Immigration law uses a single indiscriminate sanction—removal from the country—as the baseline penalty for almost any violation. Removal (deportation or exclusion from the United States) acts as a penalty in the immigration context in the same way that sentencing and other sanctions are imposed as penalties in criminal law. Criminal law, however, uses a system of graduated sanctions calibrated to the seriousness of the crime and the individual’s conduct, in contrast to immigration law’s unswerving application of the removal sanction. Removal is the sanction whether the violation is minor or grave. Using removal as a baseline penalty robs the law of any capacity for adjustment to fit the seriousness of the immigration violation or its consequences for the individual and others.

The contrast between the approach to sanctions in criminal and immigration law is especially stark because of the recent and rapid convergence of these two areas. Criminal offenses have become the primary focus of immigration control for both Congress and the Department of Homeland Security. The removal of long-term residents from the United States for crimes of questionable seriousness is now commonplace. The scholarly attention that this merger has drawn has focused both on the recent rapid expansion of the grounds of removal for criminal offenses and on the lawfulness and wisdom of deporting individuals who have significant ties here. Yet despite this merging of substantive criminal and immigration law, the approach to sanctions in each legal realm continues along divergent paths.

In this article, I propose a new approach to immigration sanctions based on the graduated penalty system in the criminal realm. This proposal would take into account the severity of the violation, its context, the conduct of the individual violator, and the stake that the individual has in remaining in this country. The first part of this article describes the convergence of immigration and criminal law that has given rise to the need for a system of graduated penalties. The second sets out the proposal and describes how it might play out for various categories of immigrants. In the conclusion, I set forth a few of the difficult questions that this proposal raises.

I. Intersections of Criminal and Immigration Law
A. Convergence of Criminal and Immigration Law

Over the past two decades, the intersections between criminal law and immigration law have multiplied. First, the scope of criminal grounds that result in removal from the United States has vastly expanded. Second, some violations of immigration law have come to carry criminal sanctions, or those sanctions have become heavier, and enforcement of conviction-related removals has increased.

Since the mid-1980s, criminal grounds for removal of aliens have expanded to include a vast array of felonies and misdemeanors. Almost every immigration statute passed since 1986 has expanded the list of crimes leading to exclusion and deportation. At the same time, the number and types of immigration-related acts that carry criminal consequences has proliferated. Actions by immigrants that were previously civil matters became criminal offenses or came to carry harsher criminal penalties with heightened enforcement. As a result, the incidence of noncitizens removed from the country has grown dramatically. Deportation of permanent residents as an additional sanction to criminal punishment, previously rare, has become commonplace.

The government also uses immigration law in lieu of criminal law to detain or deport those alleged to be involved in terrorism without resort to the criminal justice system. For example, the executive branch has required noncitizen men from certain Muslim and Arab countries to register with the immigration agency and has targeted them for detention and removal based on criminal convictions and immigration violations. The USA PATRIOT Act of 2001 authorizes detaining noncitizens without filing criminal charges for a “reasonable period of time” under extraordinary circumstances.

B. Comparison of Immigration and Criminal Sanctions

Why hasn’t the system of graduated sanctions for criminal offenses caught on in the immigration arena? Immigration and criminal law seem to have converged in every way except one: the structure of their penalty systems. While sanctions for criminal convictions arrange themselves...
along a spectrum of severity, immigration law invariably turns to the ultimate penalty of removal from the country.

Criminal law tends to impose less severe sentences for lesser crimes and harsher sentences for more serious crimes, with adjustments up or down depending on whether the offender’s conduct in committing the crime seems to merit it. This results in a range of incarceration terms, including suspended sentences, and later parole release. Criminal sanctions also come in different forms, including fines, incarceration, and community service.12

In comparison, a violation of immigration law almost invariably makes a noncitizen removable.13 While other sanctions exist, they are in addition to removal, not in lieu of it. Immigration law occasionally imposes sanctions other than removal that are similar to criminal sanctions. These include fines and incarceration for working without authorization using fraudulent documents,14 failing to depart pursuant to a removal order,15 improperly entering the country,16 marriage fraud,17 establishing a business for the purpose of evading the immigration laws,18 and unlawfully reentering the country after being removed.19 As another sanction, the law imposes a delay of three years or ten years for a noncitizen to apply to reenter the country after being removed.20

Yet each of these sanctions accompanies removal, rather than replacing it. Rather than arranging sanctions along a spectrum of severity as criminal law does, immigration law provides a baseline sanction—removal—and then stacks additional sanctions on top of that, depending on the nature of the violation.21 With some exceptions,22 a noncitizen is removable regardless of the severity of the violation of immigration law. Thus, a student who violates her student visa status by working an hour over the time allotted in the visa requirements is as removable as a noncitizen involved in terrorist activity.23 A noncitizen spouse of a business visa holder who works without authorization is as removable as a noncitizen who participated in a long-running alien smuggling enterprise.24

Crimes such as turnstile jumping,25 minor shoplifting,26 or passing a bad check27 may constitute grounds for removal. Almost any drug crime, including possession of more than thirty grams of marijuana, is a removable offense.28

Nor does immigration law permit consideration of the circumstances surrounding the violation such as the intent of the violator or his conduct during its commission. For example, when deciding whether a noncitizen is removable for committing an aggravated felony, a judge may not consider the individual’s conduct. Instead, the focus is exclusively on the nature of the crime.29

C. Removal as Punishment

The value of using removal as the sole immigration sanction depends on the purpose for which removal is intended. Removal is treated as a civil sanction, not a punishment, even when it results from a criminal conviction.30

Classifying removal as a civil sanction is inconsistent with one of the two rationales that proponents of expanding criminal grounds for removal tend to proffer: that deportation is “part of our efforts to control serious crime in our communities” and is needed “to maintain the credibility and legitimacy of our immigration laws.”31 As Daniel Kanstroom points out, “the ascendency of the crime control justification, together with the increasing real-world convergence between our criminal justice and deportation systems,” suggest that punishment is at work here at least as much as any civil justification that is traditionally offered.32 Removal resembles punishment in that it serves to incapacitate the deported noncitizen,33 is meant to deter others,34 and may function as well as a type of retribution.35

If the purpose behind the expansion of grounds for removal is in any part punitive, it makes no sense to use a single undifferentiated sanction instead of the kind of graduated system of sanctions in criminal law that is meant to match the offense with some penological basis (whether it is incapacitation, deterrence, retribution, or another). The consequences of removal compel this conclusion as they are often at least as harsh as any criminal sanction.36 The Supreme Court has long acknowledged that deportation acts as a penalty, even while stopping short of characterizing it as a criminal punishment.37 The Court has more than once compared deportation to exile or banishment.38 This is particularly true for permanent residents and other long-term immigrants. Current immigration permits removal of noncitizens who grew up in the United States, whose family members all reside here, who are the emotional and financial support for children or elderly parents, or who have other attachments to this country that render the sanction of removal particularly harsh.39

Moreover, because removal is applied with little to no regard for the seriousness of the crime or the individual circumstances, the disparity between the weight of the criminal and immigration sanctions can be great.

II. Proposal: A Nuanced System of Immigration Sanctions

Visiting the sanction of removal on all noncitizens regardless of their circumstances or the circumstances surrounding the violation seems unjustified. A system of sanctions that is more responsive to the circumstances of the violation and the consequences to the individual is called for. In light of the ongoing convergence of criminal and immigration law, it makes sense in seeking solutions in immigration law to look to the system of sanctions already established in criminal law.
What would a graduated system of immigration penalties look like? I propose that any such system embody two overarching criteria: (1) whether the violation renders the individual wholly unfit to remain in this country, taking into account not just the nature of the violation but also the circumstances surrounding its commission, and (2) the stake that the noncitizen has in this country. The first reflects the nature of criminal sentencing in that it accounts for both the seriousness of the offense and the context of its commission. The second arises from the multilevel nature of immigration status, from temporary visitor to long-term presence to legal permanent resident.

This is a classic balancing test. When the stake that the individual has in remaining in this country is great, and the immigration violation and surrounding circumstances minor, the penalty should be lighter. When the immigration violation is grave, the circumstances are comparatively reprehensible, and the individual has little stake in remaining in this country, the penalty should be heavier and include removal as a potential sanction. Below are examples of how this proposal might play out depending on the individual’s immigration status.

A. Legal Permanent Residents

For legal permanent residents, the test I propose would apply only when the ground for removal is a criminal conviction. Most of the deportability grounds that apply to legal permanent residents are crime-related, and most of those criminal grounds also exclude the resident from any form of relief from removal available for other removal grounds.44

Applying the two criteria set out above, the criminal sanction imposed for the conviction should suffice as a penalty for the vast majority of legal permanent residents. The first criterion, addressing whether the individual is unfit to reside in this society, is (at least in theory) accomplished through the criminal sentencing process. Criminal sentencing takes into account the nature of the crime and the individual’s conduct.

The second criterion, accounting for the individual’s stake in this country, is inherent in the individual’s status as a permanent resident. This category of noncitizens is likely to have strong ties to the United States in the form of family, work, friendships, cultural assimilation, economic investment, and investment in the community. There may be some leeway for imposing a removal sanction when the crime is particularly serious and the permanent resident immigrated recently with little previous contact with the United States so that these ties do not yet exist.45

When the criminal sanction alone does not suffice, sanctions other than removal should be available. Imposing additional time between the acquisition of permanent resident status and the ability to apply for citizenship is one option. This would balance concern about the individual’s fitness to join the citizenry with the need to avoid unwarranted harm to the individual and others affected by her removal.44 Probation is another alternative, essentially placing the permanent resident on notice that violation of any probation condition may result in removal.

Sanctions for permanent residents short of removal have another benefit. Refraining from removing permanent residents requires the United States to take responsibility for circumstances that are more likely to be of our own creation than those of another country, especially in the case of long-term permanent residents and those who grew up in this culture. When a long-term permanent resident commits a crime, rather than foisting off the problem on the individual’s country of origin, the United States would take responsibility on an international level for the actions of individuals whose lives were lived and shaped here.

B. Violations of Immigration Status

Many immigrants in the country on temporary visas are subject to removal when they violate the conditions of their visa. Examples are students who work more than the part-time hours allotted by law41 or spouses of certain high-skilled workers, managers, or executives here on temporary assignments who work without employment authorization.46

In this category, the second criterion of stake in this country seems less compelling than in the case of permanent residents. Nevertheless, there is an important stake in being permitted to remain to complete one’s studies. More compelling perhaps is the interest in staying with one’s spouse while she completes her work assignment. The stake increases, of course, when the noncitizen has an opportunity for permanent residence based on the temporary visa.47

Does this violation render the noncitizen unfit to remain in the United States? The nature of the violation on its face does not seem grave. A student who works thirty hours rather than the allotted twenty is not causing direct harm to others and is unlikely to be substantially displacing a U.S. worker. Perhaps the more serious element here is the rule-breaking itself. The government granted permission to the temporary visitor to enter the country under certain conditions. Why not allow the government to withdraw that permission when the individual violates the conditions on that grant of permission?

The answer is that a more graduated sanction is likely to produce a result that is less harmful to the individual and to the U.S. community. When the offense is not serious, and removal of the spouse or student impacts the purpose for providing the immigration benefit, why not use a lesser sanction if that would ameliorate the harms? If removing the spouse would impact the quality of the visa holder’s work or cause the visa holder to accompany the spouse to the home country, or removing the student would deprive both school and student of that individual’s participation in the educational community, the harm relates directly to the immigration benefit.

Here, penalties in the nature of fines may suffice to punish and deter the undesirable conduct because the
motivation for completing one’s studies or remaining with one’s spouse is sufficiently high that a lesser sanction is likely to accomplish the goal. Another alternative parallels the suspended sentence in the criminal context. Immigration relief such as a stay of removal, in which the noncitizen is determined to be removable but the sanction is stayed, would provide the same level of retribution and deterrence as a suspended sentence.

C. Undocumented Immigrants: Unauthorized Entry and Visa Overstays

The case of noncitizens whose mere presence in the country is an immigration violation poses a more difficult problem in a system of graduated sanctions. Undocumented immigrants are present in the United States because they have either entered clandestinely or overstayed the time limits imposed as a condition of their entry. Removal seems more justifiable because it appears to act less as a sanction and more as a correction of an unlawful situation.

However, under current law, removal is imposed even in circumstances when the noncitizen has a path to lawful status.48 In those circumstances, removal on the basis of the immigration violation acts solely as a sanction for the violation, and the concerns laid out above come into play. Here, stake in remaining in the United States is probably the most difficult and variable criterion. Many individuals unlawfully present in the United States have few ties here. Numerous undocumented immigrants, however, have accrued many years of residence in the United States and have family ties, employment, and investment in the culture and community. Some may have arrived as children and have little or no attachment to the country of their birth.

The penological interest of greatest concern here is deterrence. Allowing noncitizens who entered or overstayed unlawfully to remain in the country raises concerns that others will be encouraged to do the same. An inadequate sanction will result in underdeterrence. That does not compel the conclusion, however, that removal is the only adequate penalty. Immigration law already provides for criminal sanctions for clandestine entry,49 This sanction may be enough to deter others. Even if it isn’t, there is little to suggest that removal will act as a greater deterrence, as the population of undocumented immigrants has grown50 and reentries after removal have continued unabated.51

One alternative to removal that crosses the boundary between civil and criminal sanctions might be the imposition of a fine.52 Probationary delay in the acquisition of lawful status is another option. Delaying the noncitizen’s ability to become a lawful resident could be accomplished using statutory or administrative measures already in existence, such as a stay of removal53 or deferred action on enforcement of removal.54 Such a delay acts as a sanction because it renders the noncitizen ineligible for most forms of government benefits55 and deprives the noncitizen of the statutory privilege of bringing other family members into the country.16

III. Conclusion

This brief piece does not address any of the thorny implementation questions the proposal raises. Who should create such a system? Between Congress, the Department of Homeland Security, and the courts, which is most competent to shape a system of relief that would institute a just and effective system of graduated sanctions? The answer likely involves shielding the process from the highly charged political atmosphere surrounding immigration policy making while allowing the decision maker to consider matters of social policy and penological motivations.

The other difficult question is who should be charged with implementing a graduated system of immigration sanctions. On the one hand, the executive branch has had this charge for over a century and unquestionably has acquired expertise in imposing the removal sanction. On the other, courts have much more expertise in implementing a system of graduated sanctions in the criminal law context. Given the recent tendency toward merger with criminal law, providing judges with at least some power to impose immigration sanctions in some contexts is neither far-fetched nor unprecedented.57

Notes

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2 Miller, supra note 1, at 619. See Demleitner, Misguided Prevention, supra note 1, at 552.

3 Miller, supra note 1, at 619.


5 Since 1990, knowingly marrying in order to evade immigration laws, voting in a federal election as a noncitizen, and falsely claiming citizenship to obtain a benefit or employment have become criminal violations leading to

Between 1908 and 1980, approximately 48,000 immigrants were deported based on criminal convictions. Demleitner, Immigration Threats, supra note 1, at 1063 (citing U.S. Immigr. & Naturalization Serv., 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 187, tbl. 67 (1999)). In 2001 alone, there were more than 70,000 deportations. Demleitner, Immigration Threats, supra note 1, at 1063 (citing Schuck & Williams, supra note 1, at 385).

Moreover, when a noncitizen violates both criminal and immigration laws, the law does not take into consideration the sanctions imposed by each system. Usually the criminal sentence is served first, and the removal sanction (and any additional immigration sanction) is imposed afterward. Margaret H. Taylor & Ronald F. Wright, The Sentencing Judge as Immigration Judge, 51 EMORY L.J. 1131, 1134 (2002).

For example, exceptions to removal for a crime of moral turpitude take into account the age of the noncitizen, the maximum sentence for the offense, and the sentence actually imposed. INA § 212(a)(2)(A)(ii). Removability for smuggling is likewise contingent on the circumstances: a waiver is available when the noncitizen smuggled a spouse, parent, son or daughter. INA § 212(d)(11).

See, e.g., U.S. Sentencing Commission, GUIDELINES MANUAL (setting out graduated sentences depending on the nature of the offense and differing sets of facts); NY Penal Law, Title E, “Sentences” (setting out categories of offenses, gradations of punishment, and categories of punishment such as incarceration, probation, conditional discharge, fines, and restitution); Oregon Statutes Title 14, ch. 137 (same).

See Immigration and Nationality Act (“INA”) §§ 212 (setting out the categories of “Excludable Aliens”) & 237 (setting out the categories of “Deportable Aliens”). Immigration law provides some limited avenues for relief from exclusion and deportation, but these do not create a system of graduated sanctions. For some noncitizens who fall within one of the statutory removal categories, the INA provides certain waivers and relief from removal. For example, noncitizens who are inadmissible because they are unlawfully present in the country may be eligible for a waiver if they are spouses or sons and daughters of citizens or permanent residents and the removal would work an extreme hardship on that relative. INA § 212(a)(9)(Y)(v).

Permanent residents and long-term nonresidents may escape removal altogether if they meet the standards for “cancellation of removal,” which confers or maintains permanent resident status. See INA § 240A(a) (providing for cancellation of removal for permanent residents if the noncitizen has been a permanent resident for at least five years, has resided in the United States continuously for at least seven years after admission to the United States, and has not been convicted of an aggravated felony); § 240A(b) (providing for cancellation of removal for nonpermanent residents if the noncitizen has been continuously present in the United States for at least ten years during which s/he has been of good moral character, has not been convicted of certain crimes, and shows that removal would result in “exceptional and extremely unusual” hardship for a spouse, parent, or child who is a U.S. citizen or permanent resident). These waivers or avenues for relief merely serve to illustrate that removal acts more as an on-off switch than a tailored sanction.
“the agency responsible for removing aliens considers incapacitation to be its primary mission”) (citing Office of Detention & Removal, U.S. Dep’t of Homeland Sec., Detention and Removal Operations (defining mission as promoting public safety and national security through deportation of removable aliens)), at http://www.ice.gov/graphics/dro/index.htm (last modified May 5, 2005). See also Kanstroom, supra note 1, at 1894 (citing James Q. Wilson, THINKING ABOUT CRIME 145-61 (2d ed. 1983)).

34 See Miller, supra note 1, at 617; Kanstroom, supra note 1, at 1894.

35 Kanstroom, supra note 1, at 1893-94 (citing comments by legislators connecting deportation to punishment: “As Senator William Roth framed this view, ‘the bill broadens the definition of aggravated felon to include more crimes punishable by deportation.’”) 142 Cong. Rec. S4600 (statement of Sen. Roth); 142 Cong. Rec. H2376-87, H2458-59 (statement of Rep. Becerra) (arguing that although deportation is an acceptable punishment, permanent exile is too harsh).

36 Fifth and Sixth Amendment criminal process rights do not apply in removal proceedings except to the limited extent that “fundamental fairness” requires them. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (rejecting claim of deportable noncitizen that she was entitled to criminal trial-type rights); Shaughnessy v. United States, ex rel. Mezei, 345 U.S. 206, 212 (1953) (holding that initial entrant has no constitutional rights, including due process rights). Noncitizens in removal proceedings generally do not have the right to appointed counsel at government expense, INA § 292, nor are they protected against self-incrimination. See Bustos-Torres v. INS, 898 F.2d 1053, 1056-57 (5th Cir. 1990); Lavoie v. INS, 418 F.2d 732, 734 (9th Cir. 1969). The Ex Post Facto Clause does not prohibit retroactive application of laws to immigrants in removal proceedings. Johannessen v. United States, 225 U.S. 227, 242 (1912); Harris v. Shaughnessy, 342 U.S. 580, 593-96 (1952) (holding that the Alien Registration Act of 1940 did not contravene the Ex Post Facto Clause). Instead, only the Due Process Clause protects immigrants. Yamataya v. Fisher, 189 U.S. 86, 100-02 (1903). See also Kanstroom, supra note 1, at 1895.

37 See, e.g., AADC, 525 U.S. at 491; Bugajewitz, 228 U.S. at 591. Because deportation is categorized as civil, noncitizens in deportation proceedings do not enjoy Eighth Amendment protections. Briseño v. INS, 192 F.3d 1320, 1323 (1999).

38 See, e.g., Galvan v. Press, 347 U.S. 522, 530-31 (1954) (rejecting the alien’s Ex Post Facto Clause claim, but observing that “since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation”).

39 Bridges v. Wixon, 326 U.S. 135, 154 (1945) (stating “[t]hat deportation is a penalty—at times a most serious one—cannot be doubted”). See also id. (noting that deportation places “the liberty of an individual . . . at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom”), AADC, 525 U.S. at 498 (1999) (Ginsburg, J., concurring) (“Deportation has a far harsher impact on most resident aliens than many conceded ‘punishment[s]’. . . .”) (quoting G. Neuman, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 162 (1996)). See also Neuman, supra, at 126 (stating that “[i]nproofing the alien from home, friends, family, and work would be severe regardless of the country to which the alien was being returned; breaking these attachments inflicts more pain than preventing them from being made”).

40 Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating “deportation is a drastic measure and at times the equivalent of banishment or exile”); Galvan, 347 U.S. at 530 (same) (also declaring that “deportation may . . . deprive a man of ‘all that makes life worth living’”) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

41 Morawetz, supra note 25, at 1938.

42 See, e.g., INA § 240(a) (no cancellation of removal for permanent residents with aggravated felony convictions (see also § 101(a)(43) (setting out extensive list of crimes defined as aggravated felonies)); § 240B (no voluntary departure for aliens with aggravated felony convictions); § 212(h) (denying waiver of certain grounds of inadmissibility to permanent residents with aggravated felony convictions).

43 Permanent residents who immigrate based on employment under § 203(b) are more likely, certainly, to immigrate without ties than those who immigrate as family members under § 203(a). Nevertheless, employment itself can constitute a strong attachment.

44 To some extent, the current system already imposes this sanction. Conviction of certain crimes renders a permanent resident unable to establish the “good moral character” required to naturalize. Aggravated felony convictions amount to a permanent bar on naturalization. See § 316(a) (defining good moral character) and § 101(f)(8) (establishing the aggravated felony bar). Crimes involving moral turpitude, on the other hand, bar a finding of good moral character until five years after the offense was committed. See §§ 316(a) & 101(f)(3) (establishing the five-year bar). However, since the penalty for conviction of either category of crime is removal, this delay before eligibility for naturalization cannot be treated as a form of graduated immigration sanction.

45 INA § 101(a)(15)(F)(X)(1); INA § 237(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status).

46 INA § 237(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status). Spouses of high-skilled employees bearing H-1B visas generally do not have authorization to work. 8 C.F.R. § 214.2(h)(9)(iv).

47 Several temporary employment-based visas open the way to permanent resident status. See INA § 101(a)(15)(F)(ix)(b) (establishing the H-1B visa, which allows temporary employment visas for aliens in a specialty occupation); INA § 101(a)(15)(E)(i) & (ii) (establishing the E visa, which allows temporary employment visas for aliens entering the United States under a trade treaty); INA § 101(a)(15)(L) (establishing the L visa, which allows temporary employment for an alien as a manager or executive).

48 See, e.g., § 203(a) & (b) (creating pathways for admissions on the basis of family and employment).


52 See S. 1033, 109th Cong., § 304 (2005) (pending Senate bill proposing, inter alia, imposition of a fine for undocumented immigrants to obtain lawful status).
56 See INA § 203(a) (defining the family-based paths to immigration).
57 Taylor & Wright, supra note 21, at 1143-51 (describing now-repealed statutory authority for judges to issue binding “judicial recommendations against deportation”).