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The Alien Criminal Defendant: Sentencing Considerations

STEPHEN H. LEGOMSKY*

When an alien is convicted of a criminal offense, the judge's sentencing decision often predetermines whether the alien will subsequently be deported. The deportation consequence is frequently inadvertent and can be more agonizing than the criminal sentence itself, particularly when the alien is a lawfully admitted permanent resident. After summarizing existing law, this Article analyzes the policy considerations underlying the deportation of alien convicts and draws conclusions as to the circumstances under which the additional sanction of deportation is justifiable. The author then proposes ways in which Congress, sentencing judges, and counsel can rectify many of the current problems in this area.

INTRODUCTION

When a person has been convicted of a criminal offense, the sentencing judge must ordinarily consider a wide range of factors in determining what sentence should be imposed. If the convict is an alien, the job of the sentencing judge is complicated by the presence of an additional consideration: whether the sentence imposed will subject the alien to deportation. To the permanent resident alien, this consequence may be even more important than the criminal punishment itself.

It is an anomaly of American immigration law that the sentencing judge—in federal and state courts alike—frequently makes the real

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decision on whether an alien convict is to be deported. Because the anomaly is largely unrecognized, this decision is often made unwittingly, without regard to whether such a sanction is desirable in the individual case.

This Article begins with a description of the existing law, detailing the specific ways in which Congress has delegated to the sentencing judge the authority to predetermine whether the alien convict will be deported. The second section examines the propriety of deporting an alien already subject to criminal sanctions for criminal conduct. The final section identifies deficiencies in the existing law and proposes ways in which those problems can be at least partially resolved.

EXISTING LAW: HOW THE DECISION OF THE SENTENCING JUDGE DETERMINES WHETHER THE ALIEN SUBSEQUENTLY WILL BE DEPORTED

Overview of the Applicable Deportation Provisions and Limitations on the Scope of this Article

The United States immigration laws set forth eighteen grounds upon which an alien can be deported from the United States.\(^1\) Although public attention has recently focused primarily on the so-called illegal alien, it must be stressed that the statutory language is not confined to aliens who entered unlawfully.\(^2\) Thus aliens who have been lawfully admitted for permanent residence and who have complied with all provisions of the immigration laws become deportable if they fit within any of the enumerated grounds, regardless of the duration of residence.

One such ground is contained in 8 U.S.C.A. section 1251(a)(4), which provides for the deportation of any alien who

\[\text{is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.} \]

This Article concerns the effect of the sentencing judge's decision on the alien's susceptibility to deportation. Because of the nature of the topic, several limitations on the scope of this Article should be noted at the outset. First, there are several provisions other than

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2. Id. The statute mandates the deportation of "any alien in the United States" who commits specified acts.
section 1251(a)(4) which call for the deportation of aliens convicted of specified crimes. These crimes include violation of certain provisions of the Alien Registration Act, possession of specified weapons, and, most importantly, almost any marijuana or narcotics-related offense. In none of these provisions is duration or type of sentence an essential element; they are therefore beyond the scope of this discussion.

Second, section 1251(a)(4) is bifurcated: The first part relates to the alien who has been convicted of only one crime involving moral turpitude. It requires that the alien be sentenced to confinement, or actually confined, for at least one year as a condition to deportation. In contrast, the second part relates to the alien who has been convicted of two crimes involving moral turpitude and contains no sentencing requirement. Because the sentence imposed is irrelevant when deportation is predicated on the second part of section 1251(a)(4), much of this discussion will apply only to the first part.

Finally, within the first part of section 1251(a)(4), several elements other than the sentence are required. Legal issues often arise about what constitutes a final conviction, what the term crime

5. The weapons referred to are automatic and semi-automatic weapons and sawed-off shotguns. Id. § 241(a)(14), 8 U.S.C. § 1251(a)(14).
6. Id. § 241(a)(11), 8 U.S.C. § 1251(a)(11). There exist a few rare marijuana or narcotics offenses which do not give rise to deportation under this subsection. See, e.g., Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964) (being under the influence of marijuana); In re Schunck, 14 I. & N. Dec. 101 (1972) (knowingly being in a place where narcotic drugs are used); In re Sum, 13 I. & N. Dec. 569 (1970) (using marijuana). Similarly, the Board of Immigration Appeals has held that LSD is not a narcotic for purposes of § 1251(a)(11). In re Abreu-Semino, 12 I. & N. Dec. 775 (1968).
7. Although marijuana and narcotics offenses are included in the list of grounds beyond the scope of this Article, they will be discussed briefly in connection with one of the recommendations made in the final section. See text accompanying notes 166-70 & 175-76 infra.
8. One threshold issue, for example, is whether the term conviction was intended to be defined by federal or state law. Although the federal definition has generally been followed, Will v. INS, 447 F.2d 529 (7th Cir. 1971); Gutierrez v. INS, 323 F.2d 593 (9th Cir. 1963), state law is occasionally considered. Pino v. Landon, 349 U.S. 921 (1955). For a comprehensive definition of conviction, see In re L.R., 8 I. & N. Dec. 269, 270 (1959).

More specific issues often arise regarding the finality of a conviction. Com-
means,\(^9\) which crimes involve *moral turpitude*,\(^{10}\) and even whether the crime has been committed within five years after *entry*.\(^{11}\) Any of these issues could consume an entire article; the primary focus of this Article, however, is sentencing considerations.

**Defining the Sentence**\(^{12}\)

As noted above, one essential element of deportation, according to section 1251(a)(4), is that the alien be "either sentenced to confine-

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\(^{10}\) Various definitions of *moral turpitude* have been advanced. The one commonly followed is that in Ng Sui Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931). For a thorough compilation of those crimes which have been held to involve, and those held not to involve, moral turpitude, see 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 4.14 (Supp. 1975).

\(^{11}\) The definition of *entry* has given rise to a number of complex issues, surfacing most frequently in the situation where an alien who has already been lawfully admitted subsequently departs from the United States temporarily and then returns. Under certain circumstances the return may be held not to constitute an entry. See I. & N. Act § 101(a)(15), 8 U.S.C.A. § 1101(a)(15) (West Supp. 1977), as construed in the leading case of Rosenberg v. Fleuti, 374 U.S. 449 (1963). For a discussion of the *Fleuti* doctrine, see Comment, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 San Diego L. Rev. 192 (1975).

\(^{12}\) The discussion in this section relates to the effect which the terms of the sentence will have on the alien's *deportation*. However, there are immigration-related consequences other than deportation which may flow from the nature and duration of the sentence imposed. One such consequence is exclusion—that is, denial of admission. There are 32 grounds upon which an alien trying to enter the United States can be excluded; subject to the qualifications mentioned in note 11 supra, these grounds apply to the permanent resident alien who has left the country temporarily and seeks to reenter. I. & N. Act § 212(a), 8 U.S.C.A. § 1182(a) (West Supp. 1977). One such ground for exclusion is previous conviction of two or more offenses for which the "aggregate sentences to confinement actually imposed were five years or more." *Id.* § 212(a)(10), 8 U.S.C.A. § 1182(a)(10). Because no time limit is specified in § 1182(a)(10), the alien who has been sentenced to five years or more is effectively precluded from ever leaving the country unless he intends never to return. Accordingly, the sentencing judge may wish to consider the effect the sentence will have on the alien's future mobility.

Another immigration-related consequence of the sentence is that regarding
ment or confined therefor in a prison or corrective institution, for a
year or more." A number of important issues have arisen in interpret-
ing this element.

Several issues relate to the broad question of what constitutes a
sentence to confinement for a year or more. In the leading case of In
re V.,\(^1\) an alien had been convicted in a New York state court. The
court sentenced the alien to two-and-a-half to five years in state
prison, but suspended imposition of the sentence as a condition of
probation. The Board of Immigration Appeals first held that proba-
tion is not a sentence to confinement for purposes of section
1251(a)(4). Furthermore, it held that a sentence, the imposition of
which has been suspended, is not a sentence to confinement.\(^4\)

By contrast, when only the execution of the sentence has been
suspended, it has been held that a sentence to confinement exists.\(^5\) In
Velez-Lozano v. INS, for instance, the court said "[t]he essential
element . . . is the imposition of sentence rather than the actual
serving of sentence."\(^6\)

Like the New York statute under which the alien had been sentenc-
ed in In re V., California Penal Code section 1203.1 authorizes the
court granting probation to suspend either the imposition or the
execution of sentence.\(^7\) Such suspension may be granted only pur-

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\(^1\) 7 I. & N. Dec. 577 (1957).
\(^2\) Id. at 578. Accord, Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972)
dictum.

\(^3\) Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972); Wood v. Hoy, 266 F.2d
825 (9th Cir. 1959); In re M., 6 I. & N. Dec. 346 (1954).

\(^4\) 463 F.2d 1305, 1307 (D.C. Cir. 1972).

\(^5\) CAL. PENAL CODE § 1203.1 (West 1970). See also id. § 1203(a), which permits
the court in a misdemeanor case to suspend either imposition or execution of
sentence. At least one court has held that § 1203(a) has not been impliedly
repealed by enactment of § 1203.1. People v. Rye, 140 Cal. App. 2d Supp. 962, 296
suant to statutory authority and only as an incident to probation. For certain crimes, however, probation is statutorily precluded, and when it is, neither suspension of imposition of sentence nor suspension of execution of sentence is permitted. Therefore, when suspension is permitted, and when the court wishes to grant it to an alien who has been convicted, the choice to suspend imposition or execution of sentence should be a conscious one.

Another interpretation problem arising from the one-year sentence provision is the effect of premature release. In *Burr v. Edgar*, an alien had been sentenced to one year of imprisonment in the county jail. Under the California law then in effect, a prisoner was eligible for up to ten days credit for each month served, awarded on the basis of good behavior and work performance. The Court of Appeals for the Ninth Circuit, reasoning that measurement of the one-year period is controlled by the length of the sentence rather than by the actual time served, held there had been a one-year “sentence to confinement.”

Concurrent sentences may pose another measurement problem. In *In re Fernandez* the alien defendant had been convicted of two counts of transporting forged securities. The court sentenced him to three years in prison on each count, with the two sentences to be served concurrently. Under one of the exclusionary provisions of the immigration law, an alien may not be admitted to the United States if he or she has been convicted of two or more offenses for which the aggregate “sentences to confinement” actually imposed is five years or more. The Board of Immigration Appeals held that when concurrent sentences have been imposed, the actual time of the sentence rather than the total of the various sentences is counted. Although the question arose in the context of an exclusionary provision requiring sentences aggregating five years of duration, there is no reason to expect that the decision would have been different had the question related to the one-year sentence provision of section 1251(a)(4).

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21. See, e.g., id. §§ 1203.06, 1203.07.
22. 292 F.2d 593 (9th Cir. 1961).
Indeterminate sentences present another problem. It appears to be settled that an indeterminate sentence potentially lasting more than one year is deemed to be a sentence of more than one year for purposes of section 1251(a)(4), even if the convict is actually released before serving a one year term.\(^{28}\) In California the enactment of the comprehensive Uniform Determinate Sentencing Act of 1976,\(^{29}\) effective July 1, 1977,\(^{30}\) will eliminate many of the problems formerly associated with the indeterminate sentence. Under the new Act, felonies not punishable by life imprisonment or death will carry fixed sentences.\(^{31}\)

It should be noted that not all felonies are crimes involving moral turpitude for purposes of the immigration laws.\(^{32}\) Conversely, not all crimes involving moral turpitude are felonies.\(^{33}\) Thus, the sentencing considerations discussed here will often apply even when the crime of which the accused has been convicted is a misdemeanor not covered by the new Act.\(^{34}\)

The preceding discussion focused on the requirement of a sentence to confinement of one year or more. A second group of issues arises from the requirement that this sentence entail confinement to a "prison or corrective institution."\(^{35}\) It is undisputed that when convicts are imprisoned in county jails as a condition of probation,\(^{36}\) they have been sentenced to a "prison or corrective institution" for immigration purposes.\(^{37}\)

Another question which has arisen in this context is whether a


\(^{29}\) 1976 Cal. Stats., ch. 1139.

\(^{30}\) Id. § 351.5.

\(^{31}\) Id. For a thorough discussion of the new Uniform Determinate Sentencing Act, see Comment, Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act, 14 SAN DIEGO L. REV. 1176 (1977).

\(^{32}\) United States ex rel. Mongiovi v. Karnuth, 30 F.2d 825 (W.D.N.Y. 1929).

\(^{33}\) Gonzales v. Barber, 207 F.2d 398 (9th Cir.), aff’d, 347 U.S. 637 (1953); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929).

\(^{34}\) See generally Legislative Counsel’s Digest, 9 CAL. LEGIS. SERVICE 4752, 4753 (West 1976) (commenting on revision of punishments for felonies).


\(^{37}\) Burr v. INS, 350 F.2d 87 (9th Cir. 1965); Burr v. Edgar, 392 F.2d 593 (9th Cir. 1961); United States ex rel. Fells v. Garfinkel, 158 F. Supp. 524 (W.D. Pa. 1957), aff’d, 251 F.2d 846 (3d Cir. 1958).
sentence under the Federal Youth Corrections Act\textsuperscript{38} constitutes confinement in a prison or corrective institution. Under this Act a youth offender, defined as “a person under the age of twenty-two years at the time of conviction,”\textsuperscript{39} may be committed to the custody of the Attorney General in lieu of adult prison.\textsuperscript{40} In \textit{In re V.},\textsuperscript{41} an alien youth convicted of embezzlement\textsuperscript{42} had been sentenced under the Act. The Immigration and Naturalization Service (INS) instituted deportation proceedings on the ground that he had been convicted of a crime involving moral turpitude within five years after entering the United States and had been sentenced to confinement in a prison or corrective institution for one year or more. The alien argued that a sentence under the Federal Youth Corrections Act does not constitute such a “prison or corrective institution.” The Board of Immigration Appeals held for the alien, emphasizing the Act’s repeated references to treatment rather than punishment.\textsuperscript{43} Thus the rule appears to be that commitment to the custody of the Attorney General pursuant to the Federal Youth Corrections Act cannot satisfy the sentence requirement of section 1251(a)(4).\textsuperscript{44}

Under California’s Youth Authority Act\textsuperscript{45} a person who is under age twenty-one when apprehended\textsuperscript{46} may be committed to the California Youth Authority in lieu of adult prison. The express purpose of the Act is to substitute methods of training and treatment for retributive punishment.\textsuperscript{47} The Board of Immigration Appeals, over-

\begin{itemize}
\item[39.] Id. § 5006(e).
\item[40.] Id. § 5010.
\item[41.] 8 I. & N. Dec. 360 (1959).
\item[42.] The conviction was pursuant to 18 U.S.C. § 657 (1970).
\item[43.] \textit{See}, \textit{e.g.}, id. §§ 5006(f), 5006(g), 5010, 5011. The Board’s holding went to the issue of whether the requirement of a one-year sentence to a prison or corrective institution had been satisfied. It refrained from deciding a second issue: whether the possibility of expungement, pursuant to id. § 5021, precluded a finding of a final conviction. 8 I. & N. Dec. at 362. That issue would be critical in cases where the sentence is not an essential element of the deportable offense. Examples of such situations would arise when deportation is predicated upon the second part of § 1251(a)(4)—that is, two convictions of crimes involving moral turpitude—or when it is grounded on some other deportable offense requiring a conviction but not a specified sentence. \textit{See}, \textit{e.g.}, I. & N. Act § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970) (marijuana or narcotics conviction). In an analogous case, Adams v. United States, 299 F.2d 327 (9th Cir. 1962), the court held that a conviction followed by commitment to the California Youth Authority, although not a sentence for purposes of § 1251(a)(4), was nevertheless a final “conviction” on which deportation for a narcotics offense could be based.
\item[44.] Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962).
\item[45.] The Youth Authority Act is the official name. \textbf{CAL. WELF. & INST. CODE} § 1701 (West 1972).
\item[46.] \textit{Id.} § 1731.5. It should be noted that the age is measured at time of apprehension. Under the federal act, by contrast, the age is 22 and is measured at time of conviction. 18 U.S.C. § 5006(e) (1970).
\item[47.] \textbf{CAL. WELF. & INST. CODE} § 1700 (West 1972).
\end{itemize}
ruling prior law, held that commitment to the California Youth Authority does not constitute a sentence to confinement in a prison or corrective institution.

Commitment to various other types of corrective institutions often raises issues about whether the sentencing requirement has been met. The Board has ruled that commitment to the federal Public Health Service hospital following a conviction constitutes a sentence to a prison or corrective institution, and at least one judicial decision is in accord. In reaching its decision, however, the Board emphasized that under the federal statute authorizing this commitment the imprisonment was to continue even after the convict had been medically cured. Similar opinions concerning state mental hospital commitments have been written.

In cases where the principal purpose of the commitment has been found to be treatment rather than punishment, the results have been precisely the opposite. Thus, commitment pursuant to the New Jersey Sex Offenders Act, under which the court is prohibited from specifying a minimum detention period, has been held not to constitute a sentence to confinement in a prison or corrective institution. The same is true of commitments to a state mental hospital and even of commitments to a state vocational training school for youth offenders.

The Judicial Recommendation Against Deportation

The preceding section described how the sentence actually imposed may affect an alien's immigration status. By considering these effects, a sentencing judge who wishes to avoid subjecting a particular alien to deportation may decide to tailor the sentence accordingly.

In many situations, however, the sentencing judge may believe that the circumstances call for a sentence of more than one year and that suspension of the imposition of sentence would not be warranted. At the same time, he or she may wish to avoid adding the harsh penalty of deportation to an already substantial punishment, particularly if deportation would destroy the alien’s family ties. In such situations, the sentencing judge has a simple statutory mechanism for imposing the sentence he or she believes the alien deserves, without additionally causing deportation. The device is called the judicial recommendation against deportation. The pertinent statutory language reads:

The provisions of [section 1251(a)(4)] respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested state, the Immigration and Naturalization Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.59

It should be noted that the judicial recommendation applies to each of the two parts of section 1251(a)(4). Thus, unlike the sentencing considerations discussed in the preceding section, the recommendation should be considered regardless of the number of convictions the alien has had.

Although the judicial recommendation against deportation has been in force since 1917,60 it appears to be generally unknown to both courts and counsel,61 as the tragic results of the cases discussed in this section will show. One commentator, now a member of the Board of Immigration Appeals, has said that “no factor is more consistently overlooked in presentencing considerations.”62

The power of the judicial recommendation against deportation lies in its absolutely binding nature. Once the “recommendation” is issued by the sentencing judge, the alien cannot be deported on the basis of the conviction for which he or she is being sentenced.63

62. See Appleman, supra note 61, at 137.
63. Velez-Lozano v. INS, 463 F.2d 1305, 1308 (D.C. Cir. 1972); Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968); United States ex rel. DeLuca v. O'Rourke, 213 F.2d 759 (8th Cir. 1954); United States ex rel. Santarelli v. Hughes, 116 F.2d 613, 616 (3d Cir. 1940).
Furthermore, if the alien subsequently leaves the United States and attempts to return, the recommendation will prevent the INS from excluding him or her on the basis of the conviction.65

There is one major limitation on the scope of the judicial recommendation against deportation. By its own terms it prevents only those deportations which are predicated on section 1251(a)(4)—that is, conviction of one or more crimes involving moral turpitude.66 For example, when deportation is grounded on section 1251(a)(11)—conviction of a marijuana or narcotics-related offense—the recommendation will have no effect.67

The judicial recommendation against deportation will be invalid unless the statutory prerequisites of notice and timing are scrupulously honored. Although the device is very easy to apply, the failure to apply it properly is costly. The following discussion describes the two major prerequisites: timely notice to all interested parties, and timely issuance of the recommendation by the sentencing judge.

Timely Notice to Interested Parties

One statutory prerequisite of an effective judicial recommendation against deportation is that "due notice [be] given prior to making such recommendation to representatives of the interested state, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter."68 It has been held repeatedly that a recommendation issued without such prior notice is

64. With two very narrow exceptions, an alien is excludable if he or she has been convicted of a crime involving moral turpitude. I. & N. Act § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1970).


In several cases deportation has been grounded on id. § 241(a)(13), 8 U.S.C. § 1251(a)(13). In such cases the judicial recommendation against deportation has been held ineffectual. See, e.g., Jew-Ten v. INS, 307 F.2d 832 (9th Cir. 1962); In re Corral-Fragoso, 11 I. & N. Dec. 529 (1966); In re J.T., 6 I. & N. Dec. 823 (1955).

67. Statutory language making this remedy expressly unavailable in marijuana or narcotics cases was added by the Narcotic Control Act of 1956, Pub. L. No. 84-726, ch. 629, § 301(c), 70 Stat. 755. See also note 63 supra.

absolutely void. Because the recommendation must issue within thirty days after passing of sentence, and because the notice defect typically surfaces after the thirty-day period has expired, these defects are ordinarily impossible to correct.

The case of *In re I.* is illustrative. The Board of Immigration Appeals noted several “appealing factors” militating against deportation: the alien had been only seventeen years old when the crime was committed; he had been brought to this country at age sixteen by his uncle; and his testimony had indicated “extenuating circumstances” surrounding commission of the crime. The sentencing judge had accordingly issued a judicial recommendation against deportation. The Board held the recommendation invalid for lack of proper notice to the INS, however, and because the time within which to issue a new recommendation had expired, ordered the alien deported.

The INS has promulgated regulations explaining how it should be notified of the issuance of a judicial recommendation against deportation. Notice may be provided by “the court, a court official, or by counsel for the prosecution or the defense, at least 5 days prior to the court hearing.” Notice should be sent to the district director having administrative jurisdiction over the place where the court is situated. Notice to the state and to the prosecution is also required, although no indication is given of who represents “the state” for this purpose.

**Timely Issuance of the Recommendation**

Even more crippling than failure to comply with timely notice requirements has been failure to comply with timely issuance requirements. The statutory language calls for the recommendation to be made “at the time of first imposing judgment or passing sentence, or within thirty days thereafter.” The courts have interpreted the

69. United States ex rel. Piperkoff v. Esperdy, 267 F.2d 72 (2d Cir. 1959); *In re Plata*, 14 I. & N. Dec. 462 (1973); *In re I.*, 6 I. & N. 426 (1954). One case, apparently standing alone, held that if a judicial recommendation against deportation is issued without compliance with notice requirements, the recommendation may have some limited effect; it could stand until the Service had made representations and the court had acted on them. *See Haller v. Esperdy*, 397 F.2d 211 (2d Cir. 1968).

70. *See text accompanying notes 77-86 infra.*

71. This was true in all the cases cited in note 69 supra.


73. *Id.* at 428.


75. 8 C.F.R. § 241.1 (1976).


77. *Id.*

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thirty-day limitation as a strict prerequisite, invalidating recommendations issued after the period has expired.\textsuperscript{78} It is no defense that the alien, his or her counsel, and the sentencing judge were all unaware of the provision until it was too late for the recommendation to be issued—even if the judge would have issued it had there been knowledge of such a remedy.\textsuperscript{79}

The thirty-day deadline refers to the time of making the recommendation. In \textit{In re M.G.},\textsuperscript{80} counsel requested the recommendation by letter within the thirty-day period, but the sentencing judge, who had been on vacation, issued it just after the period had expired. The Board held the recommendation invalid for failure to comply with the timing requirements of the statute.\textsuperscript{81} That decision has since been followed.\textsuperscript{82}

Some courts have attempted to circumvent the thirty-day limitation by vacating the original sentence, imposing a new sentence, and then issuing the recommendation within thirty days after the new sentence was imposed. In such cases the issue arises whether the recommendation was made within thirty days after "the time of first imposing judgment or passing sentence,"\textsuperscript{83} as the statute requires. More specifically, the issue is whether the time of first imposing judgment is the original vacated judgment or the new judgment.

\begin{itemize}
\item \textsuperscript{78} Velez-Lozano \textit{v.} INS, 463 F.2d 1305 (D.C. Cir. 1972); Marin \textit{v.} INS, 438 F.2d 932 (9th Cir.), \textit{crt. denied}, 403 U.S. 923 (1971); United States \textit{ex rel.} Piperkoff \textit{v.} Esperdy, 267 F.2d 72 (2d Cir. 1959); United States \textit{ex rel.} Klonis \textit{v.} Davis, 13 F.2d 630 (2d Cir. 1926); Bruno \textit{v.} United States, 336 F. Supp. 204 (W.D. Mo. 1971); \textit{Ex parte} Eng, 77 F. Supp. 74 (N.D. Cal. 1948); United States \textit{ex rel.} Arcara \textit{v.} Flynn, 11 F.2d 899 (W.D.N.Y. 1926).
\item \textsuperscript{79} Velez-Lozano \textit{v.} INS, 463 F.2d 1305 (D.C. Cir. 1972); Marin \textit{v.} INS, 438 F.2d 932 (9th Cir.), \textit{crt. denied}, 403 U.S. 923 (1971); Bruno \textit{v.} United States, 336 F. Supp. 204 (W.D. Mo. 1971). \textit{Cf.} United States \textit{ex rel.} Klonis \textit{v.} Davis, 13 F.2d 630 (2d Cir. 1926) (counsel and the court had been unaware of the defendant's alien status).
\item The case in which counsel \textit{could} have requested a recommendation but failed to should be contrasted with that in which no opportunity for such a request was available. When an alien convicted by a court martial lost the opportunity to request a recommendation because the members of the court had scattered throughout the world before the 30-day period had expired, it was held that deportation would not be permitted. Gubbels \textit{v.} Hoy, 261 F.2d 952 (9th Cir. 1958). \textit{Cf.} Costello \textit{v.} INS, 376 U.S. 120 (1964) (naturalized citizen convicted of tax evasion nondeportable).
\item \textsuperscript{80} 5 I. \& N. Dec. 531 (1953).
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{See, e.g., In re} Tafoya-Gutierrez, 13 I. \& N. Dec. 342 (1969).
\item \textsuperscript{83} I. \& N. Act \textsection 241(b), 8 U.S.C. \textsection 1251(b) (1970) (emphasis added).  
\end{itemize}
This issue can be resolved only by reference to the reason for vacating the particular judgment. It has been consistently held that when the sole basis for vacating the judgment was "to repair the omission to make the statutory recommendation against deportation," the recommendation cannot be made more than thirty days after the original judgment. When a judgment is vacated for some reason other than to prevent deportation, however, the recommendation may be issued within thirty days after the new judgment is imposed. In ascertaining the basis for vacating the judgment, it is the reason given by the court, not the motive of the alien, which is controlling.

DEPORTATION AS AN ADDITIONAL SANCTION FOR CRIMINAL CONDUCT: WHEN IS IT JUSTIFIABLE?

Like any other people present in the United States, aliens are required to obey all laws, and they are susceptible to criminal punishment when they fail to do so. As the preceding section demonstrated, however, decisions of the sentencing judge often determine whether the alien convicted of a crime involving moral turpitude will be later subjected to the additional sanction of deportation. This section will describe the effects of deportation on the lives of the alien, the alien's family, and the general public, analyze the reasons for deportation of convicted aliens, and examine the adverse side effects of such deportations. The conclusion is that deportation as an additional sanction for the alien convict should be used sparingly and only after careful consideration of its appropriateness in individual cases.

Effects of Deportation on the Alien, the Alien's Family, and the General Public

Although recent public attention has focused on the vast numbers of aliens entering the United States unlawfully, the deportation provisions are not limited to the so-called illegal alien. While entry

without inspection is indeed one of the deportable offenses, all aliens—including those who were lawfully admitted to permanent residence—are subject to deportation for commission of specified acts. This is true regardless of the length of time the alien has lawfully resided in the United States.

There appears to be a growing trend favoring the easing of civil disabilities imposed on people convicted of crimes. The views expressed by many have focused on the loss of several specific rights, such as the right to vote, to engage in selected occupations, to litigate, to execute contracts, to serve on juries, and so forth. What is far too frequently overlooked is that the alien who is deported upon conviction of a crime is deprived in one fell swoop of every one of these rights. This is accomplished by the simple expedient of depriving him of the one right which embraces all others: the right to be in the United States.

The deported alien is precluded not only from returning to the United States to live, but also from returning even to visit family and friends whom he or she has left behind. Moreover, this banishment

93. See authority cited note 92 supra.
94. One partial exception to this omission is contained in Special Project, supra note 92, at 972-74, which gives passing mention to the possibility of deportation.
is lifelong.\textsuperscript{96}

Some of the more severe effects of deportation are those felt by the alien's family. Where family members are United States citizens or permanent resident aliens, they must choose between leaving their country and separating permanently from the family member being deported. In the words of Justice Black: "[This alien] now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country."	extsuperscript{97}

In many cases the deportee is the breadwinner of the family. His or her absence may result in the family becoming dependent on Aid to Families with Dependent Children\textsuperscript{98} or other welfare programs at great emotional cost to the family and financial cost to the general public.

When aliens are deported on certain designated grounds, including all those based on criminal convictions, they lose all rights to Social Security Old Age and Survivors payments, regardless of how much they have contributed to the program.\textsuperscript{99} The loss of payments extends not only to the deportee, but to any alien beneficiary who would have been eligible to receive payments on the basis of the deportee's earnings during any month in which the beneficiary is outside the country.\textsuperscript{100} The same is true of any lump-sum death benefits payable to the beneficiary.\textsuperscript{101} Thus, the alien beneficiary who wishes to remain with his or her spouse will have to give up both residence in the United States and the right to future social security payments.

In light of the drastic effects of deportation, it is not surprising that the courts have traditionally been vehement in expressing their views of its harshness. Although deportation has been held not to constitute punishment in the legal sense,\textsuperscript{102} many judges and other authorities

\begin{footnotes}
\textsuperscript{96} No time limit is prescribed by the provision barring previously deported aliens. Id. \textsection 212(a)(17), 8 U.S.C. \textsection 1182(a)(17). Compare this section with id. \textsection 212(a)(16), 8 U.S.C. \textsection 1182(a)(16), which bars aliens who were excluded from the United States within the preceding year.
\textsuperscript{98} The Aid to Families with Dependent Children Program is funded jointly by the federal government and the states. See 42 U.S.C. \textsection 601-610 (1970).
\textsuperscript{99} Id. \textsection 402(n). The constitutionality of this provision was upheld by the Supreme Court in a 5-4 decision. Flemming v. Nestor, 363 U.S. 603 (1960).
\textsuperscript{100} 42 U.S.C. \textsection 402(n)(1)(B) (1970).
\textsuperscript{101} Id. \textsection 402(n)(1)(C).
\textsuperscript{102} Galvan v. Press, 347 U.S. 522 (1954); Mahler v. Eby, 264 U.S. 32 (1924). The only case which has ever held contra is Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), and this case was overruled by the Seventh Circuit in an unpublished opinion, Lieggi v. INS, No. 75-1393 (7th Cir. Jan. 27, 1976). For further discussion of the Lieggi decision, see Recent Development, Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment: Lieggi
\end{footnotes}
have suggested that as a practical matter it is at least similar to punishment.\textsuperscript{103} Strong language has been used by such eminent jurists as Frankfurter,\textsuperscript{104} Brandeis,\textsuperscript{105} Hand,\textsuperscript{106} and others\textsuperscript{107} to describe the severity of deportation.

It is apparent that the consequences of deportation on the lives of the alien, the alien's family, and the general public can be staggering. Because the sanction is so severe, it is suggested that the sentencing judge, before making a decision which will render the alien convict deportable, should consider the appropriateness of deportation in the individual cases.

**The Purposes of Deporting Alien Convicts**

Many of the purposes underlying the laws requiring deportation of alien convicts are similar to the purposes traditionally offered to justify criminal punishment. As this discussion will show, these goals overlap with the policies underlying the imposition of civil disabilities on convicted offenders. They also overlap with the purposes of deportation laws in general. All these purposes will now be examined to determine the extent to which they apply to deportation of aliens convicted of criminal offenses.

**Retribution**

Retribution is the oldest theory of punishment,\textsuperscript{108} and probably the most controversial.\textsuperscript{109} The emphasis is on punishment as the infliction of pain upon the offender for his crimes.\textsuperscript{110}

\textsuperscript{103} Justice Brewer once said in dissent: "Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that often times most severe and cruel." Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893). James Madison has referred to deportation as "the severest of punishments." Madison, Report on the Virginia Resolutions, 4 Elliot's Debates 546, 555 (1800).


\textsuperscript{105} Ng Fung No v. White, 259 U.S. 276, 284 (1922) ("may result in loss of . . . all that makes life worth living.").

\textsuperscript{106} Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947).

\textsuperscript{107} See, e.g., Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963); Jordan v. De George, 341 U.S. 223, 243 (1951) (dissenting opinion); Berdo v. INS, 432 F.2d 824, 848 (6th Cir. 1970).

\textsuperscript{108} W. LaFave & A. Scott, Criminal Law 21-25 (1972), reproduced in S. Krantz, The Law of Corrections and Prisoners' Rights 30, 32 (1973). See also Special Project, supra note 92, at 1222.

\textsuperscript{109} See T. Honderich, Punishment: The Supposed Justifications 30 (1969); Armstrong, The Retributivist Hits Back, 70 Mind 471, 471-72, cited in Wang,
tion of suffering, and its validity rests on the theory that a person who has harmed others should suffer. One commentator has viewed this suffering as intended to serve two distinct purposes: revenge, which gratifies the public, and expiation of moral guilt, which is designed to help the criminal “cleanse his soul.” It has also been suggested that permitting revenge represses the criminal tendencies of the public and helps to maintain respect for the law.

Of all the theories of criminal punishment, retribution has been perhaps the least accepted by modern correctional theorists. Despite the trend away from retribution as a goal of criminal punishment, California has now adopted a sweeping revision of its criminal corrections law with the enactment of the Uniform Determinate Sentencing Act. One provision of the new bill is especially significant: “The Legislature finds and declares that the purpose of imprisonment for crime is punishment.”

Although that provision refers only to imprisonment and not to other forms of criminal sanctions, there can be no doubt that it reflects a legislative philosophy moving in the direction of increased emphasis on retribution and reduced emphasis on rehabilitation.

Regardless of whether retribution is a legitimate goal of imprisonment, its application to deportation as a sanction for criminal conduct is unjustifiable for at least three reasons. First, whenever aliens have challenged deportation orders on the ground of cruel and unusual punishment, or on the theory that the procedural safeguards ordinarily available in criminal proceedings should have been provided, the courts have consistently dismissed the claims with the summary holding that deportation is not punishment. The courts cannot have it both ways. If deportation is not considered a form of punishment for purposes of determining which constitutional rights attach, a deportation order itself cannot then be justified on the theory that it fulfills the need for punishment.


See W. LAFAVE & A. SCOTT, note 108 supra, reproduction at 32-33.

Id.

Wang, supra note 109, at 311-16.

W. LAFAVE & A. SCOTT, note 108 supra, reproduction at 33.

See id., reproduction at 32. See also K. MENNINGER, THE HUMAN MIND 448 (1945); Wang, supra note 109, at 311-16; Special Project, supra note 92, at 1223.


U.S. CONST. amend. VIII.

See cases cited note 102 supra.
Second, the demand for retribution is already satisfied by the imposition of the criminal punishment prescribed by the penal laws. If these criminal sanctions were regarded by the legislature as sufficient retribution for the citizen offender, there is no reason to think the alien who commits the same offense deserves greater retribution.

Finally, deportation is far too extreme to be justified solely by the need for retribution. Lifelong banishment as a penalty for criminal conduct reached its peak in Czarist Russia. In modern times, using it as a means of punishing deviant behavior is excessive and should be rejected.

General Deterrence

One traditional theory underlying both criminal punishment and the imposition of civil disabilities is general deterrence. The rationale is that when one individual is punished, his or her suffering will deter others from committing crimes out of fear of similar punishment.

The effectiveness of punishment in deterring the criminal conduct of others varies with a number of factors. Significantly, however, the magnitude of the punishment is not nearly as important as the probability of discovery and punishment. In California a recent legislative study found no evidence of a correlation between the severity of a penalty and its general deterrent effect. Because making the criminal penalty harsher does little to deter crime, adding civil disabilities—deportation, for instance—accomplishes even less. Not surprisingly, therefore, the incidence of crime in states with many civil disability provisions is no less than in states with few such provisions.

120. W. LaFave & A. Scott, note 108 supra, reproduction at 32 (goal of punishment); Special Project, supra note 92, at 1222 (1970) (implicit rationale of all sanctions).
121. For example, "[t]hose who commit crimes under emotional stress ... or who have become expert criminals ... are less likely than others to be deterred. ... Even apart from the nature of the crime [there are] such factors as their social class, age, intelligence, and moral training." W. LaFave & A. Scott, note 108 supra, reproduction at 32.
122. Id.
This reasoning applies particularly to the civil disability of deportation. Many attorneys are unfamiliar with the intricate body of immigration law governing the effect of a criminal conviction on an alien's status.\(^{126}\) It is unrealistic, therefore, to expect lay people, particularly alien lay people who may be unfamiliar with customs in the United States and even the English language, to have a sufficient grasp of the technical intricacies of the deportation laws to identify which conduct would lead to deportation and which would not. Even if the alien population did have sufficient understanding of the law pertaining to deportation, the preceding discussion illustrates that the spectre of deportation is likely to have little deterrent effect beyond that already provided by criminal penalties.

**Specific Deterrence**

Specific deterrence is another theory underlying both criminal punishment and the imposition of civil disabilities. The rationale is that the unpleasant nature of the sanction will impress upon the offender the consequences of repeating deviant behavior. This theory should be contrasted with the general deterrence theory which explores the effect one offender will have on others.\(^{127}\)

The specific deterrence theory is logically inapplicable to deportation. Because deportation is permanent,\(^{128}\) it makes no sense to ask whether the alien would be dissuaded by the prospect of a second deportation from committing a future crime. Except in unusual cases,\(^{129}\) the alien will not be permitted to return lawfully, and thus the issue of whether he or she will become a recidivist in the United States does not arise. Even if the alien returns surreptitiously, the possibility of deportation upon conviction of a subsequent offense will constitute no deterrent at all, for upon apprehension he or she would already be deportable for having entered without inspection.\(^{130}\)

\(^{126}\) See generally text accompanying notes 1-86 supra for examples of cases in which failings by counsel have resulted in deportation that could easily have been avoided. See also text accompanying notes 193-200 infra.

\(^{127}\) See, e.g., J. Andenas, Punishment and Deterrence 175-76 (1974); W. Lefave & A. Scott, note 108 supra, reproduction at 31 (specific deterrence referred to as "prevention"); Wang, supra note 109, at 310.


\(^{129}\) The Attorney General is empowered to grant the previously deported alien special permission to reapply for admission. Id. It should be noted this provision merely permits application; it does not exempt the alien from any of the qualitative and quantitative exclusionary provisions.

Incapacitation

It is plain from the preceding analysis that the decision to deport an alien upon conviction of a crime cannot be justified by the theories of retribution, general deterrence, or specific deterrence. There is one theory, however, which may support such a decision, depending on the circumstances of the individual case. The theory has been variously labeled incapacitation, restraint, isolation, disablement, and, in a slightly different context, the protection of the public.

The incapacitation theory proposes that society has an interest in protecting itself from people whose criminal conduct has proved them to be dangerous. Society protects itself by physically restraining the person to prevent commission of future criminal acts. The theory depends upon a finding that the person being incapacitated is likely to commit such acts—that is, that the person is simply too dangerous to be released into the community.

The most extreme form of incapacitation is the death penalty. More typically, the form used is incarceration in a penal institution. These types of incapacitation share a common characteristic: total removal of the offender from society, either permanently or temporarily.

Other forms of incapacitation, by contrast, restrain the offender only partially by preventing participation in specific activities. These represent the so-called “civil disabilities,” examples of which include loss of voting rights, loss of the right to hold public office, and loss of selected employment opportunities.

Deportation seems to resemble most closely the total removal variety of incapacitation. Rather than being barred only from selected activities, the deportee is excluded from the country entirely, and such removal is permanent.
It has been suggested that protection of the public is the only justification for civil disabilities.\textsuperscript{140} Regardless of whether so strong a generalization is permissible with respect to all civil disabilities, it seems clear that protection of the public is the only possible justification for the particular civil disability of deportation.\textsuperscript{141} The Supreme Court has held that in enacting legislation to deport convicted aliens, Congress was not seeking to increase the punishment for the crimes committed but only “to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.”\textsuperscript{142}

Civil disabilities have been imposed on criminal offenders since ancient times,\textsuperscript{143} and it is not suggested here that there is anything inherently wrong with such sanctions. As one presidential commission has observed, however, problems arise when the concept is misused.\textsuperscript{144} The commission found many civil disability statutes to be overly broad, concluding that a disability should be imposed only after considering each individual case and examining which specific forfeitures are needed and for how long.\textsuperscript{145} Another national advisory commission has recommended the repeal of provisions requiring the automatic imposition of civil disabilities in favor of laws drawn more narrowly.\textsuperscript{146} Even in \textit{DeVeau v. Braisted},\textsuperscript{147} a leading Supreme Court decision upholding the constitutionality of civil disabilities, the Court was careful to emphasize that the restraint in question was designed to guard against corruption only “in specified, vital areas.”\textsuperscript{148} One particular criticism which has been voiced relates to the interminability of many statutes—the tendency to make the convict suffer the disability long after the need has passed.\textsuperscript{149}

The overbreadth objection is strikingly applicable to deportation of alien convicts. Regardless of the circumstances of the offense, and

\begin{thebibliography}{9}
\bibitem{140} Special Project, \textit{supra} note 92, at 1235.
\bibitem{141} \textit{See} text accompanying notes 108-38 \textit{supra}.
\bibitem{142} Mahler v. Eby, 264 U.S. 32, 39 (1924).
\bibitem{145} \textit{Id.} at 89, reproduction at 273.
\bibitem{147} 363 U.S. 144 (1960) (a New York statute barred convicted felons from holding office in waterfront labor unions).
\bibitem{148} \textit{Id.} at 158-59.
\bibitem{149} Special Project, \textit{supra} note 92, at 1158-59.
\end{thebibliography}
regardless of such factors as length of residence,\textsuperscript{150} family ties, and other personal considerations, all aliens are subject to the deportation provisions relating to criminal convictions.\textsuperscript{151} Having been expelled, the deportee is effectively precluded from exercising all rights for which his or her presence is needed. With rare exceptions, the removal is permanent.\textsuperscript{152}

In addition to being overly broad, the mass deportation of convicted aliens is ineffective because it fails to incapacitate the offenders at whom it is aimed. Once deported, the alien will be under powerful pressures to try to return, and many will succeed.\textsuperscript{153} Many aliens will try to return out of fear of starvation.\textsuperscript{154} It is reasonable to assume that the poverty which causes so many people to enter the United States surreptitiously\textsuperscript{155} will be an especially powerful force for those aliens who have tasted relative economic prosperity on this side of the border. In addition, family and other ties may prove to be an irresistible lure to the deported alien.

Thus, the goal of protecting society is not well served by mass deportation of convicted aliens. Attention must be focused on the individual case and on the danger which deportation is intended to obviate.

\textsuperscript{150} One provision does theoretically consider length of time in the United States. I. & N. Act § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1970), gives the Attorney General the discretion to suspend the deportation of an alien who, \textit{inter alia}, has been present in the United States for 10 years following the commission of the act rendering him or her deportable. By its own terms, however, the statute cannot apply unless the Service waits at least 10 years to institute deportation proceedings; and even then, the other elements are so onerous as to make the provision virtually impossible to invoke when deportation is predicated on a criminal conviction. See Comment, \textit{Suspension of Deportation: Illusory Relief}, 14 SAN DIEGO L. REV. 229 (1976).

\textsuperscript{151} See notes 88-91 and accompanying text supra.


\textsuperscript{154} Manulkin & Maghame, \textit{A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker}, 13 SAN DIEGO L. REV. 42, 45 (1975).

\textsuperscript{155} Id.
Adverse Side Effects of Deporting Convicted Aliens

The preceding discussion demonstrated that deportation of the convicted alien often fails to fulfill any legitimate purpose. In addition, its side effects can work affirmative harm in several ways.

First, in many cases deportation is contrary to the strong national policy of preserving the family unit. This policy is expressed in many provisions of the present immigration law.156

Second, deportation could have the effect of destroying whatever rehabilitative possibility might have existed. Still a cornerstone of modern correctional theory, the rehabilitation approach is that everyone benefits when the offender no longer desires or needs to commit criminal offenses.157

Even in California, where the legislature has officially declared the purpose of imprisonment for crime to be punishment,158 rehabilitation arguably plays an important role. It is important to note that this statement of legislative intent refers only to imprisonment and not to probation or suspended sentences, both of which have been expressly retained.159 Furthermore, the new law provides for a maximum of one year of parole following release from incarceration,160 apparently reflecting the hope that the ex-convict will not commit further crimes.

The President’s Commission161 has expressed the view that civil disabilities impede the rehabilitative process. Rehabilitation can best be effected by reintegrating the offender into society.162 On a very practical level, one who is separated from family and friends, particularly if he or she is sent to a country in which the economic climate is poor, encounters severe obstacles to rehabilitation. In addition, like any other civil disability,163 permanent deportation tells

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156. For example, aliens with various family relationships are granted preferential status when applying for admission to the United States. See 8 U.S.C. § 201(b), 8 U.S.C. § 1151(b) (1970); id. § 203(a), 8 U.S.C.A. § 1153(a) (West Supp. 1977). A family relationship may also be a prerequisite to a waiver of excludability, id. § 212(h), 8 U.S.C. § 1182(h) (1970), or to a deportation offense, id. §§ 241(f), 244(a), 244(e), 8 U.S.C. §§ 1251(f), 1254(a), 1254(e). The residence period for naturalization is ordinarily five years, id. § 316(a), 8 U.S.C. § 1427(a), but this requirement is reduced to only three years for an alien who is married to a United States citizen. Id. § 319(a), 8 U.S.C. § 1430(a).


159. Id.

160. Id. § 270.


162. Special Project, supra note 92, at 1218.

163. Id. at 1224.
the alien that he or she can never again be trusted. These assaults on the alien's self-respect, when combined with the bitterness attending so harsh a sanction, can only hinder rehabilitation even further. If the deported alien does attempt to return unlawfully, he or she will be committing a felony, thus aggravating his or her criminal problems.

Third, even if deportation has no effect on the family unit or on the alien's rehabilitation, it is submitted that such a cruel fate is ordinarily unwarranted. When a human being—whether an alien or a citizen—violates a criminal law, punishment is justified. But once the prescribed term is served, and the debt to society paid, there are few cases which merit imposing the further indignity of permanent banishment from the resident country.

Finally, permanent banishment makes it that much more difficult for the victim of the crime to secure restitution from the offender. This is true not only because the offender will be removed from federal and state jurisdiction, but also because removal may impede his or her financial ability to compensate the victim.

Summary of the Purposes Underlying Deportation of Convicted Aliens

The foregoing analysis illustrates that most of the traditional theories underlying punishment do not apply to the sanction of deportation of convicted aliens. The only policy which can justify deportation of an alien who has already fulfilled the terms of his or her criminal sentence is protection of the public by removing the alien from society.

With respect to that policy, it is clear that judgments must be made on an individual basis. Only in some cases will the complete and permanent removal of an alien already criminally punished be essential to protecting the public against future harm. The specific factors which could be considered in making these individualized judgments will be the focus of part of the final section of this Article.

What Can Be Done?

Congress, sentencing judges, and counsel can improve the system of dealing with convicted aliens in a number of ways. The following

164. Id. at 1228.
discussion is generally limited to those methods closely related to the sentencing process.

What Congress Can Do

The Problem of Deportation Because of a Marijuana or Narcotics Conviction

Under existing law an alien can be deported on the basis of a conviction of a single crime involving moral turpitude only if he or she committed the crime within five years after entry and was sentenced to at least a one year term. By contrast, even in California an alien can be deported on the basis of a marijuana or narcotics conviction without regard to the time of commission or the sentence imposed. Thus, the absurd situation can arise in which an alien is deported on the basis of a conviction of possession of marijuana under circumstances in which deportation would not have been possible had the conviction been for murder!

There are many sweeping ways, beyond the scope of this Article, in which Congress could remedy this anomaly. One narrow approach, however, would be to incorporate into the marijuana and narcotics provision the same limitations presently part of the moral turpitude provision: requirements that the crime have been committed within five years after entry, and that a sentence of at least one year have been imposed. Such a change would do much to alleviate the inequitable treatment of the two categories of deportable aliens.

The Problem of Deportation Upon Conviction of a Moral Turpitude Crime

Under existing law one essential element of deportation pursuant to section 1251(a)(4) is that the alien must be "sentenced to confinement . . . for a year or more." As discussed earlier, the

167. New legislation in California reduced the maximum penalty for possession of less than one ounce of non-concentrated cannabis to a $100 fine. Incarceration is no longer possible. CAL. HEALTH & SAFETY CODE § 11357(b) (West Supp. 1977). Nevertheless, such a conviction will still render an alien deportable because it is a conviction of possession of marijuana for which no sentence to confinement is required. I. & N. Act § 241(a)(11), 8 U.S.C.A. § 1251(a)(11) (West Supp. 1977).
169. For example, if both crimes were committed more than five years after entry, the murderer would not be deportable. The marijuana offender would be, however, for no time requirement is imposed on such a charge. Id.
170. For example Congress could wholly repeal the provision of id., rendering an alien deportable for a marijuana or narcotics conviction. Less extreme measures would be to repeal it with respect to marijuana (but not narcotics) offenses, or simply to remove possession of marijuana from its purview.
one-year period is measured by the sentence imposed, rather than by the time actually served.\textsuperscript{172} Congress should amend this provision to refer only to the time of actual incarceration.

Such an amendment would serve two purposes. Because the rationale for deporting convicted aliens is to protect the public from dangerous criminal offenders, the measure of time used should be the one which closely reflects the offender's condition at the time of release. Time actually served will generally be a more accurate barometer of this condition than will the sentence imposed, because only the former can reflect the prisoner's progress toward rehabilitation during the period of incarceration. This is true even under California's new Uniform Determinate Sentencing Act because good time credits up to one-third of the sentence are awarded for good behavior during confinement.\textsuperscript{173}

In addition such an amendment would obviate the need to distinguish between suspension of imposition of sentence, which can save the alien from deportation, and suspension of execution of sentence, which cannot.\textsuperscript{174} Deportation should not depend upon such subtleties. Therefore, even if Congress declines this proposal, it should at least amend the statute to provide expressly that suspension of either imposition or execution of sentence will eliminate the sentence for immigration purposes.

The Problem of Judicial Recommendation Against Deportation

The judicial recommendation against deportation should be liberalized in several respects. First, the provision authorizing this procedure is at present expressly limited to deportations predicated on crimes involving moral turpitude. When deportation is based on a marijuana or narcotics conviction, the recommendation is unavailable.\textsuperscript{175} Congress should repeal the latter limitation for the same reasons as those discussed above.\textsuperscript{176} To give the sentencing judge the power to prevent the deportation of a convicted murderer, but to allow no relief for one convicted of possession of marijuana, is nonsensical.

\textsuperscript{172} See text accompanying notes 13-31 supra.
\textsuperscript{173} 1976 Cal. Stats., ch. 1139, § 276.
\textsuperscript{174} See text accompanying notes 13-21, supra.
\textsuperscript{176} For a similar recommendation see Gordon, The Need to Modernize Our Immigration Laws, 13 SAN DIEGO L. REV. 1, 22-23 (1975).
Second, under existing law the judicial recommendation against deportation is void if issued more than thirty days after the time of first passing sentence.177 This limitation should be repealed.178 When the sentencing judge believes that a particular alien should not be deported, his or her intent to spare the alien should not be frustrated by failure to comply with so needless a technicality. Congress should recognize the practical fact that most lawyers and most judges—particularly those accustomed to state rather than federal court procedure—simply do not know that the recommendation against deportation procedure exists.179 On many occasions it may not be until deportation proceedings are instituted and an attorney specializing in immigration law is retained that the sentencing judge is first informed of this remedy. If the judge is willing to recommend against deportation at that time, there is no reason to prevent him or her from so doing.

Alternatively, if Congress is unwilling to repeal the thirty-day limit entirely, it could vest the sentencing judge with the discretion to waive it “in the interest of justice” on an ad hoc basis, provided the required notice is given to all interested parties.

Third, under existing law, failure to satisfy the notice requirements renders the recommendation ineffectual.180 Yet, if the alien raises the recommendation as a defense in subsequent deportation proceedings, the INS will learn of it at that time. The notice requirements should therefore be amended to provide that a recommendation issued without proper notice will nevertheless be valid until such time as the INS makes representations to the sentencing judge and the judge changes his or her mind.181 If the judge does not change his or her mind after hearing the INS’s objections, there is no reason to set aside the recommendation merely because notice was not provided at the outset. This amendment will be especially significant if Congress declines to enact the aforementioned proposal to eliminate the thirty-day limitation, for the thirty-day limit will ordinarily have expired by the time deportation proceedings are instituted.

Fourth, the current provision requires notice to the “interested state, the Service, and prosecution authorities.”182 The reference to the “interested state” is confusing and unnecessary, and therefore

179. See text accompanying notes 68-76 supra.
180. Id.
should be deleted. The interests of the state are already sufficiently protected by notice to the prosecution.

The Problem of Permanent Inadmissibility

Congress should amend the provision rendering a once deported alien permanently inadmissible. The legislation should provide that aliens deported on the basis of criminal convictions can reapply for admission after a specified time, provided they can show abstention from criminal activity during that period.

What Sentencing Judges Can Do

At this stage, one point must be emphasized: When an alien is convicted of a crime involving moral turpitude, the action of the sentencing judge is ordinarily dispositive of the deportation issues which will later arise. Therefore, by either action or inaction, the sentencing judge usually is deciding whether the alien being sentenced is to be deported. It is sensible to permit the sentencing judges to make such decisions since they, more than anyone else, will be the authority most familiar with the defendants and the circumstances of the offense. The crucial point is that the judge should consciously consider whether the alien is a person who should be deported.

Whenever the person being sentenced is an alien whose conviction might subject him or her to subsequent deportation, the sentencing judge should make two major decisions. He or she should first decide whether that alien should be deported. If it is decided that deportation is unwarranted, the judge should then determine whether there is any possible sentence which would punish the alien appropriately without resulting in deportation.

Should the Alien Be Deported?

A decision that the alien should be deported should not be reached solely because the crime committed was a serious one. By definition, any crime involving moral turpitude is serious. That Congress in-

184. The word ordinarily is used because some situations exist in which his or her decision will not affect the alien’s immigration status. One such instance is that in which the alien has been convicted of only one crime involving moral turpitude committed more than five years after entry. Id. § 241(a)(4), 8 U.S.C.A. § 1251(a)(4). Even then, the sentencing judge’s decision on whether to issue a judicial recommendation against deportation could later become important if the alien is subsequently convicted of a second serious crime. See id.
tended a certain measure of compassion even when a crime involving moral turpitude has been committed is evident from its enactment of the provision authorizing the judicial recommendation against deportation, which applies only to crimes involving moral turpitude.

As demonstrated in the previous section, the only justification for deporting an alien on the basis of a criminal conviction, after he or she has served a criminal sentence, is to protect society. Therefore, as a general rule, an alien should not be deported on this ground unless his or her presence in the United States poses an unacceptably high risk of danger to the general public. To ascertain whether such a risk is present, the sentencing judge should consider all relevant factors, including the alien's prior record, the circumstances of the offense, and the alien's remorse.

If substantial risk of recidivism is perceived, the question of whether that risk is unacceptable should be resolved only after weighing all competing considerations. One extremely important factor in such a decision should be the alien's family ties. If the alien has a spouse, parent, or child who is a United States citizen or a lawfully admitted permanent resident alien, then deportation should not result unless the risk of danger is unusually high. Such other factors as several years of residence in the United States and other community ties similarly militate against a sanction as harsh as deportation.

How Can Deportation Be Avoided?

If the sentencing judge has determined that deportation of a particular alien convicted of a single crime involving moral turpitude is not justified, he or she may wish to avoid the one-year sentence requirement. The judge can do this in several ways.

Under California's Uniform Determinate Sentencing Act, the judge retains the authority to grant probation. As a condition of probation, the judge may sentence the alien to county jail. If he or she does so, one way to avoid deportation would be simply to order the alien confined for less than one year. Another way would be to refrain from sentencing the alien to county jail entirely and instead to find a way in which the convicted alien could contribute to the community. It may be possible, for example, to require the alien to speak to neighborhood youths, educating them about the legal consequences of a criminal conviction for an alien. If the offender qualifies, a California judge can avoid the one-year sentence element by

ordering the alien committed to the California Youth Authority. In federal court the same is true of sentences under the Federal Youth Corrections Act. In all these cases, it is critical that the judge suspend imposition of sentence, rather than mere execution.

If the judge feels that none of these options would be appropriate, he or she may sentence the alien in the same manner as any other individual convicted of the same offense, but the judge may prevent deportation by issuing the judicial recommendation against deportation. This recommendation should be liberally granted. There are no substantive statutory prerequisites other than the limitation to crimes involving moral turpitude. Compliance with the procedural requirements, while crucial, is easy. The judge need only be sure that notice is given to the INS in accordance with its regulations, that the prosecution and state authorities are also notified in advance, and that the recommendation is issued within thirty days after passing sentence.

The recommendation should not be lost merely because the defense never revealed the convict’s alienage. The sentencing judge should therefore act sua sponte in asking the convict whether he or she is an alien or a citizen. An explanation about why the question is being asked should be offered. If the defendant is an alien, the judge should request counsel to make a presentation at the sentencing hearing on the issues of whether deportation should, and how it could, be averted.

What Counsel Can Do

The case law is replete with instances in which the failings of defense counsel have deprived alien criminal defendants of remedies which would have prevented their subsequent deportations. In one remarkable case, United States v. Parrino, an alien was deported

187. See text accompanying notes 45-49 supra.
188. See text accompanying notes 38-44 supra.
189. See text accompanying notes 13-21 supra.
191. See text accompanying notes 59-86 supra.
after pleading guilty to a charge which his attorney—the former Commissioner of the INS—had assured him would not lead to deportation.

The Velez-Lozano case discussed earlier is also illustrative. The alien pleaded guilty without being advised by his attorney that deportation could follow as a consequence. Because the offense was trivial and the offender non-dangerous, the sentencing judge suspended sentence. The attorney failed to advise the judge, however, that only suspension of imposition of sentence would help the alien, and the appellate court held that the judge's suspension of execution of sentence was to no avail. Finally the court tried to issue a judicial recommendation against deportation, but it too was invalid for failure to meet the thirty-day time limitation. Despite the clear intent of the sentencing judge, counsel's repeated failures to advise the judge of the technical problems resulted in the deportation of the alien client.

United States ex rel. Piperkoff v. Esperdy is another classic example of a deportation attributable to bungling counsel. The attorney failed to request a judicial recommendation within the thirty day statutory period. Because of other failings by counsel, the court was able to vacate the original judgment and enter a new sentence. At the second sentencing hearing, a judicial recommendation against deportation was finally issued. It was held defective, however, because counsel had failed to comply with the requirement of prior notice to the INS. The court vacated the second judgment because of this failure, entered a third sentence, and tried again to issue the recommendation, this time with proper notice. That final attempt was also frustrated because it came more than thirty days after the second vacated judgment. The alien was deported.

Such failings are inexcusable. In an adversary system it is the obligation of the attorney to assure the client the best defense possible under the law. This obligation requires adequate preparation for the case. The attorney's duty "is to represent his client zealously

194. See text accompanying notes 15-16 supra.
195. The sentencing judge wrote a letter to the Attorney General explaining he had suspended the sentence because the alien had been remorseful and capable of rehabilitation. He then added: "Had the statutory requirement been called to my attention at the time of sentencing, I would have been glad to have written to you recommending against deportation, within 30 days." 463 F.2d at 1309.
196. 267 F.2d 72 (2d Cir. 1959).
197. The 30-day period would have begun with the third sentence if the vacation had been for some purpose other than to prevent deportation. See text accompanying notes 83-86 supra.
within the bounds of the law."199 When he or she fails to invoke remedies expressly provided by Congress, the duty is breached.

Lack of familiarity with immigration law does not excuse this neglect. When a lawyer accepts employment in a field of law in which he or she lacks previous experience, a duty arises to engage in whatever further study will be needed.200

Any attorney representing an alien criminal defendant should become familiar with the deportation consequences of criminal convictions and sentences. In most cases the procedures for invoking the available remedies are simple ones. Failure to request the remedy seasonably, however, can lead to complex and unnecessary legal issues. More importantly, the damage will often be irreparable.

CONCLUSION

When a person is convicted of violating a criminal law, appropriate punishment should be imposed. However, the convict—whether a citizen or an alien—is a human being. There is growing sentiment that once the debt to society is paid by fulfilling the terms of the criminal sentence, the alien should be permitted to begin rebuilding his or her life. Permanent banishment from the country in which he or she resides is not conducive to such rebuilding. It should therefore be mandated only when the alien's presence after release from incarceration would pose an unusually serious danger to the general public—and only after all circumstances of the individual case have been considered. Judge Learned Hand, in a case in which the sentencing judge had failed to issue a timely recommendation against deportation, rightly labeled the ensuing deportation a "cruel and barbarous result" and a "national reproach."201

Many aspects of a criminal prosecution influence whether an alien will be subsequently deported. They include the plea-bargaining, trial, sentencing, and even post-sentencing stages. This Article has dealt with those aspects related to sentencing. Ideas have been proposed about how Congress, sentencing judges, and counsel can improve the existing state of the art in this area. It is hoped that prompt action will be taken to rectify the enormous failings of the present system.

199. Id., EC 7-1.
200. Id., EC 6-3.