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Distinguishing Fong Yue Ting: Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment Comment.

Gregory L. Ryan

DISTINGUISHING *FONG YUE TING*: WHY THE INCLUSION OF PERJURY AS AN AGGRAVATED FELONY SUBJECTING LEGAL ALIENS TO DEPORTATION UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT VIOLATES THE EIGHTH AMENDMENT

GREGORY L. RYAN

I. INTRODUCTION

On April 19, 1995, a bomb ripped through the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people.[1] Subsequently, under pressure from both the president[2] and the public,[3] Congress spent several

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1. *See* Nolan Clay, *Judge Denies Prosecutors Chemist Interview*, DAILY OKLAHOMAN, Sept. 13, 1996, at 9. On April 19, 1995, just after 9:00 a.m., a half-ton car bomb exploded outside the nine-story Alfred P. Murrah federal building in downtown Oklahoma City, heightening American fears of terrorism. *Bombing Stuns Nation: Hundreds Missing As Rescuers Sift Rubble in Oklahoma City*, ARIZ. REPUBLIC, Apr. 20, 1995, at A1. The blast killed 168 people and injured over 500. *Evidence Sought in Bomb Trial*, ARIZ. REPUBLIC, Apr. 10, 1996, at A6. In a nationwide response to this attack, federal buildings in several American cities were evacuated and President Clinton ordered tightened security at federal buildings throughout the country. *Bombing Stuns Nation: Hundreds Missing As Rescuers Sift Rubble in Oklahoma City*, ARIZ. REPUBLIC, Apr. 20, 1995, at A1. Labeled the "worst bombing in 75 years," this attack was reminiscent of the explosion in New York's Wall Street area in 1920 that killed 40 people and left hundreds injured. *Id.* The Oklahoma City bombing reminded others of the more recent explosion at New York's World Trade Center in 1993, which killed six people and injured one thousand. Judy Gibbs, *Car Bomb Kills Dozens in Okla. City: Terror Strikes the Heartland*, BALTIMORE SUN, Apr. 20, 1995, at 1A.

Two days after the bombing, authorities arrested Timothy McVeigh, a 27-year-old army veteran, and charged him with "malicious danger and destroying by means of an explosive a building or real property, whole or in part, possessed or used in the United States." Sharon Cohen, *Manhunt Snares 1: Vengeance Reportedly Was Motive*, ARIZ. REPUBLIC, Apr. 22, 1995, at A1. Six days later, authorities charged James Nichols, a 41-year-old farmer, and his brother, Terry, 40, with conspiring to make explosive devices. David Johnston, *Brothers Charged in Conspiracy with Bombing Suspect*, COM. APPEAL (Memphis, Tn.), Apr. 26, 1995, at A1. Although the Nichols brothers were not formally charged with the bombing of the federal building in Oklahoma City, they were both accused of conspiring with McVeigh. *Id.* A government-produced affidavit stated that, like McVeigh, Terry and James Nichols blamed the federal government for the fiery deaths of over 80 people after the FBI's 1993 tear gas assault on the Branch Davidian compound near Waco, Texas. *Id.* The affidavit stated that Daniel Stomber, a witness from Evergreen Township, Michigan, heard James Nichols say that "judges and President Clinton should be killed, and that he blamed the FBI and the [Bureau of Alcohol, Tobacco and Firearms] for killing the Branch Davidians in Waco." *Id.* However, this information was deleted by a revised affidavit, released later. *Id.*

Immediately after the bombing, the government collected intelligence data on suspected groups: neo-Nazi organizations in Britain and Germany; independent terrorist groups in Sudan, Iraq, Iran, and Northern Ireland; and various white supremacist groups such as the Ku Klux Klan, the Aryan Nation, and The Order. *Evidence Sought in Bomb Trial*, ARIZ. REPUBLIC, Apr. 10, 1996, at A6. However, prosecutor Beth Wilkinson said that within two days of the attack investigators ruled out foreign terrorists after determining that all of the evidence pointed to McVeigh and Terry Nichols as the masterminds behind the bombing. *Id.*

2. *See* Lisa Anderson, *Terror in the Heartland: Tough Talk for Extremists. As Oklahomans Begin to Bury the Dead, Federal Agents Expand the Search for Bombing Suspects. Meanwhile, President Clinton Blasts "Hate" Radio Shows, Bombing*, CHI. TRIB., Apr. 25, 1995, at A1 (reporting Clinton's defense of plans seeking new anti-terrorism legis-

lation); Michael K. Frisby & Joe Davidson, *Clinton Continues Attack on Hate Speech As Hunt for Bombing Suspect Intensifies*, WALL ST. J., Apr. 25, 1995, at A5 (reporting Clinton's Office of Legal Counsel drafting legislation for dealing with terrorism); *Clinton Proposal Would Enhance Powers of FBI* (National Public Radio broadcast, Apr. 25, 1995) (discussing President Clinton's call for "new tools to combat domestic terrorism," including expansion of FBI's investigative and infiltrative powers regarding potential terrorist groups), *available in* 1995 WL 2917991. In a speech soon after the bombing, President Clinton acknowledged the importance of developing methods to prevent similar attacks in the future, saying

> the forces that are lifting us up and bringing us together contain a dark underside of possibility for evil. . . . The great challenge for the 21st century will be to see how the opportunities presented by technology, by free movement of people, by the openness of society, by the shrinking of the borders between nations without being absolutely consumed by the dangers and threats that those same forces present. . . . Because evil has not been uprooted from human nature.

Bill Tammeus, Editorial, *Surfing for Meaning; As We Head into the E-Maelstrom, A Few Questions Are Popping Up: Is the Internet Good for Us? And What Kind of Future Will It Build?*, KANSAS CITY STAR, Nov. 10, 1996, at L1.

3. *See* Editorial, *Response to Terrorism*, WASH. POST, Apr. 26, 1995, at A22 (listing dangers of congressional reaction to angry public in "scrambling to provide assurances that catastrophe like the one in Oklahoma City will not happen again"); *U.S. Mustn't Overreach in Fighting Terrorism*, MILWAUKEE J. & SENTINEL, Apr. 26, 1995, at A18 (citing danger of congressional overreaction to public fears and outrage over Oklahoma City bombing in enacting hasty and ill-conceived legislation); *VFW Calls for National Commission on Terrorism*, PR NEWSWIRE, Apr. 25, 1995 (commenting on Allen F. "Gunner" Kent's statements calling for creation of National Commission on Terrorism), *available in* Westlaw, ALLNEWSPLUS Database. Kent is the Commander-in-Chief of Veterans of Foreign Wars of United States. *Id.*

However, this public fear and concern seemed short-lived. Less than a year after the Oklahoma City bombing, a telephone poll of 1500 adults conducted by the Pew Research Center for People and the Press found that only one in eight Americans were worried about massive terrorist attacks in public places. John Diamond, *Poll Shows Few Americans Worry About Terror Attacks in U.S.*, ASSOCIATED PRESS, Apr. 10, 1996, *available in* 1996 WL 4420513. "Most Americans acknowledge the fact that terrorists could strike a U.S. city with nuclear, chemical, or biological weapons, yet few worry about the possibility." *Id.* The survey found that 72% of Americans believe terrorists would use a nuclear, chemical, or biological weapon in an attack on an American city. *Id.* However, only 13% said they were seriously concerned about the possibility of such an attack, 27% stated that they were somewhat worried, and 59% responded that they worry a little or not at all about such an attack. *Id.* An increasing number of Americans believe that a greater threat stems from a possible attack originating inside the United States. *Id.* A *Los Angeles Times* poll, taken in April 1995, showed that 40% of Americans were more concerned about attacks coming from inside the United States. *Id.* In the 1996 *Associated Press* poll, this number increased to 49%. *Id.* At the same time, fewer Americans believe that they may have to forfeit civil liberties in order to enable law enforcement officials to cope with the threats of terrorism. *Id.* In the *Los Angeles Times* poll, only 49% agreed that people might need to relinquish civil liberties. *Id.* The 1996 *Associated Press* poll showed that only 30% of Americans support such a view. *Id.*

months researching and discussing[4] the best way to strengthen the United States' ability to deter and punish terrorism.[5] On April 18, 1996, Congress sent the White House a bill designed to make "our country more safe and secure from the violent cowards who would tear at the fabric of civilized order."[6] Six days later, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[7]

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4. H.R. REP. NO. 104-383, at 37 (1995), *microformed on* Sup. Docs. No. Y 1.1/ 8:104-383 (U.S. Gov't Printing Office); *see House OKs $2.5 Billion Increase for Military*, SEATTLE TIMES, June 21, 1995, at A4 (reporting that Congress responded to Oklahoma City bombing by drafting legislation designed to combat terrorism).

5. H.R. REP. NO. 104-383, at 37 (1995), *microformed on* Sup. Docs. No. Y 1.1/ 8:104-383 (U.S. Gov't Printing Office); *see* Adam Clayton, *Fertile Attraction*, REASON, July 1, 1995 (citing congressional efforts to draft legislation to prevent international terrorism), *available in* 1995 WL 12521259; Government Press Release, *Press Conference on Anti-Terrorism and Effective Death Penalty Act of 1996*, Apr. 15, 1996 (quoting Senator Orrin Hatch as saying AEDPA will give federal government upper hand in efforts to prevent and punish both domestic and international terrorism), *available in* Westlaw, GOVPR Database 1996 WL 8785571; *Some Concern About the Anti-Terrorism Bill* (National Public Radio Broadcast, June 21, 1995) (announcing that legislation designed to enable federal officials to punish terrorists has cleared congressional House Judiciary Committee), *available in* 1995 WL 2958574.

6. *See* Laurie Kellman, *Congress Forwards Bill on Terrorism: Clinton Expected to Sign Measure*, WASH. TIMES, Apr. 19, 1996, at A6 (quoting House Judiciary Committee Chairman Henry J. Hyde). Representative Hyde also stated that the legislation "maintains the delicate balance between liberty and order." *Id.* Although Attorney General Janet Reno found the bill to be an effective tool for the fight against terrorism, critics charged that House Republicans actually intended the legislation to fulfill an element of their "Contract with America": a limitation on death-row appeals. *Id.* Democratic Representative Melvin Watt of North Carolina stated: "[W]e are about to perpetuate a fraud on the American people. This bill is no longer about terrorism." *Id.* Representative Bob Barr, a Republican from Georgia, disagreed, saying, "There is no clearer link, no stronger link, between effective anti-terrorism legislation and deterring criminal acts of violence in this country than habeas and death-penalty reform." *Id.* Like Representative Watt, Representative Charles Schumer, D-N.Y., a longtime supporter of anti-terrorism legislation, was similarly unimpressed with the new bill, stating that, "[T]his bill should be called the better-than-nothing anti-terrorism bill." Charles V. Zehren, *Anti-Terror Bill Crafted: Passage Hoped by April 19*, DENV. POST, Apr. 16, 1996, at A5. However, not all congressional members spoke unapprovingly of the legislation. Senate Judiciary Committee Chairman, Orrin Hatch, R-Utah, told reporters, "[T]here can always be something someone can criticize, but by and large, this is a darn good bill." *Id.* House spokeswoman Mary Ellen Glynn agreed, stating "It's a step in the right direction." *Id.*

7. Pub. L. No. 104-132 (Apr. 24, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) 1214 [hereinafter AEDPA]; Michael Paulson, *New U.S. Law Should Speed State Executions, Reforms Impose Strict Timetable on Federal Appeals*, SEATTLE POST, Apr. 25, 1996, at B1; *see Text of the President's Statement on Antiterrorism Bill Signing*, U.S. NEWSWIRE, Apr. 24, 1996 (quoting President Clinton, stating that new legislation is "an important step forward in the [f]ederal [g]overnment's continuing efforts to combat terrorism"), *available in* 1996 WL 5620927. President Clinton concluded,

Amazingly, Congress chose to treat foreign nationals who commit perjury[8] as the type of "violent cowards" from whom the American public needs legislative protection. Tucked away in the middle of the AEDPA, strict sanctions are imposed on noncitizens who commit perjury or subornation of perjury.[9] The AEDPA mandates that a foreign national convicted of perjury be deported.[10] This mandate is not the first time foreign nationals have been legislatively subjected to deportation for the conviction of a crime.[11] This is, however, the first time that the use of deporta-

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This legislation is a real step in the right direction. Although it does not contain everything we need to combat terrorism, it provides valuable tools for stopping and punishing terrorists. It stands as a tribute to the victims of terrorism and to the men and women in law enforcement who dedicate their lives to protecting all of us from the scourge of terrorist activity.

Id.

8. *See* 18 U.S.C. §§ 1621, 1622 (1994) (defining criminal offenses of perjury and subornation of perjury). Section 1621 states:

Whoever (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Id. § 1621. Section 1622 states: "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both." *Id.* § 1622.

9. AEDPA, *supra* note 7, § 440(c)(8)(5), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278 (amending section 101(a)(43) of Immigration and Nationality Act to include "perjury or subornation of perjury" in aggravated felony category). In 1680, Lord Coke defined perjury as a "crime committed, when a lawful oath is ministered by any that hath authority to any person, in any judicial proceeding, who sweareth absolutely, and falsely [sic] in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." Kungys v. United States, 485 U.S. 759, 769 (1988) (Stevens, J., dissenting) (quoting various legal definitions of "perjury" promulgated and used throughout history). Blackstone believed that for one to commit "the crime of wilful and corrupt perjury, [the false statement] must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid," it is unpunishable. *Id.*

10. AEDPA, *supra* note 7, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278.

11. *See* Ng Fung Ho v. White, 259 U.S. 176, 284 (1923) (acknowledging that deportation may result in "loss of both property and life, or of all that makes life worth living"). Responding to the growing concern with regard to the connection between immigration and crime, Congress passed several major pieces of legislation. *See, e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1989) (codified as amended in scattered sections of U.S.C.) (allowing deportation of aliens convicted of narcotics offenses); Anti-

tion for perjury and subornation of perjury has been legislatively mandated.[12] Traditionally, deportation has been reserved for foreign nationals convicted of more serious offenses, often involving the threat or use of violence.[13]

For example, in 1988, President Reagan signed into law the Anti-Drug Abuse Act,[14] which mandated the deportation of any foreign national

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Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1990) (codified as amended in scattered sections of U.S.C.) (broadening range of drug offenses for which alien may be deported); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. & 29 U.S.C.) (increasing border patrols and funding for INS services); *see also* Kathleen M. Kelly, *Immigration Law*, 73 DENV. U. L. REV. 787, 805–06 (1996) (discussing passage of legislation intended to curb immigrant crime).

12. *Compare* AEDPA, *supra* note 7, § 440(e)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278 (amending Immigration and Nationality Act to include perjury and subornation of perjury in list of aggravated offenses for which alien may be deported), *with* Immigration and Nationality Act § 101(a)(43), Pub. L. No. 103–413, 8 U.S.C. § 1251(a)(2)(A)(i)(I) (1994) (indicating that alien may be deported for offense involving moral turpitude) *and* Fiswick v. United States, 329 U.S. 211, 221 n.7 (1946) (interpreting statute so that perjury would fall under moral turpitude offense). During colonial times, the settlers took very seriously the commission of perjury; such an act was classified a felony, as exemplified by section 18 of the Act of April 30, 1790, which states that a person convicted of perjury

> shall be imprisoned not exceeding three years, and fined not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against said offender shall be reversed.

Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ J. INT'L & COMP. L. 215, 245–46 (1993).

Thirty-five years after this Act was passed, Congress passed the Act of March 3, 1825, which provided the same maximum sentence for one convicted of perjury, but based the sentence actually imposed on the severity of the offense committed. *Id.* at 246. Eighty-four years later, Congress passed the Act of March 4, 1909, which provided a maximum two-thousand dollar fine and five-year prison sentence for a perjury conviction. *Id.*

13. *See* Carlson v. Landon, 342 U.S. 524, 531 (1952) (holding that alien may be deported for being member of organization whose goal is *violent* overthrow of government); Wendy L. Kaplan, *Sentencing Advocacy in Massachusetts District Courts*, 80 MASS. L. REV. 22, 25 (1995) (noting that deportation of alien is permitted for committing acts of violence).

14. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 525, 102 Stat. 4181 (codified as amended at 21 U.S.C. § 1502 (1988)). The Anti-Drug Abuse Act seemed to be the culmination of a highly-politicized, twenty-year war on drugs. Robert B. Charles, *Back to the Future: The Collapse of National Drug Control Policy and a Blueprint for Revitalizing the Nation's Counternarcotics Effort*, 33 HARV. J. ON LEGIS. 339, 340–41 (1996). The law's enactment in 1988 was in response to the enormous impact of the use of illegal drugs from the early 1970s through the 1980s. *Id.* at 340.

The environment leading up to the passage of this Act is summed up as follows:

> In 1988, the illegal drug industry was making headlines on a daily basis, escalating public concern for the rights of innocent victims and law enforcement personnel. Public outrage was exemplified in surveys reporting overwhelming support of the death

convicted of an "aggravated felony," including any of a number of offenses Congress deemed serious enough to warrant deportation.[15] Within this category are serious crimes such as murder, drug trafficking, and trafficking in guns or other destructive devices.[16] Two years later,

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penalty. Surveys reveal[ed] that . . . as much as 70% of the American public [favored] the death penalty. In response to public outcry, Congress passed [the Anti-Drug Abuse Act of 1988], which provided a death penalty for drug kingpins who intentionally kill. Through bipartisan effort, Congress passed the Anti-Drug Abuse Act, featuring a great deal of political rhetoric proclaiming that it was about time that America took back the streets from the clutches of drugs, drug-related crime, and drug-related deaths. Bending to constituency pressures, the Senate quickly passed the Act. The Act's death-penalty provision passed the Senate on June 9, 1988 by an overwhelming vote of seventy to twenty-six.

Steven M. Latino, Comment, *Reversing Twenty Years of Supreme Court Postconviction Jurisprudence: Enlarging the Indigent Capital Defendant's Right to Postconviction Counsel in* McFarland v. Scott, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 327, 337–38 (1996). In the Act's introduction, Congress made twenty-one specific findings regarding drug use, including a finding that the use of illegal drugs in the workplace was prevalent and posed a serious danger not only to fellow employees, but also to public safety, national security, company morale and production. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 525, 102 Stat. 4181 (codified as amended at 21 U.S.C. § 1502 (1988)). Christopher S. Miller, *The Critical Role of a Judicially Recognized Public Policy Against Illegal Drug Use in the Workplace*, 12 INDUS. REL. L.J. 153, 177–78 (1990). Additionally, Congress found that the total impact on the economy of drug use is over $100 billion annually. Christopher S. Miller, *The Critical Role of a Judicially Recognized Public Policy Against Illegal Drug Use in the Workplace*, 12 INDUS. REL. L.J. 153, 177–78 (1990).

In passing the Anti-Drug Abuse Act, Congress announced that "[i]t is the declared policy of the United States Government to create a Drug-Free America by 1995." Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 525(b), 102 Stat. 4181 (codified as amended at 21 U.S.C. § 1502 (1988)).

15. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7342, 102 Stat. 4181 (1988) (amending section 101(a)(43) of Immigration and Nationality Act by expanding aggravated felony category punishable with deportation); *see also* Noel Anne Ferris, *Fundamentals of Judicial Review of Deportation and Exclusion* (explaining creation of aggravated felonies category and resulting deportation of alien convicted of committing one of listed offenses), *in* BASIC IMMIGRATION LAW 1993, at 229, 234 (PLI Litig. & Admin. Practice Course Handbook Series No. 466, 1993); Michael Isikoff, *Drug Wars Past and Present*, WASH. POST, Sept. 5, 1989, at A17 (detailing 895-page bill authorizing $2.8 billion to fight nation's drug problem). The Office of National Drug Control Policy was created by this Act and was designed to end "interagency turf battles." *Id.* Under this Act, deportation hearings for aliens convicted of an "aggravated felony" were authorized to proceed while the alien was being detained. Iris Gomez, *The Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act*, 30 SAN DIEGO L. REV. 75, 159 n.9 (1993). The Act established a "rebuttable presumption of deportability" and generally limited the alien's rights, regardless of whether the alien was a permanent resident of the United States. *Id.*

16. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7342, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.) (discussing criminal offenses considered aggravated felonies).

Congress passed the Immigration Act of 1990,[17] which added new offenses to the aggravated felonies category.[18] In 1994, Congress again expanded this category, adding offenses involving firearms and explosives, theft, burglary, kidnaping for ransom, child pornography, certain RICO offenses, managing a prostitution business, slavery, espionage and treason, and alien smuggling for gain.[19]

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17. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. and 29 U.S.C.). On November 29, 1990, President Bush signed into law the Act, which was reported to be the "most sweeping revision of the nation's immigration laws in 66 years." *Bush Signs Revolutionary Immigration Act into Law*, VANCOUVER SUN, Nov. 30, 1990, at A5. The new law contained provisions that allowed employment-seeking aliens to enter the United States, as well as provisions that provided for faster, more expedient deportation of alien criminals. *Id.* The law boosted immigration quotas by 40% and removed older statutory provisions that prohibited the immigration of aliens based on personal ideology or sexual orientation. *Id.* At the White House signing ceremony, President Bush stated, "This act recognizes the fundamental importance and historic contributions of immigrants to our country . . . [and] is good for families, good for business, good for crime fighting and good for America." *Id.* Attorney General Dick Thornburgh declared that the Act "encourages the immigration of exceptionally talented people such as scientists, engineers and educators, while maintaining and enhancing this nation's historic commitment to family reunification." *Id.* Although some immigrant rights advocates praised the new law, others were unimpressed. "It's a bone with very little meat on it," said Cesar Pena-Noriega, directing attorney for the One Stop Immigration and Educational Center. *Id.*

18. Immigration Act of 1990, Pub. L. No. 101–649, § 501(a)(2)–(3), 104 Stat. 4978, 5048 (codified as amended in 8 U.S.C. § 1101(a)(43) (1994)). This Act imposed harsh penalties on aliens convicted of certain crimes, particularly those found within the "aggravated felonies" category created by the Anti-Drug Abuse Act of 1988. Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L & COMP. L.J. 255, 288–89 (1996). The Act prohibited the government from granting asylum to any alien who was convicted of an aggravated felony, clarifying that such a felony is a "particularly serious crime" for withholding of deportation. *Id.*; *see* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1532 (1995) (noting that provisions of Immigration Act of 1990 limit relief available to criminal aliens and allow for expedited deportation, and provide clear evidence of harsh treatment accorded convicted aliens in American political process); Dorothy E. Graham, Comment, *Immigration Law: Withholding of Deportation*, 18 SUFFOLK TRANSNAT'L L. REV. 799, 799–800 (1995) (interpreting Immigration Act of 1990 to deem alien convicted of aggravated felony as one who has committed serious crime); Kerne H.O. Matsubara, Comment, *Domicile Under Immigration and Nationality Act Section 212(c): Escaping the Chevron Trap of Agency Deference*, 82 CAL. L. REV. 1595, 1596–97 (1994) (believing that "Congress has already taken aim at one of the easiest targets: criminally convicted immigrants").

19. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C. (1994)). On September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, said to be the "toughest, smartest crime bill in our country's

In an attempt to "strengthen the government's ability to efficiently deport aliens who are convicted of serious crimes,"[20] the AEDPA adds the offense of perjury or subornation of perjury to this growing list of aggravated felonies.[21] Thus, aliens convicted of perjury will receive the same punishment as those convicted of murder, drug trafficking, and kidnaping for ransom. Are these crimes so similarly atrocious that identical punishment is warranted? This Comment argues that these crimes are not deserving of the same punishment, and that the implementation of like punishment for these very different crimes violates the Eighth Amendment's Cruel and Unusual Punishments Clause.[22] However, before addressing the constitutionality of deportation as punishment for an alien convicted of perjury or the subornation of perjury, two judicial hurdles on this issue must first be addressed.

Part II of this Comment focuses on the first hurdle—the United States Supreme Court's landmark decision in *Fong Yue Ting v. United States*,[23] which holds that deportation is not punishment[24] and, therefore, does not invoke Eighth Amendment protection.[25] Part III addresses the second

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history." *President to Meet with U.S. Attorneys to Discuss Crime Bill Implementation*, U.S. NEWSWIRE, Sept. 13, 1994, *available in* 1994 WL 3820575.

20. H.R. REP. No. 104-22, at 7 (1995), *microformed on* Sup. Docs. No. Y 1.1/8:104-22 (U.S. Gov't Printing Office). On February 2, 1995, Representative McCollum of the Committee on the Judiciary submitted this report explaining, *inter alia*, that the reasoning behind the AEDPA's expansion of the aggravated felonies category is to deport more criminal aliens. *Id.* To accomplish this goal, the committee recommended adding several crimes to the aggravated felony category for which aliens may be deported. *Id.* These included: "certain gambling offenses, crimes involving transportation of persons for the purpose of prostitution, alien smuggling, counterfeiting, forging, or trafficking in immigration and other documents; and trafficking in stolen vehicles." *Id.* Although this congressional report was undoubtedly intended more for political fodder than legislative purposes, it failed to mention perjury and subornation of perjury as additions to the aggravated felony category. AEDPA, *supra* note 7, § 440(e)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278. The report indicated, however, that Congress intended that only the most serious offenses should render an alien deportable. H.R. REP. No. 104-22, at 8 (1995), *microformed on* Sup. Docs. No. Y 1.1/8:104-22 (U.S. Gov't Printing Office). The committee emphasized that the offenses for which it was willing to deport an alien were those that "clearly demonstrate a disregard for this nation's laws" and that those who choose not to abide by the nation's laws have no legitimate right to remain in the United States. *Id.*

21. AEDPA, *supra* note 7, § 441(e), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1279.

22. *See* U.S. CONST. amend. VIII.

23. 149 U.S. 698 (1893).

24. *Fong Yue Ting*, 149 U.S. at 730.

25. *See id.* (declaring that some constitutional protections such as Eighth Amendment's Cruel and Unusual Punishments Clause are inapplicable in deportation proceedings). The Court also found inapplicable to deportation cases the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's guarantee of trial by jury, and the Fourth Amendment's prohibition against unreasonable searches and seizures. *Id.*

judicial hurdle—the Court's long-standing rule that the Cruel and Unusual Punishments Clause is inapplicable to deportation proceedings because such proceedings are civil in nature and the Eighth Amendment applies only to criminal proceedings. Part IV presents the historical development leading to the current test for cruel and unusual punishment. Part V applies the current Eighth Amendment test to the AEDPA's authorization to deport an alien who commits perjury. This Comment concludes by arguing that deportation as punishment for perjury violates the Eighth Amendment's prohibition against cruel and unusual punishment.

II. CLEARING THE FIRST HURDLE: *FONG YUE TING V. UNITED STATES* AND CONGRESSIONAL AUTHORITY TO DEPORT ALIENS

The first hurdle in applying Eighth Amendment analysis to deportation cases was established over one hundred years ago. Decided by the United States Supreme Court in 1893, *Fong Yue Ting v. United States*[26] is the principal case establishing that deportation is not a form of punishment.[27] The significance of this holding is that the Eighth Amendment's prohibition against cruel and unusual punishment is necessarily rendered inapplicable to the deportation issue.[28] Since *Fong*, courts have widely adopted the holding that deportation is not punishment and, therefore, not subject to Eighth Amendment scrutiny.[29] Many of these decisions

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26. 149 U.S. 698 (1893).

27. *Fong Yue Ting*, 149 U.S. at 730.

28. *Id.* at 730. The Eighth Amendment's Cruel and Unusual Punishments Clause has long been interpreted to apply only to government-imposed punishments. *See* Austin v. United States, 502 U.S. 602, 607 (1993) (declaring that Eighth Amendment was intended to prevent government from abusing its power to impose punishment); Browning-Ferris v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989) (holding that purpose of Eighth Amendment was to place limits on new government's power to punish). If an action taken by the government is not judicially recognized as a punishment, the Eighth Amendment's prohibition against cruel and unusual punishment is not invoked. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (noting that Eighth Amendment is implicated only when defendant is punished). The *Fong* Court did not limit its focus to the Eighth Amendment. *See Fong Yue Ting*, 149 U.S. at 730 (deeming Sixth Amendment's guarantee to trial by jury and Fourth Amendment's prohibition against unreasonable searches and seizures inapplicable because proceeding under congressional act of 1892 was neither trial nor sentence); *see also* Santelises v. INS, 491 F.2d 1254, 1256 (2d Cir. 1974) (concluding that deportation is not subject to Eighth Amendment scrutiny).

29. *E.g.*, *Browning-Ferris*, 492 U.S. at 263; *Ingraham*, 430 U.S. at 668; Woodby v. INS, 385 U.S. 276, 285 (1966); Flemming v. Nestor, 363 U.S. 603, 616 (1960); Perez v. Brownell, 356 U.S. 44, 65 n.6 (1958); United States v. Spector, 343 U.S. 169, 176 n.3 (1952); Carlson v. Landon, 342 U.S. 524, 537 (1951); Fiswick v. United States, 329 U.S. 211, 222 n.8 (1946); Bridges v. Wixon, 326 U.S. 135, 147 (1945); Mahler v. Eby, 264 U.S. 32, 39 (1924); Scheidemann v. INS, 83 F.3d 1517, 1529 (3d Cir. 1996); Bui-Tran v. INS, No. 93–70575,

have applied *Fong*'s holding without independent analysis—simply quoting *Fong* and summarily dismissing the alien petitioner's contention that the Eighth Amendment applies.[30]

In *Fong*, the Supreme Court considered the constitutionality of the Act of May 5, 1892,[31] which required all Chinese immigrant laborers to obtain a certificate of residence within one year of their arrival in the United States.[32] The Act provided that an immigrant's failure to do so would

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1994 WL 32679, at *3 (9th Cir. Feb. 4, 1994); United States v. Leon-Leon, 35 F.3d 1428, 1434 n.1 (9th Cir. 1994); United States v. Bodre, 948 F.2d 28, 32 (1st Cir. 1991); Linnas v. INS, 790 F.2d 1024, 1030 (2d Cir. 1986); Lopez-Mendoza v. INS, 705 F.2d 1059, 1076 (9th Cir. 1983); Squires v. INS, 689 F.2d 1276, 1284 (6th Cir. 1982); United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981); LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976); Brea-Garcia v. INS, 531 F.2d 693, 698 (3d Cir. 1976); Atlas Roofing Co. v. OSHA, 518 F.2d 990, 1010 n.48 (5th Cir. 1975); Santelises v. INS, 491 F.2d 1254, 1255–56 (2d Cir. 1974); Chabolla-Delgado v. INS, 384 F.2d 360, 360 (9th Cir. 1967); Burr v. INS, 350 F.2d 87, 91 n.1 (9th Cir. 1965); United States v. Sahli, 216 F.2d 33, 40 (7th Cir. 1954); United States v. Shaughnessy, 195 F.2d 964, 967 (2d Cir. 1952); Bridges v. Wixon, 144 F.2d 927, 936 (9th Cir. 1944), *rev'd on other grounds*, 326 U.S. 135 (1945); United States v. Restrepo, 802 F. Supp. 781, 790 (E.D.N.Y. 1992); Stokes v. INS, 393 F. Supp. 24, 32 (S.D.N.Y. 1975); Buckley v. Gibney, 332 F. Supp. 790, 796 (S.D.N.Y. 1971); Matter of Extradition of Demjanjuk, 612 F. Supp. 544, 569 (N.D. Ohio 1985); Underwriters Life Ins. Co. v. Cobb, 746 S.W.2d 810, 817 (Tex. App.—Corpus Christi 1988, writ denied).

30. *See, e.g.*, *Browning-Ferris*, 492 U.S. at 263 (accepting, without analysis, *Fong*'s conclusion that deportation is not punishment for crime); *Ingraham*, 430 U.S. at 668 (holding without discussion that *Fong* Court had "no difficulty" finding deportation not punishment and not subject to Eighth Amendment); *Flemming*, 363 U.S. at 616 (citing without independent reasoning that deportation is not punishment under *Fong*); *Spector*, 343 U.S. at 176 n.3 (quoting *Fong's* holding without applying any analysis); Li Sing v. United States, 180 U.S. 486, 494–95 (1901) (reiterating, with no further discussion, *Fong's* conclusion that deportation is not punishment). This practice of accepting *Fong's* conclusion without providing independent analysis is not exclusive to the Supreme Court. *See, e.g.*, *Leon-Leon*, 35 F.3d at 1434 n.1 (providing no analysis of its own in finding persuasive *Fong's* conclusion that deportation is not punishment); *Linnas*, 790 F.2d at 1030 (commenting only that deportation has generally been held by courts not to constitute punishment); *Lopez-Mendoza*, 705 F.2d at 1076 (enunciating, without accompanying analysis, *Fong's* holding that deportation is not punishment); *Squires*, 689 F.2d at 1284 (providing little independent reasoning in following *Fong's* conclusion that deportation does not constitute punishment); *Rodriguez-Fernandez*, 654 F.2d at 1387 (agreeing with *Fong* that deportation is not punishment); *Atlas Roofing Co.*, 518 F. 2d at 1010 n.48 (failing to exercise independent judgment in following *Fong's* ruling that deportation does not constitute punishment); *Burr*, 350 F.2d at 91 n.1 (accepting without comment *Fong's* finding that deportation is not punishment); *Sahli*, 216 F.2d at 40 (reasserting *Fong's* contention that deportation is not punishment).

31. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892) (repealed 1943).

32. *Fong Yue Ting*, 149 U.S. at 699–701 n.1 (setting forth congressional Act regulating Chinese immigration into United States). The Act further required those Chinese immigrants residing in the United States to register within one year of the passage of the Act. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892) (repealed 1943).

result in his deportation to China.[33] In determining the constitutionality of deportation under this Act, the Court's finding was two-fold. First, the Court noted that every sovereign nation has an inherent right to deport aliens.[34] Second, the Court held that the right to deport was consistent with the Constitution.[35]

In establishing the congressional authority to deport foreign nationals, the *Fong* Court first looked to an 1892 case, *Nishimura Ekiu v. United States*.[36] In *Nishimura*, the Court held as an "accepted maxim of international law" that a sovereign nation possesses an inherent power to deport or exclude foreign nationals, or to admit them upon stated conditions.[37] Moreover, the Court found that the United States Constitution vests this power in the federal government, granting it exclusive control over international relations.[38] The *Nishimura* Court concluded that this power may be exercised politically by the federal government, either through treaties made between the United States and foreign countries[39] or through congressional legislation.[40]

The *Fong* Court also looked to its decision in *Chae Chan Ping v. United States*,[41] which also addressed the constitutionality of excluding Chinese laborers from the United States.[42] In *Ping*, the Supreme Court labeled the laborers "aliens" and held that congressional authority to exclude them from the United States was a proposition not open to controversy.[43] The *Ping* Court found this authority to be an incident of the nation's independence, the absence of which would subject the United States to the "control of another power."[44]

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33. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892) (repealed 1943).

34. *Fong Yue Ting*, 149 U.S. at 707.

35. *Id.* at 730–31.

36. 142 U.S. 651 (1892).

37. *Nishimura*, 142 U.S. at 659.

38. *See id.* (noting that United States government has power to control entire realm of international relations).

39. *Id.* The United States Constitution authorizes the President to make treaties, subject to ratification by the Senate. U.S. CONST. art. II, § 2, cl. 2.

40. *Nishimura*, 142 U.S. at 659.

41. 130 U.S. 581 (1889).

42. *Chae Chan Ping*, 130 U.S. at 582–83.

43. *Id.* at 603.

44. *Id.* at 604. The *Fong* Court was also influenced by the writings of Emmerich de Vattel, a recognized authority on international law during the 1700s. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 12 (1984). Vattel agreed that nations are independent from each other, and the rights one nation possesses must be respected by all other nations. FRANCIS S. RUDDY, INTERNATIONAL LAW IN THE ENLIGHTENMENT 87–88 (1975). Vattel concluded that

> it is for each Nation to decide what its conscience demands of it, what it can do or cannot do; what it thinks well or does not think well to do; and therefore it is for each

Finally, the *Fong* Court was influenced by Justice Bradley's concurring opinion in *Knox v. Lee*.[45] In *Knox*, Justice Bradley explained that the United States is not merely a government; it is a national government, and this character of nationality bestows upon the government supreme power over all its international relations.[46]

In addition to relying on prior judicial decisions, the *Fong* Court turned to the opinions of those it considered to be "leading commentators on the law of nations,"[47] such as Emmerich de Vattel, who arguably had the greatest influence on the development of international law.[48] *Fong* quotes Vattel's writings that suggest that a nation may exclude a foreigner if such exclusion is required in the interest of safety or for the prevention of harm caused by the foreigner.[49] This right stems from the country's natural liberty and from its duty to care for its own safety.[50] From this right, Vattel believed that a country also has a right to deport foreigners if the country has reason to believe that the foreigners will corrupt its citi-

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> Nation to consider and determine what duties it can fulfill towards others without failing in its duty towards itself. Hence in all cases in which it belongs to a Nation to judge of the extent of its duty, no other Nation may force it to act one way or another. Any attempt to do so would be an encroachment upon the liberty of Nations. We may not use force against a free person, except in cases where this person is under obligation to us in a definite matter and for a definite reason not depending upon his judgment; briefly, in cases in which we have a perfect right against him.

Id.

45. *See Fong Yue Ting*, 149 U.S. at 706 (reviewing opinion in Knox v. Lee, 79 U.S. 457 (1870), in expounding on general principles underlying Court's decision in *Fong*).

46. *See* Knox v. Lee, 79 U.S. 457, 555 (1870) (Bradley, J., concurring).

47. *Fong Yue Ting*, 149 U.S. at 707.

48. Emmerich de Vattel, a Swiss jurist and diplomat, is said to likely have had the greatest influence on the development of international law. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 12 (1984). Vattel's influence is said to be widespread, particularly throughout England and the United States. FRANCIS S. RUDDY, INTERNATIONAL LAW IN THE ENLIGHTENMENT 281 (1975).

49. *See Fong*, 149 U.S. at 707–08 (quoting VATTEL'S LAW OF NATIONS, book 1, ch. 19, §§ 230, 231, *reprinted in* EMMERICH DE VATTEL, THE LAW OF NATIONS 107–08 (AMS Press 1982) (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co., Law Booksellers 1863) (1758)).

50. *Fong Yue Ting*, 149 U.S. at 707 (quoting VATTEL'S LAW OF NATIONS, book 1, ch. 19, §§ 230, 231, *reprinted in* EMMERICH DE VATTEL, THE LAW OF NATIONS 107–08 (AMS Press 1982) (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co., Law Booksellers 1863) (1758)). Vattel also believed that a nation has the prerogative to determine who is permitted to stay in the country and who must go. EMMERICH DE VATTEL, THE LAW OF NATIONS 107 (AMS Press 1982) (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co., Booksellers 1863) (1758).

zens or are a threat to public safety.[51] Vattel concluded that the country has an obligation to abide by the rules that prudence dictates.[52]

The *Fong* Court also turned to Sir Robert Phillimore, another preeminent scholar of international law, who believed that not only may the government prohibit the entrance of foreigners, but that it may also specify the conditions upon which an admitted foreigner may remain.[53] Phillimore further suggested that the government has the authority to deport foreigners from its lands.[54]

Based on its prior holdings on this issue and the opinions of those it considered leading commentators, the *Fong* Court held that the federal government has an absolute and unqualified right to deport unnaturalized immigrants or those who have failed to take steps toward becoming citizens.[55] However, the *Fong* Court still needed to determine whether

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51. *Fong Yue Ting*, 149 U.S. at 707 (quoting VATTEL'S LAW OF NATIONS, book 1, ch. 19, §§ 230, 231, *reprinted in* EMMERICH DE VATTEL, THE LAW OF NATIONS 107–08 (AMS Press 1982) (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co., Law Booksellers 1863) (1758)). Vattel wrote that the nation "has a right, and is even obliged, to follow, in this respect, the suggestions of prudence." EMMERICH DE VATTEL, THE LAW OF NATIONS 108 (AMS Press 1982) (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co., Law Booksellers 1863) (1758).

52. *Fong Yue Ting*, 149 U.S. at 708. Vattel cautioned that while such prudence should not be hindered by unnecessary suspicion or jealousy, a country should not deny a safe harbor to those in need based on groundless or frivolous fears. EMMERICH DE VATTEL, THE LAW OF NATIONS 108 (AMS Press 1982) (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co., Law Booksellers 1863) (1758). Rather, Vattel believed that the government should temper its actions by keeping sight of the charitableness it owes the less fortunate. *Id.* Vattel also argued that there should be no exception to this temperance merely because a person has committed a crime, for mankind should "hate the crime, but love the man, since all mankind ought to love each other." *Id.*

53. *Fong Yue Ting*, 149 U.S. at 708 (quoting SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 320 (London, Butterworths 1879)).

54. SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 320 (London, Butterworths 1879). In addressing the difference between "banishment" and "extradition," the Court looked to Ludwig von Bar, who stated that banishment, which is the equivalent of today's deportation, is merely a question of expediency and humanity, because no country is required to accept all foreigners who wish to enter. *Fong Yue Ting*, 149 U.S. at 708–09 (quoting L. v. BAR, THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW 708 note, 711 (G.R. Gillespie ed. & trans., 1883)). Bar emphasized that it is firmly within a country's police power to decide who may remain within its borders and who must leave. *Id.* (quoting L. v. BAR, THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW 708, note, 711 (G.R. Gillespie ed. & trans., 1883)).

55. *Fong Yue Ting*, 149 U.S. at 707; *see* Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) (noting that government has power inherent to sovereignty to deport aliens who have resided in United States for long periods of time, even though this practice is severe). *But see Fong Yue Ting*, 149 U.S. at 737 (Brewer, J., dissenting) (finding majority's assertion that governmental power to deport aliens was inherent to sovereign power as both dangerous and indefinite). Justice Brewer questioned the majority's assertion by

this absolute and unqualified right was constitutionally exercised by Congress.[56] In determining the constitutionality of deportation, the *Fong* Court noted that the Constitution vests in the federal government total control over its international relations and grants the government the power necessary to maintain that control.[57] According to *Fong*, the congressional power to expel aliens is one exercise of this power.[58] This power of deportation is constitutionally-vested in the political departments of the legislative and executive branches of government.[59] Because this power of deportation is political, the *Fong* Court cautioned against judicial interference,[60] holding that courts may intervene only

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challenging the majority to document the source of the governmental power to discriminately receive and remove foreigners. *Fong Yue Ting*, 149 U.S. at 737 (Brewer, J., dissenting). Justice Brewer also questioned which branch of government was charged with pronouncing such power: was it within the capacities of either the legislative or judicial branch to establish such boundaries? *Id.* Justice Brewer argued that if expulsion of a race was within the inherent power of any government, it would be that of a dictatorship. *Id.* History has recorded numerous examples of despotic governments that freely exercised the power to remove foreigners from its territories. *Id.* No doubt aware of this history, Justice Brewer concluded that the Framers bestowed upon the early American government no general power of banishment. *Id.*

56. *Fong Yue Ting*, 149 U.S. at 711. *But see Harisiades*, 342 U.S. at 598 (Douglas, J., dissenting) (disagreeing with *Fong's* holding that congressional right to deport aliens is absolute). Noting that *Fong* was decided in 1893, Justice Douglas believed that Congress's absolute right to deport aliens is inconsistent with the constitutional law philosophy that developed for the purpose of protecting resident aliens. *Id.* at 598. Justice Douglas noted that the Court has long held that aliens are "persons" under the Fifth and Fourteenth Amendments, and so are entitled to due process before being deprived of life, liberty, or property; and are also entitled to equal protection of the laws. *Id.* Justice Douglas wrote that the very essence of freedom on which this country is founded provides aliens the same property and liberty guarantees enjoyed by citizens. *Id.* For example, an alien can reside, work, and raise a family in the United States without fear of discrimination leveled against him solely because he was born abroad. *See id.* at 599 (explaining that alien who assimilates is treated like citizen with regard to his liberty and property).

57. *Fong Yue Ting*, 149 U.S. at 708 (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

58. *Id.* at 713.

59. *Id.*

60. *See id.* at 712 (noting that when judiciary is confronted with determination of constitutionality of legislative enactment, court must not pass upon political questions because those questions belong to Executive and Legislative branches). The Court was persuaded by the Supreme Court's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which Chief Justice Marshall warned that where a law is not constitutionally prohibited, for the Supreme Court to question the efficacy of that law would infringe upon the legislature's power and authority. *Id.* at 713 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421, 423 (1819)); *see* U.S. CONST. art. IV, § 4 (declaring that federal government shall "guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence") (parentheses

in original); Galvan v. Press, 347 U.S. 522, 531–32 (1954) (acknowledging that deportation power is committed exclusively to Congress and refusing to permit judicial interference); *Harisiades*, 342 U.S. at 588–89 (1952) (observing that policies regarding aliens are intricately interwoven with congressional power to conduct international relations, make war, and maintain republican form of government; such policies are political and not within realm of judicial inquiry or interference); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (holding that judiciary does not have aptitude, facilities, nor responsibility to make decisions concerning foreign affairs and concluding that these decisions are best left to political domain); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936) (declining to interfere with congressional power of foreign relations, including deportation of aliens); Mahler v. Eby, 264 U.S. 32, 40 (1924) (asserting that congressional power of deportation is sovereign power vested in government's political branch); Pacific States Tel. v. Oregon, 223 U.S. 118, 133 (1912) (deciding that questions or matters concerning powers political in character are not cognizable by judicial power, but are solely committed by Constitution to judgment of Congress); United States v. Ju Toy, 198 U.S. 253, 261 (1905) (declaring it firmly established that congressional authority to deport aliens who violate laws is unreviewable by courts); Turner v. Williams, 194 U.S. 279, 290, 291 (1904) (deciding that "[n]o limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein"); Kaoru Yamataya v. Thomas M. Fisher, 189 U.S. 86, 97 (1903) (finding it no longer questionable that Congress may prescribe terms and conditions upon which continued presence of aliens in United States depends; such congressional power is not subject to judicial intervention); Fok Yung Yo v. United States, 185 U.S. 296, 305 (1902) (deciding that congressional action placed final determination of alien's right to remain in country in hands of executive officers and beyond judicial intervention); Chin Bak Kan v. United States, 186 U.S. 193, 200 (1902) (prohibiting judicial intervention or interference in congressional orders of deportation or other political affairs); Wong Wing v. United States, 163 U.S. 228, 232 (1896) (declaring that "the power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications"); Lem Moon Sing v. United States, 158 U.S. 538, 543 (1895) (finding deportation exclusively within province of Congress and outside realm of judicial inquiry); Hilton v. Merritt, 110 U.S. 97, 104–05 (1884) (agreeing that political power conferred upon political official is beyond review of court); Philadelphia & T.R. Co. v. Stimpson, 39 U.S. 448, 458 (1840) (addressing question of whether political powers are subject to judicial review). The *Stimpson* Court held that

> It is a presumption of law that all public officers, and especially such high functionaries, perform their proper official duties until the contrary is proved; and where . . . an act is to be done . . . and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act . . . is prima facie evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency.

Stimpson, 39 U.S. at 458; *see also* LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976) (restating Supreme Court position that deportation is strictly matter of congressional policy in which courts will refrain from intervention so long as due process requirements are met).

when "required by the paramount law of the Constitution."[61] Thus, the *Fong* Court held that the deportation of Chinese laborers who failed to satisfy mandated registration requirements was a valid exercise of Congress's power to control international relations and, as such, was removed from judicial intervention or interference.[62] More importantly, *Fong* also held that this congressional use of the deportation power was neither punishment for a crime nor a form of banishment and, therefore, not subject to Eighth Amendment scrutiny.[63] Rather, the Court concluded that deportation was simply a means of returning to one's native land an alien who did not meet the conditions requisite for continued lawful presence in the United States.[64]

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61. *Fong Yue Ting*, 149 U.S. at 713.

62. *Id.* at 730.

63. *Id.* Regarding deportation, the *Fong* Court held that such a proceeding

> is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. 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.

Id. In enunciating its belief that deportation is not punishment for a crime, the *Fong* Court held that deportation is merely the "removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, *and without any punishment being imposed or contemplated*, either under the laws of the country out of which he is sent or under those of the country to which he is taken." *Fong Yue Ting*, 149 U.S. at 709, 730 (emphasis added). *But see id.* at 740 (Brewer, J., dissenting) (disagreeing with majority and declaring that deportation is punishment). Justice Brewer argued that a person who is forcibly separated from his family and friends, removed from the land where he has established his home and business, and sent away to a distant land is indeed punishment, and oftentimes is most cruel and severe. *Id.* at 740–41 (Brewer, J., dissenting). Justice Brewer pointed out that James Madison, an author of the Constitution and president, believed that it was among the severest of punishments to banish a foreigner who has been invited into the country and has settled his family and established a residence and business. *Id.* In his presidential report on Virginia's resolutions regarding the Alien and Sedition Acts, Madison declared that if deportation "be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." *Ju Toy*, 198 U.S. at 270 (Brewer, J., dissenting).

64. *Fong Yue Ting*, 149 U.S. at 730. The *Fong* Court stated that the power to determine whether aliens may be present in the United States belongs to the federal government, in which exclusive control of international relations is constitutionally vested. *Id.* at 705; *see Curtiss-Wright Export Corp.*, 299 U.S. at 315–16 (instructing that federal government is limited by constitutionally enumerated powers only in matters of internal affairs). The *Curtiss-Wright* Court believed that the Constitution "carve[d] from the general mass of legislative powers then possessed by the states" those powers the Framers deemed prudent to vest in the federal government. *Id.* at 316 (citing Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936)). The Court reasoned that, as a result, the Constitution addresses only powers that were at one time held by the states; because the states never had the power to control international affairs, the Constitution could not have carved such powers from the

states and granted them to the federal government. *Id.* Instead, the Court found that the power over international affairs was entrusted to the United States by some other source. *Id.* The Court concluded that the investment of the national government "with the powers of external sovereignty. . . [is not dependent] upon the affirmative grants of the Constitution"; instead, such authority, including the power to expel undesirable aliens exists as "inherently inseparable from the conception of nationality." *Id.* at 318. It is important to note that the *Fong* Court was not declaring that aliens enjoy no constitutional protection. Indeed, the Court held that these aliens are entitled to all "the safeguards of the [C]onstitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility." *Fong Yue Ting*, 149 U.S. at 724; *see* Plyler v. Doe, 457 U.S. 202, 210 (1982) (noting that constitutional guarantees are not reserved exclusively for American citizens); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (stating that constitutional protections are not withheld from aliens residing in United States); *Galvan*, 347 U.S. at 530 (arguing that aliens have same protections for life, liberty, and property as those afforded citizens); *Harisiades*, 342 U.S. at 586–87 (explaining that aliens enjoy some of same constitutional protections that citizens possess); Carlson v. Landon, 342 U.S. 524, 534 (1952) (acknowledging that legally admitted aliens and foreign nationals have come "at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land [and] are entitled in their persons and effects to the protection of our laws"); Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950) (reiterating that even illegal aliens residing in United States are entitled to due process under Constitution); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (finding that Constitution prohibits deprivation of alien's property without just compensation unless he is "an enemy alien"); Truax v. Raich, 239 U.S. 33, 38–39 (1915) (declaring that under Fourteenth Amendment, aliens may not be deprived of economic opportunities available to citizens); *Wong Wing*, 163 U.S. at 238 (declaring that all persons, including aliens, in United States territory are entitled to Constitutional protections); *Nishimura*, 142 U.S. at 660 (announcing that aliens have constitutional right to invoke writ of habeas corpus to protect personal liberty); Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886) (finding that Fourteenth Amendment right to equal economic opportunity applies to persons in United States, not necessarily citizens, and so rights of petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of emperor of China). *But see Fong Yue Ting*, 149 U.S. at 723–24 (stating that Congress may withdraw "permission" for aliens to remain in United States); *Harisiades*, 342 U.S. at 586–87 (noting that alien's presence in United States is not constitutional or legal right, but only matter of permission and tolerance by government; this permission is revocable at will of government).

However, this is not to suggest that aliens enjoy all of the freedoms and opportunities enjoyed by citizens. For example, only citizens can hold certain public offices. *See* U.S. CONST. art. I, § 2, cl. 2 (requiring candidate for seat in United States House of Representatives to be citizen); U.S. CONST. art. I, § 3, cl. 3 (allowing only citizens to run for position in United States Senate). The Supreme Court has long supported the proposition that an alien in the United States resides here not by right, but by governmental permission, which may be withdrawn at any time. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (deciding that Congress has discretionary control over presence of aliens in United States); Tiaco v. Forbes, 228 U.S. 549, 556–57 (1913) (emphasizing that Congress may set conditions and terms upon which aliens may reside in United States); Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (noting that aliens may reside in United States subject to Congress's authority to order them to leave); *Ju Toy*, 198 U.S. at 261 (announcing that Congress did not exceed authority by setting conditions which aliens must meet in order to remain in United

A. *Deportation in 1893 Was Administrative*

Addressing *Fong*'s continued applicability to deportation proceedings requires a comparison between the intended purposes of deportation in 1893 and the purpose set forth in the AEDPA. It has long been argued that the intended purpose of deportation is not punishment; rather, deportation is said to serve as a vehicle for removing from the United States those noncitizens whose presence is inconsistent with the public welfare.[65] In 1893, deportation was intended merely to remove aliens who did not meet certain registration requirements.[66] In *Fong*, Chinese laborers were not targeted for deportation because they committed murder, rape, or other violent acts. Rather, the sole reason these aliens were being deported was because they failed to fill out the proper forms required by Congress.[67] If all post-*Fong* orders of deportation were reserved exclusively for aliens who failed to meet some bureaucratic prerequisite for their continued presence in the United States, then deportation would be merely an administrative procedure and not a form of punishment. As

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States); Yamataya v. Fisher, 189 U.S. 86, 97 (1903) (deciding that Congress has power to deport aliens); *Fok Yung Yo*, 185 U.S. at 302 (holding that Congress decides which aliens may remain in United States and which must leave); Li Sing v. United States, 180 U.S. 486, 494–95 (1901) (finding that aliens residing in United States are subject to congressional decision to deport them to their native land); *Lem Moon Sing*, 158 U.S. at 545–46 (stating that Congress, not courts, determines whether aliens may reside in United States).

65. *Fong Yue Ting*, 149 U.S. at 709; *see, e.g.*, Rosenburg v. Fleuti, 374 U.S. 449, 461 (1963) (respecting congressional authority to exclude from United States those aliens who are undesirable); Flemming v. Nestor, 363 U.S. 603, 616 (1960) (reminding that deportation has been determined not to be punishment, but merely exercise of congressional power to determine conditions under which aliens may remain in country); Trop v. Dulles, 356 U.S. 86, 98 (1958) (stating that Supreme Court has historically sustained deportation as exercise of sovereign's power to fix conditions upon which aliens may enter and reside in country); *Galvan*, 347 U.S. at 530 (finding that Congress has broad power over admission of aliens and their right to remain in United States); *Harisiades*, 342 U.S. at 594 (deciding that deportation is not punishment); *Li Sing*, 180 U.S. at 494 (determining that deportation is method of returning alien to her own country for failing to comply with residence requirements created by Congress).

66. *See* Act of May 5, 1892, ch. 60, §§ 4, 6, 27 Stat. 25–26 (1892) (repealed 1943) (mandating deportation for Chinese immigrant failing to meet registration requirements); *cf.* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (agreeing with *Fong's* denial of deportation as form of punishment). In 1984, the Court held that the "purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws." *Id.*

67. *Fong Yue Ting*, 149 U.S. at 731. Two of the three petitioners before the Court had "wholly neglected, failed, and refused" to apply for the certificate of residence as required by the Act of May 5, 1892, and were arrested when found without the certificate. *Id.* The third petitioner actually applied for the certificate of residence, but was refused because he was unable to produce credible witnesses to prove his residence, as required by the Act. *Id.*

such, deportation would be rightfully withheld from Eighth Amendment scrutiny. However, as is evident by the AEDPA, not all deportation proceedings are initiated for the simple failure to follow bureaucratic procedures.[68] Instead, the deportation process is also triggered when an alien

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68. *See, e.g.*, Stone v. INS, 115 S. Ct. 1537, 1540–41, 1549 (1995) (affirming deportation of alien convicted of conspiracy and mail fraud); INS v. Abudu, 485 U.S. 94, 96, 111 (1988) (upholding deportation order of citizen of Ghana convicted of drug charges); INS v. Rios-Pineda, 471 U.S. 444, 446, 452 (1985) (denying challenge to deportation order by citizens of Mexico who paid $450 to professional smuggler to transport them into United States); United States v. Valenzuela-Bernal, 458 U.S. 858, 860, 874 (1982) (upholding deportation sentence of foreign national found guilty of knowingly transporting alien into United States); Boutilier v. INS, 387 U.S. 118, 122–23, 125 (1967) (affirming deportation of alien found to be homosexual with history of psychopathic personality); Lehmann v. United States *ex rel.* Carson, 353 U.S. 685, 686, 690 (1957) (agreeing that Italian citizen should be deported for participation in two different blackmail schemes); Mulcahey v. Catalanotte, 353 U.S. 692, 692, 694 (1957) (upholding deportation order of alien convicted of federal drug-trafficking offense); Rabang v. Boyd, 353 U.S. 427, 428, 433 (1957) (approving deportation of Filipino convicted of violating federal narcotics laws); Marcello v. Bonds, 349 U.S. 302, 303, 314 (1955) (agreeing with deportation order of African national convicted of violating Marihuana Tax Act); *Galvan*, 347 U.S. at 523, 531 (affirming deportation of foreign national who admitted belonging to Communist Party from 1944 to 1946); United States v. Spector, 343 U.S. 169, 170, 173 (1952) (finding valid order of deportation of alien convicted of advocating overthrow of federal government by force and violence); *Harisiades*, 342 U.S. at 581–83, 596 (affirming deportation orders of aliens convicted of belonging to Communist Party and holding various offices therein); Jordan v. De George, 341 U.S. 223, 224, 232 (1951) (upholding deportation order of Italian immigrant found guilty of conspiracy, possession of whiskey with intent to sell, removing and concealing liquor with intent to defraud United States government, and evasion of federal taxes); Ackermann v. United States, 340 U.S. 193, 195, 202 (1950) (approving deportation of German nationals convicted of committing fraud against federal government); Salazar-Haro v. INS, 95 F.3d 309, 309, 311 (3d Cir. 1996) (agreeing that citizen of Peru convicted of conspiracy to distribute cocaine should be deported); United States v. Guerrero-Hernandez, 95 F.3d 983, 985–87 (10th Cir. 1996) (finding alien convicted of illegal reentry after deportation for possession of marijuana or hashish has no right to remain in United States); Martinez-Serrano v. INS, 94 F.3d 1256, 1257, 1260 (9th Cir. 1996) (affirming deportation of alien found to have entered United States without inspection); United States v. Aranda-Hernandez, 95 F.3d 977, 978, 983 (10th Cir. 1996) (upholding deportation order of alien convicted of illegal reentry into United States after deportation for possession of marijuana with intent to distribute); United States v. Bowen, 92 F.3d 1082, 1083–84, 1088 (11th Cir. 1996) (denying relief from order of deportation to aliens convicted of possession of marijuana, possession of firearm as convicted felon, and manufacturing of fraudulent driver's licenses); United States v. Gutierrez, 92 F.3d 468, 470, 472 (7th Cir. 1996) (affirming deportation of two aliens convicted of conspiracy to possess with intent to distribute cocaine and actual distribution of cocaine); Hincapie-Nieto v. INS, 92 F.3d 27, 28, 31 (2d Cir. 1996) (upholding deportation order of foreign national found guilty of various federal narcotics offenses); Duldulao v. INS, 90 F.3d 396, 397, 400 (9th Cir. 1996) (approving deportation of Filipino found to have violated state prohibition against possession of firearms); United States v. Cordova-Beraud, 90 F.3d 215, 215, 220 (7th Cir. 1996) (affirming deportation of alien convicted of illegal reentry into United States after having been convicted of attempted robbery); Qasguargis

is convicted of crimes identified as aggravated felonies. Therefore, *Fong*'s holding would be inapplicable where deportation is imposed because an alien is convicted of a criminal offense.[69] The question then arises

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v. INS, 91 F.3d 788, 789–90 (6th Cir. 1996) (denying relief from deportation order to alien petitioner convicted of controlled substance offense and firearms offense); Cato v. INS, 84 F.3d 597, 598–99, 602 (2d Cir. 1996) (agreeing that deportation order for permanent resident convicted of possession of loaded firearm was valid); Scheidemann v. INS, 83 F.3d 1517, 1518, 1526 (3d Cir. 1996) (upholding deportation of alien convicted of racketeering, conspiracy to commit racketeering, conspiracy to distribute and to possess with intent to distribute controlled substance, possession with intent to distribute controlled substance and use of telephone to facilitate drug conspiracy); United States v. Lopez-Gutierrez, 83 F.3d 1235, 1239, 1247 (10th Cir. 1996) (approving deportation order for alien convicted of conspiracy to distribute cocaine); San Pedro v. United States, 79 F.3d 1065, 1067, 1072 (11th Cir. 1996) (finding acceptable deportation of Cuban citizen found guilty of attempted bribery of federal public official and conspiracy to commit bribery); United States v. Xiang, 77 F.3d 771, 772, 773 (4th Cir. 1996) (affirming deportation order for Chinese immigrant found guilty of credit card fraud); Hamama v. INS, 78 F.3d 233, 235, 241 (6th Cir. 1996) (affirming deportation of Iraqi citizen convicted of felonious assault, possession of firearm in commission of felony, and carrying pistol in vehicle); United States v. Vasquez-Balandran, 76 F.3d 648, 648–49, 651 (5th Cir. 1996) (approving deportation of alien convicted of robbery); United States v. Hurtado-Gonzalez, 74 F.3d 1147, 1148, 1150 (11th Cir. 1996) (approving deportation order for foreign national convicted of possession of counterfeit currency with intent to defraud, importation of counterfeit currency into United States with intent to defraud, and conspiracy to possess and to import into United States counterfeit currency with intent to defraud); Pablo v. INS, 72 F.3d 110, 111, 113–14 (9th Cir. 1995) (affirming deportation of alien convicted of lewd and lascivious acts upon child under age of 14 and child molestation).

69. *Cf. Fong Yue Ting*, 149 U.S. at 730 (holding that deportation is appropriate for alien who has failed to adhere to appropriate requirements). Even if *Fong* was applicable to deportation resulting from commission of a criminal offense, it is inapplicable to "legal resident aliens." In 1893, the Court specifically used the term "alien" when referring to the class of persons subject to removal at the discretion of Congress. *See id.* at 709 (defining deportation as removal of *alien* because his or her presence in country is considered inconsistent with public welfare). Therefore, before attempting to apply *Fong's* holding, courts must first ascertain whether the petitioner is indeed an alien, as defined by *Fong*. *See id.* at 724 (referring to Chinese laborers as *aliens* because they are either incapable of becoming citizen or have failed to take appropriate measures toward becoming citizens). If the petitioner is not an alien, the *Fong* holding should be deemed inapplicable.

When the *Fong* Court used the term "alien," it expressly recognized two categories of people living in the United States—citizens and aliens. *See id.* at 724 (defining alien as person who has done nothing toward becoming or is incapable of becoming citizen). The *Fong* Court specifically defined aliens as those who have "taken no steps towards becoming citizens, and [are] incapable of becoming such under the naturalization laws." *Id.*; *see* United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521, 528 n.13 (1950) (relying on statutory definition of alien as one not born within United States or having undergone process of naturalization). The *Shaughnessy* Court was charged with deciding whether the Espionage Act of May 10, 1920 authorized deportation of one whose certificate of naturalization was revoked upon a finding that it was secured by deceit or deception or by other fraudulent means. *Id.* at 523. After determining that the Espionage Act did not expressly

whether the imposition of deportation is a punishment for a criminal offense. If so, deportation, like all other forms of punishment, is subject to Eighth Amendment scrutiny.

B. *Is Deportation Under the AEDPA Punishment?*

In determining whether deportation under the AEDPA is a form of punishment, one must first identify what constitutes punishment. As of early 1997, the Supreme Court has used the constitutional phrase "cruel and unusual punishment" in no fewer than 2,560 opinions,[70] yet today no clear definition of the word "punishment" exists in Supreme Court jurisprudence.[71] As discussed below, deportation under the AEDPA is punishment under either the test developed in *Trop v. Dulles*,[72] or the Banishment-Equivalency Rationale, a doctrine that stands for the proposition that banishment is cruel and unusual punishment, and that deportation is often the equivalent of banishment.[73]

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define the word "alien," the Court turned to related statutes for guidance. *Id.* at 529 n.13. The Immigration Act of February 5, 1917 defined an alien as any person "not a native-born or naturalized citizen of the United States." Immigration Act of Feb. 5, 1917, ch. 29, § 3, Pub. L. No. 64–301, 39 Stat. 874 (repealed 1952). The Immigration Act of May 26, 1924 defined an alien using identical language. Immigration Act of May 26, 1924, ch. 190, § 28, Pub. L. No. 68–139, 43 Stat. 168. The *Shaughnessy* Court was apparently persuaded by these definitions and held that such definitions were "effective today." *Id.* By implication, the *Fong* Court recognized a third category of non-citizens/non-aliens who either *have* taken steps towards becoming citizens, or *are* capable of becoming citizens under the naturalization laws. Today, we call members of this third group "legal residents." *See* Immigration and Nationality Act of 1952 § 244, 8 U.S.C. § 1254(a)(1) (1988) (defining requirements for alien to obtain permanent resident status); INS v. Hector, 479 U.S. 85, 86 (1986) (reiterating statutory definition for permanent resident aliens). The importance of the Court's implicit recognition of this third category is tremendous because *Fong* only applies to those who are deemed "aliens." *See Fong Yue Ting*, 149 U.S. at 707 (holding that nation has right to deport aliens—unnaturalized residents as well as those failing to take steps toward citizenship). As defined by the Supreme Court in *INS v. Hector*, a permanent resident is someone who has taken identifiable steps toward becoming a citizen. *Hector*, 479 U.S. at 86. Therefore, a permanent resident is not among the people addressed by the *Fong* Court.

70. Search of WESTLAW, SCT and SCT-OLD Databases (Mar. 10, 1997).

71. *Compare* Penry v. Lynaugh, 492 U.S. 302, 305 (1989) (determining that Eighth Amendment's prohibition against infliction of cruel and unusual punishment applies to practices condemned at common law, as well as to punishments that "offend our society's evolving standards of decency as expressed in objective evidence of legislative enactments and the conduct of sentencing juries"), *with* Holt v. Sarver, 309 F. Supp. 362, 365 (E.D. Ark. 1970) (deciding that cruel and unusual punishment "cannot be defined with specificity; it is flexible and tends to broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane").

72. 356 U.S. 86 (1958).

73. Delgadillo v. United States, 332 U.S. 388, 391 (1947). The *Delgadillo* Court found deportation to be an extreme measure; in some cases to be the equivalent of banishment.

1. *Trop v. Dulles*: 1958 Judicial Definition of Punishment

In pursuit of a working definition of the Eighth Amendment's use of the word "punishment," the Supreme Court took a bold step in *Trop*, declaring that, for Eighth Amendment analysis, punishment could be defined only by inquiring into the purpose and fundamental nature of the particular legislative enactment.[74] The effect of the enactment was deemed to be an irrelevant consideration.[75] In *Trop*, a United States soldier was convicted of desertion and, although Trop was a native-born American, his citizenship was revoked under the Nationality Act of 1940.[76] The Court was asked to decide whether this revocation of citizenship constituted punishment, thus subjecting the sanction to Eighth Amendment analysis.[77] *Trop* held that a statute imposes punishment if it is legislatively intended to "reprimand the wrongdoer [or] to deter others."[78] Because the Court found that the Nationality Act was congressionally intended to impose punishment on those convicted of desertion and to prevent others from committing the same act, the *Trop* Court held that the revocation of citizenship under the statute was punishment and, as such, subject to Eighth Amendment scrutiny.[79]

Id.; *see* INS v. Errico, 385 U.S. 214, 224 (1966) (agreeing with *Delgadillo* that deportation is drastic measure, at times equivalent to banishment or exile).

74. *Trop*, 356 U.S. at 95–96. After remarking that the Court had to determine the penal nature of statutes since 1798, the *Trop* Court held that it must look to the purpose of the statute in making its determination. *Id.* at 96.

75. *Id.* at 97–98.

76. *Id.* at 87–88. The facts in the case are undisputed. On May 22, 1944, Albert Trop, a private in the United States Army, walked away from a stockade at Casablanca, where he had been imprisoned for a previous breach of discipline. *Id.* at 87. The next day, Trop was walking down a road in the general direction of the camp when an Army truck pulled up beside him and stopped. *Id.* Without saying a word, Trop boarded the truck and was taken back to the camp where he was released to the military police. *Id.* Although absent for less than a day, Trop was court-martialed, convicted of desertion, and sentenced to three years at hard labor, forfeiture of all pay and allowances, and was dishonorably discharged. *Id.* at 88. Eight years later, Trop applied for a passport and was denied on the ground that the 1940 Nationality Act revoked the citizenship of soldiers who were dishonorably discharged for wartime desertion. *Id.*

77. *Id.* at 92. The *Trop* Court looked to its decision in *Perez v. Brownell*, 356 U.S. 44 (1958), which the Court believed governed the constitutional status of citizenship. *Trop*, 356 U.S. at 91–92. In *Trop*, Chief Justice Warren wrote that "citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship." *Id.* at 92.

78. *Trop*, 356 U.S. at 96.

79. *Id.* at 96–97.

This reasoning can be applied to the revocation of one's residence in the United States under the AEDPA. In determining whether deportation under the AEDPA is punishment, *Trop* requires a court to inquire into the Act's purpose and fundamental nature to determine if the Act's legislative intent is to rebuke the wrongdoer or to deter others from committing the same offense.[80] Even the most cursory perusal of the AEDPA's legislative history reveals a clear congressional intent to punish. Introducing what would later be named the AEDPA, Judiciary Committee Chairman Henry J. Hyde declared that this "legislation is intended to strengthen the ability of the United States to deter terrorist acts and to *punish* those who engage in terrorism."[81] He further noted that the government's most important responsibility is to protect the lives of its citizens.[82] Therefore, the fundamental purpose of this bill is to ensure that law enforcement officials are equipped with the necessary tools to prevent terrorism and punish terrorists who engage in criminal activities.[83] Finally, Representative Hyde announced that this legislation would establish significant penalties for those who engage in criminal activities under the auspices of political change.[84] Representative Hyde was not the only member of Congress to understand that this bill's purpose was to inflict punishment upon convicted aliens. Senate Judiciary Committee Chairman Orrin Hatch firmly believed that passing this bill was the right thing to do, and that the legislation represented a bipartisan effort to punish those who engage in domestic and international terrorism.[85] Additionally, Senator Toby Roth acknowledged that the "bill broadens the definition of aggravated felon[y] to include more crimes *punishable by*

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80. *See id.* (establishing that courts must look at legislative intent to determine if statute is meant to punish wrongdoers).

81. H.R. REP. No. 104–383, at 37 (1995), *microformed on* Sup. Docs. No. Y 1.1/ 8:104–383 (U.S. Gov't Printing Office) (emphasis added). In Chairman Hyde's April 15, 1996 committee report, he indicated that the bill's intended purpose was to "prevent and punish acts of terrorism." H.R. CONF. REP. No. 104-518, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. Three days later, the House Clerk read House Resolution 405, the response to the committee's recommendation. The first sentence the clerk read reiterated the congressional intent behind the bill: "Resolved, that upon adoption of this resolution it shall be in order to consider the conference report to accompany the bill (S. 735) to prevent and punish acts of terrorism, and for other purposes." 142 CONG. REC. H3599 (daily ed. Apr. 18, 1996) (statement of clerk).

82. H.R. Rep. No. 104–383, at 38 (1995), *microformed on* Sup. Docs. No. Y 1.1/ 8:104–383 (U.S. Gov't Printing Office).

83. *See id.* (stating that primary purpose of AEDPA is to prevent and punish terrorism).

84. *Id.*

85. Government Press Release, *Senate Consideration of the Comprehensive Terrorism Prevention Act of 1995*, Apr. 16, 1996, *available in* 1996 WL 8785671.

deportation."[86] Although not using the word "punishment," Representative Patsy Mink of Hawaii condemned the bill, believing it little more than a "vehicle to advance anti-immigrant attitudes."[87] Congressman Becerra of California argued that aliens who commit crimes should be punished by being deported and should be permanently banned from the United States.[88] Furthermore, Congressman Solomon of New York approved of the bill's provisions which he believed would prevent and punish terrorism.[89] Congresswoman Pryce supported the bill, finding that it gives law enforcement officials the tools necessary to effectively deter and punish those engaged in terrorist acts.[90] Finally, Senator Feingold of Wisconsin opposed the bill because he disapproved of the dramatic cutbacks to legal immigration "tacked on to a piece of legislation that *seeks to punish those who break our laws.*"[91] This sampling of legislative history clearly indicates Congress's intent to punish those who violate the AEDPA. Therefore, under the *Trop* analysis, deportation is clearly punishment and is subject to the Eighth Amendment's Cruel and Unusual Punishments Clause. However, even if deportation was not punishment under *Trop*, it would still be subject to the Cruel and Unusual Punishments Clause according to the "Banishment-Equivalency Rationale."

2. The Banishment-Equivalency Rationale

"Banishment as a punishment has existed throughout the world since ancient times."[92] In the United States, banishment has long been held

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86. 142 CONG. REC. S4600 (daily ed. May 2, 1996) (statement of Sen. Roth) (emphasis added). Senator Roth emphasized that many of the offenses for which aliens could be deported were not necessarily linked to terrorism; including: "prostitution, bribery, counterfeiting, forgery, vehicle theft, false immigration documents, obstruction of justice, perjury, bribery of witnesses, and failure to appear in court." *Id.*

87. 142 CONG. REC. E646 (daily ed. Apr. 25, 1996) (statement of Rep. Mink).

88. 142 CONG. REC. H2458 (daily ed. Mar. 19, 1996) (statement of Rep. Becerra).

89. 142 CONG. REC. H3600 (daily ed. Apr. 18, 1996) (statement of Rep. Solomon).

90. 142 CONG. REC. H3604 (daily ed. Apr. 18, 1996) (statement of Rep. Pryce).

91. 142 CONG. REC. S4125 (daily ed. Apr. 25, 1996) (statement of Sen. Feingold) (emphasis added).

92. *See* Cooper v. Telfair, 4 U.S. 14, 19 (1800) (holding that English and American jurisprudence established use of banishment of criminal wrongdoer, and such exercise was right of every government); *Rutherford*, 468 F. Supp. at 1360 (describing English use of banishment to transport prisoners to other countries for commission of certain criminal offenses); *cf. Numbers* 19:16–20 (declaring that person who touches corpse and does not cleanse himself "shall be cut off from Israel"). The practice of banishment spread throughout ancient Rome as an alternative punishment to the death penalty, as emperors became increasingly aware that the indiscriminate and visible exercise of execution might draw retributive attacks from one seeking to avenge the condemned's life. HANS VON HENTIG, PUNISHMENT 198 (1973). The deportation of a Roman to the islands of Gyarus, Seriphos, Patmos, Kossura, Skyros, Skiathos, and Donusa was a punishment more severe than "tak-

unconstitutional because it amounts to cruel and unusual punishment and is a denial of due process of law.[93] In *Louisiana v. Sanchez*,[94] a Louisiana court of appeals held that a sentence imposing banishment from the United States, as a condition of probation, was unconstitutional.[95] Similarly, in *Dear Wing Jung v. United States*,[96] the Ninth Circuit ruled unconstitutional a sentence suspended on the condition that the defendant permanently leave the country.[97]

While lower courts have held banishment to be unconstitutional punishment, the Supreme Court has held that deportation is at times the equivalent of banishment.[98] Consequently, if banishment is a punishment

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ing poison or the gentle death in a hot bath with a cut artery." *Id.* The severity of the crime committed generally determined the remoteness of the island to which the banished convict was sent. *Id.* Reportedly, the islands of Gyarus and Dunusa enjoyed the worst reputations: banishment to Gyarus was often compared to the death penalty. *Id.*

93. *See* Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962) (holding that removal of criminal offender from country is equivalent to banishment, which is either cruel and unusual punishment or denial of due process of law). *But see Harisiades*, 342 U.S. at 600 (Douglas, J., dissenting) (finding that banishment is not unconstitutional and may be used as punishment for crimes). Justice Douglas opined that because pre-Constitution history is replete with examples of banishment from the United States, the absence of any mention of banishment in the Constitution shows that the Framers never intended the federal government to possess such power. *Id.* However, Justice Douglas continued, the fact that the power of banishment is not granted to the federal government does not make its exercise unconstitutional; rather, this power is among those reserved to the states through the Tenth Amendment. *Id.*

94. 462 So. 2d 1304 (La. App. 5th Cir. 1985).

95. *Sanchez*, 462 So. 2d at 1310. The district court agreed to suspend the defendant's sentence, provided the defendant leave the United States permanently. *Id.*

96. 312 F.2d 73 (9th Cir. 1962).

97. *Dear Wing Jung*, 312 F.2d at 76.

98. *See Harisiades*, 342 U.S. at 600 (Douglas, J., dissenting) (arguing that aliens living in the United States who are suddenly uprooted and sent to lands no longer known to them, no longer hospitable, . . . become displaced, homeless people condemned to bitterness and despair); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (holding that, on appropriate facts, deportation can be same as banishment). Delgadillo was a citizen of Mexico who had entered the United States legally in 1923 and resided there until convicted of second-degree robbery twenty-one years later. *Delgadillo*, 332 U.S. at 390. Delgadillo was then sentenced to prison for one year to life. *Id.* The Immigration Act of February 5, 1917, provided for the deportation of an alien who was sentenced to imprisonment for one year or longer. Immigration Act of Feb. 5, 1917, ch. 29, § 19(a), Pub. L. No. 64-301, 39 Stat. 874 (repealed 1952). The pertinent section of the Act provided that "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude . . . shall, upon the warrant of the Attorney General, be taken into custody and deported." *Id.* The *Delgadillo* holding has been cited with approval in several subsequent Supreme Court decisions and numerous federal appellate court decisions. *See, e.g.*, INS v. Errico, 385 U.S. 214, 225 (1966) (agreeing with several earlier Supreme Court cases that deportation is drastic and oftentimes same as banishment or exile); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-70 (1963)

and deportation is sometimes the equivalent of banishment, deportation can be a form of punishment and therefore subject to Eighth Amendment scrutiny.

3. Deportation in 1996 Is Punishment

In 1893, the *Fong* Court allowed Congress to deport Chinese laborers who failed to obtain certificates of residence necessary to their continued presence in the United States.[99] In 1996, the AEDPA allows Congress to deport aliens who are guilty of committing, among other crimes, murder, rape, and perjury.[100] In just over one hundred years, Congress has gone from authorizing the deportation of aliens who failed to meet documentation requirements to authorizing the deportation of aliens who commit perjury, an offense that falls, remarkably, within the AEDPA's aggravated felony category. The legislative history behind the AEDPA clearly reveals Congress's intent to use deportation as a punishment for those aliens who violate the law.[101] It can no longer be said that this use of deportation is instituted "without any punishment being imposed or contemplated, under the laws of the country out of which he is sent."[102] Moreover, the Supreme Court has held that deportation is at times the equivalent of banishment, which is an unconstitutional form of punish-

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(arguing that deportation of noncitizen is punitive in nature); Barber v. Gonzales, 347 U.S. 637, 642 (1954) (acknowledging that deportation statutes may sometimes inflict equivalent of banishment or exile); *Galvan*, 347 U.S. at 530 (finding deportation equivalent of banishment, in that it deprives aliens of "all that makes life worth living"); Jordan v. De George, 341 U.S. 223, 231 (1951) (considering "grave nature" of deportation and concluding that deportation is drastic measure, at times equivalent of banishment); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (resolving statutory construction disputes in favor of alien because deportation is "drastic measure, and at times the equivalent of banishment or exile the forfeiture for misconduct of a residence in this country . . . such a forfeiture is a penalty").

Many of the U.S. appellate courts have agreed with the Supreme Court that deportation can sometimes be equivalent to banishment. *E.g.*, Scheidemann v. INS, 83 F.3d 1517, 1531 (3d Cir. 1996); Naderpour v. INS, 52 F.3d 731, 733 (8th Cir. 1995); Padilla-Agustin v. INS, 21 F.3d 970, 947 (9th Cir. 1994); Yepes-Prado v. INS, 10 F.3d 1363, 1369 n.11 (9th Cir. 1993); Gonzales v. INS, 996 F.2d 804, 811 n.7 (6th Cir. 1993); Janvier v. United States, 793 F.2d 449, 455 (2d Cir. 1986); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977); Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947).

99. *Fong Yue Ting*, 149 U.S. at 729–31.

100. *See* AEDPA, *supra* note 7, § 440(e)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278 (adding perjury to list of deportable offenses); Immigration and Nationality Act § 101(a)(43); 8 U.S.C. § 1101(a)(43) (1994) (identifying murder and rape as offenses for which aliens may be deported).

101. *See generally* 142 CONG. REC. H3599–604 (daily ed. Apr. 18, 1996) (statements of various Representatives) (discussing need to deport alien criminals in effort to combat terrorism).

102. *Fong Yue Ting*, 149 U.S. at 709.

ment.[103] Because the modern-day use of deportation is intended for a purpose different than that in 1893, *Fong*'s holding that deportation is not punishment is not applicable to proceedings brought under the AEDPA. Consequently, deportation is subject to Eighth Amendment scrutiny.

III. The Second Hurdle: Deportation—Civil or Criminal Proceeding?

Once the *Fong* hurdle to Eighth Amendment review of deportation proceedings is cleared, a second hurdle must be addressed—is deportation a civil or criminal proceeding? The answer to this question is critical because the Eighth Amendment's Cruel and Unusual Punishments Clause has long been interpreted to apply only in criminal proceedings.[104] Historically, courts have ruled that statutes authorizing deportation are nonpenal in nature and, as such, fall outside the realm of the Eighth Amendment.[105] However, the Supreme Court has held that the mere la-

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103. *See Delgadillo*, 332 U.S. at 391 (holding that deportation can be same as banishment).

104. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (finding that history of Eighth Amendment reveals that Cruel and Unusual Punishments Clause was intended to protect individuals convicted of crimes). The *Ingraham* Court stated that the English Bill of Rights of 1689, the predecessor to the Eighth Amendment, was adopted after William and Mary took power and was designed to prevent excessive penalties issued by English judges who served during the reign of James II. *Id.* The Court found that the English Bill was a response to either the Bloody Assize (the 1685 treason trials conducted by Chief Justice Jeffreys after the Duke of Monmouth's failed rebellion) or to the prosecution of Titus Oates for the crime of perjury. *Id.*

Essentially, every case in which the Supreme Court has addressed the question of whether a punishment is cruel and unusual under the Eighth Amendment has focused on a criminal punishment. *E.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 262–63 (1989); Estelle v. Gamble, 429 U.S. 97, 97–98 (1976); Gregg v. Georgia, 428 U.S. 153, 153 (1976); Furman v. Georgia, 408 U.S. 238, 239–40 (1972); Powell v. Texas, 392 U.S. 514, 517 (1968); Robinson v. California, 370 U.S. 660, 660–61 (1962); Trop v. Dulles, 356 U.S. 86, 87, 99 (1958); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 460–61 (1947); Weems v. United States, 217 U.S. 349, 357, 359 (1910); Howard v. Fleming, 191 U.S. 126, 126, 135 (1903); *In re* Kemmler, 136 U.S. 436, 438–49 (1890); Wilkerson v. Utah, 99 U.S. 130, 130, 133 (1879); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 475–76 (1867). *But see Ingraham*, 430 U.S. at 688 (1977) (White, J., dissenting) (arguing that Supreme Court has never confined Eighth Amendment's application to criminal proceedings). If a statute is penal in nature, it will be subject to Eighth Amendment analysis. *See Trop*, 356 U.S. at 101 (holding that where federal statute is penal, it is subject to Eighth Amendment analysis); *Ingraham*, 525 F.2d at 913 (citing Trop v. Dulles, 356 U.S. 86, 94–100 (1958)) (noting that Eighth Amendment is intended to apply to criminal punishments); United States v. Eleven Vehicles, 898 F. Supp. 1143, 1152 (E.D. Pa. 1995) (stating that only penal statutes are subject to Eighth Amendment scrutiny).

105. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (declaring that deportation proceeding is "purely civil action"); Woodby v. INS, 385 U.S. 276, 285 (1966) (explaining that deportation is civil proceeding, not criminal); Carlson v. Landon, 342 U.S. 524, 537

beling of a federal statute as nonpenal does not necessarily make it so and does not remove the statute from Eighth Amendment scrutiny.[106] In *Trop*, the Government argued that where an act does not impose a penalty, the Eighth Amendment's limitation on the congressional power to punish is inapplicable.[107] Noting that this conclusion was based upon Cabinet members' assertions that the legislation is not penal,[108] the Court in *Trop* suggested that the task of constitutional adjudication would be simple if a statute's nature could be determined by merely inspecting the labels placed upon them.[109] However, the determination of a statute's classification as either penal or nonpenal requires careful consideration.[110]

The Court has noted that although a statute's form may appear to be regulatory, which would render it nonpenal in nature, form alone cannot

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(1952) (deciding that deportation is civil proceeding, and not criminal proceeding); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (concluding that deportation is civil proceeding); Bassett v. INS, 581 F.2d 1385, 1388 (10th Cir. 1978) (finding congressional power to enforce deportation of alien offenders to be non-penal in nature and, as such, not subject to Eighth Amendment analysis); Santelises v. INS, 491 F.2d 1254, 1255 (2d Cir. 1974) (emphasizing that deportation is civil proceeding); Buckley v. Gibney, 332 F. Supp. 790, 796 (S.D.N.Y. 1971) (denying petitioner's argument that Eighth Amendment prohibits deportation because deportation is civil matter, not criminal). *But see* Bridges v. Wixon, 326 U.S. 135, 164–65 (1945) (Murphy, J., concurring) (arguing that it is "no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime.' Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights").

106. *See Ingraham*, 430 U.S. at 669 n.37 (holding that even though statutory punishment is not labeled criminal, it will nonetheless invoke Eighth Amendment scrutiny if it is sufficiently analogous to criminal punishments); *Trop*, 356 U.S. at 96 (explaining that Court must look to "purpose" of statute and not labels). The Supreme Court has long held that the categorization of a statutorily defined penalty as civil or criminal is a matter of statutory construction. United States v. Ward, 448 U.S. 242, 248 (1980). The Court's inquiry is two-fold: First, it determines whether Congress expressly or impliedly indicated a preference for labeling the statute civil or criminal. *Id.* Second, even where Congress has expressed an intention to establish a civil penalty, the Court will investigate the statutory scheme, determining whether its purpose or effect is so punitive as to negate that intention. *Id.* at 248–49.

107. *Trop*, 356 U.S. at 94; *see* Wilson v. Seiter, 501 U.S. 294, 296–97 (1991) (holding that Eighth Amendment prohibits imposition of "cruel and unusual punishments on those convicted of *crimes*") (emphasis added); Whitley v. Albers, 475 U.S. 312, 318 (1986) (explaining that Cruel and Unusual Punishments Clause was designed and enacted to protect persons convicted of criminal activity).

108. *See Trop*, 356 U.S. at 94.

109. *Id.*; *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 209 (1963) (Stewart, J., dissenting) (citing Trop v. Dulles, 356 U.S. 86, 94 (1958)) (arguing that task of constitutional adjudication would be simple if cursory inspection of statutory label as penal or nonpenal was dispositive).

110. *See Trop*, 356 U.S. at 95.

determine its proper classification.[111] Instead, the inquiry must be focused on a statute's substance[112] or purpose.[113] If the disability imposed by a statute is intended to punish, the statute is considered penal.[114] If, however, a statute imposes a disability designed not to punish, but to achieve a legitimate, non-punitive governmental purpose, the statute's nature is considered nonpenal.[115]

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111. *See id.* (holding that statute's form is not necessarily dispositive of its classification); United States v. Lovett, 328 U.S. 303, 315 (1946) (holding that statutory form is irrelevant in determining statute's proper classification); *see* United States v. Bize, 86 F. Supp. 939, 946 (D.Neb. 1949) (refusing to remove federal legislation from constitutional considerations merely because Congress gave civil form to statute which is penal in nature); United States v. Marsh, 11 M.J. 698, 709 (N.M.C.M.R. 1981) (arguing that form of statute not controlling in determining its nature), *rev'd on other grounds* 15 M.J. 255 (C.M.A. 1983). As an example, the *Trop* Court contended that a statute authorizing the loss of liberty of one who commits a bank robbery is penal in nature, although clearly regulatory in form. *Trop*, 356 U.S. at 95.

112. *See Trop*, 356 U.S. at 95 (suggesting that substance of statute takes precedence over form); Louis Vuitton v. Spencer Handbags Corp., 597 F. Supp. 1186, 1194 (E.D.N.Y. 1984) (looking beyond form of statute and focusing on its substance), *aff'd*, 765 F.2d 966 (1985); *Bize*, 86 F. Supp. at 946 (holding that substance of statute controls over its form).

113. *See Trop*, 356 U.S. at 96 (noting that in determining whether statute involved was penal in nature, Supreme Court has "generally based its determination upon the purpose of the statute"). The Court emphasized that it has been asked to determine the classification of statutes since its 1798 decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). *Id.* at 95. This is so because constitutional prohibitions other than the one affecting cruel and unusual punishments apply only to statutes which are deemed penal in nature. *Id.* at 95–96; *see* United States v. Lovett, 328 U.S. 303, 315–16 (1946) (reiterating that legislative acts inflicting punishment without judicial trial are bills of attainder and therefore invalid); *Calder*, 3 U.S. (3 Dall.) at 389 (stating that legislature is prevented from passing any law that would impose injustice); *see also* U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1 (forbidding bill of attainder and ex post facto laws).

114. *See, e.g.*, *Trop*, 356 U.S. at 96 (arguing that statute imposing disability for purpose of punishment is penal in nature); United States v. Lovett, 328 U.S. 303, 315 (1946) (declaring that statute imposing punishment is considered "bill of pains and penalties"); Pierce v. Carskadon, 83 U.S. 234, 239 (1872) (holding that law ordering punishment is considered penal in nature); *Ex Parte* Garland, 71 U.S. 333, 364 (1866) (deciding that courts must look to statutory effect to determine whether punishment is imposed); Cummings v. Missouri, 71 U.S. 277, 286 (1866) (looking at effect of law to determine whether it is penal or nonpenal).

115. *See, e.g.*, *Trop*, 356 U.S. at 96 (deciding that statute imposing no disability and designed merely to meet legitimate state end is not penal in nature); Mahler v. Eby, 264 U.S. 32, 39 (1924) (holding that deportation is not punishment because federal government has sovereign right to expel aliens); Hawker v. New York, 170 U.S. 189, 196 (1898) (arguing that statute is not penal if it does not seek to impose punishment); Davis v. Beason, 133 U.S. 333, 342–44 (1890) (stating that statute seeking legitimate government end is not penal in nature as it imposes no punishment); Murphy v. Ramsey, 114 U.S. 15, 41–43 (1885) (declaring that statute is not penal if it assesses no punishment upon criminal offender). In *Trop*, the Court concluded that the removal of citizenship under Section 401(g) of the Nationality Act was intended to punish because "[t]here is no other legitimate purpose

In *Trop*, while acknowledging that Congress has the power to prescribe certain rules and obligations, the Court rejected the government's argument that the statute is regulatory merely because it was authorized by Congress's war power.[116] The Court stated that a statute dictating the consequence that will result if someone violates that regulatory provision is a penal law.[117] The Court reasoned that if a statute prescribing imprisonment is penal in nature and the loss of citizenship is a substituted punishment for imprisonment, then merely substituting one form of sanction for another cannot be said to transform the fundamental nature of the statute from penal to nonpenal.[118] The *Trop* Court concluded that a statute is clearly a penal law where it imposes denaturalization with the intent to punish a particular transgression.[119]

The AEDPA mandates that an alien who commits perjury or subornation of perjury is subject to deportation.[120] If, on the other hand, a citizen of the United States commits either of these offenses, he or she will be subject to a fine, imprisonment, or a combination thereof.[121] Because deportation under the AEDPA may serve as a substitute for imprisonment, the AEDPA is a penal statute that is subject to the limitations of the Cruel and Unusual Punishments Clause.[122]

IV. The Cruel and Unusual Punishments Clause

To determine whether the punishment of deportation under the AEDPA violates the Eighth Amendment's Cruel and Unusual Punishments Clause, it is first necessary to consider what is cruel and unusual punishment. The Eighth Amendment itself does not define or explain

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that the statute could serve . . . [and where] the purpose is punishment, . . . the statute is a penal law." *Trop*, 356 U.S. at 97.

116. *Trop*, 356 U.S. at 97.

117. *Id.*; *cf.* United States v. Bodre, 948 F.2d 28, 40 (1st Cir. 1991) (finding regulation to be penal in nature because it imposes penal consequences upon violators); American Maritime Assoc. v. Blumenthal, 590 F.2d 1156, 1165 (D.C. Cir. 1978) (determining regulation to be more similar to penal statute because regulation imposed punishment). *But see Woodby*, 385 U.S. at 285 (finding deportation to be nonpenal regulatory proceeding, even though it imposes serious consequences); Lopez-Mendoza v. INS, 705 F.2d 1059, 1087 (9th Cir. 1983) (holding that although deportation imposes severe consequences, such proceeding is nonpenal in nature), *rev'd on other grounds*, 468 U.S. 1033 (1984).

118. *See Trop*, 356 U.S. at 97; United States v. Brown, 744 F.2d 905, 908 (2d Cir. 1984) (refusing to find that substitution of sanctions transforms criminal sentence into civil).

119. *Trop*, 356 U.S. at 97–98.

120. AEDPA, *supra* note 7, § 442(a)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278.

121. 18 U.S.C. §§ 1621, 1622 (1994).

122. *See* U.S. Const. amend. VIII (noting that punishments that are cruel and unusual shall not be imposed).

the terms "cruel" and "unusual." Therefore, to understand the concept, a brief discussion of the history of cruel and unusual punishment is required.

A. *History of the Cruel and Unusual Punishments Clause*

Long before the Framers crafted the Eighth Amendment, there was little restraint on a government's ability to punish its citizens.[123] In particular, early foreign governments employed a variety of punishments ranging from those intended to induce death to those that caused great pain and suffering. Popular forms of punishment included drowning,[124]

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123. *See* Jonathan A. Vold, *The Eighth Amendment "Punishment" Clause After* Helling v. McKinney: *Four Terms, Two Standards, and a Search for Definition*, 44 DEPAUL L. REV. 215, 217 (1994) (noting governmental infliction of punishment in United States was virtually unchecked prior to enactment of Eighth Amendment). *But see* Vincent R. Johnson, *The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L & COMP. L. REV. 1, 40–41 (1990) (citing MD. CONST. Declaration of Rights § XIV (1776) and noting that "sanguinary laws ought to be avoided . . . and no law, to inflict cruel and unusual pains and penalties, ought to be made"). The Massachusetts constitution imposed a similar prohibition in 1780, declaring that "[n]o magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." *Id.* (citing MA. CONST. Part 1, art. XXVI (1780)). The New Hampshire constitution of 1784 stated that "[a]ll penalties ought to be proportioned to the nature of the offense." *Id.* (citing N.H. CONST. art. XVIII (1784)). In Article 33, that constitution further addressed the types of punishments a government could impose, declaring that "[n]o magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." *Id.* (citing N.H. CONST. art. XXXIII (1784)). North Carolina adopted a similar prohibition against cruel punishments in its 1776 constitution, holding that "excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* (citing N.C. CONST. art. X (1776)). Similarly, the Pennsylvania government required that "punishments [should be] made . . . proportionate to the crimes." *Id.* (citing PA. CONST. § 38 (1776)). South Carolina's early constitution provided that "the penal laws [would be] in general proportionate to the offense." *Id.* (citing S.C. CONST. § XL (1778)). Finally, in its 1776 Bill of Rights, Virginia prohibited the use of cruel and unusual punishments. *Id.* (citing VA. BILL OF RIGHTS § 9 (1776)).

124. *See* 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 496 (1978) (describing thirteenth-century punishment of thief by casting him from rock into sea); *cf. Matthew* 18:6 (warning that one who turns children away from God would suffer punishment greater than having millstone hung around his neck and being cast into sea). In seventeenth century Scotland, drowning was reserved mostly for women. EDWARD J. WHITE, LEGAL ANTIQUITIES 278 (1986). In 1624, for example, eleven gypsy women were drowned in the North Loch of Edinburgh. *Id.* In 1685, two women who refused to forsake their Christian beliefs were tied to wooden stakes erected where the Solway River's swift tide overflowed twice daily. *Id.* One of the women, who was only eighteen years old, was partially revived by her friends and urged to say, "God save the King." *Id.* The girl refused, and drowned. *Id.* English felons convicted during the reign of Edward II were killed by drowning. *Id.* The English Crown also used drowning to punish those convicted of witchcraft. *Id.* at 277. Death by drowning was used in France until the

burying alive,[125] hanging, drawing and quartering,[126] mutilation,[127] flaying,[128] the wheel,[129] the rack,[130] scourging,[131] blinding,[132] cutting off the

late sixteenth century, and was revived during Carrier's eighteenth-century revolution at Nantes. *Id.* at 277 n.11. Hundreds of men, women, and children were drowned in the Seine River. *Id.* The condemned were taken to the river's bank, stripped, tied by the feet and hands to each other, and then thrown into the water. *Id.* In their "hideous death struggles they churned the water, for the edification of the cruel crowd, until the last poor struggler had sunk to his final rest." *Id.* at 277. Seventeenth-century America saw the employment of drowning as a punishment for those convicted of witchcraft. *Id.*

125. *See* EDWARD J. WHITE, LEGAL ANTIQUITIES 282–83 (1986) (discussing early practice of burying criminal offenders alive); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 496 n.7 (1978) (noting that practice of burying criminal offender alive is thought to have been practiced at Sandwich, Lyon, and Dover). During the Middle Ages, the French and Roman governments punished young girls who violated their oaths of chastity by burying them alive. EDWARD J. WHITE, LEGAL ANTIQUITIES 282–83 (1986). Once convicted of such a violation, the girl was scourged, attired like a corpse and placed in a sealed casket. *Id.* The casket was carried through the Forum, followed by weeping family members and friends, with all the ceremonies of a real funeral. *Id.* at 282. This procession ended at the *Campus Sceleratus*, just inside the city wall, near the Colline gate. *Id.* A local priest offered a final prayer for the condemned girl and then relinquished her to the executioner, who instructed that the coffin be lowered into a subterranean vault. *Id.* The executioner then filled the pit with earth, "thus forever consigning to mother earth the body of her wayward daughter who, in pursuance of her God-given instincts, had violated the unnatural law of the barbarous pagan days of ancient Rome." *Id.*; *see* HANS VON HENTIG, PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY 92–93 (1973) (discussing fate of unchaste maidens). In thirteenth century Bigorre, this punishment was instituted for murder, "the murdered and his murderer being interred in the same grave." EDWARD J. WHITE, LEGAL ANTIQUITIES 283–84 (1986). In 1302, a woman was buried alive for committing petty theft. *Id.* Philip Augustus reportedly used this punishment to put to death a woman convicted of committing perjury. *Id.* England also used this method of capital punishment during early times. *Id.*

126. *See* EDWARD J. WHITE, LEGAL ACTIVITIES 283–84 (1986) (noting how hanging, combined with drawing and quartering, was introduced in thirteenth century England when pirate, William Maurice, was condemned to death). The punishment was soon after used to kill those convicted of treason; the terms of the sentence imposed by Lord Ellenborough read to the condemned:

> You are to be drawn on hurdles to the place of execution, where you are to be hanged, but not until you are dead; for, while still living, your body is to be taken down, your bowels torn out and burnt before your face; your head is then to be cut off and your body divided into four quarters.

Id.

127. EDWARD J. WHITE, LEGAL ANTIQUITIES 294 (1986). Mutilations, generally used by the Israelites, Persians, Greeks, Romans, and English, consisted of "blindings, cutting off the hands or ears, branding, plucking off the hair, flaying, scourging with thorns, the stocks, stripes, the wheel, the rack, the comb with sharp teeth, the burning tile, the heavy hog-skin whip, and the injection of vinegar into the nostrils." *Id.*

128. *See* EDWARD J. WHITE, LEGAL ANTIQUITIES 300–01 (1986) (noting that flaying or skinning was punishment popular among early Persian and Assyrian governments). If the condemned's crime was not particularly offensive, the government would graciously wait until after the condemned's execution before removing the skin from his body. *Id.* at

300. However, if the criminal's offense was so great that the government wanted to deter others from committing the same crime, the criminal was flayed alive. *Id.* Afterwards the skin oftentimes was stuffed with straw or inflated to resemble the flayed individual, and it was then publicly displayed as a reminder to those who might betray the law. *Id.*

129. *See* EDWARD J. WHITE, LEGAL ANTIQUITIES 301–02 (1986) (suggesting that "wheel" was popular instrument of punishment among English and French governments during Middle Ages). In the twelfth century, Bouchard, condemned for the murder of Charles le Bon, Count of Flanders, was tied to a wheel which was suspended in mid-air, allowing the vultures to pick out his eyes and otherwise torture him. *Id.* After the birds had torn Bouchard's eyes from their sockets and slit his face with their sharp beaks, the condemned man was put to death by darts and javelins shot by the angry mob below. *Id.* at 302. St. Catherine of Alexandria was put to death on a wheel ladened with sharp spikes. *Id.* at 301. Reportedly, the wheel was destroyed in the process by Divine Grace. *Id.*

130. *See id.* at 304–05 (explaining how "rack" was used to punish criminals). The rack was a wooden frame to which a convicted criminal was fastened, his arms and legs, tied by ropes attached to pulleys, were violently stretched and pulled until the tension caused intense pain. *Id.* The bones of the arms and legs were pulled from their sockets and were frequently broken. *Id.* at 301. The rack became known as the "The Duke of Exeter's Daughter," as it was the Duke of Exeter who first implemented the use of this device in 1467, installing it in the infamous Tower in England. *Id.* The reign of Elizabeth saw extensive use of the rack, and in 1850, the Jesuit Priests involved in the Jesuit Invasion were racked in an attempt to compel them to disclose the identity of their leaders. *Id.*

Shakespeare frequently references the rack as an instrument of torture popular in his time. *Id.* at 302. In *The Merchant of Venice*, Portia refers to the enforced statements of Bassanio: "Ay, but I fear, you speak upon the rack, where men enforced do speak anything." WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 3, sc. 2.

131. *Cf. Judges* 8:7 (suggesting that scourging was form of punishment inflicted by Jews). Gideon warned that when the Lord of Israel delivered Zebah and Zalmunna to him, Gideon would rip their flesh with briars and with the thorns of the wilderness. *Id.* When the men of Succoth were delivered to him, Gideon took them and scourged them with thorns and briars. *Id.* at 8:16. The Jews frequently used ropes embedded with thorns or sharp iron scraps, or knotted sticks to punish criminals as well as the people of the lands the Jews conquered. 1 *Kings* 12:11. Scourging was considered by the Jews a way of displaying to foreign nations the strength of Israel and its power to punish. David smote the Moabites and scourged them; afterwards, they became his servants and brought him gifts, hoping to avoid being again scourged. 2 *Samuel* 8:2. David brought forth the children of Ammon from the cities and scourged them with knotted sticks embedded with iron pikes. *Id.* at 12:31.

132. *See Exodus* 21:24 (stating that punishment for personal injury shall be "eye for eye"); *accord Leviticus* 24:20 (setting out punishment as "eye for eye"). Attempting to prevent revolters from causing further harm and to deter others from taking part in such uprisings, the Assyrians and Babylonians instituted blindings of those convicted of such crimes against the government. *Cf. Esther* 7:8 (noting that insurrectionists were not permitted to look upon king). William the Conqueror sentenced those convicted of certain felonies to be blinded. EDWARD J. WHITE, LEGAL ANTIQUITIES 295–96 (1986). This form of punishment did not last long in England. *Id.* at 296. In 1108, Henry I repealed the law that sentenced those convicted of theft or robbery to be blinded and replaced it with death by hanging. *Id.*

ears,[133] plucking of the hair[134] and multiple sentencing.[135] Early commentators warned of the dangers of governmental imposition of such cruel and severe punishments.[136]

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133. *See* EDWARD J. WHITE, LEGAL ANTIQUITIES 296–97 (1986) (indicating that "cutting off the ears" was used until late seventeenth century in England as punishment for those considered by the Crown to be religious or political criminals). In 1637, Bastwick, Burton, and Prynne were labeled religious zealots for daring to refuse to bow to an authority they did not recognize, and were sentenced to having their ears removed in London's Palace Yard. *Id.* Bastwick loaned the sheriff his own knife for the punishment and advised the sheriff on how best to remove the ears, asking him to "lop them close, that it might not be necessary for him to come there again." *Id.* After the three mens' ears were cut off, they were returned to prison. *Id.*

134. *See* EDWARD J. WHITE, LEGAL ANTIQUITIES 299 (1986) (discussing how plucking of hair, or scalping, was used by governments as well as American Indians). In ancient Israel, scalping was the punishment inflicted for one who indulged in a racially mixed marriage. *See Nehemiah* 13:23, 25 (revealing that Jewish men who married wives of Ashdol were punished by having their hair pulled off). Such a practice was also common in the prophet Isaiah's time. *See Isaiah* 50:6 (declaring "I gave my back to the smiters and my cheeks to them that plucked off the hair: I hid not my face from shame and spitting"). Scalping was a severe punishment inflicted on criminals by the Israelites because, unlike the American Indians who first killed their victim and then used a knife to remove the scalp, the Israelites scalped a living offender without a knife, using only brute force to rip the hair along with the flesh from the head. EDWARD J. WHITE, LEGAL ANTIQUITIES 299–300 (1986).

135. *See* 5 THE FOUNDERS' CONSTITUTION 368–69 (Philip B. Kurland & Ralph Lerner eds., 1987) (citing Case of Titus Oates, 10 How. St. Tr. 1079, 1316 (K.B. 1685)) (discussing how in *Case of Titus Oates*, court found defendant Oates guilty of perjury and issued multiple punishments). First, the court sentenced him to a monetary fine of 1000 marks for each indictment. *Id.* at 368. Second, the court ordered that for one hour on a specified day, the defendant must stand on the pillory with a "paper over [his] head . . . declaring [his] crime," and the next day stand for an hour on a pillory at the Royal Exchange in London with the same inscription. *Id.* Third, the court ordered that on Wednesday of the following week, the defendant was to be "whipped from Aldgate to Newgate." *Id.* Fourth, on the following Friday, the defendant was sentenced to be "whipped from Newgate to Tyburn, by the hands of the common hangman." *Id.* Taking note of the fact that the defendant made more than one false statement while under oath, the court provided, as "annual commemorations," that five times a year for the remainder of the defendant's life, the defendant must stand on the pillory in various locations throughout the town and be recognized as one who committed perjury. *Id.* Finally, the court sentenced the defendant to life imprisonment for his crime of perjury. *Id.*

The dissenting opinion, issued by a minority of the House of Lords, believed that the inflicted punishments were "barbarous, inhuman, and unchristian; and there [was] no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon" the defendant. *Id.* at 369. The dissent opined that these punishments were prohibited by a recent declaration that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." *Id.*

136. *See* CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS 105 (Legal Classics Library 1984) (1748) (urging that instead of imposing severe punishments, government ought

During the Constitutional Convention, the Framers sought to prevent the introduction and implementation of such punishments. They included in the Bill of Rights a provision similar to that in the English Bill of Rights of 1688, which declared that "cruel and unusual punishments [ought not be] inflicted,"[137] transforming the suggestiveness of the English Bill's language into a mandatory prohibition: cruel and unusual punishment "shall not" be inflicted.[138] Whereas the English prohibition

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to "follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be the infamy attending it"). Montesquieu argued that an inquiry into the cause of "all human corruption" will reveal the origin of such corruption to be the "impunity of crimes, and not from the moderation of punishments." *Id.* A government which institutes only cruel punishments for all offenses, no matter how slight, is a violent government. *Id.* Montesquieu further believed that the punishment inflicted should not be disproportionate to the crime committed, because it is the greater crime which is more pernicious to society that governments should seek to deter. *Id.* at 111. As an example, Montesquieu observed that it would be a "great abuse" to bestow upon a person who commits robbery the same punishment as would be fitting for one who commits both robbery and murder. *Id.* at 112. Offering an example of the deterring effect of punishments, Montesquieu noted that in China, those who murder during the commission of a robbery "are cut in pieces: but not so the others; to this difference it is owing that though they rob in that country they never murder. In Russia, where the punishment of robbery and murder is the same, they always murder. The dead, say they, tell no tales." *Id.* Finally, Montesquieu spoke to the wisdom of pardons which, when exercised prudently, produce "admirable effects;" effects not enjoyed by despotic governments which do not utilize pardoning "letters of grace." *Id.* at 113.

In 1769, William Blackstone approved of the proportionality between the punishment inflicted and the crime committed. 4 WILLIAM BLACKSTONE, COMMENTARIES 369–74 (1769). Blackstone noted that in only the "very atrocious crimes, other circumstances of terror, pain, or disgrace are super added." *Id.* at 370. For example, Blackstone observed that when convicted of any kind of treason, the defendant is dragged to the place of execution; if convicted of high treason affecting the king personally or the government, the defendant is disembowelled alive, beheaded, and quartered; a female convicted of treason is burned at the stake; and a person convicted of murder is publicly dissected. *Id.* Blackstone then notes that the "humanity of the English nation" has mitigated the cruelty of such punishments by delaying the condemned's embowellment or burning until being "deprived of sensation by strangling." *Id.* Blackstone explains that other punishments include exile, banishment, or transportation to the American colonies, as well as mutilation or dismembering, by cutting off the convict's hand or ear, or by fixing a "lasting stigma on the offender, by slitting the nostrils, or branding in the hand or face." *Id.* Still other punishments, Blackstone continued, are inflicted for crimes arising from indigence, and are intended to induce some degree of corporal pain: whipping, imprisonment in the house of correction, the stocks, the pillory, and the ducking-stool. *Id.*

137. The Bill of Rights, 1688, 1 W. & M., ch. 2 (Eng.).

138. 1 ANNALS OF CONG. 431–34 (1789); *see* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989) (pointing out that Eighth Amendment received little debate during creation of Bill of Rights by First Congress).

By 1641, Massachusetts Bay colonists enacted a law that prohibited "inhumane, [b]arbarous or cruel" punishment of local offenders. *See In re* Kemmler, 136 U.S. 436, 446 n.1 (1890) (citing Colonial Laws of Mass. 43 (1889)). Almost half a century later, the Eng-

against cruel and unusual punishment focused on excessive or disproportionate punishment,[139] the American concept of the same prohibition emphasized the illegality of brutal methods of punishment.[140] Many of the Framers believed that although it was necessary to punish criminals and other types of offenders, such punishment should be proportionate to the crime committed.[141]

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lish bill of Rights of 1688 declared that "cruel and unusual punishments [ought not be] inflicted." Furman v. Georgia, 408 U.S. 238, 319 (1972) (Marshall, J., concurring) (discussing history of Eighth Amendment's use of terms cruel and unusual). The Eighth Amendment's Cruel and Unusual Punishments Clause was extracted from the Act of Parliament of 1688 which held that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Kemmler*, 136 U.S. at 446. After American colonists won their independence from England, this prohibition against cruel and unusual punishment was adopted by many of the colonial legislators in drafting their state constitutions. *See Furman*, 408 U.S. at 319 (showing how clause was incorporated into Virginia's Declaration of Rights of 1776 and the subsequent inclusion by four additional states).

139. *See* LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3–4 (1975) (discussing how history of England's Cruel and Unusual Punishments Clause indicates intent to prevent excessive punishments and to ensure that punishments are proportionate to offenses); *see also* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (believing that English Bill of Rights presented implementation of punishments that were disproportionate to crime committed); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 376 (1995) (noting that English prohibition of cruel punishment was directed at punishments disproportionate to offenses committed); Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL RTS. J. 185, 187 (1993) (acknowledging that English Bill of Rights prohibited issuance of punishments disproportionate to criminal offenses). *See generally* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 852–60 (1969) (discussing development of "cruel and unusual punishment" phrases in England and America).

140. *See Furman*, 408 U.S. at 377 (Burger, J., dissenting) (stating that Framers intended Eighth Amendment's Cruel and Unusual Punishments Clause to have different meaning from that of English precursor); *see also* Graham v. Connor, 490 U.S. 386, 394 (1989) (holding that, along with Fourth Amendment's prohibition against unreasonable searches and seizures, Eighth Amendment's ban on cruel and unusual punishment is foundation of constitutional protection against government-imposed physical abuse); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (finding that drafters of Eighth Amendment sought to proscribe punishments that were torturous and barbarous); *Kemmler*, 136 U.S. at 447 (deciding that punishments that inflict torture or result in lingering death are cruel and are unconstitutional under Eighth Amendment); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (concluding that punishments of torture and those that imposed unnecessary cruelty are prohibited by Eighth Amendment).

141. *See* Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776) (acknowledging necessity of punishment, disclaiming "fantastical idea" that man's virtue and public good would suffice to prevent colonists from committing crimes against state), *in* 1 THE PAPERS OF THOMAS JEFFERSON 374 (J. Boyd ed., 1950). Jefferson wrote that punishments are necessary and should be administered strictly and inflexibly, but proportionately to the crime committed. *Id.* Jefferson believed that a murder conviction warranted a death

sentence, as did treason, provided the definition of treason did not include "all crimes which are not such in their nature." *Id.*

Jefferson wrote that acts of rape and buggery should be punished by castration; all other crimes should invoke a punishment of hard labor, such as working on public roads, rivers, and gullies. *Id.* The time of such service was usually proportionate to the severity of the crime committed. *Id.* Slaves who committed these crimes punishable by hard labor, according to Jefferson, would be useless as this is the type of work slaves are already engaged in. *Id.* Thus, slaves who commit such crimes should be banished from the country, thereby ensuring that the colonists are "freed from the [slave's] wickedness." *Id.* Mercy should be the character of the law-giver, Jefferson believed; yet the judge should be a "mere machine, [t]he mercies of the law [dispensed] equally and impartially to every description of men." *Id.*

During a 1788 Constitution-ratifying debate in Virginia, Patrick Henry stated that Congress was empowered to create statutory offenses and accompanying punishments for offenders for crimes ranging from treason to petty larceny. JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 447–48 (1988). Although not concerned about how Congress would define various crimes, Henry argued that the severity of punishments should not be left to the virtue of the legislators. *Id.* at 447. Instead, Henry continued, the creation of punishment for criminal offenses should be guided by the Virginia Bill of Rights which prohibits the infliction of cruel and unusual punishments. *Id.* Henry warned that if the national legislators were free to define punishments without the control of such a provision, they might "loose the restriction of not . . . inflicting cruel and unusual punishments. . . . What has distinguished our ancestors[,] that [our legislators] would not admit of tortures, or cruel and barbarous punishment?" *Id.* Henry warned that without the protection of such a prohibition, Congress may adopt the barbarous practices of France, Spain, and England of torturing defendants to elicit confessions, in order to punish with even greater severity. *Id.* If we are to allow this, Henry concluded, "[w]e are then lost and undone." *Id.*

In response to Patrick Henry's arguments, Mr. Nicholas, one of the debaters, argued that Henry was wrong in believing that a mere constitutional prohibition against cruel and unusual punishments would prevent Congress from instituting such responses to criminal offenses. *Id.* Nicholas concluded that "[i]f we had no security against torture but our declaration of rights, we might be tortured tomorrow; for it has been repeatedly infringed and disregarded." *Id.*

Not all of the men involved in ratifying the Constitution were impressed by the provision prohibiting cruel and unusual punishments. During a floor debate in the House of Representatives, Congressman Smith of South Carolina objected to the provision's phrasing, believing it to be too indefinite to serve any practical purpose. 1 ANNALS OF CONG. 754 (1789). Representative Livermore seemed to agree, arguing that although the provision "seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary." *Id.* Livermore stated that although it may be cruel to punish criminals by hanging, whipping, and cutting off their ears, the infliction of such punishment is sometimes necessary, and until a more lenient mode of punishing offenders and deterring potential offenders is invented, the government should not be restrained from implementing punishments it deems necessary. *Id.* Representative Livermore argued that if a less cruel means of correcting "vice and deterring others from [its] commission could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind." *Id.*

B. *The United States Supreme Court and the Eighth Amendment*

From the passage of the Bill of Rights in 1791 to the present, three developmental periods in Eighth Amendment jurisprudence are readily identifiable. The periods are defined by marked expansions in the scope of Eighth Amendment protection. As discussed below, the first period prohibited the infliction of barbaric and torturous punishment. The second recognized protections against the infliction of wanton and unnecessary pain. The third period protected inmates from poor prison conditions.

1. Prohibition of Barbaric and Torturous Punishment

The first period in Eighth Amendment jurisprudence saw modest, yet steady, expansion of the prohibition against cruel and unusual punishment. The Supreme Court addressed the punishment clause in only a few cases; indeed, the Court's first substantive ruling on the clause was not issued until eighty-six years after the Eighth Amendment was ratified by the states.

In *Wilkerson v. Utah*,[142] persuaded by Blackstone's treatise on the meaning of the prohibition in the English Bill of Rights, the Supreme Court held that the Cruel and Unusual Punishments Clause prohibits punishments of torture that impose unnecessary cruelty.[143] In *Wilkerson*, the defendant was convicted of first degree murder and sentenced to death under a Utah statute that provided that a person convicted of a capital offense shall "suffer death."[144] Acknowledging the difficulty in defining the reach of the Cruel and Unusual Punishments Clause,[145] the Court held that it was "safe to affirm" that the clause prohibited the infliction of unnecessary torture, such as dragging a condemned man to a place where he was to be hung.[146] Addressing the practice of execution

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142. 99 U.S. 130 (1878).

143. *Wilkerson*, 99 U.S. at 135–36.

144. *Id.* at 130. Passed March 6, 1852, the Utah statute provided that a defendant convicted of a capital offense "shall suffer death by being shot, hanged, or beheaded, as the court may direct, or he shall have his option as to the manner of his execution." *Id.*; *see* Matthew Brown, *Firing Squad Executes Girl's Murderer in Utah*, LOS ANGELES DAILY NEWS, Jan. 26, 1996, at N18 (discussing convicted murderer's option to be executed by firing squad as provided by Utah statute). In *Wilkerson*, after announcing the jury's verdict of guilty, the presiding justice publicly sentenced the defendant to death, declaring," . . . you will be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the fourteenth day of December next . . . [from there you will be taken] to some place within this district, and that you [will] there be publicly shot until you are dead." *Wilkerson*, 99 U.S. at 130–31.

145. *See Wilkerson*, 99 U.S. at 135–36 (holding that it is difficult to define with exactness what constitutes cruel and unusual punishments).

146. *Id.*

itself, the *Wilkerson* Court held that the state's use of a firing squad was not prohibited by the Eighth Amendment.[147]

In *In re Kemmler*,[148] the Court upheld *Wilkerson's* Eighth Amendment interpretation that execution was not prohibited, declaring that the punishment of death is not cruel.[149] What the Constitution does forbid, however, is "torture or a lingering death [or] something inhumane and barbarous, something more than mere extinguishment of life."[150] Although the *Kemmler* Court speculatively prohibited punishments such as burning at the stake, breaking on the wheel, and crucifixion,[151] the Court did not find that death by electrocution violated the Eighth Amendment.[152] In determining whether certain punishments violate the Eighth Amendment, the Supreme Court noted, in the *Paquete Habana* case,[153] that standards for constitutional interpretation can be established

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147. *Id.* at 134–35. The Court ruled that the Eighth Amendment prohibits the use of cruel and unusual punishments. *Id.* However, the Court concluded that the "punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [E]ighth [A]mendment." *Id.*

148. 136 U.S. 436 (1890).

149. *Kemmler*, 136 U.S. at 447. The Supreme Court was persuaded by *Wilkerson*, which found it safe to affirm that torturous punishments are forbidden by the Eighth Amendment. *Id.* The Court continued by stating that the state's use of execution as punishment for an offense is not in itself cruel, within the meaning of the Eighth Amendment. *Id.*

In 1769, although acknowledging death as the most terrible judgment under English law, William Blackstone believed that a death sentence erased all doubt

> that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called attaint, *attinctus*, stained, or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law.

4 WILLIAM BLACKSTONE, COMMENTARIES 373–74 (1769).

150. *Kemmler*, 136 U.S. at 447.

151. *See id.* at 446 (indicating that "burning at the stake, crucifixion, [and] breaking on the wheel" are manifestly cruel and unusual).

152. *Id.* at 436, 441. Chapter 489 of the Laws of New York of 1888 provided that all capital punishment must be conducted by electrocution. *Id.* at 436. The trial court examined the state legislature's finding that the use of electricity as a method in carrying out capital punishment was actually more humane than the other methods. *See id.* at 443 (noting that electrocution was unusual but not cruel punishment). The *Kemmler* Court agreed with the lower court that the use of electricity applied to vital areas of the human body causes an instantaneous and painless death. *Id.* at 434–44. The Supreme Court accepted this finding and affirmed the trial court's ruling that death by electrocution did not violate the Cruel and Unusual Punishments Clause. *Id.* at 449.

153. 175 U.S. 677 (1900).

by the customs and norms of civilized nations.[154] The Court recognized that as society becomes more or less civilized, the rules of law change to coincide with society's morals.[155] This is exemplified by the *Paquete Habana* Court's acceptance of a traditional prohibition against the seizure of an enemy's fishing vessel during wartime as a "settled rule of international law."[156] The Court required that international law follow modern standards rather than standards existing when the Framers drafted the Constitution.[157]

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154. *Paquete Habana*, 175 U.S. at 711–14. In *Paquete Habana*, two small fishing vessels sailing under the Spanish flag were seized by an American blockading squadron. *Id.* at 713. The vessels' captains were unaware of the existence of the Spanish-American War or of the blockade. *Id.* Neither vessel carried arms or ammunition and both surrendered to American authorities without resistance. *Id.* In explaining that customs and norms can establish standards for constitutional interpretation, the Court held that

> [u]ndoubtedly, no single nation can change the law of the sea. The law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation. This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we think, we may take judicial notice. Foreign laws must indeed be proved as facts, but it is not so with the law of nations. The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

Id. at 711–12.

155. *See id.* at 694 (discussing how laws tend to change with changes in social norms).

156. *Id.* at 694. In addressing the existence of a prohibition against one country seizing the fishing vessel of another during wartime, the Court turned to Lord Stowell's judgment in *The Young Jacob and Johanna*, a 1798 English decision. *Id.* at 693–94. This case dealt with a similar capture of a fishing vessel by the coastal authorities of a different country. Lord Stowell noted that it was customary not to capture or contain such vessels during times of war, adding, however, that such rule was one of "comity," and not of "legal decision." *Id.* at 694. The *Paquete Habana* Court interpreted Lord Stowell's usage of the word "comity" as being synonymous with courtesy or goodwill. *Id.* Noting that over 100 years had passed since this English decision, the Court found that this lapse in time was sufficient to enable "what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law." *Id.*

157. *Id.* at 712. *But see id.* at 715 (Fuller, C.J., dissenting) (arguing existing custom is insufficient to establish standard of constitutional interpretation). Joined by Justices

Ten years after the *Paquete Habana* decision, the Supreme Court, in *Weems v. United States*,[158] created a proportionality test under the Eighth Amendment by expanding the Amendment's scope to prohibit punishments that were disproportional to the committed offense.[159] Accordingly, the *Weems* Court held that the Cruel and Unusual Punishments Clause is violated whenever a sentence is disproportionate to the crime committed.[160] Applying the *Paquete Habana* holding, the Court con-

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Harlan and McKenna, Chief Justice Fuller quoted Chief Justice Marshall's opinion in *Brown v. United States*, in which Marshall declined to accept the notion that "modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." *Id.* The dissent was further encouraged by Marshall's argument that while usage and custom may be persuasive, it is not authority nor law and may be disregarded at the court's discretion. *Id.* (quoting Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814).

158. 217 U.S. 349 (1910).

159. *Weems*, 217 U.S. at 380; *see* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (stating that punishments disproportionate to crimes committed are unconstitutional) (Kennedy, J., concurring); O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (arguing that Eighth Amendment's prohibition against cruel and unusual punishment is directed at all punishments which, due to their length or severity, are disproportionate to crime committed) (Field, J., dissenting); McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899) (acknowledging possibility that imprisonment in state's penal institution for lengthy period may be so disproportionate to committed offense as to constitute cruel and unusual punishment). In *Weems*, the defendant was convicted of falsifying official documents and was sentenced to fifteen years of hard labor. *Weems*, 217 U.S. at 357–58. The Supreme Court pointed out that more serious crimes, such as homicide and treason, were punished with sentences less severe than that imposed on the defendant. *Id.* at 380. Finding this punishment an unconstitutional exercise of unrestrained power, and that the purpose of punishment is fulfilled by just, and not excessive, severity, the Court concluded that the Eighth Amendment prohibits disproportionate punishments. *Id.* at 381–82.

160. *Weems*, 217 U.S. at 381–82. In attempting to show that the fifteen-year sentence was disproportionate to the offense of falsifying an official document, the Court compared this punishment with those that accompany more serious offenses. *Id.* at 380. The Court pointed out that

> [t]here are degrees of homicide that are not punished so severely, nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the Government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny, and other crimes.

Id. The Court next turned to a statutory offense it considered similar to the one for which Weems was convicted. The Court observed that the crime of embezzlement, as defined by Congress, was similar to falsifying official documents. *Id.* The Court also noted that the conviction for embezzlement imposed a sentence of a specified monetary fine and imprisonment of not more than two years. The Court found this similarity in offense and the disparity in punishments to show that Weems's sentence was cruel and unusual. *Id.* at 381. In fact, the Court noted that limitations on punishments actually establish justice. *Id.* The Court suggested that crime is repressed and criminals reformed by punishments that are equal in severity to the crime committed. *Id.*

cluded that contemporary standards of behavior could be factored into the proportionality standard test.[161]

Merging the *Weems* and the *Paquete Habana* holdings, the Supreme Court in *Trop v. Dulles*[162] held that a federal statute allowing governmental deprivation of an individual's citizenship violates the Eighth Amendment.[163] The Court opined that while the government has the power to punish, the Eighth Amendment assures that this power does not exceed civilized boundaries.[164] The Court stated that "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[165] Acknowledging that the Amendment's scope is undecided[166] and its phrasing imprecise,[167] the Court held that the Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[168] The Court then applied *Weems*'s proportionality doctrine and concluded that denationalization was excessive in relation to the offense of desertion.[169]

2. Prohibition of Wanton and Unnecessary Pain

Notwithstanding the Supreme Court's judicial steps towards defining the contours of the Cruel and Unusual Punishments Clause, the provision's exact parameters remained imprecise. In 1947, the Court further clarified the Eighth Amendment's reach by recognizing that prisoners were protected from the infliction of wanton or unnecessary pain.[170]

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161. *Id.* at 381–82.

162. 356 U.S. 86 (1958).

163. *Trop*, 356 U.S. at 103. In holding that revocation of citizenship is a violation of the Eighth Amendment, the Court recognized what it perceived to be a grave issue: challenging the constitutionality of a congressional act. *Id.* However, the Court declared that such a task, inevitably theirs, required the "exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes, but neither can they sanction as being merely unwise that which the Constitution forbids." *Id.*

164. *See id.* at 99 (suggesting that Court should determine whether penalty imposes uncivilized fate).

165. *Id.* at 100.

166. *See id.* (noting that Cruel and Unusual Punishments Clause has not been defined by Supreme Court).

167. *See id.* (indicating that Court has not given precise definition to Eighth Amendment). The Court quickly assured that this imprecision did not prevent the rendering of punishments unconstitutional, reminding that "when Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character." *Id.*

168. *Trop*, 356 U.S. at 101.

169. *Id.* at 99.

170. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463–64 (1947). In *Francis*, the defendant was convicted of murder and sentenced to death by electrocution. On May

Holding that the Constitution protects a convicted person against cruelty inherent in the method of punishment, the Court, for the first time, ruled that the wanton infliction of pain constitutes cruel and unusual punishment and is thus prohibited by the Eighth Amendment.[171]

3. Prison Environment

Nearly thirty years later, in *Estelle v. Gamble*,[172] the Supreme Court once again expanded the boundaries of the Cruel and Unusual Punishments Clause by finding the Eighth Amendment applicable to prison conditions.[173] Relying on its past holdings that the Eighth Amendment prohibits punishments that are incompatible with the "evolving standards of decency,"[174] or those which "involve the unnecessary and wanton infliction of pain,"[175] the Supreme Court ruled that the Eighth Amendment established a governmental obligation to attend to the medical necessities of its prisoners.[176] The Court concluded that deliberate indifference to a prisoner's serious medical needs violates the Cruel and Unusual Punish-

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3, 1946, Francis was strapped into the Louisiana State prison's electric chair in the presence of authorized witnesses. *Id.* at 460. When the executioner threw the switch, due to some mechanical failure, nothing happened and Francis did not die. *Id.* Francis, after being removed from the chair and returned to his prison cell, filed a writ of certiorari, and applications for mandamus and habeas corpus. The execution was temporarily stayed. *Id.* at 461. Francis claimed that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibited a second attempt at his execution. *Id.* The Supreme Court pointed out that "traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." *Id.* at 463.

171. *Id.* at 463; *see* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976) (reiterating that wanton infliction of unnecessary pain is unconstitutional); Gregg v. Georgia, 428 U.S. 153, 178 (1976) (citing *Francis*'s holding that Cruel and Unusual Punishments Clause protects convicted man against cruelty inherent in imposition of punishment); Furman v. Georgia, 408 U.S. 238, 278 n.22 (1972) (arguing that Eighth Amendment prohibits wanton infliction of unnecessary pain when carrying out death sentence) (Brennan, J., concurring). *But see Francis*, 329 U.S. at 464 (stating that Eighth Amendment does not protect necessary because suffering of method used to humanely extinguish life). Noting that the Bill of Rights of 1688 prohibited the wanton infliction of pain, and that this same language appears in the Eighth Amendment, the Court stated that there is "no purpose to inflict unnecessary pain." *Id.*

172. 429 U.S. 97 (1976).

173. *Estelle*, 429 U.S. at 104–05. In *Estelle*, a state prisoner, injured while performing a prison work assignment, filed a pro se complaint under a civil rights statute claiming that the prison officials' failure to provide adequate medical attention violated the Cruel and Unusual Punishments Clause. *Id.* at 98–99.

174. *Trop*, 356 U.S. at 101; *accord* Hudson v. McMillian, 503 U.S. 1, 8 (1992); *Gregg*, 428 U.S. at 172–77; *Weems*, 217 U.S. at 378.

175. *Gregg*, 428 U.S. at 173; *accord Francis*, 329 U.S. at 463; *Wilkerson*, 99 U.S. at 136.

176. *Estelle*, 429 U.S. at 103.

ments Clause, as it constitutes unnecessary and wanton infliction of pain.[177]

Only two years after *Estelle* was decided, the Supreme Court again expanded Eighth Amendment protection to prisoners. In *Hutto v. Finney*,[178] the Court employed *Estelle*'s "deliberate indifference" standard in finding unconstitutional the practice of keeping a prisoner in solitary confinement for periods exceeding thirty days.[179] This decision made clear the Court's determination to apply Eighth Amendment scrutiny to prison conditions.[180]

4. The 1980s: The Pendulum Swings Back

From the Supreme Court's 1910 decision in *Weems* to its 1978 *Hutto* holding, the scope of the Eighth Amendment experienced steady, albeit cautious, expansion. In the mid–1980s, the Court not only halted this expansion, but actually began to reverse this trend. The Court's efforts to narrow the Eighth Amendment's interpretation focused on two areas—prison conditions and the *Weems* proportionality doctrine.

a. Prison Conditions

In 1981, the Supreme Court narrowed its interpretation of the Eighth Amendment, affecting both the "wanton and unnecessary pain" standard and the "deliberate indifference" standard. In *Rhodes v. Chapman*,[181] the Supreme Court declared that a penal institution's decision to house two inmates in each cell does not constitute a wanton or unnecessary infliction of pain.[182] Although double-celling might cause pain, the Court

177. *Id.* at 104.

178. 437 U.S. 678 (1978).

179. *Hutto*, 437 U.S. at 684–85. After establishing that the Eighth Amendment's ban on inflicting cruel and unusual punishment was applicable to state governments through the Fourteenth Amendment, the Court held that the Cruel and Unusual Punishments Clause proscribes physically barbarous punishments, penalties that are disproportionate to the crime committed, and sentences that "transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" *Id.* at 685 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)). The Court noted that the confinement of a person in a prison or solitary confinement is a type of punishment and, as such, is subject to Eighth Amendment scrutiny. *Id.* The Court concluded that the lower court properly considered the length of time the petitioner spent in solitary confinement and correctly found that this time span, combined with the condition of the prison cells, violated the Cruel and Unusual Punishments Clause. *Id.* at 685–87.

180. *Id.* at 685.

181. 452 U.S. 337 (1981).

182. *Rhodes*, 452 U.S. at 348. The Court did not find the penal institution's use of the double celling to constitute cruel and unusual punishment. *Id.* The Court held that the prison's implementation of this celling resulted from an unanticipated increase in prison

reasoned, such pain would not be of such severity to be properly considered wanton or unnecessary.[183] Five years later, in *Whitley v. Albers*,[184] the Supreme Court carved out an exception to the "deliberate indifference standard."[185] The Court held that prison officials may use physical force during a riot situation. However, the Court concluded, the use of excessive physical force by prison officials was prohibited by this standard.[186] These decisions were only the tip of the iceberg in narrowing the scope of Eighth Amendment protection—the Supreme Court continued to restrict the interpretation of the Cruel and Unusual Punishments Clause by limiting *Weems*'s proportionality test.

b. The *Weems* Doctrine of Proportionality

While *Weems* mandated that punishments be proportional to the crime committed, the Supreme Court was unable to agree on an effective method for guaranteeing proportionality. In *Solem v. Helm*,[187] the Supreme Court constructed a three-prong proportionality test.[188] Under this test, courts should consider (1) the weight of the offense and the severity of the punishment, (2) the sentence imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.[189] Eight years later, *Solem* was overruled in part by *Harmelin v. Michigan*.[190] In *Harmelin*, the Court held five-to-four that a mandatory life sentence for a drug conviction was neither cruel nor unusual punishment under the Eighth Amendment.[191] Writing for the Court, Justice Scalia directly attacked the proportionality

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population and did not deprive them of essentials such as food, sanitation, or medical care. *Id.* Additionally, there was no increase in violence between inmates nor other intolerable conditions. *Id.*

183. *Id.* at 348–50.

184. 475 U.S. 312 (1986).

185. *Whitley*, 475 U.S. at 320. In deciding that prison officials' use of physical force under certain circumstances was constitutionally permissible, the Court held that the use of force in the face of a prison riot creates real and substantial threats to the safety of both prison guards and prisoners. *Id.* Unlike the pain inflicted upon prisoners in *Estelle*, whose medical needs were deliberately ignored, the pain in *Whitley*, even though there is possibly some degree of indifference, was neither unnecessary nor wanton. *Id.*

186. *Id.* at 327.

187. 463 U.S. 277 (1983).

188. *Solem*, 463 U.S. at 290–92.

189. *Id.* at 292.

190. 501 U.S. 957 (1991).

191. *Harmelin*, 501 U.S. at 995–96. In denying the petitioner's claim that mandatory sentencing for felony offenses constitutes cruel and unusual punishment, the Court declared that while possibly cruel; severe, mandatory penalties are far from unusual. *Id.* at 994–95. In fact, mandatory penalties have been imposed throughout United States history—having been part of the first Penal Code as well as being used in numerous states.

doctrine, believing that the Eighth Amendment contains no guarantee of proportionality.[192] Justice Scalia noted that no textual or historical evidence exists to support any claim that the Eighth Amendment was intended to protect against disproportionate sentences.[193] Further, the Court could not agree on whether *Solem* remained good law. Two justices voted to overrule *Solem*.[194] Three justices argued that while *Solem* should not be overruled, its scope should be narrowed so that only a punishment that is grossly disproportionate to the crime committed will violate the Eighth Amendment.[195] The remaining four justices voted to uphold the *Solem* decision.[196] Thus, *Harmelin* created considerable confusion with regard to the applicability of the proportionality doctrine.

V. THE AEDPA AND THE EIGHTH AMENDMENT

A. *Modern Eighth Amendment Test*

Once it is established that *Fong* is inapplicable and that deportation is substituted punishment for penal sanctions, all that is left to determine is whether deportation is cruel and unusual punishment and thus prohibited by the Eighth Amendment. Unfortunately, the Supreme Court has never annunciated a precise formula to determine whether a punishment is

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Id. Therefore, the Court held that a sentence that is neither cruel nor unusual does not become so merely by making it mandatory. *Id.*

192. *Id.* at 965, 985. Justice Scalia believed that early judicial constructions of the Eighth Amendment were more persuasive with regard to the meaning of cruel and unusual. *Id.* at 982. Scalia thus turned to *Barker v. People*, an 1823 case out of New York's highest court that he believed may have been the earliest such construction, in which Chief Justice Spencer found the proportionality of the imposed punishment to be an irrelevant consideration in determining a punishment's constitutionality. *Id.* at 982–83.

193. *Id.* at 974, 985.

194. *Id.* at 985. Joined only by Chief Justice Rehnquist, Justice Scalia argued that the Framers chose not to include in the Eighth Amendment a guarantee against disproportionate punishments. *Id.* Scalia declared that the reason underlying this omission also necessitates the overruling of *Solem*. *Id.*

195. *Id.* at 996–97 (Kennedy, J., concurring). Justice Kennedy, joined by Justices O'Connor and Souter, believed that the Eighth Amendment's proportionality principle is narrow and requires *Solem's* analysis to be reduced from three considerations to one. *Id.* at 996–97, 1004–05. Justice Kennedy noted that interjurisdictional and intrajurisdictional analyses, factors two and three of the *Solem* proportionality test, were merely discretionary considerations in the proportionality determination. *Id.* at 1005. Therefore, only *Solem*'s first factor was dispositive on the issue of whether the punishment was proportional to the offense. *Id.*

196. *See Harmelin*, 501 U.S. at 1016 (White, J., dissenting) (opining that *Solem* proportionality test is proper guide in determining constitutionality of punishment); *id.* at 1027 (Marshall, J., dissenting) (agreeing with Justice White's dissent but noting his disapproval of capital punishment). Justices Stevens and Blackmun joined in White's dissent. *Id.* at 1009.

cruel and unusual. Attempting to state a general rule in Eighth Amendment jurisprudence, judges have noted that a punishment is cruel and unusual only if it "shocks the conscious of reasonable men,"[197] "shocks the moral sense of all reasonable men as to what is right and proper under the circumstances,"[198] or "shocks our feelings of humanity, conscience, justice, and mercy."[199] Relying on any of these decisions as guides to determining whether a punishment is cruel and unusual would be dangerous and of little value. Since finding a punishment unconstitutional would require a subjective determination of moral indignation, there can be no judicial consistency under such a process.

Today, in determining whether the imposition of a punishment is cruel and unusual, a court must first inquire whether a violation of the statute requires some type of penal disability.[200] If a punishment is so mandated, the court must next determine whether the punishment is grossly disproportionate to the crime committed.[201] Because this Comment has already argued that deportation as authorized under the AEDPA constitutes punishment, thereby satisfying the first prong of the *Trop* test, it is appropriate to now focus on *Trop's* second prong—the disproportionality of this punishment to the crime of perjury.

B. *The AEDPA's Deportation for Perjury Mandate Is Unconstitutional*

While Congress and society view perjury as a crime far less serious than murder, the AEDPA imposes the same penalty upon an alien convicted of murder as one convicted of perjury.[202] Under 18 U.S.C. § 1621, an act

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197. State v. Evans, 245 P.2d 788, 792 (Idaho 1952).

198. State v. Teague, 336 P.2d 338, 340 (Or. 1959).

199. State v. Woodward, 69 S.E. 385, 389 (W. Va. 1910).

200. *See Trop*, 356 U.S. at 96 (emphasizing that only penal sections are subject to Eighth Amendment review).

201. *See id.* at 100 (stating that any punishment "may be imposed depending upon the enormity of the crime").

202. *See* AEDPA, *supra* note 7, § 440(e)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278 (indicating that alien convicted of perjury shall be deported as would person convicted of murder). The AEDPA also mandates deportation of an alien convicted of "certain gambling offenses; crimes involving transportation of persons for the purpose of prostitution; alien smuggling; counterfeiting; forging or trafficking in immigration and other documents; and trafficking in stolen vehicles." H.R. REP. No. 104-22, at 7 (1995), *microformed on* Sup. Docs. No. Y 1.1/8:104-22 (U.S. Gov't Printing Office). While these offenses are less severe than murder, they are more serious than perjury; yet perjury is listed among them as an offense requiring deportation. AEDPA, *supra* note 7, § 440(e)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278. Mark Furhman, the disgraced police officer in charge of the O.J. Simpson murder investigation, provides a recent example of how little concerned with perjurers Congress and society really are. Michael Fleeman, *Furhman Agrees to Plea Deal on Perjury Charge*, CHI. SUN-TIMES, Oct. 2, 1996, at 3; *see* Editorial, STAR-LEDGER, Oct. 7, 1996, at 10 (opining that Furhman re-

of perjury is punishable by a fine of an unspecified amount or imprisonment for a term not to exceed five years.[203] Under section 1111 of the same statute, an act of first degree murder is punishable by death or imprisonment for life.[204] Even though Congress statutorily punishes perjury and first degree murder with punishments as disparate as the crimes themselves, the AEDPA imposes identical punishments upon aliens convicted of either perjury or murder—deportation. Because the statutory punishment for murder is much more severe than that for perjury, the AEDPA's imposition of the same punishment for both offenses draws the conclusion that the use of deportation of an alien convicted of perjury is a punishment disproportionate to the crime. As such, the AEDPA's deportation provision violates the Eighth Amendment's prohibition against cruel and unusual punishment and is, therefore, unconstitutional.

VI. CONCLUSION

Although an infraction of the law, the commission of perjury is in no logical or rational sense as serious an infraction as is the crime of first degree murder. The threat to society posed by a perjurer is *de minimus* relative to that of a murderer. When people lock their doors and windows at night, it is not out of fear that a perjurer will come visiting. When parents tell their children not to talk to strangers, it is not out of concern that the children will be exposed to one who is untruthful while under oath. Women do not carry miniature spray cans of mace or pepper spray on their key rings lest they be caught unprotected from an affronting perjurer. Not only does society recognize a difference in the gravity between the offenses of perjury and murder, Congress also believes that the crime of perjury is less harmful to society than murder.

Government-imposed deportation of one who is not a United States citizen is indeed a drastic measure. In some cases, such measures are proper, even necessary, to protect those who reside in this country from noncitizens whose actions inflict terrible harm and destruction. An argu-

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ceived mere slap on wrist for admitted perjury). *But see* Call the Editor, *Furhman Represents Society*, TULSA WORLD, Oct. 26, 1996, at A2 (suggesting that Furhman should be hanged for committing perjury with editor responding that "[i]f we hanged all the liars on Earth, the last one would have to commit suicide"). Furhman was charged with perjury and accepted a plea of two years probation as punishment for this felony. Michael Fleeman, *Furhman Agrees to Plea Deal on Perjury Charge*, CHI. SUN-TIMES, Oct. 2, 1996, at 3. Had an alien spoken the same untruthful words, he or she would have been deported under the AEDPA. *See* AEDPA, *supra* note 7, § 440(e)(8)(S), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1278 (requiring deportation as punishment for alien who commits perjury).

203. 18 U.S.C. § 1621 (1996).

204. *Id.* § 1111 (1996).

ment against the deportation of noncitizens who commit murder or other heinous acts of violence would likely garner only insubstantial support. People who commit such terrible crimes arguably have no place in American society. However, a noncitizen who is untruthful while under oath in a judicial proceeding does not pose as dangerous and devastating a risk to the general public as does a noncitizen who murders someone. Therefore, the only thing more tragic than the government uprooting a person from his or her family, career, and way of life is the same government purportedly doing so in the name of protecting the American public.