

PENALTY AND PROPORTIONALITY IN DEPORTATION FOR CRIMES

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INTRODUCTION

On March 30, 2010, in the case of *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment right to counsel in criminal cases includes the right for non-citizen defendants to receive accurate advice about the immigration consequences of any plea agreement.¹ This holding proceeded from the Court's prior conclusion that deportation which results from a criminal conviction is, as a matter of federal law, "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."² This acknowledgment of the extent to which deportation proceedings can be "enmeshed" with criminal convictions and, indeed, that deportation can be part of a criminal penalty,³ marks a sharp departure from the Court's century-long characterization of immigration consequences as "purely civil"⁴ and opened the door, at least in the *Padilla* case, for the extension of a constitutional protection traditionally reserved to the criminal realm into the arena of immigration. At the same time, it opened the door to arguments that other

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1. 130 S. Ct. 1473, 1486 (2010).
2. *Id.* at 1480 (footnote omitted).
3. *Id.* at 1481.
4. *See Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893).

constitutional protections should perhaps apply to immigrants facing deportation, especially those facing deportation as a consequence for crimes committed.⁵

It remains to be seen, however, how far courts will go in working out the implications of the high Court's statement and what additional protections, if any, may be found appropriate for individuals facing deportation. The language and logic of *Padilla* arguably support the proposition that if deportation is part of a criminal penalty, other protections afforded criminal defendants should extend to removal proceedings and to the removal sanction, at least where these result directly from convictions. Such protections might include prohibitions against the imposition of ex post facto laws, disproportionate penalties, or even a right to counsel in removal proceedings.⁶ On the other hand, it is possible that courts will decline any invitation to extend the decision's reach beyond its specific terms. *Padilla* crossed the bright-line divide between civil and criminal characterizations of removal as a sanction for crime, but will it prove to be "the camel's nose under the tent" that will completely overturn a century's jurisprudence on deportation⁷ or will it end up being a high-water mark for protection of noncitizens?

For purposes of this Article, we are taking the *Padilla* Court at its word that deportation triggered solely by a criminal conviction is a part of the penalty for the underlying criminal behavior, and we begin to explore the question of what other constitutional limits might be placed on the imposition

5. The decision has prompted a plethora of articles, trainings, and symposia on its possible implications. See, e.g., other authors' arguments presented in this issue, which were presented at Saint Louis University School of Law Symposium: A New Era for Plea Bargaining and Sentencing? The Aftermath of *Padilla v. Kentucky* (Feb. 25, 2011); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Derek Wikstrom, Note, "No Logical Stopping Point": The Consequences of *Padilla v. Kentucky's Inevitable Expansion*, 106 NW. U. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1845815>; Symposium, *Crossing the Border: The Future of Immigration Law and Its Impact on Lawyers*, 45 NEW ENG. L. REV. 301 (2011); Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, CRIM. JUST., Fall 2010, at 21 [hereinafter Chin & Love, *Status as Punishment*]; Margaret Colgate Love & Gabriel J. Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION, May 2010, at 18 [hereinafter Love & Chin, *Right to Counsel and Collateral Consequences*]; Kevin Ruser, *Padilla v. Kentucky: "Crimmigration" Law Goes Constitutional*, 13 NEB. LAW. 13 (2010).

6. As others have very persuasively argued, the decision also has important and potentially far-reaching implications for the imposition of other "collateral" consequences of convictions as well. See, e.g., Love & Chin, *Right to Counsel and Collateral Consequences*, *supra* note 5, at 22–23; Chin & Love, *Status as Punishment*, *supra* note 5, at 31. Some courts have already begun to apply *Padilla's* requirement of counsel to consequences other than deportation. See, e.g., *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1275 (11th Cir. 2010) (applying *Padilla* to a case involving involuntary commitment following sex offense conviction).

7. Markowitz, *supra* note 5, at 8.

of that punishment.⁸ We choose to begin the exploration of what possible criminal procedure protections might apply to criminal deportations by considering the principle, grounded in the Eighth Amendment,⁹ that a penalty should be proportionate to the crime it punishes. The appropriateness of any given punishment is assessed in large part by how fitting it is to the crime committed, and the Eighth Amendment governs the boundaries of permissible punishment by forbidding punishment that is “cruel and unusual.”¹⁰ Within that prohibition, the Supreme Court has recognized that a punishment should be proportionate to the crime it punishes.¹¹ This requirement of proportionality, diminished though it may be in modern application, is at the heart of the prohibition against cruel and unusual punishment. The State must not enact a punishment more severe than is justified by the crime that was committed. This proportionality principle is fundamental to our sense of just punishment. Along with the prohibition against physical torture, the proportionality principle is one of the most essential limitations in preserving a sense of fairness in and the integrity of the criminal justice system, and in protecting the individual from overreaching by the coercive state. It goes to the heart of both aspects of the special interests at stake in criminal proceedings—the liberty interests of the individual and the institutional integrity of the system through which punishment is imposed.¹²

The proportionality principle is also wholly absent from our current law of deportation for crimes, which has been expanded and rigidified over the last two decades to the point that it now imposes automatic and irrevocable deportation for any so-called “aggravated felony.”¹³ This category imposes deportation equally for, among other offenses, murder, petty theft, aggravated rape, and failure to appear in court.¹⁴ Similarly, the sanction is the same

8. There are a number of other possible constitutionally-based protections. U.S. CONST. amend. VI (the right to counsel); *id.* (the right to trial by jury); *id.* (the right to confront one’s accusers); U.S. CONST. art. I, § 9 (the right to protection against ex post facto laws); U.S. CONST. amend. V (the right to protection against self-incrimination); U.S. CONST. amend. IV (the right against unreasonable searches and seizures); U.S. CONST. amend. XIV, § 1 (the right to protection from impermissibly vague laws); U.S. CONST. amend. VIII (the right to protection from cruel and unusual punishments, including disproportionate punishment).

9. U.S. CONST. amend. VIII.

10. *Id.*

11. *Weems v. United States*, 217 U.S. 349, 367 (1910).

12. *See In re Winship*, 397 U.S. 358, 364 (1970) (stating heightened protections for criminal defendant are justified both by the strong liberty interests of individual defendants and by society’s interest in the reliability and resulting moral force of the criminal justice system); *see also Santosky v. Kramer*, 455 U.S. 745, 755 (1982); *Addington v. Texas*, 441 U.S. 418, 424–27 (1979).

13. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

14. *Id.* § 1101(a)(43) (defining the broad range of offenses which qualifies as an “aggravated felony”); *see discussion infra* Part II.B.

regardless of an individual's history or connections in the community and applies equally to an undocumented individual who entered the country without permission yesterday and to a long-term lawful permanent resident who may have deep roots in the community, such as dependent U.S. citizen family members or honorable military service.¹⁵ Much of the sense of injustice that results from the operation of our current criminal deportation law comes from recognition of the blatant disproportion between the sanction of automatic deportation and the circumstances under which it is imposed.

In addition to the centrality of proportion to our sense of just punishment, Eighth Amendment jurisprudence is an attractive place to begin exploring *Padilla's* reach because the jurisprudence has already been extended to prohibit certain non-criminal sanctions where these were found to be penal in nature, even if not in name or explicit intent.¹⁶ The Court has held that the Amendment limits the government's power to punish, even when the explicitly stated purpose of a statutory sanction is remedial, when the provision in fact serves—at least in part—the goals of punishment.¹⁷ This precedent means that Eighth Amendment analysis need not rely on a firm distinction between criminal and civil proceedings but can rather be based on the effective punitive purpose or function of a sanction.¹⁸ The *Padilla* Court's statement that deportation for crimes is a penalty¹⁹ lends support to an Eighth Amendment analysis, even though it stops short of challenging the "civil" characterization of removal proceedings.

Finally, in considering where first to inquire as we peek through the door *Padilla* opened, we have considered the fact that Eighth Amendment protections in the criminal realm have been severely weakened in recent

15. See 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, 338 (2000) (noting that "extremely compelling equities" are irrelevant under the current statutory scheme).

16. See *id.* at 319–25.

17. *E.g.*, *Austin v. United States*, 509 U.S. 602, 621–22 (1993) (finding that civil forfeiture constitutes punishment and is subject to the limitations of the Eighth Amendment's Excessive Fines Clause); *Trop v. Dulles*, 356 U.S. 86, 101–04 (1958) (plurality opinion) (finding a nominally non-penal provision imposing denationalization for desertion to be punishment and prohibited by the Eighth Amendment's prohibition against cruel and unusual punishment). *But see* *United States v. Ursery*, 518 U.S. 267, 292 (1996) (refusing to subject in rem civil forfeitures to the Fifth Amendment's prohibition on double jeopardy).

18. See Pauw, *supra* note 15, at 321–24, and Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009), for a discussion of the punitive nature of deportation and corresponding limits that could be placed on it pursuant to the Eighth and Fifth Amendment limitations on the imposition of punishment.

19. 130 S. Ct. 1473, 1481 (2010).

decades.²⁰ In fact, this objection was raised by every criminal lawyer to whom we have mentioned this project: Why make the effort to come within the scope of such a toothless constitutional guarantee? It is undeniable that while the principle of proportionality has been upheld, the Eighth Amendment has provided little concrete protection to defendants in the criminal realm for many years, as courts have proved willing to defer to virtually any sentencing policy decision made by a legislature, including mandatory minimum and recidivist sentencing schemes, no matter how absurd their results in individual cases.²¹

In this context, the Court has been largely unwilling to overturn legislatures' decisions about appropriate sentencing schemes out of strong deference to legislative expertise in policy-making.²² However, we argue that this deference should not be applied to criminal *deportation* law because this law was never considered by Congress as a sentencing policy, and courts, therefore, have room for a more robust review of the proportionality of deportation for any given crime or set of crimes. We also take hope from the Court's decision just last term, *Graham v. Florida*, in which it held that the punishment of life without the possibility of parole was cruel and unusual when imposed on a juvenile offender who commits a non-homicide crime.²³ The *Graham* Court was unwilling to defer to the majority of state legislatures which allowed such a sentence, finding that "the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."²⁴ The holding and reasoning in *Graham* provide additional support for examining the constitutionality of deportation as a sanction for certain criminal violations.

Ultimately, like other immigration practitioners, we recognize the epidemic of disproportionately harsh deportations being carried out in this country for relatively minor offenses²⁵ and feel that even a relatively weak recognition that a penalty should be proportionate provides a better backstop than the current criminal removal scheme, which requires no proportionality whatsoever and, in the case of the vast number of "aggravated felonies," actually prohibits an immigration judge or any other decision maker from

20. See *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in judgment) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.").

21. See, e.g., *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion).

22. See *id.* at 24.

23. 130 S. Ct. 2011, 2034 (2010).

24. *Id.* at 2022 (citing *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

25. See, e.g., Kirk Semple, *Paterson Pardons Six Immigrants Facing Deportation Over Old Crimes*, N.Y. TIMES, Dec. 7, 2010, at A25 (describing crimes with disproportionately severe penalties).

exercising discretion in deciding whether to impose deportation.²⁶ For these reasons, we have chosen to begin our exploration of possible post-*Padilla* extensions of constitutional safeguards with a look at the opportunities and challenges attendant in contesting certain crime-related deportations as disproportionate punishment under the Eighth Amendment.

It should be noted that our piece is limited in scope. For example, though we think it is a serious question, we will not address whether society, as represented by the government, has a strong enough interest in policing its borders and the content of its community to override constitutionally based protections for individuals (the plenary powers doctrine). Heartened by *Padilla*'s willingness to rely on the constitutional rights of the individual, we leave that question for another day. Neither will we address the question of whether it is desirable or appropriate, even if *Padilla* allows it, to extend criminal-style constitutional protections to deportation for crimes—we will assume that it is. Finally, we will not spell out the details of what a litigation strategy or remedy in such a challenge to proportionality would look like.

What the Article will do is propose a theoretical framework for understanding how current Eighth Amendment jurisprudence can support the conclusion that deportation for certain crimes constitutes impermissibly cruel and unusual punishment. Part I will summarize the Supreme Court's Eighth Amendment jurisprudence on cruel and unusual punishment, addressing the analysis the Court uses in two types of challenges. Part II traces the history of the Supreme Court's characterization of the law of deportation for crimes, the changes that law has undergone in recent decades, and the Court's treatment of criminal deportation in *Padilla v. Kentucky*. Finally, Part III will explain how Eighth Amendment jurisprudence should overlap with the law of criminal deportation to result in a robust review of proportionality in deportation.

26. See 8 U.S.C. § 1229b(a)(3) (2006) (prohibiting cancellation of removal for permanent residents convicted of an aggravated felony); *id.* § 1101(f)(8) (excluding persons convicted of an aggravated felony from being classified as a "person of good moral character"); *id.* § 1229b(b)(1)(B) (limiting cancellation of removal for nonpermanent residents to persons of good moral character); 8 C.F.R. § 1240.65(a) (2011) (prohibiting suspension of deportation for persons convicted of an aggravated felony); 8 U.S.C. § 1229c(a)(1) (prohibiting voluntary departure for persons convicted of an aggravated felony); *id.* § 1229c(b)(1)(B) (limiting voluntary departure to persons of good moral character for five years prior to application); 8 C.F.R. § 1244.4 (disqualifying persons convicted of any felony from temporary protected status). Individuals convicted of aggravated felonies are even barred from some kinds of humanitarian relief, from persecution in the form of asylum, and in many circumstances, the more limited withholding of removal, as well. See 8 U.S.C. § 1158(b)(2)(B)(i) (noting persons convicted of an aggravated felony are considered "to have been convicted of a particularly serious crime"); *id.* § 1158(b)(2)(A)(ii) (prohibiting persons convicted of a particularly serious crime from obtaining asylum); *id.* § 1231(b)(3)(B)(ii) (allowing removal to a country where life or freedom would be threatened if a person convicted of a particularly serious crime was determined to be a danger to the community).

I. THE NATURE OF CRUEL AND UNUSUAL PUNISHMENT: A SUMMARY OF THE SUPREME COURT'S JURISPRUDENCE ON THE EIGHTH AMENDMENT'S FINAL CLAUSE

Since the passage of the Eighth Amendment, the Supreme Court has struggled to find a clear and succinct doctrine for determining what constitutes cruel and unusual punishment. This struggle is due in part to the changing nature of punishment in this country.²⁷ We no longer draw and quarter humans or burn them alive for committing certain crimes. As our national attitudes regarding humane punishment change, so too does the reach of the Eighth Amendment.²⁸

The Court has also struggled to find a united approach in which to ground its interpretation of the Amendment. On the one hand, the Court's decisions have steadfastly maintained that "[t]he concept of proportionality is central to the Eighth Amendment,"²⁹ which embodies the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."³⁰ On the other hand, it has been deeply divided within those decisions, with Justices disagreeing on everything from the existence of such a concept or principle, to the role of the judiciary in making judgments about its application, to the scope of any constitutional guarantee in its application in a particular sentence. The Court's recent opinion in *Graham v. Florida* gave a good summary of the Court's "closely divided" Eighth Amendment jurisprudence over the last few decades.³¹ The complex and fractured state of the analysis is illustrated by the fact that the current legal standard for individualized proportionality review was established in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*, a decision that included not only a majority

27. For example, barbaric punishment and torture were long ago recognized as cruel and unusual, but today there are still punishments that offend our modern standards of decency and are thus unconstitutional. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) ("[T]he Amendment proscribes more than physically barbarous punishments. The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .,' against which we must evaluate penal measures. . . . These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration." (citations omitted)); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.").

28. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) ("The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion))).

29. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

30. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

31. *Id.* at 2021–22.

and concurring opinion but also three dissenting opinions.³² *Graham* itself consists of a majority opinion, two separate concurrences, and two dissents.³³

Despite these divisions in the Court, however, a jurisprudence has emerged. The Court considers two types of challenges to the proportionality of a particular sentence. The first type of challenge asks whether the imposition of any number of years of incarceration is excessive as compared with the crime that was committed.³⁴ The Court “‘does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are grossly disproportionate to the crime.’”³⁵ The second type Court considers is a challenge against a particular sentencing practice.³⁶ This categorical challenge considers whether a sentence, every time it is applied a certain way, can ever be proportionate.³⁷ While historically this kind of challenge has primarily been levied against the application of the death penalty, just last term in *Graham*, the Court entertained and upheld a categorical challenge to a non-death penalty sentence.³⁸

The Court’s analysis with each type of challenge is somewhat different, but in both, the overarching principle is to balance the severity of the individual’s crime with the severity of the punishment.³⁹ In assessing the severity of the crime, the Court evaluates not only the circumstances of the offense but also the characteristics of the offender to determine if there is any increased or decreased moral culpability. The characteristics of the offender can be relevant to his or her moral culpability and thus the appropriateness of a penalty: The Court has required a mitigation of severe penalties for those with diminished moral culpability, such as juveniles⁴⁰ and individuals with intellectual disabilities,⁴¹ and has allowed increasingly severe punishments for those with increased moral culpability, such as repeat offenders.⁴²

32. 501 U.S. 957, 998–1001 (1991) (Kennedy, J., concurring in part and concurring in judgment).

33. 130 S. Ct. 2011.

34. *Id.* at 2021.

35. *Id.* at 2021 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment)).

36. *Id.* at 2021.

37. *Id.* at 2022.

38. *Id.* at 2034.

39. *See Graham*, 130 S. Ct. at 2021.

40. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that capital punishment of individuals who were under eighteen at the time they committed their capital crime is prohibited by the Eighth and Fourteenth Amendments).

41. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that executions of mentally retarded criminals were “cruel and unusual punishments” prohibited by the Eighth Amendment).

42. *E.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 76–77 (2003); *Ewing v. California*, 538 U.S. 11, 29–31 (2003) (plurality opinion); *Rummel v. Estelle*, 445 U.S. 263, 284–85 (1980); *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (per curiam).

Both types of analysis, however, are largely shaped by the Court's deep deference to the enactments of the legislative branch, which it considers to be the proper branch to make sentencing policy decisions and to express societal values in sentencing. Often, the Court is content to defer completely to the legislature's weighing of the factors identified above. The across-the-board importance of this legislative deference is striking given the divisions among Justices as to other principles of the jurisprudence. As we explain, this legislative deference also plays an important role in thinking about how Eighth Amendment jurisprudence might be applied to criminal deportation.

A. *Grossly Disproportionate Individual Sentences*

The extent to which the Court will allow the scales of justice to tip in favor of severe punishments and still find them to be proportional to the crime has arguably increased over the years. Justice Kennedy's opinion in *Harmelin v. Michigan* articulated the current standard for interpreting the proportionality of a term-of-years sentence as compared with the crime that was committed.⁴³ In *Harmelin*, the Supreme Court upheld Mr. Harmelin's life sentence after he was convicted of possessing 672 grams of cocaine.⁴⁴ The life sentence was mandatory under Michigan law.⁴⁵ It is Justice Kennedy's concurring opinion in the case that is controlling, which holds that the proportionality guarantee of cruel and unusual punishment is not extinct, as some contend, but that it is in fact "narrow."⁴⁶

Justice Kennedy begins his opinion by recognizing that the Court's analysis of Eighth Amendment issues is far from clear, but that there were some emergent guiding principles that were foundationally present in the majority of cases.⁴⁷ These principles are as follows:

Principle One: "[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'"⁴⁸ Justice Kennedy recognized that whether sentencing is viewed as a moral or political issue, it provokes deeply

43. 501 U.S. at 998–1001 (Kennedy, J., concurring in part and concurring in judgment).

44. *Id.* at 961 (plurality opinion).

45. *Id.* at 961 n.1 ("Michigan Comp. Laws Ann. § 333.7403(2)(a)(i) (West Supp. 1990-1991) provides a mandatory sentence of life in prison for possession of 650 grams or more of 'any mixture containing [a schedule 2] controlled substance'; § 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance. Section 791.234(4) provides eligibility for parole after 10 years in prison, except for those convicted of either first-degree murder or 'a major controlled substance offense'; § 791.233b[1](b) defines 'major controlled substance offense' as, *inter alia*, a violation of § 333.7403.").

46. *Id.* at 997 (Kennedy, J., concurring in part and concurring in judgment).

47. *Id.* at 998.

48. *Id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)).

conflicting ideas.⁴⁹ He concluded that “[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature.”⁵⁰ Justice Kennedy’s listing of legislative deference as the foremost principle guiding consideration of the proportionality of a particular sentence reflects the preeminence of this factor in Supreme Court case law on the topic.⁵¹

Principle Two: “[T]he Eighth Amendment does not mandate adoption of any one penological theory.”⁵² Justice Kennedy argued that there is no preference within the Constitution for retribution or deterrence, for example, nor for mandatory or discretionary laws.⁵³

Principle Three: “[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure.”⁵⁴ Thus, it is inevitable that certain states will treat their criminals more harshly than others.⁵⁵

Principle Four: “[P]roportionality review by federal courts should be informed by ‘objective factors to the maximum possible extent.’”⁵⁶ One can easily and objectively differentiate capital and non-capital punishment. It is not so easy, however, to objectively differentiate terms of years. The Court noted that the relative lack of objective standards concerning terms of imprisonment has meant that “[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.”⁵⁷

Principle Five: “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”⁵⁸ Principles one through four inform and support principle five, Kennedy explained.⁵⁹

49. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in judgment) (“As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements.” (quoting DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 1 (1990))).

50. *Id.*

51. *See id.*; *Payne v. Tennessee*, 501 U.S. 808, 824 (1991); *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Rummel*, 445 U.S. at 274; *Gore v. United States*, 357 U.S. 386, 393 (1958); *Weems v. United States*, 217 U.S. 349, 379 (1910).

52. *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in judgment).

53. *Id.*

54. *Id.*

55. *Id.* at 999–1000.

56. *Id.* at 1000 (quoting *Rummel*, 445 U.S. at 274–75).

57. *Id.* at 1001 (quoting *Solem*, 463 U.S. at 289–90).

58. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Solem*, 463 U.S. at 288).

59. *Id.*

Bearing in mind those central principles, Justice Kennedy applied a two part test to examine whether, as Harmelin challenged, the Michigan Legislature violated the Eighth Amendment by passing a sentence that was cruel and unusual either because of its gross disproportionality or mandatory nature.⁶⁰ Justice Kennedy concluded that in neither respect was there a constitutional violation.⁶¹ In part one of the test, he explained that the Court must make a threshold determination of whether or not the sentence is grossly disproportionate based on the severity of the punishment and the severity of the crime.⁶² If a sentence is found to be grossly disproportionate, the Court should then consider the sentencing practices of other jurisdictions for the same crime or sentences attendant other crimes within the same jurisdiction.⁶³ Such a comparison is employed only in the case of a threshold finding of gross disproportionality.⁶⁴

Justice Kennedy explained that his principles one through four inform and support principle five.⁶⁵ A careful examination of the five principles reveals that they are indeed related, and we would add to Justice Kennedy's comment that principles two through five all *arise out of* the first principle: that the fixing of criminal penalties is "properly within the province of legislatures, not courts."⁶⁶ Indeed, we identify this principle of strong deference to legislatures in the question of criminal sentencing policy as the controlling principle in the Court's case-by-case Eighth Amendment analysis of proportionality. Each of Justice Kennedy's other principles is derivative or supportive of the principle of legislative deference: there is no constitutional preference among policies, which leaves the choice to the legislature and requires courts to defer to that choice; there will be variation in policies from jurisdiction to jurisdiction because different legislatures will make different choices, to which courts will defer; the lack of objective factors by which courts could judge proportionality makes successful challenges "exceedingly rare," leaving intact the decision of the legislature; and courts applying the Eighth Amendment will defer to legislation, which allows widely disparate sentences, forbidding only those sentences that are grossly disproportionate.

Harmelin's sentence did not pass the threshold finding of gross disproportionality.⁶⁷ While Harmelin's sentence was the same as that received

60. *Id.*

61. *Id.* at 1009.

62. *Id.* at 1005.

63. *Id.*

64. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment).

65. *Id.* at 1001.

66. *Id.* at 998 (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)).

67. *Id.* at 1005.

in *Solem v. Helm*, in which a life sentence without parole was struck down,⁶⁸ and indeed is the second most severe sentence that could be imposed on an individual, the Court found it permissible in this case because of the severity of Harmelin's offense.⁶⁹ The Court distinguished the facts of *Solem*, finding that Solem merely wrote a bad check, "one of the most passive felonies a person could commit," whereas Harmelin was found to be in possession of nearly 650 grams of a controlled and dangerous substance.⁷⁰ The Court noted:

From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in *Solem*. Possession, use, and distribution of illegal drugs represents "one of the greatest problems affecting the health and welfare of our population." . . . To the contrary, petitioner's crime threatened to cause grave harm to society.⁷¹

Therefore, the Court found that "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole."⁷² The Court itself did not find that the sentence was proportional, but rather that there were reasonable grounds for the Michigan Legislature to conclude that it was.⁷³

Justice Kennedy next dismissed Harmelin's challenge to the mandatory nature of the sentence.⁷⁴ He concluded that mandatory sentences do not violate the Eighth Amendment because "[i]t is beyond question that the legislature 'has the power to define criminal punishments without giving the courts any sentencing discretion.'"⁷⁵ He again distinguished *Solem* on the grounds that the life without parole sentence in that case was the maximum possible sentence allowable, not the mandatory sentence imposed.⁷⁶

Since *Harmelin*, the Court has considered the issue of excessive term of years sentencing three times: in *Ewing v. California*⁷⁷ and *Lockyer v. Andrade*⁷⁸ in 2003, and in *Graham v. Florida* in 2010,⁷⁹ discussed earlier.

68. 463 U.S. 277, 303 (1983).

69. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment).

70. *Id.* at 1002 (quoting *Solem v. Helm*, 463 U.S. 277, 296 (1983)).

71. *Id.* (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989)).

72. *Id.* at 1003.

73. *Id.* at 1004.

74. *Id.* at 1006.

75. *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Chapman v. United States*, 500 U.S. 453, 467 (1991)).

76. *Id.*

77. 538 U.S. 11 (2003) (plurality opinion).

78. 538 U.S. 63 (2003).

Ewing and *Andrade* were decided the same day, both challenging the California three strikes law.⁸⁰ In *Ewing*, the Court found constitutional a sentence of 25 years to life for the theft of three golf clubs.⁸¹ In *Andrade*, the Court upheld a sentence of two back-to-back sentences of 25 years for two counts of petty theft.⁸² Both decisions were heavily guided Justice Kennedy's "guiding principles" from *Harmelin*, specifically with regard to legislative deference. The *Ewing* Court expressly upheld the application of California's three-strike law to *Ewing*'s case because "legislatures enacting three strikes laws made a deliberate policy choice" and "[t]hrough three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding."⁸³ In *Andrade*, the Court refused to grant Mr. Andrade's petition for habeas corpus review of his sentence based on the unconstitutionality of the three-strikes law because "the governing legal principle [of the cruel and unusual punishment clause] gives legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle."⁸⁴

B. *Categorically Cruel and Unusual Punishment*

Deference to legislative enactments also plays a central, but less determinative role in the Court's analysis of categorically cruel and unusual sentences. "The analysis begins," the Court has repeatedly held, "with objective indicia of national consensus."⁸⁵ The Court recognizes that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."⁸⁶ Legislative enactments, as evidence of societal values, are the principal starting place for the Court's categorical analysis, but the Court will also bring its own judgments to bear on a particular sentence and consider the specific factors: the moral culpability of an offender, such as the type of crime committed or the characteristics of the offender; the penological justifications of a particular sentence; and international consensus.⁸⁷ The Court has noted that "[i]n accordance with the

79. 130 S. Ct. 2011 (2010). *Graham* was ultimately decided as a categorical challenge to the constitutionality of imposing a sentence of life without parole on a juvenile. *Id.* at 2034.

80. *Ewing*, 538 U.S. at 11, 14 (plurality opinion); *Andrade*, 538 U.S. at 63, 66.

81. 538 U.S. at 30–31 (plurality opinion).

82. 538 U.S. at 77.

83. 538 U.S. at 24–25 (plurality opinion) (citing a string of cases emphasizing the importance of deference).

84. 538 U.S. at 76 ("And it was not objectively unreasonable for the California Court of Appeal to conclude that these 'contours' permitted an affirmance of Andrade's sentence.").

85. *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010).

86. *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)).

87. *See id.* at 2033; *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins*, 536 U.S. at 317–18; *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion); *Enmund v.*

constitutional design, “the task of interpreting the Eighth Amendment remains our responsibility.”⁸⁸

When the Court considers the proportionality of a particular category of sentencing practice, it begins by taking a poll of state legislative enactments.⁸⁹ When a majority of legislatures uphold a certain practice, the Court will generally uphold the practice as well; when only a minority of legislature support a practice, the Court will generally strike it down.⁹⁰ Rarely has the Court strayed from this time-tested deference to legislative enactments. In 1989, it upheld the practice of executing the mentally handicapped when a majority of jurisdictions did not ban the practice.⁹¹ Thirteen years later, however, the Court changed its position on the issue because the national consensus had changed.⁹² Justice Stevens began the opinion in *Atkins v. Virginia*, which struck down the practice, by noting that “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . . [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”⁹³ He then surmised the following:

Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution.⁹⁴

In order to test for such a consensus, Justice Stevens then took stock of the number of state legislatures and federal laws that forbade the execution of the mentally retarded and found that in fact a majority of States had passed legislation forbidding the practice.⁹⁵ He commented on the importance of the legislative enactments to the Court’s decision:

Florida, 458 U.S. 782, 796–97 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion).

88. *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 575).

89. *See, e.g., Roper*, 543 U.S. at 564.

90. *See, e.g., Atkins*, 536 U.S. at 312.

91. *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (“In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”), *abrogated by Atkins*, 536 U.S. 304.

92. *Atkins*, 536 U.S. at 314–16.

93. *Id.* at 306.

94. *Id.* at 307 (citation omitted).

95. *Id.* at 314–16.

It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.⁹⁶

Similarly, in 1989 the Court upheld capital punishment for juvenile offenders because “a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above”⁹⁷ but rejected it in 2005 when they found that “30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”⁹⁸

In the rare circumstances where the Court has chosen not to follow legislative trends and has overturned a particular practice though a majority of legislatures still approved it, it has made a point of showing that the sentencing practice had grown lifeless. For example, in *Graham*, the Court overturned the practice of sentencing juvenile non-homicide offenders to life in prison without parole even though a majority of states still had valid legislation approving the practice.⁹⁹ The *Graham* Court concluded, however, that the sentencing practice in question was used in those jurisdictions infrequently, if at all.¹⁰⁰ Thus, the legislation no longer represented the will of the people.¹⁰¹ Though not explicitly mentioned in *Graham*, the Court’s recognition in *Atkins* that legislatures are much more likely to pass laws that further punish criminals as opposed to ones that provide for more lenient treatment undoubtedly played a role in the Court’s conclusion that inactive legislation was not the strongest evidence of national consensus.¹⁰² Thus, the Court’s deference to recently passed, pro-active legislation is strongest, whereas dated legislation that is no longer actively employed still serves as a starting place but will perhaps

96. *Id.* at 315–16 (footnote omitted).

97. *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

98. *Roper*, 543 U.S. at 564.

99. 130 S. Ct. 2011, 2023–26, 2034 app. (2010).

100. *Id.* at 2025 (“Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.”).

101. *Id.*

102. *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002).

receive less deference as an indication of national consensus on a particular issue.

As we have discussed, in assessing the proportionality of either an individual sentence or a particular sentencing scheme, legislative deference is a central principle. The Court defers to the legislature's expertise in policy-making and judgments in fixing the appropriate number of years of incarceration. The Court further defers to legislatures' role as representatives of the people in imposing a particular sentencing scheme on a class of offenders. The Court assumes that legislators have considered the various penological goals of a punishment and agreed that the approved sentence is appropriate for either rehabilitating, incapacitating, imposing proper retribution, or properly deterring future criminal acts.¹⁰³

II. THE SUPREME COURT AND DEPORTATION AS PUNISHMENT

A. *A Hundred Years of "Civil" Sanction: The Supreme Court and Its Challengers*

The Supreme Court has thus far refused to consider, in any substantive way, to what extent the Eighth Amendment's Cruel and Unusual Punishment Clause could act as a limit on deportation proceedings. For over one hundred years, any Eighth Amendment challenge to the constitutionality of deportation has been summarily dismissed on the grounds that deportation is "purely civil" in nature and the Eighth Amendment applies only to criminal punishment.¹⁰⁴ In 1893, in the case of *Fong Yue Ting v. United States*, the Supreme Court held that proceedings to expel a noncitizen were civil rather than criminal in nature, and that many of the constitutional protections that applied to criminal defendants and criminal proceedings—including the Eighth Amendment—were therefore not applicable to deportation.¹⁰⁵ The Court held that:

[D]eportation is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend. . . . [T]he provisions of the Constitution . . . prohibiting . . . cruel and unusual punishments, have no application.¹⁰⁶

Though *Fong Yue Ting* did not involve deportation related to criminal behavior (as no such provisions existed at that time), its principle that

103. See *Graham*, 130 S. Ct. at 2028–30.

104. See, e.g., *Bassett v. INS*, 581 F.2d 1385, 1387–1388 (10th Cir. 1978) (citing a string of cases rejecting the Eighth Amendment challenge to deportation and noting that "every other appellate court facing the issue has rejected its application to [deportation] proceedings").

105. 149 U.S. 698, 730 (1893).

106. *Id.*

deportation proceedings are purely civil in nature was relied on by the Supreme Court for over a century to summarily dismiss claims that the Eighth Amendment and other constitutional protections due to criminal defendants should apply in deportation proceedings.¹⁰⁷ Though the Court did not again directly address the applicability of the Eighth Amendment to deportation, it consistently and summarily refused to allow other criminal-style constitutional protections, in most cases simply stating that the proceedings were civil and citing *Fong Yue Ting* and its progeny. For example, over the course of the century, the Court relied on *Fong Yue Ting* to dismiss claims based on the Ex Post Facto Clause,¹⁰⁸ the Fifth Amendment protection against self-incrimination,¹⁰⁹ and the Fourth Amendment's protection against unreasonable search and seizure.¹¹⁰

It is important to note, however, that there has been a consistent counterpoint to this chorus of reliance on *Fong Yue Ting*'s civil versus criminal distinction to deny constitutional protections, beginning with the powerful dissents of Justices Brewer, Field, and Fuller in *Fong Yue Ting* itself.¹¹¹ All three Justices, referring to the severe hardships imposed by deportation, would have held that deportation was punishment and merited the constitutional protections of the Fourth, Fifth, Sixth and Eighth Amendments.¹¹² In the words of Justice Brewer:

107. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1908–09 (2000) (discussing the important conceptual distinction between deportability grounds based on principles of extended border control and on post-entry conduct).

108. See *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (refusing to apply the prohibition on ex post facto laws to a deportation law because it held that deportation was not a punishment for crime). In 1952, the Court again refused to find that the Ex Post Facto Clause had been violated and upheld the deportation of a noncitizen who had become a member of the Communist Party on the grounds that “[t]he inhibition against the passage of an *ex post facto* law by Congress . . . applies only to criminal laws . . . and not to a deportation act like this.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (quoting *Mahler v. Eby*, 264 U.S. 32, 39 (1924)).

109. See *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) (refusing to apply the Fifth Amendment protection against self-incrimination in deportation because the proceeding was “not a criminal one”).

110. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (holding that the Fourth Amendment prohibition against unreasonable searches and seizures does not ordinarily justify the suppression of evidence in deportation proceedings, referencing *Fong Yue Ting* and simply stating that “[a] deportation proceeding is a purely civil action” and that “[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing”); see also Pauw, *supra* note 15, at 308 n.9 (citing like treatment by lower courts).

111. 149 U.S. at 732 (Brewer, J., dissenting); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, J., dissenting).

112. *Id.* at 740–41 (Brewer, J., dissenting); *id.* at 748–49 (Field, J., dissenting); *id.* at 763 (Fuller, J., dissenting).

But it needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.¹¹³

Interestingly, in addition to recognizing the hardships caused by deportation, the dissenters relied strongly on the fact that the noncitizens before the Court were legally present in the country,¹¹⁴ a point that mirrors the circumstances of the many lawful permanent residents currently facing deportation for crimes. On the question of the proportionality of the sanction in the context of the Eighth Amendment, Justice Field stated:

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted.¹¹⁵

The passionate dissents from *Fong Yue Ting* have echoed through the subsequent century in the voices of a steady stream of dissenting Justices, some of whom have maintained that deportation is punishment and therefore should have all the protections attendant the imposition of criminal punishment and some of whom have taken the position that constitutional protections are the responsibility of the government where important liberty interests are at stake, regardless of whether a proceeding is civil or criminal.¹¹⁶ For example, the various dissenters in *INS v. Lopez-Mendoza* all took the position that the civil nature of deportation proceedings was no reason not to apply the Fourth Amendment in full force, because the government's agents had the same

113. *Id.* at 740 (Brewer, J., dissenting). Justice Brewer goes on to quote James Madison on the banishment of aliens:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections, where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind, where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for, if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Id. at 740–41 (quoting James Madison, *Madison's Report on the Virginia Resolutions*, in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 546, 555 (1836)).

114. *Id.* at 754 (Field, J., dissenting).

115. *Id.* at 759.

116. See Pauw, *supra* note 15, at 308 n.8 (detailing these dissenting opinions).

obligation to respect an individual's right to be free of unreasonable search and seizure, regardless of whether they were investigating crime or civil immigration violations.¹¹⁷ In his dissent in *Harisiades v. Shaughnessy*, Justice Douglas took a position in support of constitutional protections for those facing deportation because of the important liberty interests at stake:

Unless [resident aliens] are free from arbitrary banishment, the "liberty" they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country.¹¹⁸

In addition, a lively scholarly conversation has repeatedly questioned the Court's characterization of deportation as purely civil and the appropriateness of foregoing constitutional protections on that basis.¹¹⁹ Nonetheless, the dominant and controlling case law of the Court has consistently held that constitutional protections due to criminal defendants generally are not applicable in deportation proceedings strictly because those proceedings are civil.¹²⁰ Only a handful of scholars have directly addressed criminal

117. *E.g.*, 468 U.S. 1032, 1052 (1984) (Brennan, J., dissenting) ("The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.")

118. 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

119. *See* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 116 (1999); Austin T. Fragomen, Jr., *The "Uncivil" Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34–35 (1978); Kanstroom, *supra* note 107, at 1893–94; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); 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, 316–20 (2008); Lisa Mendel, Note, *The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205, 216–17 (2000); Pauw, *supra* note 15, at 313; Michelle Rae Pinzon, Note, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29, 32 (2003); Gregory L. Ryan, *Distinguishing Fong Yue Ting: Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation Under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 ST. MARY'S L.J. 989, 1010–13 (1997); Lupe S. Salinas, Note, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 261–72 (2004); Ethan Venner Torrey, "The Dignity of Crimes": *Judicial Removal of Aliens and the Civil-Criminal Distinction*, 32 COLUM. J.L. & SOC. PROBS. 187, 188, 206 (1999); *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1386 (1983).

120. *E.g.*, *Lopez-Mendoza*, 468 U.S. at 1038; *Harisiades*, 342 U.S. at 594–95.

deportation as cruel and unusual punishment under the Eighth Amendment.¹²¹ The wealth of supporting scholarly research on the civil versus criminal nature of deportation and the relative lack of attention to the Eighth Amendment as a tool to challenge disproportionate deportation make this an area ripe for examination, made even more so by the Supreme Court's recent precedent-bending decisions in *Padilla* and *Graham*.

B. *The Immigration Consequences for Crime*

When discussing the relationships and interactions between criminal and immigration law, it is important to recognize two things. One is that the lives of tens of thousands of our country's citizens and residents—noncitizen defendants and their family members, many of whom are U.S. citizens—are completely and irrevocably upended each year by the deportation of lawful residents for relatively minor criminal convictions.¹²² The other is that the structure and operation of our immigration laws with regard to those who commit criminal offenses is by no means intuitively logical, fair, or even consistent with the way our criminal law treats those same individuals. In fact, quite the opposite is often true. For example, a criminal sentencing judge will take into account the circumstances of a particular case and may completely suspend the sentence of an individual for a first-time theft offense. That individual, though she spends no time at all in jail on the theft charge, may nonetheless find herself categorized as an “aggravated felon” under immigration laws.¹²³ As such, she will be subject to mandatory detention and face automatic deportation solely because of the misdemeanor theft charge, regardless of how long she has been a permanent resident or how deep her ties are in the United States. Because such outcomes are so counter-intuitive—and so common—it is important to ground any discussion of criminal deportation in a basic understanding of how immigration law actually operates in the face

121. See, e.g., Banks, *supra* note 18, at 1662; Ryan, *supra* note 119, at 1035–37. See also the writings of Third Circuit Judge H. Lee Sarokin, who has long “rail[ed] against” the unjust practice of deporting long-time residents with ties to the country for minor crimes. H. Lee Sarokin, *When Does Deportation Become Cruel and Unusual Punishment?*, HUFFINGTON POST (Mar. 31, 2010, 7:27 PM), http://www.huffingtonpost.com/judge-h-lee-sarokin/when-does-deportation-bec_b_520972.html; H. Lee Sarokin, *Debunking the Myth that Deportation Is not Punishment*, THE HUFFINGTON POST (Oct. 14, 2009, 4:44 PM), http://www.huffingtonpost.com/judge-h-lee-sarokin/debunking-the-myth-that-d_b_321329.html.

122. See UNIV. OF CAL., BERKELEY SCH. OF LAW & UNIV. OF CAL., DAVIS SCH. OF LAW, IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 3–4 (2010), available at <http://www.law.ucdavis.edu/news/images/childsbestinterest.pdf>; Michael Falcone, *100,000 Parents of Citizens Were Deported over 10 Years*, N.Y. TIMES, Feb. 14, 2009, at A16.

123. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”). Deportation consequences thus often result from the offense's classification as an “aggravated felony”.

of criminal convictions. Justice Stevens did just this in the *Padilla* decision, first tracing the history and operation of the immigration law of convictions in order to ground the decision's analysis and conclusions in that reality.¹²⁴

Removal is imposed under the Immigration and Nationality Act (hereinafter "INA") as a sanction for an extremely wide range of criminal offenses, including serious crimes,¹²⁵ but also a number of lesser offenses.¹²⁶ The consequences of these offenses depend on which category the offense falls within, as those categories are defined by the INA. The most widely prosecuted categories of offenses are drug offenses¹²⁷ and those identified as "crimes involving moral turpitude"¹²⁸ and "aggravated felonies".¹²⁹ Each of these categories, in turn, includes a broad range of offenses.

With regard to drug offenses, the INA provides that an individual is removable if convicted of any offense "relating to a controlled substance."¹³⁰ This provision has been interpreted broadly to include any drug offense from simple possession to offenses relating to drug kingpins.¹³¹ It also includes simple possession of drug paraphernalia.¹³²

The category of crimes involving moral turpitude is not defined by the INA, but it has been defined in the case law as any crime involving conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality" or "intrinsically wrong."¹³³ This category has been found to include everything from fairly standard "crimes involving moral turpitude," such as crimes committed with an intent to do bodily harm, sex offenses, and drug

124. 130 S. Ct. 1473, 1478–80 (2010).

125. *E.g.*, 8 U.S.C. § 1101(a)(43)(A) (murder); *id.* § 1101(a)(43)(F) (aggravated assault); *id.* § 1227(a)(2)(C) (firearm offenses); *id.* § 1227(a)(2)(E) (domestic violence); *id.* § 1101(a)(43)(B) (drug trafficking).

126. *E.g.*, *id.* § 1227(a)(2)(A)(iv) (high speed flight); *id.* § 1101(a)(43)(G) (theft); *id.* § 1101(a)(43)(M) (fraud); *id.* § 1227(a)(2)(B) (possession of drug paraphernalia); *id.* § 1227(a)(2)(E)(i) (child neglect or abuse); *id.* § 1101(a)(43)(P) (document fraud); *id.* § 1101(a)(43)(S) (perjury); *id.* § 1101(a)(43)(Q) (failure to appear for a criminal trial).

127. *Id.* § 1227(a)(2)(B).

128. *Id.* §§ 1227(a)(2)(A)(i)–(ii).

129. *Id.* § 1101(a)(43) (defining aggravated felonies with deportation consequences under § 1227(a)(2)(A)(iii)).

130. *Id.* § 1227(a)(2)(B).

131. *See In re Hernandez-Ponce*, 19 I. & N. Dec. 613, 616 (B.I.A. 1988) ("It is evident to us . . . that Congress intended to expand rather than limit the power of the Government to curtail drug abuse through the immigration laws. . . . In the case before us, the respondent has admitted to being twice convicted for the crime of use and being under the influence of phencyclidine. Phencyclidine is listed as a controlled substance [T]he respondent falls within the purview of the amended language . . . of the Act, which refers to convictions 'relating to a controlled substance.'" (citation omitted)).

132. *See Luu-Le v. INS*, 224 F.3d 911, 916 (9th Cir. 2000).

133. *In re Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995).

trafficking, to less serious offenses, like writing bad checks,¹³⁴ bootlegging,¹³⁵ petty theft,¹³⁶ student loan fraud,¹³⁷ making false statements,¹³⁸ and misuse of a Social Security card.¹³⁹ An individual, even if she is a permanent resident, can be removable for a crime involving moral turpitude if it is committed within five years of her admission to the United States¹⁴⁰ or if she is convicted of two such crimes, not arising out of a single scheme of criminal conduct, at any time.¹⁴¹

Depending on her underlying immigration status and how long she has held that status, a person who is removable for simple possession of a controlled substance or a crime involving moral turpitude may or may not qualify for some form of relief from deportation, such as cancellation of removal for lawful permanent residents.¹⁴² This possible eligibility for relief from removal applies also to permanent residents convicted of other removable offenses, such as domestic violence offenses¹⁴³ or illegal firearms possession.¹⁴⁴

However, since 1996, these categories of offenses for which relief from deportation is available have been largely eclipsed by the greatly expanded category of “aggravated felonies,”¹⁴⁵ which render an individual automatically removable¹⁴⁶ and disqualify her from eligibility for cancellation of removal¹⁴⁷ and virtually every other form of relief available in immigration proceedings.¹⁴⁸ In addition to automatic deportation, someone deported for an

134. *Ijoma v. INS*, 875 F. Supp. 625, 630 (D. Neb. 1995), *aff’d*, 76 F.3d 382 (8th Cir. 1996); *Burr v. INS*, 350 F.2d 87, 91–92 (9th Cir. 1965); *United States ex rel. Portada v. Day*, 16 F.2d 328, 329 (S.D.N.Y. 1926); *In re Logan*, 17 I. & N. Dec. 367, 368 (B.I.A. 1980).

135. *Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951); *Maita v. Haff*, 116 F.2d 337, 337 (9th Cir. 1940).

136. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009).

137. *Kabongo v. INS*, 837 F.2d 753, 758 (6th Cir. 1988).

138. *Zaitona v. INS*, 9 F.3d 432, 437–38 (6th Cir. 1993).

139. *Serrato-Soto v. Holder*, 570 F.3d 686, 692 (6th Cir. 2009); *Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007).

140. 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

141. *Id.* § 1227(a)(2)(A)(ii).

142. *Id.* § 1229b(a) (permitting cancellation of removal to aliens with no aggravated felonies who are legal permanent residents of the United States for a minimum of five years or who have continuously resided in the United States in a lawful presence for seven years).

143. *Id.* § 1227(a)(2)(E).

144. *Id.* § 1227(a)(2)(C).

145. *Id.* § 1101(a)(43).

146. 8 U.S.C. § 1228(c) (“Any alien convicted of an aggravated felony shall be *conclusively presumed* to be deportable from the United States.” (emphasis added)).

147. *Id.* § 1101(f)(8); *id.* § 1229b(b)(1)(B).

148. *Id.* § 1229b(a)(3). Individuals with these convictions are specifically barred from seeking relief, such as cancellation of removal for individuals who are not legal permanent residents, *id.* § 1229b(b)(1), special cancellation of removal for Central Americans under the

aggravated felony conviction is permanently barred from reentering the country,¹⁴⁹ which makes removal for an aggravated felony a kind of life banishment without the possibility of parole. This most severe of all immigration sanctions might indeed be appropriate for the most serious criminal offenses and for those noncitizens with few community ties, but the current legal framework makes the sanction automatic for a stunningly broad range of offenses—some relatively quite minor—and takes no account of the individual’s underlying immigration status or ties to the United States. As a result, there is no distinction between the sanction automatically imposed on someone who entered the country very recently and illegally and that imposed on a long term permanent resident with U.S citizen children and significant history in and ties to the community. Likewise, there is no distinction between the sanction for someone convicted of murder and someone convicted of failing to appear in court to answer a criminal charge that carries a potential two year sentence.¹⁵⁰ Both are equally subject to the full weight of automatic and permanent deportation that falls on the aggravated felony category. Other offenses that can be categorized as aggravated felonies include receipt of stolen property, petty theft, simple assault, possession with intent to distribute a controlled substance, second degree burglary, accessory after the fact, and perjury, as well as attempts or conspiracies to commit any of these offenses.¹⁵¹

Nicaraguan Adjustment and Central American Relief Act, 8 C.F.R. § 1240.66 (2011), voluntary departure, 8 U.S.C. § 1229c(a)(1), relief under the battered spouse provisions of the Violence Against Women Act, 8 C.F.R. § 1240.65(d)(3), and, in most cases, temporary protected status, *id.* § 1244.4. They are even barred from humanitarian relief from persecution in the form of asylum, 8 U.S.C. § 1158(b)(2)(B)(i), and in many circumstances where removal would threaten the safety of the alien, the more limited withholding of removal as well, *id.* § 1231(b)(3)(B)(ii). The only possible relief remaining for someone convicted of an aggravated felony requires her to demonstrate that her “life or freedom would be threatened,” *id.* § 1231(b)(3)(C), or that her government would subject her to torture if she were deported, 8 C.F.R. §§ 208.16–18. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85. Obviously, very few individuals facing removal can meet these standards.

149. Immigration and Nationality Act § 212(a)(9)(A) permanently prohibits admission to the United States for any alien who has been ordered deported at the end of removal proceedings and has been convicted of an aggravated felony. 8 U.S.C. § 1182(a)(9)(A).

150. Both offenses are defined as an aggravated felony within the meaning of immigration law. *Id.* §§ 1011(a)(43)(A), 1101(a)(43)(T).

151. *Id.* § 1101(a)(43) (2006) (defining aggravated felonies). Some of these offenses, such as theft, burglary, and crimes of violence, are classified as aggravated felonies when the conviction is accompanied by a sentence of one year or more. *Id.* §§ 1101(a)(43)(F), 1101(a)(43)(G). This includes any sentence that may have been suspended by the criminal court, another factor that makes immigration consequences counterintuitive for those accustomed to the criminal justice system. *Id.* § 1101(a)(48)(B). For an overview of many convictions categorized as aggravated felonies and convictions that fall into other removable categories, see MAUREEN A. SWEENEY ET AL., ABBREVIATED CHART FOR CRIMINAL DEFENSE PRACTITIONERS OF THE IMMIGRATION

Because of the broad reach of the aggravated felony category and the severe and automatic nature of its consequences, many criminal convictions, which may not seem like “serious” offenses to those in the criminal justice system, lead automatically to deportation for permanent residents and other noncitizens.¹⁵²

C. *Deportation as Punishment in Padilla v. Kentucky*

When understood in the context of the hundred-year-long debate over whether deportation can constitute punishment and the current severity and inflexibility of deportation for crimes, *Padilla*’s statement that “as a matter of federal law, deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes” is indeed profound.¹⁵³ While Justice Stevens was careful to acknowledge that deportation is in fact still “civil in nature,” such a statement rings hollow in light of the Court’s extended discussion of the extent to which criminal convictions and deportation have become “intimately related” and “enmeshed.”¹⁵⁴ In Parts I and II of the *Padilla* opinion, Justice Stevens posited that deportation is different today than it was when the civil versus criminal distinction was first made and it is uniquely different from a host of other “collateral” consequences for which criminal procedural protections are excluded.¹⁵⁵

Justice Stevens begins Part I of the opinion by stating, “[t]he landscape of federal immigration law has changed dramatically over the past 90 years.”¹⁵⁶ This change, he explained, has taken the United States from a time of “unimpeded immigration” to one where the “‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.”¹⁵⁷ In the era of *Fong Yue Ting* there was no such thing as a post-entry ground of deportability.¹⁵⁸ One could only be denied entry into the United States for demonstrating some reprehensible characteristic; the government did not regulate behavior after an immigrant was allowed to enter.¹⁵⁹

CONSEQUENCES OF CRIMINAL CONVICTIONS UNDER MARYLAND STATE LAW (2011), available at <http://www.law.umaryland.edu/faculty/MSweeney/ImmigrationConsequencesChart.pdf>.

152. For a more in-depth history of the expansion of the aggravated felony and other criminal deportation provisions, see Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 63–67 (2010).

153. 130 S. Ct. 1473, 1480 (2010) (footnote omitted).

154. *Id.* at 1481.

155. *Id.* at 1478–82.

156. *Id.* at 1478.

157. *Id.* (citations omitted).

158. See Kanstroom, *supra* note 107, at 1901.

159. See *Padilla*, 130 S. Ct. at 1478.

Justice Stevens explained that the concept of deportation based on post-entry behavior was first introduced with the Immigration and Nationality Act of 1917.¹⁶⁰ The Act made deportable certain aliens who committed a crime involving moral turpitude.¹⁶¹ The Act, however, “also included a critically important procedural protection to minimize the risk of unjust deportation”—The Judicial Recommendation Against Deportation, also referred to as JRAD.¹⁶² Rather than being a mere recommendation, however, the JRAD “had the effect of binding the Executive to prevent deportation; the statute was ‘consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.’”¹⁶³ Therefore, even though the classes of deportable aliens continued to expand, sentencing judges retained the right to “ameliorate unjust results on a case-by-case basis.”¹⁶⁴

Justice Stevens wrapped up Part I by explaining that sentencing judges no longer have that right to recommend against deportation; Congress eliminated that right completely in 1990, and later eliminated the Attorney General’s right to grant discretionary relief from deportation for anyone with an aggravated felony conviction.¹⁶⁵ The result is that deportation is now an entirely automatic consequence for many crimes. Thus, he concludes, “[t]hese changes confirm our view that, as a matter of federal law, 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.”¹⁶⁶

In Part II of the *Padilla* opinion, Justice Stevens explained why deportation as a consequence of a crime is within the ambit of *Strickland v. Washington*’s requirement that criminal counsel be competent.¹⁶⁷ The Kentucky Supreme Court, following numerous other courts, had held that a defense counsel’s failure to advise a defendant of a possible consequence of deportation cannot amount to ineffective assistance of counsel because immigration is a collateral rather than direct consequence of a crime, and therefore *Strickland* does not apply.¹⁶⁸ Justice Stevens reversed the Kentucky decision, pointing out that

160. *See id.* at 1479.

161. *Id.* Deportability for crimes involving moral turpitude was the same in 1917 as it is today: Anyone who commits such an offense within five years of entry and receives a sentence of one year or more is deportable, as is anyone who commits two or more such crimes at any time after admission. *Compare id.* (describing original deportability framework under the Immigration and Nationality Act of 1917), with 8 U.S.C. §§ 1227(a)(2)(A)(i)–(ii) (2006).

162. *Padilla*, 130 S. Ct. at 1479.

163. *Id.* (quoting *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986)).

164. *Id.*

165. *Id.* at 1480.

166. *Id.* (footnote omitted).

167. *Id.* at 1481–82.

168. *Padilla*, 130 S. Ct. at 1481.

because of the changes to the nature of deportation referenced in Part I, the direct versus collateral distinction was “ill-suited” to deportation:

Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context.¹⁶⁹

Justice Stevens further observed that the Court has never held that the direct/collateral distinction was relevant to the scope of *Strickland*'s requirements.¹⁷⁰ Thus, he concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla’s claim.”¹⁷¹ Justice Stevens concluded the opinion of the Court by holding that Mr. Padilla’s counsel did fail to give effective assistance, not only in that he affirmatively misadvised Mr. Padilla but also to the extent that he failed to offer advice.¹⁷² Justice Stevens remanded the case for consideration as to whether Mr. Padilla was prejudiced by the ineffective assistance of counsel, the second prong of the *Strickland* analysis.¹⁷³

Taking Justice Stevens at his word that deportation is indeed part of a criminal penalty and that punishment is indeed at times “harsh” and “severe,” we turn now to examine whether the Court’s established Eighth Amendment jurisprudence might support the position that certain cases of criminal deportation may be disproportionate and amount to cruel and unusual punishment.

III. DISPROPORTIONATE DEPORTATION AS CRUEL AND UNUSUAL PUNISHMENT

Our review of the jurisprudence of both categorical and individual Eighth Amendment challenges to sentencing demonstrates that the Court gives extremely broad deference to legislative determinations of what sentences are appropriate and proportionate. It is clear from Justice Kennedy’s concurrence in *Harmelin* and the Court’s subsequent cases that the Court considers the power to determine sentences or sentencing ranges a proper exercise of the legislature’s policy-making function to which the Court will give great deference.¹⁷⁴ Justice Kennedy began his explication of the principles guiding

169. *Id.* (citations omitted).

170. *Id.*

171. *Id.* at 1482.

172. *Id.* at 1486–87.

173. *Id.* at 1487.

174. *See supra* Part I.A.

proportionality review with the “first” principle, that of legislative deference.¹⁷⁵ Indeed, as we have seen, all of his five principles are grounded in or lead to strong deference to the legislative prerogative and expertise in policymaking.¹⁷⁶ He goes on to affirm that responsibility for making sentencing policy judgments lies squarely with the legislature, noting, “[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy.”¹⁷⁷ It is not for a reviewing court to second-guess the wisdom of the legislature’s considered judgment in these complex questions of the types and limits of punishment for crimes.¹⁷⁸ It is for precisely this reason that the Eighth Amendment does not require strict congruence between crime and sentence, despite its guiding precept of proportionality,¹⁷⁹ but rather “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”¹⁸⁰

There can be no doubt that the Court has indeed deferred substantially to legislatures in its review of sentencing schemes, a deference that has to a large extent eviscerated the Eighth Amendment’s ability to support challenges to the proportionality of individual criminal sentences. Of most direct relevance for our purposes are the cases addressing state “three-strike” laws and mandatory minimums, sentences that are applied automatically based on the offense and the individual’s criminal history, without regard to discretionary factors relating to the actual conduct of the individual offender.¹⁸¹ The majority in *Harmelin* specifically upheld the legislature’s power to impose mandatory sentences and rejected an argument that individual (non-death) sentences had to be individualized according to the trial court’s determination of whether the punishment was appropriate to the case.¹⁸² It is furthermore clear in Justice Kennedy’s concurrence that the Court’s deference to the severe, mandatory penalty was based on the premise that the legislature, the body best suited to making policy determinations, had already considered and made the

175. *Michigan v. Harmelin*, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring in part and concurring in judgment).

176. *See supra* Part I.A.

177. *Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)).

178. *See id.* at 999.

179. *See Weems v. United States*, 217 U.S. 349, 366–67 (1910).

180. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)); *see also Rummel v. Estelle*, 445 U.S. 263, 271 (1980); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Weems*, 217 U.S. at 371.

181. *See discussion supra* notes 77–84 and accompanying text.

182. 501 U.S. at 996 (“We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.”).

“substantive penological judgment” that the sentence was supported by the genuine, reasonable penological concerns of retribution and deterrence.¹⁸³ In three-strikes cases, the Court has deferred to the legislature’s judgment that the threat of recidivism justified the goals of deterring and incapacitating repeat offenders through increased sentences and refused to sit as a “superlegislature” to revisit that judgment.¹⁸⁴ As we have seen, this deference has led to the upholding of sentences that are severe indeed in light of the actual circumstances of the offenses.

In categorical proportionality challenges, deference to the legislature has been somewhat more muted than in term-of-years challenges, as the Court sees a stronger role for itself in judging the appropriateness of the uniquely severe and irrevocable sanction of death and, more recently, life without parole for juveniles. However, it is clear that the existence of legislation is a powerful factor in the Court’s assessment of whether there is a national consensus in favor of or opposed to a particular punishment, and the Court finds evidence of such policy-based legislative decision-making to be the most reliable objective evidence of national values, and thus the starting point for its analysis.¹⁸⁵

However, in order for either of these manifestations of legislative deference to make sense as a key determinant of proportionality analysis, there must be evidence that the legislature has *indeed made a substantive penological judgment* as to the appropriateness of a sentence or sentencing scheme. While he made clear that it was not the role of the judiciary to second-guess the legislature’s judgment, Justice Kennedy in *Harmelin* also clearly understood that such substantive consideration and judgment was essential at some point: “The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system.”¹⁸⁶ In other words, it is clear that there must be at least *some* reasonable penological rationale for a sentencing system, and that *someone* must have articulated this and made a judgment as to its efficacy. While the Court has often refused to engage in a *re*-evaluation of a system’s efficacy, it has refused to do so precisely because the legislature has already done an initial evaluation of the relationship between the scheme and genuine penological goals.

Likewise, in its categorical analysis in *Graham*, the Court made clear that the simple fact that a sentencing law is on the books does not mean that the legislature has necessarily fully considered its penological merits and,

183. *Id.* at 998, 1003 (Kennedy, J., concurring in part and concurring in judgment) (“[T]he Michigan Legislature could *with reason* conclude that the threat posed . . . is momentous enough to warrant the deterrence and retribution of a life sentence without parole.” (emphasis added)).

184. *Ewing v. California*, 538 U.S. 11, 28 (2003) (plurality opinion).

185. *See Graham v. Florida*, 130 S. Ct. 2011, 2022–23 (2010).

186. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in judgment).

importantly, that the deference due such laws depends upon this consideration.¹⁸⁷ In its review of state laws which allow a life sentence without parole for juveniles, the Court speculated that the states that authorize the transfer of juveniles to adult court may not have realized or intended for those juveniles to be exposed to the imposition of a life sentence without parole.¹⁸⁸ The Court concluded that the simple fact that a sentencing law or practice exists “does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.”¹⁸⁹ Without that endorsement, the Court was unwilling to defer to such statutory schemes, despite the fact that they were on the books in thirty-seven states.¹⁹⁰

Herein lies a fundamental problem with the INA’s scheme of deportation for crimes: that it operates, yet has never been evaluated by Congress or the judiciary, *as a sentencing scheme*. *Padilla* recognized the imposition of deportation for criminal conduct as part of the penalty for the commission of a crime, but it was not considered to be so when Congress passed the various provisions that make up the criminal deportation scheme. Rather, it was passed as part of the nation’s immigration laws, which the courts had been specifically exempting from constitutional criminal protections for a century on the grounds that they were civil and not criminal. Prior to *Padilla*, there was no expectation that any deportation grounds had to be evaluated or justified penologically, so they never were. While Congress did indeed pass the criminal deportation provisions, it never made a substantive penological judgment as to their appropriateness as a scheme for criminal sentencing. Thus, the rationale in favor of giving broad legislative deference to statutory provisions—that the legislature has already given “deliberate, express, and full legislative consideration” to imposing deportation as part of a criminal penalty¹⁹¹—would be without foundation, and the deference that would consequently be due the provisions under ordinary Eighth Amendment law, in the form of the gross disproportionality standard and a presumption that legislation reflects the values of the nation regarding sentencing policy, is not properly applicable in the case of deportation for crimes.

Without the limits imposed by the strong legislative deference of ordinary Eighth Amendment jurisprudence, courts should apply a robust standard of proportionality to deportation when it is imposed as part of a criminal penalty. This review should consist of the same balancing factors identified by the courts in Eighth Amendment review: the severity of the crime, the severity of the penalty, and relevant characteristics of the offender. In the context of

187. 130 S. Ct. at 2025.

188. *Id.*

189. *Id.* at 2026.

190. *Id.*

191. *Id.*

deportation, the latter would include a consideration of the individual's immigration status, as well as her history and ties to the community. As the first decision-makers to consider the appropriateness of imposing deportation as part of the criminal penalty, courts should not hesitate to make the substantive penological judgment as to the proportionality of that sanction.

There is little doubt that many deportations that are mandated or triggered by our current immigration law would undoubtedly fail to meet a standard that requires simple proportionality, and this reading of the Eighth Amendment could protect thousands of individuals and their families from suffering the disproportionate penalty of deportation for relatively minor offenses.

CONCLUSION

Our immigration law has lost any semblance of concern for proportionality in how it imposes deportation for crimes. In the past decades, and especially since 1996, the United States has deported tens of thousands of individuals—including tens of thousands of long-term permanent residents—because of criminal convictions.¹⁹² The provisions of the immigration law that allow such deportations are in many cases mandatory, permitting no relief from the sanction of removal and additionally prohibiting the individual from ever returning to the United States. While such provisions might be justified for the most serious of criminal offenses, their current sweep includes a very large number of non-violent and relatively minor crimes which are classified as “aggravated felonies,” including such offenses as petty theft with a one year suspended sentence and failure to appear in court on criminal charges with a potential two year sentence.¹⁹³ In many of these cases, the penalty of deportation seems clearly disproportionate to the offense, especially for individuals who stand to permanently lose lawful resident status in the United States.

We have taken the Supreme Court at its word in *Padilla v. Kentucky* and consider removal that is triggered solely by a criminal conviction to be “part of the penalty” for criminal activity.¹⁹⁴ We have also considered that such

192. In 2011 alone, Immigration and Customs Enforcement removed 215,698 persons convicted of felonies or misdemeanors, a record-high number for the agency. See Press Release, U.S. Immigration and Customs Enforcement, FY 2011: ICE Announces Year-End Removal Number, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security, (Oct. 18, 2011), available at <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>. Specific information on annual removal figures is made available annually by the Department of Homeland Security in the Yearbook of Immigration Statistics. See *Yearbook of Immigration Statistics*, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/files/statistics/publications/yearbook.shtm> (providing an archive of removal statistics) (last updated Oct. 12, 2011).

193. 8 U.S.C. 1101(a)(43) (2006) (defining crimes which constitute an “aggravated felony”).

194. 130 S. Ct. 1473, 1480 (2010).

deportation may likely come within the reach of the Eighth Amendment's principle that punishment for a crime should be graduated and proportionate to the offense for which it is imposed, and looked at how Eighth Amendment jurisprudence might be applied to deportation that is imposed as a criminal sanction. Because Congress has never substantively evaluated criminal deportation provisions as sentencing policy, we argue that courts should apply the Eighth Amendment to those provisions in the form of a simple proportionality standard, directly considering the severity of the offense, the severity of the penalty, and relevant characteristics of the offender regarding culpability. One response to this analysis of the Eighth Amendment's application to removal for crimes is for courts to step in, as we have argued, and review the proportionality of removal as a criminal sanction. This could take the form of the review of individual cases in which deportation may be disproportionate to the offense. It might also take the form of consideration of categorical challenges to certain aspects of the criminal removal scheme at large, such as the "aggravated felony" provisions and their inclusion of manifestly minor offenses. The latter is particularly intriguing because of the aggravated felony provisions' explicit *prohibition* on any discretionary relief from removal that might otherwise act as a mechanism to correct for disproportionate results.

Alternatively, Congress could take up the task of substantively considering the penological value and proportionality of deportation as a sanction for all of the many criminal offenses by which it can be triggered in current law. If Congress were to carry out such a substantive review, thereafter the usual Eighth Amendment standards would apply, and deportation would only be prohibited if it were grossly disproportionate to the underlying offense. To be meaningful, however, this review would have to be far-reaching and would have to seriously consider the penological rationale for imposing deportation for the many minor offenses currently included in the law. At the least, we think this review would require a reworking of the aggravated felony definition to limit its severe and automatic sanctions to the most serious of crimes and, ideally, the inclusion of mechanisms to allow criminal sentencing judges to preclude the sanction of removal and immigration judges to cancel removal when it would be disproportionate to the underlying offense.¹⁹⁵

195. Congress could also take immigration consequences seriously as part of criminal punishment and develop a system of graduated immigration-related penalties to parallel graduated criminal penalties. Juliet Stumpf has proposed a system of graduated immigration penalties that could include an extension of the waiting period for eligibility to naturalize, a finding and stay of removal analogous to a suspended sentence, fines, or a period of probation in which any further violation would result in deportation. See Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264 (2006).

The current paralysis of Congress with regard to enacting substantive immigration legislation leads us to believe, however, that major revisions to our immigration statutes are not on the horizon. Until such time as that changes, long-term permanent residents and other noncitizens will likely continue to have to look to the courts to protect them from the disproportionate sanction of deportation for minor crimes. In the wake of *Padilla*, the Eighth Amendment gives them a tool to do just that.