

Immigration Law and the Proportionality Requirement

Michael J. Wishnie*

I. Proportionality Review Outside Immigration Law.....	418
II. Proportionality Review in Immigration Law.....	424
A. Removal as a Punitive Sanction.....	425
1. Removal of Permanent Residents	427
2. Removal of Non-LPRs.....	428
B. Re-entry Bars as a Punitive Sanction	431
C. Case-by-Case Proportionality Review in Immigration Cases.....	435
D. Categorical Proportionality Review in Immigration Cases.....	439
E. Proportionality Review by Immigration Judges	441
III. Potential Objections	445
A. The Plenary Power Doctrine.....	445
B. The Continuing Offense Objection	448
C. Lack of Comparative Metrics	451

I pray that soon the good men and women in our Congress will ameliorate the plight of families like the Cabrera-Alvarezes and give us humane laws that will not cause the disintegration of such families.¹

[T]he result we must reach is as unjust as it is unreasonable.²

[W]e urge the Attorney General to closely review the facts of this heartbreaking case.³

* William O. Douglas Clinical Professor of Law, Yale Law School. I am grateful for the comments from Muneer Ahmad, Ahilan Arulanantham, Heather Gerken, Lucas Guttentag, Susan Hazeldean, Dan Kanstroom, Chris Lasch, Peter Markowitz, and Nancy Morawetz, and am indebted to Stephen Poellot and Travis Silva for superb research assistance. A portion of the material incorporated here was previously published in Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (2011) and is included with the permission of the University of Pittsburgh Law Review.

1. *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1015 (9th Cir. 2005) (Pregerson, J., dissenting).

2. *Cheruku v. Att’y Gen. of the United States*, 662 F.3d 198, 209 (3d Cir. 2011) (McKee, C.J., concurring).

3. *Martinez v. United States Att’y Gen.*, 413 F. App’x 163, 168 (11th Cir. 2011).

Proportionality is the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense. The principle is ancient⁴ and nearly uncontested,⁵ and its vitality is well established in numerous areas of criminal and civil law,⁶ in the United States and abroad.⁷ Doctrinal and theoretical debates concerning proportionality review of criminal sentences, civil punitive damages awards, and other sanctions⁸ tend to focus on four distinct questions: the justification for taking account of proportionality,⁹ which sanctions are sufficiently punitive to require review,¹⁰ which of those are so disproportionate as to be impermissible,¹¹ and whether a court or legislature should decide the maximum punishment the state may impose.¹²

The operation of contemporary immigration statutes regularly results in entry of a deportation order that some federal judges consider unjust. Opinion surveys also consistently indicate that a substantial portion of the public believes the current immigration laws are too harsh and need reform.¹³ Gridlock in Congress has prevented the modernization and reform of the statutes, however, in

4. *Solem v. Helm*, 463 U.S. 277, 284 (1983); see also KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 14 (1998) (“The idea of proportionality in sentencing has been part of our tradition since biblical times.”); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1063–65 (2004) (tracing the history of the principle of proportionality to the Magna Carta’s prohibition against excessive punishment).

5. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME AND JUSTICE 55, 56 (1992); see also STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 160 (2010) (“[P]roportionality helps reconcile competing rights and interests in a workable way.”).

6. *Graham v. Florida*, 130 S. Ct. 2011 (2010); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

7. Thomas M. Franck, *Proportionality in International Law*, 4 LAW & ETHICS OF HUMAN RIGHTS 230 (2010).

8. See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that proportionality review is required under the Eighth Amendment’s Excessive Fines Clause); *Dolan v. City of Tigard*, 512 U.S. 374, 388–91 (1994) (requiring “rough proportionality” between government conditions for approval of development and impact of proposed development on public interest); see also Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 478–86.

9. See, e.g., Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005).

10. See, e.g., *Bajakajian*, 524 U.S. 321; *BMW*, 517 U.S. 559; *Dolan*, 512 U.S. 374.

11. See, e.g., *Graham*, 130 S. Ct. 2011; *Harmelin v. Michigan*, 501 U.S. 957 (1991).

12. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

13. *Obama’s Ratings Little Affected by Recent Turmoil*, PEW RESEARCH CENTER, June 24, 2010, available at <http://www.people-press.org/files/legacy-pdf/627.pdf>; *Opinion Research Poll*, CNN, July 27, 2010, at 7–8, available at <http://i2.cdn.turner.com/cnn/2010/images/07/27/rel10f1a.pdf>; *Power and the People*, POLITICO, Aug. 16, 2010, at 10, available at http://www.politico.com/static/PPM152_1008013_politicoreport.html.

ways that might ameliorate their most inhumane consequences.¹⁴ But neither the administrative courts that adjudicate deportation cases nor the federal judiciary that reviews those decisions is powerless to prevent unjust removals.

Immigration law, which is formally civil but functionally quasi-criminal, has not previously been subject to judicial review for conformity to constitutional proportionality principles arising under the Eighth Amendment's Cruel and Unusual Punishment Clause, the textual source of the principle in criminal cases,¹⁵ nor under the Fifth Amendment's Due Process Clause, the textual source of the principle in civil punitive damages cases.¹⁶ Yet it is undisputed that the Due Process Clause applies to immigration proceedings.¹⁷ Moreover, in a landmark 2010 decision, the Supreme Court declared that a criminal defense attorney's failure to advise a client of the immigration consequences of a conviction could violate the Sixth Amendment guarantee of effective assistance of counsel, because deportation is a direct, not collateral, consequence of a conviction.¹⁸ The rationale of this decision implies that removal orders that are the inevitable result of a criminal conviction are subject to review for excessiveness under the Eighth Amendment.

This Article contends that removal orders are subject to constitutional proportionality review.¹⁹ A removal order is sufficiently punitive to trigger

14. Efforts to pass comprehensive immigration reform statutes failed in 2006 and 2007. S. 2611, 109th Cong. (2006); S. 1348, 110th Cong. (2007). Even the DREAM Act, which would have provided a path to citizenship for a limited class of individuals who had entered the country as children, could not pass the Senate in 2009. S. 3992, 111th Cong. (2010). See Julia Preston, *Tweak in Rule to Ease a Path to Green Card*, N.Y. TIMES, Jan. 6, 2012, available at <http://www.nytimes.com/2012/01/07/us/path-to-green-card-for-illegal-immigrant-family-members-of-americans.html> ("White House officials acknowledge that there will be no progress before the November elections on legislation the president supports to give legal status to millions of illegal immigrants.").

15. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Weems v. United States*, 217 U.S. 349 (1910); see also Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 576–90 (2005); Lee, *supra* note 9, at 687–99; Rachel A. Van Cleave, "Death is Different," *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 223–46 (2003).

16. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); see also Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 903–14 (2004).

17. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that the Due Process Clause guarantees fundamental fairness in removal proceedings); see also *Landon v. Plasencia*, 459 U.S. 21 (1982) (holding that due process protections apply in deportation proceedings).

18. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

19. Writing before the Supreme Court's decisions in *Padilla v. Kentucky* and *Graham v. Florida*, other scholars have argued that deportation may be a disproportional sanction in some cases, and have recommended legislative solutions. Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1671–79 (2009) (noting that due process requires proportionality and proposing enactment of a rights-based category of statutory relief from removal that would permit immigration judges to consider factors necessary to ensure proportionality); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732–40 (2009) (proposing graduated system of sanctions for immigration

constitutional proportionality review, and metrics adapted from the criminal sentencing and civil punitive damages context are available to conduct the sort of proportionality review that is well established in many other areas of law. Moreover, the statutory provision requiring an immigration judge to “decide whether an alien is removable from the United States” at the conclusion of removal proceedings²⁰ must be understood to incorporate Fifth and Eighth Amendment proportionality principles, pursuant to the constitutional avoidance canon of statutory interpretation²¹ and the guarantee of fundamental fairness in immigration proceedings long recognized by the Supreme Court.²² Accordingly, the obligation to conduct a proportionality review of removal orders extends to immigration judges, as well as to the U.S. Courts of Appeals that review those orders.

Proportionality review rarely results in a court displacing a criminal sentence, punitive damages award, or other sanction,²³ largely because of judicial deference to legislative judgments and jury deliberations.²⁴ Invalidation of a removal order will also be infrequent. Nevertheless, a court should set aside a removal order as constitutionally impermissible in the rare case where the punishment of the removal order is grossly disproportionate to the underlying misconduct, just as the Fifth and Eighth Amendments require in other contexts.

I. PROPORTIONALITY REVIEW OUTSIDE IMMIGRATION LAW

Proportionality “embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not. Departures from proportionality—though perhaps eventually justifiable—at least stand in need of defense.”²⁵ The concept is

violations). I argue that proportionality review in immigration cases is not merely advisable but required under the direct command of the Fifth Amendment’s Due Process Clause and in some cases the Eighth Amendment as well.

20. 8 U.S.C. § 1229a(c)(1)(A) (2006).

21. See, e.g., *Clark v. Martínez*, 543 U.S. 371, 381 (2005) (construing immigration statute to avoid constitutional difficulty and explaining that the constitutional avoidance canon “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 402 (2005) (defending the avoidance canon as “not so much a maxim of statutory interpretation as it is a tool of constitutional law”).

22. See *infra* notes 188–219 and accompanying text.

23. *Ewing v. California*, 538 U.S. 11, 37 (2003) (Breyer, J., dissenting) (“I recognize the warnings implicit in the Court’s frequent repetition [in its proportionality cases] of words such as ‘rare.’”); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“[S]uccessful challenges to the proportionality of particular sentences have been exceedingly rare.”).

24. *Id.* at 23 (majority opinion) (emphasizing “primacy of the legislature”).

25. Von Hirsch, *supra* note 5, at 56; see also Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS OF HUMAN RIGHTS

important not only to retributivists, who focus on whether an individual receives a just desert, but also to utilitarians, who argue that a failure to punish proportionally is inefficient, fails appropriately to deter misconduct, and undermines the rule of law.²⁶ It may be understood best as a “side constraint that embodies retributivism,” as Youngjae Lee has contended, limiting the sanction that might otherwise be imposed consistent with deterrence, incapacitation, or other theories of punishment.²⁷

Notwithstanding debate about their theoretical justification, proportionality requirements are well developed in the criminal law precedents, tracing back more than a century²⁸ and including more than ten Supreme Court decisions since 1980 addressing noncapital²⁹ and capital sentences.³⁰ In criminal cases, the “thicket of Eighth Amendment [proportionality] jurisprudence”³¹ contains internal tensions, but it is not difficult to discern certain basic principles. The Court’s approach recognizes two distinct forms of proportionality review. The first is a “narrow proportionality review,” which the Court has also referred to as the “gross

140, 141 (2010) (“Proportionality-based judicial review institutionalizes a right to contest the acts of public authorities and demand a public reasons-based justification.”).

26. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272–79 (2005); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (“[B]ecause it promotes forces that lead to a law-abiding society, a criminal law based on the community’s perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime.”).

27. Lee, *supra* note 9, at 742; see also NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 199 (1982) (“Desert is . . . a limiting principle. The concept of ‘just desert’ sets the maximum and minimum of the sentence that may be imposed for any offense The fine-tuning is to be done on utilitarian principles.”); STITH & CABRANES, *supra* note 4, at 22 (“One widely shared understanding is that even if deterrence of crime is the general aim of a system of criminal prohibitions, ‘just desert’ (or retribution) should be a limit on the distribution of punishment.”).

28. *Weems v. United States*, 217 U.S. 349 (1910).

29. *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that a life sentence for juvenile offender who did not commit homicide violates Eighth Amendment proportionality requirement); *Solem v. Helm*, 463 U.S. 277 (1983) (holding that a life sentence for seventh conviction for passing bad check violates same). *But see* *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding life sentence for California third-strike conviction); *Ewing*, 538 U.S. 11 (same); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that a life sentence for cocaine possession is not constitutionally disproportionate); *Hutto v. Davis*, 454 U.S. 370 (1982) (upholding forty-year sentence for possession and intent to distribute nine grams of marijuana); *Rummel*, 445 U.S. 263 (upholding life sentence under Texas recidivist statute for theft of \$120).

30. *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that death sentence for defendant who was under eighteen years of age at the time of his capital crime violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that death sentence for mentally retarded defendant violates the Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that death sentence for felony murder *simpliciter* with no finding of an intent to kill is constitutionally disproportionate); see also *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that death sentence for a murder committed when defendant was fifteen years of age violates the Eighth Amendment).

31. *Lockyer*, 538 U.S. at 72; see also Lee, *supra* note 9, at 681 (characterizing modern proportionality decisions as “messy and complex” and a “meaningless muddle”).

disproportionality principle.” This is essentially a form of case-by-case analysis.³² The second is a categorical review, through which an entire class of criminal punishment for a particular offense (e.g., capital punishment for a nonhomicide offense) or for a particular population (e.g., juvenile offenders) is examined.

The case-by-case proportionality analysis requires a two-step inquiry. First, the Court asks whether a particular criminal sentence is so excessive in relation to the gravity of the offense as to raise an inference of “gross disproportionality.”³³ For instance, in *Solem*, the Supreme Court concluded that a life sentence for passing a bad check raised an inference of gross disproportionality,³⁴ and in 2010, Chief Justice John Roberts reached the same conclusion in another noncapital case.³⁵ On the other hand, a 5–4 majority of the Court in *Ewing* held that California’s “three strikes” law did not raise an inference of gross disproportionality on the facts of the case before it.³⁶

In the rare case where a sentence is so excessive in relation to the offense as to create an inference of gross disproportionality, the court will conduct two comparative assessments: (1) an intrajurisdictional review examining other sentences imposed for comparable offenses within the same jurisdiction and other crimes for which the same sentence is imposed, and (2) an interjurisdictional analysis considering how other jurisdictions punish similar offenses.³⁷ Occasionally, a court will conclude that a sentence otherwise lawfully imposed is so disproportionate as to be unconstitutional, in violation of the Eighth Amendment.³⁸

This case-by-case proportionality analysis rarely leads to overturning a sentence, and some scholars have concluded that the doctrine is moribund outside the capital context,³⁹ especially since the Court’s rejection of proportionality

32. See, e.g., *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring) (“Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.”). See also John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 84–86 (2010); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 57–58 (2000).

33. *Harmelin*, 501 U.S. at 1005–06.

34. *Solem*, 463 U.S. at 291–303.

35. *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring) (concluding life sentence without possibility of parole for juvenile offender convicted of nonhomicide offense failed gross disproportionality review).

36. *Ewing v. California*, 538 U.S. 11 (2003).

37. *Solem*, 463 U.S. at 291, 299–300 (comparing sentences and noting that the defendant was treated in “the same manner as, or more severely than, criminals who have committed far more serious crimes” and “more severely than he would have been in any other State”).

38. See, e.g., *id.* at 303; *Weems v. United States*, 217 U.S. 349 (1910).

39. See e.g., Castiglione, *supra* note 32, at 84 (“[T]he narrow proportionality regime, which prevails today, is generally considered to be an empty shell; it prohibits punishments that are ‘grossly disproportionate,’ but almost never leads to the overturning of a sentence of a term of years.”).

challenges to California's "three strikes" law.⁴⁰ The Supreme Court has insisted on the vitality of the principle, however, and even in *Ewing* it affirmed that the Constitution requires "gross disproportionality" review of individual sentences.⁴¹ Moreover, in 2010 Chief Justice Roberts concurred in *Graham v. Florida* on this rationale, concluding that a sentence of life without parole for a juvenile nonhomicide offender violated the "gross disproportionality" test on a case-by-case analysis.⁴² In other words, the demise of the doctrine may be overstated.

The Court's second approach to considering whether a criminal sentence is constitutionally proportional is categorical.⁴³ Here, the judicial inquiry focuses on the nature of the offense or the characteristics of the offender.⁴⁴ The Court has in a number of cases held that a punishment is grossly excessive for certain offenses and for certain offenders.⁴⁵

The judicial test for proportionality in these categorical cases is phrased differently from that for proportionality on a case-by-case basis. A court "first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue."⁴⁶ This analysis requires review of statutory text, as well as consideration of practices on the ground, which often differ from law on the books.⁴⁷ The court may also examine foreign or international practices.⁴⁸ The court will then take into account "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question,"⁴⁹ and whether the penalty "serves

40. *Ewing*, 538 U.S. at 37; see also *Lockyer v. Andrade*, 538 U.S. 63, 72–74 (2003) (emphasizing, in a companion case to *Ewing*, that "gross disproportionality principle is applicable to sentences for terms of years" and holding that state court rejection of proportionality challenge to "three strikes" law was not contrary to, or unreasonable application of, clearly established federal law, as required for habeas relief under 28 U.S.C. § 2254(d)(1)).

41. Justice Thomas specifically dissented in *Ewing* to argue that no such constitutional proportionality requirement exists, but the majority rejected that position. *Ewing*, 538 U.S. at 32 (Thomas, J., dissenting) ("In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.").

42. 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring).

43. *Id.* at 2022 (majority opinion).

44. *Id.*

45. *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding death penalty impermissible for rape of child not resulting and not intended to result in death); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding death penalty impermissible for seventeen-year-old homicide offender); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding death penalty impermissible for mentally retarded offender); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding death penalty impermissible for aiding and abetting in felony murder); see also *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding death penalty impermissible for fifteen-year-old homicide offender).

46. *Graham*, 130 S. Ct. at 2022 (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

47. *Id.*

48. *Id.* at 2033 (listing Eighth Amendment cases where the Court "looked beyond our Nation's borders"); see also Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 70–80 (2006).

49. *Graham*, 130 S. Ct. at 2026.

legitimate penological goals,⁵⁰ namely retribution, deterrence, incapacitation, or rehabilitation.

In its categorical proportionality opinions, the Court has held that capital punishment is constitutionally impermissible for nonhomicide crimes⁵¹ and for homicide committed by juvenile offenders⁵² or those with low intellectual functioning.⁵³ The latter cases place significant emphasis on the diminished culpability of young persons and those with mental health or developmental impairments, who do not bear the same moral responsibility for their actions as mentally competent adults.⁵⁴ For many years the Supreme Court applied its categorical analysis exclusively in capital cases and reviewed proportionality challenges to noncapital sentences only under the case-by-case standards for proportionality. That changed in 2010, however, when Justice Kennedy wrote for the Court that a sentence of life without parole for a juvenile nonhomicide offender violated the constitutional command of proportionality under the categorical approach.⁵⁵

Proportionality as a constitutional command is not limited to the Cruel and Unusual Punishment Clause. Fines, penalties, and other civil sanctions may be sufficiently punitive to require constitutional proportionality review under the Fifth Amendment and the Eighth Amendment's Excessive Fines Clause. As Justice Blackmun explained for the Court in *Halper*, "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."⁵⁶

In this regard, the Court has concluded that fines are subject to an excessiveness review under the Excessive Fines Clause. In a case involving a man who failed to disclose the full amount of cash he was lawfully carrying out of the country and, subsequently, received a massive fine for what was essentially a paperwork violation,⁵⁷ the Court explained that "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to

50. *Id.* See also *Kennedy*, 554 U.S. at 440–43; *Panetti v. Quaterman*, 551 U.S. 930, 957–60 (2007).

51. *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that death sentence for rape is disproportionate).

52. *Roper v. Simmons*, 543 U.S. 551 (2005).

53. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986).

54. See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272–73 (2005).

55. *Graham*, 130 S. Ct. at 2030–33. Chief Justice Roberts concurred in the judgment but would have ruled only on the narrower case-by-case proportionality grounds. *Id.* at 2036 (Roberts, C.J., concurring).

56. *United States v. Halper*, 490 U.S. 435, 447–48 (1989).

57. *United States v. Bajakajian*, 524 U.S. 321 (1998).

punish.”⁵⁸ The Court went on to apply a version of case-by-case proportionality analysis.⁵⁹

The constitutional rule that a penalty must not be excessive in relation to the underlying misconduct is also required when it comes to civil sanctions subject only to Fifth Amendment, not Eighth Amendment, scrutiny. For instance, in the land use case, *Dolan v. City of Tigard*,⁶⁰ the Supreme Court used a form of case-by-case analysis that it called “rough proportionality.” The Court reasoned that under the Takings Clause, “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”⁶¹

Proportionality is also required by the Due Process Clause, and it is in this context that the doctrine is best developed in civil cases. In its punitive damages precedents, the Supreme Court initially held that such awards were immune from substantive judicial review⁶² but eventually revised its position and concluded that such awards are subject to a proportionality analysis very similar to that under the Eighth Amendment.⁶³ In *BMW v. Gore*, the Court established three “guideposts” for assessing whether a punitive damages award was constitutionally permissible: (1) reprehensibility of the underlying conduct, (2) ratio of punitive damages award compared to harm to plaintiff and other conceivable victims (compensatory damages), and (3) comparison of punitive damages award to other civil and criminal penalties that could be imposed for similar conduct.⁶⁴ In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court went further, articulating a categorical-type rule that “few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”⁶⁵

BMW v. Gore reads much like a case-by-case proportionality decision in a noncapital case. The Court starts by considering the severity of the sentence in relation to the gravity of the offense, and in the uncommon case continues on to various comparative analyses. And the conclusion in *State Farm* is essentially a categorical holding for punitive damages cases. Indeed, scholars have noted that judicial scrutiny of disproportionate civil sanctions, such as punitive damages,

58. *Id.* at 334.

59. *See id.* at 336; *see also* Lee, *supra* note 9, at 729–30; Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949, 961–62 (2008); Van Cleave, *supra* note 15, at 250–53.

60. 512 U.S. 374, 391 (1994).

61. *Id.*; *see also* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 74–80 (2009); K.G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 655–58 (2002).

62. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

63. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

64. *Id.* at 574–83.

65. 538 U.S. 408, 425 (2003).

appears to be more searching than review of criminal sentences.⁶⁶ This close scrutiny of civil punishments suggests that there is an important judicial role in reviewing the proportionality of civil immigration sanctions, such as deportation.

II. PROPORTIONALITY REVIEW IN IMMIGRATION LAW

In recent years, courts have decried the harsh consequences of our immigration laws in particular cases,⁶⁷ but I am not aware of any decision by an Article III or administrative court in the United States that has evaluated whether deportation is disproportional to the underlying misconduct. Removal orders, however, should be subject to proportionality review by courts and immigration judges, both on a case-by-case basis and categorically.

Proportionality is required under the Eighth Amendment, at least in cases where a removal order is the result of a criminal conviction; as the Supreme Court observed in *Padilla v. Kentucky*, “deportation is an integral part—indeed, sometimes the most important part—of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes.”⁶⁸ Proportionality is also a command of the Fifth Amendment’s Due Process Clause even where deportation is not the result of a criminal conviction. This is so because the Supreme Court has explained that if any part of a sanction is punitive, then the entire sanction may be subject to proportionality review.⁶⁹ Because a removal order mandates departure⁷⁰ and also bars lawful return for a period of years,⁷¹ removal orders are subject to judicial review on constitutional proportionality grounds even where the individual has not been convicted criminally.⁷² Further, the immigration statutes

66. See, e.g., Chemerinsky, *supra* note 4, at 1051 (noting the “cruel irony . . . that too many years in prison for shoplifting does not violate the Constitution but too much money in punitive damages against a business for ‘manslaughter’ is unconstitutional”); Karlan, *supra* note 16, at 910 (contrasting the “Court’s retreat from proportionality review in the criminal context” with “its enthusiastic embrace in the punitive damages cases”).

67. See, e.g., *Cheruku v. Att’y Gen. of the United States*, 662 F.3d 198, 209 (3d Cir. 2011) (McKee, C.J., concurring); *Martinez v. United States Att’y Gen.*, 413 F. App’x 163, 168 (11th Cir. 2011) (noting “heartbreaking” consequences of removal of mother of young children who had escaped domestic abuse); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1015 (9th Cir. 2005) (Pregerson, J., dissenting).

68. 130 S. Ct. 1473, 1480 (2010) (emphasis added) (footnote omitted).

69. *United States v. Halper*, 490 U.S. 435, 447–48 (1989).

70. See *Padilla*, 130 S. Ct. at 1481 (“We have long recognized that deportation is a particularly severe ‘penalty. . . .’”) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)); *Delgadillo v. Carmichael*, 332 U.S. 388, 390–91 (1947) (“Deportation can be the equivalent of banishment or exile.”) (citing *Bridges v. Wixon*, 326 U.S. 135, 147 (1945)); *Bridges*, 326 U.S. at 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual That deportation is a penalty—at times a most serious one—cannot be doubted.”).

71. 8 U.S.C. § 1182(a)(9)(A)(i), (ii)(II) (2006) (stating that a person who has been ordered removed may not lawfully return to the United States for five, ten, or twenty years, or ever, depending on circumstances).

72. Immigration fines, such as those imposed on employers found to have knowingly hired or employed an unauthorized worker, may also be subject to proportionality review. See *United States v.*

must be construed so as to avoid requiring entry of a constitutionally disproportionate removal order, thus extending to immigration judges the obligation to conduct a proportionality review before entering a removal order.

A. Removal as a Punitive Sanction

Is a removal order sufficiently punitive that it is subject to a constitutional proportionality requirement, under the Fifth or Eighth Amendment? The Supreme Court has stated that deportation proceedings are civil, not criminal,⁷³ and that deportation itself is not punishment, at least as that term is understood for the purpose of certain constitutional provisions.⁷⁴ As a result, requirements of constitutional criminal procedure such as the right to counsel,⁷⁵ the rule against admissibility of illegally-obtained evidence,⁷⁶ and the prohibition on ex post facto laws⁷⁷ do not apply in civil removal proceedings. Yet the civil/criminal distinction is not dispositive for proportionality analysis, as confirmed by the excessive fines, punitive damages, and land use takings cases, all of which involve scrutiny of a civil sanction for conformity to constitutional proportionality requirements. Rather, the decisive classification for proportionality review is whether a sanction is remedial or punitive. If deportation is wholly remedial, without any punitive element, then proportionality review is not required by the Constitution.⁷⁸ Nor,

Bajakajian, 524 U.S. 321 (1998) (Excessive Fines Clause requires proportionality review). See generally 8 U.S.C. § 1324a(f) (2006) for the criminal penalties for engaging in a pattern or practice of employing unauthorized foreign nationals.

73. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that ordinary Fourth Amendment exclusionary rule does not apply in deportation proceedings, which are civil, except in cases of egregious violations).

74. See, e.g., *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999) (“While the consequences of deportation may assuredly be grave, they are not imposed as a punishment.”); *Fong Yue Ting*, 149 U.S. at 730 (holding that constitutional protections for criminal defendants “have no application” in civil deportation proceedings).

75. See, e.g., *Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010) (explaining that there is no Sixth Amendment right to counsel in immigration proceedings).

76. *Lopez-Mendoza*, 468 U.S. 1032.

77. *Marcello v. Bonds*, 349 U.S. 302, 314 (1955) (stating that ex post facto clause does not apply to retroactive application of immigration statute); *Fong Yue Ting*, 149 U.S. at 722–24 (same). Courts have held that the Due Process Clause, which governs the conduct of removal proceedings, incorporates weaker versions of some rules of criminal procedure, such as the exclusionary rule, *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234–37 (2d Cir. 2006) (holding exclusionary rule applies in removal proceedings in cases of egregious violations); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448–49 (9th Cir. 1994) (explaining that “egregious Fourth Amendment violations warrant the application of the exclusionary rule in civil proceedings”), and the rule against retroactive enforcement of statutes, *INS v. St. Cyr*, 533 U.S. 289, 315–20 (2001) (utilizing presumption against retroactive application of statutes to construe ambiguous immigration provision).

78. *Banks*, *supra* note 19, at 1656 (“[T]he key question in determining whether or not a sanction is punishment is not whether it is criminal or civil, but whether it is remedial or punitive.”); *id.* at 1658 (arguing that proportionality review is appropriate in immigration cases only where there is “initial determination that deportation is punitive rather than remedial”).

then, would the immigration statutes need to be construed to incorporate a proportionality review so as to avoid constitutional difficulty.

The Supreme Court's guidance on classifying a government sanction as punitive or remedial displays "significant methodological turmoil."⁷⁹ Nevertheless, some principles can be divined from two overlapping lines of precedent, in which the Supreme Court has considered cases involving a civil proceeding challenged as violative of the Double Jeopardy or Excessive Fines Clause.

Litigants have occasionally argued that a proceeding termed civil by a legislature is nevertheless substantively so punitive that it must be deemed criminal for double jeopardy purposes.⁸⁰ To analyze such a claim, courts begin with the legislative characterization and set aside the civil label for double jeopardy purposes only upon significant evidence of the factors outlined in *Kennedy v. Mendoza-Martinez*.⁸¹ This standard is a high one and is rarely satisfied in modern cases.

Scholars have contended that deportation proceedings are quasi-criminal, containing both criminal and civil aspects, and that therefore more constitutional criminal procedure norms should apply.⁸² These arguments tend to focus on deportation of lawful permanent residents, in circumstances that Daniel Kanstroom has described as reflecting "post-entry social control."⁸³ There is force

79. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1925–26 (2000); see also Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. REG. 47 (2010).

80. *Hudson v. United States*, 522 U.S. 93 (1997) (overruling *Halper* in part and holding criminal prosecution following civil monetary penalty and administrative debarment proceeding does not violate double jeopardy); *United States v. Ursery*, 518 U.S. 267, 287–88 (1996) (“[C]ivil [in rem] forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.”); *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994) (imposition of state “dangerous drug tax” constituted punishment for double jeopardy purposes); *United States v. Halper*, 490 U.S. 435 (1989) (prosecuting civil claim under False Claims Act following criminal prosecution was criminal punishment in violation of Double Jeopardy Clause); *United States v. Ward*, 448 U.S. 242 (1980) (emphasizing deference to legislative classification of sanction as civil or criminal for double jeopardy purposes); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (elaborating six-factor test to determine whether sanction classified by legislature as civil is sufficiently punitive to be deemed criminal for double jeopardy analysis).

81. *Hudson*, 522 U.S. at 99–100 (quoting *Ward*, 448 U.S. at 248–49) (explaining that a court must “first ask” whether legislature applied civil or criminal label, but should also consider *Mendoza-Martinez* factors to determine “whether the statutory scheme was so punitive either in purpose or effect” as to render the sanction a criminal punishment for double jeopardy purposes).

82. Kanstroom, *supra* note 79; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469 (2007); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 323–25 (2000) (arguing that at least some deportation proceedings should be viewed as quasi-criminal); see also Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1350 (2011) (arguing that deportation cases are neither truly civil nor criminal, but should be understood as residing “in the space between the two realms”).

83. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); Kanstroom, *supra* note 79.

to these views, and the Supreme Court's decision in *Padilla* confirms them in some cases. Because proportionality is a requirement of the Due Process Clause as well as the Eighth Amendment, however, these arguments bolster, but are unnecessary to, my contention that removal orders are subject to proportionality review, even where the deportation order is indisputably civil.

Unlike the double jeopardy precedents, in cases arising under the Excessive Fines Clause of the Eighth Amendment, the Court has looked to history, congressional intent, and the relationship of the fine to the underlying misconduct to determine whether a government sanction is sufficiently punitive to trigger review for excessiveness.⁸⁴ The standard has been less exacting in practice, as demonstrated most plainly by the Court's conclusion that a civil forfeiture may be sufficiently punitive to trigger review under the Excessive Fines Clause, even if not punitive enough to constitute criminal punishment for double jeopardy purposes.⁸⁵ This may reflect the Court's willingness to restrain egregious civil sanctions (as reflected in the lower standard for what constitutes punishment under the Excessive Fines Clause), even when reluctant to prohibit the sanction outright (as would be required from a conclusion that the same sanction constituted punishment under the Double Jeopardy Clause).

1. *Removal of Permanent Residents*

For proportionality review, the question is whether deportation is wholly remedial (such that the Constitution imposes no proportionality requirement), or whether it is punitive at least in part (such that it does). Maureen Sweeney has argued that where a conviction results in the automatic deportation of a permanent resident, "removal functions as punishment for wrongdoing" and thus should not be "grossly disproportionate to the offense."⁸⁶ In 2010 the Court appears to have accepted these contentions, at a minimum as to permanent residents who are removable because of a criminal conviction.⁸⁷ Deportation is, the Court emphasized, a "particularly severe 'penalty.'"⁸⁸ And because "recent changes in our immigration law have made removal nearly an automatic result" of conviction for many offenses,⁸⁹ it is "most difficult" to divorce the penalty from

84. *Austin v. United States*, 509 U.S. 602, 609–19 (1993) (concluding civil forfeiture is punishment subject to Excessive Fines Clause); *United States v. Bajakajian*, 524 U.S. 321 (1998) (same).

85. *Compare Austin*, 509 U.S. at 609 (concluding civil forfeiture is punishment subject to excessive fine review), and *Bajakajian*, 524 U.S. at 333–34 (same), with *Ursery*, 518 U.S. at 287 (holding that civil forfeiture is not punishment subject to Double Jeopardy Clause).

86. Sweeney, *supra* note 79, at 87–88; see also Banks, *supra* note 19.

87. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010); see also *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile.") (citing *Bridges v. Wixon*, 326 U.S. 135, 147 (1945)).

88. *Padilla*, 130 S. Ct. at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

89. *Id.* at 1483.

the conviction in the deportation context.”⁹⁰ Any insistence that removal is not punitive thus fails in the face of *Padilla*, as well as for the reasons articulated by Kanstroom and others, in cases involving permanent residents convicted of crimes which render their removal “nearly an automatic result.”

One might respond that the *Padilla* holding that deportation is an “integral part” of the penalty imposed upon conviction of a criminal offense means that removal must be taken into account in an Eighth Amendment proportionality challenge to the conviction. This may well be so. But if deportation as the “nearly . . . automatic result” of a conviction is a “penalty,” as the *Padilla* Court concluded, then the removal order itself must also be subject to Fifth Amendment proportionality review in the immigration proceedings.

The government removes few lawful permanent residents (LPRs) on grounds other than conviction of a criminal offense, but it does remove some, for instance for immigration fraud. Where one has secured permanent resident status by misrepresentation, deprivation of LPR status may be solely remedial. But removal itself may still be punitive, for reasons discussed below regarding removal of non-LPRs.

2. Removal of Non-LPRs

Is removal of a person *other than* a permanent resident sufficiently punitive to be subject to constitutional proportionality review?⁹¹ The Court has emphasized that when a government sanction is intended other than for a remedial purpose, even in part, then it is a penalty. In other words, a “civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.”⁹² To the extent that a removal order is punitive, even in part, its imposition must satisfy constitutional proportionality requirements.

A “penalty” is “the suffering in person, rights, or property that is annexed by law or judicial decision to the commission of a crime or public offense,” as one dictionary states its primary definition.⁹³ Many foreign nationals have of course

90. *Id.* (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

91. *See, e.g., Banks, supra* note 19, at 1658 (declining to examine whether removal of persons who have evaded “border controls through surreptitious entry, fraud, or misrepresentation” is subject to constitutional proportionality requirements because removal in such circumstances is “essentially remedial in nature”); Sweeney, *supra* note 79.

92. *United States v. Halper*, 490 U.S. 435, 448 (1989) (emphasis added); *see also Austin v. United States*, 509 U.S. 602, 620–22 (1993). *Halper* was abrogated in part by *Hudson v. United States*, 522 U.S. 93 (1997) (overturning double jeopardy holding of *Halper*), but the Court’s Excessive Fine Clause analysis in *Austin* was undisturbed. Matthew C. Solomon, *The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court’s Double Jeopardy Excursion*, 87 GEO. L.J. 849 (1999).

93. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 915 (Frederick C. Mish et al. eds., 11th ed. 2009); *see also id.* at 1009 (defining “punish” as “to impose a penalty on for a fault, offense, or violation; to inflict a penalty for the commission of (an offense) in retribution or retaliation”); BLACK’S LAW DICTIONARY 1353 (9th ed. 2009) (defining “punishment” as “[a] sanction—such as a

developed substantial ties within this country prior to the commencement of a removal proceeding against them—bonds of family, community, employment, faith, and otherwise. Most painfully, removal is frequently destructive of family integrity. In reality, the removal order entered against a non-LPR must be understood as a penalty in many cases. Deportation of persons who arrived at a young age or who have long resided in this country “bristles with severities,”⁹⁴ even when the person is not a permanent resident.

Foreign and international law increasingly recognize that removal may be a disproportionate sanction, especially where it will impact minor children or destroy family unity.⁹⁵ A number of international instruments recognize the importance of family unity and the right of parents to raise their children and of children to reside with their parents.⁹⁶ The Convention on the Rights of the Child, for instance, provides that “State Parties shall ensure that a child shall not be separated from his or her parents against their will,” except under lawful procedures and upon a determination that “such separation is necessary for the best interests of the child.”⁹⁷ Additional proposed instruments would also strengthen proportionality as a constraint on the power to deport.⁹⁸

fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law”); *id.* at 1247 (defining “penalty” as “[p]unishment imposed on a wrongdoer, usu. in the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party’s loss). Though usu. for crimes, penalties are also sometimes imposed for civil wrongs.”).

94. *Harisades v. Shaughnessy*, 342 U.S. 580, 588 (1952).

95. *Beharry v. Reno*, 183 F. Supp. 2d 584, 603–05 (E.D.N.Y. 2002) (immigration statutes must be construed in harmony with customary international law, which prevents arbitrary interference with family unity and protects best interest of child), *rev’d on other grounds*, 329 F.3d 51 (2d Cir. 2003).

96. *See* Universal Declaration of Human Rights art. 16, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”); International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 (prohibiting “arbitrary or unlawful interference with . . . family [or] home”); Convention on the Rights of the Child art. 7, 28 I.L.M. 1456, 1577 U.N.T.S. 3 (guaranteeing “as far as possible, the right to know and be cared for by his or her parents”); *see also* DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (forthcoming 2012) (manuscript at 250–67) (on file with author) (describing the application of human rights and international law norms, including proportionality, to immigration proceedings); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213 (2003). The United States is not a signatory to the Convention on the Rights of the Child.

97. Convention on the Rights of the Child, *supra* note 96, 28 I.L.M. at 1460, 1577 U.N.T.S. at 47.

98. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, Art. 56(3), U.N. Doc. A/RES/45/158 (Dec. 18, 1990); *International Migrant Bill of Rights (Draft in Progress)*, 24 GEO. IMMIGR. L.J. 399, 402 (2010) (“States shall establish opportunities for relief from removal for migrants who have a substantial connection to the host country or for whom removal would impose serious harm, either due to family relationships or conditions in the State to which he or she would be removed.”).

The European Court of Human Rights has held that deportation must be “proportionate to the legitimate aim pursued,”⁹⁹ which requires consideration of the individual’s circumstances as well as the State’s interest in removal. In 2011 the European Court of Justice enjoined the refusal of Belgium to grant residency and employment authorization to the parent of an EU national child because to force the separation of the child and parent (if the child did not accompany the parent upon departure) or the constructive deportation of the child (if she did accompany the parent) would deny the child her rights as an EU national.¹⁰⁰ In reviewing removal orders entered in the United States, the Inter-American Commission on Human Rights concluded that “it is well-recognized under international law that a Member State must provide non-citizen residents an opportunity to present a defense against deportation based on humanitarian and other considerations.”¹⁰¹

It is no answer, in human terms, to say that the establishment of these human relationships was tainted from the outset by one’s unlawful arrival or extended stay. The immigration statutes prohibit residence beyond the expiration of a visa as well as entry into the nation without inspection at the border.¹⁰² In some circumstances they bar employers from hiring a person.¹⁰³ But they do not ban marriage, childrearing, school attendance,¹⁰⁴ acceptance of employment,¹⁰⁵ formation of relationships with friends and neighbors, religious observance, or many other forms of community. Moreover, one may readily acknowledge the government’s broad power to deport foreign nationals¹⁰⁶ while also insisting that exercise of that power can, in some instances, impose a suffering the law deems punitive. The forcible, enduring, and possibly permanent severing of these ties is frequently “heartbreaking,”¹⁰⁷ and it is a “savage penalty”¹⁰⁸ in the everyday sense of the word.

99. *Dalia v. France*, 1998-I Eur. Ct. H.R. 14–15.

100. Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, 2011 ECJ EUR-Lex LEXIS 82 (“A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit,” violates Article 20 of Treaty on the Functioning of the European Union, 9.5.2008).

101. *Wayne Smith, Hugo Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, OEA/Ser.L./V/II.139, doc. 21 ¶ 5 (2010); see also *id.* at ¶ 56 (“[T]he IACHR particularly emphasizes that the best interest of minor child must be taken into consideration in a parent’s removal proceeding.”); *KANSTROOM*, *supra* note 96 (manuscript at 255–62) (discussing *Smith/Armendariz* IACHR decision).

102. 8 U.S.C. § 1325 (2006).

103. *Id.* § 1324a(a)(1).

104. Children have a constitutional right to attend public primary and secondary schools regardless of immigration status. *Plyler v. Doe*, 457 U.S. 202 (1982).

105. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

106. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952). See also Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (analyzing exclusive nature of the federal government’s broad immigration powers).

107. *Martínez v. United States Attorney General*, 413 F. App’x 163, 168 (11th Cir. 2011).

B. *Re-entry Bars as a Punitive Sanction*

Whether entered against permanent residents or others, today all removal orders contain an additional feature that is undeniably punitive—imposition of a ban on lawful return for at least five years and in some cases, forever. The length of the re-entry bar depends on various factors, but it is imposed in all cases: five years (if the removal order is entered upon one’s arrival or attempted entry into the United States),¹⁰⁹ ten years (if the removal proceedings is commenced after one’s initial entry),¹¹⁰ twenty years (if the removal order is a second or subsequent order),¹¹¹ or a lifetime ban (if the person was convicted of an “aggravated felony”).¹¹²

The ban on return cannot be justified in remedial terms; it accomplishes deterrence and retributive goals.¹¹³ Consideration of the origins and purpose of the re-entry bars confirms as much. The first such measure appears to have been a one-year bar adopted by Congress in 1917. It was initially applicable only in deportation cases,¹¹⁴ and its history reveals a deterrent purpose. According to a Senate Report, Congress adopted the re-entry bar to end “the quite extensive and very annoying practice of aliens expelled from the country or debarred at the ports thereof immediately reattempting to break past the barriers and enter.”¹¹⁵ In 1929 Congress extended the one-year bar to exclusion cases as well and made the deportation bar permanent, without any statutory waiver provision.¹¹⁶

Upon enactment of the Immigration and Nationality Act in 1952, Congress

108. *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (describing deportation).

109. 8 U.S.C. § 1182(a)(9)(A)(i) (2006). This bar on lawful return may be waived by the Attorney General. *Id.* § 1182(a)(9)(A)(iii).

110. *Id.* § 1182(a)(9)(A)(ii). This bar on lawful return may be waived by the Attorney General. *Id.* § 1182(a)(9)(A)(iii).

111. *Id.* § 1182(a)(9)(A). These bars on lawful return may be waived by the Attorney General. *Id.* § 1182(a)(9)(A)(iii).

112. 8 U.S.C. § 1182(a)(9)(A). The statutory category “aggravated felony” is extremely expansive and includes a wide range of misdemeanors and nonviolent offenses. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939–41 (2000).

113. A person who illegally re-enters the United States to rejoin family members, but in violation of the applicable bar, and who is then criminally prosecuted, *see* 8 U.S.C. § 1326 (2006), may also be able to raise a traditional proportionality defense in that criminal prosecution, on either a categorical or case-by-case basis.

114. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 30 Stat. 874, 876 (providing for exclusion of “persons who have been deported under any of the provisions of this Act, and who may again seek admission within one year from the date of such deportation” absent advance permission from the Secretary of Labor).

115. S. REP. NO. 64-352, at 4 (1916).

116. Act of March 4, 1929, Pub. L. No. 70-1018, § 1, 45 Stat. 1551, 1551 (amending 1917 re-entry bar to apply to “persons who have been excluded from admission and deported in pursuance of law”).

retained the one-year re-entry bar for exclusion cases¹¹⁷ and also the draconian permanent bar on re-entry in deportation cases,¹¹⁸ and made both subject to waiver by the Attorney General. There does not seem to be legislative history elaborating on the legislative intent motivating continuation of the re-entry bars,¹¹⁹ but it is hard to understand the bars in wholly remedial terms.

In 1982 Congress eliminated the permanent ban on re-entry in deportation cases and substituted instead a five-year bar.¹²⁰ The House Report noted that the permanent re-entry bar served “little useful purpose,”¹²¹ and since the Immigration and Nationality Service “routinely granted permission to re-enter” to persons who had remained outside the United States for significant periods of time after deportation,¹²² reducing the permanent re-entry bar to five years would create “a direct economy by eliminating the need to adjudicate consent applications.”¹²³

Congress famously introduced the statutory term “aggravated felony” in the Anti-Drug Abuse Act of 1988, at which time it doubled the re-entry bar to ten years “in the case of an alien convicted of an aggravated felony.”¹²⁴ Two years later, Congress doubled the re-entry bar again for aggravated felons to twenty years.¹²⁵ I am not aware of legislative history of the 1988 or 1990 Acts elaborating on the purpose for extending the re-entry bar to twenty years for aggravated felons.¹²⁶

The most important recent revisions to the re-entry bars occurred with enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),¹²⁷ in which Congress extended the re-entry bar in exclusion¹²⁸ cases from one year to five years; extended the bar in deportation cases from five years to ten years; extended the bar in aggravated felony cases from twenty years

117. Pub. L. No. 82-414, § 236, 66 Stat. 163, 183, codified at 8 U.S.C. § 1182(a)(16) (1952).

118. *Id.*

119. *See, e.g.*, S. REP. NO. 81-1515, at 413 (1950).

120. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 4, 95 Stat. 1611, 1612.

121. COMMITTEE ON THE JUDICIARY, 100th CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT 138 (Comm. Print 1988) (quoting H.R. REP. NO. 97-264, at 20 (1981)).

122. *Id.*

123. *Id.*

124. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 1988 U.S.C.C.A.N. (102 Stat.) 4181.

125. Immigration Act of 1990, Pub. L. No. 101-649, 1990 U.S.C.C.A.N. (104 Stat.) 4978.

126. *See* IGOR I. KAVASS & BERNARD D. REAMS, JR., THE IMMIGRATION ACT OF 1990: A LEGISLATIVE HISTORY OF PUB. L. NO. 101-649 (1997), available at <http://heinonline.org/HOL/Index?index=leghis/lhimact&collection=leghis>.

127. Pub. L. No. 104-208, Div. C, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546.

128. IIRIRA substituted the term “removal” for what the INA had previously labeled “exclusion” and “deportation” cases, but in substance preserved many of the distinctions between the two proceedings. I continue to use the terms exclusion and deportation in this section for ease of historic comparison.

to a permanent bar; and created an additional twenty-year bar for illegal re-entry cases.¹²⁹ There is little direct legislative history of the extensions of the re-entry bars,¹³⁰ but there is evidence that Congress understood the purpose of the re-entry bars to be punitive.

First, when Rep. Randy Tate offered an amendment on the House floor to establish a permanent bar for anyone who entered or attempted to enter unlawfully, a discussion of the purpose of re-entry bars occurred. Although the Tate amendment failed, the floor debate centered on the re-entry bars in the existing bill, which did become law, and confirm that Congress enacted these bars to achieve punitive and deterrent purposes. Rep. Marge Roukema, for instance, argued in support of the Tate amendment that “the one-strike-and-you’re-out amendment will attach a *real penalty* to those who have crossed our borders illegally. It is a common sense measure and it will prove to be a very effective *deterrent*.”¹³¹ Rep. John Bryant objected that this amendment was unnecessary, citing the re-entry bar provisions contained in the proposed legislation: “The bill says already that you can exclude people from 5 years to 10 years depending on the category they are in if they come into the country illegally and are ordered removed. We have already got a *stiff penalty* in the bill.”¹³² Representative Xavier Becerra opposed the Tate amendment on similar grounds, repeating that the existing bill would extend the general re-entry bar to ten years, which “is very severe *punishment* to serve.”¹³³

Second, the history of a separate set of re-entry bars enacted in IIRIRA, the three- and ten-year bars for unlawful presence in the United States of six or twelve months, respectively,¹³⁴ indicate that Congress generally intended re-entry bars as punitive. The relevance of congressional debate on the unlawful presence bars to the legislative purpose underlying extension of the re-entry bars is confirmed by their placement in consecutive sections of IIRIRA, § 301(c)(A) and § 301(c)(B), as well as their joint treatment in some committee reports.¹³⁵ And the history of the unlawful presence bars demonstrates an unmistakable intent to punish.

In a House Judiciary Committee hearing, Rep. Xavier Becerra proposed to eliminate the unlawful presence bars, but the Chair, Rep. Henry Hyde, objected,

129. IIRIRA § 301 (codified at 8 U.S.C. §1182).

130. Replacement of the twenty-year re-entry bar for aggravated felons with a permanent bar was proposed by Rep. Bob Goodlatte (R-Va.) during a committee mark-up, and opposed by Rep. Jerrold Nadler (D-NY). *Hearing of the House Judiciary Committee Markup*, 104th Cong. (1995), available at <http://www.fednews.com>. The record of the mark-up contains no meaningful discussion of the purpose of the Goodlatte amendment.

131. 142 CONG. REC. 2378, 2459 (1996) (emphasis added).

132. *Id.* at 2458.

133. *Id.* (emphasis added).

134. IIRIRA § 301.

135. See H.R. REP. NO. 104-169, at 528 (1996) (dissenting views) (characterizing extension of re-entry bars and establishment of unlawful presence bars as “harsh new bans on the ability of aliens to seek lawful entry into this country”).

explaining their purpose is “to validate our immigration laws, and to put some *penalty* on people who cross into our country illegally or undocumentedly [sic].”¹³⁶ Rep. Elton Gallegly agreed with Hyde, emphasizing that the re-entry bars for unlawful presence were necessary because “if we don’t have *penalties* for illegal immigration, for heaven’s sakes, how are we ever going to deal with this issue?”¹³⁷ Rep. Howard Berman then offered an alternative amendment, softening but not eliminating the new re-entry bars by establishing certain exceptions, while arguing that the unlawful presence bars would create “a very harsh *penalty*.”¹³⁸

Judicial opinions discussing the re-entry bars that result from removal confirm that these are punitive, not remedial. In *Dada v. Mukasey*,¹³⁹ for example, the Supreme Court explained that a grant of voluntary departure (rather than entry of a removal order) “allows an alien . . . to sidestep some of the penalties attendant to deportation.”¹⁴⁰ The first “penalt[y] attendant to deportation” listed by the *Dada* Court was the re-entry bars.¹⁴¹ The Board of Immigration Appeals (BIA) has also agreed that the purpose of the re-entry bars is to “compound the adverse consequences of immigration violations,” accomplishing punitive and deterrence goals.¹⁴² And various U.S. Courts of Appeals have characterized the re-entry bar as a “penalty,”¹⁴³ a “concrete disadvantage imposed as a matter of law,”¹⁴⁴ and “reflect[ing] a congressional intent to sever an alien’s ties to this country.”¹⁴⁵

In short, the genesis of the re-entry bar in the 1917 Act was intended to alleviate an administrative burden and achieve deterrence, but in 1952 and emphatically in 1996 Congress hardened and recast the bar as a more severe deterrent and to accomplish starkly punitive purposes. Courts, Congress, and the BIA have consistently characterized the re-entry bars as a penalty intended to punish immigration violations. Removal is a “civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also

136. *Hearing of the House Judiciary Committee*, 104th Cong. (1995), available at <http://www.fednews.com> (emphasis added).

137. *Id.* (emphasis added) (Rep. John Bryant joined Rep. Xavier Becerra in opposing the re-entry bars for unlawful presence at the same committee hearing, noting that their harsh operation would “result in a flood of individual cases coming before this committee trying to get relief . . . And every one of the cases . . . are going to be heart-rending and tear-jerking and probably meritorious and we’re going to turn this committee into a virtual immigration court for the next several years”).

138. *Id.* (emphasis added); *see also id.* (remarks of Representative Berman) (“There is no doubt a 10 year bar is a penalty.”).

139. 545 U.S. 1 (2008).

140. *Id.* at 11.

141. *Id.* at 11–12.

142. *In re Raul Rodarte-Roman*, 23 I. & N. Dec. 905, 909 (2006); *see also id.* (“It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent.”); *Lemus-Losa v. Holder*, 576 F.3d 752, 755 (7th Cir. 2009) (endorsing *Rodarte-Roman* analysis).

143. *Zalawadia v. Ashcroft*, 371 F.3d 292, 298 (5th Cir. 2004).

144. *Tapia Garcia v. INS*, 237 F.3d 1216, 1219 (10th Cir. 2001).

145. *Juarez-Ramos v. Gonzales*, 485 F.3d 509, 512 (9th Cir. 2007).

erving either retributive or deterrent purposes,”¹⁴⁶ because its necessary and inevitable consequence is the imposition of a bar on re-entry. Removal is therefore punishment for Fifth Amendment proportionality purposes.

C. Case-by-Case Proportionality Review in Immigration Cases

The Supreme Court directs that the case-by-case proportionality inquiry in criminal cases begins with a comparison between the gravity of the offense and the severity of the sanction.¹⁴⁷ Where there is an inference of gross disproportionality, the court must then proceed to various forms of comparative analysis, both intra- and interjurisdictional.¹⁴⁸ In immigration cases, one can imagine the analysis frequently ending at the first step, with courts concluding that deportation and a bar on return for a period of years or on a permanent basis are not grossly disproportionate to the underlying immigration offense.

But this will not always be so, just as it is not always the end of the analysis in proportionality challenges to an award of punitive damages or to a criminal sentence. Consider a DREAMer,¹⁴⁹ a young adult who is undocumented and arrived in this country with her parents as an infant or child. Or a refugee fleeing violent persecution who is time barred from pursuing asylum because she was unable to file an application within the one-year statute of limitations. Or a long-term permanent resident who came to this country legally as a small child and has maintained her status ever since but, as an adolescent, was convicted of a nonviolent offense, such as shoplifting or vehicle theft, that is now classified as an

146. *United States v. Halper*, 490 U.S. 435, 448 (1989); *see also* *Austin v. United States*, 509 U.S. 602, 620–22 (1993).

147. *Solem v. Helm*, 463 U.S. 277, 290–91 (1983).

148. *Id.* at 296–300.

149. *See, e.g.*, Tara Bahrapour, *Students Raise Stakes Against Immigration's Status Quo*, WASH. POST, July 21, 2010, available at <http://pqasb.pqarchiver.com/washingtonpost/access/2086440071.html?FMT=ABS&FMTS=ABS:FT&date=Jul+21%2C+2010&author=Tara+Bahrampour&desc=Students+raise+the+stakes+against+immigration%27s+status+quo> (describing sit-ins outside of the White House and Senate Office Building); *see also* Rhonda Bodfield, *Four Arrested at McCain Office Sit-in*, ARIZ. DAILY STAR, May 18, 2010, available at http://azstarnet.com/news/local/border/article_53e85e22-abeb-5507-9920-b6e4260212f9.html; Maggie Jones, *Coming Out Illegal*, N.Y. TIMES MAG., Oct. 21, 2010, available at <http://www.nytimes.com/2010/10/24/magazine/24DreamTeam-t.html?pagewanted=all>; David Montgomery, *Trail of Dreams Students Walk 1,500 Miles to Bring Message to Washington*, WASH. POST, May 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043001384.html>; Maria Sacchetti, *Students Here Illegally Rally in Hope of Living American Dream*, BOSTON GLOBE, May 26, 2010, available at <https://secure.pqarchiver.com/boston/access/2041660871.html?FMT=ABS&FMTS=ABS:FT&type=current&date=May+26%2C+2010&author=Maria+Sacchetti&pub=Boston+Globe&edition=&startpage=B.5&desc=Students+here+illegally+rally+in+hope+of+living+American+dream>. The movement has continued into the fall. *See, e.g.*, Diana Marcum, *Students Want the Dream Act to Become Reality*, L.A. TIMES, Nov. 28, 2010, available at <http://articles.latimes.com/2010/nov/28/local/la-me-dream-act-20101128>.

“aggravated felony.”¹⁵⁰ There may well be deportation cases in which a court should conclude that the severity of the sanction, namely removal and prohibition on lawful return for a period of years, is so excessive in relation to the offense that an “inference of gross disproportionality” arises.

Courts seem to have found some deportation orders excessive, but have concluded they are powerless to void the orders. In one recent example, the Eleventh Circuit wrestled with the “heartbreaking” case of a young mother of six U.S. citizen children, who had come to this country as a child, escaped from two abusive marriages, and who was ineligible for cancellation of removal, a form of relief under the INA. “Simply put, this case calls for more mercy than the law permits this Court to provide.”¹⁵¹ There are other such cases,¹⁵² but the courts have been wrong to conclude they cannot intervene. The Constitution may not compel mercy, it does require proportionality. The penalty of removal must not be grossly excessive to the underlying offense.

If so, then to what, if anything, might one compare the sanction? In the excessive fine case, *Bajakajian*, the Court looked to the criminal and civil penalties apart from the fine.¹⁵³ Here, they may be modest, much more so than the severity of removal itself. For the DREAMer and the late-filing asylum seeker, entry without inspection is a misdemeanor punishable by a maximum sentence of six months,¹⁵⁴ a civil fine of \$50 to \$250,¹⁵⁵ and a criminal fine of \$5,000,¹⁵⁶ for instance. The permanent resident convicted of shoplifting may have received no jail time at all, only a suspended sentence.¹⁵⁷

A court might also look beyond penalties authorized on the face of statutes to actual sentencing and enforcement practices. The Supreme Court did precisely that in *Graham v. Florida*, the life-without-parole case for nonhomicide juvenile offenders, when it emphasized that few states pursue such harsh sentences, even though most states authorize them.¹⁵⁸ In immigration cases, it may be relevant that

150. Morawetz, *supra* note 112, at 1940; see *INS v. St. Cyr*, 533 U.S. 289, 319 (2001) (describing the retroactive effect of the IIRIRA’s expansion of the “aggravated felon” definition).

151. *Martinez v. United States Attorney General*, 413 F. App’x 163, 169 (11th Cir. 2011).

152. See *Cheruku v. Att’y Gen. of the United States*, 662 F.3d 198, 209 (3d Cir. 2011) (McKee, C.J., concurring); *Martinez v. United States Att’y Gen.*, 413 F. App’x 163, 168 (11th Cir. 2011); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1015 (9th Cir. 2005) (Pregerson, J., dissenting).

153. 524 U.S. 321, 338–39 (1998).

154. 8 U.S.C. § 1325(a) (2006).

155. *Id.* § 1325(b)(1).

156. 18 U.S.C. § 3571(b) (2006).

157. The immigration statute directs that “[a]ny reference to a term of imprisonment” is deemed to include the sentence of incarceration ordered, “regardless of any suspension of the imposition or execution of that imprisonment or sentence.” 8 U.S.C. § 1101(a)(48)(B) (2006) (defining “conviction”).

158. 130 S. Ct. 2011, 2023 (2010) (“Actual sentencing practices are an important part of the Court’s inquiry into consensus.”).

the United States does not deport many DREAMers.¹⁵⁹ Immigration authorities have also repeatedly declared their intent to prioritize the arrest and removal of those who pose a threat to national security or public safety, as opposed to more low-level offenders.¹⁶⁰ Signaling the possibility that such enforcement practices may be relevant in removal cases, a Ninth Circuit panel recently ordered the Attorney General to address the effect of Immigration and Customs Enforcement's enforcement priorities "on the government's continued prosecution of the action in this case given that petitioners do not fall within any of the categories of aliens deemed priorities by [Immigration and Customs Enforcement (ICE)] for deportation."¹⁶¹

Notably, in 2011 the Director of ICE issued two memoranda affirming that local ICE offices and prosecutors must exercise prosecutorial discretion in decisions to arrest, detain, and remove.¹⁶² In many ways these memos merely restated longstanding agency guidance discouraging removal of witnesses cooperating with government investigations, military veterans, survivors of domestic violence, and others,¹⁶³ while explicitly extending such guidance to a few

159. Susan Carroll, *Immigration Cases Being Tossed by the Hundreds: Docket Review Pulls Curtain Back on Procedure by Homeland Security*, HOUSTON CHRONICLE, Oct. 16, 2010, available at <http://www.chron.com/news/article/Houston-immigration-cases-tossed-by-the-hundreds-1711874.php> (noting that ICE is dismissing cases where respondent has been present in the United States for two years or more and has no serious criminal history).

160. Memorandum from John Morton, Assistant Secretary, DHS, to U.S. Immigration and Customs Enforcement Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010) (establishing those who pose "a danger to national security or a risk to public safety" as "priority one," recent illegal entrants as "priority two," and immigration fugitives or those who "otherwise obstruct immigration controls" as "priority three"), available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf; see also *Alvarez v. Holder*, No. 08-71383 (9th Cir. Jan. 7, 2011) (order requesting supplemental briefing on the effect of the Morton Memorandum); CRISTINA RODRÍGUEZ, ET AL., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G), at 12 (2010) (analyzing new priorities for 287(g) agreements that prioritize persons convicted of violent crimes as "Level 1"), available at <http://www.migrationpolicy.org/pubs/287g-March2010.pdf>.

161. *Alvarez*, No. 08-71383.

162. Memorandum from John Morton, Assistant Secretary, DHS, to all U.S. Immigration and Customs Enforcement Field Office Directors, Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Memo I]; Memorandum from John Morton, Assistant Secretary, DHS, to all U.S. Immigration and Customs Enforcement Field Office Directors, Special Agents in Charge, and Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> [hereinafter Morton Memo II].

163. See, e.g., Memorandum from Doris Meissner, INS Commissioner, to Immigration and Naturalization Service Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000), available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00>; Memorandum from Julie L. Myers, Assistant Secretary, DHS, to all U.S. Immigration and Customs

additional categories of person, such as DREAMers and civil rights litigants.¹⁶⁴ It is yet unclear whether issuance of these prosecutorial discretion memos will alter agency practices in any meaningful way, but on their face they appear to reflect an agency internalization of the basic requirements of constitutional proportionality.

The imposition of re-entry bars should also be subject to proportionality review. These bars on lawful return may violate case-by-case proportionality, because they raise an inference of gross disproportionality and function as a civil sentence that in many cases will be radically greater than any criminal sentence that was or could have been imposed.¹⁶⁵

Finally, a small number of persons ordered removed applied for relief but were denied it, either because they failed to demonstrate a substantive ground for relief—such as persecution for asylum¹⁶⁶ or hardship for cancellation of removal¹⁶⁷—or were denied relief at the discretion of the immigration judge. An immigration judge's refusal to grant discretionary relief for which one has applied and is eligible may also be subject to proportionality review on a case-by-case basis. In such cases, a court may undertake a form of intrajurisdictional analysis by comparing disposition of an instant case to others decided by the courts or the BIA, which hears administrative appeals in removal cases.¹⁶⁸ And, while the immigration statutes generally bar review of the denial of discretionary immigration relief other than asylum,¹⁶⁹ the U.S. Courts of Appeals retain

Enforcement Field Office Directors and Special Agents in Charge, Prosecutorial and Custody Discretion (Nov. 7, 2007), available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myers%20Memo%20Custody%20Discretion%202011-7-07.pdf/view>; former INS Operations Instruction 242.1(a)(18) (rescinded June 24, 1997) (discouraging deportation of veterans), reprinted in CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 242.1 (2011).

164. Morton Memo I, *supra* note 162, at 4 (DREAMers); Morton Memo II, *supra* note 162, at 2 (“[I]ndividuals engaging in a protected activity related to civil or other rights . . . who may be in a non-frivolous dispute with an employer, landlord, or contractor.”); see also Mary O’Leary, *Appeal By Illegal Immigrant From New Haven Helps Rewrite Policy, Puts Deportation On Hold*, NEW HAVEN REGISTER, June 23, 2011, available at <http://www.nhregister.com/articles/2011/06/21/news/doc4e013e0124dcf017428516.prt>.

165. United States v. Bajakajian, 524 U.S. 321, 338–39 (1998) (comparing fine to potential criminal penalties for underlying misconduct); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–83 (1996) (same as to punitive damage award).

166. 8 U.S.C. § 1158(b)(1) (2006) (Attorney General may grant asylum to person determined to be “refugee” within meaning of 8 U.S.C. § 1101(a)(42)(A)); *id.* § 1101(a)(42)(A) (refugee is one who is unable to return to their country of nationality because of “persecution” or a “well-founded fear of persecution”).

167. *Id.* § 1229b(b)(1)(D) (among other criteria, nonpermanent resident who seeks “cancellation of removal” must demonstrate “exceptional and extremely unusual hardship” to qualifying relative).

168. Margot K. Mendelson, Note, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012 (2010) (examining BIA decisions on application for cancellation of removal and discerning functional criteria applied by Board to sort meritorious and nonmeritorious cases).

169. 8 U.S.C. § 1252(a)(2)(B) (2006).

jurisdiction to review constitutional claims.¹⁷⁰ Therefore, a claim that one's removal violates constitutional proportionality requirements would be subject to judicial review, even in a case involving the denial of discretionary relief.

D. *Categorical Proportionality Review in Immigration Cases*

As for the categorical approach in removal cases, a court applying existing Eighth Amendment standards for proportionality review would begin with the "objective indicia" of society's standards, namely laws and practices.¹⁷¹ As above, it is not generally the practice of immigration authorities to remove DREAMers. ICE leadership has repeatedly emphasized, moreover, that it prioritizes for arrest and removal those persons convicted of serious crimes, who pose a national security or public safety threat, or who have previously been ordered removed but failed to depart.¹⁷² ICE has also reaffirmed that its prosecutors and officials possess the discretion to determine whether to proceed even in cases that could be brought.¹⁷³ There are other categories of persons who could be prosecuted in removal proceedings, such as juveniles and the mentally ill, but generally are not singled out in ICE enforcement programs.¹⁷⁴ A categorical analysis might well focus on such subgroups of persons subject to, but not usually targeted for, removal.

The Court will then look to "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."¹⁷⁵ The Court will also ask whether the sentencing practice "serves legitimate penological goals."¹⁷⁶

170. *Id.* § 1252(a)(2)(D) (INA does not preclude review of constitutional claims); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (bar to review "pure question of law" in removal cases would raise "substantial constitutional questions").

171. *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010); *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

172. *See supra* notes 159–64 and accompanying text.

173. *Morton Memo I*, *supra* note 162, at 2–3.

174. ICE does arrest or place into removal proceedings substantial numbers of juveniles, mentally ill persons, and low-level offenders, even though such persons are not within the agency's enforcement priorities. *See, e.g.*, HUMAN RIGHTS WATCH/ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM (2010) ("While no exact official figures exist, the percentage of non-citizens in immigration proceedings with a mental disability is estimated to be at least 15 percent of the total immigrant population in detention."); AARTI SHAHANI, NEW YORK CITY ENFORCEMENT OF IMMIGRATION DETAINERS: PRELIMINARY FINDINGS 1 (2010) ("While Homeland Security purports to target the most dangerous offenders [at Rikers Island jail], there appears to be no correlation between offense level and identification for deportation."), available at <http://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf>.

175. *Graham*, 130 S. Ct. at 2026.

176. *Id.*

The Supreme Court has emphasized the diminished culpability of juveniles in *Roper*¹⁷⁷ and *Graham*¹⁷⁸ and those with low intellectual functioning in *Ford*¹⁷⁹ and *Atkins*.¹⁸⁰ In discussing juveniles, the Court has explained that “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility;’”¹⁸¹ and therefore, while a juvenile “is not absolved of responsibility for his actions[,] . . . his transgression ‘is not as morally reprehensible as that of an adult.’”¹⁸² Surely the lack of moral culpability of an infant carried across the border by his mother, or of a severely mentally ill person, diminishes the reprehensibility of his conduct. And the severity of the sentence imposed on one who is mentally ill or who has never really lived in a country of birth, does not speak the language, and has no close family, is undeniably acute.

As for the penological goals, removal of DREAMers and others not targeted for enforcement by ICE, will incapacitate, but it cannot deter future infants, for instance, nor is it likely to deter other juvenile offenders for the reasons elaborated by the Court in *Graham*.¹⁸³ Nor is removal of such persons likely to lead to rehabilitation for the immigration violation. Nor, finally, is it clear that removal in such instances will serve retributive purposes. To the extent retribution is even appropriate for an immigration violation; philosophers and criminal law scholars agree that achieving retribution in a victimless offense situation can be particularly difficult.¹⁸⁴

There will be other applications of the categorical approach to proportionality in immigration law. The immigration statutes for more than a century have contained a sort of statute of limitations, called registry. This provision directs that a person who entered the United States before January 1, 1972, has resided here continuously, and is of good moral character may obtain LPR status.¹⁸⁵ The statute effectively creates a statute of limitations, or rather, a cutoff date for enforcement of immigration law. For most of the past century,

177. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits death penalty for juvenile offenders).

178. *Graham*, 130 S. Ct. 2011 (holding that the Eighth Amendment prohibits life without parole for juvenile nonhomicide offenders).

179. *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits execution of prisoner who is insane).

180. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (holding that the Eighth Amendment prohibits the execution of mentally retarded criminals).

181. *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569–70).

182. *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)); see also *id.* (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”).

183. *Id.* at 21 (discussing retribution, deterrence, incapacitation, and rehabilitation, and emphasizing that juveniles are immature and “less likely to take a possible punishment into consideration when making decisions”); see also *Roper*, 543 U.S. at 571 (“[J]uveniles will be less susceptible to deterrence.”).

184. Von Hirsch, *supra* note 5, at 82 n.7.

185. 8 U.S.C. § 1259 (2006).

Congress periodically revised this statute to ensure the limitations period was much briefer. The 1972 date was fixed by Congress in 1986, for instance, replacing the prior date of June 30, 1948.¹⁸⁶ The 1948 date was itself established in 1965 to replace June 28, 1940,¹⁸⁷ and so on back into the 1920s—a long tradition of an enforcement deadline of approximately fifteen to twenty years for immigration offenses.¹⁸⁸ It may be that removal of a person who has been present for, say, twenty years and is of good moral character is grossly disproportionate to the underlying offense.

Similarly, it may be that the expansive definition of “aggravated felony” in immigration law, which encompasses a long and growing list of crimes from murder to misdemeanor theft offenses, raises categorical proportionality problems.¹⁸⁹ That is because one convicted of an “aggravated felony” is not only subject to removal but also barred from immigration relief. Removal as the *automatic* consequence of a minor or nonviolent crime may be grossly disproportional to the gravity of the offense, in violation of Eighth and Fifth Amendment proportionality requirements.

Finally, the re-entry bars discussed above may also categorically violate the constitutional requirement of proportionality, and not only in the case of juveniles, the mentally ill, or those convicted only of nonviolent criminal offenses. A *permanent* bar on the lawful return of one convicted of a minor crime that is nevertheless classified as an “aggravated felony” by the immigration statutes may contravene the due process requirement of proportionality. It may also be, for example, that imposition of the ten-year bar on lawful return for persons ordered removed violates proportionality when applied to adults who have resided for many years in the United States, even without status, and who have children, a spouse, or strong community ties here.

E. Proportionality Review by Immigration Judges

The obligation to conduct a proportionality review of entry of a removal order is imposed by statute as well as the Fifth and Eighth Amendments. The Immigration and Nationality Act (INA) directs that “[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.”¹⁹⁰ The canon of constitutional doubt¹⁹¹ requires that this

186. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 203(a)–(b), 100 Stat. 3359, 3405 (1986) (codified at 8 U.S.C. § 1259 (2006)).

187. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 19, 79 Stat. 911, 920 (codified as amended at 8 U.S.C. § 1259 (2006)).

188. See Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 180–90 (2010).

189. 8 U.S.C. § 1101(a)(43) (2006); Morawetz, *supra* note 112, at 1939.

190. 8 U.S.C. § 1229a(c)(1)(A) (2006).

191. See, e.g., Clark v. Martinez, 543 U.S. 371, 385 (2005); Zadvydas v. Davis, 533 U.S. 678, 689 (2001); INS v. St. Cyr, 533 U.S. 289, 300–01 (2001); see generally *infra* note 217. See William N.

provision not be construed to permit an immigration judge to order removal in violation of constitutional proportionality requirements.¹⁹² In other words, this statute must be interpreted to incorporate, in the immigration judge's decision, an evaluation of whether removal would be impermissibly disproportionate to the gravity of the underlying misconduct. Accordingly, immigration judges and members of the BIA must evaluate removal orders for excessiveness.

The canon holds that where “an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ [a court is] obligated to construe the statute to avoid such problems.”¹⁹³ In other words, courts should presume that Congress intended to legislate “in the light of constitutional limitations,”¹⁹⁴ and prefer a construction that “preserv[es] congressional enactments that might otherwise founder on constitutional objections.”¹⁹⁵ The principle is often associated with Justice Brandeis for his *Ashwander* opinion,¹⁹⁶ but is of older origin,¹⁹⁷ dating at least to the opinion of Chief Justice John Marshall in *Murray v. The Charming Betsy*.¹⁹⁸ And while scholars have debated the wisdom of the canon, and in particular whether it invites or curbs judicial activism,¹⁹⁹ the Supreme Court regularly deploys it to analyze statutes. One of its most forceful explicators is Justice Scalia. In a case involving an immigration crime, for instance, he explained, “This ‘cardinal principle,’ which ‘has for so long been applied by this Court that it

Esckridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020–22 (1989) (cautioning against reflexive invocation of canon of constitutional avoidance); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (discussing the relationship between the canon of avoidance and the doctrine of severability).

192. See, e.g., *Zadvydas*, 533 U.S. at 682, 689 (applying constitutional avoidance canon to interpret 8 U.S.C. § 1231(a)(6) (that certain persons ordered removed “may be detained beyond the removal period”) to include “reasonable time” limitation); *Clark*, 543 U.S. at 385–86 (affirming the *Zadvydas* Court’s interpretation of 8 U.S.C. § 1231(a)(6)).

193. *St. Cyr*, 533 U.S. at 299–300 (internal citations omitted).

194. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

195. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); see generally Frickey, *supra* note 21.

196. 297 U.S. 288, 348–49 (1936) (Brandeis, J., concurring). See also *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.”).

197. See *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 499 (1979) (attributing canon to “Mr. Chief Justice Marshall’s admonition in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) . . . that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available”).

198. 6 U.S. (2 Cranch) 64, 118 (1804); see also Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203 n.49 (2006) (noting view that avoidance canon originates with *Charming Betsy* and alternative theory that principle arose even earlier).

199. Compare JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997), and Vermeule, *supra* note 191, and Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000), with Frickey, *supra* note 21.

is beyond debate,⁷ requires merely a determination of serious constitutional *doubt*, and not a determination of *unconstitutionality*.²⁰⁰

The Supreme Court has applied the constitutional doubt canon in immigration cases.²⁰¹ Of particular relevance, it has done so in cases involving a substantive due process challenge like the Fifth Amendment proportionality claim discussed here.²⁰² This is significant because the plenary power doctrine of immigration law, while widely and properly condemned,²⁰³ holds that immigration statutes are immune from substantive due process challenge—which would therefore appear to render the INA *free* of “constitutional doubt” in the face of such challenges. Yet in *United States v. Witkovich*,²⁰⁴ the Supreme Court adopted a statutory interpretation favorable to the immigrant so as to avoid a substantive due process problem, even though, as one scholar of statutory interpretation drily noted, the “constitutional values in play were not well established at the time.”²⁰⁵

More recently, in *Zadvydas v. Davis*,²⁰⁶ the Court applied the constitutional doubt canon to interpret 8 U.S.C. § 1231(a)(6), which authorizes the Attorney General to detain persons “beyond the removal period,” so as to incorporate a reasonable time limitation.²⁰⁷ Without question, *Zadvydas* involved a substantive due process challenge to the statute,²⁰⁸ notwithstanding a century of case law

200. *Almendarez-Torres*, 523 U.S. at 250 (Scalia, J., dissenting) (emphasis in original) (citations omitted) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988)).

201. *See* *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (interpreting immigration statute precluding judicial review of certain deportation orders not to bar challenge on habeas petition to same orders); *United States v. Witkovich*, 353 U.S. 194, 199 (1957) (adopting narrow construction of immigration statute authorizing supervision of persons subject to deportation order and explaining that “[a] restrictive meaning for what appear to be plain words may be indicated by . . . the rule of constitutional adjudication . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts”).

202. *See* *Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

203. *See infra* note 225 and accompanying text.

204. 53 U.S. 194 (1957).

205. Frickey, *supra* note 21, at 451 (in *Witkovich*, “the constitutional question was murky”); *see also Witkovich*, 353 U.S. 194. Frickey argues that the *Witkovich* opinion was an important illustration of use of the avoidance canon to promote a dialogue between the Court and Congress, “defuse political opposition while incrementally adjusting public law to better respect individual liberty,” and “allow[] the Court to play a game of high-stakes politics, to correct individual injustice in some circumstances, and to protect its independence and future autonomy.” Frickey, *supra* note 21, at 401, 457. Much the same may be said of the current state of immigration law, and the Court’s engagement with Congress at a time of intense public debate over immigration. *See* Markowitz, *supra* note 82, at 1346 & n.190 (calculating that immigrants have prevailed in sixty-three percent of cases decided by the Roberts Court).

206. 533 U.S. 678 (2001).

207. *Id.* at 689 (discussing constitutional doubt canon and holding “[f]or similar reasons, we read an implicit limitation into the statute before us”); *see also Clark*, 543 U.S. at 380–82.

208. The *Zadvydas* majority relied on, cited to, and quoted from substantive due process decisions. 533 U.S. 678, 690 (2001) (citing to *Foucha v. Louisiana* passage regarding “substantive component” of Due Process Clause, 504 U.S. 71, 80 (1992) and to *Kansas v. Hendricks*, which rejected substantive due process challenge to civil confinement of sexual predators, 521 U.S. 346, 356 (1997)).

holding that immigration statutes are exempt from such challenge.²⁰⁹ In a companion case to *Zadhydas* decided four years later, Justice Scalia elaborated the rationale for the canon when applying it to construe the same immigration statute, 8 U.S.C. § 1231(a)(6), once again so as to avoid a substantive due process difficulty. “[O]ne of the canon’s chief justifications,” he explained, “is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”²¹⁰

Returning to the question of proportionality review, 8 U.S.C. § 1229a(c)(1)(A) provides that “[a]t the conclusion of the [removal] proceeding, the immigration judge shall decide whether an alien is removable from the United States.”²¹¹ This authorization for an immigration judge to enter a removal order should be construed to include a restriction on imposition of an order that is excessive in relation to the underlying offense. One may counter that the plain language of the statute imposes no proportionality requirement, and further that Congress has taken proportionality concerns into account in fashioning certain waivers and categories of relief from deportation.²¹² On the other hand, to paraphrase the Court’s opinion in *Zadhydas*, a statute permitting the immigration judge to enter a removal order that was grossly disproportional to the underlying misconduct would raise a serious constitutional problem.²¹³ Pursuant to the avoidance canon, upon “a determination of serious constitutional *doubt*,”²¹⁴ a court must presume that Congress did not intend to enact a statute authorizing an unconstitutional outcome. The BIA has held that this same avoidance canon is applicable in the administrative setting and binding on immigration judges.²¹⁵

It did not, however, conduct the classic procedural due process analysis required by *Mathews v. Eldridge*, 424 U.S. 319 (1975).

209. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 724, 730 (1893) (rejecting substantive challenge to deportation statute); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 599 (1889) (rejecting substantive challenge to exclusion statute).

210. *Clark*, 543 U.S. at 381; see also *id.* at 382 (“The canon is thus a means of giving effect to congressional intent, not of subverting it.”).

211. 8 U.S.C. § 1229a(c)(1)(A) (2006).

212. See, e.g., 8 U.S.C. § 1158 (2006) (political asylum); *id.* § 1229b (cancellation of removal).

213. Cf. *Zadhydas*, 533 U.S. at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”).

214. *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1997) (Scalia, J., dissenting) (internal quotations and citations omitted, emphasis in original).

215. *In re Q-T-M-T-*, 21 I. & N. Dec. 639, 667–68 (1996) (“Although we do not decide the constitutionality of the statutes which we interpret, our role is to construe statutes to achieve results which are consistent, rather than in conflict, with constitutional protections.”); *In re Leoncio Crisoforo Gonzalez-Camarillo*, 21 I. & N. Dec. 937, 953 (1997) (“It is a basic canon of statutory construction that where we can interpret a statute so as to avoid any constitutional infirmity, we should do so.”).

Because a construction of § 1229a(c)(1)(A) that would permit an immigration judge to impose a removal order that is grossly disproportional to the underlying misconduct creates at least “serious constitutional doubt,” the statute must be interpreted to contain a proportionality limitation. This analysis is consistent with the rationale of the Court in *Zadvydas* and *Martinez*, where it construed § 1231(a)(6) to contain a “reasonable time” limitation on post-final order detention, as well as the reasoning of *St. Cyr*, where the Court construed § 1252 not to preclude habeas review of certain deportation orders. In “decid[ing] whether an alien is removable from the United States,”²¹⁶ the immigration judge must determine that the penalty of removal is not excessive in relation to the underlying misconduct.²¹⁷

This construction of § 1229a(c)(1)(A) would also serve the best purposes of the avoidance canon. If Philip Frickey is correct that the constitutional doubt canon “provides a means to mediate the borderline between statutory interpretation and constitutional law . . . where judicial line-drawing is especially difficult and where underenforced constitutional values are at stake,”²¹⁸ then interpreting § 1229a(c)(1)(A) to incorporate a proportionality review makes a great deal of sense. There are few areas of law where constitutional values are more underenforced than immigration law.²¹⁹ And as Frickey himself noted, “[B]old constitutional lawmaking protecting the rights of [immigrants] may be unlikely”²²⁰ in the current era. As it did in the 1950s, therefore, “the Court may find it useful to return . . . to the avoidance canon to mediate statutory or administrative harshness and constitutional values” in immigration cases.²²¹

III. POTENTIAL OBJECTIONS

There are three principal objections to the claim that removal orders are subject to proportionality review.

A. *The Plenary Power Doctrine*

One might object that the “plenary power doctrine” of immigration law bars judicial review of substantive immigration law, therefore foreclosing constitutional

216. 8 U.S.C. § 1229a(c)(1)(A) (2006).

217. It follows as well that on appeal of the immigration judge’s decision, the BIA must also review the decision of the immigration judge for conformity to constitutional proportionality requirements.

218. Frickey, *supra* note 21, at 402.

219. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that plenary power doctrine has distorted immigration jurisprudence and forced courts to incorporate basic constitutional norms through statutory interpretation).

220. Frickey, *supra* note 21, at 403 (comparing circumstance of immigrants after September 11 to alleged Communists in the 1950s and lauding application of avoidance canon in *St. Cyr* and *Zadvydas* decisions).

221. *Id.*

proportionality review. The plenary power doctrine was born in the *Plessy v. Ferguson* era²²² and reaffirmed in a series of decisions in the McCarthy years.²²³ It justifies judicial deference to executive and congressional choices regarding deportation proceedings based on the exigencies of foreign affairs and the demands of national security. “The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.”²²⁴ In a more recent but no less forceful statement, the Supreme Court explained that “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”²²⁵ The Court has specifically held that the plenary power doctrine bars substantive due process challenges to deportation statutes,²²⁶ and thus arguably poses an obstacle to the argument that the Constitution requires proportionality review of removal orders.

Of course, nearly every modern immigration scholar has condemned the “plenary power doctrine” as erroneous and a shameful relic of the *Plessy* era, one that has left immigration a legal backwater out of step with developments in modern constitutional law.²²⁷ This is true. Moreover, the plenary power doctrine

222. In a series of late-nineteenth century decisions, the Supreme Court held that persons in “exclusion” proceedings at the nation’s borders could invoke neither the procedural nor the substantive elements of the Due Process Clause and that persons physically present in the country and placed in “deportation” proceedings could bring procedural, but not substantive, due process challenges. See *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903); *Fong Yue Ting v. United States*, 149 U.S. 698, 724, 730 (1893) (rejecting substantive challenge to deportation statute); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (rejecting procedural challenge to exclusion statute); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 599 (1889) (rejecting substantive challenge to exclusion statute).

223. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (“We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation.”).

224. *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

225. *Harisiades*, 342 U.S. at 588–89 (footnote omitted); see also, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“[I]mmigration is a sovereign prerogative, largely within the control of the executive and the legislature.”); *Kleindienst v. Mandel*, 408 U.S. 753, 765–67 (1972).

226. *Fong Yue Ting*, 149 U.S. 698.

227. See, e.g., Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that plenary power doctrine arose from *Plessy*-era judicial commitment to racial segregation); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) (“Chinese Exclusion—its very name is an embarrassment—must go.”); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that plenary power doctrine has distorted

may be coming to play a less central role in the adjudication of immigration cases. In recent years the Supreme Court has regularly rejected the government's position in removal cases, even while espousing deference to the legislative and executive branches,²²⁸ and even in cases in which national security concerns are present.²²⁹ In particular, in *Zadvydas* and *Martinez*,^z the Court agreed that a substantive due process challenge to an immigration law raised constitutional doubt about the validity of the statute—holdings necessarily premised on the view that the plenary power doctrine does *not* foreclose all substantive due process challenges in immigration law. Similarly, the Supreme Court has not hesitated to apply other constitutional principles in the face of plenary power arguments.²³⁰

Further, even accepting that some judicial deference is appropriate in removal cases, the plenary power doctrine does not preclude a constitutional proportionality analysis. As noted, in *Padilla v. Kentucky* the Court held that “deportation is an integral part . . . of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes.”²³¹ Thus, proportionality review in cases where removal is the inevitable consequence of a criminal conviction is required by the Eighth Amendment as well. The plenary power cases barring substantive due process challenges to deportation do not preclude an Eighth Amendment proportionality challenge.

Further, even as to removal orders that are *not* the result of a criminal conviction, a case-by-case proportionality analysis is not a facial challenge to grounds of removability, such as might be precluded by the plenary power doctrine. Case-by-case proportionality review is an as-applied challenge, which does not implicate the plenary power doctrine quite so directly. In most cases, it will implicate neither foreign affairs nor national security, as the overwhelming

immigration jurisprudence and forced courts to incorporate basic constitutional norms through statutory interpretation).

228. See, e.g., *Dada v. Mukasey*, 545 U.S. 1 (2008); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (conviction under Florida's driving-under-the-influence statute not an aggravated felony for immigration purposes).

229. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

230. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (applying constitutional avoidance doctrine to construe immigration detention statute as permitting post-final order detention for only six months, absent evidence of dangerousness or foreseeable removal, in light of significant due process concerns raised by alternative statutory interpretation urged by government); *INS v. St. Cyr*, 533 U.S. 289 (2001) (Suspension Clause requires judicial review of at least questions of law in deportation orders).

231. 130 S. Ct. 1473, 1480 (2010) (emphasis added). Many prior cases had stated that deportation was not punishment. See, e.g., *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (“It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination . . . is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want.”).

majority of individual deportation cases do not.²³² Alternatively, it may be that courts ultimately conclude that a diminished version of the proportionality review required in criminal cases is applicable in immigration proceedings, just as they have done with the exclusionary rule,²³³ and have implied with the prohibition on selective enforcement.²³⁴ A categorical proportionality claim would concededly be a more explicit challenge to the plenary power doctrine, but it is surely no less invasive of federal sovereignty than the invalidation of state capital punishment or life-without-parole sentences for juveniles is of state sovereignty.

Finally, the plenary power objection does not bar the conclusion that 8 U.S.C. § 1229a(c)(1)(A) itself should be construed to incorporate proportionality requirements, such that a review for excessiveness is required in the immigration judge's "deci[sion] whether an alien is removable from the United States."

B. *The Continuing Offense Objection*

One might next object that an immigration violation is a *continuing* offense, and thus for a court to prohibit removal on the ground that it violated a proportionality principle would be to allow continued illegality.²³⁵ The Supreme Court recently emphasized this point in a case arising in a somewhat different context. There, the Court explained that an immigration statute allowing reinstatement of a prior deportation order against one who illegally re-enters after removal "applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country."²³⁶ Similarly, one might object that the presence of all foreign nationals, even lawful permanent residents, is not a "right but is a matter of permission and tolerance."²³⁷

As a preliminary matter, where deportation may be imposed as part of the criminal penalty on a *legal* immigrant, the continuing offense problem does not

232. Cf. *Kleindiest v. Mandel*, 408 U.S. 753 (1972) (rejecting First Amendment challenge to denial of visa waiver to European intellectual).

233. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule of criminal cases does not generally apply in civil removal proceedings but may apply in cases of "egregious" violations of Fourth Amendment or other rights); *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006) (holding exclusionary rule applies in removal proceedings in case of egregious violations); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (same); see generally Stella Burch Elias, "Good Reason to Believe": *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109 (2008) (critiquing application of watered-down version of exclusionary rule in immigration cases).

234. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (prohibition on selective enforcement in criminal cases does not generally apply in civil removal proceedings, but may apply in cases of "outrageous" discrimination).

235. See *Lopez-Mendoza*, 468 U.S. at 1039 ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."); *Landon v. Plasencia*, 459 U.S. 21, 25 (1982) (characterizing immigration proceedings as legal measures through "which aliens can be denied the hospitality of the United States").

236. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006).

237. *Hariades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952).

necessarily arise. That is, there is no “continuing offense” difficulty if a court were to hold that a removal order against an LPR offender were to be invalidated as a sanction that is grossly disproportionate to the underlying criminal offense. Similarly, for a foreign national eligible for but denied immigration relief, where the denial was in violation of constitutional proportionality requirements, there would be no “continuing offense problem,” because the remedy would be to overturn the refusal to grant the relief. This outcome would confer lawful status and eliminate any continuing offense concern.²³⁸

The “continuing offense” objection to proportionality review is strongest in the context of an undocumented immigrant who is not eligible for any relief. But even here it fails. There are many circumstances in immigration law in which immigration judges or the courts will dismiss a removal proceeding, restoring the respondent to the status quo ante—including, specifically, allowing an apparently undocumented person to walk out of the courtroom at liberty. Such cases include those in which the government fails to carry its initial burden of proof to establish “alienage,”²³⁹ for instance where the court has granted a suppression motion excluding the government’s evidence of alienage,²⁴⁰ or where the government has violated its own regulations in the conduct of the arrest, interrogation, or prosecution of the respondent.²⁴¹ These dismissals without prejudice permit the government to refile a new removal case in the future, but they do result in dismissing a particular removal proceeding, notwithstanding the continuing offense concern. The decision by an immigration judge not to enter a removal order (or of a reviewing court not to affirm an order previously entered) because it would be grossly disproportional to the underlying misconduct would stand in the

238. The Supreme Court has characterized the grant of discretionary immigration relief as “an act of grace” done pursuant to the Attorney General’s “unfettered discretion,” *Jay v. Boyd*, 351 U.S. 345, 354 (1956), comparable to “a judge’s power to suspend the execution of a sentence, or the President’s to pardon a convict.” *Id.* at 354 n.16. *See also* *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). Nevertheless, even the exercise of discretion in granting immigration relief is subject to constitutional requirements. *See, e.g., Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (no bar generally to selective enforcement in immigration cases except in circumstance of “outrageous” discrimination).

239. 8 U.S.C. § 1229a(c)(3)(A) (2006) (“[I]he Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.”); *Lopez-Chavez v. INS*, 259 F.3d 1176, 1180–81 (9th Cir. 2001) (same); *Murphy v. INS*, 54 F.3d 605, 608–09 (9th Cir. 1995) (explaining that government bears burden to establish alienage because it is a jurisdictional fact on which authority of immigration court to conduct deportation proceeding depends).

240. *See, e.g., Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008) (holding exclusionary rule applies in removal proceedings in cases of egregious violations and directing exclusion of evidence based on warrantless entry into private home, in egregious violation of Fourth Amendment); *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006) (holding exclusionary rule applies in removal proceedings in cases of egregious violations).

241. *See, e.g., Singh v. United States Department of Justice*, 461 F.3d 290, 296–97 (2d Cir. 2006) (violations of regulations or rules warrant termination of immigration proceedings).

same tradition: it would terminate the instant proceeding, without barring the government from renewing its prosecution in the future.

Nor, in any event, can the continuing offense objection defeat the constitutional proposition. First, the re-entry bars may be unconstitutionally excessive in a particular case. These bars go well beyond mere cessation of unlawful conduct; they are enduring sentences. In *Graham v. Florida*, the Supreme Court held that a juvenile sentenced to life imprisonment must be afforded “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”²⁴² A juvenile ordered removed may be constitutionally entitled to some similar opportunity to demonstrate “maturity and rehabilitation” so as lawfully to return to the United States. The immigration statute does authorize a waiver of the bars on lawful return,²⁴³ but the agency regulation implementing this provision states that no one may apply for such a waiver until five years after removal, or twenty years if removed following conviction for an aggravated felony.²⁴⁴ Furthermore, agency guidance appears to direct that such waivers be granted only very infrequently.²⁴⁵ The regulation and the agency guidance may not be consistent with constitutional proportionality requirements in individual cases.

Nor can the “continuing offense” objection overcome the proportionality requirement as applied to a removal order itself, even an order entered against an undocumented person who is ineligible for relief. At a minimum, proportionality may require deferral of execution of a removal order, for instance, until the U.S. citizen children of an undocumented adult complete high school or otherwise reach the age of majority. In other circumstances, removal prior to other important events in one’s familial, religious, or professional life may violate proportionality principles. So too might removal that would divest one of a meaningful opportunity to participate as a witness or party in pending legal proceedings.²⁴⁶ More broadly, it may be that the Due Process Clause’s

242. 130 S. Ct. 2011, 2030 (2010).

243. 8 U.S.C. § 1182(a)(9)(A)(iii) (2006).

244. 8 C.F.R. § 212.2(a) (2011).

245. See, e.g., *Dragon v. INS*, 748 F.2d 1304, 1306–07 (9th Cir. 1984); *In re Lee*, 17 I. & N. Dec. 275 (1978) (relevant factors in adjudicating application for readmission include moral character, recency of deportation, need for person’s service in U.S., and duration of residency in U.S.); *In re Tin*, 14 I. & N. Dec. 371, 373–74 (1973). Many persons removed would also confront a second set of bars on lawful return, those set forth at 8 U.S.C. § 1182(a)(9)(B)(i) (person unlawfully present in United States for six months may not re-enter for three years, and one unlawfully present for one year may not re-enter for ten years). There are a number of exceptions, *id.* § 1182(a)(9)(B)(iii), and also a narrow statutory waiver. *Id.* § 1182(a)(9)(B)(v).

246. Morton Memo II, *supra* note 162, at 1–2 (discouraging removal of victims of crime or civil rights violation, or witness in pending proceedings). See also 8 C.F.R. § 241.6(a) (2011) (ICE officials may grant stay of removal “in consideration of factors listed in 8 C.F.R. 212.5”); *id.* § 212.5(b)(4) (listing persons “who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States”); former INS Operations Instruction 287.3a, *redesignated as* § 33.14(h) of the INS Special Agent’s Field Manual (Apr. 2000) (directing that “arrangements for aliens to be held or to be interviewed” by state or federal labor inspectors or

proportionality requirement does, in fact, permanently bar the removal of certain categories of undocumented immigrants ineligible for relief, such as the DREAMers or those with low mental functioning, as discussed above. It may even permanently bar the removal of certain individuals in extreme situations, pursuant to case-by-case proportionality analysis.

C. *Lack of Comparative Metrics*

Finally, one might object that there are fewer available benchmarks for making the comparative assessments that are common to capital, noncapital, and civil proportionality analyses. While the metrics will differ from those used in other proportionality contexts, they are not wholly absent in the immigration context, and scholarship and judicial opinions may help to develop them further. For instance, the sort of intrajurisdictional comparison called for by *Solem*, *Hamelin*, and other decisions in the case-by-case lines may be possible in some instances in removal cases,²⁴⁷ particularly where an applicant has been denied relief on factual circumstances that, in other cases, have resulted in a grant of relief.²⁴⁸ Similarly, as in the punitive damages and excessive fine cases, there may be a useful comparison between the lifetime consequences of deportation and the modest civil or criminal penalties authorized for some of the underlying immigration offenses.²⁴⁹

Respondents in removal proceedings might argue that their removal would violate the principles of proportionality inherent in the Due Process Clause, which indisputably governs removal proceedings, and the Eighth Amendment, which after *Padilla* may as well, at least where removal is the result of a criminal conviction. In addition, the statutory provision authorizing an immigration judge to “decide whether an alien is removable from the United States” must be read to incorporate the constitutional proportionality requirement. Proportionality claims might arise where the immigration courts have denied an application for relief from one eligible to request it, or even where no relief is authorized. Courts will honor these principles, and Supreme Court precedent, by adjudicating both case-

attorneys, prior to removal, “will be determined on a case-by-case basis”) *reprinted in* 74 No. 4 Interpreter Releases 188 App’x. IV (Jan. 27, 1997); 8 U.S.C. § 1101(a)(15)(S) (2006) (establishing “S” visa category for certain cooperating witnesses necessary to a criminal investigation or prosecution); *id.* § 1101(a)(15)(U) (establishing “U” visa category for victims of listed crimes).

247. *Hamelin v. Michigan*, 501 U.S. 957 (1991); *Solem v. Helm*, 463 U.S. 277, 291 (1983).

248. *Mendelson*, *supra* note 168.

249. *See supra* notes 51–61 and accompanying text. A skeptic might also raise the “floodgates” concern, noting that the U.S. Courts of Appeals must already adjudicate enormous numbers of immigration appeals. *See, e.g.*, John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006). But the courts are quite capable of applying legal rules “to separate specious claims from those with substantial merit,” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (rejecting “floodgates” objection), and have not been overwhelmed with proportionality claims in the criminal or punitive damages context.

by-case and categorical proportionality challenges. In appropriate cases, including those heartbreaking ones where an unjust and unreasonable outcome is otherwise inevitable, Article III and administrative courts should find that removal is so grossly disproportionate to the gravity of the offense as to be forbidden by the INA and the Constitution.