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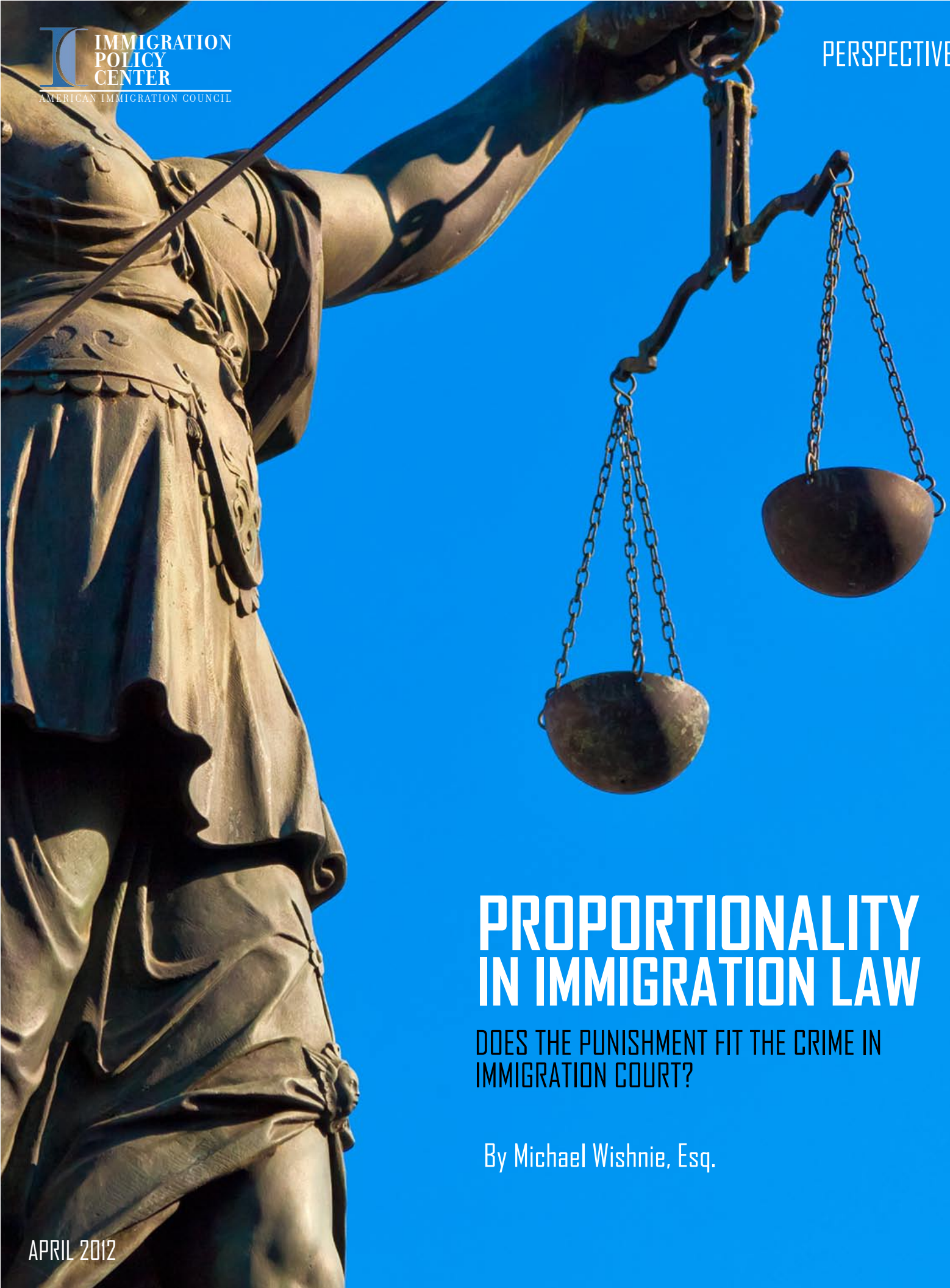

PROPORTIONALITY IN IMMIGRATION LAW

DOES THE PUNISHMENT FIT THE CRIME IN IMMIGRATION COURT?

By Michael Wishnie, Esq.

APRIL 2012

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ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

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ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

INTRODUCTION

The current controversies regarding Secure Communities, harsh state enforcement schemes, deportation of college students, and the Obama administration's record-breaking number of removals reflect an underlying, substantive disagreement about the content of our immigration laws and policies. Many who resist these enforcement measures believe that federal immigration laws are inhumane, and that significant numbers of people who are subject to arrest, detention, and removal should not be. After all, if today's immigration laws are the moral equivalent of Jim Crow, as some argue, then no one could suggest that we should expend scarce public dollars for their more efficient implementation. By contrast, many who advocate for intensified enforcement at every level of government reject the suggestion that our current laws are too severe.

Another way to describe this fundamental disagreement is as one about proportionality. 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[1] and nearly uncontestable,[2] and its operation pursuant to diverse constitutional provisions is well-established in numerous areas of criminal and civil law,[3] in the United States and abroad.[4] Even the Obama administration seems to have acknowledged the force of this principle, at least rhetorically: in recent memos and statements on prosecutorial discretion, Immigration and Customs Enforcement (ICE) Director John Morton and Department of Homeland Security (DHS) Secretary Janet Napolitano have, in essence, urged agency personnel to use a proportionality analysis when considering whether to initiate removal proceedings or effectuate a final order.[5] The balancing of underlying misconduct and equities is fundamentally about proportionality.

It is a fitting analysis, as the stakes in many immigration cases are devastatingly high. Deportation can mean impoverishment for an entire family, lengthy or permanent exile from family, friends, and community, and in some cases a forcible return to conditions of persecution, or to a nation where one has never lived and has no meaningful ties.

In reality, a removal order imposes two discrete penalties: the person must leave the United States *and* is forbidden from returning for a period of time ranging from five years to a lifetime.[6] But are these penalties appropriate for a person fleeing violent persecution who cannot apply for asylum because she was unable to file an application within the one-year statute of limitations? Or for a long-term permanent resident who came to the United States legally as a young child and has maintained her status ever since, but as an adolescent was convicted of a non-violent offense such as shoplifting or vehicle theft that is now classified as an "aggravated felony"? Or for DREAM Act-eligible youth who have lived nearly their entire lives in this country, and earned a high school or college degree? In these cases and many others, is deportation and prohibition on lawful return for ten years (the DREAMer and the asylum seeker) or forever (the permanent resident convicted of shoplifting) excessive in relation to the offense? If so, they will violate the constitutional requirement of proportionality.

Immigration law, which is formally termed "civil" but is functionally quasi-criminal, has not previously been subject to judicial or administrative review for conformity to constitutional proportionality principles. Yet it is undisputed that the Due Process Clause—one of the sources of the proportionality principle in American law—applies to immigration proceedings. In addition, in a

landmark 2010 decision, the Supreme Court held that constitutional protections in the criminal justice system must be applied with greater force where removal is the inevitable consequence of a criminal conviction.[7] The rationale of this decision implies that the Eighth Amendment's Cruel and Unusual Punishment Clause—another source of the proportionality requirement—also limits removal when caused by a criminal conviction.

Because removal orders are always at least partially punitive, even when not the product of a criminal conviction, their entry should be subject to proportionality review, as a constitutional command of the Fifth Amendment.[8] Where entry of a removal order is grossly disproportionate to the underlying misconduct, a court is obliged to set aside the removal order as constitutionally impermissible. Indeed, because the Supreme Court has previously interpreted immigration statutes to incorporate substantive due-process principles,[9] the obligation to conduct a proportionality review extends as well to Immigration Judges and the Board of Immigration Appeals.

This essay suggests that understanding the use of proportionality in criminal and civil law offers immigration practitioners a new way to challenge the status quo, particularly in cases where the underlying basis for the removal order and the resulting consequences of removal are so disparate. 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. These constitutional principles are incorporated in the INA, for instance in 8 U.S.C. § 1229a(c)(1)(A), which provides that "[a]t the conclusion of the [removal] proceeding, the immigration judge shall decide whether an alien is removable from the United States." This authorization for an immigration judge to enter a removal order must be construed to include a restriction on imposition of an order that is excessive in relation to the underlying offense.

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 Constitution

Moreover, that same principle can become the basis for assessing existing immigration policy, supplying an analytic framework for evaluating attempts to create an ever more punitive immigration system. Applying established proportionality principles, attorneys and policymakers can both argue for a more sane and balanced approach to immigration enforcement, one that measures the relative nature of an immigration offense against the severity of the current removal system, while securing judicial review of individual removal orders for consistency with constitutional proportionality requirements.

UNDERSTANDING THE PROPORTIONALITY DOCTRINE

Proportionality precedent is best developed in the criminal context, tracing back more than a century and including more than ten Supreme Court decisions since 1980 addressing non-capital and capital sentences. In criminal cases, the "thicket of Eighth Amendment [proportionality] jurisprudence"[10] 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: so-called "narrow proportionality review," which reviews criminal sanctions on a case-by-case basis, and categorical review, which examines a punishment as applied to a class of individuals

Narrow proportionality review is essentially a form of case-by-case analysis.[11] In the criminal context, courts use a two-step inquiry to apply this case-by-case proportionality analysis. 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."[12] For instance, in *Solem v. Helm*, the Supreme Court concluded that a life sentence for passing a bad check raised an inference of gross disproportionality.[13] Second, the Court will conduct a "comparative analysis" to determine whether a particular sentence is significantly out of step with sentences imposed for comparable misconduct.[14] In a rare case, the Court may conclude that a sentence otherwise lawfully imposed is so disproportionate as to be unconstitutional, in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.[15]

The Court's second approach to considering whether a criminal sentence is constitutionally "proportional" is categorical.[16] In this line of cases, the judicial inquiry focuses generally on the nature of the offense or the characteristics of the offender.[17] Applying the categorical approach, the Supreme Court has occasionally held that capital punishment is grossly excessive—unconstitutionally disproportionate—for certain offenses and for certain offenders. For example, the Court no longer permits capital punishment for certain offenses, namely non-homicide crimes against individuals,[18] or for certain offenders, specifically juvenile offenders[19] or those with mental disabilities.[20]

Graham v. Florida illustrates both proportionality approaches. The Supreme Court reviewed a sentence of life without parole for a juvenile non-homicide offender. The majority struck down the sentence by applying the categorical proportionality test.[21] In other words, the majority held that juvenile offenders as a class may not be sentenced to life without parole for a non-homicide offense. By contrast, Chief Justice Roberts concurred by applying the "narrow proportionality" test.[22] The Chief Justice's approach would have invalidated only Graham's sentence while leaving undisturbed the sentences of other juvenile offenders.

The constitutional command of proportionality is not limited to Eighth Amendment review of criminal sentences. As Justice Blackmun explained for the Court in *United States v. Halper*, "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."[23] The Court has also 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.[24] There, the Court explained, "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[25]

Similarly, in reviewing land use exactions under the Takings Clause, the Supreme Court used a form of case-by-case analysis that it called "rough proportionality."[26]

The widest application of proportionality analysis in civil cases has involved punitive damages. In *BMW v. Gore*, the Court established three "guideposts:" for assessing proportionality under the Fifth Amendment's Due Process Clause, much like the case-by-case analysis applied in criminal law: (1) reprehensibility of the underlying conduct, (2) the ratio of a punitive damages award to compensatory damages awarded to remedy the harm suffered by the plaintiff and other conceivable victims and (3) comparison to other civil and criminal penalties that could be imposed for conduct.[27] In *State Farm Mutual Automobile Insurance 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."[28] Many scholars have noted that judicial scrutiny of disproportionate civil sanctions, such as punitive damages, appears to be more searching than review of criminal sentences.[29] This too suggests that there can be an important role for the courts in considering the proportionality of civil immigration sanctions, such as deportation.

APPLYING PROPORTIONALITY ANALYSIS TO IMMIGRATION CASES

What might this mean for immigration law? Given the severe and often disproportionate consequences of a removal order, those orders should be subject to proportionality review by courts and immigration judges, both on a case-by-case basis and categorically. The Supreme Court has explained that if any part of a sanction is punitive (imposed as a punishment), then the entire sanction may be subject to proportionality review. Because a removal order mandates departure[30] and also imposes an indisputably punitive bar on lawful return for a period of years,[31] removal orders are subject to judicial review on constitutional proportionality grounds even where the individual has not been convicted criminally.

Deportation and Re-Entry Bars as Punishment

The availability of proportionality review turns on the nature of the sanction. If deportation and the reentry bars are wholly remedial, without any punitive element, then proportionality review is not required by the Constitution.[32] But when a government sanction is intended to be more than remedial, even in part, then it is a penalty: 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."[33] Importantly, whether the underlying proceeding is criminal or civil in nature is not dispositive to the question of whether the sanction imposed is remedial or punitive. The excessive fines, punitive damages, and land use takings cases confirm that proportionality review is appropriate in civil proceedings that lead to punitive sanctions. To the extent that a removal order is punitive, even in part, its imposition must satisfy constitutional proportionality requirements.

The Supreme Court has often stated that deportation is not punishment,[34] and that it is civil not criminal in nature.[35] However, many scholars have argued that deportation proceedings are "quasi-criminal," reflecting both criminal and civil elements, and that therefore more constitutional criminal procedure norms—such as proportionality tests—should apply.[36] Maureen Sweeney, for example, 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."[37]

The removal of persons who have long resided in this country "bristles with severities,"[38] and it is punitive in the common-sense meaning of that term. 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.[39]

The Court appears to have accepted this contention, at least as to permanent residents who are removable because of a criminal conviction. As Justice Stevens explained 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."[40] It is, the Court emphasized, a "particularly severe 'penalty.'"[41] Any contention that removal due to a criminal conviction is not punitive thus fails in the face of *Padilla.*

The removal of unauthorized immigrants for immigration violations (as opposed to criminal convictions) is also punitive. The Court has held that retributive or deterrent sanctions are punitive in nature; to the extent that removal serves to deter future immigration violations, it must be understood as punishment.[42] 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. 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, child-rearing, 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,"[43] and it is a penalty in the everyday sense of the word. International legal norms also increasingly recognize the disproportionate nature of removal, especially where it will impact minor children or destroy family unity.[44]

The five-year, ten-year, twenty-year, and permanent bars on returning to the United States are also punitive, and meant to accomplish deterrent and retributive goals. The origin of the re-entry bars confirms that Congress purposely imposed them as a means to punish immigrants who were deported and to deter them from attempting to re-enter the United States. The first enactment imposing a re-entry bar appears to have been a one-year bar adopted by Congress in 1917. It was initially applicable only in deportation cases,[45] 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."[46]

The bars were amended and extended over the course of the last century, most recently in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Legislative debates during IIRIRA's enactment confirm Congress's unmistakable and longstanding intent that the re-entry bars be punitive. During the debate on IIRIRA, Rep. Randy Tate offered an amendment on the House floor to establish a permanent bar for anyone who entered, or attempted to enter, unlawfully. Although the Tate amendment failed, the floor debate centered on the purpose of the re-entry bars in the existing bill, which did become law, and reveals that Congress enacted them to achieve punitive and deterrent purposes. Rep. Marge Roukema, for instance, argued in support of

the Tate amendment that "the one-strike-and-you're-out amendment will attach a *real penalty* to those who have crossed our borders illegally. It is a common sense measure and it will prove to be a very effective *deterrent*."[47] 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."[48] Rep. Xavier 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."[49]

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 at least six or twelve months, respectively,[50] 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.[51]

The history of the unlawful presence bars demonstrates an unmistakable intent to punish.
In a Judiciary Committee hearing, Rep. Becerra proposed to eliminate the re-entry bars for unlawful presence, but Chairman 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 undocumentedly [sic]."[52] 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?"[53] 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*."[54] Because imposition of a bar on re-entry is its necessary and inevitable consequence, 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."[55]

Judicial opinions discussing the re-entry bars that result from removal confirm that these bars are punitive, not remedial. In *Dada v. Mukasey*,[56] 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."[57] The first "penalt[y] attendant to deportation" listed by the *Dada* Court was the re-entry bars.[58] The Board of Immigration Appeals 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.[59] And various U.S. Courts of Appeals have characterized the re-entry bar as a "penalty,"[60] a "concrete disadvantage imposed as a matter of law,"[61] and "reflect[ing] a congressional intent to sever an alien's ties to this country."[62] In short, the courts, Congress, and even the Board of Immigration Appeals (BIA) have consistently characterized the re-entry bars as a penalty intended to punish immigration violations.

Accordingly, because imposition of a bar on re-entry is the necessary and inevitable consequence of a removal order, removal becomes punishment for Fifth Amendment proportionality purposes.

Case-by-Case Proportionality Review in Immigration Cases

The Supreme Court directs that the case-by-case proportionality inquiry in criminal cases begin with a comparison between the gravity of the offense and the severity of the sanction.[63] Where there is an "inference of gross disproportionality," the court must then proceed to various forms of comparative analysis, both intra- and inter-jurisdictional.[64] In most cases, no such inference of "gross disproportionality" arises, and that is the end of the analysis. In reviewing a removal order for conformity to the constitutional command of proportionality arising under the Fifth and Eighth Amendments, an inference of "gross disproportionality" may also be rare. But as with criminal sentences, punitive damage awards, land use exactions, and fines, there will 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 who had come to this country as a child, escaped from two abusive marriages, and raised six U.S.-citizen children, but who was placed in proceedings and found ineligible for any immigration relief. "Simply put, this case calls for more mercy than the law permits this Court to provide."[65] While the Constitution may not compel mercy, it does require proportionality.

Where a court has determined that removal raises an inference of gross disproportionality, it must then undertake a series of comparative analyses. In *Bajakajian*, the excessive fine case, the Court looked to the criminal and civil penalties imposed in addition to the fine.[66] In the context of a removal proceeding, the other civil and criminal sanctions may be substantially more modest than removal. For example, the DREAMer and the late-filing asylum-seeker would be subject to a maximum sentence of six months,[67] a civil fine of $50 to $250,[68] and a criminal fine of $5,000,[69] as sanctions for entry without inspection. The permanent resident convicted of shoplifting may have received no jail time at all, only a suspended sentence.[70]

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 2010 in a case involving sentences of life without parole for certain juvenile offenders, finding that while most states authorize such harsh penalties, few states actually pursue them.[71] When applying proportionality review in removal hearings, it may be relevant that the United States does not deport many DREAMers, for instance.[72] 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,[73] and recent statements regarding the exercise of prosecutorial discretion recognize that the removal of many other persons, from veterans to those with no significant criminal history, should also be rare. Signaling the possibility that such enforcement practices may be relevant in removal cases, 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."[74]

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[75] or hardship for cancellation of removal[76]—or were denied relief in 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 intra-jurisdictional analysis by comparing how similar cases were handled by other courts or the BIA.[77] And, while the immigration statutes generally bar review of the denial of discretionary immigration relief other than asylum,[78] the U.S. Courts of Appeals retain jurisdiction to review constitutional claims.[79] Therefore, a claim that one's removal violates constitutional proportionality requirements could be subject to judicial review, even in a case involving the denial of discretionary relief.

Categorical Proportionality Review in Immigration Cases

If the courts were to review deportation cases for categorical proportionality, they might find that, for certain categories of immigrants or certain classes of misconduct, deportation is indeed disproportionate to the offense.

A court applying existing Eighth Amendment standards for proportionality review would begin with the "objective indicia" of society's standards, namely laws and practices.[80] For example, it is not generally the practice of immigration authorities to remove DREAMers, and ICE leadership has repeatedly emphasized 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,[81] while also reaffirming that ICE prosecutors and officials possess the discretion to determine whether to proceed even in cases that could be brought.[82] 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.[83] A categorical analysis might well focus on such sub-groups of persons subject to, but not usually targeted for, removal.

The Court would 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.

Consider that the Supreme Court has already emphasized the diminished culpability of juveniles in *Roper v. Simmons*[84] and *Graham v. Florida*[85] and those with low intellectual functioning in *Ford v. Wainwright*[86] and *Atkins v. Virginia*.[87] 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;'"[88] 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.'"[89] 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 deterrence, deporting DREAMers cannot deter future infants from coming to the United States, nor is it likely to deter other juveniles who are immature and "less likely to take a possible punishment into consideration when making decisions."[90] Nor is removal of such persons likely to lead to rehabilitation for the immigration violation. And it is not 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.[91]

There may be other applications of the categorical approach to proportionality in immigration law. The immigration statutes for more than a century have contained a kind 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 Lawful Permanent Resident (LPR) status.[92] The statute effectively creates a statute of limitations or, rather, a cut-off 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.[93] The 1948 date, in turn, was inserted in 1965 to replace June 28, 1940[94] and so on back into the 1920s—a consistent tradition of a statute of limitations of approximately 15-20 years on immigration offenses.[95] Congress has failed to update the registry date since 1986, but future legislative proposals could marshal proportionality principles in support of updating this statute of limitations such that it practically provides relief for long-term undocumented residents. 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.[96] That is because one convicted of an "aggravated felony" is not only subject to removal, but also barred from most forms of immigration relief. Removal as the *automatic* consequence of a minor or non-violent crime may be grossly disproportional to the gravity of the offense. 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.

Finally, the 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.

Objections and Further Considerations

While I have offered a proportionality analysis grounded in current Constitutional jurisprudence, there will nonetheless be objections, chief of which is the judicial deference generally accorded to Congress and administrative agencies under the plenary power doctrine. The plenary power doctrine was born in the *Plesssy v. Ferguson* era[97] and reaffirmed in a series of decisions in the McCarthy era.[98] 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. As the Supreme Court stated at the end of the 19th century, "[t]he 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."[99] 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."[100] The Court has specifically held that the plenary power doctrine bars substantive due-process challenges to deportation statutes,[101] 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 law.[102] This is true. Moreover, the plenary power doctrine may be coming to play a less central role in the adjudication of immigration cases, as 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),[103] even in cases in which national security concerns are undeniably present.[104]

Nevertheless, even accepting that some judicial deference is appropriate in removal cases, the plenary power doctrine does not preclude a constitutional proportionality analysis. As noted above, 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."[105] Thus, proportionality review in cases where removal is the inevitable consequence of a criminal conviction is required by the Eighth Amendment, not only 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. It 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.[106] 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 it has done with the exclusionary rule,[107] and has implied with the prohibition on selective enforcement.[108] As for a categorical proportionality claim, that would concededly be a more explicit challenge to the plenary power doctrine but, perhaps, no less invasive of federal sovereignty than invalidation of state capital punishment or life-without-parole sentences for juveniles is of state sovereignty.

Further, the Immigration and Nationality Act itself must be interpreted to incorporate a proportionality requirement, as a matter of statutory interpretation and application of the constitutional avoidance doctrine.[109] The Supreme Court has not hesitated to construe provisions of the INA as incorporating substantive due-process norms, even if the plenary power doctrine might preclude a direct substantive due-process challenge.[110] Here, the statutory requirement that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States"[111] must be read to include a requirement of proportionality review—just as the statutory requirement that post-final order persons must be detained was read to incorporate a "reasonable time" requirement.[112] In other words, Immigration Judges must determine that the penalty of removal is not excessive in relation to the underlying misconduct as inherent in "decid[ing] whether an alien is removable from the United States."[113]

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.[114] 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. 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.[115]

The "continuing offense" objection to proportionality review fails even in the context of an undocumented immigrant who is not eligible for any relief. 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,"[116] for instance where the court has granted a suppression motion excluding the government's evidence of alienage[117] or where the government has violated its own regulations in the conduct of the arrest, interrogation, or prosecution of the respondent.[118]

Finally, the "continuing offense" objection cannot 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. Moreover, the "continuing offense" objection does not require the government to actually effectuate removal orders. 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 or until the conclusion of pending legal proceedings.[119] 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 situations, pursuant to case-by-case proportionality analysis.

CONCLUSION

For more than two decades, immigrants facing removal from the United States have been subjected to increasingly aggressive prosecution with limited opportunities for relief from deportation. The absence of such relief, coupled with expanded definitions of aggravated felonies, and harsh penalties governing return of those removed have raised the need to revisit traditional assumptions that deportation is not punitive in nature. Moreover, as Congress continues to avoid any attempt to pass comprehensive immigration reform, the number of people subject to removal, and therefore to disproportionate harm, has grown enormously.

Applying a proportionality analysis to both legal and policy efforts to reform our immigration system offers a new and useful framework for tackling the difficult cases found in immigration law. For attorneys with clients in removal proceedings, the proportionality analysis allows them to argue that removal would violate the principles of proportionality inherent in the Due Process Clause and the Eighth Amendment. This is a constitutional claim for which judicial review is available.[120] Further, the Immigration and Nationality Act itself incorporates a proportionality requirement, as a matter of statutory interpretation and application of the constitutional avoidance doctrine,[121] in the statutory requirement that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."[122] In other words, persons in removal proceedings may also insist that the Immigration Judges and BIA determine whether the penalty of removal is excessive in relation to the underlying misconduct, as necessarily inherent in "decid[ing] whether an alien is removable from the United States."[123] In appropriate cases, an Immigration Judge, the BIA, or reviewing courts should conclude that removal is so grossly disproportionate to the gravity of the offense as to be forbidden by the Constitution.

For those promoting legislative change, a proportionality analysis also offers a common-sense framework for evaluating immigration legislation. Using proportionality as both an analytical tool and a measure of outcomes gives policymakers a discrete way to evaluate the impact of changes to immigration law. Moreover, when politicians seek to use immigration law as a vehicle for retribution and deterrence, the proportionality analysis allows advocates and legislators to invoke constitutional concerns and protections, drawing upon ancient and widely accepted notions of justice.

Intensifying enforcement of laws that disproportionately punish DREAMers and others with deportation and prolonged or permanent exile reveal a statutory regime that is desperately off-kilter. The struggle for balance in immigration policy will continue to play out primarily in Congress, as is appropriate, and well-established proportionality principles may supply a useful frame of reference for legislators when they do, eventually, update and reform our immigration statutes. Until then, however, it will also be vital for administrative and judicial courts to test removal orders against the constitutional command of proportionality.

ENDNOTES

[1] Solem v. Helm, 463 U.S. 277, 284 (1983).
[2] Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME AND JUSTICE 55, 56 (1992) (principle "embodies, or seems to embody, notions of justice . . . Departures from proportionality—though perhaps eventually justifiable—at least stand in need of defense").
[3] See, e.g., Graham v. Florida, 130 S. Ct. 2011 (2010) (Cruel and Unusual Punishment Clause of Eighth Amendment requires proportionality in criminal punishment); United States v. Bajakajian, 524 U.S. 321 (1998) (same as to fines, per Excessive Fines Clause of Eighth Amendment); BMW of N. Am, Inc. v. Gore, 517 U.S. 559 (1996) (same as to punitive damages, per Due Process Clause of Fifth Amendment); Dolan v. City of Tigard, 512 U.S. 374 (1994) (same as to land use exactions, per Takings Clause of Fifth Amendment).
[4] Thomas M. Franck, *Proportionality in International Law*, 4 *LAW & ETHICS OF HUMAN RIGHTS* 230 (2010); *Dalia v. France*, 1998-I Eur. Ct. H.R. 14-15.
[5] Memorandum from John Morton, Assistant Secretary, DHS, to all U.S. Immigration and Customs Enforcement Field Office Directors, Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; memorandum from John Morton, Assistant Secretary, DHS, to all U.S. Immigration and Customs Enforcement Field Office Directors, Special Agents in Charge, and Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.
[6] There is a five-year bar to reentry if the removal case begins upon a foreign national's arrival to the U.S.; a ten-year bar if the removal case begins after one's initial entry; a twenty-year bar if the removal order is a second or subsequent order. There is a permanent bar to reentry if the person has been convicted of an "aggravated felony."
[7] Padilla v. Kentucky, 130 S. Ct. 1473 (2010).
[8] 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). This essay argues that proportionality review in immigration cases is not merely advisable but required, under the direct command of the Fifth Amendment.
[9] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).
[10] Lockyer v. Andrade, 538 U.S. 63, 72 (2003).
[11] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.").
[12] *Harmelin*, 501 U.S. at 1005–06.
[13] *Solem*, 463 U.S. at 291–303.
[14] *See, e.g.*, *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.").
[15] *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910); *Solem*, 463 U.S. at 303.
[16] *Graham*, 130 S.Ct. at 2022.
[17] *Id.*
[18] Coker v. Georgia, 433 U.S. 584 (1977) (holding that death sentence for rape is disproportionate); Enmund v. Florida, 458 U.S. 782 (1982) (holding that death sentence for felony murder *simpliciter*, with no finding of an intent to kill, is disproportionate).
[19] Roper v. Simmons, 543 U.S. 551 (2005).
[20] Atkins v. Virginia, 536 U.S. 304, 311 (2002); Ford v. Wainwright, 477 U.S. 399 (1986).
[21] 130 S. Ct. at 2030-33.
[22] *Id*. at 2036 (Roberts, C.J., concurring).
[23] 490 U.S. 435, 447-48 (1989).
[24] U.S. v. Bajakajian, 524 U.S. 321 (1998).
[25] *Id.* at 334.
[26] *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("[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"). *See also* E THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 74-80 (2009).
[27] *BMW of N. Am.*, 517 U.S. at 574-83.
[28] 538 U.S. 408, 425 (2003).

[29]*See, e.g.*, Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment,* 88 MINN. L. REV. 880, 910 (2004) (contrasting the "Court's retreat from proportionality review in the criminal context" with "its enthusiastic embrace in the punitive damages cases"); Erwin Chemerinsky, *The Constitution and Punishment,* 56 STAN. L. REV. 1049, 1051 (2004) (noting "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").

[30]*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"); Bridges v. Wixon, 326 U.S. 135, 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").

[31]8 U.S.C. § 1182(a)(9)(A)(i),(ii)(II) (person removed may not lawfully return to the United States for 5, 10, or 20 years, or ever, depending on circumstances).

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

[33] 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. Matthew C. Solomon, *The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court's Double Jeopardy Excursion*, 87 GEO. L.J. 849 (1999).

[34] 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).

[35] 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).

[36] Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV.L.REV. 1889 (2000); Stephen H. Legomsky, *The New Path of Immigration Law: Assymetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469 (2007); Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution's Criminal Procedure Must Apply*, 52 ADMIN.L.REV. 305 (2000); Peter Markowitz, "Deportation is Different" Benjamin N. Cardozo School of Law, Jacob Burns Institute for Advanced Legal Studies, Working Paper No. 308, August 2010..

[37]Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. REG. 47, 87-88 (2010). See also Banks, supra note 8.

[38] Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1952).

[39] Webster's (2011). See also id. (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 (9th ed. 2009) (defining "punishment" as "[a] sanction — such as a fine, penalty, confinement, or loss of property, right, or privilege — assessed against a person who has violated the law"); id. (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").

[40] 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"); Bridges v. Wixon, 326 U.S. 135, 147 (1945).

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

[42] United States v. Halper, 490 U.S. 435, 448 (1989).

[43] Martinez v. U.S. Attorney General, 413 Fed.Appx. 163, 2011 U.S. App. LEXIS 2242, at *13, 16 (11th Cir. Feb. 4, 2011).

[44] 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). *See* Universal Declaration of Human Rights art. 16, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 (prohibiting "arbitrary or unlawful interference with . . . family [or] home"); Convention on the Rights of the Child art. 7, 28 I.L.M. 1456, 1577 U.N.T.S. 3 (guaranteeing "as far as possible, the right to know and be cared for by his or her parents"); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA (forthcoming 2012) (manuscript at 250–267) (on file with author) (describing the application of human rights and international law norms, including proportionality, to immigration proceedings); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003); 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."); *Dalia v. France*, 1998-I Eur. Ct. H.R. 14–15; Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), 2011 ECJ EUR-Lex LEXIS 82 ("A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit," violates Article 20 of Treaty on the Functioning of the European Union, 9.5.2008); Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L./V/II.139, doc. 21 ¶ 5 (2010); *see also id.* at ¶ 56 ("[T]he IACHR particularly emphasizes that the best interest of minor child must be taken into consideration in a parent's removal proceeding.").

[45] 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).

[46] S. Rep. No. 352, at 4 (1916).

[47] 142 Cong. Rec. 2378, 2459 (1996) (emphasis added).

[48] Id. at 2458.

[49] Id. (emphasis added).

[50] IIRIRIA § 301, codified at 8 U.S.C. § 1182.

[51] 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").

[52] Hearing of the House Judiciary Committee Markup Chairman, Sept. 19, 1995, 104th Cong. (1995), available through Federal News Service (emphasis added).

[53] Id. (emphasis added). Rep. John Bryant joined Rep. 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").

[54] Id. (emphasis added). See also id. (remarks of Rep. Berman) ("There is no doubt a 10 year bar is a penalty").

[55] U.S. v. Halper, 490 U.S. at 448; see also Austin, 509 U.S. at 620-22.

[56] 545 U.S. 1 (2008).

[57] Id. at 11 (emphasis added).

[58] Id. at 11-12.

[59] 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"); Lemus-Losa v. Holder, 576 F.3d 752, 755 (7th Cir. 2009) (endorsing *In re Rodarte-Roman* analysis).

[60] Zalawadia v. Ashcroft, 371 F.3d 292, 298 (5th Cir. 2004).

[61] Tapia Garcia v. I.N.S., 237 F.3d 1216, 1219 (10th Cir. 2001).

[62] Juarez-Ramos v. Gonzales, 485 F.3d 509, 512 (9th Cir. 2007).

[63] *Solem*, 463 U.S. at 290-91.

[64] *Id.* at 296-300.

[65] Martinez v. U.S. Attorney General, 2011 U.S. App. LEXIS 2242, at *13, 16. See also Cheruku v. Att'y Gen. of the United States, 662 F.3d 198, 209 (3d Cir. 2011) (McKee, C.J., concurring); Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1015 (9th Cir. 2005) (Pregerson, J., dissenting).

[66] 524 U.S. 321, 338-39 (1998).

[67] 8 U.S.C. § 1325(a).

[68] *Id*. § 1325(b)(1).

[69] 18 U.S.C. § 3571(b).

[70] 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." *Id.* § 1101(a)(48)(B) (defining "conviction").

[71] *Graham*, 130 S. Ct. at 2023 ("Actual sentencing practices are an important part of the Court's inquiry into consensus.").

[72] Susan Carroll, *Immigration cases being tossed by the hundreds: Docket review pulls curtain back on procedure by Homeland Security*, HOUSTON CHRONICLE (Oct 16. 2010) (noting that ICE dismissed cases where respondent present in United States for two years or more and has no serious criminal history).

[73] John Morton, Assistant Secretary, DHS, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, June 30, 2010 (establishing those who pose "risk to national security or danger 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) (ordering 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)* (Migration Policy Institute: 2010), at 12 (analyzing new priorities for 287(g) agreements that prioritize persons committed of violent crimes as "Level 1").

[74] Vega Alvarez v. Holder, No. 08-71383 (9th Cir. Jan. 7, 2011), ECF No. 24.

[75] 8 U.S.C. § 1158(b)(1) (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 country of nationality because of "persecution" or a "well-founded fear of persecution").

[76] *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).

[77] 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 non-meritorious cases).

[78] 8 U.S.C. § 1252(a)(2)(B).

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

[80] *Graham*, 130 S.Ct. at 2022; *Roper*, 543 U.S. at 572.

[81] See supra note 5.

[82] Morton Memo I.

[83] ICE does arrest or place into removal proceedings substantial numbers of juveniles, mentally ill persons, and low-level offenders, even though such persons are not within the agency's enforcement priorities. See, e.g., Human Rights Watch/ACLU, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (2010) ("While no exact official figures exist, the percentage of non-citizens in immigration proceedings with a mental disability is estimated to be at least 15 percent of the total immigrant population in detention"); Aarti Shahani, *New York City Enforcement of Immigration Detainers: Preliminary Findings* (Justice Strategies: 2010), at 1 ("While Homeland Security purports to target the most dangerous offenders [at Rikers Island jail], there appears to be no correlation between offense level and identification for deportation"), available at http://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf.

[84] 543 U.S. 551 (2005)) (holding that Eighth Amendment prohibits death penalty for juvenile offenders).

[85] 130 S.Ct. 2011 (2010) (holding that Eighth Amendment prohibits life without parole for juvenile nonhomicide offenders).

[86] 477 U.S. 399 (1986) (holding that Eighth Amendment prohibits execution of prisoner who is insane).

[87] 536 U.S. 304, 311 (2002) (holding that the Eighth Amendment prohibits the execution of mentally incompetent criminals).

[88] Graham, 130 S.Ct. at 2026 (quoting Roper, 543 U.S. at 569-70).

[89] 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").

[90] Id. at 2028-29 (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 ("juveniles will be less susceptible to deterrence").

[91] Von Hirsch, *Proportionality*, 16 CRIME AND JUSTICE at 82 n.7.

[92] 8 U.S.C. § 1259.

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

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

[95] *See* Richard A. Boswell, *Crafting an Amnesty With Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 180-190 (2010)

[96] 8 U.S.C. § 1101(a)(43); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-40 (2000).

[97] 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 procedurual but not substantive due process challenges. See 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); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903).

[98] 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").

[99] Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

[100] Harisiades, 342 U.S. at 588-89 (footnote omitted). See also Landon v. Plasencia, 459 U.S. 21, 34 (1982) ("immigration is a sovereign prerogative, largely within the control of the executive and the legislature"); Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972).

[101] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[102] *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) ("Chinese Exclusion—its very name is an embarrassment—must go."); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts,* 22 Hastings Const. L.Q. 925 (1995); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that plenary power doctrine arose from *Plessy*-era judicial commitment to racial segregation); 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);

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

[104] Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 533 U.S. 723 (2008).

[105] 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) (holding that ex post facto clause does not apply to deportation and explaining "[i]t 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) (same and stating "'It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment").

[106] Cf. Kleindeist v. Mandel, 408 U.S. 753 (1972) (rejecting First Amendment challenge to denial of visa waiver to European intellectual).

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

[108] Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999) (prohibition on selective enforcement in criminal cases does not generally apply in civil removal proceedings but may apply in cases of "outrageous" discrimination).

[109] See, e.g., Zadvydas v. Davis, 533 U.S. 678 (2001): Clark v. Martinez, 543 U.S. 371 (2005): INS v. St. Cyr, , 533 U.S. 289 (2001); see generally, Motomura, supra note 102.

[110] The Supreme Court in Zadvydas v. Davis, 533 U.S. 678 (2001) was not explicit as to whether its analysis was one of procedural due process, substantive due process, or both. It is plain, however, that the analysis was primarily one of substantive due process. From the very start of its discussion, the Zadvydas majority relied on, cited to, and quoted from substantive due process decisions. Id. at 690 (citing to Foucha v. Louisiana, 504 U.S. 71, 80 (1992) passage regarding "substantive component" of Due Process Clause and to Kansas v. Hendricks, 512 U.S. 346, 356 (1997), which rejected substantive due process challenge to civil confinement of sexual predators). It did not, however, conduct the classic procedural due process analysis required by Mathews v. Eldridge. See also Clark v. Martinez, 543 U.S. 371 (2005).

[111] 8 U.S.C. § 1229a(c)(1)(A).

[112] Zadvydas, 533 U.S. at 701; see also Clark v. Martinez, 543 U.S. 371 (2005).

[113] 8 U.S.C. § 1229a(c)(1)(A).

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

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

[116] 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).

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

[118] *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).

[119] Morton Memo II, *supra* note 160, at 1–2 (discouraging removal of victims of crime or civil rights violation, or witness in pending proceedings). *See also* 8 C.F.R. § 241.6(a) (2011) (ICE officials may grant stay of removal "in consideration of factors listed in 8 C.F.R. 212.5"); *id.* § 212.5(b)(4) (listing persons "who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States"); former INS Operations Instruction 287.3a, *redesignated as* § 33.14(h) of the INS Special Agent's Field Manual (Apr. 2000) (directing that "arrangements for aliens to be held or to be interviewed" by state or federal labor inspectors or attorneys, prior to removal, "will be determined on a case-by-case basis") *reprinted in* 74 No. 4 Interpreter Releases 188 App'x. IV (Jan. 27, 1997); 8 U.S.C. § 1101(a)(15)(S) (2006) (establishing "S" visa category for certain cooperating witnesses necessary to a criminal investigation or prosecution); *id.* § 1101(a)(15)(U) (establishing "U" visa category for victims of listed crimes).

[120] 8 U.S.C. § 1252(a)(2)(D).

[121] See, e.g., Zadvydas v. Davis, 533 U.S. 678 (2001): Clark v. Martinez, 543 U.S. 371 (2005): INS v. St. Cyr, 533 U.S. 289 (2001); see generally, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990).

[122] 8 U.S.C. § 1229a(c)(1)(A).

[123] 8 U.S.C. § 1229a(c)(1)(A).