Immigration Law and the Proportionality Requirement

Michael J. Wishnie*

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 operation pursuant to diverse constitutional provisions is well-established in numerous areas of criminal and civil law, in the United States and abroad. Doctrinal debates concerning proportionality review of criminal sentences, civil punitive damages awards, and other sanctions tend to center on what counts as a sanction triggering review, which sanctions are so disproportionate as to become constitutionally impermissible, and whether a court or legislature should decide.

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. Moreover, in a landmark 2010 decision, the Supreme Court declared that a criminal defense attorney’s failure to advise a client of the immigration consequences of a conviction could violate the Sixth Amendment guarantee of effective assistance of counsel—implying that the Eighth Amendment Cruel and Unusual Punishment Clause would also apply in at least those removal cases that are the inevitable result of a criminal conviction. Accordingly, the Fifth and Eighth Amendments would appear to compel proportionality review of immigration cases.

This essay contends that there is no reason in principle or precedent that removal orders—whether entered against lawful permanent residents, persons of any status eligible for but denied immigration relief, and even undocumented immigrants ineligible for relief—should not be 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 in practice 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” must be understood to incorporate Fifth and Eighth Amendment proportionality requirements, 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

* Clinical Professor of Law, Yale Law School.
2 Writing before the Supreme Court’s decisions in Padilla v. Kentucky and Graham v. Florida, other scholars have argued that deportation may be a disproportional sanction in some cases, and have recommended legislative solutions. Angela Banks, Proportional Deportation, 55 WAYNE L. REV. 1651, 1671-79 (2009) (noting that due process requires proportionality and proposing enactment of rights-based category of statutory relief from removal that would permit immigration judges to consider factors necessary to ensure proportionality); Juliet Stumpf, Fitting Punishment, 66 WASH & LEE L. REV. 1683, 1732-1740 (2009) (proposing graduated system of sanctions for immigration violations). I argue that proportionality review in immigration cases is not merely advisable but required, under the direct command of the Fifth Amendment Due Process Clause.
review of removal orders extends to immigration judges, as well as to panels of the U.S. Courts of Appeals who conduct judicial review of 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. Nevertheless, a court must 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 punitive damages awards, civil fines, land use exactions, and capital and noncapital criminal sentences.

I. Proportionality Review Outside Immigration Law

Proportionality precedent is well developed in the criminal law, 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 “thicket of Eighth Amendment [proportionality] jurisprudence” contains some 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 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 last year, 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 assessment 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 assessment 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 concluded that the doctrine was effectively extinguished outside the capital context, especially after the Court’s rejection of proportionality challenges to California’s “three

---

4 Lockyer v. Andrade, 538 U.S. at 72.
5 Harmelin, 501 U.S. at 1005–06.
7 Graham v. Florida, 130 S. Ct. at 2036 (Roberts, C.J., concurring) (concluding life sentence without possibility of parole for juvenile offender convicted of nonhomicide offense failed gross disproportionality review).
9 Solem, 463 U.S. at 291; id. at 299–300 (comparing sentences and noting that the Helm was treated “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.”).
10 See, e.g., Weems v. United States, 217 U.S. 349 (1910); Solem, 463 U.S. at 303.
strikes” law.\textsuperscript{11} The Supreme Court has insisted on the vitality of the doctrine, however, and even in Ewing it affirmed that the Constitution requires “gross disproportionality” review of individual sentences.\textsuperscript{12} Moreover, Chief Justice Roberts concurred in Graham v. Florida on this rationale, concluding that a sentence of life without parole for a juvenile nonhomicide offender violated the “gross disproportionality” test on a case-by-case analysis.\textsuperscript{13}

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

The judicial test for proportionality in these categorical cases is phrased differently from that for proportionality on a case-by-case basis, but the underlying inquiry is similar. Under the categorical approach, “the 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{14} This analysis requires review of statutes on the books, as well as consideration of practices on the ground, which often differ from law on the books. The Court may also consider foreign or international practices. The Court will then examine “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question,”\textsuperscript{15} and whether the penalty “serves legitimate penological goals,”\textsuperscript{16} including 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.\textsuperscript{17}

Yet proportionality as a constitutional command is not limited to the Eighth Amendment’s Cruel and Unusual Punishment Clause. Fines, penalties, and other punishments may be classified as “civil” but nevertheless trigger constitutional proportionality review. As

\textsuperscript{11} Ewing v. California, 538 U.S. 11, 37 (2003); see also Lockyer v. Andrade, 538 U.S. 63, 72 (2003) (emphasizing that “gross disproportionality principle is applicable to sentences for terms of years” in companion case to Ewing 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{12} Justice Thomas specifically dissented in Ewing to argue that no such constitutional proportionality requirement exists, but the majority rejected that position. Ewing, 538 U.S. at 34 (Thomas, J., dissenting) (“In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle”).
\textsuperscript{13} 130 S. Ct. at 2036 (2010) (Roberts, C.J., concurring).
\textsuperscript{14} Id.
\textsuperscript{15} Id. at 2026.
\textsuperscript{17} Graham, 130 S.Ct. at 2030-33.
Justice Blackmun explained for the Court in *Halper*, “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.”

The Court has concluded that fines are subject to a similar 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 “[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” The Court went on to apply a version of case-by-case proportionality analysis.

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 a land use case, *Dolan v. City of Tigard*, 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.”

Proportionality is also required by the Due Process Clause, and it is in this civil context that the doctrine is best developed. In its punitive damages precedents, the Supreme Court initially held that such awards were immune from substantive judicial review but eventually revised its position and concluded that they are subject to a proportionality analysis very similar to that under the Eighth Amendment. In *BMW v. Gore*, the Court established three “guideposts” for assessing whether a particular 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. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, the Court went further, articulating a categorical-type rule that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”

Scholars have noted that judicial scrutiny of disproportionate civil sanctions, such as punitive damages, appears to be more searching than review of criminal sentences. This close scrutiny of civil sanctions 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

---

20 *Id.* at 334.
24 *Id.* at 574-83.
26 See, e.g., Karlan, *supra note ___* at 910 (contrasting the “Court's retreat from proportionality review in the criminal context” with “its enthusiastic embrace in the punitive damages cases”); Chemerinsky, *supra note ___* at 1051 (noting the “cruel irony … 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”).
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 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 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, the latter of which is plainly punitive, removal orders are subject to judicial review on constitutional proportionality grounds even where the individual has not been convicted criminally. Further, the immigration statutes 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

The Supreme Court has stated that deportation is a civil proceeding and that it is not punishment. As a result, requirements of constitutional criminal procedure such as the right to counsel and the prohibition on ex post facto laws do not apply in civil removal proceedings. 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, and further, the immigration statutes need not 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.

---

29 See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (ordinary Fourth Amendment exclusionary rule does not apply in deportation proceedings, which are civil, except in cases of egregious violations).
30 See, e.g. Reno v. American-Arab Antidiscrimination Committee, 525 U.S. 471, 491 (1999) (“‘[w]hile the consequences of deportation may assuredly be grave, they are not imposed as a punishment’”; Fong Yue Ting v. United States, 149 U.S. 689, 730 (1893) (constitutional protections for criminal defendants “have no application” in civil deportation proceedings).
31 Banks, supra note __, at 1656 (“the key question in determining whether or not a sanction is punishment is not whether it is criminal or civil, but whether it is remedial or punitive”); id. at __ (proportionality review appropriate in immigration cases only where there is “initial determination that deportation is punitive rather than remedial”).
32 Daniel Kanstroom, supra note __, at 1925-26; see also Maureen A. Sweeney, Fact or Fiction: The Legal Construction of Immigration Removal for Crimes, 27 YALE J. REG. 47 (2010).
First, 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 displace 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 rarely satisfied in modern cases.

Scholars have nevertheless 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 are most compelling as to deportation of lawful permanent residents, in circumstances that Daniel Kanstroom has described as reflecting “post-entry social control.” There is force to these views, and *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 argument that removal orders are subject to proportionality review.

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 least as to permanent residents who are removable because of a criminal conviction. As Justice Stevens explained in *Padilla*, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that

---

33 Hudson, 522 U.S. at 99-100 (court must “first ask” whether legislature applied civil or criminal label, but will also consider Mendoza-Martinez factors to determine whether “whether the statutory scheme was so punitive either in purpose or effect” as to render the sanction a criminal punishment for Double Jeopardy purposes) (quoting United States v. Ward, 448 U.S. at 248).

34 Kanstroom, supra note ___; Daniel Kanstroom, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).


37 Sweeney, supra note ___, at 87-88. See also Banks, supra note __.
may be imposed on noncitizen defendants who plead guilty to specified crimes.”\textsuperscript{38} It is, the Court emphasized, a “particularly severe ‘penalty.’”\textsuperscript{39} And because “recent changes in our immigration law have made removal nearly an automatic result” of conviction for many offenses,\textsuperscript{40} it is “most difficult to divorce the penalty from the conviction in the deportation context.”\textsuperscript{41} Any contention that removal is not punitive thus fails in the face of \textit{Padilla}, as well as for the reasons articulated by Kanstroom and others, at least as to permanent residents convicted of crimes which render removal “nearly an automatic result.”

One might contend that the \textit{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 \textit{to the conviction}. This may well be so. But if deportation as the “nearly . . . automatic result” of a conviction is a “penalty,” as the \textit{Padilla} Court concluded, then the removal order itself must also be subject to Fifth Amendment proportionality review in the immigration proceedings.

\textbf{2. Removal of non-LPRs}

Is removal of a person \textit{other than} a permanent resident sufficiently punitive to be subject to constitutional proportionality review? The Court has emphasized that if 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 \textit{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.”\textsuperscript{42} To the extent that a removal order is punitive, even in part, its imposition must satisfy constitutional proportionality requirements.

\textbf{a. Re-entry bars as punishment}

The aspect of a removal order that seems most obviously punitive is the imposition of a ban on return of five years or more, depending on an individual’s circumstances. The length of the re-entry bar depends on various factors, but it is imposed in all cases: five years (if the removal case begins upon a foreign national’s arrival to the United States),\textsuperscript{43} ten years (if the removal case begins after one’s initial entry),\textsuperscript{44} twenty years (if the removal order is a second or subsequent order),\textsuperscript{45} or a lifetime ban (if the person was convicted of an “aggravated felony”).\textsuperscript{46}

The ban on return cannot be easily justified in remedial terms and would seem to accomplish primarily specific deterrence and retributive goals. Consideration of the history and purpose of the re-entry bars confirms as much. The first enactment imposing a re-entry bar appears to be a one-year bar adopted by Congress in 1917. It was initially applicable only in

\textsuperscript{38} 130 S.Ct. 1473, 1480 (2010). See also Delgadillo v. Carmichael, 332 U. S. 388, 390–391 (1947) (deportation is “the equivalent of banishment or exile”);
\textsuperscript{39} Padilla v. Kentucky, 130 S.Ct. at 1481 (quoting \textit{Fong Yue Ting v. United States}, 149 U.S. 698, 740 (1893)).
\textsuperscript{40} Id. at 1483.
\textsuperscript{41} Id. (internal citation and quotation omitted).
\textsuperscript{42} U.S. v. Halper, 490 U.S. 435, 448 (1989) (emphasis added); see also Austin, 509 U.S. 602, 620-22 (1993). Halper was abrogated in part by Hudson v. U.S., 522 U.S. 93 (1997) (overturning Double Jeopardy holding of Halper), but the Court’s excessive fine clause analysis in Austin was undisturbed.
\textsuperscript{43} 8 U.S.C. § 1182(a)(9)(A)(i). This bar on lawful return and those described in notes ___ - ___ \textit{infra} may be waived by the Attorney General. \textit{Id.} § 1182(a)(9)(A)(iii).
\textsuperscript{44} Id. § 1182(a)(9)(A)(ii)(II).
\textsuperscript{45} Id. id. § 1182(a)(9)(A)(i).
deportation cases, but 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 re-entry 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 retained the one-year re-entry bar for exclusion cases and also the draconian permanent bar on re-entry in deportation cases but made both subject to waiver by the Attorney General. There does not appear to be legislative history elaborating on the legislative intent motivating continuation of the re-entry bars, but it is hard to understand such a bar 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 again, 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 to a permanent bar; and created an additional twenty-year bar for illegal re-entry cases. There is little direct legislative history of the extensions of the re-entry bars, 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 the 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

---

47 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 seek admission within one year from the date of such deportation,” absent advance permission from the Secretary of Labor).
49 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”).
51 Id.
52 Id.
enacted the re-entry 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-re-out amendment will attach a real penalty to those who have crossed our borders illegally. It is a common sense measure and it will prove to be a very effective deterrent.”\textsuperscript{55} Rep. John Bryant objected that this was unnecessary, citing the re-entry bar provisions already in the proposed legislation: “The bill says already that you can exclude people from 5 years to 10 years depending on the category they are in if they come into the country illegally and are ordered removed. We have already got a stiff penalty in the bill.”\textsuperscript{56} Rep. Becerra opposed the Tate amendment on similar grounds, repeating that the existing bill already extended the general re-entry bar to ten years, which “is very severe punishment to serve.”\textsuperscript{57}

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{58} indicate that Congress generally intended re-entry bars as punitive. The relevance of congressional debate on the new unlawful presence bars to the legislative purpose underlying the extension of the re-entry bars after removal 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{59} 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 re-entry bars for unlawful presence, but the Chair, Rep. Henry Hyde, objected, explaining their purpose is “to validate our immigration laws, and to put some penalty on people who cross into our country illegally or undокументedly [sic].”\textsuperscript{60} 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?”\textsuperscript{61} 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 re-entry bars for unlawful presence would create “a very harsh penalty.”\textsuperscript{62}

Judicial opinions discussing the re-entry bars that result from removal confirm that these bars are punitive, not remedial. In \textit{Dada v. Mukasey},\textsuperscript{63} 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.”\textsuperscript{64} And the first “penalt[y] attendant to deportation” listed by the \textit{Dada} Court were the re-entry bars.\textsuperscript{65} The Board of Immigration Appeals (BIA) has also agreed that the purpose of the re-entry bars is to “compound the adverse

\textsuperscript{55} 142 Cong. Rec. 2378, 2459 (1996) (emphasis added).
\textsuperscript{56} Id. at 2458.
\textsuperscript{57} Id. (emphasis added).
\textsuperscript{58} IIRIRIA § 301, codified at 8 U.S.C. § 1182
\textsuperscript{59} See H. Rep. No. 104-169, at 528 (1995) (dissenting views) (characterizing extension of re-entry bars after removal and establishment of re-entry bars for unlawful presence as “harsh new bans on the ability of aliens to seek lawful entry into this country”).
\textsuperscript{61} Id. (emphasis added).
\textsuperscript{62} Id. (emphasis added). See also id. (remarks of Rep. Berman) (“There is no doubt a 10 year bar is a penalty”).
\textsuperscript{63} 545 U.S. 1 (2008).
\textsuperscript{64} Id. at 11.
\textsuperscript{65} Id. at 11-12.
consequences of immigration violations,” accomplishing punitive and deterrence goals.\(^66\) And various U.S. Courts of Appeals have characterized the re-entry bar as a “penalty,”\(^67\) a “concrete disadvantage imposed as a matter of law,”\(^68\) and “reflect[ing] a congressional intent to sever an alien’s ties to this country.”\(^69\)

In short, the genesis of the re-entry bar in the 1917 Act was intended to alleviate an administrative burden, but in 1952, and emphatically in 1996, Congress hardened and recast the bar for punitive and deterrent 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 serving either retributive or deterrent purposes,”\(^70\) because its necessary and inevitable consequence is the imposition of a bar on re-entry. Removal is therefore punishment for Fifth Amendment proportionality purposes.

b. Removal itself as penalty

In addition to the re-entry bar that accompanies any removal, the removal order itself entered against a non-LPR may be understood as a penalty and not merely remedial in many cases. Removal of persons who have long resided in this country “bristles with severities,”\(^71\) but the government’s power to expel or deport foreign nationals is beyond question. To acknowledge the nation’s power to remove foreign nationals is to answer a different question than whether that removal may be characterized as punitive.

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.\(^72\) Many foreign nationals have of course 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 terms cognizable under foreign and international law, if not directly violative of domestic law. It is no answer, in human terms, to say that the establishment of these connections was itself unlawful; the immigration statutes prohibit entry into the nation without inspection at the border, and sometimes 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. The forcible, enduring, and possibly permanent severing of these ties is frequently “heartbreaking,”\(^73\) and it is a “savage penalty”\(^74\) in the everyday sense of the word.

B. 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. Where there is an inference of gross disproportionality, the court must then proceed to various

\(^{66}\) In re Rodarte-Roman, 23 I. & N. Dec. 905, 909 (BIA 2006); see also id. (“It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent”).

\(^{67}\) Zalawadia v. Ashcroft, 371 F.3d 292, 298 (5th Cir. 2004).

\(^{68}\) Tapia Garcia v. I.N.S., 237 F.3d 1216, 1219 (10th Cir. 2001).

\(^{69}\) Juarez-Ramos v. Gonzales, 485 F.3d 509, 512 (9th Cir. 2007).

\(^{70}\) U.S. v. Halper, 490 U.S. at 448; see also Austin, 509 U.S. at 620-22.


\(^{72}\) Webster’s (2011).


forms of comparative analysis, both intra- and interjurisdictional. In immigration, 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, 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 nonviolent offense, such as shoplifting or vehicle theft, that is now classified as an “aggravated felony.” There may well be 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.

Indeed, courts seem to have reached just such a conclusion in some cases. 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, but 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.” There are other such cases, and while the Constitution may not compel mercy, it does require proportionality.

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

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 earlier this year in 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. In immigration cases, it may be relevant that the United States does not deport many DREAMers, for instance. 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. Signaling the possibility that such enforcement practices may be relevant in removal cases, earlier this year a Ninth Circuit panel entered an order directing the Attorney General to address the effect of ICE’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 ICE for deportation.”

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. 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, while explicitly extending such guidance to a few additional categories of person, such as DREAMers and civil rights litigants. It is yet unclear whether issuance of these prosecutorial discretion memos will affect 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 also violate the constitutional command of case-by-case proportionality, because they raise an inference of gross disproportionality and work a kind of sentence that in many cases will be radically greater than any actual criminal sentence that was, or could have been, imposed.

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 or hardship for cancellation of removal—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. And, while the immigration statutes generally bar review of the denial of discretionary immigration relief other than asylum, the U.S. Courts of Appeals retain jurisdiction to review constitutional claims. 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.

**C. 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. 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. ICE has also reaffirmed that its prosecutors and officials possess the discretion to determine whether to proceed even in cases that could be brought. 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 any ICE enforcement program for prosecution or arrest on those grounds. 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.” The Court will also ask whether the sentencing practice “serves legitimate penological goals,” meaning: retribution, deterrence, incapacitation, or rehabilitation.

The Supreme Court has emphasized the diminished culpability of juveniles in *Roper* and *Graham* and those with low intellectual functioning in *Ford* and *Atkins*. In discussing

---

77 Graham, 130 S.Ct. at 2022; Roper, 543 U.S. at 572.
78 Graham, 130 S.Ct. at 2026.
79 Id.
80 543 U.S. 551 (2005)) (Eighth Amendment prohibits death penalty for juvenile offenders).
juveniles, the Court has explained that “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility,’”\textsuperscript{84} 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.’”\textsuperscript{85} 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 their 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 \textit{Graham}. 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.

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 currently 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. The statute effectively creates a statute of limitations or, rather, a cutoff date for enforcement of immigration law. For most of the past century, 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. The 1948 date was itself established in 1965 to replace June 28, 1940, and so on back into the 1920s—a long tradition of an enforcement deadline of approximately 15 to 20 years for immigration offenses.\textsuperscript{86} 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 list of crimes from murder to misdemeanor theft offenses, raises categorical proportionality problems. 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 bars on lawful return discussed above may also categorically violate the constitutional requirement of proportionality, 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

\textsuperscript{82} 477 U.S. 399 (1986) (Eighth Amendment prohibits execution of prisoner who is insane).
\textsuperscript{83} 536 U.S. 304, 311 (2002) (Eighth Amendment prohibits the execution of mentally retarded criminals).
\textsuperscript{84} \textit{Graham}, 130 S.Ct. at 2026 (quoting Roper, 543 U.S. at 569-70).
\textsuperscript{85} Id. (quoting Thompson, 487 U.S. at 835). See also id. (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”).
\textsuperscript{86} See Richard A. Boswell, \textit{Crafting an Amnesty With Traditional Tools: Registration and Cancellation}, 47 HARV. J. ON LEGIS. 175, 180-190 (2010)
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.

**D. 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.” The canon of constitutional doubt requires that this provision not be construed to permit an immigration judge to order removal in violation of constitutional proportionality requirements. In other words, this statutory provision 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 Board of Immigration Appeals must also evaluate removal orders for excessiveness, pursuant to the INA.

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 therefore should 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 *Ashwander* 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 “[t]his cardinal principle, which has for so long been applied by this Court that it is beyond debate, requires merely a determination of serious constitutional doubt, and not a determination of unconstitutionality.”

The Supreme Court has applied the constitutional doubt canon in immigration cases, and of particular relevance, it has done so in cases involving a substantive due process claim like the Fifth Amendment proportionality claim discussed here. The application of the constitutional doubt canon in the face of a substantive due process challenge to an immigration statute is particularly significant because the plenary power doctrine of immigration law, while

---

91 6 U.S. 64, 118 (1804). See also Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum. L. Rev. 1189, 1204 n.49(2006) (noting view that avoidance canon originates with *Charming Betsy* and alternative theory that principle arose even earlier).
92 Almendarez-Torres v. United States, 523 U.S. at 250 (Scalia, J., dissenting) (internal quotations and citations omitted, emphasis in original).
93 United States v. Witkovich, 353 U.S. 194, 199 (1957) (adopting narrow construction of immigration statute authorizing supervision of persons subject to deportation order and explaining that “[a] restrictive meaning for what appear to be plain words may be indicated by . . . the rule of constitutional adjudication . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts”); 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).
widely and properly condemned, holds that immigration statutes are immune from substantive
due process challenge—which would therefore appear to render the INA free of “constitutional
doubt.” Yet in United States v. Witkovich, the Supreme Court adopted a statutory
interpretation favorable to the immigrant, even though as one scholar of statutory interpretation
pritely noted, the “constitutional values in play were not well established at the time.”

More recently, in Zadvydas v. Davis, the Court applied the constitutional doubt canon to
interpret 8 U.S.C. § 1231(a)(6), which authorizes the Attorney General to detain persons ordered
“beyond the removal period,” so as to incorporate a “reasonable time” limitation lest the statute
violate substantive due process principles. Without question, Zadvydas involved a substantive
due process challenge to the statute, notwithstanding a century of case law holding that
immigration statutes are exempt from substantive due process challenge. In a companion case to
Zadvydas decided four years later, Justice Scalia again 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.”

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.” The government, presumably, would contend that
the most plausible interpretation of this text imposes no proportionality requirement—indeed,
that any legislative consideration of proportionality in immigration proceedings is reflected
elsewhere, in the statute’s establishment of narrow categories of relief from deportation. 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. But pursuant to the avoidance canon, upon “a
determination of serious constitutional doubt,” a court must presume that Congress did not
intend to enact a statute to authorize an unconstitutional outcome.

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

95 353 U.S. 194 (1957).
96 Frickey, supra note ___, at 451.
98 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 v. Martinez, 543 U.S. 371, 380-82 (2005).
99 543 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”).
100 Almendarez-Torres v. United States, 523 U.S. at 250 (Scalia, J., dissenting) (internal quotations and citations
omitted, emphasis in original).
therefore, the immigration judge must determine that the penalty of removal is not excessive in relation to the underlying misconduct.\textsuperscript{101}

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,”\textsuperscript{102} 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 under-enforced than immigration law. And as Frickey himself notes, the persecution of immigrants after the September 11 attacks makes unlikely “bold constitutional lawmaking protecting the rights of such individuals.”\textsuperscript{103} As it did in the 1950s, in Frickey’s study, “the Court may find it useful to return yet again to the avoidance canon to mediate statutory or administrative harshness and constitutional values” in immigration cases.\textsuperscript{104}

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 proportionality review. The plenary power doctrine was born in the Plesssy v. Ferguson era and reaffirmed in a series of decisions in the McCarthyism years. 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{105} 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{106} The Court has specifically held that the plenary power doctrine bars substantive due process challenges to deportation statutes, 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 and McCarthyite eras, one that has left immigration a legal backwater that is out of step with developments in modern constitutional

\textsuperscript{101} It follows as well that on appeal of the immigration judge decision, the Board of Immigration Appeals must also review the decision of the immigration judge for conformity to constitutional proportionality requirements.

\textsuperscript{102} Frickey, supra note ___, at 402.

\textsuperscript{103} Frickey, supra note ___, at 403 (comparing circumstance of immigrants after September 11 to alleged Communists in 1950s and lauding application of avoidance canon in St. Cyr and Zadvydas decisions).

\textsuperscript{104} Id.

\textsuperscript{105} Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

law. This is true. More important than scholarly condemnation, however, is that the plenary power doctrine may be coming to play a less central role in the adjudication of immigration cases. The Court has in recent years regularly rejected the government’s position in removal cases, even while espousing deference to the legislative and executive branches, 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, not the Fifth Amendment Due Process Clause. The plenary power cases barring substantive due process challenges to deportation do not preclude an Eighth Amendment proportionality challenge.

Moreover, 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. Rather, case-by-case proportionality review is an as-applied challenge, which does not implicate the plenary power doctrine quite so directly and in most cases will implicate neither foreign affairs nor national security, as the overwhelming 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 are 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. Further, one might contend that the Supreme Court has held that the presence even of lawful permanent residents is not a “right but is a matter of permission and tolerance.”

\[107\] 130 S.Ct. at 1480. (emphasis added). Many prior cases had stated that deportation was not punishment. See, e.g., 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”); 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”).

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 necessarily arise. That is, there is no such “continuing offense” difficulty if a court were to hold that removal of a LPR convicted of a particular offense 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 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.

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 prohibiting 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 same tradition: it would terminate the instant proceeding, without barring the government from renewing its prosecution in the future, for instance if it developed evidence of additional misconduct.

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 incapacitation of the offender; 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.”109 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, 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. Furthermore, agency guidance appears to direct that such waivers be granted only very infrequently. 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

109 130 S.Ct. at 2030.
as a witness or party in pending legal proceedings. More broadly, it may be that the Due Process Clause’s 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 factual situations, pursuant to case-by-case proportionality analysis.

C. Lack of Comparative Metrics

Finally, one might object that there are fewer available metrics 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 further scholarship and judicial opinions may help to develop the metrics, as has occurred in the punitive damages and criminal law contexts. 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, 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.