

DEPORTING THE ADDICTED: ARGUMENTS FOR THE REPEAL OF SECTION 237(A)(2)(B)(II) OF THE IMMIGRATION AND NATIONALITY ACT

INTRODUCTION

Imagine the following three scenarios. Jacques, a French national, came to the United States as a lawful permanent resident four years ago to marry his wife, a United States citizen. They are expecting their first child in six months. They have lived continuously in Philadelphia where they intend to build a life and raise their child. Jacques remains in the United States as a lawful permanent resident and has elected not to pursue citizenship, as he is proud of his French heritage and wishes to maintain status as a French citizen. Within the past two years, Jacques has unfortunately experimented with and become addicted to amphetamines. In an effort to cure this problem, Jacques and his wife decided to seek help at a local drug clinic.

Carlos, a thirty-year-old Mexican citizen, entered the United States illegally fifteen years ago with his mother. They have remained in the San Diego area since then. Carlos earns a living in a shoe factory and is his mother's sole provider. He leads a relatively unremarkable life and has never been in trouble with the law. Over the past five years, Carlos has gradually become dependent on alcohol, specifically hard alcohol such as vodka. As the dependence became more severe, it began to interfere in Carlos's life. To regain control, he began attending Alcoholics Anonymous meetings at a local church. A month ago, the shoe factory laid him off, and, on his way home to break the unfortunate news to his mother, he stopped off at a neighborhood bar and had a few drinks. While walking home, he stumbled a couple of times, and, when approached by a police officer, he slurred his words. The officer arrested Carlos for public drunkenness. Carlos and his attorney have decided that at his arraignment next week, Carlos should plead guilty and ask the judge for leniency due to his addiction.¹

¹ This hypothetical assumes that the "public drunkenness" conviction by way of a guilty plea would not by itself constitute a ground of deportation under INA § 237(a)(2)(A)(i) (crimes of moral turpitude) nor under INA § 237(a)(2)(A)(ii) (multiple criminal convictions). *See* Immigration and Nationality Act ("INA") § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 1996).

Madeline, an Italian citizen, came to the United States as a child seventy years ago. As a lawful permanent resident, she lives in Buffalo where she raised her seven children and saw her many grandchildren and great-grandchildren grow up. Madeline, whose husband died ten years ago, lives a simple life, supplemented only by her social security checks and her late husband's meager pension. Five years ago, a doctor diagnosed Madeline with liver cancer. In an effort to provide Madeline comfort in her last years, her doctor prescribed morphine to dull the pain. Madeline's cancer is now in remission, but she has since become severely addicted to the pain killers. The addiction is destroying her relationship with her dozens of grandchildren and great-grandchildren. As a family, they decide to have her committed to a drug rehabilitation clinic so that she will be able to enjoy her final years drug-free.

Section 237(a)(2)(B)(ii) of the Immigration and Nationality Act ("INA") states that any alien who is a drug abuser or addict is deportable.² In each of the above scenarios, the non-citizen in question risks deportation under this provision if the Immigration and Naturalization Service ("INS") somehow learns of the alien's addiction.³ Section 237(a) lists all of the current deportation grounds, but subsection (a)(2)(B)(ii) in particular brushes up against several constitutional boundaries.⁴

This Note argues for the repeal of section 237(a)(2)(B)(ii) based on several arguments challenging the constitutionality of this provision.⁵ Part I of the Note examines the history of the immigration acts and the development of the congressional power to deport.⁶ Part II examines possible constitutional violations of section 237(a)(2)(B)(ii) including violations of the Eighth Amendment prohibition against cruel and unusual punishment, the Fourteenth Amendment Equal Protection Clause and the Fifth Amendment procedural and substantive due process protections.⁷ Finally, Part III argues that section 237(a)(2)(B)(ii) is unconstitutionally vague because it draws no dis-

² *Id.* § 237(a)(2)(B)(ii). INA § 237(a)(2)(B)(ii) provides that "[a]ny alien who is, or at any time after admission has been, a drug abuser or addict is deportable." *Id.* This provision was formerly within INA section 241, but the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208, Div. C., 110 Stat. 3009 amended the INA and re-designated the section to be set out as 8 U.S.C. § 1227.

³ See INA § 237(a)(2)(B)(ii).

⁴ *Id.* § 237(a); see *id.* § 237(a)(2)(B)(ii).

⁵ See *infra* note 292 and accompanying text.

⁶ See *infra* notes 9-63 and accompanying text.

⁷ See INA § 237(a)(2)(b)(ii); see also *infra* notes 64-272 and accompanying text.

inctions as to what particular types of drugs, nor what degree of addiction or abuse, would warrant deportation.⁸

I. DEVELOPMENT OF THE PLenary POWER DOCTRINE AND THE EVOLUTION OF CONGRESS'S RIGHT TO DEPORT

Since the late 1800s, the United States Supreme Court has recognized that Congress has the complete power, as an incident of sovereignty, to exclude foreigners.⁹ This plenary power was and continues to be the basis for all immigration legislation as it relates to restricting the types of individuals who are allowed to cross the United States border and regulating the types of individuals who are allowed to stay.¹⁰

In 1888, in *Chae Chan Ping v. United States* ("Chinese Exclusion Case"), the United States Supreme Court held that the power of exclusion of foreigners is an incident of sovereignty and thus Congress has the plenary power to pass legislation that excludes foreigners from the United States.¹¹ Chae Chan Ping was a Chinese laborer who entered the United States in 1875 and lived in San Francisco until 1887.¹² In 1887, he left for a visit to China, and upon his return, the INS denied him admission pursuant to an 1888 act that prohibited the return of all Chinese laborers who had left the United States.¹³ The Court rejected Chae Chan Ping's various constitutional challenges to the Act of 1888, reasoning that the congressional power to restrict immigration was an important element of maintaining sovereignty.¹⁴ The Court

⁸ See INA § 237(a)(2)(b)(ii); see also *infra* notes 273-91 and accompanying text.

⁹ See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *Massieu v. Reno*, 915 F. Supp. 681, 698 (D.N.J. 1996) (reiterating that legislative power over admission of aliens is absolute).

¹⁰ See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 (1952) (holding that an alien's status in this country is a matter of Congressional permission and tolerance, and an alien has no constitutional right to remain in the United States); *United States v. Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 1257 (1997) (same).

¹¹ 130 U.S. at 609.

¹² See *id.* at 582.

¹³ See *id.* In 1882, Congress passed an act which suspended the immigration of Chinese laborers for ten years. See Act of May 6, 1882, ch. 126, 22 Stat. 58 ("Act of 1882"); THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION PROCESS AND POLICY* 4 (3d ed. 1995). Because it was not Congress's intent for the Act of 1882 to affect Chinese laborers who were already in the United States, the statute established a procedure for the issuance of "certificates of identity" so that if a Chinese laborer chose to leave for a visit, he could re-enter. Act of 1882 § 4; see ALEINIKOFF, *supra*. Prior to his departure, Chae Chan Ping complied with the Act of 1882 and obtained a certificate of identity, believing that such certificate would entitle him to re-enter the United States without a problem. See *Chae Chan Ping*, 130 U.S. at 582. Congress passed another act in 1888, however, that prohibited the return of all Chinese laborers who had left the United States regardless of whether or not they obtained their certificates pursuant to the Act of 1882. See Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476 ("Act of 1888"); ALEINIKOFF, *supra*.

¹⁴ *Chae Chan Ping*, 130 U.S. at 608, 609. Chae Chan Ping argued that the Act of 1888 was

stated that not only does the government have the right to regulate immigration, but the government has the duty to do so in order to protect the country's independence.¹⁵ The Court concluded that a sovereign nation has the inherent right and the plenary power to exclude foreigners and that such a right cannot be granted away or restrained.¹⁶ The Supreme Court thus held that Congress's refusal to allow Chae Chan Ping reentry into the United States was a valid exercise of legislative power.¹⁷

It was in this *Chinese Exclusion Case* that the Supreme Court first discussed the plenary power doctrine, which essentially placed unfettered authority with respect to immigration laws and restrictions in the hands of the federal government.¹⁸ The plenary power doctrine finds its roots in the concept of absolute and inherent sovereignty, though there is no one particular provision in the Constitution from which it can find support.¹⁹

Four years later, in 1892, in *Nishimura Ekiu v. United States*, the United States Supreme Court upheld the Immigration Act of 1891 ("Act of 1891"), which codified existing exclusion laws and provided for exclusive inspection of aliens by the federal government.²⁰ When petitioner, Nishimura Ekiu, arrived at the United States border in 1891,

unconstitutional for several reasons. See *id.* at 584-89. First, he argued that the Act of 1888 contravened the Burlingame Treaty of 1868 which recognized that an alien has an "inherent and inalienable right . . . to change his home and allegiance" as well as the "mutual advantage of free migration and emigration of [American and Chinese] citizens." *Id.* at 585. Second, he claimed that the INS detained him without due process, and thus in violation of the Fifth Amendment. See *id.* at 584. Third, he argued that he had a vested right to return to the United States because he had previously lived there as a peaceable resident. See *id.* at 586-88. Fourth, Chae Chan Ping argued that the Act of 1888 violated the ex post facto prohibition in the Constitution because it was applied retroactively. See *id.* at 589. The Court rejected all of Chae Chan Ping's arguments. *Id.* at 603, 609.

¹⁵ *Id.* at 605-06.

¹⁶ *Id.* at 609.

¹⁷ *Id.* at 605-06, 609.

¹⁸ See *id.*, at 605-06, 609; Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 965 (1993); see also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that control over matters of immigration is a sovereign prerogative).

¹⁹ See Scaperlanda, *supra* note 18, at 972. Although no one particular provision of the Constitution provides a justification for the plenary power to regulate immigration, commentators have suggested that there are several possible constitutional clauses or doctrines that may apply. See ALEINIKOFF, *supra* note 13, at 8-14. The power to regulate immigration may stem from the Commerce Power, U.S. CONST. art. I, § 8, cl. 3, the Naturalization Power, U.S. CONST. art. I, § 8, cl. 4, the Migration and Importation Clause, U.S. CONST. art. I, § 9, cl. 1, the Foreign Affairs Power, or, as the Court in the *Chinese Exclusion Case* held, the power may stem from inherent powers of a sovereign nation. See *Chae Chan Ping*, 130 U.S. at 609; ALEINIKOFF, *supra* note 13, at 8-14.

²⁰ Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084 ("Act of 1891"); *Nishimura Ekiu v. United*

an inspector refused to allow her to enter pursuant to an 1882 act that required exclusion of an alien if the inspector believed that the alien would likely become a public charge.²¹ The main issue in this case was the validity and effect of the inspector's actions, and Nishimura argued that the inspector did not have the authority to order exclusion because the Secretary of the Treasury (rather than the Superintendent of Immigration) had appointed him.²² The Court rejected Nishimura's argument on the grounds that the Act of 1891 specifically delegated to the Secretary of the Treasury the power to appoint immigration inspectors.²³ The Court, in an often cited passage, reiterated its reliance on the plenary power doctrine as a means of settling immigration issues:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.²⁴

The Court concluded that pursuant to the plenary power to regulate immigration, Congress had the authority to pass legislation that delegated authority to the Secretary of the Treasury and, therefore, the Act of 1891 was constitutional and valid.²⁵ The Court thus affirmed the Secretary's decision to exclude Nishimura.²⁶

The aliens in the *Chinese Exclusion Case* and *Nishimura* were seeking entry into the United States, and thus the issue in their cases was whether the exclusion from entry was proper.²⁷ Exclusion, however, was not the only means available to Congress in regulating immigration.²⁸

States, 142 U.S. 651, 664 (1892); see ALENIKOFF, *supra* note 13, at 14. Section 7 of the Act of 1891 established the office of superintendent of immigration and provided the basis for his or her power. See Act of 1891 § 7; *Nishimura*, 142 U.S. at 662.

²¹ See Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 ("Act of Aug. 1882"); *Nishimura*, 142 U.S. at 652, 661. The Act of Aug. 1882 provided that the Secretary of the Treasury had the duty to examine the immigrants who are seeking entry, and "if on such examination there shall be found among such passengers any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge, . . . such persons shall not be permitted to land." Act of Aug. 1882 § 2; see *Nishimura*, 142 U.S. at 661.

²² See *Nishimura*, 142 U.S. at 662-63.

²³ *Id.* at 663.

²⁴ *Id.* at 659.

²⁵ *Id.* at 659, 664.

²⁶ *Id.* at 664.

²⁷ *Nishimura*, 142 U.S. at 652; *Chae Chan Ping*, 130 U.S. at 581-82.

²⁸ See ALENIKOFF, *supra* note 13, at 511-12.

Congress also had the power to pass legislation regarding the ability to deport aliens who were already within the United States borders.²⁹

In 1888, Congress enacted the first permanent deportation statutes.³⁰ One of these statutes required the removal, at any time after entry, of all persons of Chinese descent who were found inside the United States in violation of the law.³¹ The other statute required the removal by administrative process, within one year after entry, of all aliens who had landed in violation of the 1885 and 1887 contract labor laws prohibiting the importation or migration of aliens who had pre-existing contracts to work in the United States.³² Congress amended the deportation laws in 1892 to state that all Chinese laborers in the United States were required to obtain a certificate of residence from the Collector of Internal Revenue, and, according to the regulations promulgated pursuant to this amendment, the Collector would only issue a certificate on the "affidavit of at least one credible white witness."³³ The Act of 1892 provided that the government could arrest and deport any alien who failed to acquire this certificate within the requisite time period.³⁴

²⁹ See *id.* Deportation refers to the removal of a non-citizen who is within the United States borders, and exclusion refers to the non-admittance of a non-citizen who is waiting at the border. See *id.* at 20-21. Traditionally, the amount of due process the INS affords to an alien depends on which proceeding the INS has commenced against the alien. See *id.* at 512. In deportation proceedings, the alien has generally had more due process rights, both procedural and substantive, and these rights are based in part on the notion that once someone is within the border, he or she has a "stake" or a vested interest. See, e.g., *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that an alien who has entered the country is entitled to due process under the Fifth Amendment and cannot be deported without an opportunity for a hearing); *Caballero v. Caplinger*, 914 F. Supp. 1374, 1376 (E.D. La. 1996) (holding that aliens in deportation proceedings are entitled to constitutional protections of due process). Conversely, an alien in exclusion proceedings has significantly less due process rights. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating that an alien at the border stands on a different footing than an alien who is already within the border); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress, it is due process as far as an alien is concerned.") In the recently enacted HIRAIRA, the distinction between deportation and exclusion proceedings has been eradicated. HIRAIRA § 301, Pub. L. No. 104-208, Div. C., 110 Stat. 3009 (1996) (to be codified 8 U.S.C. § 1229). It is unclear what effect abolishing this distinction will have on the particular rights afforded to an alien in a given proceeding. The proceeding for either category is now termed "Removal Proceedings." See *id.* § 304.

³⁰ See Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 ("Act of Oct. 1888"); Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476 ("Act of Sept. 1888"); Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 312 (1956).

³¹ See Act of Sept. 1888; Maslow, *supra* note 30, at 312.

³² See Act of Oct. 1888 (amended Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 and Act of Feb. 23, 1887, ch. 220, 24 Stat. 414); Maslow, *supra* note 30, at 312.

³³ Act of May 5, 1892, ch. 60 § 6, 27 Stat. 25 ("Act of 1892"); see ALEINIKOFF, *supra* note 13, at 21.

³⁴ Act of 1892; see ALEINIKOFF, *supra* note 13, at 21.

In 1893, in *Fong Yue Ting v. United States*, the United States Supreme Court upheld the constitutionality of the Act of 1892 and ruled that Congress had the absolute right, pursuant to the plenary power doctrine and the notion of inherent sovereignty, to pass deportation legislation.³⁵ The INS arrested Fong Yue Ting, a Chinese laborer, for failure to produce a certificate of residence as required by the Act of 1892.³⁶ An immigration judge subsequently ordered Fong Yue Ting's deportation because he could not establish his residency through the testimony of at least one credible white witness.³⁷ The Court rejected Fong Yue Ting's claims that he was deprived of life, liberty and property without due process of law.³⁸ The Court stated that the right to deport immigrants who have not been naturalized or taken any steps toward becoming citizens is as absolute and unqualified as the right to exclude.³⁹ The Court relied on the plenary power doctrine to uphold the constitutionality of the Act of 1892 and held that the power to exclude aliens as well as the power to expel them is an inherent power incident to sovereignty.⁴⁰ The Court thus upheld Fong Yue Ting's deportation order.⁴¹

In 1907, Congress expanded the immigration law to provide for the deportation of aliens engaged in prostitution and aliens who had become public charges due to conditions that existed prior to their entry into the United States.⁴² In 1917, Congress again extended the deportation grounds to include all those who became public charges from pre-entry causes and those who were sentenced to jail for two or

³⁵ Act of 1892; 149 U.S. 698, 711 (1893).

³⁶ See *Fong Yue Ting*, 149 U.S. at 702.

³⁷ See *id.* at 704.

³⁸ *Id.* at 730. In his dissent, Justice Brewer argued that the act is unconstitutional because it imposes punishment without due process of law. *Id.* at 733 (Brewer, J., dissenting). He said, "[d]eportation is punishment. It involves first an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property." *Id.* at 740 (Brewer, J., dissenting). Justice Field, in his dissent, also was unwilling to accept that deportation is not punishment. *Id.* at 759 (Field, J., dissenting). He said that "if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." *Id.* at 759 (Field, J., dissenting).

³⁹ *Id.* at 707. The Court commented on the fact that the Chinese immigrants had taken no steps toward becoming citizens; yet, until 1943, the law prohibited them from naturalizing. See Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (persons of Chinese origin specifically barred from naturalization), *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 601; *Fong Yue Ting*, 149 U.S. at 724; Scaperlanda, *supra* note 18, at 980 n.56.

⁴⁰ See *Fong Yue Ting*, 149 U.S. at 707.

⁴¹ *Id.* at 732.

⁴² Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 899-900; see Maslow, *supra* note 30, at 313.

more crimes involving "moral turpitude."⁴³ This act and subsequent amendments remained in effect until 1952.⁴⁴

In 1952, Congress passed the McCarran-Walter Act which required the deportation of eighteen general classes of aliens.⁴⁵ In this act, Congress outlined the procedures involved in deporting aliens and also defined the limited discretion of the Attorney General in deportation proceedings.⁴⁶ The McCarran-Walter Act provided, for the first time, for deportation of aliens addicted to narcotics.⁴⁷ The act did not distinguish between those aliens who had cured their addiction and those who had not.⁴⁸ Similarly, the act required deportation even if the alien never engaged in criminal activity with respect to his addiction or was a useful member of the community.⁴⁹ Critics of this provision in the McCarran-Walter Act feared that it was an unfair provision, and they argued for its repeal.⁵⁰ Although ultimately overridden, President Franklin D. Roosevelt vetoed the provision and stated that narcotics addiction is a lamentable disease and should not be treated as a crime.⁵¹

Despite the criticism, the McCarran-Walter Act, at least with respect to the provision regarding narcotics addiction as a ground for

⁴³ Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889; see Maslow, *supra* note 30, at 313. Adequate consideration to the meaning of the term "moral turpitude" is beyond the scope of this Note. In fact, the leading treatise on immigration law states that "[a]ttempts to arrive at a workable definition of moral turpitude never have yielded entire satisfaction. . . . [T]his term defies precise definition, since its limits are charted by human experience." ALEINIKOFF, *supra* note 13, at 544 (quoting CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, § 71.05[1][d][i] (1994)). BLACK'S LAW DICTIONARY provides the most common definition of moral turpitude: "the act of baseness, vileness or the depravity in private and social duties which man owes to his fellow man," but even this definition gives little indication of how the courts have struggled to categorize a particular crime as one involving moral turpitude. BLACK'S LAW DICTIONARY 698 (6th ed. 1991); see ALEINIKOFF, *supra* note 13, at 544. For examples of how the courts have interpreted "moral turpitude," see *Jordan v. DeGeorge*, 341 U.S. 223, 229 (1951) (holding that crime involves moral turpitude if fraud is an ingredient) and *Goldeshtein v. INS*, 8 F.3d 645, 647 (9th Cir. 1993) (holding that the statutory definition of crime, not the specific conduct that resulted in conviction, determines whether the crime includes intent to defraud as an element, and thus one involving moral turpitude).

⁴⁴ See Maslow, *supra* note 30, at 313.

⁴⁵ McCarran-Walter Act § 241, 8 U.S.C. § 1251 (1952); see Maslow, *supra* note 30, at 314.

⁴⁶ See McCarran-Walter Act § 242; Maslow, *supra* note 30, at 317.

⁴⁷ McCarran-Walter Act § 241; Maslow, *supra* note 30, at 339. The McCarran-Walter Act provided for the deportation of any alien who "is, or hereafter at anytime after entry has been, a narcotic drug addict." McCarran-Walter Act § 241.

⁴⁸ See McCarran-Walter Act § 241; Maslow, *supra* note 30, at 339.

⁴⁹ See McCarran-Walter Act § 241; Maslow, *supra* note 30, at 339.

⁵⁰ See Maslow, *supra* note 30, at 339.

⁵¹ See *id.*

deportation, remained intact until 1990.⁵² The Immigration Act of 1990 amended the grounds of deportation by consolidating the eighteen categories of deportable aliens into five broader classes.⁵³ This statute also amended the language of the drug addiction provision of the McCarran-Walter Act by dropping the term "narcotic."⁵⁴ This change reflected Congress's recognition that certain drugs, like cocaine, are not narcotics but are nevertheless addictive, and that abuse of drugs, even absent addiction, can have a harmful impact on and pose a danger to society.⁵⁵

The current version of the INA leaves the language with respect to the addiction provision relatively unchanged.⁵⁶ Recent amendments to this version, however, render the consequences significantly more harsh in that the possibility for relief is greatly curtailed.⁵⁷ The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") removed the possibility of a waiver of deportation for deportation orders based on drug offenses.⁵⁸ Prior to the passage of this law, the immigration statutes provided for discretionary relief of deportation.⁵⁹ The AEDPA, however, eliminated waivers of deportation for any alien who is deportable under, *inter alia*, section 237(a)(2)(B)(ii).⁶⁰ Under section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of

⁵² See McCarran-Walter Act § 241; Immigration Act of 1990 § 602(a) ("Immigration Act of 1990" or "INA"), 8 U.S.C. § 1251.

⁵³ See INA § 602(a).

⁵⁴ Compare *id.* ("Any alien who is, or at any time after entry has been, a *drug abuser or addict* is deportable.") (emphasis added) with McCarran-Walter Act § 241 ("[a]ny alien in the United States shall, upon the order of the Attorney General, be deported who . . . is, or hereafter at any time after entry, has been, a *narcotic drug addict* . . .") (emphasis added).

⁵⁵ See H.R. REP. NO. 101-723, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6735.

⁵⁶ See INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 1996). The section numbers changed with the passage of the IIRAIRA, Pub. L. No. 104-208, Div. C., 110 Stat. 3009 (1996). See *supra* note 3 and accompanying text.

⁵⁷ See Anti-Terrorism and Effective Death Penalty Act of 1996 § 440(a) ("AEDPA"), Pub. L. No. 104-132 (April 24, 1996) (to be codified at 8 U.S.C. § 1105a(a)).

⁵⁸ *Id.* The phrase "drug offenses" in this context refers to criminal convictions as well as drug addiction. See *id.* Therefore, the AEDPA does not only remove a waiver possibility for those convicted of drug crimes, but it also removes the possibility for those who are merely addicts. See *id.*

⁵⁹ See INA § 212(c). Although the language in this section appears to indicate that this relief is only available in exclusion proceedings, the Attorney General has ruled that section 212(c) relief is likewise available in deportation proceedings. See *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) (holding that fundamental fairness dictates that section 212(c) should apply in both deportation and exclusion hearings); Dan Kesselbrenner, *The "Anti-Terrorism" Law*, IMMIGR. NEWS. (National Immigration Project, National Lawyers Guild, Inc., Boston, MA), June 1996, at 7.

⁶⁰ AEDPA § 440(a); see INA § 237(a)(2)(B)(ii); Kesselbrenner, *supra* note 59, at 7.

1996 ("HRAIRA") there are still some situations where cancellation of removal is a possible remedy, but those situations are limited and left entirely to the Attorney General's discretion.⁶¹ In addition, the AEDPA severely restricts the opportunity for judicial review of a deportation order.⁶² Thus, even though the current version of the INA with respect to drug addiction has remained relatively unchanged, by removing many procedural protections, the AEDPA severely increased the potential harshness of INA section 237(a)(2)(B)(ii).⁶³ Where there is no possibility of judicial review and where the only possibility of a waiver is in the Attorney General's discretion, this provision, if enforced, may have harsh effects never intended by the original drafters of this provision.

II. CONSTITUTIONAL VIOLATIONS OF SECTION 237

Although Congress has the plenary power to enact legislation to restrict immigration as well as the power to enact legislation pertaining to the rights of an alien to remain in the United States, such laws may nevertheless violate the Constitution.⁶⁴ It is well settled that the judiciary applies deferential treatment to such legislation, but Congress must remain within the confines of the United States Constitution.⁶⁵ Congress should thus repeal section 237(a)(2)(B)(ii), or in the alternative, the courts should declare that section unconstitutional because it violates several provisions in the Constitution.⁶⁶

⁶¹ HRAIRA § 304.

⁶² AEDPA § 440(a). AEDPA § 440(a) amended 8 U.S.C. § 1105a(a) to read, in pertinent part, that any final order of deportation as a result of a criminal conviction (which includes deportation orders based on drug addiction under § 237(a)(2)(B)(ii)) shall not be subject to review by any court. AEDPA § 440(a); see *Duldulao v. INS*, 90 F.3d 396, 399–400 (9th Cir. 1996) (upholding the constitutionality of denial of judicial review stating that there is no constitutional right to judicial review in deportation cases); *Hincapie-Nieto v. INS*, 92 F.3d 27, 29–30, 31 (2d Cir. 1996) (upholding the constitutionality of denial of judicial review, especially because habeas corpus relief was still available as a remedy).

⁶³ INA § 237(a)(2)(B)(ii); AEDPA § 440(a).

⁶⁴ See *Massieu v. Reno*, 915 F. Supp. 681, 698 (D.N.J. 1996) ("[n]otwithstanding the political branches' near plenary power over aliens, this power is circumscribed by the constitutional constraints imposed on the exercise of all governmental authority.")

⁶⁵ See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (stating that the Congress's power over the admission of aliens is absolute); *Mbiya v. INS*, 930 F. Supp. 609, 611 (N.D. Ga. 1996) (stating that although Congress's power to deport is plenary, it is nevertheless subject to judicial intervention under the paramount law of the Constitution); *Chan v. Reno*, 916 F. Supp. 1289, 1296 (S.D.N.Y. 1996) (stating that judicial review in immigration matters is narrowly circumscribed); *Massieu*, 915 F. Supp. at 698 (D.N.J. 1996) (same).

⁶⁶ INA § 237(a)(2)(B)(ii); see *infra* note 292 and accompanying text.

A. Violation of the Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.⁶⁷ Section 237(a)(2)(B)(ii) of the INA violates the Eighth Amendment's prohibition against cruel and unusual punishment because it unconstitutionally characterizes a person as an addict and imposes an extreme consequence due to such status.⁶⁸ Although the Supreme Court has declared that deportation does not constitute punishment for purposes of the Eighth Amendment protection, this Note analogizes the characterization of "addict" in the immigration context to those situations in the criminal context where the Court has found that similar characterizations violate the Constitution.⁶⁹

In 1958, in *Trop v. Dulles*, the United States Supreme Court struck down a portion of the nationality law that stripped citizenship from those convicted of desertion from the military during a war.⁷⁰ The petitioner, a native-born American, deserted the United States Army.⁷¹ In 1952, Trop applied for a passport, but was denied on the ground that under section 401(g) of the Nationality Act of 1940, he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.⁷² The Court invalidated the expatriation provision in part because it violated the Eighth Amendment.⁷³ The Court stated that the framers of the provision intended expatriation to constitute punishment.⁷⁴ Moreover, the Court reasoned that because denationalization destroyed an individual's status in society, it constituted cruel and unusual punishment.⁷⁵ The Court thus concluded that the Eighth Amendment forbids Congress to punish by taking away citizenship.⁷⁶

⁶⁷ U.S. CONST. amend. VIII. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

⁶⁸ See *id.*; INA § 237(a)(2)(B)(ii).

⁶⁹ See, e.g., *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (invalidating as unconstitutional under the Eighth Amendment a statute criminalizing an involuntary status); *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893) (stating that deportation is not punishment).

⁷⁰ 356 U.S. 86, 101 (1958).

⁷¹ See *id.* at 87.

⁷² See Nationality Act of 1940 § 401(g), ch. 876, 54 Stat. 1137, 1168-69, 8 U.S.C. §§ 501-504, repealed by Act of June 27, 1952, ch. 477, 66 Stat. 280; *Trop*, 356 U.S. at 88.

⁷³ *Trop*, 356 U.S. at 101.

⁷⁴ *Id.* at 97.

⁷⁵ See *id.* at 101-02.

⁷⁶ *Id.* at 103.

In 1962, in *Robinson v. California*, the United States Supreme Court held that a statute criminalizing narcotic addiction violated the Eighth Amendment.⁷⁷ The defendant was a narcotics addict, and the State charged the defendant with violating a statute that made it a misdemeanor punishable by imprisonment for any person to be addicted to narcotics.⁷⁸ A police officer arrested the defendant after observing scar tissue and discoloration on the defendant's arm, and based on his experiences, the officer determined that the defendant had used narcotics.⁷⁹ The Court acknowledged that a state has a right to regulate narcotic drug traffic, but implied that such regulation is limited to specific acts, such as use, purchase, sale or possession of narcotics and may not apply to the status of narcotics addiction.⁸⁰ The Court stated that narcotic addiction is an illness contracted innocently or involuntarily.⁸¹ The Court concluded that a state law that imprisons a diseased individual as a criminal is an infliction of cruel and unusual punishment unless such addiction is accompanied by a volitional act.⁸² Thus, the Court reversed Robinson's conviction on the grounds that the statute upon which he was convicted was unconstitutional under the Eighth Amendment.⁸³

In 1977, in *Ingraham v. Wright*, the United States Supreme Court ruled that the Eighth Amendment's prohibition against cruel and unusual punishment protected only those convicted of a crime.⁸⁴ Pupils in a junior high school alleged that they were denied their constitutional rights when their teachers used corporal punishment as a means of discipline.⁸⁵ In *Ingraham*, petitioners alleged several incidents of severe corporal punishment, including an instance where a teacher paddled one of the petitioners more than twenty times, resulting in a hematoma requiring medical attention.⁸⁶ The Court rejected petitioners' claim that the teachers' actions violated the Eighth Amendment's prohibition against cruel and unusual punishment.⁸⁷ The Court looked to the history of the Amendment, as well as to the Court's prior decisions that construed the proscription against cruel and unusual

⁷⁷ 370 U.S. 660, 666-67 (1962).

⁷⁸ See *id.* at 660, 663.

⁷⁹ See *id.* at 662.

⁸⁰ See *id.* at 665-66.

⁸¹ *Id.* at 667.

⁸² *Robinson*, 370 U.S. at 667.

⁸³ *Id.* at 666-67, 668.

⁸⁴ 430 U.S. 651, 664 (1977).

⁸⁵ See *id.* at 653, 655.

⁸⁶ *Id.* at 657.

⁸⁷ *Id.* at 664.

punishment to protect only those convicted of crimes.⁸⁸ The Court stated that a schoolchild has little need for the protection of the Eighth Amendment and thus held that when public school teachers impose corporal punishment as a disciplinary tool, the Eighth Amendment does not apply.⁸⁹

In 1978, in *McJunkin v. Immigration and Naturalization Service*, the United States Court of Appeals for the Ninth Circuit held that section 241(a)(11) of the INA did not violate the Eighth Amendment.⁹⁰ *McJunkin*, a citizen of Germany, lawfully entered the United States in 1956.⁹¹ Pursuant to the Narcotic Addict Rehabilitation Act ("NARA"), *McJunkin* voluntarily sought, and received pursuant to a hearing, an order of commitment to a drug rehabilitation clinic due to his narcotics addiction.⁹² The INS received the order of commitment, which characterized the alien as a drug addict, and the INS used this order to initiate deportation proceedings against the alien.⁹³

McJunkin first argued that the INS could not use a NARA order as evidence in a deportation proceeding.⁹⁴ *McJunkin* relied on a provision in the NARA that provides that "[t]he results of any hearing, examination, test or procedure to determine narcotic addiction of any patient under this subchapter shall not be used against such patient in any criminal proceeding."⁹⁵ The court rejected this argument on the ground that deportation proceedings constitute civil, not criminal, proceedings and thus this provision of the NARA did not apply.⁹⁶ *McJunkin* also argued that admitting this order in a deportation pro-

⁸⁸ *Id.* In his dissent, Justice White disagreed with the majority's limitation on the Eighth Amendment's prohibitions. *See id.* at 685 (White, J., dissenting). He looked to the express language of the Amendment and determined that there was no such limitation. *See id.* (White, J., dissenting). He also relied on the fact that the Framers deliberately excluded the word "criminal" as evidence that the Amendment was designed to prohibit *all* inhumane or barbaric punishments regardless of whether the offense was civil or criminal in nature. *See id.* (White, J., dissenting); *see also* *Whitney v. Albers*, 475 U.S. 312, 318-19 (1986) (reiterating that the Eighth Amendment prohibition against cruel and unusual punishment was only applicable in criminal adjudications).

⁸⁹ *Ingraham*, 430 U.S. at 670, 671.

⁹⁰ 579 F.2d 533, 535 (9th Cir. 1978); *see* INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1976). Section 241 of the INA provided for the deportation of any alien who "is, or hereafter at any time after entry has been, a narcotic drug addict . . ." INA § 241(a)(11).

⁹¹ *See McJunkin*, 579 F.2d at 535.

⁹² *See* Narcotic Addict Rehabilitation Act ("NARA") §§ 2-316, 42 U.S.C. §§ 3401-3426 (1976); *McJunkin*, 579 F.2d at 535.

⁹³ *See McJunkin*, 579 F.2d at 535. The opinion is unclear as to how INS obtained the order of commitment entered by the district court. *See id.*

⁹⁴ *See id.*

⁹⁵ NARA § 309; *see McJunkin*, 579 F.2d at 535.

⁹⁶ *McJunkin*, 579 F.2d at 535; *see Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (holding

ceeding would defeat the reformatory purpose of the NARA as it would ultimately discourage alien addicts from reaping the benefits of the NARA.⁹⁷ In response, the court stated that it was Congress's task, not the courts', to change the words of the NARA to include deportation proceedings.⁹⁸

Secondly, McJunkin argued that the NARA hearing did not establish an addiction for purposes of deportation.⁹⁹ The Ninth Circuit also rejected this argument, but declined to hold as a matter of law that a NARA order would automatically provide sufficient evidence in all deportation cases.¹⁰⁰ The court recognized that in each of the proceedings, different standards of proof apply—deportation proceedings require proof by "clear, convincing and unequivocal language," and commitment under the NARA is not necessarily as demanding.¹⁰¹ The court thus held that an addiction established for NARA purposes should constitute no more than a *prima facie* case subject to the alien's rebuttal.¹⁰² In this particular case, however, the court considered the NARA commitment order sufficient to establish addiction for purposes of deportation.¹⁰³

McJunkin's third argument challenged the constitutionality of addiction as a ground for deportation.¹⁰⁴ McJunkin argued that under *Robinson*, the provision of the INA that provided for deportation of an addicted alien was a violation of the Eighth Amendment.¹⁰⁵ The Ninth Circuit rejected McJunkin's analogy to *Robinson*.¹⁰⁶ The court based this rejection on the theory that deportation does not rise to the level of a criminal sanction.¹⁰⁷ The court stated that under the Constitution, the freedom from criminal sanctions is unrelated to an alien's privilege to enter or remain in this country and thus, they are subject to different

that deportation is a civil rather than criminal proceeding, and thus no matter how severe the consequences, Eighth Amendment protections do not apply).

⁹⁷ See *McJunkin*, 579 F.2d at 535.

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting *Woodby v. INS*, 385 U.S. 276, 285–86 (1966)). The court, however, did not expressly state what the requisite standard of proof is in an NARA commitment hearing. See *id.* at 536 & n.1.

¹⁰² *McJunkin*, 579 F.2d at 536.

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ U.S. CONST. amend. VIII; see INA § 241(a)(11); *McJunkin*, 579 F.2d at 536. For a discussion of *Robinson*, see *supra* notes 77–83 and accompanying text.

¹⁰⁶ See *Robinson*, 370 U.S. at 667; *McJunkin*, 579 F.2d at 536.

¹⁰⁷ See *McJunkin*, 579 F.2d at 536; see also *Harisiades*, 342 U.S. at 594; *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893).

limitations.¹⁰⁸ The Ninth Circuit further noted that Congress has the plenary power to impose conditions on an alien who wishes to remain in this country which they could not similarly impose on United States citizens.¹⁰⁹ The court thus upheld McJunkin's deportation order as being a constitutional exercise of power.¹¹⁰

In 1994, in *Pottinger v. Miami*, the United States District Court for the Southern District of Florida held that the city's practice of arresting homeless persons for performing life-sustaining activities such as sleeping, standing and congregating in public places violated the Eighth Amendment.¹¹¹ In *Pottinger*, the plaintiffs were homeless men, women and children who argued that their status of being homeless was involuntary and beyond their immediate ability to change.¹¹² They argued that the conduct for which they were arrested was inseparable from their status as homeless.¹¹³ Relying on *Robinson*, the court stated that criminalizing an involuntary status is unconstitutional under the Eighth Amendment.¹¹⁴ The plaintiffs in this case, the court stated, had no choice but to eat, sleep and engage in other life-sustaining activities in public.¹¹⁵ Thus, the court held, arresting them for such conduct was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.¹¹⁶

Many states have attempted to criminalize a "status," such as addiction or homelessness, but the Supreme Court has declared such statutes unconstitutional violations of the Eighth Amendment guarantee against "cruel and unusual punishment."¹¹⁷ The Court struck down these statutes, reasoning that penalizing a person for an involuntary status violates the constitutional prohibition against cruel and unusual punishment.¹¹⁸ Examples of "status" characteristics include age, race, gender, national origin and illness.¹¹⁹

¹⁰⁸ *McJunkin*, 579 F.2d at 536.

¹⁰⁹ *Id.* at 536 (citing *Brice v. Pickett*, 515 F.2d 153 (9th Cir. 1975)).

¹¹⁰ *Id.*

¹¹¹ 810 F. Supp. 1551, 1559, 1565 (S.D. Fla. 1992); see also *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (looking to various factors such as the involuntariness of the acquisition of that characteristic and the degree to which an individual has control over that characteristic in determining whether or not a characteristic was a "status").

¹¹² 810 F. Supp. at 1561.

¹¹³ See *id.*

¹¹⁴ *Id.* at 1561-62; see *Robinson*, 370 U.S. at 666.

¹¹⁵ *Pottinger*, 810 F. Supp. at 1565.

¹¹⁶ *Id.*

¹¹⁷ See U.S. CONST. amend. VIII; see, e.g., *Robinson*, 370 U.S. at 666-67; *Pottinger*, 810 F. Supp. at 1562.

¹¹⁸ *Robinson*, 370 U.S. at 666-67; *Pottinger*, 810 F. Supp. at 1565.

¹¹⁹ See *Joyce*, 846 F. Supp. at 857.

Thus, although the Supreme Court's decisions clearly reflect a desire to separate criminal sanctions from deportation, the Supreme Court has also declared that statutes criminalizing a status are unconstitutional.¹²⁰ *McJunkin* thus may have been more successful had he attacked this particular INS provision arguing not that the ultimate sanction of deportation was cruel and unusual, but rather that the categorization as an addict was cruel and unusual, and thus in violation of the Eighth Amendment.¹²¹ In *Robinson*, the Court did not base its holding on the notion that the actual punishment was cruel and unusual, but rather on the notion that criminalizing something out of a person's control was cruel and unusual.¹²² If the Supreme Court admonishes the criminalization of the status of addiction, then deporting an individual solely because of his or her addiction would also violate the Constitution.¹²³ Thus, in *McJunkin's* case, the law is well settled that he cannot argue that deportation, as a resulting sanction, was cruel and unusual, but the law is significantly less settled with respect to the argument that the mere categorization of "addict" is in and of itself cruel and unusual punishment.¹²⁴

Even if the court were to accept that the Eighth Amendment prohibits such a categorization, this argument may nevertheless fail because the Supreme Court has interpreted the Eighth Amendment as applicable only to criminal matters.¹²⁵ Though the Court may have in the past limited Eighth Amendment protections to only those situations involving a criminal matter, the express language of the Amendment contains no such restriction.¹²⁶ The Court in *Ingraham* cites to the history of the Amendment for support of its holding that the

¹²⁰ See *Robinson*, 370 U.S. at 666-67; *McJunkin*, 579 F.2d at 536; *Pottinger*, 810 F. Supp. at 1565; see also *Harisiades*, 342 U.S. at 594; *Fong Yue Ting*, 149 U.S. at 709.

¹²¹ See *Robinson*, 370 U.S. at 666; *McJunkin*, 579 F.2d at 536.

¹²² See *Robinson*, 370 U.S. at 667. The Court stated, "[t]o be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*

¹²³ See INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 1996); *Robinson*, 370 U.S. at 666. This Note does not challenge the constitutional validity, nor the public policy concerns, with respect to the grounds of deportation that deal with narcotic criminal offenses. This provision, however, does not distinguish between those who act upon their addiction in a criminal manner and those who are innocently afflicted. See INA § 237(2)(B)(i)-(ii) (criminal offenses as a ground for deportation).

¹²⁴ See *Robinson*, 370 U.S. at 666-67; *McJunkin*, 579 F.2d at 536; *Pottinger*, 810 F. Supp. at 1565; see also *Harisiades*, 342 U.S. at 594; *Fong Yue Ting*, 149 U.S. at 709.

¹²⁵ U.S. CONST. amend. VIII; see *Ingraham*, 430 U.S. at 664.

¹²⁶ See U.S. CONST. amend. VIII; *Ingraham*, 430 U.S. at 664; see also *Ingraham*, 430 U.S. at 685 (White, J., dissenting).

Eighth Amendment protects only those convicted of a crime; however, the majority opinion is unconvincing.¹²⁷ Justice White, in his dissenting opinion in *Ingraham*, is more persuasive than the majority.¹²⁸ In arguing that the Eighth Amendment is not limited to criminal matters, Justice White relies on the fact that the Framers deliberately excluded the word "criminal" in the Amendment and regards such exclusion as strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments.¹²⁹

In addition, the popular definition of "punishment" extends well beyond criminal sanction, thus a plain language interpretation of the Eighth Amendment would similarly extend beyond criminal sanction.¹³⁰ According to *Webster's Ninth New Collegiate Dictionary*, for example, one definition of punishment is severe, rough or disastrous treatment.¹³¹ Categorizing someone as an addict for purposes of governmental action is arguably "severe, rough or disastrous treatment," and thus under a plain language interpretation of the Eighth Amendment, this governmental action is subject to the Eighth Amendment limitations regardless of whether or not the categorization occurred in a criminal or civil setting.

Although it purports to keep alienage issues outside of Eighth Amendment protections, the United States Supreme Court has to some level acknowledged that the right to maintain residency in the United States is a constitutionally protected right.¹³² The observations in *Trop*, for example, seem inconsistent with the prevailing view that deportation does not constitute punishment.¹³³ This inconsistency supports the argument that deportation does in fact rise to the level of punishment and therefore should enjoy the protections of the Eighth Amendment. Although the statute in *Trop* did impose a sanction for a crime, and thus fell squarely within Eighth Amendment protections, the Court nonetheless spoke to the harshness of denationalization, which is similar to deportation.¹³⁴ Thus, if the Supreme Court was willing to hold that denationalization constitutes cruel and unusual

¹²⁷ *Ingraham*, 430 U.S. at 664-66; see *id.* at 685 (White, J., dissenting).

¹²⁸ *Id.* (White, J., dissenting).

¹²⁹ See *id.* (White, J., dissenting).

¹³⁰ U.S. CONST. amend. VIII; WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 955 (1988).

¹³¹ WEBSTER'S, *supra* note 130, at 955.

¹³² See *Trop*, 356 U.S. at 101.

¹³³ See *id.* at 101; see also *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (stating that "[deportation] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (observing that deportation may be the equivalent of banishment or exile).

¹³⁴ 356 U.S. at 88, 101.

punishment because it destroys an individual's status in society, then deportation, which has similar consequences, must also constitute cruel and unusual punishment.¹³⁵

In addition, although the notion that deportation is civil, not criminal, finds support in the case law, many dissenters and scholars challenge this concept as a legal fiction.¹³⁶ In arguing against the Alien and Sedition Acts, for example, James Madison expressed the belief that deportation constitutes punishment for Eighth Amendment purposes.¹³⁷ More recently, as judges and lawyers give more consideration to immigration consequences when contemplating plea arrangements and imposing sentences, the line the courts had previously drawn dividing deportation from criminal sanction has blurred.¹³⁸ Thus, section 237(a)(2)(B)(ii) of the INA may violate the Eighth Amendment in two different ways.¹³⁹ First, given the recent trend in treating deportation as if it were a criminal punishment, deportation is, or should be, within the Eighth Amendment's protection against cruel and unusual punishment; thus, section 237(a)(2)(B)(ii) is invalid because it is cruel

¹³⁵ See *id.* at 101.

¹³⁶ See, e.g., *Trop*, 356 U.S. at 98 (stating that the notion that deportation is not punishment "may be highly fictional"); *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting) (stating that deportation is punishment because it takes an individual away from home, family, friends, business and property and sends him or her across the ocean to a distant land); *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926) (Judge Learned Hand stated that no matter how heinous a crime, deportation is basically exile, which was a dreadful punishment abandoned by the common consent of all civilized people).

¹³⁷ ALEINIKOFF, *supra* note 13, at 512-13 (citing 4 Elliot's Debates 555 (Phila., J.B. Lippincott & Co., 1881 ed.)). James Madison said:

If banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for; . . . —if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Id.

¹³⁸ See, e.g., Maryellen Fullerton and Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425, 426 (1986) (interplay between law enforcement and deportation is evident where the INS assigns immigration investigators to work with state law enforcement in an effort to seek out aliens who are involved in criminal activity); Daniel M. Kowalski and Daniel C. Horne, *Defending the Non-Citizen*, 24 U. COLO. L. REV. 2177, 2180 (1995) (under a recent federal statute, prosecutors and defense counsel may add deportation to the plea bargaining/sentencing mix; under a different federal statute, a U.S. Attorney may request the federal criminal court to hold a "deportation hearing").

¹³⁹ See U.S. CONST. amend. VIII; INA § 237(a)(2)(B)(ii).

and unusual to punish someone due to a disease.¹⁴⁰ This argument is not likely to succeed, however, because the actual penalty, deportation, has traditionally been excluded from Eighth Amendment protection.¹⁴¹ Secondly, section 237(a)(2)(B)(ii) is unconstitutional under the Eighth Amendment because it categorizes an individual as an addict and imposes a sanction as a result of that status—such categorization violates the Eighth Amendment.¹⁴² This argument has a greater chance of success because it does not ask the courts to depart from precedent to declare that deportation is punishment for Eighth Amendment purposes, but rather, it argues that any statute that imposes some form of sanction for an involuntary status violates the Eighth Amendment.¹⁴³

B. *Violation of the Fourteenth Amendment Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution mandates that no state may deny any person equal protection under the law.¹⁴⁴ The law is well settled that the courts will uphold a legislative classification challenged on equal protection grounds if it bears a rational relation to some legitimate end.¹⁴⁵ Where a statute targets a suspect class, however, the courts will subject the legislative classification to strict scrutiny analysis.¹⁴⁶ A legislative classification will survive strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest.¹⁴⁷ Because aliens

¹⁴⁰ See U.S. CONST. amend. VIII; INA § 237(a)(2)(B)(ii); see also *Trop*, 356 U.S. at 100 (stating that the basic concept underlying the Eighth Amendment is nothing less than dignity of man and that power to punish should be exercised within limits of civilized standards); Fullerton, *supra* note 138, at 426; Kowalski, *supra* note 138, at 2180.

¹⁴¹ See, e.g., *Whitney v. Albers*, 475 U.S. 312, 318–19 (1985) (holding that Eighth Amendment was only applicable in criminal adjudications); *Ingraham*, 430 U.S. at 664 (same).

¹⁴² U.S. CONST. amend. VIII; INA § 237(a)(2)(B)(ii); see *Robinson*, 370 U.S. at 666–67; *Pottinger*, 810 F. Supp. at 1562.

¹⁴³ See, e.g., *Robinson*, 370 U.S. at 666–67; *Pottinger*, 810 F. Supp. at 1562.

¹⁴⁴ U.S. CONST. amend. XIV. The Amendment provides in pertinent part: “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

¹⁴⁵ See, e.g., *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981); *Robinson v. Fauver*, 932 F. Supp. 639, 644 (D.N.J. 1996) (holding that unless a law targets a suspect class, a legislative classification will be upheld on equal protection grounds so long as it bears a rational relation to some legitimate end).

¹⁴⁶ See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (holding that classifications involving suspect class are subject to strict scrutiny under equal protection); *Artway v. Attorney General of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996) (same); *Yokley v. Belaski*, 982 F.2d 423, 425 (10th Cir. 1992) (same).

¹⁴⁷ See, e.g., *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 273–74 (1986) (to pass strict

are members of a suspect class, classifications based on alienage must be narrowly tailored to serve a compelling governmental interest.¹⁴⁸

In 1886, in *Yick Wo v. Hopkins*, the United States Supreme Court held that the constitutional promise of equal protection of the laws applies to aliens as well as to citizens.¹⁴⁹ In *Yick Wo*, a San Francisco ordinance placed restrictions on the ability to establish a laundry within the city limits.¹⁵⁰ Yick Wo, a native of China and a legal resident of the United States, was arrested for violating this statute.¹⁵¹ Yick Wo argued that this statute violated the Equal Protection Clause of the Fourteenth Amendment because the statute had the effect of discriminating against the Chinese because Chinese immigrants had established most of the laundry facilities.¹⁵² The Court ruled that the Equal Protection Clause protected aliens as well as citizens.¹⁵³ Thus, the Court held that because this statute, though fair and impartial on its face, unjustly discriminated against the Chinese, it violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁴

In 1971, in *Graham v. Richardson*, the United States Supreme Court struck down Arizona and Pennsylvania statutes that disqualified aliens from receiving various forms of welfare assistance.¹⁵⁵ In *Graham*, the aliens sought welfare benefits under their respective state statutes, but the states denied them the benefits.¹⁵⁶ The Arizona statute required fifteen years residence for non-citizens to become eligible for benefits, and the Pennsylvania statute denied the benefits to all aliens, regardless of residency.¹⁵⁷ The Court acknowledged that aliens as a class are a prime example of a "discrete and insular" minority, and thus held that the statutes were subject to strict scrutiny analysis.¹⁵⁸ In order to pass strict scrutiny, legislation that involves a suspect class must be narrowly tailored to serve a compelling state interest.¹⁵⁹ The states justified the statutes on the ground that they preserved welfare benefits

scrutiny review, the legislation must be narrowly tailored to achieve a compelling governmental interest); *Cleburne*, 473 U.S. at 439 (same).

¹⁴⁸ See *Cleburne*, 473 U.S. at 440; see also *Quill v. Vacco*, 80 F.3d 716, 726 (2d Cir. 1996), cert. granted, 117 S. Ct. 36 (1996) (listing aliens among those groups who qualify as a suspect class).

¹⁴⁹ 118 U.S. 356, 369 (1886).

¹⁵⁰ *Id.* at 357.

¹⁵¹ See *id.* at 357, 358.

¹⁵² See *id.* at 369, 374.

¹⁵³ *Id.*

¹⁵⁴ *Yick Wo*, 118 U.S. at 373-74.

¹⁵⁵ 403 U.S. 365, 366, 368, 376 (1971).

¹⁵⁶ *Id.* at 366-68, 368-70.

¹⁵⁷ See *id.* at 367-68.

¹⁵⁸ *Id.* at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

¹⁵⁹ See, e.g., *Wygant*, 476 U.S. at 273-74; *Cleburne*, 473 U.S. at 439; *Graham*, 403 U.S. at 376.

for citizens.¹⁶⁰ The Court applied a strict scrutiny analysis to the challenged statutes and concluded that the states' interest in preserving welfare benefits for their own citizens did not justify the denial of those same benefits to aliens.¹⁶¹

In 1980, in *Minnesota v. Clover Leaf Creamery Co.*, the Supreme Court upheld a state statute banning plastic non-returnable milk containers on the grounds that such classification was rationally related to a legitimate state interest.¹⁶² The respondents argued that the classification between plastic and non-plastic non-returnable milk containers unfairly discriminated against them.¹⁶³ The state identified several reasons for the ban and produced evidence to show how the ban on non-plastic non-returnable milk containers furthered its interests.¹⁶⁴ Both parties agreed that because the classification did not involve a suspect class, the appropriate standard of review of the Equal Protection claim was the "rational basis" test.¹⁶⁵ The Court stated that where there was evidence before the legislature reasonably supporting the classification, the legislation must be upheld.¹⁶⁶ Thus, the Court held that this legislative classification was rationally related to a state interest and upheld the statute.¹⁶⁷

In 1986, in *Wygant v. Jackson Board of Education*, the United States Supreme Court struck down an affirmative action plan because the plan was not sufficiently narrowly tailored and thus violated the Equal Protection Clause.¹⁶⁸ The case arose when, in response to racial tension, the Jackson Board of Education ("the Board") considered adding a layoff provision ("Article XII") to the Collective Bargaining Agreement ("CBA") between the Board and the Jackson Education Union.¹⁶⁹ The plan, as originally considered, was designed to protect minority employees.¹⁷⁰ The Board initially failed to comply with Article XII but ultimately began to adhere to the provision, which resulted in the layoff of nonminority teachers.¹⁷¹ The displaced nonminority teachers brought suit arguing that Article XII violated the Equal Protection

¹⁶⁰ See *Graham*, 403 U.S. at 372.

¹⁶¹ *Id.* at 376.

¹⁶² 449 U.S. 456, 470 (1980).

¹⁶³ See *id.* at 458 & n.1.

¹⁶⁴ See *id.* at 465-70.

¹⁶⁵ See *id.* at 461.

¹⁶⁶ *Id.* at 464.

¹⁶⁷ *Clover Leaf*, 449 U.S. at 470.

¹⁶⁸ 476 U.S. 267, 270, 272, 283-84 (1986).

¹⁶⁹ See *id.* at 270.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 271, 272.

Clause.¹⁷² The Court first recognized that because the classification in Article XII was based on race—a suspect class—strict scrutiny was the appropriate level of review.¹⁷³ The Court identified the two prongs of this analysis.¹⁷⁴ First, any racial classification must be justified by a compelling government interest and, second, the means chosen to effectuate that goal must be narrowly tailored.¹⁷⁵ The Court concluded that while the Board's interest in providing minority role models for its minority students was compelling, Article XII was not sufficiently narrowly tailored.¹⁷⁶ The Court thus held that the Board's selection of layoffs as the means to accomplish even a valid purpose violated the Equal Protection Clause.¹⁷⁷

INA section 237(a)(2)(B)(ii) creates two possible classifications.¹⁷⁸ First, the statute classifies an alien as either an addict or a non-addict.¹⁷⁹ Because diseased individuals do not constitute a suspect class, the standard of review for equal protection purposes is whether the classification is rationally related to a legitimate governmental purpose.¹⁸⁰ Arguably, Congress has recognized that the drug problem in this country is important enough to pass legislation that seeks to eradicate the problem.¹⁸¹ This justification fails, however, when we take into account that this provision has the effect of deporting individual aliens who in actuality pose no threat to the safety of the nation.¹⁸² A classification is "overinclusive" if it disadvantages some people who do not in fact threaten the government's interest.¹⁸³ Although an overinclusive statute does not automatically render the statute unconstitutional under the Equal Protection Clause, it is certainly a factor a court should consider in making the rational basis determination.¹⁸⁴ A classification

¹⁷² See *id.* at 272.

¹⁷³ *Wygant*, 476 U.S. at 273–74.

¹⁷⁴ *Id.* at 274.

¹⁷⁵ See *id.*

¹⁷⁶ *Id.* at 274, 283–84.

¹⁷⁷ *Id.* at 283–84.

¹⁷⁸ See INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 1996).

¹⁷⁹ See *id.*

¹⁸⁰ See, e.g., *Clover Leaf*, 449 U.S. at 470; *Gazette v. City of Pontiac*, 41 F.3d 1061, 1067 (6th Cir. 1994) (status of being an alcoholic is not a suspect class for equal protection purposes); *Pierce v. King*, 918 F. Supp. 932, 942 (E.D.N.C. 1996) (disabled individuals do not constitute a suspect class).

¹⁸¹ See INA § 237(a)(2)(B)(ii).

¹⁸² See *id.*

¹⁸³ See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 568 (3d ed. 1996).

¹⁸⁴ See STONE, *supra* note 183, at 568. "It seems clear therefore that the permissibility of a legislative generalization must turn on the cost of the generalization as compared to the cost of a more individualized judgment." *Id.*

that may result in overinclusion tends to undercut the governmental claim that the classification serves legitimate political ends. Take Madeleine, for example. If she were to seek assistance under the NARA as McJunkin did, the INS could place her in deportation proceedings, subject only to the Attorney General's discretion.¹⁸⁵ Given that she has been in the United States for seventy years, it is highly unlikely that the Attorney General would deny a waiver request, but deportation nevertheless remains a possibility. If the INS did deport her, they would unlikely be able to demonstrate how a legitimate governmental end was achieved. Thus, in order to pass constitutional muster, the statute should take into consideration the potential overinclusiveness of a literal application of section 237(a)(2)(B)(ii).¹⁸⁶

Second, section 237(a)(2)(B)(ii) classifies individuals as addicted citizens versus addicted aliens.¹⁸⁷ The courts subject legislation that involves a suspect class to strict scrutiny.¹⁸⁸ Suspect classes are those identified by race, alienage or national origin.¹⁸⁹ To survive strict scrutiny, legislation classifying a suspect class must be narrowly tailored to achieve a compelling governmental interest.¹⁹⁰

The plenary authority to regulate immigration extends to the classification of aliens as a basis for determining their eligibility to remain in the United States, thus, the courts have determined that these classifications are not entitled to strict scrutiny analysis.¹⁹¹ Courts apply rational basis review to deportation statutes that establish classifications.¹⁹² The equal protection argument unsuccessfully advanced against these deportation statutes, however, differs from the equal protection argument advanced in this Note against section 237(a)(2)(B)(ii).¹⁹³ The argument here is not that Congress cannot classify someone as an alien and establish certain requirements to determine his or her eligibility to remain.¹⁹⁴ Rather, the equal protection argument is that by nature of its sanction (deportation), section

¹⁸⁵ See *supra* notes 1-2 and accompanying text.

¹⁸⁶ See INA § 237(a)(2)(B)(ii).

¹⁸⁷ See *id.*

¹⁸⁸ See, e.g., *Wygant*, 476 U.S. at 274; *Cleburne*, 473 U.S. at 440; *Quill*, 80 F.3d at 726.

¹⁸⁹ See *Cleburne*, 473 U.S. at 440; see also *Quill*, 80 F.3d at 726.

¹⁹⁰ See, e.g., *Wygant*, 476 U.S. at 274; *Cleburne*, 473 U.S. at 440; *Quill*, 80 F.3d at 726.

¹⁹¹ See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Giusto v. INS*, 9 F.3d 8, 9 (2d Cir. 1993) (stating that because of Congress's plenary power, statutes relating to immigration matters are subject only to rational basis review).

¹⁹² See *Giusto*, 9 F.3d at 10.

¹⁹³ See INA § 237(a)(2)(B)(ii); *Giusto*, 9 F.3d at 9-10.

¹⁹⁴ See *Giusto*, 9 F.3d at 10 (alien unsuccessfully argued that Congress could not classify aliens (for deportation purposes) on the basis of time served for a crime).

237(a)(2)(B)(ii) effectively discriminates against aliens who wish to seek treatment for their addiction.¹⁹⁵ Thus, strict scrutiny should apply because this provision involves a suspect class in that it classifies an addict as either alien or non-alien.¹⁹⁶

Section 237(a)(2)(B)(ii) classifies between alien addicts and citizen addicts.¹⁹⁷ This classification arguably disadvantages the suspect class, alien addicts, by effectively denying them the ability to seek treatment, either under the NARA or by means of other treatment options, such as Alcoholics Anonymous or drug rehabilitation centers. Alien addicts who are aware of section 237(a)(2)(B)(ii) may be reluctant to seek treatment for fear that the INS will learn of their addiction and subsequently deport them.¹⁹⁸ Thus, because this provision discriminates against a suspect class, aliens, section 237(a)(2)(B)(ii) is subject to strict scrutiny.¹⁹⁹ In order to survive strict scrutiny, this provision must be narrowly tailored to achieving a compelling governmental interest.²⁰⁰ The stated legislative purpose of this provision is to crack down on drug abuse.²⁰¹ Although this undeniably constitutes a legitimate governmental interest, the issue is whether on balance it is a compelling enough interest to result in the extreme consequence of deportation. Even if this is a compelling governmental interest, the provision nevertheless fails a strict scrutiny analysis because the provision is not narrowly tailored.²⁰² On the contrary, the provision makes no distinction between the type of addiction nor takes into consideration the factors surrounding the addiction.²⁰³ The classification sweeps too broadly in that many aliens who do not threaten the government's interest may nevertheless qualify for deportation.²⁰⁴

C. Fifth Amendment Procedural Due Process Violations

Section 237(a)(2)(B)(ii) of the INA violates the Constitution because it deprives an alien of his or her procedural due process rights

¹⁹⁵ See INA § 237(a)(2)(B)(ii); *Cleburne*, 473 U.S. at 440; *Quill*, 80 F.3d at 726.

¹⁹⁶ See INA § 237(a)(2)(B)(ii); see, e.g., *Cleburne*, 473 U.S. at 440; *Quill*, 80 F.3d at 726.

¹⁹⁷ See INA § 237(a)(2)(B)(ii).

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*; see also *Wygant*, 476 U.S. at 274; *Cleburne*, 473 U.S. at 440; *Quill*, 80 F.3d at 726.

²⁰⁰ See *Graham*, 403 U.S. at 372; see also *Wygant*, 476 U.S. at 274; *Cleburne*, 473 U.S. at 439; *Quill*, 80 F.3d at 726.

²⁰¹ See INA § 237(a)(2)(B)(ii); H.R. REP. NO. 101-723, at 55 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6735.

²⁰² See *Graham*, 403 U.S. at 372; see also *Wygant*, 476 U.S. at 274.

²⁰³ See INA § 237(a)(2)(B)(ii). See *infra* notes 273-91 and accompanying text for a discussion of the void for vagueness challenge.

²⁰⁴ See INA § 237(a)(2)(B)(ii).

under the Fifth Amendment.²⁰⁵ Even though Congress has the absolute and inherent right to decide who may remain in this country, the Bill of Rights protects aliens in non-immigration contexts.²⁰⁶ Specifically, in criminal contexts aliens have the same rights as citizens.²⁰⁷ The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law, and to accomplish this goal, a criminal defendant has the right to present a defense.²⁰⁸ Deportation based on addiction could have the effect of inhibiting an alien's presentation of his or her defense in a criminal trial or could have an effect on the sentence ultimately imposed if an alien is convicted.

In 1972, in *Chambers v. Mississippi*, the United States Supreme Court held that the right to a fair opportunity to defend against the State's accusation is the essence of the due process rights of an accused.²⁰⁹ In *Chambers*, the petitioner was tried and convicted of murdering a police officer.²¹⁰ As part of his defense, petitioner wished to cross-examine the individual whom the petitioner alleged to have committed the murder.²¹¹ The trial court denied him the opportunity to cross-examine on the basis of a state common law rule prohibiting a party from impeaching his or her own witness.²¹² The Supreme Court stated that the right of cross-examination is more than a desirable rule of trial procedure, but rather a component of the constitutional right of confrontation.²¹³ Because this right is an essential and fundamental element of a fair trial, the Court held that the denial of this right violated due process.²¹⁴ The Court thus reversed the defendant's conviction and held that the due process right of an accused in a criminal trial is protected by the right to a fair opportunity to defend against the State's accusations.²¹⁵

In 1977, in *United States v. Henricksen*, the United States Court of Appeals for the Fifth Circuit held that substantial government interfer-

²⁰⁵ See U.S. CONST. amend. V; INA § 237(a)(2)(B)(ii). The Due Process Clause of the Fifth Amendment provides in pertinent part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

²⁰⁶ See ALEINIKOFF, *supra* note 13, at 527; see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (affording Fifth and Sixth Amendment protections to aliens, but only with respect to criminal sanctions).

²⁰⁷ See *Wong Wing*, 163 U.S. at 238.

²⁰⁸ See U.S. CONST. amend. V; *Chambers v. Mississippi*, 410 U.S. 284, 294 (1972).

²⁰⁹ 410 U.S. at 294.

²¹⁰ *Id.* at 285.

²¹¹ See *id.* at 291-92.

²¹² See *id.* at 295.

²¹³ *Id.*

²¹⁴ *Chambers*, 410 U.S. at 302.

²¹⁵ *Id.* at 294.

ence with a defense witness's free and unhampered choice to testify violates due process.²¹⁶ The prosecution charged the defendant with various drug offenses.²¹⁷ The defendant, as part of her defense, wished to call a codefendant to testify because the codefendant's testimony would have tended to exonerate the defendant.²¹⁸ As part of his plea, however, the codefendant had to agree not to testify.²¹⁹ Because the codefendant's plea agreement adversely affected the defendant's defense, the court reasoned that the government should not have imposed that requirement on the codefendant.²²⁰ Thus, the court held that a due process violation occurs when the government substantially interferes with a defendant's right to present her defense.²²¹

In 1978, in *United States v. Paige*, the United States District Court for the Eastern District of Pennsylvania held that the defendant would be severely prejudiced if he were deterred from testifying by the fear that he would be convicted on the basis of a prior crime.²²² In *Paige*, the defendant was charged with knowing receipt and concealment of stolen securities.²²³ The prosecution wished to produce evidence of defendant's prior criminal record and the defendant objected on the grounds of prejudice.²²⁴ The court stated that if the defendant chose to take the stand, he may not be able to adequately explain his prior criminal history to the jury's satisfaction, and thus the jury may infer guilt of the present crime.²²⁵ The court stated that such an inference unfairly shifts the burden of proof to the defendant.²²⁶ The court concluded that if the defendant is deterred from testifying for fear that the inadequate explanation of the prior crime would ultimately convict him, then the defendant is unfairly prejudiced.²²⁷ The court thus excluded the evidence of the defendant's prior conviction.²²⁸

²¹⁶ 564 F.2d 197, 198 (5th Cir. 1977); see also *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980) (holding that threats against witnesses constituted substantial government interference with a defense witness's free and unhampered choice to testify and thus violated due process).

²¹⁷ See *Henricksen*, 564 F.2d at 198.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ *Id.*

²²² 464 F. Supp. 99, 101 (E.D. Pa. 1978).

²²³ *Id.* at 100.

²²⁴ See *id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Paige*, 464 F. Supp. at 100.

²²⁸ *Id.*

In 1996, in *United States v. Workman*, the United States Court of Appeals for the Second Circuit held that post-arrest rehabilitation may justify downward departures in sentences under appropriate circumstances.²²⁹ In *Workman*, the defendant was convicted of various charges relating to narcotics trafficking and conspiracy.²³⁰ The trial judge departed from the United States Sentencing Guidelines ("Guidelines") and relaxed the sentence based on the defendant's rehabilitation, and the Government appealed such departure.²³¹ The Second Circuit affirmed the departure stating that the trial judge acted fully within his authority in granting a downward departure for rehabilitation.²³²

Section 237(a)(2)(B)(ii) constructively interferes with the defendant's free and unhampered choice to testify.²³³ A defendant charged with public drunkenness, for example, may wish to testify that he or she has an addiction. He or she may believe that such testimony, though it does not by itself relieve him or her of criminal responsibility, could elicit sympathy from the fact-finder, and this sympathy could help in an acquittal. An alien defendant who is aware of section 237(a)(2)(B)(ii) may choose not to testify about his or her addiction for fear of deportation.²³⁴ Thus, section 237(a)(2)(B)(ii) is unconstitutional under the Fifth Amendment because it interferes with a defendant's free and unhampered choice to testify.²³⁵

Under the Guidelines, a defendant in a prosecution for a federal crime is sometimes entitled to a downward departure in sentencing.²³⁶ Though not specifically mentioned as a ground for departure, many courts reduce a sentence based on either a defendant's rehabilitation effort or his or her acceptance of responsibility.²³⁷ In the cases where

²²⁹ 80 F.3d 688, 701 (2d Cir. 1996); see also *United States v. Williams*, 37 F.3d 82, 86 (2d Cir. 1994) (holding that defendant's rehabilitative efforts in ending his drug dependence may be permissible ground for downward departure), *appeal after remand*, 65 F.3d 301 (1995); *United States v. Maddalena*, 893 F.2d 815, 818 (6th Cir. 1989) (same), *appeal after remand*, 931 F.2d 57 (1991). But see *United States v. Deigert*, 916 F.2d 916, 919 n.2 (4th Cir. 1990) (holding that drug abuse, even under extraordinary circumstances, may not support downward departure under the Sentencing Guidelines); *United States v. Pharr*, 916 F.2d 129, 130 (3d Cir. 1990) (holding that a defendant's drug rehabilitation is not a ground for departure).

²³⁰ 80 F.3d at 692.

²³¹ See *id.* at 701.

²³² *Id.* at 701-02.

²³³ See INA § 237(a)(2)(B)(ii).

²³⁴ See *id.*

²³⁵ See U.S. CONST. amend. V; INA § 237(a)(2)(B)(ii); *Henricksen*, 564 F.2d at 198; *Paige*, 464 F. Supp. at 100.

²³⁶ See 18 U.S.C. § 3553(b) (1994).

²³⁷ See *Workman*, 80 F.3d at 701; J. Gordon Seymour, *Downward Departures from the Federal Sentencing Guidelines Based on the Defendant's Drug Rehabilitative Efforts*, 59 CHI. L. REV. 837, 840

courts consider drug rehabilitation efforts when departing from the Guidelines, the courts are not acknowledging that alcohol or drug use excused or justified the offense, but rather acknowledging that the rehabilitation effort can serve merely as a factor to consider in determining the appropriate sentence.²³⁸

Although some courts have not accepted drug addiction and efforts at rehabilitation as grounds for downward departure, there nevertheless remains the possibility that a court may so choose, and therefore, section 237(a)(2)(B)(ii) infringes on the defendant's right to present a defense.²³⁹ If courts may depart from the Guidelines when a defendant either accepts responsibility or attempts to undergo rehabilitation, section 237(a)(2)(B)(ii) could deprive an alien of his or her due process rights during a criminal proceeding.²⁴⁰ An alien, such as Carlos in the scenario set out above, may be reluctant to admit his or her addiction for fear of deportation pursuant to section 237(a)(2)(B)(ii).²⁴¹ If the alien feels constrained in presenting his or her defense, one could construe that as a due process violation.²⁴²

D. Fifth Amendment Substantive Due Process Violations

Section 237(a)(2)(B)(ii) violates substantive due process under the Fifth Amendment because it deprives an alien of his or her liberty interest of participating in drug and alcohol rehabilitation.²⁴³ Substantive due process prevents a state from depriving an individual of his or her liberty or property interests without due process of law.²⁴⁴ An individual has a liberty interest in remaining healthy and taking meas-

(1992); *see, e.g., Williams*, 37 F.3d at 86; *Maddalena*, 893 F.2d at 818. *But see Pharr*, 916 F.2d at 132.

²³⁸ *See, e.g., Williams*, 37 F.3d at 86; *Maddalena*, 893 F.2d at 818; Seymour, *supra* note 237, at 840.

²³⁹ INA § 237(a)(2)(B)(ii); *see, e.g., Workman*, 80 F.3d at 701; *Williams*, 37 F.3d at 86; *Deigert*, 916 F.2d at 919 n.2; *Pharr*, 916 F.2d at 130; *Maddalena*, 893 F.2d at 818; Seymour, *supra* note 237, at 840.

²⁴⁰ *See* INA § 237(a)(2)(B)(ii).

²⁴¹ *See* U.S. CONST. amend. V; INA § 237(a)(2)(B)(ii). This challenge assumes that the particular offense that the alien is charged with is not in and of itself a ground for deportation. *See* INA § 237(2)(a). In Carlos' case, for example, public drunkenness would not be a deportable offense, unless a particular court construes such a statute to be a crime of "moral turpitude." *See id.* Even in that case, the statute allows for exceptions to deportation in those instances. *See id.*

²⁴² *See Paige*, 464 F. Supp. at 100.

²⁴³ *See* U.S. CONST. amend. V; INA § 237(a)(2)(B)(ii). The Fifth Amendment Substantive Due Process Clause states, in pertinent part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

²⁴⁴ U.S. CONST. amend. V.

ures to ensure one's own health and safety.²⁴⁵ A legal alien enjoys the same constitutional and statutory protections that are afforded to citizens.²⁴⁶

In 1985, in *Baldi v. City of Philadelphia*, the United States District Court for the Eastern District of Pennsylvania held that the Constitution guarantees the right to be free from undue state interference or hindrance in promptly obtaining or attempting to obtain available medical treatment when it is needed.²⁴⁷ In *Baldi*, a friend was transporting the decedent, plaintiff's husband, to the hospital and the police stopped the vehicle for a traffic violation.²⁴⁸ Plaintiff alleged that the state violated the decedent's civil rights because the police action deprived the decedent of life or liberty without due process of law.²⁴⁹ The court did not accept plaintiff's argument that there is a general constitutional right to receive medical treatment absent state custody.²⁵⁰ The court did, however, state that the liberty interests of the Due Process Clause encompass the right to promptly seek available medical care without undue state interference or hindrance irrespective of the state's custody or control over an individual.²⁵¹

In 1990, in *Colon v. Schneider*, the United States Court of Appeals for the Seventh Circuit held that in order to demonstrate a constitutionally protected liberty interest, an individual must establish that he or she has a legitimate claim of entitlement to it.²⁵² In *Colon*, the petitioner, an inmate, brought an action alleging that a corrections officer violated his liberty interest when the officer used mace against the petitioner.²⁵³ Petitioner relied on a Wisconsin statute that governed the use of mace in disciplining inmates.²⁵⁴ In determining the existence of a liberty interest, the court examined whether petitioner had a legitimate claim of entitlement to be free from the use of mace.²⁵⁵

²⁴⁵ See *Baldi v. City of Phila.*, 609 F. Supp. 162, 167 (E.D. Pa. 1985).

²⁴⁶ See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that aliens are persons guaranteed due process of law by the Fifth and Fourteenth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (same).

²⁴⁷ 609 F. Supp. at 167.

²⁴⁸ *Id.* at 165.

²⁴⁹ See *id.*

²⁵⁰ *Id.* at 166.

²⁵¹ *Id.* at 167.

²⁵² 899 F.2d 660, 666 (7th Cir. 1990).

²⁵³ *Id.* at 665.

²⁵⁴ See *id.* at 667. The statute prohibited the use of mace for refusal to obey an order except in an emergency. See WIS. ADMIN. CODE § HSS 306.08(5)(b); *Colon*, 899 F.2d at 663.

²⁵⁵ *Colon*, 899 F.2d at 666-67.

In order for a state regulation to create a constitutionally protected liberty interest, the regulations must employ mandatory language.²⁵⁶ The court concluded that although the Wisconsin statute limited the permissible use of mace, it did not contain mandatory language, and thus held that the statute did not create a constitutionally protected liberty interest.²⁵⁷

Section 2 of the Narcotic Addict Rehabilitation Act ("NARA") represents congressional intent to commit for treatment, rather than criminally punish, certain persons charged or convicted of narcotics violations who are narcotics addicts and who are likely to be rehabilitated through treatment.²⁵⁸ In enacting NARA, Congress intended that certain persons addicted to narcotic drugs who are not charged with a criminal offense should be afforded the opportunity to be committed for treatment.²⁵⁹ Under section 2, a person who believes himself or herself to be a narcotic addict may petition for voluntary treatment, and, similarly, a person who believes that a relative may be a narcotics addict may petition for treatment on behalf of the relative.²⁶⁰

An act of Congress that has the effect of establishing a statutory right constitutes a liberty interest for purposes of substantive due process rights.²⁶¹ The Fifth Amendment protects individuals against arbitrary governmental deprivations of life, liberty or property.²⁶² In demonstrating a constitutionally protected liberty interest, an individual must establish that he or she has a legitimate claim of entitlement to such interest.²⁶³ A state or federal regulation creates a constitutionally protected liberty interest when the regulation employs language of a mandatory character.²⁶⁴

Voluntary civil confinement as provided by the NARA establishes a constitutionally protected liberty interest because the statute uses mandatory language.²⁶⁵ The statute states,

[a]fter considering such [voluntary petition for civil commitment], the United States attorney *shall*, if he determines that

²⁵⁶ See *id.* at 667; see also *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1990) (holding that mandatory language in a state regulation creates a constitutionally protected liberty interest).

²⁵⁷ *Colon*, 899 F.2d at 669.

²⁵⁸ NARA § 2, 42 U.S.C. § 3401 (1994).

²⁵⁹ See *id.*

²⁶⁰ *Id.*

²⁶¹ See, e.g., *Hewitt*, 459 U.S. at 471-72; *Colon*, 899 F.2d at 667.

²⁶² U.S. CONST. amend. V.

²⁶³ See, e.g., *Hewitt*, 459 U.S. at 471-72; *Colon*, 899 F.2d at 667.

²⁶⁴ See, e.g., *Hewitt*, 459 U.S. at 471-72; *Colon*, 899 F.2d at 667.

²⁶⁵ See, e.g., NARA § 302; *Hewitt*, 459 U.S. at 471-72; *Colon*, 899 F.2d at 667.

the person named in such petition is a narcotic addict, . . . file a petition with the United States district court to commit such person to a hospital of the Service for treatment ²⁶⁶

Because the NARA establishes a constitutionally protected liberty interest, the mere existence of section 237(a)(2)(B)(ii) effectively deprives an individual of that liberty interest.²⁶⁷ An alien addict who is aware of the consequences of section 237(a)(2)(B)(ii) may choose not to avail himself or herself of this constitutionally protected liberty interest, and thus section 237(a)(2)(B)(ii) violates substantive due process.

Thus, if a statute interferes with or hinders an individual in obtaining medical treatment, which section 237(a)(2)(B)(ii) arguably does, then the statute unconstitutionally violates substantive due process rights.²⁶⁸ Section 237(a)(2)(B)(ii) contemplates undue interference or hindrance for purposes of a substantive due process violation.²⁶⁹ Aliens enjoy the same protections that Congress affords to citizens in all situations except in the deportation context.²⁷⁰ Thus, they are equally entitled to enjoy the protections and the benefit of rehabilitation as enunciated in the NARA.²⁷¹ Unfortunately, an alien who is aware of section 237(a)(2)(B)(ii) will choose not to participate in the NARA's benefits and this constitutes a constructive deprivation of a legitimate liberty interest.²⁷²

III. VOID FOR VAGUENESS

Congress should repeal section 237(a)(2)(B)(ii) because it is unconstitutionally vague and does not provide any standards by which a person of reasonable intelligence would be able to understand what type of conduct is prohibited.²⁷³

²⁶⁶ NARA § 302 (emphasis added).

²⁶⁷ See INA § 237(a)(2)(B)(ii); NARA § 3412.

²⁶⁸ See INA § 237(a)(2)(B)(ii); *Baldi*, 609 F. Supp. at 167; see also *McJunkin v. INS*, 579 F.2d 533, 535 (9th Cir. 1978) (alien deported after trying to obtain, under the NARA, needed medical treatment for his addiction).

²⁶⁹ See INA § 237(a)(2)(B)(ii); see also *Baldi*, 609 F. Supp. at 167.

²⁷⁰ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (holding that aliens are entitled to constitutional protections when they have come within the United States and have developed substantial connections with this country); *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986) (aliens are guaranteed due process and equal protection under the Fifth and Fourteenth Amendments).

²⁷¹ See, e.g., NARA § 302; *Verdugo-Urquidez*, 494 U.S. at 270-71; *Gomez*, 797 F.2d at 419.

²⁷² See INA § 237(a)(2)(b)(ii); see also *McJunkin*, 579 F.2d at 535.

²⁷³ See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996).

In 1988, in *Maynard v. Cartwright*, the United States Supreme Court held that objections to vagueness under the Due Process Clause rest on lack of notice, and hence, may be overcome in any specific case in which reasonable persons would know their conduct is at risk.²⁷⁴ In *Maynard*, the defendant was tried and convicted of murdering his former employers.²⁷⁵ The jury imposed the death penalty after concluding that a statutory aggravating circumstance existed—the murder was “especially heinous, atrocious or cruel.”²⁷⁶ The Supreme Court accepted the defendant’s argument that the statute defining the relevant aggravating circumstance was unconstitutionally vague because it did not provide the jury with precise standards with which to determine a sentence.²⁷⁷ The Court held that the language of the statute did not provide the jury with sufficient guidance and thus was unconstitutionally vague and a violation of due process.²⁷⁸

In 1996, in *Upton v. SEC*, the United States Court of Appeals for the Second Circuit held that due process requires that laws give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.²⁷⁹ In *Upton*, the Securities and Exchange Commission (“SEC”) censured the petitioner for failing reasonably to supervise a subordinate employee who aided and abetted in a violation of an SEC rule.²⁸⁰ Petitioner argued that he did not have sufficient notice of the rule upon which the SEC relied.²⁸¹ The court acknowledged that the SEC is entitled to broadly construe its own rules, and may determine specific applications on a case-by-case basis.²⁸² The court stated, however, that the SEC is not entitled to substantial deference when doing so would penalize an individual who has not received fair notice of a regulatory violation.²⁸³ Thus, the court vacated the SEC’s censure order holding that due process requires that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.²⁸⁴

²⁷⁴ 486 U.S. at 361.

²⁷⁵ *Id.* at 358.

²⁷⁶ *See id.* at 359.

²⁷⁷ *Id.* at 359, 361, 363–64.

²⁷⁸ *Id.* at 359, 361, 364.

²⁷⁹ 75 F.3d at 98.

²⁸⁰ *Id.* at 93.

²⁸¹ *See id.* at 97–98.

²⁸² *Id.* at 97.

²⁸³ *Id.* at 98.

²⁸⁴ *Upton*, 75 F.3d at 98; *see Smith v. Avino*, 91 F.3d 105, 108 (11th Cir. 1996) (holding that in order to pass constitutional muster, a statute must give person of ordinary intelligence a

Section 237(a)(2)(B)(ii) only contains language providing that the INS may deport an alien drug addict or abuser.²⁸⁵ It allows for deportation if such a condition existed at any time after entry.²⁸⁶ According to the plain language of the provision, an individual whose addiction to narcotics results in dangerous propensities may find himself or herself in deportation proceedings.²⁸⁷ Likewise, an individual who is a recovering alcoholic who attends Alcoholic Anonymous meetings regularly may find himself or herself in deportation proceedings.²⁸⁸ Even more shocking, an individual who smokes two packs of cigarettes a day and is admittedly addicted to nicotine may, under the plain language of the provision, find himself or herself in deportation proceedings.²⁸⁹ Section 237(a)(2)(B)(ii) is unconstitutionally vague because it does not give a person of ordinary intelligence a reasonable opportunity to know what behavior is prohibited and it does not provide explicit standards for those who apply it.²⁹⁰ With respect to section 237(a)(2)(B)(ii), an alien would unlikely realize that by undergoing medical treatment for cancer (where the possibility of becoming dependent on pain killers is significant), the alien is putting himself or herself at risk of deportation.²⁹¹ Likewise, an alien who enters the United States, unaware that he or she is predisposed to alcoholism, would unlikely realize that the act of taking one drink, and thus triggering her disease, would result in deportation.

CONCLUSION

Congress should repeal section 237(a)(2)(B)(ii) because it violates several different provisions of the United States Constitution.²⁹² It violates the Eighth Amendment's prohibition against cruel and unusual punishment in that it categorizes an individual as an addict, and the Supreme Court has ruled that such a categorization is unconstitutional. This provision violates an alien's equal protection rights because it either classifies an individual based on his or her addiction, in which

reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement); *Recycling Indus. Inc. v. City of New York*, 928 F. Supp. 407, 421 (S.D.N.Y. 1996) (same).

²⁸⁵ See INA § 237(a)(2)(B)(ii), 8 U.S.C.A. § 1227(a)(2)(B)(ii) (West 1996).

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *id.*

²⁸⁹ See *id.*

²⁹⁰ See, e.g., *Maynard*, 486 U.S. at 361; *Upton*, 75 F.3d at 98.

²⁹¹ See INA § 237(a)(2)(b)(ii).

²⁹² See *id.*

case the legislation is overinclusive and thus not rationally related to a legitimate state interest; or in the alternative, it classifies an individual based on alienage, in which case the legislation fails strict scrutiny review because it is not narrowly tailored to serve a compelling governmental interest. Section 237(a)(2)(B)(ii) violates procedural due process under the Fifth Amendment because it could have the effect of hindering or infringing upon an individual's right to a fair criminal trial. Similarly, it violates substantive due process under the Fifth Amendment in that it interferes with an individual's liberty interest in obtaining medical treatment. Finally, INA section 237(a)(2)(B)(ii) is unconstitutionally vague because the language of the provision fails to provide standards by which a person of reasonable intelligence would be able to understand what type of conduct the statute prohibits.

Although not entirely immune from constitutional challenges, it is well settled that the judiciary applies deferential treatment to immigration statutes. Congress may have exceptionally broad authority to promulgate laws governing the expulsion of aliens, but Congress must nevertheless remain within the confines of the United States Constitution. Thus, if the courts are unwilling, or unable, to strike down this provision, then it is the responsibility of Congress to recognize the constitutional infirmities of section 237(a)(2)(B)(ii).

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