DEPORTATION OF AN ALIEN FOR A MARIJUANA CONVICTION CAN CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT: *Lieggi v. United States Immigration and Naturalization Service*, 389 F. Supp. 12 (N.D. Ill. 1975).

INTRODUCTION

In *Lieggi v. United States Immigration and Naturalization Service*,[1] the Federal District Court for the Northern District of Illinois held deportation of an alien convicted of selling marijuana to be cruel and unusual punishment.

Andrea Lieggi had immigrated to the United States from Italy and had several years later been convicted under California law[2] of selling three marijuana cigarettes to his former roommate. On the basis of this conviction the Immigration and Naturalization Service found him deportable.[3] In his petition for a writ of habeas corpus, Lieggi argued that his deportation would constitute cruel and unusual punishment. Responding to this contention, the court stated:

> At the outset it must be noted that there is no precedent for applying cruel and unusual punishment standards to a deportation case. . . . Historically, the courts never considered the Eighth Amendment to be appropriate in deportation cases. . . .
> . . . In support counsel cited passages from Alexander Solzhenitsyn's *Gulag Archipelago*, but unfortunately no legal authority or precedent.[4]

Nevertheless the court agreed with Lieggi and granted his petition.

NATURE OF DEPORTATION

Deportation is the procedure whereby the Attorney General

1. 389 F. Supp. 12 (N.D. Ill. 1975).
2. CAL. HEALTH & S. CODE § 11531 (now *id.* § 11360, West 1974).
3. An alien is deportable if he has been convicted of any law relating to possession of, or traffic in, marijuana or narcotic drugs. Immigration and Nationality Act [hereinafter cited as I. & N. Act], § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970).
4. Lieggi v. INS, 389 F. Supp. 12, 19-20 (N.D. Ill. 1975).

effects the departure from the United States[5] of an alien[6] who has committed an offense rendering him deportable.[7] Not all deportable offenses are criminal acts; an alien may be deported for behavior which is not punishable at all when engaged in by citizens.[8]

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5. The exclusive procedure for determining deportability is a hearing before a "special inquiry officer" (also called an Immigration Judge), who is an employee of the Immigration and Naturalization Service [hereinafter referred to as the Service]. The mechanics of the procedure are set forth in the I. & N. Act, § 242(b), 8 U.S.C. § 1252(b) (1970). Once an alien has been found deportable, the Attorney General (through the Service) has six months in which to effect the alien's departure from the United States. *Id.* § 242(c), 8 U.S.C. § 1252(c).

6. An alien is "any person not a citizen or national of the United States." *Id.* § 101(a)(3), 8 U.S.C. § 1101(a)(3). It should be noted this definition thus includes not only persons who entered the United States illegally, but also aliens admitted as lawful permanent residents or as lawful nonimmigrants (*e.g.*, aliens with student visas, tourist visas, etc.).

7. The grounds for deporting an alien from the United States are enumerated in the I. & N. Act, § 241(a), 8 U.S.C. § 1251(a) (1970).

8. *See, e.g., id.* § 241(a)(3), 8 U.S.C § 1251(a)(3) (deportable if institutionalized at government expense because of mental disease, within five years after entry, unless the alien can affirmatively show such disease did not exist prior to entry); *id.* § 241(a)(6)(B), 8 U.S.C. § 1251(a)(6)(B) (deportable for advocating, or for being affiliated with any organization which advocates, opposition to all organized government); *id.* § 241(a)(6)(C), 8 U.S.C. § 1251(a)(6)(C) (deportable for joining the Communist party); *id.* § 241(a)(11), 8 U.S.C. § 1251(a)(11) (deportable for being, or ever having been, a narcotic drug addict, even if rehabilitated).

An alien is also deportable if, at the time of any entry into the United States, he was subject to some *exclusionary* provision of the law. *Id.* § 241(a)(1), 8 U.S.C. § 1251(a)(1). The offenses for which an alien can be excluded from (*i.e.*, denied admittance to) the United States are enumerated in the I. & N. Act § 212(a), 8 U.S.C. § 1182(a). *See, e.g., id.* § 212(a)(1), 8 U.S.C. § 1182(a)(1) (excludable if mentally retarded); *id.* § 212(a)(2), 8 U.S.C. § 1182(a)(2) (excludable if insane); *id.* § 212(a)(3), 8 U.S.C. § 1182(a)(3) (an alien is excludable if he has ever had a single attack of insanity); *id.* § 212(a)(4), 8 U.S.C. § 1182(a)(4) (excludable if afflicted with a psychopathic personality, sexual deviation, or mental defect); *id.* § 212(a)(11), 8 U.S.C. § 1182(a)(11) (excludable for advocating the practice of polygamy); *id.* § 212(a)(15), 8 U.S.C. § 1182(a)(15) (excludable if likely to become a public charge); *id.* § 212(a)(25), 8 U.S.C. § 1182(a)(25) (excludable if unable to read and understand some language). Thus an alien, long resident in the United States, may be deported if he leaves the country temporarily, and returns while falling into one of the above exclusionary provisions. For limitations on the extent to which deportation can be predicated on an entry following a temporary absence, *see* Rosenberg v. Fleuti, 374 U.S. 449 (1963).

Finally, it should be noted several of the above offenses are not acts at all, but rather physical or mental conditions, or sometimes mere beliefs.

The power of the United States to deport aliens has historically rested on principles of sovereignty. The leading case applying the sovereignty theory is *Fong Yue Ting v. United States*,[9] where the Supreme Court reasoned if a nation has inherent power to exclude (*i.e.*, deny admittance to) aliens, then it also has power to admit aliens conditionally. Thus, deportation is merely a mechanism to enforce the return to his own country of an alien who has violated the terms of his admittance. The sovereignty theory, adopted by a long line of cases,[10] has nevertheless been denounced by judges and commentators as indefinite and dangerous,[11] supportive of mass exile,[12] and highly fictional.[13]

Deportation Is Punishment

Prior to *Lieggi*, the courts had consistently held deportation to be a civil action, not a criminal punishment.[14] The *Lieggi* court, expressing a view shared by many,[15] condemned such a notion:

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9. 149 U.S. 698 (1893).

10. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Shaughnessy v. Mezei, 345 U.S. 206 (1953); Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Keller v. United States, 213 U.S. 138 (1909) (dictum); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Ekiu v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (the Chinese exclusion case). A full discussion of the sovereignty theory is beyond the scope of this paper.

11. Justice Brewer has said:

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Fong Yue Ting v. United States, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting).

Substantially agreeing with Justice Brewer's dissent were Justices Fuller and Field, also dissenting.

12. One commentator, in an excellent discussion of aliens' constitutional rights, pointed out that the sovereignty theory logically permits, without hearing, mass exile of aliens long resident in the United States. Note, *Immigrants, Aliens, and the Constitution*, 49 Notre Dame Law. 1075, 1094 (1974).

13. Trop v. Dulles, 356 U.S. 86, 98 (1958) (Warren, C.J.).

14. *See, e.g.*, Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); Mahler v. Eby, 264 U.S. 32 (1924); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); Cortez v. INS, 395 F.2d 965 (5th Cir. 1968).

15. *E.g.*, Justice Brewer has said:

> But it needs no citation of authorities to support the proposition that deportation is punishment. 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) (dissent).

James Madison, reporting on the Virginia resolutions pertaining to a proposed alien statute, stated:

> [I]f a banishment of this sort be not a punishment, and among

> How can deportation of an alien legally residing in the United States be considered anything but punishment? In this case petitioner stands to lose his residence, livelihood, and most importantly, his family. Certainly if the same thing occurred to a United States citizen, a court would not hesitate to call it punishment—moreover, cruel and unusual punishment.[16]

The above reasoning, concentrating on the *consequences* of deportation, is subject to the criticism that something does not constitute punishment merely because its consequences happen to be severe. Such a criticism must be examined in light of the judicial, sociological, and historical views of punishment.

Punishment has been judicially defined so as to include pain or any other penalty inflicted on a person for a crime or offense, by an authority to which the offender is subject.[17] A proceeding need not be commenced by indictment or information to give rise to "punishment."[18] A punishment need not be retributive; it may be rehabilitative, deterrent, or preventive.[19]

One author has defined punishment as "such suffering as is inflicted upon the offender in a definite way by, or in the name of, the society of which he is a permanent or temporary member."[20] Another author has set forth four elements of punishment: the state must inflict the punishment in its own name for the violation of a code; it must administer some sort of suffering (which

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> the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. Madison, *Report on the Virginia Resolutions*, 4 ELLIOTT'S DEBATES 546, 555 (1800) (debates in state conventions concerning adoption of the United States Constitution and statutes pursuant thereto).

Many modern jurists have expressed similar feelings. Thus Justice Frankfurter acknowledged that "the intrinsic consequences of deportation are so close to punishment for crime. . . ." Galvan v. Press, 347 U.S. 522, 531 (1954). Justice Brandeis noted deportation "may result also in loss of both property and life, or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). Judge Learned Hand stated flatly, "nothing can be more disingenuous than to say that deportation in these circumstances is not punishment." Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947).

16. 389 F. Supp. at 17.

17. Fowler v. American Mail Line, 69 F.2d 905 (9th Cir. 1934); Washington v. Dowling, 92 Fla. 601, 109 So. 588 (1926); McIntyre v. Commonwealth, 154 Ky. 149, 156 S.W. 1058 (1913).

18. McHugh v. Placid Oil Co., 206 La. 511, —, —, 19 So. 2d 221, 225, 227 (1944).

19. United States v. Brown, 381 U.S. 437, 458 (1965).

20. 1 E. WESTERMARCK, THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS 169 (1906).

may include mental anguish or the loss of social status); the punishment must be intended, not accidental, and it must be a form of disapproval.[21]

Deportation falls squarely within these definitions. That it entails suffering is amply demonstrated by the above-quoted passage from *Lieggi*; deportation is inflicted by, and in the name of, the United States for violation of the immigration laws; the removal is intentional, not fortuitous, and there can be no doubt it is a form of disapproval. Thus, deportation satisfies all the elements of punishment.

Historically, exile and banishment were common forms of punishment.[22] Penal sanctions in 17th century France included banishment (for life) and exile (which did not connote the same degree of infamy as banishment).[23] The transportation of criminal offenders to penal colonies was a practice arising among those European nations which had acquired distant colonies.[24] England first began transporting criminals to its American colonies in 1718; after the American Revolution, English convicts were transported to Australia and adjacent islands.[25] Banishment and exile reached their peak as forms of punishment in Czarist Russia.[26] The historical practice of removing criminal offenders from society supports views proclaiming such removal to be punishment.[27]

The notion that deportation is not punishment is thus incompatible with the judicial, sociological and historical views of punishment, as well as with common sense. Given the obviously enormous disruptive effect of deportation on the lives of entire families,[28] this area of the law is one in which dependence on legal fictions is uniquely inappropriate.

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21. W. RECKLESS, THE CRIME PROBLEM (4th ed. 1967) [hereinafter cited as RECKLESS]. The disapproval aspect was emphasized in S. SCHAFER, THEORIES IN CRIMINOLOGY 299 (1969).

22. RECKLESS 497, n.25.

23. C. VON BAR, A HISTORY OF CONTINENTAL LAW 269-77 (1916).

24. RECKLESS 497-98. *See also* Barnes, *Transportation of Criminals*, 15 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 90-93 (1935).

25. H. MAYHEW & J. BINNY, THE CRIMINAL PRISONS OF LONDON AND SCENES OF PRISON LIFE 92-93 (1862).

26. RECKLESS 498.

27. *E.g.*, deportation has been explicitly characterized as a punitive measure. *See id.* Removal of an individual from a group has been described as a typical form of punishment; such removal includes not only execution and confinement, but also banishment and transportation. E. SUTHERLAND, CRIMINOLOGY 317 (1924).

28. *See* text accompanying note 16 *supra*. The court later acknowledged Lieggi's argument that deportation not only punishes the alien, but also destroys his American family. Lieggi v. INS, 389 F. Supp. 12, 19 (N.D. Ill. 1975).

Deportation for a Marijuana Conviction Is Cruel and Unusual Punishment

The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Having concluded deportation is a form of punishment, the court in *Lieggi* was faced with the issue of what causes a particular punishment to be regarded as cruel and unusual. Though the Supreme Court acknowledged it has not defined the exact scope of the phrase "cruel and unusual,"[29] certain principles have evolved.

In *Furman v. Georgia*,[30] Justice Brennan wrote a concurring opinion analyzing the problem in depth. He set forth several guiding principles, one of which was that a punishment cannot be excessive.[31] A punishment is excessive if it serves no penal purpose more effectively than a lesser punishment (*i.e.*, the severe punishment is unnecessary) or by its length or severity it is greatly disproportionate to the offense.[32] Some courts have considered addi-

29. Trop v. Dulles, 356 U.S. 86, 99 (1958).

30. 408 U.S. 238 (1972). In a 5-4 decision the Court held the imposition and execution of the death penalty on three black defendants who had been charged with murder (in one case) and rape (in the other two cases) would constitute cruel and unusual punishment. Each of the nine justices wrote a separate opinion. Justices Douglas and Stewart emphasized the selective application of the death penalty to minorities. Justices Brennan, White, and Marshall stressed the excessive and unnecessary nature of the death penalty; Justice Marshall believed it was morally unacceptable to the American people. Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist dissented, arguing the eighth amendment does not bar all punishments which the state is unable to prove necessary to control crime, and does not concern itself with the procedure by which a state arrives at a particular punishment in a particular case.

31. *Id.* at 280.

32. *Id.* Justices White and Marshall also indicated the punishment cannot be excessive. Justice White noted that the infrequent imposition of a penalty may prevent it from accomplishing the aims of retribution and deterrence. Justice Marshall detailed the history of the proscription of cruel and unusual punishment in Anglo-American law. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910); Howard v. Fleming, 191 U.S. 126 (1903); O'Neil v. Vermont, 144 U.S. 323 (1892) (Field & Harlan, JJ., dissenting) (majority did not reach issue of cruel and unusual punishment); Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975); People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

tional factors: the nature of the offense and the offender, with particular regard to the degree of danger present to society; a comparison of the challenged penalty to penalties in the same jurisdiction for more serious crimes; and a comparison of the challenged penalty to that for the same offense in other jurisdictions.[33]

A second principle discussed by Justice Brennan is that a punishment must not be so severe as to be degrading to human dignity.[34] In particular, a severe punishment arbitrarily inflicted will be regarded as one not comporting with human dignity.[35]

A third guiding principle is that the standards for judging whether a particular punishment is cruel and unusual change as society's values become more enlightened and more humane.[36] Thus a penalty permissible at one time is not necessarily permissible today.[37]

A corollary to the above principles is that the determination of whether a punishment is cruel and unusual must be made in light of the seriousness of the offense for which punishment has been prescribed. Therefore, it is essential to consider the nature of a marijuana conviction. The following discussion will demonstrate that all three of the foregoing principles lead to the same conclusion; deportation of an alien for a marijuana conviction is cruel and unusual punishment.

In almost every area but immigration law, the modern trend has been to reduce the penalties for conviction of marijuana violations. The National Commission on Marijuana and Drug Abuse,[38]

33. Weems v. United States, 217 U.S. 349 (1910); People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

34. Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

35. *Id.* at 274.

This conclusion stems from the thesis that "the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." *Id.*

36. *Id.* at 242; Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910); Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975).

37. Furman v. Georgia, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

38. The National Commission on Marijuana and Drug Abuse was established by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 601, 84 Stat. 1236, 1280. By statute, the Commission consisted of two members of the Senate, two members of the House, and nine persons appointed by the President (Mr. Nixon). *Id.* It should be noted a majority of the members, before joining the Commission, had

after intensive study,[39] concluded that marijuana use produces no significant defects, injury to brain tissue or other organs, or significant physical, biochemical, or mental irregularities; that even the long-term consumption of *cannabis* in moderate doses has no harmful effects; that marijuana use is not addictive; and that possession of marijuana for personal use should no longer be a criminal offense.[40]

A number of states have all but eliminated serious penalties for marijuana violations.[41] These changes signal a clear national trend toward recognizing the relatively harmless nature of marijuana. Such a trend, together with the Commission recommendations discussed above, destroys any justification for severe penalties.

Is deportation disproportionate to a marijuana offense? Compare the harshness of the penalty to the gravity of the offense.

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opposed the decriminalization of marijuana. U.S. NEWS & WORLD REPORT, Feb. 21, 1972, at 75.

39. The first Commission Report contained a two-volume Appendix of Technical Papers, consisting of the results of various studies performed either before the formation of, or at the direction of, the Commission. *See* Albrecht, *Marijuana Possession and the California Constitutional Prohibition of Cruel or Unusual Punishment*, 21 U.C.L.A. L. REV. 1136, 1136 n.1 (1974).

40. FIRST REPORT OF NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE at 154, n.1 (1972), *cited in* Lieggi v. INS, 389 F. Supp. 12, 20 (N.D. Ill. 1975).

41. Possession of up to one ounce of marijuana is punishable by a maximum fine of $100 in Oregon; incarceration has been eliminated as a sanction. In Massachusetts, probation is mandatory upon first conviction for possession. West Virginia law provides that any first possession or distribution offense (less than fifteen grams) must be conditionally discharged. Likewise, a conviction as a "disorderly person", a quasi-criminal non-indictable offense, is the maximum which can be imposed for possession of twenty-five grams or less in New Jersey. Nebraska imposes a maximum penalty of seven days imprisonment for conviction of possession of up to one pound of marijuana. Other states provide for minimal imprisonment. In addition, at least thirty-two states now have statutes resembling the conditional discharge provisions of the Uniform Controlled Substances Act. These statutes provide for dismissal without an adjudication of guilt upon completion by the arrestee of conditions set by the court (footnotes omitted). Albrecht, *supra* note 39, at 1160-61.

The California statute enacted on July 9, 1975, also implements a sweeping reform of the state's marijuana laws. The statute reduces the maximum penalty for possession, transportation, or giving away (of one ounce of other than "concentrated cannabis" or less) to a $100 fine, and creates comprehensive expungement procedures. CAL. HEALTH & S. CODE §§ 11357(b), 11360(c), 11361.5 (West Supp. 1976).

Deportation, because of its severity, has traditionally been viewed with great disfavor by the judiciary.[42] As Justice Black observed: "Petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country."[43] Quite often an immigrant has broken all ties with his former country. To deport such a person is to forbid a return to his adopted nation.

Against the extreme harshness of the penalty, the gravity of the offense pales. The victimless nature of the crime, the obvious frequency with which the marijuana laws are broken,[44] the lack of significant physiological or mental damage associated with marijuana, and its lack of addictive properties[45] combine to illustrate the relatively trivial nature of a marijuana violation. The disproportionate character of the deportation penalty is all too apparent.

Deportation is excessive not only because it is disproportionate to the offense, but also because it is unnecessary. It should be noted deportation is *double* punishment; *i.e.*, it is imposed in addition to the full measure of criminal penalties already applicable. Since not all potential criminal offenders are aliens, one must assume the existing level of criminal sanctions represents a legislative judgment that these sanctions are themselves adequate to achieve desired penal goals. Thus, deportation, when added to a potential fine or imprisonment already deemed adequate, is unnecessary and therefore excessive.

Rapid liberalization in various states' marijuana laws reflect the modern attitude toward marijuana. Such fundamental changes by society bolster the argument that in today's time frame, deporting

42. *E.g.*, deportation has been described as a "drastic sanction, one which can destroy lives and disrupt families," Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963); a "savage penalty," Jordan v. DeGeorge, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting); a drastic measure and at times "the equivalent of banishment or exile," Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947); "as great a hardship as the deprivation of the right to pursue a vocation or a calling," Bridges v. Wixon, 326 U.S. 135, 147 (1945); a "drastic sanction," Berdo v. INS, 432 F.2d 824, 848 (6th Cir. 1970).

Many of the passages cited in notes 15 & 16 *supra*, which demonstrate that deportation is punishment, serve also to illustrate the peculiar severity of such punishment.

43. Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting).

44. Approximately 24,000,000 Americans over eleven years of age have used marijuana, including one half of all people in the 18-to-25 age group. FIRST REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE at 32 (1972).

45. *Id.* at 154, n.1, *cited in* Lieggi v. INS, 389 F. Supp. 12, 20 (N.D. Ill. 1975).

an alien for a marijuana conviction is cruel and unusual punishment. Drug laws enacted at a time when public knowledge and understanding of marijuana were minimal should not serve as a basis today for effecting a sanction as severe as deportation.

The arbitrary nature of deporting an alien convicted of a marijuana violation can be dramatically illustrated by comparing such an offender to one convicted of premeditated murder. An alien convicted of a crime involving moral turpitude is deportable only if the crime was committed within five years after he entered the United States.[46] An alien is also deportable if he is convicted of possession of marijuana *regardless of when the crime was committed.*[47] Thus if two aliens, both of whom have resided lawfully in the United States for at least five years, are subsequently convicted of different crimes—alien # 1 of premeditated murder, and alien # 2 of possession of marijuana—the staggering result of the

46. Even then, such an alien is deportable only if a sentence of at least one year is imposed. I. & N. Act § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970). This subsection also prescribes deportation for an alien convicted of two crimes involving moral turpitude, regardless of timing and regardless of sentence imposed. *Id.*

47. *Id.* § 241(a)(11), 8 U.S.C. § 1251(a)(11) (covering any law relating to possession of, or traffic in, marijuana or narcotic drugs). It has been held a statute proscribing *use* of marijuana is not one relating to possession and thus cannot subject an alien to deportation under this section. Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964); *In re* Sum, 13 I. & N. Dec. 569 (1970). Nor do statutes proscribing being under the influence of marijuana result in deportation. Varga v. Rosenberg, 237 F. Supp. 282 (S.D. Cal. 1964). The same is true for statutes proscribing knowingly being in a place where narcotic drugs are used. *In re* Schunck, 14 I. & N. Dec. ___ (I.D. 2137 1972). All these cases have stressed the congressional intent to deter aliens from committing crimes potentially involving trafficking.

The Second Circuit held on October 7, 1975, that John Lennon, convicted of possession of marijuana under an English statute not requiring guilty knowledge, could not be *excluded* from the United States pursuant to the I. & N. Act § 212(a)(23), 8 U.S.C. § 1182(a)(23) (1970), which renders excludable any alien convicted of "illicit" possession of marijuana. The court held the term "illicit" requires a guilty knowledge on the part of the accused, and thus one cannot be excluded on the basis of a conviction for possession of marijuana unless the conviction was pursuant to a statute requiring guilty knowledge. The Board of Immigration Appeals, although differing with the court's construction of the English statute in question, had agreed that guilty knowledge is required. The *Lennon* holding should apply equally to the corresponding deportation provisions, *id.* § 241(a)(11). 8 U.S.C. § 1251(a)(11), for that provision also requires "illicit" possession. The *Lennon* case, not yet reported, is discussed in 44 U.S.L.W. 2169 (2d Cir. Oct. 21, 1975).

present law is that alien # 2 is deportable while alien # 1 is not. This result amply illustrates the arbitrary nature of the deportation laws regarding marijuana.[48]

The Effect of *Lieggi*

Ruling that deportation is punishment[49] has potentially enormous ramifications. It is well-settled that an alien undergoing deportation proceedings is entitled to procedural due process;[50] all that remains to be resolved is which rights such due process entails. If the equal protection clause requires that an alien facing punishment receive the same procedural due process safeguards as a citizen in like circumstances, and if deportation is punishment, then it follows that an alien at a deportation hearing should be entitled to the same procedural due process safeguards to which a citizen would be entitled in criminal proceedings.[51] Such safeguards would presumably include, *inter alia*, the right to counsel at all significant stages (at government expense),[52] the right to be free

48. Analogous reasoning was employed in Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975). In that case, the court, after noting that the Ohio criminal penalties for sale of marijuana far exceed those for several violent crimes, declared such marijuana penalties to be cruel and unusual punishment.

49. The ruling that deportation is punishment, being essential to the court's conclusion that deporting Lieggi would be cruel and unusual punishment, is holding, not dictum.

50. *See, e.g.*, Piccirillo v. INS, 512 F.2d 1289 (9th Cir. 1975); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962); McConney v. Rogers, 287 F.2d 473 (9th Cir. 1961); Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961); Yiannopoulos v. Robinson, 247 F.2d 655 (7th Cir. 1957).

51. The court asserts the following thesis:

> This court is of the opinion that application of the equal protection doctrine to legal resident aliens requires that they not be subjected to the penalty of deportation without the application, at a minimum, of those standards of due process and equal protection which would be enjoyed in a criminal trial involving a citizen. Lieggi v. INS, 389 F. Supp. 12, 19 (N.D. Ill. 1975).

The court later states, however, that the "exact parameters of how far the Supreme Court will extend constitutional protections to aliens is still undetermined," *id.*, and that "Lieggi is entitled to *at least minimal* constitutional rights," *id.* (emphasis added). These statements would seem to indicate the court is trying to retreat from the far-reaching position that an alien at a deportation hearing is entitled to the same due process requirements as is a citizen in a criminal proceeding, by classifying the position as dictum. It is suggested the court cannot escape the conclusion that such a position is holding, for, as the text accompanying this footnote demonstrates, the position follows logically from the court's holding that deportation is punishment.

52. Argersinger v. Hamlin, 407 U.S. 25 (1972); United States v. Wade, 388 U.S. 218 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

from unreasonable searches and seizures (and an exclusionary rule with which to effectuate that right),[53] a requirement that every essential fact be proved beyond reasonable doubt,[54] the right to reasonable bail,[55] the right to jury trial,[56] and the right to receive *Miranda* warnings.[57]

Ruling that deportation of an alien for a marijuana conviction can be cruel and unusual punishment has an even more direct effect. Defeating deportation predicated on a marijuana or narcotics conviction traditionally has been nearly impossible, for many of the defenses applicable to deportation based on other crimes are specifically inapplicable to that based on marijuana and narcotics.[58] Thus, constitutional attack may prove to be the only effective means of preventing deportation in these areas.

LIMITATIONS ON THE *Lieggi* HOLDING

Stopping short of ruling that deportation of an alien for a marijuana conviction will *always* be cruel and unusual punishment, Judge Bauer noted the "unique facts" and "compelling circum-

53. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).
54. *In re* Winship, 397 U.S. 358 (1970).
55. Stack v. Boyle, 342 U.S. 1 (1951).
56. Duncan v. Louisiana, 391 U.S. 145 (1968).
57. Miranda v. Arizona, 384 U.S. 436 (1966).
58. For example, four such defenses are:
(a) The judicial recommendation against deportation, a device whereby the trial judge can prevent deportation predicated on the conviction by recommending the alien not be deported, is by its own terms inapplicable to I. & N. Act § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970), which renders an alien deportable for a marijuana or narcotics violation. *Id.* § 241(b), 8 U.S.C. § 1251(b);
(b) The same is true of the executive pardon. *Id.*;
(c) A discretionary remedy, suspension of deportation, allows the Attorney General to suspend the deportation of an alien who meets certain conditions, including a continuous residence requirement. *Id.* § 244(a), 8 U.S.C. § 1254(a). For most crimes the requirement is that the alien reside continuously in the United States for seven years immediately preceding the date of application for the remedy. *Id.* § 244(a)(1), 8 U.S.C. § 1254(a)(1). For marijuana or narcotics, however, the continuous residence requirement is ten years, and the period does not even begin until the time of violation. *Id.* § 244(a)(2), 8 U.S.C. § 1254(a)(2);
(d) For most crimes, deportation can often be averted by expunging the conviction; for youth offenders, pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5021 (1969), or the California Youth Authority Act, CAL. WELF. & INST'NS CODE § 1772 (West 1971); for adult offenders, pursuant

stances"[59] of the case: Lieggi was the sole financial support of his family; he had no close relatives, and no independent means of support outside the United States; he had sold only three marijuana cigarettes to his former roommate; he was a lawful permanent resident; he had conducted himself in an exemplary manner since the conviction; and during his ten years in the United States he had on no other occasion been "involved with the law."[60]

Further, given the court's emphasis on the relatively innocuous nature of a marijuana violation,[61] it must be assumed the holding does not extend to convictions involving other drugs.[62] However, since Lieggi's conviction was for *sale* of marijuana, the court's holding would seem to apply a fortiori to such other marijuana offenses as possession, possession for sale, transportation, giving away, use, being under the influence, and knowingly being in a place where marijuana is used.[63]

Finally, although the procedural device employed by Lieggi was a petition for a writ of habeas corpus, nothing in the court's opinion indicates the holding would not apply equally when the issue is raised on direct appeal.[64]

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to CAL. PENAL CODE §§ 1203.4, 1203.4a (West 1969). Expungement under any of these statutes eliminates the conviction as a basis for deportation *for most crimes*. *In re* Nagy, 12 I. & N. Dec. 623 (1968); *In re* Ibarra-Obando, 12 I. & N. Dec. 576 (A.G. 1967). However, *adult* expungement has been held not to eliminate a *marijuana or narcotics* conviction as a basis for deportation. Brownrigg v. INS, 356 F.2d 877 (9th Cir. 1966); Kelly v. INS, 349 F.2d 473 (9th Cir.), *cert. denied*, 382 U.S. 932 (1965); Garcia-Gonzales v. INS, 344 F.2d 804 (9th Cir.), *cert. denied*, 382 U.S. 840 (1965); *In re* A-F-, 8 I. & N. Dec. 429, 445-46 (A.G. 1959). It was only recently, in fact, that courts first allowed *youth* expungements to eliminate a marijuana conviction for deportation purposes. *See* Mestre-Morera v. INS, 462 F.2d 1030 (1st Cir. 1972); *In re* Andrade, 14 I. & N. Dec. ___, (I.D. 2276 1974); *In re* Zingis, 14 I. & N. Dec. ___, (I.D. 2270 1974).

59. Lieggi v. INS, 389 F. Supp. 12, 21 (N.D. Ill. 1975).

60. *Id.* at 13, 14, 19.

61. *See id.* at 20.

62. Deportation of aliens based on both marijuana and narcotics convictions is prescribed by I. & N. Act § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970).

63. For examples of such statutes *see* CAL. HEALTH & S. CODE § 11357 (West Supp. 1974) (possession); *id.* § 11359 (possession for sale); *id.* § 11360 (transporting, selling, or giving away); *id.* § 11365 (knowingly being in a place where marijuana is used); *id.* § 11550 (use or being under the influence). On January 1, 1976, the new California law discussed in note 41 *supra* takes effect.

64. Under I. & N. Act § 105a, 8 U.S.C. § 1105a (1970), an alien may appeal an adverse Board of Immigration Appeals decision directly to the United States Court of Appeals.

CONCLUSION

Two important rules of law emerging from *Lieggi* are that deportation is punishment, and that deportation for a marijuana conviction can be cruel and unusual punishment.

When coupled with the accelerated pace of statutory reform regarding marijuana,[65] as well as with several recent Supreme Court decisions expanding the constitutional rights of aliens in other areas,[66] the *Lieggi* decision hopefully will be applied liberally. At the very least, *Lieggi*'s value lies in its break with previous judicial refusal to treat deportation as a form of punishment. Those judges whose sole reason for rejecting eighth amendment arguments in a deportation context had been the absence of precedent may now be more comfortable in recognizing what has long been common sense: the alien deported from the country in which he resides has been punished, and such punishment, at least with respect to marijuana convictions, can be cruel and unusual. The *Lieggi* decision is welcome and long overdue.

STEPHEN H. LEGOMSKY

FOURTH AMENDMENT CHALLENGE TO AN INTERNAL REVENUE CODE SECTION 7602 SUMMONS: *United States v. Sun First National Bank of Orlando*, 510 F.2d 1107 (5th Cir. 1975)

United States v. Sun: THE DECISION BY THE FIFTH CIRCUIT

In 1973, the Internal Revenue Service undertook an investigation of the consolidated income tax return of the First at Orlando,

65. *See* note 41 *supra*.
66. *In re* Griffiths, 413 U.S. 717 (1973) (state bar cannot exclude aliens); Sugarman v. Dougall, 413 U.S. 634 (1973) (state cannot exclude aliens from civil service employment); Graham v. Richardson, 403 U.S. 365 (1971) (state cannot exclude aliens from welfare benefits).