortunately has been replete with such examples of racial and ethnic injustice, such as the days of slavery, the frauds perpetrated on Native Americans, the passage of legislation to exclude Chinese immigrants, the inclusion by the United States of Mexican Texas over the complaints in 1845 of Senator John C. Calhoun of adding an inferior group of “colored” people³¹ to the white American population, and the public school segregation of both blacks

²⁸ The standards utilized by the European Court of Human Rights provide that a deportation order may be overturned when the interests of the non-citizen outweigh those of the United States. Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293 (2003).

²⁹ See, e.g., *St. Cyr v. INS*, 229 F.3d 406, 408 (2d Cir. 2000), *aff'd*, *INS v. St. Cyr*, 533 U.S. 289 (2001) (changes in immigration consequences of a conviction require clear congressional intent in order to be imposed retroactively). As to retroactive effect of plea agreements, see, e.g., *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284, 290-91 (4th Cir. 2002); *Perez v. Elwood*, 294 F.3d 552, 559-60 (3rd Cir. 2002); *Domond v. INS*, 244 F.3d 81, 86 (2nd Cir. 2001); *Leguerre v. Reno*, 164 F.3d 1034, 1037 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000). As to differences in defining the term or as to the effect of an “aggravated felony,” see e.g., *Leocal v. Ashcroft*, No. 03-583, 2004 U.S. LEXIS 7511 (U.S. Nov. 9, 2004) (alien’s DUI offense, that resulted in bodily injury to another, was not a crime of violence/aggravated felony, since the statutory phrase “use of physical force against the person or property of another” suggested a higher degree of intent than negligent or merely accidental conduct; also, a Florida DUI statute does not describe a crime that carries the risk of having to use such force in committing a crime); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Lara-Ruiz v. INS*, 241 F.3d 934, 942 (7th Cir. 2001) (aliens convicted of an aggravated felony are ineligible for cancellation of removal); *Le v. U.S. Att’y Gen.*, 196 F.3d 1352 (11th Cir. 1999).

³⁰ See *BALT. JEW. TIMES*, Feb. 24, 1989 [title and page unknown], available at www.wiesenthal.com.

³¹ DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 137 (University of New Mexico Press, 1973) (quoting CONG. GLOBE, 30th Cong., 1st Sess. 98-99). The highly respected Calhoun stated, “Ours, sir, is the Government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing these colored races on an equality with the white race.” *Id.* at 135. (emphasis added).

and Latinos through the 1970s.³² These historically racist practices have been substantially outlawed. By the same token, the federal government's abusive and constitutionally questionable practices in the immigration arena should cease. Such a result will mean radical departures from judicial precedence, such as eradicating the fiction that any deportation-related abuses do not constitute punishment.³³ Even conceding that deportation is civil in general, it unquestionably loses that characteristic when removal is conditioned upon a penal conviction.³⁴

Specific incidents of injustice might assist the reader in understanding the 1996 Immigration Act's potentially horrific impact.³⁵ One involves a woman who lived in the United States for twenty-eight years. In 1989 she was convicted of writing a forged check for under twenty dollars. The conviction qualified her, with the passage of the 1996 Immigration Acts and the retroactive application of the law, to banishment from the United States and from her mother to a country she would not likely recall because she immigrated at the age of four.³⁶ The writer further recalls the news story of a decorated Vietnam veteran in South Texas who received his notice from the INS to appear and show cause why he should not be deported. It seems this war hero had a drinking problem that resulted in a felony driving while intoxicated conviction. He also had been sober for several years when he faced deportation.³⁷ The federal

³² See, e.g., Guadalupe Salinas, *Mexican Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929 (1971); Jorge Rangel & Carlos Alcala, *De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307 (1972).

³³ E.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (deportation is not punishment); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (since deportation is not punishment, neither is indefinite incarceration pending deportation a form of punishment); *United States v. Yacoubian*, 24 F.3d 1 (9th Cir. 1994).

³⁴ See 110 Stat. 3009-597, § 304 (b), creating 8 U.S.C. § 1229b (a)(3) (Supp. V 1994); see definition of aggravated felony, 8 U.S.C. § 1101 (a)(43).

³⁵ Some incidents do not raise sympathy, such as the case where an alien was convicted of possession with the intent to deliver two pounds of cocaine, *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2003), and the case of Tuan Ahn Nguyen, *Nguyen v. INS*, 533 U.S. 53 (2001), convicted in 1992 of child sexual assault. Erroneously believing he was a U.S. citizen by virtue of his American soldier father, a soldier in Vietnam, Nguyen, as a deportable alien, faced return to Vietnam which he left at the age of six. See Patty Reinert, *Supreme Court ruling means veteran's son may be deported*, HOUS. CHRON., June 12, 2001, at A4.

³⁶ See Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIG. L.J. 589, 591 (1998); see Sarah Kershaw & Monica Davey, *Plagued by drugs, tribes revive ancient penalty*, N.Y. TIMES, Jan. 18, 2004, at 1 (reference to banishment as "severe" and "excessive").

³⁷ See Mark Bradford, Note, *Deporting Nonviolent Violent Aliens: Misapplication of 18 U.S.C. §16 (B) to Aliens Convicted of Driving Under the Influence*, 52 DE PAUL L. REV. 901 (2003).

appellate court for Texas later concluded that felony drunk driving does not meet the “aggravated felony” definition.³⁸

This erroneous application of the law did not prevent the extreme punitive result of death. One of the nineteen aliens who died in the suffocating heat of an enclosed tractor trailer in Victoria, Texas in May 2003 had been improperly removed as a criminal alien for a driving while intoxicated conviction. Mateo Salgado, a twenty-year resident of Houston, served his sentence for driving while intoxicated and then received a government-sponsored trip to the Mexican border. Upon his removal, Salgado called Houston and told his family that he would return soon.³⁹ He did return, but the family could only have access to his corpse.⁴⁰ He should never have been exposed to the risks of sneaking back into the country where he was a permanent resident alien who had not breached his contract to remain in the United States. There are too many other stories that reflect an ugly side of our nation’s current immigration policy.⁴¹

III. CONGRESSIONAL PLENARY POWER IN THE AREA OF IMMIGRATION AND NATURALIZATION

The courts of the United States have concluded that Congress enjoys plenary, i.e., full and complete, power in the area of immigration.⁴² As a sovereign nation, America unquestionably possesses inherent power to deport aliens.⁴³ The nation also has the power to exclude undesirables:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every indepen-

³⁸ See, e.g., *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). The writer does not extend this principle to a death resulting from driving while intoxicated, even a first-time incident. This would, in the opinion of the writer, constitute a crime of violence.

³⁹ Edward Hegstrom, *Illegal immigrant died trying to return to family*, Hous. Chron., May 23, 2003, at A33.

⁴⁰ *Id.* Salgado was not identified until more than a week after the tragedy.

⁴¹ E.g., Ana Radelat, *Banned at the Border*, HISPANIC 41-46 (Feb. 1998).

⁴² See U.S. CONST. art. I, § 8, cl. 4; see, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *De Canas v. Bica*, 424 U.S. 351, 354 (1976); see generally Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 15 (2003).

⁴³ *Tiaco v. Forbes*, 228 U.S. 549, 556-557 (1913). The Supreme Court also held in the *Chinese Exclusion Cases* that Congress has the authority to exclude nationals of another country. *Chae Chan Ping v. United States*, 130 U.S. 581, 603-604 (1889).

dent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.⁴⁴

The Court further explained that the powers to regulate foreign commerce and admit subjects of other nations to citizenship are sovereign powers “restricted in their exercise only by the Constitution itself and considerations of public policy and justice. . . .”⁴⁵ The Court defers to Congress on matters involving purely “political questions,” but we see how the Court later conceded that it had power in the area of political questions if violations of the constitutional rights of persons in the various states existed.⁴⁶

Unquestionably, one aspect of a nation’s sovereignty is the power to regulate the admission of aliens. The United States, like any other nation, can base its immigration policy on racial, religious or other suspect grounds.⁴⁷ However, once a person attains permanent resident alien status, American constitutional standards apply.⁴⁸ For years, the treatment of aliens differed on the basis of which government conducted the discriminatory treatment. *Yick Wo v. Hopkins*⁴⁹ involved state action while the *Chinese Exclusion Case*⁵⁰ involved federal law. The Supreme Court did not develop an equivalent equal protection standard for federal action until its decision in *Bolling v. Sharpe*⁵¹ in 1954. Even before this date, however, the Court had ruled that illegal entrants must be afforded constitutional protections in criminal proceedings.⁵²

*Fong Yue Ting v. United States*⁵³ addressed the validity of a federal law that required a Chinese person to establish a certificate of residence by the word of at least one white citizen. The Court upheld this clearly racist statute on the basis of international law and particularly on the absolute and unqualified right of a nation to expel or deport foreigners, equating

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at 604.

⁴⁶ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Baker v. Carr*, 369 U.S. 186, 211-213 (1962).

⁴⁷ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (requiring an affidavit from a white citizen to establish the right of a Chinese alien to a certificate of residence). Persons of the Chinese race were not deemed to be credible witnesses.

⁴⁸ See, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (voiding of a city ordinance on equal protection grounds since the discrimination appeared to be based on hostility towards the race and nationality of Yick Wo and his fellow litigants in the laundry business).

⁴⁹ *Id.*

⁵⁰ *Chae Chan Ping* 130 U.S. 581, 589.

⁵¹ 347 U.S. 497 (1954) (school segregation outlawed in the District of Columbia under the Due Process Clause of the Fifth Amendment).

⁵² *Wong Wing v. United States*, 163 U.S. 228 (1896) (voiding a section of the 1892 immigration act which called for imprisonment at hard labor without a trial).

⁵³ 149 U.S. 698 (1893).

this power to their right to prohibit and prevent their entrance.⁵⁴ The Court additionally stated:

The order of deportation is 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*. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions. . . . He has not, therefore, been deprived of life, liberty or property without due process of law. . . .⁵⁵

The Court concluded by classifying this issue as one best left for resolution to the political department of the government.⁵⁶

IV. AEDPA AND IIRIRA: THE 1996 IMMIGRATION ACTS AND THE "AGGRAVATED FELONY"

The Antiterrorism and Effective Death Penalty Act (AEDPA),⁵⁷ combined with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁵⁸ [hereinafter referred to as the 1996 Immigration Acts] extensively amended the Immigration and Nationality Act of 1952 (INA).⁵⁹ The INA historically provided in section 212 (c) that the Attorney General could exercise discretion in deciding whether to waive deportation of an alien otherwise subject to deportation or removal.⁶⁰ The 1996 Immigration Acts changed aspects of this law by restricting the circumstances under which aliens could seek relief from the Attorney General or other officials.⁶¹ Other major changes involving the administrative and military detention of aliens came with the passage of the PATRIOT Act, an acronym for the real title of the legislation, "Unifying and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."⁶²

IIRIRA, enacted a few months after AEDPA, went a step further and repealed section 212 (c), replacing it with a new section excluding from the class entitled to relief from removal those persons who had been *pre-*

⁵⁴ *Id.* at 707.

⁵⁵ *Id.* at 730 (emphasis added).

⁵⁶ *Id.* at 713. One hundred years later, Congress, the political department, enacted the punitive immigration acts that are the subject of this article.

⁵⁷ Pub. L. 104-142, § 401-443, 110 Stat. 1214, 1258-81 (1996), codified at 18 U.S.C. § 2339B (a) (7) (2001) [hereinafter 1996 IMMIGRATION ACTS].

⁵⁸ Pub. L. 104-208, Div. C, 110 Stat. at 3009-546 through 3009-724 (1996), 8 U.S.C. § 1101 *et seq.* (West 2000) [hereinafter 1996 IMMIGRATION ACT].

⁵⁹ 66 Stat. 163 (1952), 8 U.S.C. § 1101 *et seq.* [hereinafter INA].

⁶⁰ *Id.* § 212 (c).

⁶¹ See 8 U.S.C. § 1229b(a) (cancellation of removal); § 1229b(b) (cancellation); § 1229c (voluntary departure); § 1231(b)(3) (restriction of removal); § 1225(a)(1) (withdrawal of application for admission); § 1158 (political asylum).

⁶² Pub. L. 107-56, 115 Stat. 272 (2001).

viously “convicted of any aggravated felony.”⁶³ Congress first utilized the “aggravated felony” concept in 1988, making an alien deportable if convicted of such a described felony, regardless of how long before the crime had been committed.⁶⁴ The 1996 Immigration Acts went even further in defining the term “aggravated felony,” which, for example, now includes convictions for theft or burglary if the alien receives a term of imprisonment of at least a year (as opposed to five years in the pre-IIRIRA era).⁶⁵ The amendment further includes convictions for fraud and deceit where the victim lost over \$10,000 (as opposed to \$200,000 before IIRIRA).⁶⁶ Criminal defense practitioners now have to contend with the dilemma, for example, that a resident alien with a pre-1996 conviction in which he received a one-year suspended sentence for misdemeanor assault causing bodily injury became removable on September 30, 1996, the effective date of the second Immigration Act and the date the resident alien’s previous conviction legislatively transformed from a misdemeanor into an “aggravated felony.”⁶⁷

Finally, Congress expanded the term “aggravated felony” to include any “crime of violence”⁶⁸ resulting in a prison sentence of at least one year (as opposed to five years before).⁶⁹ The term “crime of violence” includes offenses which have as an element “the use, attempted use, or threatened use of physical force against the person or property of another” or “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.”⁷⁰

⁶³ 110 Stat. 3009-597, § 304 (b), creating 8 U.S.C. § 1229b (a) (3) (1994 ed., Supp. V) (emphasis added); see 8 U.S.C. § 1101 (a) (43) (definition of aggravated felony).

⁶⁴ Anti-Drug Abuse Act of 1988, 8 U.S.C. § 1101(a)(43) (2000).

⁶⁵ Compare 8 U.S.C. § 1101(a)(43)(G) (Supp. V 1994) with 1994 ed.

⁶⁶ Compare 8 U.S.C. § 1101(a)(43)(M)(i) (Supp. V 1994) with 1994 ed.

⁶⁷ Maynard, *supra* note 3, at 29; INA, 8 U.S.C. § 1101 (a)(43)(F) (2000). Appellate courts have held that misdemeanor shoplifting convictions with a one-year suspended sentence or potential sentence amount to aggravated felonies. *E.g.*, United States v. Pacheco, 225 F.3d 148, 153 (2d Cir. 2000); United States v. Graham, 169 F.3d 787, 791-92 (3rd Cir.), *cert. denied*, 528 U.S. 845 (1999).

⁶⁸ 18 U.S.C. § 16 (Supp. V 1994); INA, 8 U.S.C. § 1101 (a)(43)(F) (2000).

⁶⁹ Compare 8 U.S.C. § 1101 (a) (43) (F) (1994 ed., Supp. V) with (1994 ed.). Apparently, an actually served sentence of 364 days in jail custody does not meet the one-year requirement. See Maynard, *supra* note 3, at 28; see also Stanley G. Schneider, *Post-Conviction Remedies*, State Bar of Texas 2003 Immigration Law Course, Ch. 3.1 (2003).

⁷⁰ 18 U.S.C. § 16(a), (b) (2000). Around the United States, many aliens have appeared at show cause hearings and have been removed for the “crime of violence” of driving while intoxicated. The Fifth Circuit later reversed its previous ruling and held that driving while intoxicated, without aggravating factors, is not a crime of violence. United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001). *Contra* Tapia-Garcia v. INS, 237 F.3d 1216, 1223 (10th Cir. 2001).

The sovereignty rights and relations between the state and the federal governments begin to fade with the enactment and enforcement of this provision of the 1996 Immigration Acts.

The 1996 Immigration Acts raise serious constitutional questions because the legislation multiplied the number of so-called “aggravated felons” by expanding the definition and by applying the concept retroactively.⁷¹ One might determine that some of these new crimes that qualify for the additional sanction of removal (deportation) are neither “aggravated” nor “felonies.” The term “aggravated,” for example, when describing a crime, denotes that the criminal activity has been made worse, more severe, or less excusable.⁷² Some of the offenses included do not involve any violence, and thus seem to be far from “aggravated.”

In addition, the 1996 Immigration Acts conflict with other federal legislation that define a “felony” as any offense punishable by death or imprisonment for a term *exceeding one year*.⁷³ Thus, a number of so-called “felonies” under the immigration statutes qualify as misdemeanors under the federal criminal code.⁷⁴ The description of an aggravated felony in the 1996 Immigration Acts qualifies state crimes, including misdemeanors punishable by one year, for deportation.⁷⁵ One student writer comments, “These laws are not only cruel, but also wildly inconsistent, meting out the same punishment to lawful permanent residents who commit a misdemeanor offense as they do to undocumented non-citizens who enter the country to commit a terrorist act.”⁷⁶

⁷¹ See U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. amend. 5; see generally *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1999) (due process/fair notice concerns created by retroactive legislation); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the Due Process Clause of the Fifth Amendment reaches congressional and other federal action).

⁷² WEBSTER'S DELUXE UNABRIDGED DICTIONARY 36 (Jean McKechnie ed., New World Dictionaries 1958).

⁷³ 18 U.S.C. § 1(1) (1984) (emphasis added). Any other offense is a misdemeanor. 18 U.S.C. § 1(2). Section 1 was repealed by the Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, §§ 211-239, 98 Stat. 1837, 1987, 2027 (1984). Pub. L. No. 98-473, Title II § 218(a)(1), Oct. 12, 1984, 98 Stat. 2027. The historical definition of a felony continued in U.S. SENTENCING GUIDELINES MANUAL, § 4A1.2(c) (1998). Congress threw a curve, however, with its 1996 definition and examples of aggravated felonies. See 8 U.S.C. § 1101(a)(43)(A)-(U) (1999).

⁷⁴ See 18 U.S.C. § 1(2) (1984).

⁷⁵ E.g., TEX. PEN. CODE ANN. § 1.07(23), (31) respectively provide that a felony includes an offense punishable by death or imprisonment in a penitentiary and a misdemeanor is one punishable by fine, by confinement in jail, or by both. The maximum punishment for a misdemeanor is confinement in jail for a term not to exceed one year. TEX. PEN. CODE ANN. § 12.21(2) (1996).

⁷⁶ Cook, *supra* note 23, at 327-28.

In an Orwellian⁷⁷ sweep, deportations became “removals.”⁷⁸ Those once described as excludable became “inadmissible.”⁷⁹ However, the most critical changes related to those who became eligible for removal. Congress mandated that the Attorney General shall take into custody any alien who is “deportable.”⁸⁰ As to aggravated felonies, the Attorney General, subsequent to the effective date of the 1996 Immigration Acts, concluded that the Attorney General’s Office did not have any authority to waive deportation.⁸¹

The federal code now permits several avenues for removal. One primary category for removal includes aggravated felony convictions.⁸² These convictions include murder and rape,⁸³ drug trafficking,⁸⁴ a crime of violence that received a term of imprisonment of at least one year,⁸⁵ burglary or theft for which the term of imprisonment is at least one year,⁸⁶ and even an attempt or a conspiracy to commit an offense describe in this section.⁸⁷

Crimes involving moral turpitude, i.e., dishonesty, constitute another category that makes an alien eligible for removal.⁸⁸ The law now provides that an alien is deportable if he is convicted of a crime involving moral turpitude committed within five years after admission⁸⁹ and the conviction is for a crime “for which a sentence of one year or longer may be imposed.”⁹⁰ The law also allows removal of an alien who at any time after admission is convicted of two or more crimes involving moral turpi-

⁷⁷ GEORGE ORWELL, 1984, 45 (1949) (reference to the euphemistic replacement of words).

⁷⁸ 110 Stat. 3009-620, 3009-621, Pub. L. 104-208 (1996).

⁷⁹ *Id.* at 3009-619.

⁸⁰ Congress apparently did not succeed completely in their Orwellian efforts. The words “removal” and “deportation” appear throughout the statute.

⁸¹ *See* St. Cyr, 533 U.S. 289, 297 (2001).

⁸² 8 U.S.C. § 1101 (a)(43)(A)-(U) (1999). The term “aggravated felony” applies to any offense described in this section whether in violation of federal or state law. The term even applies to “such an in violation of the law of a foreign country for which the term of imprisonment was completed with the previous 15 years.” 8 U.S.C. § 1101 (a)(43) (1999).

⁸³ 8 U.S.C. § 1101 (a)(43)(A) (1999).

⁸⁴ 8 U.S.C. § 1101 (a)(43)(B) (1999).

⁸⁵ 8 U.S.C. § 1101 (a)(43)(F) (1999).

⁸⁶ 8 U.S.C. § 1101 (a)(43)(G) (1999).

⁸⁷ 8 U.S.C. § 1101 (a)(43)(U) (1999).

⁸⁸ 8 U.S.C. § 1227 (a)(2) (1999).

⁸⁹ 8 U.S.C. § 1227 (a)(2)(A)(i) (I) (1999). The statute provides for a ten-year rule for certain aliens who have provided information that has substantially contributed to the success of an investigation or prosecution of a criminal organization or enterprise. 8 U.S.C. § 1255 (j) (1999); 8 U.S.C. § 1101 (a)(15)(S)(i) (I) (1999).

⁹⁰ 8 U.S.C. § 1227 (a)(2)(A)(i) (II) (1999).

tude, so long as the two crimes do not arise out of a single scheme of criminal misconduct.⁹¹

The INA defines an aggravated felony by listing twenty-one classifications and grades of crimes.⁹² Until 1984, the federal criminal code defined a felony as an offense punishable by imprisonment for a term exceeding one year.⁹³ The current sentencing classification continues the practice of classifying the lowest felony as one that carries “more than one year” imprisonment.⁹⁴ Class A misdemeanors are those in which the maximum term of imprisonment authorized is *one year or less* but more than six months.⁹⁵ However, when Congress amended the INA through the 1996 Immigration Acts, it included convictions for a misdemeanor as an “aggravated felony” when it specifically included a crime of violence or theft or burglary offenses for which the term of imprisonment is at least one year.⁹⁶ The legality of the contradiction necessarily has to be addressed by Congress or the courts. That one-day difference in federal criminal law and immigration law effectively increases the number of permanent resident aliens who need to worry about their eventual removal from the United States.⁹⁷ What makes this concern of even greater constitutional impact is the decision by Congress to apply the aggravated felony label “to an offense described in this paragraph whether in violation of Federal or State law” and to any such offense “regardless of whether the conviction was entered *before, on, or after September 30, 1996.*”⁹⁸

Consequently, the 1996 Immigration Acts create serious conflicts for the constitutional right to procedural and substantive due process of law under the Fifth Amendment to the United States Constitution. Procedural due process of law guarantees all persons in the United States the right to notice of the rules by which our conduct will be regulated and

⁹¹ 8 U.S.C. § 1227 (a)(2)(A)(ii) (1999). Under this provision, two separate shoplifting crimes may result in removal. See Maynard, *supra*, note 3, at 31.

⁹² 8 U.S.C. § 1101 (A)—(U).

⁹³ 18 U.S.C. § 1 (1984), *repealed by Sentencing Reform Act of 1984*, Pub. L. 98-473, Title II, §§ 211-239, 98 Stat. 1837, 1987, 2027 (1984); U.S. SENTENCING GUIDELINES MANUAL §? 4A1.2(c) (1998) (For sentencing purposes, a felony offense means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed) (emphasis added).

⁹⁴ 18 U.S.C. § 3559 (a)(5) (2000).

⁹⁵ 18 U.S.C. § 3559 (a)(6) (2000) (emphasis added).

⁹⁶ 8 U.S.C. § 1101 (a) (43) (G); 8 U.S.C. § 1101 (a)(43)(P), (R), and (S).

⁹⁷ Philip Martin and Elizabeth Midgley, *Number of Foreign-Born Reaches All-Time High in U.S.—up to 32.5 Million*, at <http://www.hispanicvista.com/html3/061603gi.htm>.

⁹⁸ 8 U.S.C. § 1101 (a)(43) (emphasis added). See generally 8 U.S.C. § 1101 (a)(48)(A),(B). Congress also included attempts and conspiracies to commit an enumerated offense, but the Congress inadvertently or oddly excluded solicitations to commit a crime.

punished. Permanent resident aliens who plead guilty to a crime at a time when punitive removal orders are not mandated expect to move on to a life free from further government control. In addition, a law that forecloses any opportunity for relief must be categorized as one that is arbitrary and capricious. The 1996 Immigration Acts provide that an immigration judge may not consider mitigating factors; such factors allegedly are not relevant because everything turns on whether the alien was convicted of an “aggravated felony.” In addition, the deportation is not subject to judicial review.⁹⁹ The Supreme Court addressed this patently questionable provision in *INS v. St. Cyr*.¹⁰⁰ The Court resolved the constitutional concern by holding that certain aliens could not be deported retroactively and that Congress did not intend to eliminate habeas corpus in these limited circumstances.¹⁰¹

V. THE SUPREME COURT’S DEPORTATION RULINGS—A CONSTITUTIONAL ENIGMA?

*Harisiades v. Shaughnessy*¹⁰² exemplifies a rather extreme circumstance. The Supreme Court in *Harisiades* permitted the deportation of a legal resident alien because of membership in the U.S. Communist Party. The membership occurred at a time before U.S. law specifically outlawed such activity. The Court noted that the involved aliens had been “offered naturalization, with all of the rights and privileges of citizenship, conditioned only upon open and honest assumption of undivided allegiance to our Government.”¹⁰³ However, the dissent questioned how the majority could uphold the view that “the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate.”¹⁰⁴ The dissent also noted that “the power of deportation is . . . an *implied* one. The right to life and liberty is an *express* one. Why this *implied* power should be given priority over the *express* guarantee of

⁹⁹ IIRIRA §§ 304 (a), 306 (a)(2) (codified at 8 U.S.C. § 1252 (a)(2) (C)).

¹⁰⁰ 533 U.S. 289 (2001).

¹⁰¹ *Id.* at 320-26.

¹⁰² 342 U.S. 580 (1952); *see also* *Marcello v. Bonds*, 349 U.S. 302 (1955) (non-citizen eligible for deportation for offense committed several years before the federal deportation law enacted even though alien had been in the United States since the age of three); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (no *ex post facto* claim where Congress in 1920 added deportation as an additional sanction to the conviction for prior violation of the Selective Service Act and the Espionage Act; the Court cited the safety and welfare of society as a factor).

¹⁰³ *Harisiades*, 342 U.S. at 585. American citizenship is not a bar to deportation. If the government can establish fraud, then the naturalization can be set aside and the suspect can be deported. *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950).

¹⁰⁴ *Harisiades*, 342 U.S. at 598 (quoting from *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

the Fifth Amendment has never been satisfactorily answered.”¹⁰⁵ Fifty years later, this nation still has not directly rationalized this constitutional aberration.

*Galvan v. Press*¹⁰⁶ represents another deportation to rid the United States of an alien affiliated with the Communist Party. Galvan became a resident of the United States in 1918. He joined the Communist Party from 1944-46. The Government then deported him in 1950, even though the U.S. Constitution allowed Communist Party candidates to appear on California ballots. Justice Frankfurter, in upholding the deportation on *stare decisis* grounds, nevertheless questioned the practice by stating: “And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the Ex Post Facto Clause, even though applicable only to punitive legislation, should be applied to deportation.”¹⁰⁷

VI. DEPORTATIONS/REMOVALS CONSTITUTE PUNISHMENT

A. *The Constitutional Basis for Deportations*

The dissents in *Fong Yue Ting*¹⁰⁸ are noteworthy. Justice Brewer takes judicial notice of more than 100,000 resident aliens, persons who have lawfully entered the United States with the intention to remain.¹⁰⁹ The justice notes that those “who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, [a concept that] has long been recognized by the law of nations.”¹¹⁰ On the question whether deportation constitutes punishment, Justice Brewer emphatically states:

Deportation is punishment. It involves first an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property. . . . It needs no citation of authorities to support the proposition that deportation is punishment. . . . But punishment implies a trial: “No person shall be deprived of life, liberty, or property, without due process of law.”¹¹¹

¹⁰⁵ *Id.* at 599.

¹⁰⁶ 347 U.S. 522 (1954).

¹⁰⁷ *Id.* at 531. For support that some deportations are downright arbitrary, see *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (alien female married an American while she worked with the U.S. government in Germany; the Attorney General determined confidentially that she posed a risk to the United States; Court reasoned that it was not for any court to review the actions of the political branch of government in excluding a given alien).

¹⁰⁸ *Fong Yue Ting*, 149 U.S. at 698.

¹⁰⁹ *Id.* at 734. The most recent census reports that the United States has over thirty-one million non-citizen residents.

¹¹⁰ *Id.* at 740-741

¹¹¹ *Id.* at 746.

It will later be shown how individuals, later deemed removable under the 1996 Immigration Acts, have been subjected to a “trial,” even if they did not know at the time of their plea of guilty that they would face further punishment, i.e., removal, in the future.

Interestingly, Justice Field, the author of the opinion in the *Chinese Exclusion Case*, also dissented in *Fong Yue Ting*. He begins by noting “a wide and essential difference” between exclusion and deportation of those who have acquired a residence in the United States.¹¹² He notes that the majority opinion is replete with citations to support the exclusion of aliens but only a few loose observations as to the national power to expel and deport aliens domiciled in the United States.¹¹³

The writer agrees that individuals who entered the United States with fraudulently obtained permission deserve to have their status revoked and to be removed from the United States. In those cases, the federal government never had a genuine opportunity to accept the alien as a resident. Deception invalidated the agreement, failing at the stage of assent to the terms. Similarly, individuals who violate the implicitly given promise of abiding by the laws of the states and of the United States during their status as permanent resident aliens can lose that status. Our procedural due process jurisprudence would put those immigrants on notice that their invitation to become resident aliens, and possibly later American citizens, would be rescinded upon the violation of certain laws. The real debate centers on the practice of enacting ex post facto laws, a practice so abhorred for historical reasons by our Founding Fathers that it received not one comment only but instead two prohibitive directives, one for the national government and one for the states.¹¹⁴

The United States Constitution does not actually give Congress plenary power over *immigration*; it instead gives the Congress the power to establish a “uniform Rule of Naturalization.”¹¹⁵ This is far from granting Congress absolute immunity and unrestricted authority in the “removal” of individuals who have committed “aggravated felonies,” words that have made their way into our legal lexicons through an Orwellian twist.¹¹⁶ Congress unquestionably has power to determine who has earned the coveted title of American citizen through naturalization. Because the

¹¹² *Id.* at 756.

¹¹³ *Id.* at 756.

¹¹⁴ See U.S. CONST., Art. I, § 9, cl.3 (“No Bill of Attainder or ex post facto Law shall be passed.”) & Art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . .”)

¹¹⁵ U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

¹¹⁶ ORWELL, *supra* note 77, at 45. Orwell’s character discusses Newspeak by stating, “It’s a beautiful thing, the destruction of words. Of course the great wastage is in the verbs and adjectives, but there are hundreds of nouns that can be got rid of as well.” In 1983, Walter Cronkite wrote a preface to this book in which he asserted: “We hear Newspeak in every use of language to manipulate, deceive, to cover harsh realities with the soft snow of euphemism.” *Id.* at 1.

Constitution remains to this date explicitly silent on the authority of the United States to engage in the practice of expatriation or banishment of resident aliens, then the courts must identify a provision that implicitly places this authority in the Congress. Assuming *arguendo* that the Naturalization Clause grants Congress this power implicitly, then the remaining question is whether the explicit provisions of the Constitution that provide all persons within the jurisdiction of the United States the guarantees of equal protection and due process apply to resident aliens as well.¹¹⁷ The writer contends that a resident alien, a person who has gained entitlement to a greater degree of protection than undocumented aliens, can nonetheless legally face deportation or removal for having been convicted of a qualifying crime. However, the writer asserts that such punitive actions can constitutionally occur only if the legislative enactments overcome *ex post facto* concerns and meet procedural and substantive due process standards as guaranteed by the Fifth Amendment.¹¹⁸

B. *The Role of the Common Law in American Jurisprudence*

As the United States and her people battled through the courts with Watergate and other civil rights crises, jurists making the ultimate assessments oftentimes determined whether rights and privileges existed at common law. To the American student of the law, it appears that our courts invite an inherent conflict by mixing principles and attitudes forged during very different periods of time. Early decisions invited the new republic to discard the common law whenever inapplicable to the situation or repugnant to other rights and privileges.¹¹⁹ Thus, the American common law model, especially beginning in the mid-1950s, provided progressive pronouncements.¹²⁰ On the other hand, the English model adheres to traditional principles, not even changing where sound reason-

¹¹⁷ See *Yick Wo v. Hopkins*, 118 U.S. 356, 368-370 (1886) (The Fourteenth Amendment extends to the protection of non-citizens).

¹¹⁸ U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty or property, without due process of law . . .") (governing federal conduct). See also U.S. CONST. amend. XIV (governing state conduct); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-370 (1886).

¹¹⁹ *Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815); see generally *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829).

¹²⁰ E.g., *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (the precise contours of official immunity do not have to be derived from the strict liability rules of the often arcane English common law); *Griffin v. Illinois*, 351 U.S. 12 (1956) (an indigent defendant must be furnished with a trial transcript to effectuate appellate review).

ing based on development of the truth necessitates an adjustment or reversal of a rule of law.¹²¹

American courts have begun to abandon English common law principles.¹²² A quite recent example involves the abandonment of a common law concept dating back to the 13th century. In *Rogers v. Tennessee*¹²³ the accused faced a murder indictment even though the victim died after the expiration of a year and a day. The common law recognizes the validity of a murder prosecution if the death occurs within a year and a day of the assault. The Supreme Court of Tennessee acknowledged that the common law had been in force at the time of the death, but the court nevertheless upheld the validity of the murder indictment, reasoning that the issue had hardly ever surfaced in state law.¹²⁴ The United States Supreme Court sustained the murder conviction, even though the applicable rule at the time of the fatal act provided for a lesser crime other than murder.¹²⁵ The common law is an English mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules.¹²⁶ Such rules evolve around principles, which remain firm in the face of formidable attempts to overthrow or to supersede them.¹²⁷ Not even the American Revolution and its ultimate goal of liberation from the Crown kept the new nation from occasionally citing English common law doctrine as precedent.¹²⁸ Undoubtedly, the common law had its highly reputable supporters, such as Sir William Blackstone, perhaps the most influential of these advocates. Professor Blackstone, so enamored with the common law, wrote four volumes regarding the evolution of English law.¹²⁹ Scholars who revere Blackstone's work adhere to his warnings against wholesale and radical change

¹²¹ *E.g.*, *The Queen v. Kearley*, 2 All E.R. 345 (H.L. 1992) (declaring that an implied statement is not hearsay because it is not intended as an assertion). *See also*, *United States v. Zenni*, 492 F. Supp. 464 (E.D. Ky 1980). *See*, FED. R. EVID. 801(a).

¹²² *E.g.*, *Forrester v. White*, 484 U.S. 219 (1988) (A state district judge is not immune for administrative, i.e., non-judicial, employment decisions); *Pulliam v. Allen*, 466 U.S. 522 (1984) (Court held that judicial immunity is limited to protection from liability for damages; it erects no bar to injunctive and declaratory relief, or the award of attorney's fees under the civil rights statute)

¹²³ 532 U.S. 451 (2001).

¹²⁴ *Id.* at 465-67.

¹²⁵ *Id.* at 480-81.

¹²⁶ ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 1 (Marshall Jones Co. 1921) [hereinafter POUND].

¹²⁷ *Id.*

¹²⁸ *Id.* at 6.

¹²⁹ *See* BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, 4 Volumes (Wayne Morrison, ed., 2001, Cavendish Publishing Limited) [hereinafter BLACKSTONE].

of the legal system and his cautions against overturning the entrenched wisdom of the past.¹³⁰

On the other hand, a number of colonies disregarded the English model. For one, very few law-trained professionals migrated to the New World, and those bold immigrants who came brought with them little support for lawyers.¹³¹ Second, colonies like New England, centered their law, for better or worse, so that it would be “agreeable to the word of God,” with absolutely no reference to the common law of England.¹³² Professor Pound provides a third concern against the development of an American common law prominently shaped by the English model. Pound observed that the English common law had evolved with trained jurists while the American model, involving “an elective judiciary, holding for short terms, . . . does not give us courts adequate to such a task.”¹³³ He criticized the biased and narrow-minded decisions in the early part of the twentieth century as the work of popularly elected judges.¹³⁴ One scholar noted that the more simple, popular and general parts of the English common law initially influenced colonial legal relations, yet he found in the colonies originality in legal conclusions, departing widely from the most settled theories of the common law.¹³⁵ Scholars often express respect for the common law, yet the common law serves as the clearly established rule of judicature in only a few cases.¹³⁶

Nothing stated here should suggest any desire to bury the common law in the sacred grounds of the past in order to make room for an allegedly enlightened new age. The common law affords American legal scholars and practitioners with superb ammunition in their battle to seek justice. For instance, in addition to the notable characteristics of predictable rules, the common law effected individual natural rights and secured individual interests against aggression and arbitrary invasion not only by others but also by state or society.¹³⁷ That, in itself, places the jurisprudence of the Crown on a pedestal worthy of protection akin to that given by environmentalists to endangered species. Yet some scholars recognize

¹³⁰ *Id.* at xiii-xiv.

¹³¹ PAUL S. REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 61 (Gordon Press 1977), based on his 1898 thesis at the University of Wisconsin [hereinafter REINSCH]. As in other colonies, lawyers were so unpopular in New York that the general cry of the people was “No lawyer in the Assembly.”

¹³² REINSCH 11.

¹³³ POUND 7. The writer, a sixteen-year veteran of the trial bench, fully agrees with Professor Pound’s observations. This opinion from such a noted scholar furthers the view that the United States Supreme Court, comprised of jurists who serve for life, needs to fulfill their mission as set forth in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (a statute in conflict with the Constitution is void).

¹³⁴ POUND 7.

¹³⁵ REINSCH 7.

¹³⁶ *Id.* at 57.

¹³⁷ POUND 101.

that certain aspects of our Anglo-American legal traditions must expire and drift into oblivion, preserved in the history books where they merely serve as materials for scholars to peruse and possibly yearn for the days of yore.

The writer humbly submits that Professor Pound's concern about the proper development of the American common law, including his preoccupation with an elective judiciary, remains with us today. However, the distress today involves not only elected judges but also appointed judges. The political element so dominates the election and selection of judges in America today that the public has begun to have less confidence in our judiciary and its lack of independence.¹³⁸ The 1980s brought this nation twelve consecutive years of Reagan-Bush, a political era marked by a policy or at least a practice of appointing youthful and extremely conservative lawyers to the federal judiciary.¹³⁹

C. *Do Removals/Deportations Constitute Punishment Under Traditional Concepts?*

A review of English common law history leads us to several examples where the English courts utilized the practice known as banishment or transportation, the ancient equivalent of today's deportation.¹⁴⁰ The primary distinction between these two practices involves the characteristics of the candidates for exile and disappearance from the nation that removes the person. In England the deportees were citizens or subjects of the Crown who had, pursuant to due process of law, lost their right to remain among the civilized people of the English countryside. Their ban-

¹³⁸ For example, Harris County (Houston), Texas had in the 1970s an all-Democratic judiciary. Today it is 100 per cent controlled by the Republican Party from the County Courts to the two appellate courts. Interview with Hon. Mark Davidson, 11th District Court, Harris County, Texas, (Oct. 22, 2004.) Some candidates even advertise their partisan label as a job qualification. See generally Stephen Murdoch, *The Politics of Judicial Nominations*, WASH. LAWYER, 25, 26 (Sept. 2002).

¹³⁹ See generally Marianne Means, *Estrada right to quit nomination fight*, HOUS. CHRON., Sept. 13, 2003, at A 40 ("Democrats are just as partisan but not as unified nor driven to reshape the judiciary along a hard-edged ideology."); Michael Olivas, *Being Latino doesn't qualify Estrada to be judge*, HOUS. CHRON., Feb. 12, 2003, at A 31 (Law Professor Olivas refers to Estrada as an ideologue who hides his views and lacks experience). As a federal prosecutor, the writer appeared before Judge Hayden Head, appointed by President Reagan at the age of thirty-three to the district court bench in Corpus Christi, Texas. The same president later appointed Edith Jones, about the same age, to the Fifth Circuit Court of Appeals. Notwithstanding their youth and conservative ideologies, both have distinguished themselves in their respective courts.

¹⁴⁰ See generally Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999).

ishment came as an integral part of the punishment for the conviction of a crime.¹⁴¹ According to Blackstone, the exiling or banishing of subjects are *punishments* that the common law once imposed.¹⁴² On the contrary, in America today the deportees are legal resident aliens¹⁴³ whose banishment and transportation out of the United States sometimes involves conduct which occurred at a time when the resident alien lacked notice that his or her conduct would, in some indefinite time in the future, result in his involuntarily leaving his job, his spouse, his children and his grandchildren while he seeks to begin a new life in a country where generally he no longer has any established roots.

This writer submits that removals or deportations, modern-day banishments, constitute punishments. Deportations do not serve as treatment for an alleged offender,¹⁴⁴ nor does a removal involve efforts to supervise.¹⁴⁵ Instead, the removals constitute punitive measures separately appended to and/or conditioned upon convictions for criminal activity.¹⁴⁶ The INA defines "conviction" as a formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where "(i) a judge or jury has found the alien guilty or *the alien* has entered a plea of guilty or nolo contendere or *has admitted sufficient facts to warrant a finding of guilt*, and (ii) *the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.*"¹⁴⁷ Arguably, an alien who receives a deferred adjudication type of probation or community supervision, a program that seeks to give wrongdoers a second chance by clearing their record by dismissal of the conviction, can be removed

¹⁴¹ See 1 BLACKSTONE 102.

¹⁴² *Id.* (emphasis added). See also Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 345 (2000).

¹⁴³ This article does not question the removal of undocumented persons so long as our due process protections are utilized to minimize the risks of abuse. In the United States constitutional rights have been historically extended to resident aliens on a basis similar to citizens. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Court held unconstitutional a Civil Service Commission regulation requiring citizenship for most federal civil service positions); *In re Griffiths*, 413 U.S. 717 (1973) (Court voided a Connecticut law requiring citizenship as a prerequisite for admission to the bar); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Yick Wo v. Hopkins*, 118 U.S. 386 (1886) (Court held aliens are entitled to equal protection of the laws).

¹⁴⁴ E.g., *Kansas v. Hendricks*, 521 U. S. 346 (1997).

¹⁴⁵ E.g., *Johnson v. United States*, 529 U. S. 694 (2000) (re-imposition of supervised release does not violate the ex post facto clause).

¹⁴⁶ One way to qualify for removal under the 1996 Immigration Acts is to have a conviction for an aggravated felony committed on, after or even before the effective date of the 1996 legislation. 8 U.S.C. § 1101 (a)(48)(A).

¹⁴⁷ 8 U.S.C. § 1101 (a) (48) (A) (1999) (emphasis added).

under the 1996 Immigration Acts.¹⁴⁸ In some cases, where the status of a “conviction” bothers the government’s immigration attorney, the attorney instead relies on the INA’s requirement of showing an unlawful presence in the United States and/or alien smuggling activities.¹⁴⁹

What makes the current practice in the United States suspect is the inclusion of punishment, specifically removal or deportation, for convictions that did not mandate that sanction prior to the 1996 Immigration Acts. In other words, the 1996 Acts clearly impose a condition that adversely affects the liberty interest of the non-citizen resident alien. As such, that action should meet the constitutional standards of due process and of the prohibition against *ex post facto* laws. Our constitutional law forbids retroactively increasing the punishment for an existing offense.¹⁵⁰ As a people, Americans, regardless of status, possess a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty.¹⁵¹

A recent Supreme Court case provides some interesting history on the concept known as banishment.¹⁵² The Court’s dissent in *Stogner* discussed how only a parliamentary act could subject an individual to banishment in 17th-century England and how Parliament’s power to pass such acts was unquestioned.¹⁵³ Most relevant, however, is the comment that a “*sanction of banishment was acknowledged as a punishment provided for by the existing laws, both at the time of Clarendon’s trial and afterwards.*”¹⁵⁴ The contrast between the rights from banishment of the

¹⁴⁸ *E.g.*, *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (successful completion of deferred adjudication in Texas constituted a conviction); *accord*, *United States v. Campbell*, 167 F.3d 94 (2d Cir. 1999) (INA does not indicate need to interpret in accordance with state law).

¹⁴⁹ *E.g.*, *Renteria-Gonzalez v. INS*, 322 F.3d 804, 817 n.15 (5th Cir. 2002) (reference to standards of proof under 8 U.S.C. § 1227(a)(1)(B), (E)(i)). The relaxed procedures in these immigration cases allow the use of hearsay statements by the investigating agent, who is permitted to produce a Form I-213, where the transported aliens’ statements are recorded.

¹⁵⁰ *E.g.*, *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

¹⁵¹ *See Carmell v. Texas*, 529 U.S. 513 (2000) (Ex Post Facto Clause is violated where the rules of evidence changed, allowing less testimony for conviction than the law required at the time of the alleged commission of the offense).

¹⁵² *See generally Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 2466-69 (2003).

¹⁵³ *Id.* at 2467 (Kennedy, J., dissenting).

¹⁵⁴ *Id.* (emphasis added) (quoting 11 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 569 (1938)). *See generally* W.F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. REV. 388, 392 (1890) (“Banishment, perpetual or temporary, was well known to the common law”); *An Act for Punishment of Rogues*, 39 Eliz. 1, c. 4, § 4 (1597) (Eng.) (permitting banishment of dangerous rogues); *Roman Catholic Relief Act*, 10 Geo. 4, c. 7, § 28-36 (1829) (Eng.) (providing for the banishment of Jesuits).

English citizen and the American resident alien blurs into irrelevance when we superimpose American constitutional protections on the legal map. The Due Process Clause of the Fifth and the Fourteenth Amendments discuss the rights of “persons,”¹⁵⁵ the drafters perhaps recognizing the classification of slaves as non-citizens and the involvement of people from other countries in our nation’s evolution. The post-Civil War amendment obviously sought to assure that all *persons*, not just citizens, received the constitutional safeguards. Aliens accordingly receive protection under this amendment.¹⁵⁶ Some authorities exist to support the claim that aliens held by our government outside United States territory have no constitutional protections. For example, the D.C. Circuit Court of Appeals held in 2003 that detainees at Guantanamo Bay Naval Base in Cuba have no right to hearings in United States courts because they are not entitled to due process rights under the Constitution.¹⁵⁷ The writer questioned this principle because the Court has held that non-citizens present in the United States enjoy full due process protections.¹⁵⁸ The Supreme Court in June 2004 declared that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.¹⁵⁹

D. *Is Removal, Conditioned Upon a Criminal Conviction, a Punishment?*

A critical question surfaces as to whether a legislated response to conduct, whether deemed criminal or civil, is classified as “punishment” or as a mere “sanction.” Regardless of the label the response receives, another inquiry centers on whether the designation lessens the need for intervention of protections possibly found in the United States Constitution. Webster defines “punish” as follows: “to cause to undergo pain, loss, or suffering for a crime or wrongdoing” and “to impose a penalty for [an offense].”¹⁶⁰ Something is “punitive” if it inflicts or is concerned with

¹⁵⁵ U. S. CONST. amend. XIV.

¹⁵⁶ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Plyler v. Doe*, 457 U. S. 202 (1982).

¹⁵⁷ *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, *Rasul v. Bush*, —U.S.—, 124 S. Ct. 2686, 2687-2688 (2004) (Court ruled in both *Al Odah* and *Rasul* that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals).

¹⁵⁸ *E.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (undocumented alien school children); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁵⁹ *Rasul v. Bush*, —U.S.—, 124 S. Ct. 2686, 2687-2688 (2004) (companion case to *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, —U.S.—, 124 S. Ct. 2686 (2004)).

¹⁶⁰ WEBSTER’S DELUXE UNABRIDGED DICTIONARY, *supra* note 72, at 1462.

punishment.¹⁶¹ The term “punishment” further indicates “harsh treatment.”¹⁶² On the other hand, a “sanction” has an almost contrary meaning. One view has a sanction meaning support or approval while the other denotation, the one addressed in this article, refers to a coercive measure,¹⁶³ such as an economic boycott or payment of a fine. Thus, removal is far from a mere sanction when the removal is conditioned upon a conviction for a qualifying crime. The removals authorized by the 1996 Act qualify as an after-the-fact increase in punishment.

Writers in the field of criminal law have sought to distinguish the boundaries of criminal punishment as opposed to other coercive burdensome but non-criminal sanctions.¹⁶⁴ For example, in the immigration field, deportation or removal is provided as a coercive sanction when the agents identify an undocumented entrant. The administrative process of immigration law enforcement is then triggered. At this stage the law does not call for criminal punishment. The INS agents dutifully make entries in their files that an undocumented alien entered the United States and that the alien received a voluntary departure or that he underwent a deportation hearing. All this occurs in civil administrative proceedings.

The fact that this removal arises in an allegedly non-criminal setting does not remove the punitive aspect of the removal. On the other hand, when a sanction is imposed in a criminal court, or pursuant to a criminal conviction, it is unquestionably punitive. The fact that a federal law retroactively incorporates state (or federal) criminal conduct that resulted in a conviction and adds a removal sanction does not make it less punitive. The sanction would not have occurred *but for* the criminal conviction. At this point constitutional protections of due process of law and the Ex Post Facto Clause must stand as barriers to the trampling of constitutional rights.

In urging radical departures from precedence, the writer is not oblivious to the well-established principle enunciated by the United States Supreme Court in *Calder v. Bull*¹⁶⁵ in 1798. In *Calder* the Court stated the Ex Post Facto Clause is limited to criminal cases.¹⁶⁶ Because deportations or removals have been judicially classified as civil in nature, there is arguably no constitutional protection. However, a scholar has taken the

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1603.

¹⁶⁴ G. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 4, 5 (1998), *quoted in* M. GARDNER & R. SINGER, CRIMES AND PUNISHMENT: CASES, MATERIALS AND READINGS IN CRIMINAL LAW 39 (3d ed. 2001) [hereinafter CRIMES AND PUNISHMENT].

¹⁶⁵ 3 U.S. (3 Dall.) 386 (1798). *See also* *Hawker v. New York*, 170 U.S. 189, 196 (1898) (Where a physician is convicted of abortion, a felony, the state is seeking not to further punish such a criminal but to protect its citizens from physicians of bad character when it makes it a crime to practice medicine).

¹⁶⁶ *Id.* at 391.

position that we look at the totality of the circumstances in deciding if a practice should receive constitutional scrutiny:

[T]here are recurrent problems in assessing the punitive nature of other sanctions, such as . . . expatriation, deportation. . . . That the legislature has identified these sanctions as civil in nature does not control the constitutional issue, for if the sanction is punitive, if it constitutes “punishment,” then regardless of the legislative label, the process is criminal and the constitutional guarantees apply.¹⁶⁷

Another writer defines punishment in terms of five elements:

1. It must involve pain or have other unpleasant consequences;
2. It must be for an offense against legal rules;
3. It must be of an actual offender for his offense;
4. It must be intentionally administered by human beings other than the offender; and
5. It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.¹⁶⁸

It is the position of the writer that the term punishment includes the practice, currently referred to in our federal law as “removal,” which has over the years encountered euphemistic synonyms. Historically, removal has been known as banishment, transportation, exile, expatriation, deportation, to name but a few.¹⁶⁹ In his writings on the common law of England, Blackstone, a source for our American jurisprudence, elaborates on the personal liberties violated when a person is driven from his country:

A natural and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and *not to be driven from it unless by the sentence of the law*. . . . But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. *For exile, and transportation, are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself*

¹⁶⁷ G. FLETCHER, *RETHINKING CRIMINAL LAW* 408-09 (1978), quoted in *CRIMES AND PUNISHMENT* 39; see *Allen v. Illinois*, 478 U.S. 364 (1986) (For a civil confinement statute to avoid being punitive in nature, the ultimate purpose must be to treat and not to punish) and *United States v. Salerno*, 481 U.S. 739, 747 (1987) (Court found the pre-trial detention of a criminal defendant to be regulatory and not punitive).

¹⁶⁸ H. HART, *PUNISHMENT AND RESPONSIBILITY* 4-6 (1968), quoted in *CRIMES AND PUNISHMENT* 40; see also T. Hobbes, *Leviathan* 353, 355 (C. MacPherson ed. 1971), quoted in *CRIMES AND PUNISHMENT* 42.

¹⁶⁹ See 1 *BLACKSTONE* 102; see, e.g., *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947) (deportation of a permanent resident alien is “the equivalent of banishment or exile”); however, *Carlson v. Landon*, 342 U.S. 524 (1951), later repeated the view that deportation is not a criminal proceeding and has never been held to be punishment. 342 U.S. at 537.

to escape a capital punishment, *or else by the express direction of some modern act of parliament*. To this purpose the great charter declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land.¹⁷⁰

A formal removal order further aggravates the alien's conduct when the alien's spouse is faced with the dilemma of remaining in the United States to work and provide for their children or returning to the life of poverty or persecution that they initially abandoned.¹⁷¹ A removal requirement pursuant to a criminal conviction should thus be legislatively articulated contemporaneously as part of the punishment attached to the crime. That is the only means by which a resident alien or other person will have adequate notice as to the consequences of a waiver of a trial by jury and a guilty plea resulting in a conviction, protections which the United States Constitution grants to *all persons* regardless of citizenship.¹⁷² Even if removal is not clearly articulated as a condition of a criminal act, such drastic governmental action satisfies the concept of punishment where it is triggered by a conviction. Deportation has been equated to a forfeiture of residence and thus a penalty.¹⁷³

VII. THE EX POST FACTO CLAUSE: A REVIEW OF SUPREME COURT EX POST FACTO DECISIONS

The Ex Post Facto Clause of the United States Constitution refers to *legislative* acts when it provides "No Bill of Attainder or ex post facto Law shall be passed."¹⁷⁴ It is consequently necessary to proceed primarily and initially with this constitutional standard in determining the validity of federal legislation which removes permanent resident aliens from the United States on the basis of having been convicted of an aggravated

¹⁷⁰ 1 BLACKSTONE'S at 102 (emphasis added).

¹⁷¹ See generally *id.* at 343 ("The duty of parents to provide for the maintenance of their children, is a principle of natural law; . . . they would be in the highest manner injurious . . . if they only gave their children life, that they might afterwards see them perish.")

¹⁷² See, e.g., U.S. CONST. amend. VI ("In all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."); see U.S. CONST. amend. V ("No *person* shall be . . . deprived of life, liberty, or property, without due process of law"); see U.S. CONST. amend. XIV ("nor shall any State deprive any *person* of life, liberty, or property, without due process of law") (emphasis added in text and footnote).

¹⁷³ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (deportation is a drastic measure and at times the equivalent of banishment or exile); see Sarah Kershaw & Monica Davey, *Plagued by drugs, tribes revive ancient penalty*, N.Y. TIMES, Jan. 18, 2004, at 1 (reference to banishment as a "severe and bygone punishment").

¹⁷⁴ U.S. CONST., art. I, § 9, cl.3. The principle is sometimes referred to by the Latin phrase *nulla poena sine lege*, which basically means "no punishment without a law authorizing it." BLACK'S LAW DICTIONARY 1095 (8th ed.2004) (emphasis added).

felony. The concerns with ex post facto laws prompted an essay comment by James Madison that such laws are contrary to the principles of the social compact.¹⁷⁵

An early case involving the interpretation of the Ex Post Facto Clause is *Beazell v. Ohio*,¹⁷⁶ a case that addressed a change in the law from a separate to a joint trial for persons indicted jointly. The defendant argued that such a change violated the Ex Post Facto Clause. The Court disagreed because the change involved only the rules of procedure and not the traditional substantive matters addressed in *Calder*.¹⁷⁷ The Court further stated that the Constitution intended through the Clause to secure substantial personal rights against arbitrary and oppressive legislation.¹⁷⁸ Interestingly, the Court emphasized that the “criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislature enactment, after the fact, to the disadvantage of the accused.”¹⁷⁹

Whether the removal is classified by statute or by the courts as civil in nature is irrelevant for the purposes of deportations that result from pre-1996 convictions.¹⁸⁰ In *United States v. Ward*¹⁸¹ the Supreme Court stated that whether a statutorily defined penalty is civil or criminal requires answers to two questions: first, did Congress designate the penalty as civil or criminal; second, if the penalty has a civil designation, is it so punitive in purpose or effect as to negate Congress’ intention.¹⁸² It is the writer’s contention that the mere reference of a sanction, in this case removal, to an event, specifically a criminal conviction, suffices to classify the action as punishment. The reaction is then beyond a mere sanction. Once mandated by federal statute, what could once be termed a “sanction” graduates to the level of *de jure* punishment. The removal action serves to promote the retributive, preventive and deterrent aspects of our punishment system.

When Congress enacted the 1996 Immigration Acts, it enlarged the class of individuals who could be deported for aggravated felonies. Congress effectively created two constitutional problems. First, it created an ex post facto issue by declaring that the aggravated felony provision applies regardless of when the conviction occurred, even if it preceded

¹⁷⁵ THE FEDERALIST NO. 44, at 279 (James Madison) (G. B. Putnam’s Sons 1888).

¹⁷⁶ 269 U.S. 167 (1925).

¹⁷⁷ *Id.* at 170.

¹⁷⁸ *Id.* at 171.

¹⁷⁹ *Id.* at 170.

¹⁸⁰ See generally *Pace v. United States*, 585 F. Supp. 399, 400 (S.D. Tex. 1984) (“In order to be a forbidden *ex post facto* measure, a statute that is civil in nature on its face must effect a punishment”).

¹⁸¹ 448 U.S. 242 (1980).

¹⁸² *Ward*, 448 U.S. at 248-49.

the effective date of the act. Second, Congress created a substantive and procedural due process concern because some crimes are neither felonies nor aggravated.¹⁸³ Additionally, most lawyers, including even board-certified criminal law specialists, lack the ability to predict future political and legal mandates. When those accused or their lawyers waive their jury trial right and plead guilty or *nolo contendere*, neither knew that the convictions would thereafter result in additional sanctions or punishments. Such issues have resulted in an incredibly high number of court confrontations in recent years.¹⁸⁴

Undoubtedly, the battle to have the High Court extend the application of the Ex Post Facto Clause to civil immigration deportation proceedings faces an almost insurmountable history of long-established judicial precedence.¹⁸⁵ Since 1798, the Supreme Court has conclusively held that the Constitution's Ex Post Facto Clause applies only to criminal matters.¹⁸⁶ However, Blackstone recognized that the common law could change when he stated that *stare decisis* "admits of exception, where the former determination is most evidently contrary to reason. . . ."¹⁸⁷ Blackstone further recognized that the common law is English in origin, suggesting that the American colonies had to adopt and apply it in appropriate circumstances.¹⁸⁸

Wise men and women have often articulated that a nation is judged by how their laws and their courts treat people within their jurisdiction. The United States, in spite of early constitutional aberrations, has, through

¹⁸³ The 1996 Immigration Acts, in their retroactive aspect, create arbitrary and capricious results by redefining the felony concept in federal law. The Acts also eliminate the concept of adequate notice of negative implications for one's conduct, especially as the conduct relates to the waiver of constitutional rights at a time when the negative implications were not capable of being known.

¹⁸⁴ *E.g.*, *INS v. St. Cyr*, 533 U.S. 289 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348, 350 (2001); *Zadydas v. Davis*, 533 U.S. 678 (2001); *Renteria-Gonzalez v. INS*, 310 F.3d 825 (5th Cir. 2002) (whether or not transporting aliens constitutes an aggravated felony); *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (intoxication assault does not constitute a crime of violence); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001).

¹⁸⁵ *See, e.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Quite recently, the First Circuit reiterated that the Ex Post Facto Clause is not violated by a civil deportation. *Seale v. INS*, 323 F.3d 150, 159-160 (1st Cir. 2003); *accord*, *Carlson v. Landon*, 342 U.S. 524, 537 (1951).

¹⁸⁶ *See Calder generally*. The Court has further distinguished retrospective laws from ex post facto laws, holding that retroactive legislation is not necessarily in conflict with the United States Constitution. *See, e.g.*, *Kring v. Missouri*, 107 U.S. 221 (1882); *In re Medley*, 134 U.S. 160 (1890); *Duncan v. Missouri*, 152 U.S. 377 (1894).

¹⁸⁷ 1 BLACKSTONE 69.

¹⁸⁸ *See id.* at 107-08.

her courts, extended protections to persons at all levels of the social, racial and political spectrum.¹⁸⁹ We should not allow political extremism, exacerbated by economic fears and other concerns of the American public, to dictate a change in the role of the courts in protecting the rights of the less privileged.¹⁹⁰ Unfortunately, the terrorist attacks on the World Trade Center and Pentagon drove several public officials to support measures that restrict the civil liberties of not only Americans but also resident and other aliens in this country.¹⁹¹

The federal Ex Post Facto Clauses provide limitations on criminal prosecutions for acts that were not proscribed at the time committed.¹⁹² The Founding Fathers, apparently addressing the Congress, included that “No Bill of Attainder or ex post facto Law shall be passed,”¹⁹³ and then in the next section repeated the message to the states.¹⁹⁴ Ex Post Facto Clause jurisprudence has evolved to include various circumstances. A constitutional violation occurs if, after the alleged commission of a criminal act, the legislative branch aggravates a crime by increasing the punishment¹⁹⁵ or if it reduces the measure of proof necessary to convict the accused.¹⁹⁶

¹⁸⁹ *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (aliens); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Latino citizens); *Brown v. Board of Education*, 347 U.S. 483 (1954) (African American school children); *Plyler v. Doe*, 457 U.S. 202 (1982) (undocumented alien school children).

¹⁹⁰ For example, in 1994 California voters, under the leadership of Governor Pete Wilson, approved Proposition 187, an effort to deny education, social services and some health benefits to undocumented immigrants. A federal judge ruled that the effort violated the Constitution. *Judge overturns prop. 187*, HOUS. CHRON., Mar. 19, 1998, at A23.

¹⁹¹ Patty Reinert, *Experts Fear Net Ensnarls Liberties*, HOUS. CHRON., Oct. 7, 2001 at A1 (Attorney General Ashcroft unsuccessfully has asked Congress for authority to jail immigrants indefinitely, without charges or a visit to a magistrate as well as the authority to secretly search people’s homes).

¹⁹² *See* U.S. CONST. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1. *See also* TEX. CONST. art. 1, § 16.

¹⁹³ U.S. CONST. art. I, § 9, cl. 3.

¹⁹⁴ *Id.* art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law . . .”).

¹⁹⁵ *See, e.g.*, *Scafati v. Greenfield*, 390 U.S. 713, 88 S. Ct. 1409 (1967) (statute forbade deductions for good conduct time during the first six months re-incarceration following parole violation).

¹⁹⁶ *E.g.*, *DeWoody v. Superior Court*, 87 Cal. Rptr. 210 (Cal. Ct. App. 1970), found an impermissible ex post facto legislatively-created presumption of driving under the influence of an intoxicating liquor where the proof established a certain level of alcohol in the driver’s blood. The law took effect after the arrest of the accused. The new evidentiary system would allow conviction on less proof than previously required. *Accord* *Plachy v. State*, 239 S.W. 979 (Tex. Crim. App. 1922) (change in the accomplice statutory requirement of corroboration in prosecutions involving sellers of intoxicating liquors two weeks after the indictment).

Take the situation of a recidivist who discovers that after his two prior felony convictions, his home state decided to pass a “three strikes and you are out” law, making him eligible for life without parole upon a new felony accusation. The previous statutory scheme provided that an habitual violator could qualify for parole upon the receipt of good conduct and other credits. At trial, his lawyer asserts that the change in the law is *ex post facto* because he had already been convicted and had served his sentences for the two prior crimes. Without those two convictions as enhancements of the punishment range, he qualifies for parole. However, counsel will likely lose this plea because courts have historically held that a statute is not *ex post facto* because it increases the punishment for a subsequently-committed crime where the increase results from an enhancement allowed by the prior convictions.¹⁹⁷

The Supreme Court has long been involved with the protection of constitutional rights in civil proceedings. For example, in juvenile adjudication proceedings, legislative policy dictates that youthful offenders be treated as non-adults. However, the courts generally held that this policy did not deprive children of rights that adults had when they faced quasi-criminal accusations in adult court. For example, the Court in *In re Gault*¹⁹⁸ decided that juveniles have the right to adequate notice and counsel and protection of their privilege against self-incrimination. The Court followed a few years later with *In re Winship*¹⁹⁹ where the Court stated that even though a juvenile adjudication proceeding is civil in nature, the proof necessary for an adjudication must be based on the beyond a reasonable doubt standard, a standard reserved for criminal cases.²⁰⁰

More recently, in *Seling v. Young*,²⁰¹ the State of Washington enacted a statute that authorized the commitment of sexually violent predators to a treatment facility where the offender is in the custody of an agency dealing with social and health services. The act defines a sexually violent predator as someone who has been convicted of, or charged with, a crime

¹⁹⁷ See, e.g., *McDonald v. Massachusetts*, 180 U.S. 311; *State v. Dowden*, 115 N.W. 211 (1908).

¹⁹⁸ 387 U.S. 1, 36-37 (1967). A few years before *In re Gault*, the Court ruled in *Kent v. United States*, 383 U.S. 541 (1966) that the waiver of juvenile jurisdiction to adult status must comport with due process.

¹⁹⁹ 397 U.S. 358 (1970).

²⁰⁰ In spite of the extension of rights known in the criminal process to the civil juvenile process, the Court has held that trial by jury is not constitutionally required in the adjudicatory phase of the state juvenile court delinquency proceeding. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). The Court distinguished the right to a trial by jury from other constitutional rights accorded juveniles, pointing out that these prior rights emphasized the integrity of the fact finding process and rationalizing that there is nothing to confirm that the jury is a necessary component of accurate fact finding.

²⁰¹ 531 U.S. 250 (2001).

of sexual violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. The accused in *Young* was convicted of six rapes. Prior to his release, the State filed a petition to commit Young to the treatment facility as a sexually violent predator. Young appealed his commitment to the facility arguing that the law violated the Ex Post Facto Clause of the U.S. Constitution. Young argued that the Act, as applied, violated the U.S. Constitution because the conditions in the facility were similar to being incarcerated.²⁰²

The Court disagreed with *Young*, basing its decision on *Kansas v. Hendricks*²⁰³ where the Court addressed the issue of whether the Kansas Sexually Violent Predator Act was punitive in nature. In addressing the issue, the Court stated that the question of whether an act is civil or criminal in nature is determined by statutory construction.²⁰⁴ In *Hendricks* the court held that the court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.²⁰⁵ Based upon *Hendricks*, the Court in *Young* held that the legislature enacted the Washington statute to be civil in nature, concluding that "the conditions of confinement were largely explained by the State's goal to incapacitate, not to punish."²⁰⁶ Therefore, based upon the precedent set in *Hendricks*, the Court held the non-punitive statute did not violate the Ex Post Facto Clause of the United States Constitution.²⁰⁷

The Supreme Court recently encountered an ex post facto violation. In *Carmell v. Texas*²⁰⁸ the Court reviewed the amendment of a Texas statute that allowed for a person to be convicted of a sexual offense based upon the victim's testimony along with other corroborating evidence. The 1993 amendment allowed convictions based upon the victim's uncorroborated testimony alone. The prosecution charged Carmell with 15 counts of various sexual offenses that began in 1991 and ended in 1995. Carmell contested convictions for several pre-amendment counts. The Court held that the pre-amendment convictions violated the Ex Post Facto Clause.

²⁰² See *id.* at 259-60.

²⁰³ 521 U.S. 346 (1997)

²⁰⁴ 531 U.S. at 261; see *Carlson v. Landon*, 342 U.S. 524, 537 (1951) (Deportation is not a criminal proceeding and has never been held to be punishment).

²⁰⁵ *Seling*, 531 U.S. at 261.

²⁰⁶ *Id.* at 262.

²⁰⁷ *Id.* at 267. The Supreme Court has also held that changes in parole consideration intervals from every three to every eight years in life sentences did not violate the Ex Post Facto Clause since it did not create a sufficient risk of increasing the measure of punishment attached to the crime. *Garner v. Jones*, 529 U.S. 244, 251 (2000); see also *California Dep't of Corr. v. Morales*, 514 U.S. 499 (1995).

²⁰⁸ 529 U.S. 513 (2000).

Citing *Weaver v. Graham*,²⁰⁹ the *Carmell* Court stated: “The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date.”²¹⁰ The State argued that the amended statute did not increase the punishment nor change the elements of the offense. The Court however found that the amended statute reduced the amount of evidence required to convict.²¹¹ *Carmell* further cited *Calder v. Bull*²¹² where Justice Chase categorized four types of ex post facto laws: (1) Every law that makes an action done before the passing of the law, and which was innocent when done criminal; (2) Every law that aggravates a crime, or makes it greater than it was, when committed; (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.²¹³

Whether a statute is criminal or civil in nature, one must look to the legislative intent when the statute was enacted.²¹⁴ In *Kansas v. Hendricks*,²¹⁵ the State of Kansas enacted the Sexually Violent Predator Act to provide for the “civil commitment” of sexual offenders in a treatment center for long-term care and treatment. Hendricks, classified as a sexually violent offender, was committed to a treatment program required by the act, and he complained that the statute violated the Ex Post Facto Clause. Hendricks argued that the Act established criminal proceedings and a form of punishment. He specifically argued that because he had already been convicted and served his term of confinement, the Predator Act allowed for additional punishment based upon his past acts.

The Court held that the Act did not violate the Ex Post Facto Clause. The majority held that to determine whether the Act established civil or criminal proceedings, the Court must look to the legislative intent when the Act was established and enacted. Based upon the legislative intent the Court determined that *on the face of the statute* the legislature did not intend to create a criminal proceeding.²¹⁶ To overcome this, the person challenging the statute must show “the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to deem it civil.”²¹⁷

²⁰⁹ 450 U.S. 24 (1981).

²¹⁰ *Carmell*, 529 U.S. at 520.

²¹¹ See *Carmell*, 529 at 532-33; see also *id.* at 553 (Ginsburg, J., dissenting).

²¹² 3 U.S. (3 Dall.) 386 (1798).

²¹³ *Id.* at 390-91.

²¹⁴ See *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

²¹⁵ 521 U.S. 346 (1997).

²¹⁶ *Hendricks*, 521 U.S. at 361 (emphasis added).

²¹⁷ *Id.* (emphasis added).

Hendricks further states that the purpose of the statute is not retroactive because it does not punish the sexual offender for his past conduct. The offender's past conduct is used primarily for the purpose of "[demonstrating] that a mental abnormality exists or to support a finding of future dangerousness."²¹⁸ Citing *United States v. Salerno*,²¹⁹ the Court reasoned: "Although the civil commitment scheme at issue here does involve an affirmative restraint, 'the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.'"²²⁰ Therefore, based upon the Court's reasoning, they found the Act to be civil in nature and not punitive and thus not in violation of the Ex Post Facto Clause.

*Department of Revenue v. Kurth Ranch*²²¹ represents a forceful authority for the proposition that the 1996 Immigration Acts enact punitive removal orders in violation of the Ex Post Facto Clause. Authorities arrested members of the Kurth family for harvesting marijuana on their property. The Kurths pleaded guilty to conspiracy to possess drugs with the intent to sell. Subsequently they entered into a plea agreement and the family members were sentenced. Montana enacted the Dangerous Drug Tax Act prior to the Kurths' arrest. The Act provided "that the tax was to be 'collected after any state or federal fines or forfeitures have been satisfied.'"²²² The Kurths challenged the constitutionality of the Montana tax under the Double Jeopardy Clause. They argued that the tax was punitive in nature because the legislature conditioned it upon commission of a crime.

The Court held that the tax violated the Constitution. In evaluating this issue, the Court cited *United States v. Halper*²²³ where the Court stated that the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character.²²⁴ *Kurth Ranch* evaluated the tax and how it was applied under the Act. The Court pointed out that the tax was conditioned upon the commission of a crime.²²⁵ Only after the crime is committed and the person arrested is the tax imposed. Further, the tax was different from other types of taxes in that the tax was imposed on illegal activities.

In *Halper*, the defendant was charged and convicted on 65 counts of violating the criminal false claims statute. Subsequent to his conviction

²¹⁸ *Id.* at 362.

²¹⁹ 481 U.S. 739 (1987).

²²⁰ 521 U.S. at 363.

²²¹ 511 U.S. 767 (1994).

²²² *Id.* at 770.

²²³ 490 U.S. 435 (1989).

²²⁴ *Id.* at 442.

²²⁵ The writer contends that the removal complained of in this article is one conditioned upon a conviction based upon conduct finalized prior to the effective date of the 1996 Immigration Acts.

and sentence, the Government brought an action under the civil False Claims Act. Based upon his criminal conviction, the District Court granted a summary judgment for the Government. Under the remedial provision of the act he was liable to the government for more than \$130,000. Based upon the large amount, the District Court found it to be a second punishment for double jeopardy purposes. The Government appealed to the Supreme Court to clarify whether a civil penalty such as a statutory penalty can constitute punishment for the purposes of the Double Jeopardy Clause.

The Court held that the statutory penalty was a violation of the Double Jeopardy Clause. The government argued that only a second criminal prosecution would give rise to double jeopardy, adding that the statute involved is civil in nature. In addition, based upon statutory construction, they contended the Act was not intended to be criminal in nature. The Court held, however, that even if the Act was intended to be civil in nature, the penalty may be so extreme as to constitute punishment.²²⁶ The Court further held that when determining whether the Double Jeopardy Clause of the Constitution has been violated depends not upon statutory interpretation or intent of the legislature, but on the character of the sanctions that are imposed on the individual.²²⁷ The Court stated, "Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."²²⁸ In concluding that the statute in this case did constitute punishment for purposes of double jeopardy, the Court stated that a civil sanction serving not just a remedial purpose, but also a retributive or deterrent purpose was punishment.²²⁹

The Supreme Court later decided *Hudson v. United States*²³⁰ and criticized its holding in *Halper* for deviating from longstanding double jeopardy principles by focusing on whether the sanction was so grossly disproportionate to the harm caused as to constitute punishment.²³¹ *Hudson* restates the principle that whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction.²³² A legislature could indicate expressly or impliedly if the statute is criminal or civil. If the legislature considers the law to be criminal, much of the inquiry is completed. However, even in those situations where the legislature indicates an intention to establish a civil penalty, the Court inquires further as to whether the statutory scheme is so punitive either in

²²⁶ *Halper*, 490 U.S. at 442.

²²⁷ *Id.* at 447.

²²⁸ *Id.* at 448.

²²⁹ *Id.*

²³⁰ 522 U.S. 93 (1997).

²³¹ *Id.* at 101-02.

²³² *Id.* at 99.

purpose or effect as to “transform what was clearly intended as a civil remedy into a criminal penalty.”²³³

In addition, the *Hudson* Court noted the need to adhere to the factors listed in *Kennedy v. Mendoza-Martinez*²³⁴ as useful guidelines. These include (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as 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.²³⁵

VIII. PRE-1996 ACT CONVICTIONS LEAD TO UNCONSTITUTIONAL EX POST FACTO REMOVALS

A. *The Punitive Aspects of the Removal Provisions of the 1996 Immigration Acts*

Let us begin with the reality that the legislative history of the 1996 Immigration Acts is punitive in its major and overriding aspects.²³⁶ The 1993 bombing of the World Trade Center basement and the 1995 destruction of the Oklahoma City federal building incited Congress to act. The first act passed, the AEDPA, has a section entitled “Terrorist and Criminal Alien Removal and Exclusion.”²³⁷ In addition, representatives for the Department of Justice asserted: “The chief target of these reforms are the statutory and administrative protections . . . that enable alien terrorists to delay their removal from the U.S.”²³⁸

Furthermore, applying the *Kennedy* factors to the 1996 Immigration Acts and its removal provisions for those convicted of aggravated felonies, the immigration sanctions clearly adopt a punishment scheme. Because the removals can relate back to convictions finalized prior to the effective date of the 1996 Immigration Acts, they send a clear signal that the statute is punitive. The removal action is conditioned upon an alien’s conviction for a specified crime. As such, the Act violates the Ex Post Facto Clause. First, the removal sanction involves an affirmative disability or restraint. Once convicted of an aggravated felony, the resident alien is given a notice to appear, i.e., summoned to show cause as to why he should not be removed. The alien seldom wins this contest. A long-

²³³ *Id.*

²³⁴ 372 U.S. 144 (1963).

²³⁵ *Hudson*, 522 U.S. at 99-100 (quoting from *Kennedy*, 372 U.S. 144, 168-169).

²³⁶ The 1996 Immigration Acts, in their removal provisions, can arguably be classified as regulatory.

²³⁷ 8 U.S.C. §§ 1531 -1537 (2000).

²³⁸ H.R. conf. rep. no. 104-518, at 116 (1996).

term resident alien with substantial equities could qualify for removal from his entire family, friends, property and employment.

Second, removal from one's country of residence has historically been regarded as punishment. It may have been known as transportation, exile, expatriation, or banishment in the days of the common law, but it nonetheless served as punishment for criminal activities. Third, removal is triggered under the 1996 Immigration Acts by conviction of a crime, all of which require a finding of scienter (aggravated felonies, crimes of violence, drugs, etc.). Fourth, the removal seeks to promote the traditional aims of punishment, which prominently include retribution and deterrence. This factor suffices clearly insofar as a prospective crime is involved, but it is constitutionally repugnant because the conduct to which the removal attaches occurs in the past as opposed to the present or the future.

Retribution for conduct not explicitly classified as punishable by removal is just plain mean and shocking to the sensibilities of our free society. One could expect such conduct in a totalitarian state, but for this to exist in American jurisprudence is highly aberrant. Seeking to impose deterrence for conduct not explicitly classified as punishable by removal is quite simply arbitrary and capricious. One who becomes aware after the fact of a sanction imposed subsequent to alleged improper conduct can hardly be deterred. The inevitable result is further punishment in a form that Congress should have imposed *ab initio*.

Fifth, and perhaps the most explicit factor establishing removal as punishment, the removal sanction is conditioned upon behavior already classified as a crime. If one commits an aggravated felony, then removal is a related punishment. The writer sees no constitutional problem with this type of law. However, the flaw occurs when the 1996 Immigration Acts increase the punishment for previously committed crimes. Sixth, the alternative purpose arguably assigned to the removal provision centers on the plenary power of Congress in the field of immigration and naturalization. The writer has previously asserted that the Constitution grants Congress the explicit power to regulate naturalization, and implicitly immigration as well, but Congress does not possess the plenary power to override other human and civil rights of people within the jurisdiction of the courts. As to the seventh factor, the comments in the sixth *Kennedy* factor understandably advance the position that removal is excessive in relation to the alternative purpose assigned.²³⁹

Department of Revenue v. Kurth Ranch also promotes the writer's argument. In concluding that the tax for the possession of the marijuana was so exaggerated as to constitute punishment,²⁴⁰ the Court stressed that the

²³⁹ See *Kennedy*, 372 U.S. at 168-169.

²⁴⁰ See generally *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 784 (1994). *Contra* *United States v. Ursery*, 518 U.S. 267 (1996) (forfeiture had non-punitive goals, i.e., it encouraged property owners to avoid the use of their property for illegal

tax was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested, thus limiting its application to a person charged with a crime. In the removal provision of the 1996 Immigration Acts, these factors exist as well. The alien has been convicted of his qualifying crime. The removal occurs in response to the arrest and the crime. As to the focus of this article, the removal occurs even though the alien committed his societal wrong before the sanction was legislatively enacted.

Who could foresee that Congress would supplement the punishment set forth in the penal codes of the various states by enacting later legislation which would result in the removal and banishment from their adopted country, not to mention isolation from their families? The benefit of having a lawyer with a clairvoyant view on the evolution of immigration-related criminal law would logically assist the accused in deciding whether to intelligently and competently waive his right to a jury trial in either the state or federal court. However, justice does not rely on lawyers with extrasensory tools to assist in its administration. Procedural due process, at a minimum, dictates that the parties in a criminal setting know what the litigation and constitutional rules are. An accused cannot possibly act intelligently and competently if the additionally punitive rules are not in place until several years after a conviction is returned on a plea bargain disposition.²⁴¹ Some jurisdictions, like Texas, require a trial court, before accepting a guilty plea, to inform defendants that a conviction in the absence of U.S. citizenship could result in exclusion, removal or denial of U.S. citizenship.²⁴² Others merely state that failure to advise a client of the immigration consequences of his guilty plea does not nullify an otherwise voluntarily and knowingly entered plea.²⁴³

To allow the removal of resident aliens convicted of so-called aggravated felonies prior to the effective date of the 1996 Immigration Acts violates a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁴⁴ Does this practice of changing the rules of procedure and punishment after the fact violate those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions"?²⁴⁵ This writer asserts that it does. Of course, the writer concedes that numerous precedents exist against the argument that the removal provisions found in the 1996 Immigration

purposes, it was not tied to scienter, and it was imposed *in rem*, rather than *in personam*).

²⁴¹ See *Johnson v. Zerbst*, 304 U.S. 458, 464, 468 (1938) (holding that an accused has the right to counsel in all federal criminal trials).

²⁴² See, e.g., TEX. CODE CRIM. PROC. art. 26.13 (a) (4) (1985) (The immigration consequences language was added to the plea requirements in 1985).

²⁴³ See, e.g., *United States v. Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988).

²⁴⁴ See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

²⁴⁵ *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

Acts are unconstitutional.²⁴⁶ Notwithstanding, the writer urges the Supreme Court and the Congress to correct the abuses created by the 1996 Immigration Acts so that we as a people can return to the constitutional foundation upon which the United States built its government and its republic.

The Founding Fathers, reacting to a history of oppressive practices in Great Britain, included specific wording in the Constitution to protect against past abuses. In declaring that retroactive legislation would be impermissible, the drafters directed their prohibitions against the Congress and then the States. These leaders admonished Congress that “No Bill of Attainder or ex post facto Law shall be passed.”²⁴⁷ The drafters then instructed that “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . .”²⁴⁸ The drafters undoubtedly contemplated only legislative action when it referred to bills and laws in the Constitution. However, a persistent question in the evolution of our law is whether such legislation can include punitive civil matters. The courts since time immemorial have held that the clause is limited to criminal statutes.²⁴⁹

A review of our American common law development leads the writer to conclude that our unique jurisprudence has room to evolve. Nothing in our early constitutional history should obstruct the pronouncement of a rule that civil statutes, punitive in nature and/or in application, qualify as bills of attainder and/or ex post facto laws.²⁵⁰ On the contrary, rulings by the United States Supreme Court and other lower courts lend support to the writer’s thesis that the removals resulting from pre-1996 convictions should undergo constitutional scrutiny.²⁵¹

²⁴⁶ See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (Deportation is not punishment; it is simply a refusal by the government to harbor persons it does not want).

²⁴⁷ U.S. CONST. art. I, § 9, cl. 3.

²⁴⁸ U.S. CONST. art. I, § 10, cl. 1.

²⁴⁹ See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798); *United States v. Yacoubian*, 24 F.3d 1 (9th Cir. 1994).

²⁵⁰ See *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829) (“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.”)

²⁵¹ See, e.g., *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (indigent parents in civil child termination proceeding can qualify for court-appointed counsel); *In re Winship*, 397 U.S. 358 (1970) and *In re Gault*, 387 U.S. 1 (1967) (juveniles in civil adjudicatory hearings entitled to rights normally limited to criminal cases); *contra*, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juveniles are not entitled to a jury trial as not essential to the development of the truth).

Ironically, *Calder v. Bull*,²⁵² the case primarily cited for the principle that the Ex Post Facto Clause applies only to criminal cases, addressed a civil dispute. The Calderys and the Bulls battled in a probate court in 1793 while our nation adjusted to liberty and experienced the opportunity to develop its jurisprudence. The Calderys won. The law did not provide for appeal or for a new hearing in probate court so the legislature of Connecticut in 1795, acting in a judicial capacity, effectively set aside the earlier decree in probate.²⁵³ The Bulls then prevailed. The Court's sole inquiry was whether the resolution or law of the State of Connecticut qualified as an ex post facto law within the prohibition of the United States Constitution.²⁵⁴ The Supreme Court answered in the negative.²⁵⁵

Justice Chase began his opinion in *Calder* by stating "The decision of one question determines (in my opinion) the present dispute. I shall, therefore, state from the record no more to the case, than I think necessary for the consideration of that question only."²⁵⁶ The new law or procedure no doubt adversely affected the Calderys. They lost a right to realty, not to liberty. The *Calder* battle perhaps should have been settled on other grounds, but the ex post facto issue surfaced directly. The Supreme Court addressed the history of bills of attainder, also known as bills of pains and penalties (bills which addressed lesser punishments) and of ex post facto laws (statutes which involved capital punishments).²⁵⁷ A majority and two analytically supportive concurring opinions consistently adhered to the premise that the history of ex post facto legislation centered on criminal and not on civil laws.²⁵⁸

The writer asserts that the 1996 Immigration Acts, albeit civil in context when it discusses removals, is so intertwined with the criminal convictions of permanent resident aliens, that removal legislation is either punitive on its face or at least quasi-punitive in its application. Consequently, the constitutional prohibitions involving the Ex Post Facto Clause necessarily apply. *Calder*, often cited approvingly by courts denying relief to aliens in removal cases, actually appears to provide the rationale that the retroactive removal provisions of the 1996 Immigration Acts

²⁵² 3 U.S. (3 Dall.) 386 (1798).

²⁵³ *Id.* at 386-87.

²⁵⁴ *Id.* at 387.

²⁵⁵ *Id.* at 390, 394-95.

²⁵⁶ *Id.* at 386 (emphasis in original). The Court, promising to state no more than essential, nevertheless proceeded to engage in an extensive pronouncement on the criminal aspects of the bills of attainder and ex post facto laws, alleged dictum later criticized by Justice Johnson in *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416, 681-87 (1829).

²⁵⁷ *Id.* at 389.

²⁵⁸ *Id.* at 388-89.

are unconstitutional. An analysis in support of this statement follows in the discussion of the *Stogner* decision.²⁵⁹

Justice Chase stated that the Ex Post Facto Clause did not secure a citizen in his private property or contract rights.²⁶⁰ However, the Court noted that the purpose of the clause is an additional bulwark in favor of the personal security of a person who is retrospectively subjected to punishment by a legislative act, specifically providing that a legislature should not pass a law “*after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.*”²⁶¹ Justice Chase then stated the four categories of what he considered to be ex post facto laws.²⁶² Chase emphasized that these four categories, and similar laws, are manifestly unjust and oppressive, adding, “Every *ex post facto* law must necessarily be *retrospective*; but every *retrospective* law is not an *ex post facto* law: The former, only, are prohibited.”²⁶³ To be ex post facto, the law must create, or aggravate, the crime, or increase the punishment, or change the rules of evidence for the purpose of facilitating a conviction.²⁶⁴

Justice Paterson then proceeds to concur and provide further guidance on the ex post facto issue. He cites the writings of Judge Blackstone as proof that the term unquestionably refers to crimes and nothing else and follows that with a supportive review of the constitutions of the various states.²⁶⁵ Specifically, Justice Paterson declares that the prohibition against the states has to be read in its entirety, i.e., that no State shall “pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts,” adding that the framers of the Constitution “understood and used the words in their known and appropriate signification, as referring to crimes, pains, and penalties, and no further. The arrange-

²⁵⁹ See *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446 (2003) (Court ruled that a resurrection of an expired statute of limitations statute in child molestation cases violates the Ex Post Facto Clause).

²⁶⁰ *Calder*, 3 U.S. at 390.

²⁶¹ *Id.* (emphasis in original). Note the clairvoyance with which Justice Chase distinguished between a fact done by a *subject* and one done by a *citizen*. The issues the courts encounter today, as a result of the 1996 Immigration Acts, specifically test this nation’s resolve as to the rights of legal immigrants who have invested their person, financial standing and families in the United States of America.

²⁶² *Id.* at 390 (emphasis in original).

²⁶³ *Id.* at 391 (emphasis in original).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 396-97 (quoting 1 BLACKSTONE 6). However, the Court later referred to the ex post facto prohibition against States as applying to civil as well as to criminal acts. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 286 (1827); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 138-39 (1810) (the Court discussed the ex post facto issue in the context of a contract involving land).

ment of the distinct members of this section, necessarily points to this meaning.”²⁶⁶

B. *A Historian’s View of the Calder Ruling and the Ex Post Facto Clause*

Not all constitutional scholars adhere to *Calder’s* restrictive interpretation of the Ex Post Facto Clause. Professor Leonard Levy has studied the question surrounding the basis upon which the U.S. Constitution should be interpreted.²⁶⁷ Should we read the notes of what occurred at the Constitutional Convention? Or should we rely on other historical documents and the common law of England? In his book Levy finds no evidence for grounding the law in original intent, arguing that judicial activism, the continual reinterpretation of the Constitution, is inevitable.²⁶⁸ His most critical observation, insofar as the theme of this article is concerned, centers on the instability of the ruling in *Calder v. Bull*²⁶⁹ when one studies all the viewpoints of the time of the Constitutional Convention.

The term “original intent” stands for the idea that the Supreme Court, in its interpretation of the Constitution, should adhere to the understanding of it by the Framers,²⁷⁰ people such as James Madison, Thomas Jefferson, John Marshall, Elbridge Gerry, and William Paterson, later a Supreme Court Justice on the *Calder* case. Original intent should be followed when it is clear, and the courts should look to it as an interpretive guide.²⁷¹ To that extent, those officials, at all three branches of government, who interpret the Constitution should be led by the Preamble that begins “We the People,” a message that transmits the idea that the government of the United States exists to serve the people.²⁷² President Lincoln best stated it when he said that this nation was conceived in liberty and dedicated to the proposition that all people are created equal.²⁷³

In assessing the meaning of terms in the Constitution, such as ex post facto laws, one can conclude that the most important evidence of original intent is the Constitution itself.²⁷⁴ The writer places himself in the “inter-

²⁶⁶ *Calder*, 3 U.S. at 397. This position seems to strengthen the argument that criminal defendants who followed their lawyer’s advice and pled guilty on the belief that the then-existing law and policy would save them from deportation have a constitutional claim since they relied to their detriment on prior law.

²⁶⁷ Leonard W. Levy received the Pulitzer Prize in history for his work *ORIGINS OF THE FIFTH AMENDMENT*. He is formerly the Earl Warren Professor of Constitutional History at Brandeis University. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMER’S CONSTITUTION* (1988) [hereinafter *ORIGINAL INTENT*].

²⁶⁸ *ORIGINAL INTENT* at back cover.

²⁶⁹ 3 U.S. (3 Dall.) 386 (1798).

²⁷⁰ *ORIGINAL INTENT* at x.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at xi.

pretivist” category because he believes that courts should conform to the text of the Constitution, to original intent if it is clearly discernible, to principles and purposes derived from the Constitution, to history, and to precedents and conventional rules of construction.²⁷⁵ If the original intent is clear, then it can be said that the “plain meaning” approach applies.²⁷⁶ The Ex Post Facto Clause does not require the intervention of the Golden Rule exception, which is based on the logic that the legislature, or in this case, the Framers, would not have intended an unjust or ridiculous result.²⁷⁷ That is because the plain meaning of the Constitution unquestionably bars statutes which have a retroactive punitive approach. Because there is an obvious difference of opinion among members of the federal judiciary as to the clarity and meaning of the Ex Post Facto Clause, the writer seeks to articulate the reasons why the 1996 Immigration Acts violate the Constitution.

The strongest basis for upholding the 1996 Immigration Acts is the “purpose” approach. This method of interpretation directs the judge to the purpose behind the enactment of the statute. The idea is that because the purpose of the statute was to eliminate a particular wrong or mischief, the court should interpret the statute to produce the result.²⁷⁸ The Congress and the courts refer to the need to control our borders. One of the 1996 Immigration Acts refers to “antiterrorism” in its title. One of the first terrorist acts in the United States occurred in 1993 in New York. The second notorious terrorist act was committed not by an alien but by an American citizen in Oklahoma City in 1995. The writer agrees that the purpose of the 1996 Immigration Acts, i.e., protecting our nation by removing criminal aliens, is appropriate. However, the disagreement centers on their conflict with the Ex Post Facto Clause. Thus, the “purpose” approach does not answer the legislative goals of those who sought enactment of these Acts.

In interpreting the application of the Ex Post Facto Clause, the writer prefers “contextualism,” the process of using the context in which a statute was enacted to give the statute meaning.²⁷⁹ The process is merely extended to the Super Legislature, i.e., the Constitutional Convention, the group that enacted the Ex Post Facto Clause. By reviewing how the term was utilized during the time period in which American leaders enacted the Constitution, we will better appreciate and understand the connotations of the term “ex post facto laws.”

²⁷⁵ *Id.* at xv.

²⁷⁶ See NITA, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 38-39 (2002); see also *Greenwood v. United States*, 350 U.S. 366, 374 (1956).

²⁷⁷ See NITA *supra* at 40-41; see also *United States v. Oregon*, 366 U.S. 643 (1961).

²⁷⁸ See NITA *supra* at 43; see also *Moskal v. United States*, 498 U.S. 103, 117 (1990).

²⁷⁹ NITA *supra* note 276 at 47; see, e.g., *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 316-318 (1977).

James Madison, considered the Father of the Constitution and of the Bill of Rights, rejected the doctrine that the original intent of those who drafted the Constitution should be accepted as an authoritative guide to its meaning.²⁸⁰ The Framers apparently thought the original understanding at the convention did not greatly matter.²⁸¹ Instead, the Framers considered significant things such as the text of the Constitution, construed in the light of conventional rules of interpretation, the ratification debates, and other contemporary expositions.²⁸² Madison also relied on the ordinary rules of the common law applicable when construing a document and the history of the time.²⁸³ The one factor that Madison believed predominated in seeking the meaning of the Constitution centered on “the true spirit of liberty.”²⁸⁴ This spirit he believed came from the people who ratified the Constitution when acting through their state conventions and not from the framers.²⁸⁵

Professor Levy supports the writer’s position, i.e., that the *Calder* decision is flawed: “The three [Justices] agreed that ex post facto laws comprehended criminal cases only and did not apply to civil cases or cases that affect property rights. All three men seem to have been mistaken.”²⁸⁶ As Levy sees the development of the *Calder* opinion, the issue centered on whether legislation that operated retroactively against one’s civil interest encroached on the Ex Post Facto Clause.²⁸⁷ Justice William Paterson, a member of the Constitutional Convention, authored one of the opinions. Justice Paterson made no reference to his recollections of the debates on the Ex Post Facto Clause. Instead, he engaged in an effort to construe the term ex post facto by the location of the Ex Post Facto Clause in Article I, section 10. Section 10 included some prohibitions, civil in nature, in a section ending with a semicolon. Justice Paterson concluded that the Ex Post Facto Clause included only criminal matters because the Clause was found after the semicolon where other prohibitions barred state bills of attainder, ex post facto laws, laws impairing the obligation of contracts, and the granting of any title of nobility.²⁸⁸ In support of his position, Levy states:

²⁸⁰ ORIGINAL INTENT 1. The fact that Madison discredited original intent might explain why he did not publish his “Notes of Debates in the Federal Convention” until 1840, fifty-three years after the Framers finished the draft of the Constitution. *Id.*

²⁸¹ *Id.* at 2. Professor Levy notes that Chief Justice William H. Rehnquist points to “the original understanding at Philadelphia” as being of prime importance. *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 5.

²⁸⁴ *Id.* at 6.

²⁸⁵ *Id.* at 17.

²⁸⁶ *Id.* at 65.

²⁸⁷ *Id.* at 66.

²⁸⁸ *Id.*

Contrary to Paterson, “the arrangement of the distinct members of this section” does not “necessarily” prove that “the framers of the Constitution . . . understood and used the words . . . as referring to crimes, pains, and penalties. . . .” The placement of the clause against titles of nobility shows that Paterson was wrong. Moreover, the *ex post facto* clause appears in a list of prohibitions only one of which, bills of attainder, is criminal in character. Indeed, the clause sits between the bill of attainder clause and the contract clause, suggesting that *ex post facto* laws can involve crimes such as bills of attainder *and* civil matters such as contracts.²⁸⁹

Professor Levy also notes that *The Federalist* and Sir William Blackstone’s writings, previously referred to, assisted the Court in the *Calder* outcome.²⁹⁰ However, Levy notes that Justice Chase, the lead author in *Calder*, failed to quote *The Federalist* # 84 where Alexander Hamilton had merely called *ex post facto* laws “formidable instruments of tyranny,” because they created enemies “after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law. . . .”²⁹¹ Levy asserts that neither Hamilton nor Blackstone ever suggest that *ex post facto* laws did not concern civil matters or that they concerned criminal matters only.²⁹²

The ratifying conventions of the various states provide interesting views on this topic, particularly because the comments made by the leaders of the various states provide guidance as to the meaning of the Clause. The *Calder* opinion referred to four state constitutions for the definition of the term *ex post facto*. Two referred to criminal matters; the other two did not use the term, but they referred to oppression from laws that punished actions not criminal when made.²⁹³ Pennsylvania and South Carolina added an *ex post facto* clause to their Constitutions. The drafters apparently took their *ex post facto* language from the United States Constitution “without in any way referring to criminal matters.”²⁹⁴ The 1784 New Hampshire provision proves even more explicit that the term *ex post facto* encompasses civil matters: “Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences.”²⁹⁵

The North Carolina ratification debates in 1788 also confirm the civil nature of *ex post facto* laws. James Iredell, who later became one of the

²⁸⁹ *Id.* (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798)) (emphasis in original) (footnote omitted).

²⁹⁰ ORIGINAL INTENT 67.

²⁹¹ *Id.*

²⁹² *Id.*; *but see* *Calder*, 3 U.S. at 396-97 (quoting 1 BLACKSTONE 6).

²⁹³ ORIGINAL INTENT 68.

²⁹⁴ *Id.* (footnote omitted).

²⁹⁵ *Id.* (footnote omitted).

justices in the *Calder* majority, debated the possible ex post facto impact on the state's currency laws. Timothy Bloodworth argued against ratification because the Constitution banned state laws allowing payment in paper money for debts. Bloodworth feared the ban might be applied ex post facto. Another debater, Stephen Cabarrus, stated the state's currency laws would survive because the Constitution prohibited ex post facto legislation by Congress.²⁹⁶ "Iredell, answering Bloodworth, agreed with Cabarrus by revealing his understanding that ex post facto laws extended to civil matters," specifically declaring that an express clause "provides that there shall be no *ex post facto* law."²⁹⁷ Justice Iredell was not alone in contradicting himself once he became a Supreme Court Justice. As a circuit judge, in 1795, Judge William Paterson instructed a federal jury that the Constitution's prohibition of state ex post facto laws extended to statutes disturbing land titles.²⁹⁸

Madison's Notes on the Convention also support the flexible interpretation of the Ex Post Facto Clause to include non-criminal matters. In one instance, Rufus King of Massachusetts urged a contract clause to limit state power to violate private contracts. After an objection, James Wilson of Pennsylvania replied: "The answer to these objections is that retrospective interferences only are to be prohibited."²⁹⁹ According to Levy, because the debate centered on contract rights, Wilson's remark indicated that ex post facto laws extended to civil, non-criminal matters.³⁰⁰ Madison inquired if that protection already existed: "Is that not already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void."³⁰¹

Professor Levy cites several other historical examples of the common understanding of ex post facto laws,³⁰² but one specific example serves to conclude with the argument that *Calder* needs to be either overruled or modified. Two leading American heroes, George Mason and Patrick Henry, speaking against ratification during the Virginia ratifying convention, "opposed the ban on ex post facto laws precisely because those laws extended to civil matters."³⁰³ However, an opponent of theirs, Edmund Pendleton, a ratificationist who presided over the Virginia ratifying con-

²⁹⁶ *Id.* at 68-69.

²⁹⁷ *Id.* at 69.

²⁹⁸ *Id.* After the *Calder* opinion, Congress debated the bankruptcy act, a purely civil matter. Opponents described the act as a prohibited ex post facto law. The proponents declared it was not an ex post facto law. "No one in the debates of 1799-1800 or 1803 stated the ex post facto laws did not apply to civil matters; and no one cited *Calder*." *Id.* Yet today we cite it almost as a conditioned response that the Ex Post Facto Clause is limited to criminal cases.

²⁹⁹ ORIGINAL INTENT 70.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 71.

³⁰² *See id.* at 65-74; *see also id.* at 126-28; 151-52; 413 n.76.

³⁰³ ORIGINAL INTENT 73.

vention, four years later declared in a judicial opinion that ex post facto laws “destroy rights already acquired under the former statute, by one made subsequent to the time when they were vested,” clearly indicating that Pendleton and his judicial brethren believed that ex post facto laws comprehended civil matters.³⁰⁴

Whether one looks to the original intent of the Framers, such as Madison, or the plain meaning, to principles and purposes derived from the Constitution, to history, and to precedents and conventional rules of construction, the final product should be the same. *Calder* went too far in its declaration that the Ex Post Facto Clause includes only criminal cases. The limited ruling is not supported by any of the methods of analysis traditionally utilized by jurists. Professor Levy concludes his attack on *Calder* by stating: “The Court in [*Calder*] reinvented the law on the subject. In doing so the Court did not rely on original intent, and when it reconfirmed the basic doctrine of *Calder* in 1854 and claimed to be relying on original intent, it rested exclusively on Dickinson’s remark; having found what it sought the Court ignored all else.”³⁰⁵

C. *Post-Calder Supreme Court Decisions Support a Modification*

It is the humble opinion of this writer that the *Calder* principles are correct but only as the rules apply to criminal cases. The Supreme Court, if faced with the issue in a case involving a retroactively imposed removal, should modify *Calder* to apply to quasi-punitive “civil” deportations based upon a pre-1996 Immigration Acts conviction. Only then can we return, in part, to the standards of decency upon which our great nation was born. Contrary to a large number of precedents that state that deportations are civil in nature and that *Calder* applies to criminal cases only, authorities exist to establish that the Ex Post Facto Clauses extend to civil settings.

For example, in *Fletcher v. Peck*³⁰⁶ and *Ogden v. Saunders*,³⁰⁷ the Court referred to the ex post facto prohibition against States as applying to civil as well as to criminal acts.³⁰⁸ *Fletcher* involved the ex post facto issue in

³⁰⁴ *Id.* (quoting *Turner v. Turner’s Ex’x*, 4 Call. (Va.) 234, 237 (1792)). ORIGINAL INTENT 411. This decision, preceding *Calder* by six years, is a prime example of the understanding of the term ex post facto during the colonial era.

³⁰⁵ ORIGINAL INTENT 74. Levy refers to John Dickinson of Delaware who observed that on examining Blackstone’s *Commentaries*, he found that the term ex post facto related to criminal cases only. *Id.* at 71.

³⁰⁶ 10 U.S. (6 Cranch.) 87, 138 (1810).

³⁰⁷ 25 U.S. (12 Wheat.) 213, 286 (1827).

³⁰⁸ A more modern discussion of the Ex Post Facto Clause and its application to civil matters occurred in *Hiss v. Hampton*, 338 F. Supp. 1141 (D.D.C. 1972). In the 1950s Alger Hiss was convicted of perjury in connection with issues dealing with national security. Upon reports that he would receive his federal pension a few years later, Congress enacted the Hiss Act, a law which denied him his pension. The House

the context of a contract involving land. Chief Justice Marshall, writing for a unanimous court, rationalized that because the estate passed into the hands of a purchaser for valuable consideration, without notice, either general principles of law or the United States Constitution restrained the state of Georgia from passing a law whereby the estate could be impaired and rendered null and void.³⁰⁹ The Court stated that an ex post facto law may inflict penalties on the person or it may inflict pecuniary penalties that swell the public treasury.³¹⁰ “The legislature is then prohibited from passing a law by which a man’s estate . . . shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment.”³¹¹

In *Ogden* Justice Johnson initiated his crusade against the ex post facto dictum found in *Calder*. “It is true, that some confusion has arisen from an opinion, which seems early, and without due examination, to have found its way into this Court; that the phrase “*ex post facto*,” was confined to laws affecting criminal acts alone.”³¹² Two years later, Justice Johnson made his last effort to correct his perceived wrongs of *Calder*. In *Satterlee v. Mathewson*,³¹³ he repeated his concerns with the “unhappy idea” that the phrase ex post facto would be limited to criminal cases only, “a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the constitution.”³¹⁴ He went even further by appending to the *Satterlee* opinion a note on the exposition of the phrase “*ex post facto*” in the Constitution.³¹⁵ First, *Calder* could have been decided on more narrow grounds without having to expound on the ex post facto issue; the acts of the Connecticut legislature amounted to the exercise of judicial, not legislative, authority, and thus, by definition, not reachable under the Ex Post Facto Clause.³¹⁶ Second, the adjudication in *Calder* amounted to *obiter dictum* because the law or act complained of had nothing to do with criminal law.³¹⁷

Extending the appropriate courtesies to his learned brethren in *Calder*, Justice Johnson proceeds to establish that they have not proved that the

debate included comments that the pension denial would be penal and not regulatory. *Id.* at 1153.

³⁰⁹ 10 U.S. (6 Cranch.) 87, 138 (1810).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² 25 U.S. (12 Wheat.) 213, 286 (1827).

³¹³ 27 U.S. (2 Pet.) 380 (1829).

³¹⁴ *Id.* at 416. Justice Johnson prepared an appendix to this opinion in which he sets forth a linguistic and legal history of the term ex post facto. See 27 U.S. (2 Pet.) at 681-87.

³¹⁵ *Id.* at 681-87.

³¹⁶ *Id.* at 682. The Connecticut legislature historically engaged in judicial activities such as granting new trials. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798).

³¹⁷ *Id.* at 683 (“An opinion given in court, if not necessary to the judgment given of record, is . . . no judicial opinion at all, and consequently no precedent. . .”).

term *ex post facto* is limited to criminal cases.³¹⁸ To best prove that civil cases came within the *ex post facto* concept, he refers to a precedent from the year 1720, involving a contract and a later enacted statute. The court there stated: “This act being *ex post facto*, the construction of the words ought not to be strained, in order to defeat a contract, to the benefit whereof the party was well entitled, at the time the contract was made.”³¹⁹ Three points support Justice Johnson’s position: First, the courts used the term *ex post facto* “in a sense equally applicable to contracts and to crimes; second, the courts applied it to statutes affecting contracts; and third, as late as the time of Lord Raymond, the term had not received a practical or technical construction which restricted it to criminal cases.”³²⁰ If the *Ex Post Facto* Clause applies to assets, as *Fletcher* discusses, then it undoubtedly should apply to the liberty of a permanent resident alien who has been additionally punished by removal for a previously committed crime.

When Wooddeson, a noted scholar, wrote about the subject, he referred to “all penal statutes passed *ex post facto*.”³²¹ Johnson questions “but why say *penal* statutes, and not simply statutes passed *ex post facto*, if the use of the phrase was exclusively limited to penal statutes.”³²² Additionally, he cites other sources that state “if a contract be not in its inception usurious, no matter *ex post facto* shall make it so.”³²³ In a final rebuttal to the *Calder* jurists, Justice Johnson notes:

But with all deference, I must contend that if any thing is to be deduced from the arrangement of the three instances of restriction, the argument will be against [Justice Paterson]. For by placing “*ex post facto* laws” between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that *ex post facto* laws partook of both characters, was common to both purposes.³²⁴

Simply stated, “the case of *Calder vs. Bull* cannot claim the pre-eminence of an adjudged case upon this point, and if adjudged was certainly not sustained by reason of authorities.”³²⁵ Subsequent Supreme Court opinions nonetheless adhere to the *Calder* dictum.³²⁶

Not all was lost in the effort to broaden the meaning of the *Ex Post Facto* Clause. In *Cummings v. Missouri*,³²⁷ the Court addressed a ques-

³¹⁸ *Id.*

³¹⁹ *Id.* at 684 (quoting *Wilkinson v. Meyer*, 2 Lord Raym. 1350-52).

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* (emphasis in original).

³²³ *Id.* at 686 (quoting 1 SHEPPARD’S TOUCHSTONE 63) (emphasis in original).

³²⁴ *Id.* at 687.

³²⁵ *Id.*

³²⁶ *E.g.*, *Carpenter v. Commonwealth*, 58 U.S. (17 How.) 456, 463-64 (1854).

³²⁷ 71 U.S. (4 Wall.) 277, 278-79, 317 (1866).

tion regarding the state's practice in its post-bellum constitution of restricting the civil rights of individuals who had previously engaged in armed hostility to the United States, particularly requiring priests and clergymen to take and subscribe an oath that they had not committed certain designated acts. In a companion case, *Ex parte Garland*,³²⁸ the Court voided an 1865 act of Congress which provided that no person shall be admitted as an attorney and counselor to the bar of the Supreme Court and to the bars of any other circuit or district courts of the United States unless he shall have first taken and subscribed the oath that he has never voluntarily borne arms against the United States. The Court ruled that such oaths respectively imposed punishments.³²⁹

The Court in *Cummings* criticizes the counsel for the state of Missouri for minimizing the scope of the term "punishment" by limiting it to only a deprivation of life, liberty, or property. The majority opinion states:

The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. . . .The learned counsel . . . does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under such property those estates which one may acquire in professions. . . . *The deprivation of any rights, civil or political, previously enjoyed, may be punishment. . . . Disqualification from office may be punishment, as in cases of conviction upon impeachment.*³³⁰

The Court further cites Blackstone who claims that some punishments consist of "exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment."³³¹ If Blackstone is good authority for the alleged claim that ex post facto laws relate only to criminal matters, with which the writer vehemently disagrees, then there should be no quarrel with Blackstone's claim that exile and banishment, i.e., removal, constitute punishment. If so, then the writer's position that the Ex Post Facto Clause applies to deportations and removals, modern-day exiles and banishments, should be accepted without further debate.

The language involving bills of attainder and ex post facto laws, according to Chief Justice Marshall, contains perhaps the closest protection in the nature of a bill of rights for the people of the various states.³³² The Court in *Cummings* discusses the little-known concept of a bill of attain-

³²⁸ *Ex parte Garland*, 71 U.S. 333, 347 (1866).

³²⁹ *Id.* at 333, 347; *Cummings*, 71 U.S. at 320

³³⁰ *Id.* at 320 (emphasis added) Compare this disqualification from office to a disqualification from continued residence in or removal from the United States on the basis of conviction for an alleged aggravated felony.

³³¹ *Id.* at 321.

³³² *See id.* at 325. The Constitutional Convention adopted the Constitution in Philadelphia in September 1787 and ratified it on July 2, 1788. The section known today as The Bill of Rights, amendments one through ten, was ratified in December

der, describing it as a legislative act that inflicts punishment without a judicial trial.³³³ In those cases the legislative body exercises the powers and office of a judge by pronouncing upon the guilt of the party, without any of the safeguards of a trial; it determines the sufficiency of the required proof; and it fixes the punishment in accordance with its own notions of the enormity of the offense.³³⁴ One specific historical example of a bill of attainder involves the Earl of Clarendon. A bill entered against the earl provided that he should suffer perpetual exile, i.e., forever banished, from the realm.³³⁵

In *Cummings*, the Court concludes that the actions of the state legislature took aim at past, not future, acts that did not define any crimes or declare that any punishment shall be inflicted.³³⁶ However, the state provisions were intended to deprive such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations.³³⁷ In its final holding, the Court stated:

This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. . . . To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for the act.³³⁸

1791. CENTER FOR CIVIC EDUCATION, AMERICAN LEGACY: THE UNITED STATES CONSTITUTION 12, 27-28 (1998).

³³³ 71 U.S. (4 Wall.) 277, 323 (1866) (compare the bill of attainder definition to the statutory provisions of the 1996 Immigration Acts that call for removal of any alien convicted of an aggravated felony at any time, whether before, on, or after the effective date of the law). The dissenting opinion in *Ex parte Garland* limits bills of attainder to those which involve a capitally condemned person whose inheritance suffered the stain or corruption of blood. See *Ex parte Garland*, 71 U.S. at 333, 387.

³³⁴ *Cummings*, 71 U.S. at 323. The Court further quotes Justice Story in his Commentaries, § 1344, who explains that bills of attainder are generally enacted in times of "violent political excitements," trampling the rights and liberties of others. *Id.* (compare the post-war actions in *Cummings* and *Ex parte Garland* to the atmosphere after the 1993 World Trade Center bombing and the 1995 bombing of the Oklahoma City Federal Building as they contributed to the 1996 anti-terrorist legislative emotional intensity on Capitol Hill and now the aftermath of the Twin Tower Tragedy).

³³⁵ *Cummings*, 71 U.S. at 324 (if the earl were to be found in England or any of the king's dominions after the first of February 1667, he should suffer the pains and penalties of treason).

³³⁶ *Id.* at 327.

³³⁷ *Id.*

³³⁸ *Id.* (emphasis added).

IX. *STOGNER V. CALIFORNIA: THE DEATH KNELL FOR PUNITIVE DEPORTATIONS?*

A. *Stogner: The Supreme Court Re-Visits the Ex Post Facto Clause*

In *Stogner v. California*³³⁹ the United States Supreme Court encountered a sensitive issue, i.e., adjudication of the constitutional rights of an accused child molester. Justice Breyer, writing for the majority, concluded that a California statute enacted after pre-existing limitations periods had expired and which resurrected otherwise time-barred criminal prosecutions violated the Constitution's Ex Post Facto Clause.³⁴⁰ California allowed prosecution for sex-related child abuse if the prosecution began within one year of a victim's report to police. A subsequent provision clarified that this law revived causes of action barred by prior limitations statutes. In 1998 *Stogner* was indicted for sex-related child abuse committed between 1955 and 1973. At the time those crimes were allegedly committed, the limitations period was three years. The Court held that the new California statute of limitations law produces the kind of retroactivity that the Constitution forbids. First, the law threatens the kinds of harm that the Clause seeks to avoid, because the Clause bars governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects.³⁴¹ Second, the law falls literally within the categorical descriptions of ex post facto laws that Justice Chase set forth authoritatively more than 200 years ago in *Calder*. It falls within the second category, which Justice Chase understood to include a new law that inflicts punishments where the party was not, by law, liable to any punishment.³⁴²

Justice Breyer described the impact of the changes in the statute of limitations by saying the government has refused "to play by its own rules"³⁴³ and has deprived the defendant of the "fair warning"³⁴⁴ that might have led him to preserve exculpatory evidence. Allowing legislatures to decide when to enact retroactive laws, he added, risks both "arbitrary and potentially vindictive legislation" and erosion of the separation of powers.³⁴⁵ Drawing substantially on Richard Wooddeson's 18th-century commentary on the nature of ex post facto laws, the majority recounts the four factors that Justice Chase enumerated in *Calder*:

³³⁹ 539 U.S. 607, 123 S. Ct. 2446 (2003). Justice Breyer was joined in the majority opinion by Justices O'Connor, Ginsburg, Souter, and Stevens. *Id.* at 2448.

³⁴⁰ *Id.* at 2448, 2449.

³⁴¹ *Id.*

³⁴² *Id.* at 2450-51; see *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

³⁴³ *Stogner*, 539 U.S. at 611 (quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000)).

³⁴⁴ *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).

³⁴⁵ *Id.*, quoting *Weaver*, 450 U.S. at 29. See also, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810) (viewing the Ex Post Facto Clause as a protection against "violent acts which might grow out of the feelings of the moment").

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. *Every law that aggravates a crime, or makes it greater than it was, when committed.* 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.³⁴⁶

The Court found the second category—including any “law that aggravates a crime, or makes it greater than it was, when committed”—describes California’s statute as long as those words are understood as Justice Chase understood them, i.e., as referring to a statute that “inflicts punishments, where the party was not, by law, liable to any punishment.”³⁴⁷ After all, the statute of limitations had expired. Justice Breyer further found historical support in the writings of R. Wooddeson who discusses the ex post facto status of a law that affects punishment by “making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law.”³⁴⁸ He cites as an example of such a law the Acts of Parliament that banished certain individuals accused of treason, a fact significant because Parliament had enacted those laws not only after the crime’s commission but also under circumstances where banishment “was simply not a form of penalty that could be imposed by the courts.”³⁴⁹

The majority opinion takes the offensive against the dissent, accusing them of undertaking a Herculean effort to prove that it is not unfair, in any constitutionally relevant sense, to prosecute a man for crimes committed twenty-five to forty-two years earlier when nearly a generation has passed because the law granted him an effective amnesty.³⁵⁰ According to the majority, the dissent interprets Justice Chase’s historical examples to show that *Calder’s* second category concerns only laws that both (1) subject the offender to increased punishment and (2) do so by changing the nature of an offense to make it greater than it was at the time of commission.³⁵¹

³⁴⁶ *Stogner*, 539 U.S. at 612 (quoting *Calder*, 3 U.S. at 390-91 (emphasis added to portion relevant to application to the 1996 Immigration Acts)).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 613 (emphasis in original) (quoting R. WOODENSON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 638 (1792)).

³⁴⁹ *Stogner*, 539 U.S. at 613.

³⁵⁰ *Id.* at 621.

³⁵¹ *Id.* at 622.

Justice Kennedy, writing for the dissent, says it is a fallacy to apply the label “unfair and dishonest” to the statute, even though the law revives long-dead prosecutions.³⁵² A law that does not alter the definition of the crime but only revives prosecution does not make the crime “greater than it was, when committed.” He further argued that until *Stogner*, a plea in bar had not been thought to form any part of the definition of an offense.³⁵³ The dissent additionally asserts that the reach of the Ex Post Facto Clause is strictly limited to the precise formulation of the *Calder* categories. The first three categories guard against the common problem of retroactive redefinition of conduct by criminalizing it (category one), enhancing its criminal character (category two), or increasing the applicable punishment (category three).³⁵⁴ Citing from *Calder*, Justice Kennedy repeats: “The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together.”³⁵⁵

The dissent noted that it was an accepted procedure in 17th-century England for Parliament to pass laws imposing banishment. In order to counter the majority, the dissent discussed the examples of Clarendon and Bishop Francis Atterbury, who, in the midst of hysteria over both real and supposed plots, was accused of conspiracy to depose George I. The evidence against Atterbury was meager, and supporters of the Crown, fearing neither the common-law courts nor even the House of Lords would convict, introduced a bill of banishment, declaring Atterbury a traitor and subjecting him to a range of punishments not previously imposed, including exile and civil death.³⁵⁶ The Duke of Wharton, who registered the lengthiest dissent, commented that “[Atterbury’s] Bill seems as irregular in the punishments it inflicts, as it is in its foundation, and carries with it an unnatural degree of hardship,” adding that the sanction against Clarendon, although more mild, was just as violative of the rule against penalties imposed after the fact.³⁵⁷ According to the dissent, these illustrative examples suggest the second *Calder* category encompasses only the laws that, to the detriment of the defendant, change the character of the offense to make it *greater* than it was at the time of commission.³⁵⁸

³⁵² See *id.* at 636. Justice Kennedy was joined in the dissent by Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.* at 639.

³⁵³ See *id.* at 639.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 639-640 (quoting *Calder*, 3 U.S. at 397).

³⁵⁶ *Id.* at 647, citing G. BENNETT, *TORY CRISIS IN CHURCH AND STATE, 1688-1730*, at 258-65 (1975); *BISHOP ATTERBURY’S TRIAL*, 16 *How. St. Tr.* 323, 640, 644-46 (1723) (reprint 2000).

³⁵⁷ *Id.*

³⁵⁸ *Id.* (emphasis added). Based on his perspectives as a former trial judge in criminal matters, the writer agrees with the dissent on the need to consider the age and other characteristics of the victims in the enactment of an appropriate statute of

Justice Kennedy approvingly states that Justice Paterson noted in *Calder* the link between these three categories: “The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together.”³⁵⁹ Finally, the dissent cites an expert’s treatise on the Ex Post Facto Clause, stating that the category of retroactive legislation covered:

[T]he law which undertakes to aggravate a past offence, and make it greater than when committed, endeavors to bring it under some description of transgression against which heavier penalties or more severe punishments have been denounced: as, changing the character of an act which, when committed, was a misdemeanor, to a crime; or, declaring a previously committed offence, of one of the classes graduated, and designated by the number of its degree, to be of a higher degree than it was when committed.³⁶⁰

The federal law, seen as supreme in matters involving immigration matters, clearly impacted state misdemeanors by graduating them to “a higher degree than it was when committed.” Stated another way, Congress converted scores of state misdemeanors across the nation into “aggravated felonies” and, even worse, increased the punishment by adding removal, modern-day banishment, as a further consequence of the conviction. The federal courts should thus apply the *Stogner* ex post facto interpretation and void punitive removals that are based on retroactive criminal convictions.

Stogner is not the only shining light that the Supreme Court has emitted in potential efforts to undo injustices created by the 1996 Immigration Acts. Earlier in the same term the Court decided *Smith v. Doe*,³⁶¹ a case challenging a sex offender registration act as an unconstitutional ex post facto law. The Alaska statute at issue in *Smith v. Doe* required any sex offender or child kidnapper to register either with a prison system, if incarcerated, or with local law enforcement if the individual is at liberty. Both the registration and the notification system are retroactive.³⁶² The law mandated registration for 15 years if convicted only once and for life if convicted of an aggravated sex offense or of two or more sex offenses.³⁶³ The respondents in *Smith v. Doe* were each convicted of aggravated sexual abuse of a minor and were each released in 1990 from prison. John Doe I and John Doe II claimed that the even if the legislature intended the act to be a non-punitive, civil regulatory scheme, as

limitations. However, such factors cannot justify the dissent’s abandonment of constitutional protections against Ex Post Facto legislation.

³⁵⁹ *Id.* at 639-640 (quoting *Calder*, 3 U.S. at 397).

³⁶⁰ *Id.* at 639 (quoting WILLIAM WADE, OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS § 273, at 317-18 (1880)).

³⁶¹ 538 U.S. 84 (2003).

³⁶² *Id.* at 90.

³⁶³ *Id.*

applied to them it constitutes retroactive punishment forbidden by the Ex Post Facto Clause.³⁶⁴ The Court held that the Alaska statute established a civil regulatory scheme, one whose retroactive application did not violate the Ex Post Facto Clause.³⁶⁵

In considering whether a law constitutes retroactive punishment, the Court must first “ascertain whether the legislature meant the statute to establish ‘civil’ proceedings.”³⁶⁶ If the legislature intended, or the Congress in the case of the 1996 Immigration Acts, to impose punishment, that ends the inquiry. On the other hand, if the intention was to enact a regulatory scheme that is civil and non-punitive, the inquiry proceeds to examine whether the statutory scheme is so punitive either in purpose or effect as to negate the Government’s intention to have a purely civil system.³⁶⁷ Even if the statute’s objective is consistent with the purposes of the Alaska criminal justice system, Alaska’s regulatory scheme, i.e., registration and notification, does not make the objective punitive.³⁶⁸ Further, where a legislative act is related to the state’s power to protect the health and safety of its citizens, it will be considered regulatory and not a purpose to add to the punishment.³⁶⁹

B. *The Punitive Aspects of the Aggravated Felony Legislation*

One only need look objectively at the 1996 Immigration Acts to conclude that Congress intended the enactment of punitive legislation. Legislative history might be helpful but hardly essential to establish intent where Congress so blatantly set out to create a new scheme to fight terrorism and the infiltration of aliens into American society.³⁷⁰ Congress first utilized the “aggravated felony” concept in the passage of the Anti-Drug Abuse Act of 1988.³⁷¹ Congress next addressed the term in the 1996 enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996³⁷² (AEDPA) and the Illegal Immigration Reform and Immigrant

³⁶⁴ See *id.* at 91-92.

³⁶⁵ *Id.* at 105-06.

³⁶⁶ *Id.* at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

³⁶⁷ *Id.* See also *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

³⁶⁸ *Smith*, 538 U.S. at 94.

³⁶⁹ *Id.* at 93-94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

³⁷⁰ A Harvard University professor, Samuel P. Huntington, documents some of our nation’s xenophobic concerns in an excerpt from his book *WHO WE ARE* in which he discusses an alleged Hispanic challenge. Huntington warns of the need for immigrants of Mexican descent to become Americanized and of the fears that these immigrants from Mexico and Latin America will make the United States a divided bilingual, bicultural nation. John Hall, *Noted Professor Sounds the Alarm on Immigration*, RICHMOND TIMES DISPATCH, Mar. 7, 2004, at A-13.

³⁷¹ 8 U.S.C. § 1101 (a) (43) (2000).

³⁷² Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Responsibility Act of 1996.³⁷³ What better proof of intent to enact punitive laws than by the title of the two more recent pieces of legislation.

In addition to the obvious intent, the 1996 Immigration Acts further concentrated on a new penalty classification scheme with removal consequences. The Acts further defined the term “aggravated felony,” which, for example, now includes convictions for theft or burglary if the alien receives a term of imprisonment of at least a year.³⁷⁴ The amendment further includes convictions for fraud and deceit where the victim lost over \$10,000.³⁷⁵ The congressional intent was so punitive that on September 30, 1996, the effective date of the second Immigration Act, a resident alien’s pre-1996 conviction legislatively transformed from a misdemeanor into an “aggravated felony.”³⁷⁶ Congress also expanded the term aggravated felony to include any “crime of violence”³⁷⁷ resulting in a prison sentence of at least one year.³⁷⁸

A further view of *Smith v. Doe* corroborates the writer’s argument that the 1996 Immigration Acts qualify as strictly punitive statutes for Ex Post Facto Clause analysis. The Court discusses the fact that a state that seeks to punish an individual will likely select a means that is traditionally considered punitive, proceeding to conclude that sex offender registration and notification statutes do not meet that punitive level.³⁷⁹ The sex offenders in *Smith v. Doe* argued that they were being subjected to shaming punishments of the colonial period, but the Court concluded that the state does not make the publicity and the resulting stigma “an integral part of the objective of the regulatory scheme.”³⁸⁰

³⁷³ Pub. L. No. 104-208, 110 Stat. 3009, 3009-46 (1996).

³⁷⁴ Compare 8 U.S.C. § 1101(a)(43)(G) (Supp. V 1994) with 1994 ed.

³⁷⁵ Compare 8 U.S.C. § 1101(a)(43)(M)(i) (Supp. V 1994) with 1994 ed.

³⁷⁶ Maynard, *supra* note 3, at 29; INA, 8 U.S.C. § 1101 (a) (43) (F) (2000). Appellate courts have held that misdemeanor shoplifting convictions with a one-year suspended sentence or potential sentence amount to aggravated felonies. *E.g.*, *United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000); *United States v. Graham*, 169 F.3d 787, 791-92 (3rd Cir.), *cert. denied*, 528 U.S. 845 (1999).

³⁷⁷ 18 U.S.C. § 16 (1994 ed., Supp. V); INA, 8 U.S.C. § 1101 (a) (43) (F) (2000).

³⁷⁸ Compare 8 U.S.C. § 1101 (a) (43) (F) (1994 ed., Supp. V) with (1994 ed.). Apparently, an actually served sentence of 364 days in jail custody does not meet the one-year requirement. *See* Maynard, *supra* note 3, at 28. *See generally* 18 U.S.C. §§ 16 (a), (b) (2000). The question whether a drunk driving case that results in injury constitutes a crime of violence should be answered by the Supreme Court within the year. *See* *Leocal v. Ashcroft*, No. 03-583, 2004 U.S. LEXIS 7511 (U.S. Nov. 9, 2004) (interpreting the crime of violence provisions of 18 U.S.C. § 16 to encompass accidental or negligent conduct blurs the distinction between “violent” crimes Congress sought to distinguish for heightened punishment and other crimes); *see also* 8 U.S.C. § 1101 (h) (3) (injury resulting to another from driving while intoxicated constitutes a “serious criminal offense”).

³⁷⁹ *Smith*, 538 U.S. 84, 97 (2003).

³⁸⁰ *Id.* at 97, 99.

Of particular interest is the Court's treatment of the history of other colonial era punishments. The Court recognized that certain colonial practices were designed to make these offenders suffer "permanent stigmas, which in effect cast the person out of the community."³⁸¹ The Court continued, "The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one."³⁸² In addition to the dissemination of information to society in early punitive practices, the Court noted that banishment particularly carried more than the normal: It meant expulsion from the community.³⁸³ In upholding Alaska's statutory scheme, the Court observed: "In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme."³⁸⁴ On the other hand, Congress, in passing the 1996 Immigration Acts, acted to make removal, a euphemistically-labeled banishment, "an integral part of the objective of the regulatory scheme." In doing this, Congress created a punitive system that must overcome ex post facto and due process of law challenges.

C. *Application of Stogner to the Removal Aspects of the 1996 Legislation*

Justice Breyer described the impact of the changes in the statute of limitations by saying the government has refused "to play by its own rules"³⁸⁵ and has deprived the defendant of the "fair warning"³⁸⁶ that might have led him to preserve exculpatory evidence. Allowing legislatures to decide when to enact retroactive laws, he added, risks both "arbitrary and potentially vindictive legislation" and erosion of the separation of powers.³⁸⁷ Similarly, the 1996 Immigration Acts place the resident alien in the predicament of making knowing, voluntary and intelligent decisions on whether or not to waive valuable constitutional rights in a vacuum. Making a decision on whether or not to abandon a right to a jury trial, or to contest questionably-obtained evidence, is sufficiently troubling. Now the Congress and the courts in incredibly large numbers are requiring removals of aliens who waived rights to contest the quan-

³⁸¹ *Id.* at 98 (quoting Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991)).

³⁸² *Id.* (quoting T. BLOMBERG & K. LUCKEN, *AMERICAN PENOLOGY: A HISTORY OF CONTROL* 30-31 (2000)).

³⁸³ *Id.*

³⁸⁴ *Id.* at 99.

³⁸⁵ *Stogner*, 123 S. Ct. at 2450 (quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000)).

³⁸⁶ *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).

³⁸⁷ *Id.* (quoting *Weaver*, 450 U.S. at 29). *See also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-138 (1810) (The Ex Post Facto Clause seen as a protection against "violent acts which might grow out of the feelings of the moment").

tum of evidence and the legality of searches in the honest and legitimate, at the time, belief that the offense was not a deportable offense.

Justice Breyer refers to the *ex post facto* status of a law that affects punishment by “making therein some innovation, or *creating some forfeiture or disability, not incurred in the ordinary course of law.*”³⁸⁸ The ordinary course of the criminal law in 1980, for example, was whatever the penal statute provided as punishment. Adding removal, modern-day banishment, to the consequences of a criminal conviction more than a decade after the finality of the conviction clearly constitutes a forfeiture or disability not incurred in the regular course of the law.

The writer’s thesis, that deportations for criminal conduct engaged in at any time before the effective date of the new statute, in this case the 1996 Immigration Acts, violate the Ex Post Facto Clause, is supported by both the majority and the dissenting opinions in *Stogner*. For instance, both opinions refer to the historical practice of banishment as punishment. Can one really dispute that banishment is deportation, exile, removal? The writer does not seek to bar all removals; instead, the writer seeks to restrict the power of Congress from retroactively imposing removals for criminal convictions finalized prior to the effective date of the 1996 Immigration Acts and as to additional retroactive efforts in future legislation. Further support for the writer’s position surfaces in the following passage of the majority opinion:

In sum, Clarendon’s case involved Parliament’s punishment of an individual who was charged before Parliament *with treason* and satisfactorily *proven to have committed treason*, but whom Parliament punished by imposing “banishment” in circumstances where the party *was not, in “the ordinary course of law,” liable to any “banishment”* To repeat, the example of Clarendon’s banishment is an example of an individual’s being punished through legislation that subjected him to punishment otherwise unavailable, to any degree, through “the ordinary course of law. . . .”³⁸⁹

³⁸⁸ *Stogner*, 539 U.S. at 613 (quoting R. WOODDENSON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 638 (1792)) (emphasis from original opinion).

³⁸⁹ *Id.* at 622. See also *Carmell*, 529 U.S. at 523, n. 11. With respect to the second category, Justice Chase provided two examples: the banishments of Lord Clarendon in 1667 and of Bishop Francis Atterbury in 1723. *Id.* at 647. Banishment is acknowledged as a punishment. *id.*; see also, Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. REV. 388, 392 (1890) (Both perpetual and temporary banishment were well known to the common law) (Cited by Justice Kennedy in his dissent, *Stogner*, 539 U.S. at 647).

D. *A Historical Precedence for Ex Post Facto Assessment of a Civil Statute*

In *Hiss v. Hampton*³⁹⁰ a federal employee named Alger Hiss accumulated fifteen years of federal employment service between 1929 and 1947. Hiss was convicted in 1950 of perjury before a Federal grand jury and sentenced to five years.³⁹¹ When he reached the age of 62 in 1966, he became eligible for a federal monthly annuity. In 1967 Hiss filed a claim for his annuity. The Civil Service Commission rejected his application pursuant to section 1 (a) (3) (B) of Public Law 87-299.³⁹² That section, retroactively applied to Hiss, provided: An individual . . . may not be paid annuity or retired pay [. . .] if the individual—was convicted, *before, on, or after* September 1, 1954 of [. . .][p]erjury committed under the statutes of the United States or the District of Columbia” [. . .]in testifying before a Federal grand jury [. . .] in connection with a matter involving or relating to an interference with or endangerment of [. . .] the national security or defense of the United States.³⁹³

The district court faced the issue whether the imposed disabilities were effectively punitive even though the denial of the pension was based upon a civil statute. The court stated that the disabilities imposed by the statute could not be applied to Hiss because of the Ex Post Facto Clause.³⁹⁴ The court appears to center its decision on the fact that the civil disability was contingent upon the criminal conviction he suffered in 1950, eleven years before the enactment of the law.³⁹⁵ The district court declared that as applied to Hiss and his co-defendant Strasburger, the retroactive statute “does not regulate, it punishes” because other violent and morally corrupt former federal employees were restored to grace and not denied benefits.³⁹⁶

X. CONCLUSION

Our American jurisprudence has seen antiquated rulings set aside to make room for our ever-evolving sense of fairness.³⁹⁷ This great nation should not succumb to the concerns expressed by the patriot Thomas Paine who stated: “A long habit of not thinking a thing wrong gives it a

³⁹⁰ 338 F. Supp. 1141 (D.D.C. 1972).

³⁹¹ *Id.* at 1144.

³⁹² *Id.* at 1143. The statute is codified at 5 U.S.C. § 8312 (1996).

³⁹³ 338 F. Supp. at 1144 (emphasis added).

³⁹⁴ *Id.* at 1153.

³⁹⁵ *Id.* at 1148. The 1996 Immigration Acts repeat this history and base a removal, in part, upon conviction for an aggravated felony.

³⁹⁶ *Id.* at 1153.

³⁹⁷ *E.g.*, *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963); *Wolf v. Colorado*, 338 U.S. 25 (1949) (and its exclusionary rule limitations), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

superficial appearance of being right.”³⁹⁸ In addition, we should always consider, regardless of our partisan politics, the words of Robert F. Kennedy, the words with which this article began. We should not just complain about injustices we see around us. We should utilize our God-given intellectual powers and debate issues that concern America and possibly attain a resolution. Specifically, we may never find an adequate answer to the human suffering that results from the migration of undocumented workers. However, we should address the issues regarding when, how and why a United States permanent resident alien has to vacate his American home, other than by the issuance of an absolute legislative edict. Where is the third branch of government in this process? Two hundred years ago, Chief Justice John Marshall delivered his decision in *Marbury v. Madison*. As enunciated in *Marbury*, the third branch has to revive its historical mission of tackling those statutes that are repugnant to the Constitution.³⁹⁹

The United States necessarily accepts undocumented immigrant labor, primarily Latinos from Mexico. Enticed by the opportunities, Latinos and others continue to migrate, both legally and illegally. The fact that a number of immigrants violate the law during their United States residence does not justify the nation’s policy, as reflected in the 1996 Immigration Acts, of disregarding the Constitution and curtailing rights of resident aliens by retroactively punishing them for criminal convictions obtained years before 1996. Without question, the Constitution places in the Congress ultimate control over immigration issues. However, the Constitution places in the three branches of government the duty to respect the overall spirit of our fundamental document and to accord due process protections to all, even to those who are not yet citizens of the United States. The Founding Fathers essentially sent this message when they avoided any mention of “citizens” in promulgating the Bill of Rights, and Congress continued this constitutional doctrine in distinguishing between the rights of citizens and the rights of all persons in drafting later amendments.⁴⁰⁰

In conclusion, the writer urges the United States Supreme Court to extend the Ex Post Facto Clause to quasi-punitive deportation proceedings, i.e., those in which the removal order resulted from a pre-1996 conviction. Our Constitution has developed over the years into a document that flexibly adjusts to the changing times. The thousands of American residents who face removal or have been removed from their adopted country and from their families for conduct preceding the 1996 Act

³⁹⁸ Guy N. Harrison, *Who Guarantees These Rights?*, 65 TEX. B.J. 794 (2002).

³⁹⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

⁴⁰⁰ E.g., U.S. CONST. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”); U.S. CONST. amend. XV (involving the rights of citizens to vote).

should receive relief. Those who have already suffered separation from their home and family should be re-evaluated for return to the United States.

The writer hopes he has shown and explained how retroactive statutes, albeit partially civil in nature, can have such punitive consequences that they should be constitutionally prohibited. The 1996 IIRIRA legislation represents one of those statutes that, in specific circumstances, has not only a retroactive reach but also a punitive impact. The writer further contends that removal, when conditioned upon a prior conviction, results in a loss of liberty that triggers not only due process protections but also *ex post facto* prohibitions.

The 1996 Immigration Acts must be amended. Cases that reach the courts must be accorded a constitutional rule consistent with American and constitutional history. Judicial precedents have been reversed in the past. Judicial precedents will be reversed in the future. The amelioration of immense suffering in families throughout America will result once we correct this part of our history and eliminate the regressive and punitive impact of the 1996 Immigration Acts. Remembering the words of Anthony Lewis, a prominent columnist for the *New York Times*, who called for reform of the 1996 Act, we as a great people need to return to the concepts of American decency. Proud Americans and the immigrant community petition the nation's Supreme Court to cut through the ideological barriers and exercise its power as the third branch of government by correcting—retroactively—the multitude of wrongs that have occurred since the passage of the AEDPA and IIRIRA, the 1996 Immigration Acts.

