ARTICLES

PROPORTIONALITY: THE STRUGGLE FOR BALANCE IN U.S. IMMIGRATION POLICY[†]

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In September 1957, Governor Orval Faubus dispatched Arkansas National Guard troops to prevent black students from entering Central High School in Little Rock, Arkansas. The Eisenhower Administration responded by sending Justice Department lawyers to enter school desegregation litigation brought by the NAACP that was already pending before the U.S. District Court in Arkansas. The court granted the preliminary injunction sought by the Justice Department and the NAACP, holding that federal law preempted state interference with school integration.[1] A few weeks later, in the face of local resistance edged with hatred and violence, President Eisenhower ordered the famous 101st Airborne to Arkansas to maintain order and safeguard the black school children. The court's injunction was upheld on appeal, and Central High was eventually desegregated.[2] The most important legacy of the conflict, however, may have been the images from the streets of Little Rock—striking

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1. Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957).
2. Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

photographs of tense black students, sturdy federal troops, and a surging, spitting crowd of white protesters.[3]

It is too early to know whether the events of the summer of '10 will mark a similar watershed in the struggle for immigrant rights, or the Justice Department's role in that struggle. But it is noteworthy that in July of 2010—echoes of the summer of '57—Justice Department lawyers went to U.S. District Court to enjoin Arizona Senate Bill 1070, Arizona's most recent nativist statute, after the American Civil Liberties Union, NAACP, and others had already commenced litigation. The District Court granted the Justice Department's request for a preliminary injunction.[4]

In a further echo of the heartbreaking courage displayed by the young adults who attempted to integrate Central High, the summer of '10 also witnessed widespread protests by undocumented high school and college students, many of whom were brought to the United States as infants. Across the country, young adults declared their unauthorized status to political leaders and the media, risking deportation even while insisting on their moral claim to full and equal membership in society.[5] Many of these protests were organized in support of proposed legislation, known as the DREAM Act,[6] which would allow some students to regularize their status. No image from these protests has yet achieved the iconic, conscience-provoking status of the photographs from Little Rock, but the movement is still young.

Finally, as summer ended in early September, the U.S. Court of Appeals for the Third Circuit invalidated, on preemption grounds, an anti-immigrant ordinance enacted in Hazleton, Pennsylvania, not 100 miles from where we

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3. Will Counts, *A Life is More than a Moment: The Desegregation of Little Rock's Central High* (2007), *available at* http://www.encyclopediaofarkansas.net/media/gallery/photo/will_counts1_f.jpg.

4. United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, ___ F.3d ___, 2011 WL 1346945 (9th Cir. Apr. 11, 2011). The District Court subsequently denied most parts of the State's motion to dismiss the suit filed by civil rights organizations as well. Friendly House v. Whiting, No. CV 10-1061-PHX-SRB (Oct. 8, 2010), *available at* http://acluaz.org/press_releases/Attachments/Bolton%20Order%20on%20Mot%20to%20Dismiss.pdf.

5. *See, e.g.*, Tara Bahrampour, *Students Raise Stakes Against Immigration's Status Quo*, WASH. POST, July 21, 2010 (describing sit-ins outside of the White House and Senate Office Building); *see also* Maggie Jones, *Coming Out Illegal*, N.Y. TIMES MAG., Oct. 25, 2010; Maria Sacchetti, *Students Here Illegally Rally in Hope of Living American Dream*, BOSTON GLOBE, May 26, 2010; David Montgomery, *Trail of Dreams Students Walk 1,500 Miles to Bring Message to Washington*, WASH. POST, Apr. 30, 2010; Rhonda Bodfield, *Four Arrested at McCain Office Sit-in*, ARIZ. DAILY STAR, May 18, 2010. The movement has continued into the fall. *See, e.g.*, Diana Marcum, *Students Want the Dream Act to Become Reality*, L.A. TIMES, Nov. 28, 2010.

6. Development, Relief, and Education for Alien Minors Act of 2009, S. 729. 111th Cong. (2009); American Dream Act, H.R. 1751, 111th Cong. (2009).

are now, in a sweeping 188-page opinion authored by Chief Judge Ted McKee.[7]

Like Orval Faubus before her, Governor Jan Brewer of Arizona appealed the court order enjoining S.B. 1070. She has sounded "law-and-order" themes (even while asserting, and then disavowing, the claim that illegal immigration has left headless corpses scattered along the Arizona side of the border) and insisted on the right of her state to conduct its own affairs.[8] The struggles today in Arizona, Hazleton, and elsewhere do not occur in a vacuum, of course, but rather play out in the context of the nation's historic immigration law and policy. Nor is the specific dispute in Arizona—the proper role, if any, for state and local actors in making or enforcing immigration law—new.

I hope to do three things. First, I will consider state variation and state-federal conflict over immigration from a historical perspective. Second, I will share my sense of the context and likely outcome of the current debates. Finally, I want to talk about proportionality in immigration law and suggest an important, but previously under-appreciated, role for the courts in smoothing out the roughest edges of the current disputes.

I. EARLY ORIGINS

Two founding-era debates illustrate that disagreements about liberal and restrictive immigration and naturalization policies and the optimal degree of local autonomy in a system of national immigration rules date to the very earliest days of the nation.

A. Acadian Refugees

One immigration event that likely shaped views of the founding generation was the Acadian refugee crisis of the late 1750s. The Acadians were French Catholic settlers in the Canadian Maritimes who became British subjects under the Treaty of Utrecht.[9] However, the Acadians refused to swear

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7. Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *cert. filed*.

8. *Cf.* Linda Feldmann, *Obama, Arizona Gov. Brewer Face Off Over Illegal Immigration*, CHRISTIAN SCI. MONITOR, June 3, 2010 (quoting Gov. Brewer: "I think it's important to not only the state of Arizona but to all of America that we are able to tell [President Obama] exactly what is taking place down there in Arizona and that we need to have our borders secured," and "The kidnap capital of the world is Phoenix because of the drop-houses, the drug cartels. . . . We can't tolerate it."); Paul Davenport & Amanda Lee Myers, *Arizona Governor Admits She Was Wrong About Beheadings*, ASSOCIATED PRESS, Sept. 4, 2010.

9. NAOMI E.S. GRIFFITHS, THE CONTEXTS OF ACADIAN HISTORY, 1686–1784, at 35 (1992).

allegiance to Britain and as a result, their formal citizenship status was ambiguous.[10] Many British authorities and American colonists considered the Acadians foreigners, "French" or, at best, "French neutrals."[11]

Weary of Acadian resistance to English rule, in 1755, British troops launched a brutal campaign to deport thousands of Acadians by driving them off their lands, burning their former villages, and removing the Acadians to the American colonies.[12] The response of the colonies to this early refugee crisis varied, however. Massachusetts and Pennsylvania, for instance, enacted legislation authorizing the compulsory "binding out" of Acadian children as indentured laborers.[13] One Acadian petition in Pennsylvania sought mercy, explaining that Acadians would be "the most unhappy People that ever appeared, if, after having lost what God had given us, for the Subsistence of our Families, we see ourselves forced to tear our Children from the Arms of our tender Wives."[14]

Elsewhere, colonial officials detained or jailed groups of Acadians and considered mass expulsions. The British delivered many of the most dangerous Acadians to South Carolina, where local authorities at first refused to allow the refugees to set foot on land.[15] The Governor suggested resettling the Acadians on islands off the South Carolina coast, "where little Huts may be put up for them"[16] and cattle and rice supplied until either further instructions from the Crown were given, "or some legal & effectual Method be thought of to get clear of them."[17] Eventually, the Governor agreed to send the most dangerous Acadians up the coast to North Carolina and Virginia, and the Assembly passed legislation to indenture some of the remaining Acadians and release others for resettlement.[18]

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10. FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF THE EMPIRE IN BRITISH NORTH AMERICA, 1754–1766, at 113 (2000); GRIFFITHS, *supra* note 9, at 113.

11. *Id.* at 36.

12. ANDERSON, *supra* note 10, at 113–14; STEPHEN PLANK, AN UNSETTLED CONQUEST: THE BRITISH CAMPAIGN AGAINST THE PEOPLES OF ACADIA 149 (2001).

13. GRIFFITHS, *supra* note 9, at 95–127; PLANK, *supra* note 12, at 149–57.

14. Naomi E.S. Griffiths, *Petitions of Acadian Exiles, 1755–1785: A Neglected Source*, 11 HISTOIRE SOCIALE-SOCIAL HISTORY 215, 218 (May 1978).

15. THE COLONIAL RECORDS OF SOUTH CAROLINA: JOURNAL OF THE COMMONS HOUSE OF ASSEMBLY, 1755–1757, at xii (Terry Lipscomb ed., 1989) [hereinafter COLONIAL RECORDS OF SOUTH CAROLINA].

16. Message of the Royal Governor James Glen to the Commons House of Assembly (Feb. 21, 1756), *reprinted in* COLONIAL RECORDS OF SOUTH CAROLINA, *supra* note 15, at 120.

17. *Id.*

18. COLONIAL RECORDS OF SOUTH CAROLINA, *supra* note 15, at xviii–xxi.

B. Naturalization Clause

A second example of early disputes over immigration policy concerns the meaning of "naturalization." "Citizenship" was an unsettled notion in the colonial era and did not operate to demarcate rights as sharply as it does in the modern period. Under colonial laws, for instance, noncitizens were frequently eligible to vote.[19] While colonists usually considered themselves subjects of Britain, Britain and its American colonies had distinct bodies of "subjectship" law. In particular, colonial naturalization policies began to reject concepts of natural and permanent allegiance in favor of volitional and contractual principles of citizenship.[20]

Yet the Declaration of Independence lists British restraints on naturalization and immigration as a colonial grievance and states that the King "has endeavoured to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their migration hither. . . ."[21]

The Articles of Confederation allowed each state to legislate its own naturalization statutes, resulting in significant variation.[22] Madison described this checkerboard of state rules as "a fault in our system, and as laying a foundation for intricate and delicate questions. . . ."[23] By operation of the privileges and immunities clause, however, all states were obligated to respect the rights of the "free inhabitants" of other states.[24] Resentment soon blossomed within restrictionist states opposed to the more generous laws of other states, especially Pennsylvania, which was alleged to have "receive[d] all that would come there . . . at the expense of religion and good morals."[25]

There was little debate at the Constitutional Convention and during the ratification period over the desirability of substituting a single national naturalization rule for the varied state laws. Even Anti-Federalists agreed that the state naturalization experience was disastrous.[26] The text of the

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19. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1399 (1993).

20. JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 9 (1978).

21. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

22. ARTICLES OF CONFEDERATION of 1781, art. IV.

23. THE FEDERALIST NO. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961).

24. ARTICLES OF CONFEDERATION of 1781, art. IV.

25. Agrippa, Letter to the Mass. Gazette (Dec. 28, 1787), *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 79 (Paul Leicester Ford ed., 1892).

26. Michael T. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1009–13 (1976); Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony"*

Constitution reflected this consensus as it empowers Congress to "establish an uniform Rule of Naturalization . . . throughout the United States."[27] This consensus was also reflected in early Supreme Court decisions, such as Chief Justice Marshall's declaration in 1817, "[t]hat the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted."[28] In other words, the Framers deliberately drafted the Constitution to grant the naturalization power to the federal government based on the widespread view that disuniform state regulation in this area under the Articles of Confederation had failed.

Disuniform local responses to the perceived burdens of new immigrants; frustration with the immigration policies of a national sovereign; fear and animus directed towards immigrant families in some communities; local impulses to welcome new immigrants in other communities; all of these phenomena would have been familiar to the founding generation and are visible in the colonial responses to Acadian refugees in the late 1750s and divergent state naturalization policies under the Articles of Confederation.

II. THE DEVELOPMENT OF THE MODERN IMMIGRATION REGIME

Congress launched the beginnings of our modern immigration regime in the post-Civil War period. The Reconstruction Congresses expressed concern for the mistreatment of immigrants in their debates on the "involuntary servitude" clause of the Thirteenth Amendment,[29] the Anti-Peonage Act of 1867,[30] the Civil Rights Act of 1870,[31] and the Padrone Act of 1874.[32] This concern was particularly expressed with regard to Chinese immigrants in the western United States, Mexican immigrants in the southwest, and even Italian

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Convictions, 74 N.Y.U. L. REV. 1696, 170 (1999).

27. U.S. CONST. art. I, § 8, cl. 4.

28. Chirac v. Chirac's Lessee, 15 U.S. (2 Wheat.) 259, 269 (1817).

29. Robertson v. Baldwin, 165 U.S. 275, 282 (1897) ("the addition of the words 'involuntary servitude' were said . . . to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name").

30. *See* Peonage Cases, 123 F. 671, 673 (D. Ala. 1903) (noting that Congress intended the Anti-Peonage Act of 1867 to target Mexican peonage system as it existed in New Mexico).

31. *See* Duane v. GEICO, 37 F.3d 1036, 1041–42 (4th Cir. 1994) (discussing legislative history of Act of 1870 as response in part to anti-Chinese violence in California), *cert. granted*, Gov't Employees Ins. Co. v. Duane, 513 U.S. 1189 (1995), *and cert. dismissed*, 515 U.S. 1101 (1995).

32. United States v. Kozminski, 487 U.S. 931, 947 (1988) (noting that Padrone Act was enacted to "prevent [the] practice of enslaving, buying, selling, or using Italian children").

immigrant children in the eastern cities.[33] Soon thereafter, however, Congress began to enact laws directing the exclusion at ports of entry of certain undesirable persons, and later, the deportation or removal from within the country of others.

Many of these early grounds for federal exclusion or deportation reflected the same concerns with poverty, disease, and criminality as prior state laws. Other federal laws became explicitly racial, initially targeting Chinese, Japanese, and other Asian nationals. Eventually, these laws established national origins quotas and discriminated against Mexican and other Latino nationals as well.

As Congress moved to legislate national immigration laws in the late nineteenth century, legal challenges to the residual state measures, as well as to various procedural and substantive features of the new federal laws, arose. The U.S. Supreme Court soon discerned an unenumerated federal power to regulate immigration, held that the power was exclusively federal, and invalidated state laws on this basis. In *Chy Lung v. Freeman*,[34] for example, the Court considered a California statute that permitted state officials to examine new immigrants arriving at its ports and, if the inspector determined that an immigrant was within any one of numerous categories of undesirable persons, to require immigrants to post a significant bond. In 1875, the Supreme Court struck down the California statute, explaining: "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores *belongs to Congress, and not to the States*."[35] Similar language appears throughout dozens of judicial opinions in the ensuing century.[36] With the expansion of the federal immigration apparatus in the late

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33. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872) ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.").

34. 92 U.S. 275 (1875).

35. *Id.* at 280 (emphasis added).

36. *See, e.g.*, United States v. Valenzuela-Bernal, 458 U.S. 858, 864 (1982) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government."); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens. This power is 'committed to the political branches of the Federal Government.'" (citations omitted)); Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the

nineteenth and early twentieth centuries, backed by Supreme Court decisions such as *Chy Lung v. Freeman*, the role of individual states in developing or implementing immigration policy rapidly diminished.

The full history of federal immigration law, from its late nineteenth century origins to the modern twenty-first century conflicts, is beyond the scope of this talk. Today's immigration regime is codified primarily in the Immigration and Nationality Act, adopted by Congress in 1952 and frequently amended since, especially in 1965, 1986, and 1996. In the course of crafting the statute, Congress has reflected the post-Civil War understanding that immigration regulation is an exclusively federal function and has occasionally legislated narrow and explicit derogations from the otherwise muscular preemption of state or local laws. None of these exceptions, however, authorize the sort of laws and practices that have cropped up in places like Arizona and Hazleton.

For example, Congress has expressly authorized direct enforcement of two *criminal* immigration provisions. Section 274 of the INA prohibits the smuggling, transporting, or harboring of illegal immigrants. Subsection (c) of that provision, entitled "Authority to Arrest," permits INS agents "and all other officers whose duty it is to enforce criminal laws" to arrest individuals who violate Section 274.[37] In other words, Congress expressly authorized all those empowered to enforce criminal laws—including state and local police—to make arrests for smuggling, transporting, and harboring offenses. Section 274's legislative history confirms its plain meaning. As initially drafted, the provision allowed officers "of the United States" to arrest alleged smugglers. When Congress removed the restrictive phrase "of the United States," it intended to expand enforcement authority by allowing all criminal law enforcement officers—federal, state, or local—to make arrests for INA § 274 violations.[38] It makes sense specifically to authorize local police to

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States. . . ."); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government."); Hines v. Davidowitz, 312 U.S. 52, 68 (1941) ("[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continually existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law."). *But see* DeCanas v. Bica, 424 U.S. 351, 358 (1976) ("[A]n independent review [of the INA] does not reveal . . . that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.").

37. 8 U.S.C. § 1324 (2006).

38. *See* H.R. CONF. REP. NO. 82-1505, at 1361 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1360, 1361 (noting conference agreement to a House amendment striking out "of the United States" so that "other officers whose duty it is to enforce criminal laws, would have authority to make an arrest for a violation of a provision of the act"); Robert S. Chapman & Robert F. Kane, *Illegal Aliens and Enforcement: Present*

enforce INA § 274 only in a world in which police are otherwise *prohibited* from such enforcement. And, as the Supreme Court has repeatedly reminded litigants, Congress does not intend any of its statutes to be superfluous, and thus each provision must be read to have new and definite meaning.

In 1996, Congress passed an amendment to empower state and local police to arrest a second set of immigration violators: individuals who have committed the criminal offense of illegal reentry following a prior deportation based on a felony conviction. The 1996 amendment specifically provides that "state and local law enforcement officials are authorized to arrest and detain an individual who (1) is an alien illegally present in the United States and (2) has previously been convicted of a felony" and ordered deported.[39]

When Representative John Doolittle initially offered the floor amendment that became the above described provision, he explained that "the Federal Government has tied the hands of our State and local law enforcement officials"[40] because "current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encounter[] through their routine duties."[41] His amendment, he contended, would "untie the hands of those we ask to protect us,"[42] for the purpose of arresting deported felons who illegally reenter the country.

Congress has also long understood that local police enforcement of *civil* immigration law is broadly preempted unless expressly authorized by Congress. Section 103(a)(8) of the INA, first enacted in the 1950s, provides the Attorney General with emergency powers to authorize "any State or local law enforcement officer" to enforce federal immigration laws if the Attorney General certifies the existence of "an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border."[43]

Furthermore, in 1996, Congress added non-emergency procedures for state and local jurisdictions to enforce federal immigration laws in INA § 287(g). This provision requires training of state or local police, execution of

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Practices and Proposed Legislation, 8 U.C. DAVIS L. REV. 127, 145–46 (1975) (discussing the legislative history of INA §§ 274 and 275 and concluding "[s]ince both of these sections deal with illegal entry into the United States and since both were considered by the same Congress, the legislators apparently intended [INA § 274] to be enforced by all enforcement officials and [INA § 275] to be enforced only by the INS").

39. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439 (codified as 8 U.S.C. § 1252C(a) (2000)).

40. 142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (remarks of Rep. Doolittle).

41. *Id.*

42. *Id.*

43. 8 U.S.C. § 1103(a)(8) (1996), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 372(3), 110 Stat. 3009–646.

a written agreement, and close oversight by federal immigration authorities.[44] As of 2010, over seventy jurisdictions have entered into a "287(g) agreement," authorizing state or local police to enforce civil immigration laws.[45] More importantly, these twin procedures—the emergency "mass influx" procedures and the ordinary "287(g)" process—reflect a legislative determination that immigration laws may be enforced by state and local police only pursuant to a detailed congressional scheme, subject to federal training, supervision, and oversight, and not at the unilateral initiative of local jurisdictions.

In other words, during the second half of the twentieth century, Congress approved state and local enforcement of specified immigration crimes and broad civil enforcement, if done pursuant to detailed statutory procedures. Each of these provisions was enacted on the understanding that only the federal government can make or enforce immigration laws, and each represents a narrow, but explicit, departure from that principle.

III. THE CONTEMPORARY PERIOD

While the twentieth century was largely a time of an ascendant federal immigration regime and diminishing state and local participation, the past decade looks different.

The federal regime, creaky and out-of-date, has endured nevertheless, and the Department of Homeland Security is currently the largest federal law enforcement agency. It is an agency with skyrocketing budgets and new records for arrests, detentions, and removals set virtually every year—higher in the first year of the Obama Administration than in any year of the Bush II Administration.[46]

At the same time, however, there has been an undeniable explosion of immigration-related policymaking at the state and local level. Punitive measures, such as those adopted in Hazleton, Pennsylvania and in Arizona, have received much of the media attention. Some local integrationist strategies, such as municipal confidentiality or non-cooperation orders regarding immigration enforcement or New Haven's own Elm City Resident

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44. INA § 287(g), 8 U.S.C. § 1357(g). Congress established these procedures in 1996 upon enactment of the Illegal Immigration Reform and Immigrant Responsibility Act.

45. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm#signed-moae (last visited Nov. 21, 2010).

46. *Secretary Napolitano announces record-breaking immigration enforcement statistics achieved under the Obama administration*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Oct. 6, 2010), http://www.ice.gov/news/releases/1010/101006washingtondc2.htm ("In fiscal year 2010, ICE set a record for overall removals of illegal aliens, with more than 392,000 removals nationwide.").

Card (an optional municipal identification card), have provoked local controversy.[47] Still other inclusionary approaches, many modest or incremental, such as a town hall offering some of its materials in languages other than English, have become common, but do not always attract the same public scrutiny. What explains the growth of state and local measures and the wildly divergent approaches adopted by communities across the country? And given the longstanding history of federal supremacy in immigration policy and enforcement, are they likely to survive and flourish? I think four primary factors explain the current turmoil.

First is a general trend toward devolution, visible across government programs affecting immigrants and predating the most recent events. For instance, in 1996, Congress enacted a major overhaul of welfare programs.[48] When Congress could not resolve a disagreement about immigrant eligibility for the major cooperative federal-state programs, such as Medicaid and Temporary Assistance to Needy Families (the successor to AFDC), it largely punted to the states, authorizing each to determine for itself whether large classes of foreign nationals would be eligible for Medicaid and TANF, subject to federal limitations.[49]

Thus, in the late 1990s, when all state legislatures had to rewrite their own welfare laws in response to vast federal changes, they also were forced to legislate in historic detail regarding a long list of particular immigration statuses, mapping those onto state, local, and cooperative federal-state programs.[50] Similarly, state criminal justice systems have been increasingly forced to confront the consequences of immigration status at arraignments, plea hearings, sentencing, and during probation.[51] This trend dramatically

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47. Jennifer Medina, *New Haven Approves Program to Issue Illegal Immigrant IDs*, N.Y. TIMES, June 5, 2007, at B6. *See also* Wyatt Buchanan, *S.F. Supervisors Approve ID Card for Residents*, S.F. CHRON., Nov. 14, 2007, at B1; Jocelyn Wiener, *Coalition Seeks Oakland ID Card*, EAST BAY EXPRESS, Sept. 17, 2008.

48. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act or PRA), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 and 42 U.S.C.).

49. Title IV of the Welfare Act is entitled "Restricting Welfare and Public Benefits for Aliens." *Id.* §§ 400–451, 110 Stat. at 2260–77. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 101 (2000) (analyzing constitutionality of federally-authorized, state-imposed alienage restrictions on welfare benefits).

50. Wishnie, *supra* note 49, at 121 ("The PRA's sweeping changes to public benefits programs compelled nearly every state legislature to rewrite vast swaths of state law.").

51. *See, e.g.*, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

intensified in the aftermath of the Supreme Court's 2010 decision in *Padilla v. Kentucky*, holding that a criminal defense lawyer's failure to advise her client of the immigration consequences of a plea may constitute ineffective assistance of counsel.[52] This ruling is not only likely to result in numerous vacated convictions of non-citizens, but also will likely lead to reforms in all fifty states regarding the role of judges in state criminal courts when accepting plea agreements, by which the overwhelming majority of criminal prosecutions are resolved. Finally, but to a lesser degree, following a 2002 Supreme Court decision called *Hoffman Plastic Compounds, Inc. v. NLRB*, concerning the rights of undocumented workers under federal labor laws,[53] many state labor and worker compensation agencies were forced to engage, more deeply than previously required, the intersection of labor and employment law with immigration status.[54]

Second is demography. While not reaching historic peaks as a percentage of the population, legal and unauthorized migration in the last twenty years has been high. More importantly, in the 1990s, new immigrants moved beyond the traditional "receiving" states, such as California, Texas, Florida, and New York, to other states and, within all states, beyond the largest cities to suburban and rural communities, many of which had not experienced significant new immigration in nearly a century.[55] The arrival of new, largely Spanish-speaking Latino immigrants caused local frictions in communities where, at least initially, mediating religious, business, and other civic institutions often did not yet exist. At worst, members of some such communities reacted with racism and nativism. At a minimum, the reality of new immigrant populations in such towns compelled public institutions, such as police departments, public schools, hospitals, and libraries, to adapt their practices to address the reality of these new residents. And it is these sort of local adaptations, from Hazleton's effort to penalize landlords who rent to immigrant tenants, to the Houston Police Department's non-cooperation

52. 130 S. Ct. 1473 (2010).

53. 535 U.S. 137 (2002), *remanded*, No. 98-1570, 2002 WL 1974040 (D.C. Cir. Aug. 27, 2002).

54. *See* Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 467, 512–16 (2004).

55. Michael J. Wishnie, *Welfare Reform after a Decade: Integration, Exclusion, and Immigration Federalism*, *in* IMMIGRANTS AND WELFARE: THE IMPACT OF WELFARE REFORM ON AMERICA'S NEWCOMERS 69, 76 (Michael Fix ed., 2009); *see also* Migration Policy Institute, *2009 American Community Survey and Census Data on the Foreign Born by State*, *available at* http://www.migrationinformation.org/datahub/acscensus.cfm#rankings.

policy[56] and New Haven's municipal ID, that have often sparked local controversies, protests, and lawsuits.

Third is September 11. Following the terrorist attacks, the U.S. Department of Justice rescinded a prior Office of Legal Counsel memo, concluding that local police lacked authority to engage in civil immigration enforcement;[57] encouraged jurisdictions to execute 287(g) agreements (in the five years from its initial enactment in 1996 to 2001, not one local jurisdiction had executed a 287(g) agreement); commenced entering tens of thousands of administrative immigration warrants into the FBI's National Crime Information Center database, through which local police conduct records checks on millions of motorists, arrestees, and others they encounter every day;[58] and began an aggressive, public campaign to persuade local law enforcement officials to make civil immigration enforcement part of their routine duties, even without a 287(g) agreement.[59] Without doubt, the prior Administration argued that civil immigration enforcement was a national security imperative and, except for the last one mentioned, each of the above programs launched to increase state and local participation in immigration enforcement after September 11 has been continued and intensified by the current Administration.

Fourth is the absence of meaningful federal reform to our immigration laws, which remain rooted in a post-WWII model that is out of step with our current economic and security needs and inconsistent with our moral values. Polls indicate that a significant majority of the American public supports immigration reform built on the three pillars of legalization for some but not all of the current undocumented population; expanded but not unlimited opportunities for future, lawful immigration, both to reunify families and through temporary worker programs; and more effective enforcement of the resulting immigration order.[60] These three principles were also the foundation

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56. HOUSTON, TX POLICE DEPT. GEN. ORDER NO. 500-5 (June 1992); *see also* Hartford, CT, Ordinance Concerning the City of Hartford's Policy of Providence of City Services as It Relates to Residents' Immigration Status (July 2008).

57. Nat'l Council of La Raza v. DOJ, 411 F.3d 350 (2d Cir. 2005) (ordering release of 2002 OLC memorandum); *see also* ACLU Refutation of Department of Justice Immigration Memo, *available at* http://www.aclu.org/files/assets/ACF3189_2005.pdf (critiquing reasoning of 2002 OLC memorandum).

58. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONSTL. L. 1084, 1095–96 (2004).

59. HANNAH GLADSTEIN ET AL., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAWS USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–04 (MPI 2005).

60. POLLS SHOW MOST AMERICANS SUPPORT COMPREHENSIVE IMMIGRATION REFORM, AMERICA'S VOICE (2010), http://amvoice.3cdn.net/5cb65e264ef69be85b_nwm6bhjre.pdf (summarizing twenty-nine

of bipartisan discussions in the U.S. Senate in 2006 and 2007.[61] In the absence of federal legislative action, however, states and localities have had no choice but to undertake their own diverse efforts to adapt local rules to the demographic realities of their communities.[62]

Where will this lead? I expect that many of the most punitive local measures, like Arizona's S.B. 1070 and the Hazleton ordinance, will be struck down by the courts as preempted by federal law. This is certainly the trend of decisions in the U.S. District Courts and the U.S. Courts of Appeals.[63] By contrast, more inclusionary local measures have rarely been challenged in court, and the few suits initiated have generally failed.[64] Thus, I expect that communities inclined in this direction will continue to pursue integrationist policies.

More broadly, the state and local debate about appropriate policies towards new residents that is as old as the Acadian refugee crisis of the 1750s will surely endure. Yet, this very local friction will likely contribute to the pressure on Congress to modernize our antiquated immigration statutes in ways that reflect the center of public opinion: some legalization, some enhanced "future flows," and meaningful enforcement of laws capable of being carried out.

IV. PROPORTIONALITY

It is no secret that the motivation for many of those who promote laws like S.B. 1070 and of those who resist such oppression is *not* to achieve a

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polls conducted by different polling firms from September 2008 through November 2010, finding majority support for immigration reform); *see also* RESEARCH CENTER: PUBLIC OPINION ON IMMIGRATION, NATIONAL IMMIGRATION FORUM (2010), http://www.immigrationforum.org/research/public-opinion.

61. *See, e.g.*, S. 1348, 110th Cong. (as introduced in Senate May 9, 2007); *Immigration Bill Dies in the Senate*, CHI. TRIB., June 29, 2007 (noting bipartisan support for proposal).

62. Wishnie, *supra* note 55, at 76–79.

63. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (granting permanent injunction); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Ca. 2006) (granting TRO); Reynolds v. City of Valley Park, No. 06-CC-3802, 2007 WL 857320 (Mo. Cir. Ct. Sept. 27, 2006) (second TRO issued Sept. 27, 2006), *vacated as moot*, 254 S.W.3d 264 (Mo. App. E.D. 2008); Robert Stewart, Inc. v. Cherokee County, No. 07-CV-0015 (N.D. Ga. Jan. 4, 2007) (granting TRO); *but see* Gray v. City of Valley Park, Mo., No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (dismissing challenge to local employer and landlord sanctions measure).

64. *See, e.g.*, Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) (dismissing challenge to in-state tuition law for plaintiffs' lack of standing without reaching plaintiffs' argument that state law was preempted by federal law), *rehearing en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008); Martinez v. Regents of the Univ. of Cal., 241 P.3d 855 (Cal. 2010) (rejecting challenge to California in-state tuition provision).

more perfect balance in state-federal relations. Rather, it is an underlying, substantive disagreement about the content of our immigration laws and policies. Many who resist S.B. 1070 believe that federal immigration laws are too harsh, and that many 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,[65] then none could argue we should expend scarce local dollars for their more efficient implementation. And yet, many who advocate S.B. 1070, of course, do not believe the current laws are too harsh. If they did, they would not call for the dedication of state resources to their enforcement.

Another way to describe this more fundamental disagreement is as one about proportionality—whether the sanction of removal fits the offense for which it is meted out. Proportionality is a concept with ancient roots in Anglo-American law, dating at least to Magna Carta.[66] Andrew von Hirsch, a leading philosopher of proportionality, explained that the principle of proportionality "embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not. Departures from proportionality—though perhaps eventually justifiable—at least stand in need of defense."[67] And it is not only the retributive theorists, who focus on whether an individual receives a "just desert," that express this view, but also many utilitarians (tracing all the way back to Bentham) who argue that a failure to punish proportionally is inefficient, fails appropriately to deter misconduct, and undermines the rule of law.[68]

The principle of proportionality is also reflected in numerous common law rules and constitutional provisions, from the Eighth Amendment's

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65. *See, e.g.*, Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010).

66. Solem v. Helm, 463 U.S. 277, 284 (1983).

67. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 56 (1992); *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 160 (2010) ("proportionality helps reconcile competing rights and interests in a workable way"); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 141, 141 (2010) ("Proportionality-based judicial review institutionalizes a right to contest the acts of public authorities and demand a public reasons-based justification.").

68. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272–79 (2005); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 499 (1997) ("because it promotes forces that lead to a law-abiding society, a criminal law based on the community's perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime").

prohibitions on cruel and unusual punishment[69] and excessive fines,[70] to the Fifth Amendment's bar on grossly excessive punitive damages[71] and its command that private property shall not "be taken for public use without just compensation."[72] Notions of proportionality also find expression in international law and some foreign legal traditions.[73]

In the United States, judicial enforcement of the constitutional command of proportionality tends to operate as a limiting principle, restricting government action only in the most extreme of cases. Yet the doctrine is robust across substantive legal disciplines and, more importantly, the principle may have useful application in the immigration context, especially in the period between today and the date on which Congress, one day, enacts humane immigration laws of which we can be proud.[74]

Broadly speaking, the Supreme Court has developed two forms of proportionality review. The first it has called "narrow proportionality review"

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69. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910); Coker v. Georgia, 433 U.S. 584 (1977). *See also* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 687–99 (2005); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 576–90 (2005); Rachel Van Cleave, *"Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 223–46 (2003).

70. United States v. Bajakajian, 524 U.S. 321 (1998); *see also* Barry Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 478–86; Van Cleave, *supra* note 69, at 250–53.

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

72. Dolan v. City of Tigard, 512 U.S. 374, 388–91 (1994) (requiring "rough proportionality" between government conditions for approval of development and impact of proposed development on public interest); *see also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (noting that "in a general sense concerns for proportionality animate the Takings Clause" but limiting "rough proportionality" test to exactions requiring dedication of property for public use).

73. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008); Thomas M. Franck, *Proportionality in International Law*, 4 LAW & ETHICS OF HUMAN RIGHTS 230 (2010).

74. 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 various legislative reforms to address the constitutional problem. Angela Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1671–79 (2009) (noting that due process requires proportionality and proposing creation of rights-based category of relief from removal that would allow immigration judges to consider factors necessary to ensure proportionality); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732–40 (2009) (proposing graduated system of sanctions for immigration violations). In these remarks, I contend that courts should apply proportionality analysis to removal cases, under the direct command of the Fifth Amendment Due Process Clause.

and this is essentially a form of case-by-case analysis.[75] 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."[76] 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,[77] and last year, Chief Justice John Roberts did the same in another non-capital case.[78] Next, the Court will proceed to conduct two comparative assessments: one intra-jurisdictional, examining other sentences meted out for comparable offenses within the same jurisdiction and other crimes for which the same sentence is imposed, and the other inter-jurisdictional, looking at how other jurisdictions punish similar offenses.[79] At this step in the inquiry, the court attempts to determine whether a particular sentence is significantly out of step with sentences imposed for comparable misconduct within and without the sentencing jurisdiction.[80] 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.[81]

This case-by-case proportionality analysis rarely leads to overturning a sentence.[82] But sometimes it does. Chief Justice Roberts concurred in *Graham v. Florida* on this rationale, concluding that a sentence of life without parole for a juvenile non-homicide offender failed this sort of case-by-case gross disproportionality test.[83] Overall, the Supreme Court has decided more than a half-dozen non-capital cases on this case-by-case proportionality basis.[84]

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75. *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."). *See also* John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 84–86 (2010); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 57–58 (2000).

76. *Harmelin*, 501 U.S. at 1005–06.

77. *Solem*, 463 U.S. at 291–303.

78. Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring).

79. *Solem*, 463 U.S. at 291.

80. *See, e.g.*, *id.* at 299–300 (comparing sentences and noting that Helm was treated in "the same manner as, or more severely than, criminals who have committed far more serious crimes" and "more severely than he would have been in any other State").

81. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910); *Solem*, 463 U.S. at 303.

82. *See e.g.*, Castiglione, *supra* note 75, at 84 ("[T]he narrow proportionality regime, which prevails today, is generally considered to be an empty shell; it prohibits punishments that are 'grossly disproportionate,' but almost never leads to the overturning of a sentence of a term of years.").

83. 130 S. Ct. at 2036 (2010) (Roberts, C.J., concurring).

84. *See* Weems v. United States, 217 U.S. 349 (1910) (fifteen-year sentence at hard and painful

The Court's second approach to considering whether a criminal sentence is constitutionally "proportional" is not case-by-case, but rather categorical.[85] In this line of cases, the judicial inquiry focuses generally on the nature of the offense or the characteristics of the offender.[86] 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.

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 not radically dissimilar. 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."[87] This involves not only counting up and comparing state laws, but also examining state practices, which often differ from law on the books.[88] 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."[89] The court will also ask whether the sentencing practice "serves legitimate penological goals,"[90] meaning retribution, deterrence, incapacitation, or rehabilitation. The court may also consider foreign or international practices.[91]

And in cases applying the categorical approach to proportionality review, the doctrine is more robust. Applying its categorical proportionality test in capital cases, the Supreme Court has held that capital punishment is not

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labor in Philippines, and imposition of lifetime disabilities, for violation of public document rule regarding payment of wages, violates Eighth Amendment); Solem v. Helm, 463 U.S. 277 (1983) (life sentence for seventh conviction for passing bad check violates proportionality). *But see* Harmelin v. Michigan, 501 U.S. 957 (1991) (life sentence for cocaine possession not disproportional); Lockyer v. Andrade, 538 U.S. 63 (2003) (same as to California third-strike conviction); Ewing v. California, 538 U.S. 11 (2003) (same); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence under Texas recidivist statute for theft of $120); Hutto v. Davis, 454 U.S. 370 (1982) (upholding forty-year sentence for possession and intent to distribute nine grams of marijuana).

85. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 2026.

90. *Id. See also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2661–62 (2008); Panetti v. Quaterman, 551 U.S. 930, 957–60 (2007); Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1179 (2009).

91. *Graham*, 130 S. Ct. at 2033 (listing Eighth Amendment cases where the Court "looked beyond our Nation's borders"). *See also* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 70–80 (2006).

permissible for certain offenses, namely non-homicide crimes against individuals,[92] or certain offenders, specifically juvenile offenders[93] or those with low intellectual functioning.[94] The latter cases place significant emphasis on the diminished culpability of young persons, who do not bear the same moral responsibility for their actions as adults, and others with mental health or developmental impairments.

Importantly, for many years the Supreme Court applied its categorical analysis only to capital cases and reviewed proportionality challenges to non-capital sentences only under the case-by-case standards for proportionality. That changed last year. In *Graham v. Florida*, Justice Kennedy wrote for the Court that a sentence of life without parole for a juvenile non-homicide offender violated the constitutional command of proportionality under the categorical approach.[95]

So far, I have discussed only cases arising under the Eighth Amendment's Cruel and Unusual Punishment Clause. But 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.[96] 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."[97] The Court went on to apply a version of case-by-case proportionality analysis, which the Court termed "gross disproportionality."[98]

Proportionality is also required when it comes to civil sanctions, including land use exactions and punitive damages. In the land use case *Dolan v. City of Tigard*,[99] the Supreme Court again used a form of case-by-case analysis that it called "rough proportionality." The Court reasoned that "[n]o precise mathematical calculation is required, but the city must make some sort

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92. 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).

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

94. Atkins v. Virginia, 536 U.S. 304, 313–17 (2002); Ford v. Wainwright, 477 U.S. 399 (1986).

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

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

97. *Id.* at 334.

98. *Id.* at 336. *See also* Lee, *supra* note 69, at 728–30; Van Cleave, *supra* note 69, at 246–53.

99. 512 U.S. 374, 391 (1994).

of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[100]

On the civil side, the notion of proportionality is best developed in punitive damage cases. There the Court has moved from an initial series of decisions holding punitive damage awards immune from substantive review[101] to concluding that they are subject to a proportionality analysis very similar to that under the Eighth Amendment.[102] In *BMW v. Gore*, the Court established three "guideposts": (1) reprehensibility of the underlying conduct, (2) ratio of harm to plaintiff and other conceivable victims (compensatory damages), and (3) comparison to other civil and criminal penalties that could be imposed for conduct.[103] In *State Farm Mutual Auto 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."[104]

BMW v. Gore reads a lot like a case-by-case proportionality review in a non-capital case, where the court begins by considering the severity of the sentence in relation to the gravity of the offense and then may move on to various comparative analyses. And the analysis in *State Farm* yields a near-categorical holding for punitive damages not unlike the Court's categorical proportionality rulings in *Graham* and a number of capital cases. 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.[105] This too suggests that there is an important role for the courts in considering the proportionality of civil immigration sanctions, such as deportation.

What might all of this mean for immigration law? As a threshold matter, removal orders should be subject to proportionality review by courts, both on a case-by-case basis and categorically. This is so under the Eighth

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

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

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

103. *Id.* at 574–83.

104. 538 U.S. 408, 425 (2003).

105. *See, e.g.*, Karlan, *supra* note 71, at 910 (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 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").

Amendment, at least in cases where a removal order is the result of a criminal conviction. As the Supreme Court observed last year, "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."[106] This is also so under the Fifth Amendment Due Process Clause, even where deportation is not the result of a criminal conviction, because a removal order is a punitive sanction that mandates departure[107] and also bars lawful return for a period of years.[108] Because the Due Process Clause requires that a civil penalty be proportionate to the gravity of the offense, and removal orders are punitive, at least in part, then removal orders are subject to judicial review on constitutional proportionality grounds even where the individual has not been convicted criminally.

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

How should judicial review for proportionality operate on a case-by-case basis in removal proceedings? 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.[109] Where there is an inference of gross disproportionality, the court must then proceed to various forms of comparative analysis, both intra- and inter-jurisdictional.[110] 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 is 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. A removal order imposes two discrete penalties: mandatory departure from the United States and a ban on lawful return. The

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106. Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

107. *Id.* 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.").

108. 8 U.S.C. § 1182(a)(9)(A)(i), (ii)(II) (2006) (person removed may not lawfully return to the United States for 5, 10, or 20 years, or ever, depending on circumstances).

109. *Solem*, 463 U.S. at 290–91.

110. *Id.* at 296–300.

length on the ban on lawful return depends on various factors, but is imposed in all cases and will be five years (if the removal case begins upon a foreign national's arrival to the United States),[111] ten years (if the removal case begins after one's initial entry),[112] twenty years (if the removal order is a second or subsequent order),[113] or a lifetime ban (if the person was convicted of an "aggravated felony").[114] Moreover, both undocumented immigrants and those lawfully present, whether on a visa as permanent residents or otherwise, are subject to removal. Finally, it may be relevant to the proportionality analysis that the current immigration statutes authorize discretionary relief from removal for a small number of persons otherwise subject to removal, for instance, on the basis of a valid asylum claim[115] or where one is the victim of domestic violence.[116]

Now, consider a DREAMer,[117] 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 his status ever since but, as an adolescent, was convicted of non-violent offense, such as shoplifting or vehicle theft, that is now classified as an "aggravated felony."[118] 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 10 years (the DREAMer and the asylum seeker), or removal and prohibition on lawful return *ever* (the permanent resident convicted of an aggravated felony), is so excessive in relation to the offense that an "inference of gross disproportionality" arises.

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111. 8 U.S.C. § 1182(a)(9)(A)(i) (2006). This bar on lawful return and those described *infra* notes 113–15 may be waived by the Attorney General. 8 U.S.C. § 1182(a)(9)(A)(iii) (2006).

112. 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

113. *Id.*; 8 U.S.C. § 1182(a)(9)(A)(i).

114. *Id.* The statutory category "aggravated felony" is extremely expansive and includes a wide range of misdemeanors and non-violent offenses. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939–40 (2000).

115. 8 U.S.C. § 1158. Asylum is not generally available to, *inter alia*, those who fail to file their applications within one year of entry, 8 U.S.C. § 1158(a)(2)(B), who have previously applied for asylum, 8 U.S.C. § 1158(a)(2)(C), or who have been convicted of a "particularly serious crime." 8 U.S.C. § 1158(b)(2)(A)(ii).

116. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(iii)–(vii), (B)(ii)–(iii).

117. *See supra* note 5, listing articles that describe the situations of students whom the DREAM Act would help.

118. Morawetz, *supra* note 114, at 1940.

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.[119] Here, they may be modest, much more so than removal. For the DREAMer and the asylum-seeker, entry without inspection is a misdemeanor, punishable by a maximum sentence of six months,[120] a civil fine of $50–$250,[121] and a criminal fine of $5,000,[122] for instance. The permanent resident convicted of shoplifting may have received no jail time at all, only a suspended sentence.[123]

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 the life-without-parole case for non-homicide juvenile offenders when it emphasized that few states pursue such harsh sentences, even though most states authorize them.[124] In immigration cases, it may be relevant that the United States does not deport many DREAMers, for instance.[125] 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.[126]

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119. *Bajakajian*, 524 U.S. at 338–39.

120. 8 U.S.C. § 1325(a).

121. *Id.* § 1325(b).

122. 18 U.S.C. § 3571(b) (2006).

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

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

125. *See* Stephen Dinan, *DHS: Illegal Immigrant Students Not a Target for Deportation*, WASH. TIMES, Apr. 1, 2011, *available at* http://www.washingtontimes.com/news/2011/apr/1/dhs-illegal-immigrant- students-not-target-deportat/?page=1 (quoting Secretary Napolitano as stating that DREAMers are "not the priority" and ICE Director John Morton as stating that there are "in fact very, very few deportations of [DREAMers]"); Susan Carroll, *Immigration Cases Being Tossed by the Hundreds: Docket Review Pulls Curtain Back on Procedure by Homeland Security*, HOUS. CHRON., Oct. 16. 2010, at A1 (noting that ICE is dismissing cases where respondent has been present in United States for two years or more and has no serious criminal history).

126. Memorandum from John Morton, Assistant Sec'y, U.S. Dep't of Homeland Sec., to all employees of U.S. Immigration and Customs Enforcement (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf (establishing those who pose a "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"); *see also* Alvarez v. Holder, No. 08-71383 (9th Cir. Jan. 7, 2011) (ordering supplemental briefing on the effect of the Morton Memorandum); Dinan, *supra* note 125 (quoting Secretary Napolitano as saying that DREAMers are "not a priority" for enforcement). CRISTINA RODRIGUEZ ET AL., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) 12 (Migration Policy Inst. 2010), *available at* http://www.migrationpolicy.org/pubs/287g-March2010.pdf (analyzing new priorities for 287(g)

The above remarks examine how a court might conduct a case-by-case proportionality analysis as to the sanction of removal itself. But there is a second aspect of all removal orders that should also be subject to proportionality review, namely the bar on lawful return. This bar varies from five years to forever, depending on the circumstances of the individual.[127] 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.[128]

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[129] or hardship for cancellation of removal[130]—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 the disposition of an instant case to others decided by the courts or the Board of Immigration Appeals, which hears administrative appeals in removal cases.[131] And while the immigration statutes generally bar review of the denial of discretionary immigration relief other than asylum,[132] the U.S. Courts of Appeals retain jurisdiction to review constitutional claims.[133] 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.

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agreements that prioritize persons committed of violent crimes as "Level 1").

127. *See supra* notes 112–15 and accompanying text.

128. *See*, *e.g.*, *Bajakajian*, 524 U.S. at 338–39 (comparing fine to potential criminal penalties for underlying misconduct); *BMW*, 517 U.S. at 574–83 (same as to punitive damage award).

129. 8 U.S.C. § 1158(b)(1) (authorizing grant of asylum to a person determined to be a "refugee" within the meaning of § 1101(a)(42)(A)); 8 U.S.C. § 1101(a)(42)(A) (Refugee is one who is unable to return to her country of nationality because of "persecution" or a "well-founded fear of persecution.").

130. 8 U.S.C. § 1229b(b)(1)(D) (establishing that, among other criteria, a nonpermanent resident who seeks "cancellation of removal" must demonstrate "exceptional and extremely unusual hardship" to a qualifying relative).

131. *See* 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).

132. 8 U.S.C. § 1252(a)(2)(B).

133. 8 U.S.C. § 1252(a)(2)(D) (stating that INA does not preclude review of constitutional claims); *see also* INS v. St. Cyr, 533 U.S. 289, 300 (2001) (stating that barring review of "pure question[s] of law" in removal cases would raise "substantial constitutional questions").

B. 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.[134] As above, 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.[135] 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.[136] A categorical analysis might well focus on such sub-groups 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."[137] The Court will also ask whether the sentencing practice "serves legitimate penological goals,"[138] namely retribution, deterrence, incapacitation, or rehabilitation.

Consider that the Supreme Court has emphasized the diminished culpability of juveniles in *Roper*[139] and *Graham*,[140] and those with low

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134. *Graham*, 130 S. Ct. at 2022; *Roper*, 543 U.S. at 564.

135. *See supra* notes 125–26.

136. ICE does arrest and 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 8 (2010), *available at* http://www.aclu.org/files/assets/usdeportation0710_0.pdf ("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 & JUSTICE STRATEGIES, NEW YORK CITY ENFORCEMENT OF IMMIGRATION DETAINERS: PRELIMINARY FINDINGS 1 (2010), *available at* http://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf ("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.").

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

138. *Id.*

139. *Roper*, 543 U.S. at 578 (holding that Eighth Amendment prohibits death penalty for juvenile offenders).

140. *Graham*, 130 S. Ct. at 2034 (holding that Eighth Amendment prohibits life without parole for juvenile nonhomicide offenders).

intellectual functioning in *Ford*[141] and *Atkins*.[142] In discussing juveniles, for instance, the Court has explained that "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'";[143] 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.'"[144] Is there not an argument that the 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 *Graham*.[145] 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.[146]

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 LPR status.[147] The statute effectively creates a statute of limitations or, rather, a cut-off date for enforcement of immigration law. But

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141. *Ford*, 477 U.S. at 417–18 (holding that Eighth Amendment prohibits execution of prisoner who is insane).

142. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that Eighth Amendment prohibits the execution of mentally retarded criminals).

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

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

145. *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 ("[J]uveniles will be less susceptible to deterrence.").

146. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 82 n.7 (1992).

147. 8 U.S.C. § 1259 (2006).

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.[148] The 1948 date, in turn, was inserted in 1965, to replace June 28, 1940[149] and so on back into the 1920s—a consistent tradition of a statute of limitations of approximately 15–20 years on immigration offenses.[150] 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.[151] 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 non-violent 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 non-violent criminal offenses. A *permanent* bar on the lawful return of one convicted of a minor crime that is nevertheless classified as an "aggravated felony" by the immigration statutes may contravene the due process requirement of proportionality. It may also be, for example, that imposition of the ten year bar on lawful return for persons ordered removed violates proportionality when applied to adults who have resided for many years in the United States, even without status, and who have children, a spouse, or strong community ties here.

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

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

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

151. 8 U.S.C. § 1101(a)(43); Morawetz, *supra* note 114.

C. Potential Objections

One might raise several objections to the claim that an ethic of proportionality can operate in removal cases and, indeed, that the Constitution requires judges to undertake this analysis when requested.

I have already hinted at one objection, namely that proportionality is really a creature of criminal law, and while it may have crept into civil cases that is a mistake and should not be encouraged.[152] As a matter of doctrine, this objection plainly fails—it is now well-settled that the Due Process Clause, Takings Clause, and Excessive Fines Clauses require proportionality review in, respectively, punitive damages,[153] land use exaction,[154] and civil forfeiture[155] and fine cases.[156] All of these are civil proceedings. More fundamentally, this objection fails as a matter of principle as well. The criminal/civil distinction is often formalistic,[157] and 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."[158]

A related but more serious objection may be that only *punitive* sanctions trigger proportionality scrutiny, and deportation is remedial, not punitive. To be sure, the Supreme Court has often stated that deportation is not punishment[159] and that it is civil not criminal in nature.[160] The civil/criminal distinction is not dispositive for proportionality analysis, as just explained, but

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152. *See, e.g.*, A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1089–90 (2006).

153. BMW v. Gore, 517 U.S. 559, 596–97 (1996); State Farm. Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

154. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

155. Austin v. United States, 509 U.S. 602, 606 (1993).

156. United States v. Bajakajian, 524 U.S. 321, 334 (1998).

157. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1916–20 (2000); Peter L. Markowitz, Deportation is Different (Aug. 27, 2010) (unpublished manuscript, on file as Cardozo Legal Studies Research Paper No. 308), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666788; Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 323–24 (2000).

158. United States v. Halper, 490 U.S. 435, 447–48 (1989), *abrogated on other grounds by* Hudson v. United States, 522 U.S. 93, 99 (1997).

159. *See, e.g.*, Reno v. American-Arab Anti-Discrimination 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. 698, 730 (1893).

160. *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that ordinary Fourth Amendment exclusionary rule does not apply in deportation proceedings, which are civil, except in cases of egregious violations).

the remedial/punitive classification is. In other words, if deportation is wholly remedial, then proportionality review is not required by the Constitution.[161]

The Supreme Court's guidance on classifying a government sanction as punitive or remedial displays "significant methodological turmoil."[162] 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. First, the Court has clarified that the standard for assessing when a proceeding that is labeled "civil" by a legislature is nevertheless substantively so punitive that it must be considered "criminal" for Double Jeopardy purposes.[163] This standard directs courts to begin with the legislative characterization, and to displace the "civil" label for Double Jeopardy Purposes only on upon significant evidence of the factors outlined in *Kennedy v. Mendoza-Martinez*.[164] This standard is a high one, rarely satisfied in modern cases, no doubt because, at least in part, the Supreme Court is reluctant to forbid outright multiple government sanctions for the same underlying offense.

In cases arising under the Excessive Fines Clause of the Eighth Amendment, by contrast, the Court has looked to history, congressional intent, and the relationship of the sanction to the underlying misconduct to determine whether a government sanction is sufficiently punitive to trigger review for excessiveness.[165] The standard has been less exacting in practice, as

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161. Banks, *supra* note 74, 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 1658 (proportionality review appropriate in immigration cases only where there is "initial determination that deportation is punitive rather than remedial").

162. Kanstroom, *supra* note 157, 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).

163. United States v. Ward, 448 U.S. 242 (1960) (emphasizing deference to legislative classification of sanction as civil or criminal for Double Jeopardy purposes); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (elaborating six-factor test to determine whether sanction classified by legislature as civil is sufficiently punitive to be deemed criminal for Double Jeopardy analysis); United States v. Halper, 490 U.S. 435 (1989) (civil False Claims Act following criminal prosecution was criminal punishment in violation of Double Jeopardy); Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994) (imposition of state "dangerous drug tax" constituted punishment for Double Jeopardy purposes); United States v. Ursery, 518 U.S. 267 (1996) (civil in rem forfeiture not punishment for Double Jeopardy purposes); Hudson v. United States, 522 U.S. 93 (1997) (overruling *Halper* in part and holding criminal prosecution following civil monetary penalty and administrative debarment proceeding does not violate Double Jeopardy Clause).

164. *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 the statutory scheme was so punitive either in purpose or effect'" as to render the sanction a criminal punishment for Double Jeopardy purposes) (*quoting Ward*, 448 U.S. at 248–49).

165. Austin v. United States, 509 U.S. 602, 609–19 (1993) (concluding civil forfeiture is punishment

demonstrated most starkly by the Court's conclusion that civil forfeiture is sufficiently punitive to trigger review under the Excessive Fines Clause, but not punitive enough to constitute criminal punishment for Double Jeopardy purposes.[166] 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).

Returning to the objection that deportation is civil and remedial, not punitive, and thus no proportionality review is required, many scholars have argued persuasively that deportation proceedings are "quasi-criminal," reflecting both criminal and civil elements, and that therefore, more constitutional criminal procedure norms should apply.[167] These arguments are most compelling as to deportation of permanent residents, in circumstances that Daniel Kanstroom has described as reflecting "post-entry social control."[168] Maureen Sweeney, for instance, has specifically 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."[169] 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 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."[170] It is, the Court emphasized, a "particularly severe 'penalty.'"[171]

Thus, the objection that removal is not punitive fails, at least as to permanent residents convicted of crimes, in the face of *Padilla* and for the

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subject to Excessive Fines Clause); United States v. Bajakajian, 524 U.S. 321, 328 (1998) (same).

166. *Compare* Austin v. United States, 509 U.S. 602, 609–19 (1993) (civil forfeiture is punishment subject to Excessive Fine review); United States v. Bajakajian, 524 U.S. 321, 328 (1998) (same), *with* United States v. Ursery, 518 U.S. 267, 274 (1996) (civil forfeiture not punishment subject to Double Jeopardy clause).

167. Kanstroom, *supra* note 157; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469 (2007); Pauw, *supra* note 157; Markowitz, *supra* note 157.

168. Kanstroom, *supra* note 157; *see also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

169. Sweeney, *supra* note 162, at 87–88; s*ee also* Banks, *supra* note 74.

170. 130 S. Ct. 1473, 1480 (2010); *see also* Delgadillo v. Carmichael, 332 U. S. 388, 390–91 (1947) (deportation is "the equivalent of banishment or exile").

171. *Padilla*, 130 S. Ct. at 1481 (*quoting Fong Yue Ting*, 149 U.S. at 740).

reasons articulated by Kanstroom and others. However, neither the courts nor scholars have yet deeply engaged the question of whether removal of persons *other than* permanent residents is also sufficiently punitive to be subject to constitutional proportionality review,[172] and thus, the objection here must be met more directly.

The Court has emphasized that if any portion of a sanction is punitive (even if other parts are remedial), then the government sanction is a penalty. In other words, a "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[173] To the extent that a removal order is punitive, even in part, its imposition must satisfy constitutional proportionality requirements.

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.[174] The ban on return cannot be easily justified in remedial terms, and would appear to accomplish primarily deterrent and retributive goals.[175] A full history of such bars is beyond the scope of this essay, but should their history indicate a legislative intent to punish or deter, that will confirm that this aspect of a removal order, even directed at an unauthorized immigrant, is punitive, thereby triggering proportionality review of the entire order. Moreover, the removal order itself should be understood as a penalty, not merely remedial, in many cases; again, consider a DREAMer brought to this country as an infant.

Second, one might object that the "plenary power doctrine" of immigration law bars judicial review of substantive immigration law. This is the doctrine, articulated in the late nineteenth century with roots intertwined

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172. *See, e.g.*, Banks, *supra* note 74, at 1658 (declining to examine whether removal of persons who have "evad[ed] border controls through surreptitious entry, fraud, or misrepresentation" is subject to constitutional proportionality requirements because removal in such circumstances is "essentially remedial in nature"); Sweeney, *supra* note 162.

173. United States v. Halper, 490 U.S. 435, 448 (1989); *see also Austin*, 509 U.S. 602, 620–22 (1993). *Halper* was abrogated in part by *Hudson v. United States*, 522 U.S. 93 (1997) (overturning Double Jeopardy holding of *Halper*), but the Court's Excessive Fines Clause analysis in *Austin* was undisturbed. *See also* 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).

174. *See supra* notes 111–14 and accompanying text.

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

with *Plessy v. Ferguson*,[176] that holds that courts simply may not entertain challenges to the substantive grounds for deportation, but only to their procedures.[177] On the other hand, there is hardly an immigration scholar who has not written an article explaining that this doctrine is grossly wrong and has left immigration a legal backwater, out of step with developments in modern constitutional law.[178] But, in addition, a case-by-case proportionality analysis is not a facial challenge to grounds of removability, such as would be precluded by the plenary power doctrine. It is strictly an as-applied challenge. As for a categorical proportionality claim, that would concededly be a more direct challenge to the plenary power doctrine but, perhaps, no less invasive of federal sovereignty than invalidation of capital punishment or life-without-parole sentences for juveniles is of state sovereignty.

Third, one might object that unlike a criminal offense, or a civil tort for which punitive damages are allowed, an immigration violation is a *continuing* offense. In other words, for a court to prohibit removal on the ground that it violated a proportionality principle would be to allow continued illegality.[179] Yet, 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 legal permanent resident 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, which denial was in violation of constitutional proportionality requirements, there would be no "continuing offense problem," because the constitutional remedy would be to overturn the refusal to grant the relief. This outcome would in turn confer lawful status and eliminate any continuing offense concern.

Like other objections, the "continuing offense" objection to proportionality review is strongest in the context of an undocumented

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176. 163 U.S. 537 (1896).

177. Chae Chan Ping v. United States (the Chinese Exclusion Case), 130 U.S. 581, 604 (1889); Harisiades v. Shaughnessy, 342 U.S. 580, 589–91 (1952).

178. *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 the plenary power doctrine arose from *Plessy*-era judicial commitment to racial segregation).

179. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.").

immigrant who is not eligible for any relief. But even here, the objection cannot defeat the constitutional proposition. First, the bar on lawful return of five or more years for anyone ordered removed 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."[180] A juvenile ordered removed may be constitutionally entitled to some similar opportunity to demonstrate "maturity and rehabilitation" so as to be able to lawfully to return to the United States. The immigration statute does authorize a waiver of the bars on lawful return,[181] 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.[182] Furthermore, agency guidance appears to direct that such waivers be granted only very infrequently.[183] The regulation and the agency guidance may not be consistent with constitutional proportionality requirements in individual cases.

Further, the "continuing offense" objection does not 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 important events in one's familial, religious, or professional life may violate proportionality principles. So too might removal that would divest one of a meaningful opportunity to participate as a witness or party in pending legal proceedings, or removed to a country devastated by a recent natural disaster, such as the hurricanes and earthquake

180. 130 S. Ct. at 2030.

181. 8 U.S.C. § 1182(a)(9)(A)(iii).

182. 8 C.F.R. § 212.2(a) (2010).

183. *See, e.g.*, Matter of Lee, 17 I&N Dec. 275, 277–78 (Comm. 1978) (listing relevant factors in adjudicating application for readmission as including moral character, recency of deportation, need for person's service in the United States, and duration of residency in the United States); Matter of Tin, 14 I&N Dec. 371, 373 (Comm. 1973); Dragon v. INS, 748 F.2d 1304, 1306 (9th Cir. 1984). Many persons removed would also confront a second set of bars on lawful return. *See* 8 U.S.C. § 1182(a)(9)(B)(i) (2006) (stating that a person unlawfully present in the United States for six months may not reenter for three years, and one unlawfully present for one year may not reenter for ten years). There are a number of exceptions. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). There is also a narrow statutory waiver. *See* 8 U.S.C. § 1182(a)(9)(B)(v).

in Haiti.[184] 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.

Fourth, one might raise the floodgates problem, noting that the U.S. Courts of Appeals are already drowning in immigration appeals[185] to contend that they could not possibly conduct a meaningful proportionality review in the tens of thousands of removal cases reviewed each year. This is a valid concern, but not a dispositive one, as the Supreme Court itself has often noted.[186] The federal courts have not been overcome by proportionality claims in either direct criminal appeals or on habeas petitions to review state convictions, and there is little basis to conclude that adjudicating such claims in removal cases will be much different. In the vast majority of cases, a case-by-case proportionality challenge would be swiftly dismissed, as no inference of "gross disproportionality" would arise. In those few cases where the court might conclude that a removal order would violate constitutional proportionality principles, the additional analysis need not be burdensome.

Finally, one might object that there are fewer available metrics for making the comparative assessments that are common to capital, non-capital, and civil proportionality analyses. While the metrics may differ in some respects 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 intra-jurisdictional comparison called for by *Solem*, *Harmelin v. Michigan*, and other decisions in the case-by-case

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184. *See, e.g.*, 8 C.F.R. § 241.6(a) (2010) (ICE officials may grant stay of removal "in consideration of factors listed in 8 C.F.R. 212.5"); *id.* § 212.5(b)(4) (2010) (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"); 8 U.S.C. § 1101(a)(15)(S) (2006) (establishing "S" visa category for certain cooperating witnesses necessary to a criminal investigation or prosecution); 8 U.S.C. § 1101(a)(15)(U) (2006) (establishing "U" visa category for victims of listed crimes).

185. *See, e.g.*, John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006–07).

186. *See, e.g.*, *Padilla*, 130 S. Ct. at 1486 (rejecting "floodgates" concern and emphasizing that lower federal courts are capable of applying legal frameworks "to separate specious claims from those with substantial merit").

lines may be possible in some removal cases,[187] particularly where an applicant has been denied relief on factual circumstances that, in other cases, have resulted in a grant of relief.[188] 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 offenses.[189]

In sum, 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. 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.

I am not suggesting that more vigorous judicial oversight of the proportionality of removal orders as a constitutional command would end the debate on the streets of Arizona, Hazleton, New Haven, and elsewhere. But courts could and should smooth out the coarser expressions of that debate, as the Constitution requires. In a sense, this may be what the S.B. 1070 and Hazleton decisions also represent, a judicial policing of the boundaries of government punishment that invalidates the harshest, most disproportionate outcomes, while reserving to the Congress a broad space for policy disagreement and the ultimate determination of our nation's immigration policies.

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Years from now, I expect it will be difficult to explain to our children and grandchildren why for decades this nation countenanced the *de jure* subjugation of millions of immigrants, benefiting from their labor while forcing them to live a life in the shadows as members of a reviled caste denied their full human flourishing. The struggle for balance in immigration policy will continue to play out primarily in legislatures, and ultimately in Congress as is appropriate. Yet there remains a vital role for courts in testing local

187. *Solem*, 463 U.S. at 291.
188. Mendelson, *supra* note 131.
189. *See supra* note 154 and accompanying text.

measures, no less than federal removal orders, against the constitutional commands of preemption, equal protection, due process, and, I hope, proportionality. And in that context, even in the centuries-long debate about the content of our immigration laws and the role of state and local governments in carrying them out, the conflicts of the Summer of ’10 may well turn out to look a lot like those of the Summer of ’57.