A Critique Of The Fugitive Disentitlement Doctrine And Why It Should Not Apply In Certain Immigration Proceedings

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I. Introduction

The fugitive disentitlement doctrine is becoming an increasingly common tool used by government prosecutors in modern appellate civil and criminal litigation. The doctrine in its essence is a discretionary mechanism which allows an appeals court to dismiss an appeal if the defendant is a fugitive from justice.[1] Originally created in a brief Supreme Court opinion over a century ago in the criminal context, it has expanded to almost every area of law in which the United States government has an interest. Despite the fact that the doctrine has neither constitutional nor statutory origins at the federal level, it nonetheless has become a key strategic tool used with increasing frequency by U.S. attorneys to dismiss cases at the federal appellate level.[2]

Much has already been written on why this doctrine should not be used in certain civil claims and the rationales advanced aptly highlight the inappropriateness of the use of the doctrine outside the criminal appeals context.[3] However, given the circuit interpretation of the doctrine despite the limiting language in last Supreme Court case, further action should be taken to ensure that the use of this doctrine, with no constitutional underpinnings and stemming from a cursory opinion over a century ago, does not further encroach upon civil and human liberties in the United States. While the fugitive disentitlement doctrine has not yet been addressed by the Supreme Court in relation to federal civil immigration based appeals, this article will hopefully serve to prevent the further deterioration of the rights of immigrants seeking protection from torture and persecution abroad.

This article explores the history and rationales behind the fugitive disentitlement doctrine in its criminal context and explains why it should not be applicable to federal appeals based on asylum claims in federal immigration law. First, this article will address the origins and history of the doctrine and its application in the criminal and limited civil context. The article will then compare the contexts of criminal and immigration cases and will explain why the rationales of the fugitive disentitlement doctrine are incongruent to asylum appeals. Finally, the article will explain why the language of *Degen* persuades against the use of the doctrine in asylum cases and why the use of the doctrine in these cases is grossly unfair and overly draconian.

II. The Origins of the Fugitive Disentitlement Doctrine

[1] See Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 JCRLC 751 (1997)
[2] See Henry Tashman, Jennifer Brockett, and Rochelle Wilcox, *Fight or Flight*, 29-OCT L.A. Law. 44 (October, 2006)
[3] *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 JCRLC 751

To understand why this doctrine should not be used to dismiss asylum appeals it is vital to completely understand the history and limited context in which the fugitive disentitlement doctrine arose and the rationales advanced for its use.

a. The Origin of the Fugitive Disentitlement Doctrine in a Criminal Law Context

What has come to be known as the fugitive disentitlement doctrine first arose in 1876 in a purely criminal context from the Supreme Court's ruling in *Smith v. United States*, where the Court declared that "It is clearly within our jurisdiction to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render".[4] The court then explained "If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."[5] Beyond this brief explanation, the court did not in any way explain the legal basis for its ruling. Eleven years later the doctrine resurfaced in *Bohanan v. Nebraska* in the context of an indictment for murder.[6] Again the court simply stated within one paragraph, citing only *Smith* as a legal basis, that the case would be set aside unless the plaintiff came into the jurisdiction before the last day of the then current term of court.[7] Thus enforceability of the judgment was the primary rationale behind theses original rulings.[8]

However, it remains a mystery why the court never (and still has never) addressed the glaring separation of powers problem or the procedural reality pointed out by Justice Jackson in *Eisler v. United States* in relation to the enforceability rationale. Although the court in *Eisler* upheld the dismissal *per curiam*, Justice Jackson, in his dissent, pointed out that under the circumstances of an escape during the pendency of an appeal, the case had already been fully submitted "and all that remains is for the members of the court to hand down their opinions and the decision"; the defendant's presence for that "would be neither necessary nor usual".[9] The grant of the writ before the Supreme Court meant that serious questions had been raised requiring a decision and that this remains the case even if the defendant is still at large.[10] The question posed by this approach, namely the reality of the appellate process and the lack of necessity of the defendant's presence has mysteriously remained unaddressed by any court since.

Ten years after *Bohanan*, in 1897, the Supreme Court finally hinted at a legal basis for the doctrine when it declared in *Allen v. Georgia*, that "we have repeatedly held that we would not hear and determine moot cases" and that by escaping during the pendency of the appeal the criminal defendant had caused the case to become moot.[11] That court then couched its rationale in terms of the escape as being a separate criminal offense and further to hear the case would be

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[4] *Smith v. United States*, 94 U.S. 97 (1876)
[5] *Id.*
[6] *Bohanan v. Nebraska*, 125 U.S. 692 (1887)
[7] *Id.*
[8] *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240 (1993)
[9] *Eisler v. United States*, 338 U.S. 189, 195 (1949) J. Jackson dissenting
[10] *Id.* (also note the Justice Jackson's observation at 338 U.S. 196: "I do not think that we can run away from the case just because Eisler has")
[11] *Allen v. Georgia*, 166 U.S. 138, 140 (1897)

an indignity upon the court.[12] In *Molinaro v. New Jersey* the Supreme Court, facing the appeal of a convicted abortionist, finally clarified that while an escape does not strip the case of its character as an adjudicable case or controversy, it disentitles the defendant to call upon the resources of the court for determination of his claims.[13] Thus the court rejected the mootness rationale but upheld that to adjudicate the appeal of an escapee would be an affront to the dignity of the court. Yet, the court still failed to explain what precise legal basis, apart from mere precedent, the doctrine rested on.

In 1992 in *Ortega-Rodriguez v. United States*, the Supreme Court, in a divided opinion, for the first time limited the application of the fugitive disentitlement doctrine. In *Ortega-Rodriguez* the petitioner had been convicted of possession, with intent to distribute, and conspiring to possess with intent to distribute, over five kilos of cocaine intercepted after an exchange in international waters.[14] After conviction, but prior to sentencing, the defendant absconded and was sentenced *in absentia*. He was then recaptured and taken into custody prior to filing his appeal. While his appeal was pending the government filed a motion to dismiss on the basis that he had become a fugitive prior to his appeal.[15] The Supreme Court held that in such circumstances the previous rationales of enforceability did not apply and thus enforceability alone could not be the sole rationale for upholding the doctrine.[16] Instead the court listed three other rationales. According to the court, in addition to enforceability concerns, dismissal by an appellate court after the defendant has fled its jurisdiction serves an important deterrent function as well as advances an interest in appellate efficiency and respect for dignified appellate practice.[17] However, the court then turned sharply and explained that it would not allow any expansion of the fugitive disentitlement doctrine that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for the judicial system.[18] Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during the ongoing appellate process, the justifications advanced for dismissal of fugitive's pending appeals generally will not apply.[19]

b. Circuit Court Interpretation Of The Doctrine And The Fallacy Of The Rationales Advanced

While adopting the rationales of the Supreme Court, circuit courts have further elaborated on the reasoning behind the fugitive disentitlement doctrine but have still failed to provide compelling practical justifications for the doctrine – even in the criminal context in which it has arisen.

For example, in the Second Circuit in *United States v. Persico*, a case cited in most fugitive disentitlement cases, the court gave four rationales for dismissing a fugitive's appeal. First, a decision respecting a fugitive is effectively unenforceable because the fugitive is beyond

[12] *Id.* at 166 U.S. 141
[13] *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970)
[14] *Ortega-Rodriguez v. United States*, 507 U.S. 234, 237-239
[15] *Id.* at 507 U.S. 239
[16] *Id.* at 507 U.S. 241
[17] *Id.* at 507 U.S. 242
[18] *Id.* at 507 U.S. 246
[19] *Id.* at 507 U.S. 349

the control of the court.[20] However, the problem with this rationale remains that it fails to address how the duty of the court to decide the case before it is affected in reality; nor does it address the legal and factual conflict that the executive branch is charged with enforcement of judicial decisions – not the judiciary[21]. Second, under *Persico*, loss of appellate review is appropriate because a fugitive flouts the judicial process by escaping.[22] This rationale also fails in light of Justice Jackson's analysis in *Eisler*: at the appellate level, once briefs have been submitted, all that remains is for the members of the court to hand down their opinions; the defendant's presence for this is neither necessary nor usual.[23] Third, a rule of dismissal has the salutary effects of discouraging escape and promoting the efficient operation of appellate courts.[24] As the court explains, "practical concerns make it unreasonable for a court to devote its limited resources to litigants who disregard procedure by fleeing.[25] The problem with the first part of this rationale (discouraging escape) is that under federal law, escape itself is a separate criminal offense for which the escapee can be prosecuted for upon his capture.[26] Further, the court does not elaborate on exactly what "practical concerns" would make it unreasonable for the court to devote its limited resources to. Thus this rationale again fails to address the fact that at the appellate level, once the briefs have been filed, all the court has left to do is decide on the briefs and in the rare instance hear oral argument regarding the law.[27] Finally, the court states in *Persico* that the delay occasioned by the period of a defendant's flight can prejudice the prosecution, should a new trial be ordered after a successful appeal.[28] This may be of some applicability in the criminal context where the burden is placed on the government to prove guilt beyond a reasonable doubt.[29] However, more likely, if a retrial is granted, then the government will not only already have the previous evidence, but it will have the additional time actually granted by the defendant's flight, with which to gather more evidence. Far from prejudicing the government, a deferral may actually help the government build its case. Indeed as the court in *Persico* subsequently points out, "flight during trial is much more aggravating than flight after conviction and thus the disrespect shown to a court when a defendant flees during the appellate process is less.[30] This is because flight during the production of evidence can limit testimony from the defendant and thereby potentially prevent the government from being able to argue its full case. In contrast, once on appeal, all the evidence has already been gathered and review is primarily upon the law or the validity of the previous ruling on the facts.

The Fifth Circuit put further restrictions upon the doctrine in *United States v. DeValle* where that court held that the district court must allow the defendant time to return to custody voluntarily before the case is stricken.[31] That ruling followed the Fourth Circuit case of *United*

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[20] *United States v. Persico*, 853 F.2d 134, 137 (2nd Cir., 1988)
[21] *The Constitution of the United States of America* Art. II Sect. 3
[22] *Persico*, 853 F.2d at 137
[23] See *Eisler*, 338 U.S. at 195 (J. Jackson dissenting)
[24] *Persico*, 853 F.2d at 137
[25] *Id.*
[26] Although this argument is dismissed in *Allen v. Georgia* (discussed above) it may once again be relevant in light of the ruling in *Degen v. United States* as discussed below
[27] *Eisler*, 338 U.S. at 195 (J. Jackson dissenting)

[28] *Persico*, 853 F.2d at 137
[29] *In re Winship*, 397 U.S. 358 (1970)
[30] *Persico*, at 853 F.2d 138
[31] *United States v. DeValle*, 894 F.2d 133, 137 (5th Cir., 1990)

States v. Snow holding that, in exercise of its discretion, it had no need to flex its muscles when the defendant had already returned to custody.[32]

The Ninth Circuit has seemingly advanced the additional rationale of assuring an effective adversary process as a justification for dismissing a fugitive's appeal.[33] However, precisely how declining to review legal issues presented to a court not requiring the defendant's presence (and only rarely requiring the presence of the attorneys) furthers assuring the adversary process remains a question to be answered.[34]

While the Eleventh Circuit falls in line with the holding of *Ortega-Rodriguez* it relies principally on the rationale that it is within the inherent right of the court to dismiss a case because a fugitive has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate the claim.[35] While more difficult to refute, the inherent right rationale has since been eroded by the most recent Supreme Court holding in *Degen v. United States*[36]. Further, this rationale still ignores the role of appellate court to decide cases and controversies before it, and just because a defendant has escaped doe not mean that the legal issues escape with him.[37] Indeed, as Justice Murphy pointed out in his dissent in *Eisler*,

> "Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties".[38]

Thus having arisen in a purely criminal context over a century ago in a two paragraph opinion courts since have declared it well settled despite the lack of any constitutional basis or practical applicability of any of the rationales since advanced.[39] The only practical concern of a fugitive at large may arguably be danger to the public. However, adjudication of the merits will ultimately determine justice and will resolve important legal issues facing society.[40] If the petitioner is guilty then his appeal will be denied on the merits; and if he is not then he should not have been kept in custody anyway. The role of the judiciary is to interpret and apply the law to the facts of the case. It should leave enforcement to the appropriate constitutionally designated authority: the executive branch.

However, even if one can foresee why dismissing a convicted criminal's appeal when he becomes a fugitive during the process makes sense, the Supreme Court decision in *Degen v. United States* and Mary Stolley's *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine* abundantly clarify why the doctrine makes even less sense in civil appellate litigation.[41]

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[32] *United States v. Snow*, 748 F.2d 928, 930 (4th Cir., 1984)
[33] *United States v. Gonzalez*, 300 F.3d 1048, 1051 (9th Cir., 2002)
[34] See *Eisler*, 338 U.S. at 195 (J. Jackson dissenting)
[35] *Lynn v. Untied States*, 365 F.3d 1225, 1241 (11th Cir., 2004)
[36] *Degen v. United States*, 517 U.S. 820, 829 (1996). This case will be discussed in greater detail below.
[37] See *Eisler* at 338 U.S. 195 J.Jackson dissenting ("under our practice, the grant of Eisler's petition meant that four justices of this court, at least, were in agreement that the questions he raised were of this description (general importance). If they were then, they still are")
[38] *Id.* at 338 U.S. 195
[39] See *Ortega-Rodriguez* 507 U.S. 234*;* See also *DeValle*, 894 F.2d 133
[40] *Eisler*, at 338 U.S. 195 (J. Jackson dissenting)
[41] *Degen v. United States*, 517 U.S. 820; see also *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 JCRLC 751

Analysis within these contexts further illustrates precisely why the fugitive disentitlement doctrine should not be applied to asylum claims.

c. Application Of The Doctrine In Civil Contexts Relating To Criminal Matters

Although the fugitive disentitlement doctrine was originally only ever intended (and really can only seem remotely fair) in the criminal context it has been extended in recent history in the circuit courts to civil claims.[42] However, in the most recent Supreme Court case concerning the fugitive disentitlement doctrine, *Degen v. United States*, the court explained in greater extent the legal basis and the limitations of the application of the doctrine – especially in relation to civil appellate litigation.[43]

In *Degen* the petitioner had been previously indicted for distributing marijuana, money laundering, and "related crimes".[44] On the same day as the indictment the government also prosecuted a civil forfeiture complaint against Degen seeking his properties in California, Nevada, and Hawaii allegedly purchased with the proceeds of Degen's drug sales.[45] One year previous to the indictment, Degen, a dual Swiss-American citizen, had moved with his family to Switzerland.[46] The offenses for which Degen was prosecuted did not oblige Switzerland to extradite Degen to the United States.[47] The District Court in Nevada granted the government's motion to strike Degens claims in the civil forfeiture proceedings because he remained at large; and the Ninth Circuit affirmed based on the fugitive disentitlement doctrine.[48]

The Supreme Court began its discussion of the fugitive disentitlement doctrine by explaining that courts invested with judicial power have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.[49] The court then clarified that the extent of these powers must be delimited with care, for there is danger of overreaching when one branch of the Government without benefit of cooperation or correction from another, undertakes to define its own authority.[50] Principles of deference counsel restraint in resorting to inherent power and require its use to be a reasonable response to the problems and needs that invoke it.[51] The court then explained that fugitive disentitlement doctrine is a "most severe" sanction that should not be resorted to easily for "it could disserve the dignitary purposes for which it is invoked".[52] The existence of alternative means of protecting the government's interests, however, shows the lack of necessity for the harsh sanction of absolute disentitlement.[53] The court finally concluded that since the District Court had other means to sanction Degen, the use of the disentitlement doctrine was unnecessary.

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[42] See e.g. *United States v. $45,940*, 739 F.2d 792 (2nd Cir., 1984)
[43] *Degen*, 517 U.S. 820
[44] *Id.* at 517 U.S. 821
[45] *Degen*, 517 U.S. 821
[46] *Id.* at 517 U.S. 822
[47] *Id.*
[48] *Id.*
[49] *Id.* at 517 U.S. 823
[50] *Id.*
[51] *Id.*
[52] *Id.* at 517 U.S. 828
[53] *Id.* at 517 U.S. 827

While *Degen* was a step in the right direction, as Mary Stolley explains in *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, the Supreme Court should go further to limit the use of the doctrine in civil proceedings.[54] Mary Stolley makes several key arguments in her article. Primarily, she argues that under the Due Process clause the Supreme Court has long recognized that the right to defend is fundamental, notwithstanding the individual's status.[55] To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.[56] The article then addresses the rationales behind the doctrine in light of civil proceedings.

The rationale of enforceability makes no sense in the civil context because the government already has control over the property in question.[57] Next, in relation to the rationale of promoting the efficient operation of the judicial process and protecting the dignity of the court, she points out that the Constitution recognizes higher values than speed and efficiency… the Due Process Clause…was designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize government officials.[58] Indeed, as Justice Kennedy noted in *Degen*, the judicial system earns respect and dignity not through oppressive implementation of its rules, but through fair and considered judgment on the merits.[59] The article explains that application of the disentitlement doctrine in civil forfeiture actions, where the government already has a substantial advantage over claimants is also inherently unfair.[60] To seize a fugitive's property, the Government only has to show probable cause to believe the property at issue is related to the alleged illegal activity; the burden then shifts to the claimant to prove by a preponderance of the evidence that the property is not thus connected.[61] The article concludes by noting crucially that by invoking the doctrine in civil forfeiture proceedings, the Government essentially blackmails the claimant: he is forced to submit to arrest in exchange for the right to defend himself against litigation.[62]

The language in *Degen* and the further elaboration and critique of the rationales and its inapplicability to civil forfeiture proceeding are directly parallel to the justifications in limiting the fugitive disentitlement doctrine in asylum claims. The rationales behind the doctrine are not only inapplicable, but the severity of the doctrine's application is overly draconian to those who have committed no crime and are merely seeking protection against persecution and torture.

III. Why The Doctrine Should Not Apply In Certain Immigration proceedings

As *Degen* and *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine* illustrate, the fugitive disentitlement doctrine should be severely limited in its application to civil actions. The rationales that might support the application of the doctrine in criminal appellate

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[54] *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 JCRLC 751
[55] *Id.* at 87 JCRLC 770
[56] *Id.* quoting *Hovey v. Elliot*, 167 U.S. 409, 414 (1897)
[57] *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, at 87 JCRLC 776
[58] *Id.* at 87 JCRLC 779
[59] *Id.* at 87 JCRLC 780
[60] *Id.* at 87 JCRLC 782
[61] *Id.*
[62] *Id.* at 87 JCRLC 784

proceedings do not apply and are extremely unfair in civil proceedings. Nonetheless circuit courts have recently applied the doctrine to appellate immigration proceedings with increasing frequency despite the fact that immigration proceedings are civil - not criminal - proceedings and in most cases the petitioner has never committed a crime.[63] When a person has committed no crime and is merely seeking protection against torture or persecution, the fugitive disentitlement doctrine overreaches its rationales and is both inherently unfair and over draconian. Thus, should it have the opportunity, the Supreme Court should affirmatively prohibit application of the doctrine to asylum appeals.

a. The Doctrine Should Not Apply In Immigration Matters Because It Is Out Of Context In Comparison To Criminal Cases

First, the fugitive disentitlement doctrine should be limited in application to civil immigration appeals, especially those pertaining to asylum claims, because the doctrine is out of context in comparison to the concerns underlying a criminal appeals. In criminal cases, a person has been convicted of a crime by proof beyond a reasonable doubt and the burden to prove guilt is on the government.[64] Thus the likelihood of guilt of actual commission of a crime is more likely. In contrast, in immigration proceedings the government does not have to prove the commission of any crime but merely that the person is deportable. While critics would jump on the statement that the government has to prove deportability, in reality this is merely a formality because the petitioner usually concedes deportability unless he is a U.S. citizen, has a current visa, or has familial ties to a U.S. citizen (and even sometimes that is not enough). In many asylum cases the petitioner has never committed nor been prosecuted for any crime at all. It is worthy to note that even in most civil forfeiture claims, where the Supreme Court has deemed the fugitive disentitlement doctrine all but inapplicable[65], the petitioner is being prosecuted for allegedly having committed some crime, even if it is unrelated to the civil action.

Once the petitioner is deemed deportable, the *petitioner*, not the government, must establish that he or she qualifies for asylum.[66] To qualify for asylum the petitioner must prove that he or she is a refugee.[67] This requires the asylum seeker to prove the he or she is unable or unwilling to return to his or her country of origin, or unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[68] Thus the burden is on the petitioner to prove that he or she is a refugee and the grant of asylum is discretionary.[69]

Most circuit courts applying the fugitive disentitlement doctrine rely principally on two Circuit cases applying the doctrine to immigration appeals: *Arana v. INS*, 673 F.2d 75 (3rd Cir., 1982) and *Bar-Levy v. INS*, 990 F.2d 33 (2nd Cir., 1993). It is often said that, "bad cases make bad law"; these cases are prime examples for this quote. Both of these cases contain underlying

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[63] See *Martin v. Mukasey*, 517 F.3d 1201 (10th Cir., 2008); *Gao v. Gonzalez*, 481 F.3d 173 (2nd Cir., 2007); *Antonio-Martinez v. INS*, 317 F.3d 1089 (9th Cir., 2003)
[64] *In re Winship*, 397 U.S. 358 (1970)
[65] *Degen*, at 517 U.S. 829
[66] The Immigration and Nationality Act (INA) §208(b) (2008)
[67] *Id.*
[68] INA §101(a)(42(A)
[69] INA §208(b)

criminal processes that do not occur in many immigration proceedings. Yet courts since have failed to notice this crucial aspect.

Arana v. INS, the first case to apply the fugitive disentitlement doctrine to a civil immigration appeal, arose prior to *Degen*, and only 12 years after the decision on *Molinaro* (above).[70] The Third Circuit court does not state why the petitioner is being removed or on what grounds he is appealing the deportation order.[71] The decision simply states that after Arana failed to report for deportation, he petitioned the court for habeus corpus (again the court fails to explain why).[72] The Immigration and Nationality Service (INS) then obtained a bench warrant for his arrest.[73] How exactly a warrant for his arrest was possible or even legal when Arana had committed no crime remains a question to be answered because immigration orders are civil not criminal, and immigration courts are administrative courts in which an executive officer sits as an immigration judge. Despite this mystery the Third Circuit then entertains the government motion to dismiss by referring to the *Molinaro* decision.[74] However, the language referring to the *Molinaro* decision used in the *Arana* decision itself indisputably refers to a fugitive as a person who escapes from the restraints placed upon him *pursuant to a conviction*.[75] The court then refers to their own decision dismissing the appeal of a convicted escapee as support without comparing or analyzing any similarities or difference between a criminal conviction and a civil removal proceeding.[76] The only analysis in relation to a civil context the court makes at all is contained in a footnote where the court states "Although Molinaro did not involve an immigration-related appeal, nothing in the Supreme Court's opinion suggests that the rule announced there is only applicable in the criminal law context".[77] Not only is this analysis shorthanded it also overlooks the glaring plain language of the *Molinaro* decision explaining that the court has no persuasive reason "to adjudicate the merits of *a criminal case* after *the convicted defendant* who has sought review escapes from the restraints placed upon him *pursuant to a conviction*.[78] By referring to criminality three times in the one sentence referred to in *Arana*, the plain language of *Molinaro* did in fact suggest applicability of the doctrine solely to criminal appeals. In light of the misapplication in the *Arana* decision, subsequent cases applying the fugitive disentitlement doctrine to immigration claims seem to rest their analysis upon an error. Thus the doctrine has been applied to immigration claims the in the wrong context from the beginning.

The second case universally cited by circuit courts applying the fugitive disentitlement doctrine to immigration claims is *Bar-Levy v. INS.*[79] This case, and subsequent cases using this case as precedent, should not be cited to state that the fugitive disentitlement doctrine applies broadly to all immigration cases, because the facts of that case and its glaring oversight ignore the brutal reality of asylum claims in contrast to criminal defendants. First, the facts of *Bar-Levy* are inapplicable to most asylum cases insofar as Bar-Levy himself was in deportation

[70] *Arana v. INS*, 673 F.2d 75 (3rd Cir., 1982)
[71] *Id.*
[72] *Arana v. INS*, 673 F.2d 75, 76
[73] *Id.*
[74] *Id.* at 673 F.2d 77
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Molinaro*, at 396 U.S. 366
[79] *Bar-Levy v. INS*, 990 F.2d 33

proceedings due to his conviction of a narcotics offense.[80] In this case Bar-Levy was in fact a criminal fugitive to which the rationales of the fugitive disentitlement doctrine in its criminal context and *Molinaro* analysis could theoretically apply.[81] In contrast, many asylum seekers are not criminal fugitives. Thus the factual scenario of *Bar-Levy* should preclude application of the rationales of this particular case to broad application of the fugitive disentitlement doctrine in all immigration cases. Secondly, *Bar-Levy* raises a distinction of utmost importance between criminal appeals and immigration appeals: if the immigrant asylum seeker turns himself in before or during appeal to the Federal Circuit, he can be deported into persecution and potential torture while his appeal is being heard! In asylum law, once an appeal to the BIA is rejected a deportation order becomes final and the petitioner can be, and often is, deported.[82] An alien does not reach the judiciary until his appeal is heard in a Circuit court because the Immigration Judge (IJ) is an executive officer, as are the judges at the Board of Immigration Appeals (BIA) to which the petitioner must turn after being denied by the IJ. Thus not only is the asylum seeker deprived of his only chance of a hearing in a full judicial court by use of the fugitive disentitlement doctrine, to avoid use of the doctrine as it now stands, the asylum seeker must turn himself in where he will be deported to the country of persecution and potential torture before his claim seeking prevention of that very fact is even heard.[83] However, the *Bar-Levy* decision only briefly raises this issue, vaguely calls on the Supreme Court to address similar issues, and then disposes of it in one conclusory sentence.[84] In contrast, a criminal fugitive enjoys the constitutional protections of the United States and its relatively lenient correctional facilities if he turns himself in[85]. Thus the criminal context of the fugitive disentitlement doctrine does not quite fit with the harsh realities of asylum proceedings. Because the *Bar-Levy* decision addresses facts not usually present in asylum cases and because it completely fails to analyze the reality of prehearing deportation during the pendency of an appeal, the rationales of the fugitive disentitlement doctrine applied in *Bar-Levy* should not be used to categorically deny all immigration cases and especially not asylum cases.[86]

b. The Doctrine Should Not Apply In Asylum Proceedings Because Its Rationales Do Not Fit In These Proceedings

As alluded to in the analysis of *Bar-Levy* and the arguments made in *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, the fugitive disentitlement doctrine should not apply to asylum proceedings because the rationales as applied in its criminal context do not apply in asylum proceedings.[87]

i. Enforceability Concerns And Deterrence

The first rationale often applied by courts in applying the fugitive disentitlement doctrine remains that a decision respecting a fugitive is effectively unenforceable because the fugitive is

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[80] *Id.* at 990 F.2d 34
[81] *Molinaro*, at 396 U.S. 366
[82] INA § 241
[83] Though it is true that in normal immigration removal proceedings the alien is simply returned to his country of origin, and unlike an asylum seeker, does not face persecution or torture upon return.
[84] *Bar-Levy v. INS*, at 990 F.2d 35-36
[85] At least more lenient than many countries where prisoners are often tortured or starved (e.g. Iran, China).
[86] *Bar-Levy*, 990 F.2d 33
[87] *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 JCRLC 751

beyond the control of the court and applying the doctrine helps deter future flight during the appellate process.[88] However, this rationale is in applicable to asylum proceedings for two reasons. First, the government already effectively controls an alien's life in the United States and thus enforcement certainly is not beyond the reach of the court. Once an alien's claim has been rejected by the BIA the alien's status is no longer legal, and he is deportable.[89] Without legal status an alien will have an extremely difficult time living in the United States – especially while being pursued by Immigration and Customs Enforcement. Secondly, and most crucially, application of the rule will be very unlikely to fulfill any kind of deterrence function in relation to asylum seekers because an alien seeking protection from persecution and torture will almost always do any anything to prevent a return to torture or persecution. The torture and persecution that the asylee would face in many countries is far worse than anything else imaginable, so why under any circumstances would an alien return to custody to take the chance (and given the likelihood of pre-decision deportation, the near certainty) of being returned to these circumstances? No rule a court could constitutionally come up with could deter flight when such flight is necessary to prevent imminent persecution and torture. Thus the rationales of enforceability and deterrence of flight make no sense in application of the fugitive disentitlement doctrine to asylum proceedings.

ii. Efficient Operation And Protecting Dignity Of The Court

The second rationale often advanced by circuit courts for upholding the fugitive disentitlement doctrine in dismissing immigration appeals is that, by fleeing custody the fugitive shows disrespect to the court and dismissing the appeal promotes efficient operation of the courts. Yet, as pointed out so poignantly in Mary Stolley's article, and declared by the Supreme Court itself, "The Constitution recognizes higher values than speed and efficiency and was designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for effieciency and efficacy that may characterize government officials.[90] Second, an asylees presence is neither necessary nor usual for adjudication at the appellate level so this rationale fails to explain how the application of this doctrine promotes efficiency of that court.[91] Further, in terms of respect, how can a court expect an alien to show respect for the judicial operation when the same system would deport him into the very horror he seeks to escape from before he is allowed to have his claim even heard. Finally, an asylee shows no disrespect to the duties of court by hiding from deportation back to persecution – only disrespect for a rule (promoting pre-decision execution), which would be unconstitutional if applied to any other type of defendant.[92] This type of reasoning is like asking a capital criminal defendant to return to custody even though the state could execute him before any appeal is heard. Thus although promoting efficiency and protecting dignity of the court make little practical sense even when applied to criminal fugitives, they make much less sense when applied to asylum seekers. These rationales

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[88] *Id.*; see also *Garcia-Flores v. Gonzalez*, 477 F.3d 439, 441-442 (6th Cir., 2007); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir., 2003)

[89] INA § 241

[90] *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, at 87 JCRLC 779 (quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972)

[91] *Eisler v. United States*, 338 U.S. 189, 195 (1949) J. Jackson dissenting

[92] *Fiallo v. Bell*, 430 U.S. 787, 792 (In exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens)

should not allow a court to dismiss an asylum applicant's appeal simply because he did not show up to be deported before his claim is heard.

iii. Prejudice To The Government

One other rationale that has often been advanced by circuit courts to dismiss an immigrants appeal under the fugitive disentitlement doctrine is that the fugitive's escape prejudices the government.[93] While this rationale makes some sense in relation to a criminal fugitive in criminal proceedings, it makes no sense in appellate immigration proceedings. The difference remains that in criminal proceedings the defendant's absence may prejudice the government because, if a new trial is ordered, key testimony or evidence may be missing due to the time lapse and the petitioners absence[94]. The prejudice is palpable because the government in a criminal trial must prove every element beyond a reasonable doubt.[95] However, as explained, in immigration proceedings, prejudice would only likely accrue to the asylum applicant, because in asylum proceedings the burden is on the applicant to prove his status.[96] Further, an asylum applicant is much more likely to return upon retrial because not only is his status now necessary legal (due to the necessary removal of the deportation order), he also gets another chance to prevent his return to torture. As justice Murphy stated in his dissent in *Eisler*, " We are not at liberty to assume that all escaped defendants will never return to the jurisdiction";[97] this is especially relevant in immigration cases. Thus the rationale of prejudice to the government makes absolutely no sense when applied to disentitle an asylum applicant's appeals.

c. The Doctrine Should Not Apply In Asylum Proceedings Because Of The Extreme Harshness Of Its Application

Finally, the implication of the language of the *Degen* decision and the extreme harshness of the reality of asylum procedures should prevent application of fugitive disentitlement doctrine to dismiss asylum appeals. In *Degen* the court recognized that the sanction of disentitlement is most severe and could disserve the dignitary purposes for which it is invoked.[98] The court's inherent power, as the basis to dismiss fugitives' appeals under the fugitive disentitlement doctrine, is limited by the necessity giving rise to its exercise.[99] Courts have already held that the application of the disentitlement doctrine in civil forfeiture actions, where the government already has a substantial advantage over claimants, is inherently unfair.[100]

These holdings are not only directly applicable to asylum-based appeals, as they are to civil forfeiture proceedings, they are essential to ensure dignity and respect for justice. Respect for the judicial process, is eroded, not enhanced by too free a recourse to rules foreclosing consideration of claims on the merits.[101] As the seventh circuit noted, the fugitive disentitlement

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[93] *Gao v. Gonzalez*, 481 F.3d 173, 176-177 (2007)
[94] *Persico*, 853 F.2d 134, 138
[95] *In re Winship*, 397 U.S. 358
[96] INA §208(b)
[97] *Eisler*, at 338 U.S. 194 (per curiam) (J. Murphy dissenting)
[98] *Degen*, at 517 U.S. 828
[99] *Id.* at 517 U.S. 829
[100] *Sword or Shiled: Due Process and the Fugitive Disentitlement Doctrine*, at 87 JCRLC 782; See also *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151, 1156 (7th Cir., 1994)
[101] *Degen*, at 517 U.S. 829

doctrine is inherently unfair when applied to actions where the government already has substantial advantage over claimants.[102]

In comparison to civil forfeiture proceedings, and in direct contrast to criminal proceedings, in asylum proceedings the government already enjoys an enormous advantage. First, unlike criminal proceedings once the government has met the minimal burden of proving removability, the burden then shifts to the petitioner to prove that he is entitled to asylum – and even then the grant of asylum is discretionary and comes from an *executive branch official* acting as Immigration Judge.[103] While critics may point out that the asylum applicants burden is only to show a reasonable possibility that he or she will be persecuted, this point would be unfounded by a simple glance at statistics. While 61% of asylum applicants were denied asylum nationwide in 2007, the average denial rate in many places in Georgia, Florida, and Texas were above 70% and in some places, such as Atlanta, Georgia denial rates were above 83%.[104] Given the thousands of asylum applicants per year this burden is, in actuality, obviously much more difficult than it appears. Second, the application for asylum has a one-year statute of limitations, which starts running upon the date of entry into the United States.[105] Thus often an immigrant cannot file for asylum even if they could show that they are likely to be persecuted or tortured upon return. Even then the burden is on the applicant to show that the application is filed within one year of entry.[106] Finally, not only is the burden on the petitioner during trial stage to prove eligibility and overcome all bars to asylum, as opposed to the government in criminal proceedings, but at the appeal stage the government enjoys an even greater advantage.[107] If an immigration judge has made an adverse credibility determination, as they most often seem to do, the circuit court can affirm the denial of asylum on that basis alone.[108] Thus, the government enjoys enormous procedural advantages in asylum proceedings as opposed to criminal proceedings; and under *Degen* and *$40,877.59 in United States Currency* the fugitive disentitlement doctrine is too harsh a sanction to apply to a non-criminal asylee.[109]

In fact one circuit court has already used *Degen* as precedent to deny the dismissal of an alien's appeal.[110] In *Gutierrez-Almazan*, the seventh circuit denied the government's motion to dismiss under the fugitive disentitlement doctrine even though the immigrant was a criminally convicted non-asylee applicant.[111] The court held that, under *Degen*, the fugitive disentitlement doctrine was too blunt an instrument to be used against deterrence and protecting the dignity of the court.[112] If the doctrine does not apply to criminal immigrants in civil immigration proceedings, it should certainly not apply to asylum proceedings where the applicant has committed no crime.

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[102] *United States v. $40,877.59 in United States Currency*, at 32 F.3d 1156
[103] INA §208(b)
[104] http://trac.syr.edu/immigration/reports/judgereports/ (a statitscal database from Syracuse University monitoring asylum denial rates from 2002 through 2007)
[105] INA § 208(a)(3)
[106] INA § 208(a)(2)(D)
[107] INA § 208(b)
[108] *Samatar v. U.S. Attorney General*, 140 Fed.Appx. 226, 227 (11th Cir., 2005)
[109] *Degen*, 517 U.S. 820; *United States v. $40,877.59 in United States Currency*, at 32 F.3d 1151
[110] *Gutierrez-Almazan v. Gonzalez*, 453 F.3d 956, 957 (7th Cir., 2006)
[111] *Id.*
[112] *Id.* (although the petitioner had already returned to custody)

Yet there is also another reason that the fugitive disentitlement doctrine is unfair when applied to asylum based appeals: prehearing deportation. As explained above, the Department of Homeland Security (DHS) can deport a person once the BIA affirms a deportation order of an Immigration Judge; and a determination by the judiciary is not required.[113] Thus if the asylee reports to Immigration and Customs Enforcement he or she can be deported during the pendency of appeal to the Circuit court.[114] This effectively eviscerates the purpose of filing for asylum. Thus the application of the fugitive disentitlement doctrine to dismiss an asylum applicant's appeal when the person does not report for deportation is unfair as it forces the applicant to choose between persecution and the denial of his or her appeal there from. This is precisely the kind of unfair harshness in which a court should refuse to apply the fugitive disentitlement doctrine.[115]

IV. Conclusion

The fugitive disentitlement doctrine originally arose solely in the criminal context to dismiss a criminal's appeal when the criminal remained at large or escaped during the pendency of appeal.[116] Yet even the rationales applied to a criminal proceeding rest on unstable ground because the rationales do not make practical sense in light of appellate procedure. To apply those rationales to deny an asylum seeker a judicial hearing is not only irrational but also unfair. The rationales for the fugitive disentitlement doctrine the criminal context do not match up to civil asylum proceedings where the petitioner faces persecution or torture upon return. Further, the language of *Degen* reiterates that such a harsh sanction should not be applied in when the government and lower court already have advantages or other means at their disposal.[117] The doctrine is already out of context in some civil proceedings and it is greatly out of place in appeals from asylum decisions.

While this issue has not yet reached the Supreme Court, should it eventually do so, the Supreme Court should hold unequivocally that the fugitive disentitlement doctrine does not apply to civil asylum proceedings just as it should not apply to certain civil forfeiture proceedings.[118] The doctrine was originally created in the criminal context and its rationales only fit in that context – if at all. One could even make the argument that denying an asylee a judicial hearing by dismissing it under the fugitive disentitlement doctrine is incompatible with conducing compliance with human rights law abroad. By denying an asylee's appeal simply because he refuses to report for deportation while his appeal before the judiciary is pending, the court is in effect telling the world that refugees' and asylees' rights under the United Nations Conventions (to which the U.S. is a party),[119] are subordinate to national circuit rules based on inherent judicial discretion. This approach is hardly conducive to compliance with principles of international law. Equity, justice, the *Degen* decision, and conducive international compliance all

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[113] INA § 241
[114] *Id.*
[115] *United States v. $40,877.59 in United States Currency*, at 32 F.3d 1156
[116] *Smith*, 94 U.S. 97; *Bohanan*, 125 U.S. 692; *Allen*, 166 U.S. 138; *Eisler*, 338 U.S. 189; *Molinaro*, 396 U.S. 365
[117] *Degen,* 517 U.S. 820
[118] *Degen*, 517 U.S. 820
[119] The principle basis for refugee and asylum law in the United States derive from the *1951 United Nations Convention relating to the Status of Refugees* and the *1967 United Nations Protocol relating to the status of Refugees*

demand that the fugitive disentitlement doctrine not be used to dismiss an asylee's appeal simply because the immigrant fearing persecution has failed to report for deportation.