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Deportation Based on Criminality Before Entry

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THERE ARE two principal statutory grounds for deportation of aliens based on criminality. First is the restriction against those who committed crimes before coming to these shores. Second is the ground which provides for the expulsion of the undesirable who was welcome when he first applied for admission to the United States but has subsequently committed proscribed acts. The purpose of this article is to examine the first class named above, and to consider proposed legislation on the subject now before the Congress.

Section 155a of Title 8 of the United States Code[1] reads in part as follows:

> "* * * any alien who was convicted, or admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude * * * shall, upon the warrant of the Attorney General, be taken into custody and deported."

These words are probably the broadest relating to the deportation of criminals that have ever been enacted into law in the history of our country, or for that matter, of any country.

"Any Alien"

It is basic that a United States citizen cannot be the subject of deportation. If an alien becomes naturalized, he also cannot be expelled, since acquisition of citizenship by naturalization clothes such citizen with all the rights and immunities of a citizen by birth.[2]

Therefore the first element toward proving deportability is that the accused must be an alien. The burden of establishing

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[1] 8 U. S. C. § 155a (1946).

[2] U. S. Const. Amend. XIV, § 2.

alienage is on the Government. Once alienage is proved, the accused must establish that he is lawfully in the country.[3]

"Convicted"

There seems to be no disagreement as to the meaning of the term "conviction" in the statute. It may be defined as "a legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded." [4]

Evidence of a conviction would ordinarily be an officially certified copy of a record of the conviction from the court of jurisdiction. Often this record may not be available for various reasons, and in that event the problem of establishing that an alien has in fact been convicted becomes rather difficult. Few substitutes for the conviction record itself have been found acceptable. In one instance the Board of Immigration Appeals held that a letter from a foreign police official coupled with the alien's admission of the conviction as shown in the letter was competent evidence to support a deportation charge based on a crime prior to entry.[5]

"Admits Commission"

The broadness of the statute under discussion is best demonstrated in the phrase "or admits the commission." Whether we believe that Congress was naive or optimistic in embodying these words into the law is not important. The motive seems clear. Congress may have reasoned that if an alien committed a crime in his country of former residence, and the law enforcement agencies of that country were unsuccessful in apprehending the culprit before he emigrated, perhaps he might be induced to admit to our minions of the law that he had in fact committed the crime. Presumably, in its anxiety to keep the moral tone of the country on a high level, Congress endeavored to keep out not only the convicted criminal but also the one whose crime had not even been suspected.

It is difficult for us to conceive of an alien admitting, for example, that he murdered or robbed in his native country, and as a practical matter this does not usually happen. Most aliens know that they cannot be imprisoned in this country for crimes committed abroad. But they seem to dread expulsion infinitely

[3] U. S. ex rel. Bilokumsky v. Tod, 263 U. S. 149 (1923).
[4] Bouvier's Law Dictionary (Baldwin's Century Edition, 1948).
[5] Matter of F....., A-1161940, 2 Dec. Imm. & Nat. Laws 520 (1946).

more than incarceration upon their return to their own countries. Nevertheless there are cases on record where an alien has admitted the commission of perjury,[6] incidental to his efforts in effecting entry into the United States in some unlawful manner. An example is the making of false statements under oath before American consuls and other officials. The alien's willingness to make this damaging admission is based on the fact that many people from Europe and the Far East do not consider an infraction based on an untruth as particularly immoral.

Establishing deportability in a case involving the alleged admission of the perpetration of a crime requires strict observance of rules set up over the years by the courts and administrative agencies. The testimony of witnesses to the crime, for instance, would be absolutely irrelevant. Admissions by the alien of facts alone are not held to be admissions of the commission of crimes.[7] In his memorandum of May 29, 1945 the Solicitor General prescribed the following rules which must be observed in making out a deportation charge that an alien admits the commission of a crime involving moral turpitude:[8]

1. It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred.
2. The alien must be advised in a clear manner of the essential elements of the alleged crime or misdemeanor.
3. The alien must clearly admit conduct constituting the essential elements of the crime or misdemeanor and that he committed such offense. By the latter is meant that he must admit the legal conclusion that he is guilty of the crime or misdemeanor.[9]
4. It must appear that the crime or misdemeanor admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude.
5. The admission must be free and voluntary.

Moreover, it is well settled that a plea of guilty in a court is considered an admission of the commission of a crime for deportation purposes.[10]

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[6] Boehm v. U. S., 123 F. 2d 791 (8th Cir. 1941); cert. denied, 315 U. S. 800.
[7] Howes v. Tozer, 3 F. 2d 849 (2d Cir. 1925).
[8] "Moral turpitude," *infra.*
[9] See note 7 *supra.*
[10] U. S. ex rel. Boraca v. Schlotfeldt, 109 F. 2d 106 (7th Cir. 1940); Blumen v. Haff, 78 F. 2d 833 (9th Cir. 1935).

"Prior to Entry"

It might seem that any extended discussion of the term "prior to entry" is unnecessary. In the enforcement of the immigration laws, however, the interpretation of the word "entry" is of great moment. Should it mean the alien's first entry into the United States, or should it be interpreted as *any* entry from a foreign place?

Until 1933 an alien's entry was deemed to be the event of his first coming to the United States. Based on this concept, a long line of cases held that if an alien were convicted of a crime more than five years after his entry into the United States he could not be deported after subsequent entries, on the ground that he was convicted of a crime prior to entry.[11] This doctrine was completely changed by the celebrated *Volpe v. Smith* case.[12]

Volpe was regularly admitted as an immigrant when still very young. More than five years after his entry he was convicted in this country of counterfeiting. Nineteen years after his original entry he made a brief visit to Cuba and returned to the United States. The United States Supreme Court held that Volpe's entry from Cuba was to all intents and purposes a new entry, and therefore he was required to meet all the tests of admissibility which were applied to an alien entering for the first time.

The effect of this decision has been very far reaching. If the alien's conviction took place before an entry into the country, he is subject to deportation. It is immaterial when or where the crime was committed. Likewise it is of no importance whether the alien is coming from half way around the world on his first arrival or from across a footbridge after an hour in Canada or Mexico.[13]

"Moral Turpitude"

There is no particular necessity of discussing the connotation of the terms: "felony," "crime," or "misdemeanor." It is of no consequence for deportation purposes, which was committed, so long as it is an infraction which involves moral turpitude. An

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[11] U. S. ex rel. Giacone v. Corsi, 64 F. 2d 18 (2d Cir. 1933); U. S. ex rel. Consiglio v. Day, 55 F. 2d 229 (2d Cir. 1932); Wilson v. Carr, 41 F. 2d 704 (9th Cir. 1930); Browne v. Zurbrick, 45 F. 2d 931 (6th Cir. 1930); Wong Yow v. Weedin, 33 F. 2d 337 (9th Cir. 1929).

[12] U. S. ex rel. Volpe v. Smith, 289 U. S. 422 (1933).

[13] U. S. ex rel. Azzarello v. Kessler, 88 F. 2d 301 (5th Cir. 1937).

exception to this general rule might be the violation of a city ordinance, which by its wording would not fit into any of the three foregoing categories.[14]

It would be an understatement to assert that much has been written about the phrase, "moral turpitude," and its application to deportation is no exception. For our purposes it will suffice to quote from a few authorities:

> (Moral turpitude) "Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (21 Am. and Eng. Encyc. of Law, 872.)
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> "A crime involving moral turpitude may be either a felony or misdemeanor, existing at common law or created by statute, and is an act or omission which is *malum in se* and not merely *malum prohibitum*; which is actuated by malice or committed with knowledge and intention and not done innocently or without inadvertence or reflection; and which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons; but which is not the outcome merely of natural passions, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles, unaccompanied by a vicious motive or a corrupt mind." (Op. Solicitor of Department of Labor, Dec. 5, 1922, 4/561.)
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> "A thief is a debased man. He has no moral character. The fact that a statute may classify his act as grand and petit larceny and does not punish the latter with imprisonment and declare it to be only a misdemeanor does not destroy the fact that theft, whether it be grand or petit larceny, involves moral turpitude. It is *malum in se,* and so the consensus of opinion—statute or no statute—deduces from the commission of the crimes *mala in se* the conclusion that the perpetrator is depraved in mind and is without moral character." (Bartos v. United States, 19 F. 2d 722 (8th Cir. 1927).)

So it seems that gravity of punishment has no bearing on whether the crime involves moral turpitude.[15] An alien found guilty of a crime which does not in itself involve moral turpitude cannot be deported because he can be shown, aside from the conviction, to be a depraved person.[16]

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[14] Matter of C....., A-5536201, 2 Dec. Imm. & Nat. Laws 367 (1945).
[15] U. S. ex rel. Zaffarano v. Corsi, 63 F. 2d 757 (2d Cir. 1933).
[16] U. S. ex rel. Mylius v. Uhl, 210 Fed. 860 (2d Cir. 1914).

The standard by which an offense is to be judged, regardless of where it was committed, is that prevailing in the United States as a whole.[17] One cannot look beyond the conviction record and the statute where it is clearly shown that the offense committed in a foreign country can be readily compared to a similar offense in this country.[18] But where the wording of the foreign statute is such that it may or may not involve moral turpitude it is permissible to look beyond the statute and behind the conviction record to reach a conclusion as to whether the crime involves moral turpitude under our law.[19]

Among the offenses which have been held to involve moral turpitude are: assault while intoxicated,[20] forgery,[21] fraud,[22] counterfeiting,[23] concealing assets in bankruptcy,[24] Prohibition Act violations where the Government is defrauded of tax,[25] falsifying an income tax return to avoid payment of tax,[26] and all theft where the accused intends to deprive the owner permanently of the property.[27]

Some offenses held not to involve moral turpitude are: failure to pay ship's fare,[28] violation of Prohibition Act where no fraud is involved,[29] lottery,[30] depositing a slug in a streetcar coin box,[31] gambling with policy slips,[32] obtaining a passport by fraud when not accompanied by perjury,[33] and breaking prison.[34]

Generally in conspiracy, if the substantive offense involves moral turpitude then, as a matter of law, the conspiracy to commit that offense also involves moral turpitude.[35]

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[17] 37 Ops. Att'y. Gen. 294; see also note 16 *supra*.
[18] Matter of F....., A-6019766, 2 Dec. Imm. & Nat. Laws 756 (1947).
[19] Matter of F....., A-6194022, 2 Dec. Imm. & Nat. Laws 520 (1946).
[20] U. S. ex rel. Mazzillo v. Day, 15 F. 2d 391 (2d Cir. 1926).
[21] Ponzi v. Ward, 7 F. Supp. 736 (1934).
[22] See note 21 *supra;* Mercer v. Lence, 96 F. 2d 122 (10th Cir. 1938).
[23] U. S. ex rel. Volpe v. Smith, 289 U. S. 422 (1933); see note 12 *supra*.
[24] U. S. ex rel. Medich v. Burmaster, 24 F. 2d 57 (8th Cir. 1928).
[25] Maita v. Haff, 116 F. 2d 337 (9th Cir. 1940).
[26] Matter of A....., 56041/710, 1 Dec. Imm. & Nat. Laws 436 (1943).
[27] U. S. ex rel. Rizzio v. Kenney, 50 F. 2d 418 (2d Cir. 1931).
[28] U. S. ex rel. Fontana v. Uhl, 16 F. Supp. 428 (S. D. N. Y. 1926).
[29] U. S. ex rel. Iorio v. Day, 34 F. 2d 920 (2d Cir. 1929).
[30] U. S. v. Carrollo, 30 F. Supp. 3 (W. D. Mo. 1939).
[31] Matter of G....., 56158/190, 2 Dec. Imm. & Nat. Laws 235 (1945).
[32] Matter of G....., 56040/601, 1 Dec. Imm. & Nat. Laws 60 (1941).
[33] Matter of G....., 56056/326, 1 Dec. Imm. & Nat. Laws 73 (1941).
[34] Matter of Z....., 56033/458, 1 Dec. Imm. & Nat. Laws 238 (1942).
[35] U. S. ex rel. Berlandi v. Reimer, 113 F. 2d 429 (2d Cir. 1940).

Returning to that portion of the statute under discussion which deals with those who admit having committed crimes involving moral turpitude. Although the motive of the legislation can be understood, the method does not merit commendation. Consider the fairness, for instance, of the following example: Mr. "A" wants to leave his wartorn, economically prostrate country; he is anxious to join relatives in the United States. In making application for his immigration, he makes a materially false statement under oath before an American Consul, knowing that if the truth were disclosed he would not be permitted to emigrate. He eventually is granted permission and he comes to the United States. He lives here fifteen years, marries, raises a family, and contributes much to the community in which he lives. He applies for naturalization and here the false statement comes to light.

Under deportation proceedings he admits the making of the false statement under oath and the motive. Having confessed the elements of perjury, this alien—uneducated, ignorant of legal consequences, in great fear—is asked to admit the commission of perjury by the following definition of the crime:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000, and imprisoned not more than five years." (18 U. S. C. § 1621 (1946).)

If Mr. "A" answers in the affirmative to this definition, he makes himself subject to deportation. And yet if he were being tried for even the most minor criminal infraction, legal conclusions could not be used in evidence against him. It is argued that deportation is not a punishment, but from a humane viewpoint it can be more terrible than imprisonment.

Proposed Legislation

Congress has during the past three years conducted extensive research in the field of immigration and naturalization with the purpose of codifying all the laws relating to this administrative

branch. A bill covering this subject was introduced in the Senate and at this writing is under consideration.[36]

Of interest is one proposed change in the law, a portion of which was the subject of our discussion. In addition to basing deportation on convictions of crimes involving moral turpitude and admissions of such crimes, Congress proposes to add the ground of "admission of the commission of the acts which constitute the essential elements of crimes" of that nature. If this change were enacted into law, the effect would be to remove from the alien the burden of evaluating abstruse definitions; his deportation would not depend on his own legal conclusion as to whether he committed a crime. Under the proposed change he would merely admit the acts, and the administrative agency would then apply the acts to the statute. If the agency would decide that all the elements of the crime are present, the alien would be found deportable.

This proposed change in the statute does not appear to be an improvement over the present law. An enforcement agency by its very nature cannot be expected to be unbiased and objective. It should not be placed in a position where it must make decisions against itself. It should not be burdened with judicial duties.

An alien cannot be vested with citizenship through naturalization unless a court of law gives its approval.[37] The equally vital privilege of remaining in this country should not be taken away without similar assent.

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[36] S. 2550, Calendar No. 1072, 82d Congress, 2d Session (1952).
[37] 8 U. S. C. 701 (1940).