2012

Immigration Law and the Proportionality Requirement

Michael J. Wishnie
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
Wishnie, Michael J., "Immigration Law and the Proportionality Requirement" (2012). Faculty Scholarship Series. 4138.
https://digitalcommons.law.yale.edu/fss_papers/4138

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Immigration Law and the Proportionality Requirement

Michael J. Wishnie*

I. Proportionality Review Outside Immigration Law

II. Proportionality Review in Immigration Law

A. Removal as a Punitive Sanction
   1. Removal of Permanent Residents
   2. Removal of Non-LPRs

B. Re-entry Bars as a Punitive Sanction

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

D. Categorical Proportionality Review in Immigration Cases

E. Proportionality Review by Immigration Judges

III. Potential Objections

A. The Plenary Power Doctrine

B. The Continuing Offense Objection

C. Lack of Comparative Metrics

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

The result we must reach is as unjust as it is unreasonable.²

We 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 Guttenplan, 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.

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 ancient and nearly uncontestable, and its vitality is well established in numerous areas of criminal and civil law, in the United States and abroad. Doctrinal and theoretical debates concerning proportionality review of criminal sentences, civil punitive damages awards, and other sanctions tend to focus on four distinct questions: the justification for taking account of proportionality, which sanctions are sufficiently punitive to require review, which of those are so disproportionate as to be impermissible, and whether a court or legislature should decide the maximum punishment the state may impose.

The operation of contemporary immigration statutes regularly results in an 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. Gridlock in Congress has prevented the modernization and reform of the statutes, however, in...
ways that might ameliorate their most inhumane consequences. 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, nor under the Fifth Amendment’s Due Process Clause, the textual source of the principle in civil punitive damages cases. Yet it is undisputed that the Due Process Clause applies to immigration proceedings.

This Article contends that removal orders are subject to constitutional proportionality review. A removal order is sufficiently punitive to trigger
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 proceedings must be understood to incorporate Fifth and Eighth Amendment proportionality principles, pursuant to the constitutional avoidance canon of statutory interpretation and the guarantee of fundamental fairness in immigration proceedings long recognized by the Supreme Court. 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, largely because of judicial deference to legislative judgments and jury deliberations. 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.” The concept is

21. See, e.g., Clark v. Martinez, 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.
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. 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.

Notwithstanding debate about their theoretical justification, proportionality requirements are well developed in the criminal law precedents, tracing back more than a century and including more than ten Supreme Court decisions since 1980 addressing noncapital and capital sentences. In criminal cases, the "thicker of Eighth Amendment [proportionality] jurisprudence" 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) ("Because 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.").


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. 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.” For instance, in Solem, the Supreme Court concluded that a life sentence for passing a bad check raised an inference of gross disproportionality, and in 2010, Chief Justice John Roberts reached the same conclusion in another noncapital case. 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.

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. Occasionally, a court will conclude that a sentence otherwise lawfully imposed is so disproportionate as to be unconstitutional, in violation of the Eighth Amendment.

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, 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 TEM. L. REV. 41, 57–58 (2000).
33. Harmelin, 501 U.S. at 1005–06.
34. Solem, 463 U.S. at 291–303.
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.\textsuperscript{40} The Supreme Court has insisted on the vitality of the principle, however, and even in \textit{Ewing} it affirmed that the Constitution requires “gross disproportionality” review of individual sentences.\textsuperscript{41} Moreover, in 2010 Chief Justice Roberts concurred in \textit{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.\textsuperscript{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.\textsuperscript{43} Here, the judicial inquiry focuses on the nature of the offense or the characteristics of the offender.\textsuperscript{44} The Court has in a number of cases held that a punishment is grossly excessive for certain offenses and for certain offenders.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{47} The court may also examine foreign or international practices.\textsuperscript{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,”\textsuperscript{49} and whether the penalty “serves

\textsuperscript{40} \textit{Ewing}, 538 U.S. at 37; see also \textit{Lockyer v. Andrade}, 538 U.S. 63, 72–74 (2003) (emphasizing, in a companion case to \textit{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)).

\textsuperscript{41} Justice Thomas specifically dissented in \textit{Ewing} to argue that no such constitutional proportionality requirement exists, but the majority rejected that position. \textit{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.”).


\textsuperscript{43} \textit{Id.} at 2022 (majority opinion).

\textsuperscript{44} \textit{Id.}


\textsuperscript{46} \textit{Graham}, 130 S. Ct. at 2022 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.} at 2033 (listing Eighth Amendment cases where the Court “looked beyond our Nation’s borders”); see also Sarah H. Cleveland, \textit{Our International Constitution}, 31 YALE J. INT’L L. 1, 70–80 (2006).

\textsuperscript{49} \textit{Graham}, 130 S. Ct. at 2026.
legitimate penological goals, namely retribution, deterrence, incapacitation, or rehabilitation.

In its categorical proportionality opinions, the Court has held that capital punishment is constitutionally impermissible for nonhomicide crimes and for homicide committed by juvenile offenders or those with low intellectual functioning. 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. 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.

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.”

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, the Court explained that “the 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. Quateeman, 551 U.S. 930, 957–60 (2007).
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).
punish." 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. Schuckerman, *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).
64. Id. at 574–83.
appears to be more searching than review of criminal sentences. 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, 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.” 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. Because a removal order mandates departure and also bars lawful return for a period of years, removal orders are subject to judicial review on constitutional proportionality grounds even where the individual has not been convicted criminally.

66. See, e.g., Chereminsky, 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”).


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)-(H) (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, and that deportation itself is not punishment, at least as that term is understood for the purpose of certain constitutional provisions. As a result, requirements of constitutional criminal procedure such as the right to counsel, the rule against admissibility of illegally-obtained evidence, and the prohibition on ex post facto laws 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. Nor,
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.” 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. 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. 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. These arguments tend to focus on deportation of lawful permanent residents, in circumstances that Daniel Kanstroom has described as reflecting “post-entry social control.” There is force


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 I. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 WASH. & LEE L. REV. 469 (2007); Robert Paul, 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 I. 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. 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. 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.” 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. Deportation is, the Court emphasized, a “particularly severe ‘penalty.’” And because “recent changes in our immigration law have made removal nearly an automatic result” of conviction for many offenses, it is “most difficult to divorce the penalty from

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 Delgadillo 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.
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?\(^{90}\) 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”); Swency, supra note 79.  
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,” 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. 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. 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.” Additional proposed instruments would also strengthen proportionality as a constraint on the power to deport.

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.”).

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).
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,” 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. 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.”

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. In some circumstances they bar employers from hiring a person. But they do not ban marriage, childrearing, school attendance, acceptance of employment, 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 nationals 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,” and it is a “savage penalty” in the everyday sense of the word.

100. Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEem), 2011 ECR 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).
103. Id. § 1324a(a)(1).
107. Martinez 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), ten years (if the removal proceedings is commenced after one’s initial entry), twenty years (if the removal order is a second or subsequent order), or a lifetime ban (if the person was convicted of an “aggravated felony”).

The ban on return cannot be justified in remedial terms; it accomplishes deterrence and retributive goals. 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, 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.” In 1929 Congress extended the one-year bar to exclusion cases as well and made the deportation bar permanent, without any statutory waiver provision.

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

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).
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).
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 cases and also the draconian permanent bar on re-entry in deportation cases, 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, 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. The House Report noted that the permanent re-entry bar served “little useful purpose,” 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, reducing the permanent re-entry bar to five years would create “a direct economy by eliminating the need to adjudicate consent applications.”

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.” Two years later, Congress doubled the re-entry bar again for aggravated felons to twenty years. 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.

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), in which Congress extended the re-entry bar in exclusion 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.

---

118. Id.
122. Id.
123. Id.
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.\textsuperscript{129} There is little direct legislative history of the extensions of the re-entry bars,\textsuperscript{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 \textit{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 \textit{deterrent}.”\textsuperscript{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 \textit{stiff penalty} in the bill.”\textsuperscript{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 \textit{punishment} to serve.”\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,

\begin{itemize}
  \item \textsuperscript{129} IIRIRA § 301 (codified at 8 U.S.C. §1182).
  \item \textsuperscript{131} \textit{Id.} at 2378, 2459 (1996) (emphasis added).
  \item \textsuperscript{132} \textit{Id.} at 2458.
  \item \textsuperscript{133} \textit{Id.} (emphasis added).
  \item \textsuperscript{134} IIRIRA § 301.
  \item \textsuperscript{135} See \textit{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”).
\end{itemize}
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].” 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?” 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.”

Judicial opinions discussing the re-entry bars that result from removal confirm that these are punitive, not remedial. In Dada v. Mukasey, 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.” The first “penalty attendant to deportation” listed by the Dada Court was the re-entry bars. 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. And various U.S. Courts of Appeals have characterized the re-entry bar as a “penalty,” a “concrete disadvantage imposed as a matter of law,” and “reflect[ing] a congressional intent to sever an alien’s ties to this country.”

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

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

---

148. Id. at 296–300.
“aggravated felony.”\textsuperscript{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.”\textsuperscript{151} There are other such cases,\textsuperscript{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, \textit{Bajakajian}, the Court looked to the criminal and civil penalties apart from the fine.\textsuperscript{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,\textsuperscript{154} a civil fine of $50 to $250,\textsuperscript{155} and a criminal fine of $5,000,\textsuperscript{156} for instance. The permanent resident convicted of shoplifting may have received no jail time at all, only a suspended sentence.\textsuperscript{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 \textit{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.\textsuperscript{158} In immigration cases, it may be relevant that

\begin{footnotesize}
\textsuperscript{150} Morawetz, \textit{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).
\textsuperscript{151} Martinez v. United States Attorney General, 413 F. App’x 163, 169 (11th Cir. 2011).
\textsuperscript{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).
\textsuperscript{155} Id. § 1325(b)(1).
\textsuperscript{156} 18 U.S.C. § 3571(b) (2006).
\textsuperscript{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”).
\textsuperscript{158} 130 S. Ct. 2011, 2023 (2010) (“Actual sentencing practices are an important part of the Court’s inquiry into consensus.”).
\end{footnotesize}
the United States does not deport many DREAMers.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,\textsuperscript{163} while explicitly extending such guidance to a few


\textsuperscript{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 RODRIGUEZ, 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 I”), available at http://www.migrationpolicy.org/pubs/287g-March2010.pdf.

\textsuperscript{161} \textit{Alvarez}, No. 08-71383.


\textsuperscript{163} \textit{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.\textsuperscript{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.\textsuperscript{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 asylum\textsuperscript{166} or hardship for cancellation of removal\textsuperscript{167}—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.\textsuperscript{168} And, while the immigration statutes generally bar review of the denial of discretionary immigration relief other than asylum,\textsuperscript{169} the U.S. Courts of Appeals retain

\begin{itemize}
  \item \textsuperscript{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, Appealed 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.pdf.
  \item \textsuperscript{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”).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
\end{itemize}
jurisdiction to review constitutional claims.\footnote{Id. \textsection 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”).} 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.

\section*{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.\footnote{Graham v. Florida, 130 S. Ct. 2022 (2010); Roper v. Simmons, 543 U.S. 551, 572 (2005).} 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.\footnote{See supra notes 159–64 and accompanying text.} ICE has also reaffirmed that its prosecutors and officials possess the discretion to determine whether to proceed even in cases that could be brought.\footnote{Morton Memo 1, supra note 162, at 2–3.} 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.\footnote{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. \textit{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.”); \textit{Aarti Shahani, New York City Enforcement of Immigration Detainers: Preliminary Findings} I (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 \url{http://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf}.} 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.”\footnote{Graham, 130 S. Ct. at 2026.} The Court will also ask whether the sentencing practice “serves legitimate penological goals.”\footnote{Id.}
The Supreme Court has emphasized the diminished culpability of juveniles in *Roper*\(^\text{177}\) and *Graham*\(^\text{178}\) and those with low intellectual functioning in *Ford*\(^\text{179}\) and *Atkins*\(^\text{180}\). 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’;”\(^\text{181}\) 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.’”\(^\text{182}\) 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*.\(^\text{183}\) 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.\(^\text{184}\)

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.\(^\text{185}\) The statute effectively creates a statute of limitations, or rather, a cutoff date for enforcement of immigration law. For most of the past century,

---


\(^{178}\) *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).


\(^{181}\) *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.

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.\textsuperscript{186} The 1948 date was itself established in 1965 to replace June 28, 1940,\textsuperscript{187} and so on back into the 1920s—a long tradition of an enforcement deadline of approximately fifteen to twenty years for immigration offenses.\textsuperscript{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.\textsuperscript{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.

\textbf{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.”\textsuperscript{190} The canon of constitutional doubt\textsuperscript{191} requires that this

\begin{itemize}
  \item \textsuperscript{188} See Richard A. Boswell, Crafting an Amnesty with Traditional Tools: Registration and Cancellation, 47 HARV. J. ON LEGIS. 175, 180–90 (2010).
  \item \textsuperscript{189} 8 U.S.C. § 1101(a)(43) (2006); Morawetz, supra note 112, at 1939.
  \item \textsuperscript{190} 8 U.S.C. § 1229a(c)(1)(A) (2006).
  \item \textsuperscript{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. 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.” In other words, courts should presume that Congress intended to legislate “in the light of constitutional limitations,” and prefer a construction that “preserv[es] congressional enactments that might otherwise founder on constitutional objections.” The principle is often associated with Justice Brandeis for his Ashmander opinion, but is of older origin, dating at least to the opinion of Chief Justice John Marshall in Murray v. The Charming Betsy. And while scholars have debated the wisdom of the canon, and in particular whether it invites or curbs judicial activism, 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


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. Si. Gav, 533 U.S. at 299–300 (internal citations omitted).


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.”).


198. 6 U.S. (2 Cranch) 64, 118 (1804); see also Yevor 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).

is beyond debate,’ 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. Winkovich, 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


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. Winkovich, 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”);


203. See infra note 225 and accompanying text.

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

205. Frickey, supra note 21, at 451 (in Winkovich, “the constitutional question was murky”); see also Winkovich, 353 U.S. 194. Frickey argues that the Winkovich 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).


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.

holding that immigration statutes are exempt from such challenge.209 In a companion case to Zadvydas 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 Zadvydas, 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.”).


215. In re Q-M-I-, 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 Martiñez, 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," the immigration judge must determine that the penalty of removal is not excessive in relation to the underlying misconduct.

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," 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. And as Frickey himself noted, "[B]old constitutional lawmaking protecting the rights of [immigrants] may be unlikely" 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.

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

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 era\textsuperscript{222} and reaffirmed in a series of decisions in the McCarthy years.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{225} The Court has specifically held that the plenary power doctrine bars substantive due process challenges to deportation statutes,\textsuperscript{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.\textsuperscript{227} This is true. Moreover, the plenary power doctrine

\textsuperscript{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).

\textsuperscript{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.”).

\textsuperscript{224} Leng Moon Sing v. United States, 158 U.S. 538, 547 (1895).


\textsuperscript{226} Fong Yue Ting, 149 U.S. 698.

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, and even in cases in which national security concerns are present. In particular, in *Zadvydas* and *Martinez*, 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.

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.” 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).


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. 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, and have implied with the prohibition on selective enforcement. 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 “decision 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. 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.” 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.”

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


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); Almudia-Amari v. Gonzalez, 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).


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. Plascencia, 459 U.S. 21, 25 (1982) (characterizing immigration proceedings as legal measures through “which aliens can be denied the hospitality of the United States”).


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.

2 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,” for instance where the court has granted a suppression motion excluding the government’s evidence of alienage, or where the government has violated its own regulations in the conduct of the arrest, interrogation, or prosecution of the respondent. 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. Yuch-Shao 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-Dis6 miWation 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) (“[T]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); Almefida-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

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 Lec., 17 L. & N. Dec. 275 (1978) (relevant
factors in adjudicating application for readmission include moral character,
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)(ii), 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(b) 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, particularly where an applicant has been denied relief on factual circumstances that, in other cases, have resulted in a grant of relief. 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.

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-
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.