

Re-thinking Illegal Entry and Re-entry

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This Article traces the history of two federal immigration crimes that have long supplemented the civil immigration system and now make up nearly half of all federal prosecutions: illegal entry and illegal re-entry. Little has been previously written about the historical lineage of either crime, despite the supporting role each has played in enforcing the nation's civil immigration laws, particularly along the U.S.-Mexico border. This Article takes a critical look at the enforcement of each crime—from when they were initially conceived of as a way to deter illegal immigration, then as a way to target dangerous aliens, and most recently as a means to do both. These shifting strategies, however, have one thing in common: ineffectiveness. Enforcing the crimes has never meaningfully deterred illegal immigration, and the government's poorly designed proxy to determine whether an alien is "dangerous" has ensured that prosecutions have not made the public safer. The most recent period is particularly troubling—enforcement has led to approximately 72,000 combined prosecutions a year, at the cost of well over a billion dollars a year, and at the expense of prosecuting more serious crimes. Despite these huge costs and the related human carnage, the criminalization of illegal entry and re-entry is invariably left out of the discussion of comprehensive immigration reform, which reflects the silent treatment these crimes have received in the immigration and criminal law literature more generally. By reviewing eight decades of ineffective policy, this Article makes the case for why there should be a fundamental re-thinking concerning the way in which the United States uses the criminal justice system to regulate immigration.

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INTRODUCTION

Finding common ground in the debate on comprehensive immigration reform in the United States remains elusive. But politicians apparently agree on one issue: the appropriateness of using the criminal justice system—rather than merely the civil immigration system—to regulate illegal entry (entering the United States without legal permission) and illegal re-entry (entering the United States after having been deported).¹ Conversations about reform have simply not included talk about the enforcement of these crimes. This silent treatment mirrors the lack of attention these crimes typically receive in academic literature on both immigration law and criminal law more generally.²

The crimes of illegal entry and re-entry deserve more attention. With 72,000 combined convictions in 2011, almost *half* of all federal prosecutions are now for illegal entry or re-entry,³ a stunning and mostly unnoticed development in the federal criminal justice system. The prosecutions occur almost exclusively in districts along the U.S.-Mexico border, where they have been nothing short of cataclysmic for the administration of justice. Prosecutors, defense counsel, and court personnel are overwhelmed by a tidal wave of cases. The District Court of Arizona, for example, was driven to declare a judicial emergency—the first time any district has been forced to do so in almost three decades.⁴ To support the huge caseloads, many border districts have turned federal criminal proceedings into something unrecognizable as

1. See 8 U.S.C. § 1325 (1952) (illegal entry); 8 U.S.C. § 1326 (1952) (illegal re-entry).

2. As Professor Ingrid Eagly notes in one of the few articles to grapple with the issues surrounding the government's newfound vigor for prosecuting immigration cases:

Criminal law scholars have typically overlooked immigration crime in their study of federal criminal law. In part, this omission reflects the tendency to treat white collar crime as the paradigmatic example of federal prosecution. Immigration law scholars, in contrast, have traditionally explored civil regulatory questions of admission, exclusion, and removal, and largely ignored the criminal arm of the immigration bureaucracy. A nascent body of literature has begun to document the increasing merger of the immigration and criminal systems, yet such analysis has focused on how the federal immigration agency imposes quasi-criminal sanctions in a setting that skirts criminal constitutional rights.

Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1283–84 (2010) (footnotes omitted). See generally Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009), http://www.columbialawreview.org/Sidebar/volume/109/135_Chacon.pdf (discussing some of the issues surrounding the government's use of the criminal justice system to regulate immigration and listing the literature on the subject).

3. See *infra* text accompanying notes 345–48 (providing annual statistics for prosecutions).

4. *In re* Approval of Judicial Emergency Declared in Dist. of Ariz., 639 F.3d 970, 971–75 (9th Cir. 2011) (granting the District of Arizona's request to declare a judicial emergency and noting the “crushing criminal caseload”).

such: immigration officials, instead of Assistant U.S. Attorneys, now prosecute defendants, and defendants often meet with their attorneys for mere minutes before pleading guilty—alongside dozens of other defendants—in front of magistrate judges.⁵ The government has also diverted resources from prosecuting more serious crimes and now spends well over one *billion* dollars a year, mostly on incarceration costs, on these cases.⁶ This colossal investment, however, is neither deterring illegal immigration nor making the public safer—the two claimed objectives of the prosecutions.⁷

This Article contends that policymakers and scholars need to start paying more attention to these crimes and their enforcement. In making that case, this Article reviews eight decades of ineffective enforcement efforts of these immigration crimes—crimes that have quietly become a significant aspect of immigration enforcement. More specifically, this Article critically examines the shifting purposes the government has cited to justify prosecuting illegal entrants and re-entrants rather than merely sending them through the civil immigration system—from when prosecutions were initially conceived of as a way to deter illegal immigration, then as a way to target dangerous aliens, and most recently, as a means to do both. This Article's central claim is that prosecuting illegal entrants and re-entrants has not meaningfully fulfilled either penological goal. This failure should initiate a fundamental re-thinking of the wisdom of using the criminal justice system as a tool to regulate immigration through the prosecution of illegal entry and re-entry cases.

Part I of this Article tracks the first stage (1929 through 1986) of the journey to the current policy mess and the rise of the claim that prosecuting illegal entrants and re-entrants could deter illegal immigration from Mexico. Part I also documents the birth of various aspects of policy that play an important role in enforcing the crimes today. Part I begins by discussing Congress's creation of the modern versions of both crimes in 1929 to combat illegal immigration along the border. But, of the hundreds of thousands of individuals apprehended for illegal entry or re-entry, no more than 10,000 a year were prosecuted, ensuring that the threat of prosecution was unlikely to meaningfully deter individuals from coming to the United States illegally. Ineffective deterrence, however, was likely the point. Given

5. See *infra* text accompanying notes 339–43 (discussing the procedures used in current immigration prosecutions).

6. See *infra* text accompanying notes 365–66 (noting that the detention cost for illegal re-entry defendants alone is around \$750 million annually).

7. See *infra* Part III (discussing the failure of current prosecution policy).

the importance of illegal immigration to the nation's economic engine, immigration officials undoubtedly did not want to actually discourage it.⁸

Part II covers the evolution of the crimes of illegal entry and re-entry from 1987 through 2004, highlighting the dramatic shift in strategy behind prosecuting these cases. No longer were the crimes considered tools to deter illegal immigration per se; rather, prosecuting such cases came to be viewed as a way to protect the public from dangerous aliens who came illegally to the United States to commit crimes.⁹ This Part describes the government's terrible proxy—the “prior conviction enhancement scheme”—which was created to determine whether an alien was dangerous. The proxy could deem aliens dangerous based on a single, non-violent prior conviction, which could have occurred decades prior.¹⁰ Thus, many individuals were labeled dangerous who were not. Nevertheless, such individuals were targeted for prosecution—both to specifically deter them from coming to the United States and to incapacitate them—and many were given harsh sentences for non-violent, regulatory offenses.

Part II also follows the rise in the number of prosecutions of illegal entry and re-entry cases to around 20,000 a year, most of which occur along the U.S.-Mexico border.¹¹ This rise in prosecutions was made possible because of the “fast track” program, a special type of plea program whereby some illegal entry and re-entry defendants could receive a discounted sentence if they agreed to waive their rights and plead guilty quickly.¹² While the program mitigated otherwise harsh penalties, it raised its own set of questions, particularly because the program was not evenly applied throughout the country.¹³ The program

8. The history discussed in Part I is, in some ways, a familiar one. A number of scholars have traced the progression of immigration enforcement in the United States, which inevitably requires the spotlight to shine on the U.S.-Mexico border. These scholars have focused on civil enforcement—the ebb and flow of deportations and grants of voluntary departure. Enforcing the criminal prohibition against illegal entry and re-entry, however, is rarely mentioned. When mentioned, it is merely as an aside. One goal of this Part is to add an additional layer to a picture that other scholars have already painted, creating a more detailed depiction of the government's historical efforts to regulate immigration.

9. See *infra* text accompanying notes 215–19 (discussing the Department of Justice's shift toward prosecuting illegal entrants and re-entrants with prior criminal histories).

10. See *infra* text accompanying notes 241–44 (discussing the low standard for what qualified a defendant as “dangerous” under the prior-conviction enhancement scheme).

11. See *infra* text accompanying notes 293–97 (noting the rise in the number of prosecutions between 2001 and 2004).

12. See *infra* text accompanying notes 225–34 (discussing the procedures implemented by the fast-track program and the reason the program was created).

13. See *infra* text accompanying notes 256–72 (discussing the wide differences in how district

also further opened the door to the idea that it was appropriate to drastically cut, for the sake of a more efficient guilty-plea process, the amount of process a federal criminal defendant could receive—an idea on which the government now heavily relies.

Part III documents the final period of illegal entry and re-entry prosecutions from 2005 to the present day, and the 72,000 combined prosecutions per year that are overwhelming border districts. This most recent period has witnessed the marriage of the worst aspects of prior periods—the belief that prosecuting cases can deter illegal immigration along the U.S.-Mexico border and that the prior-conviction scheme can be used to target particularly dangerous individuals for heightened sentences. This Part explores why neither goal has been met—despite the explosion in prosecutions—and the consequences of pursuing what appears to be a self-destructive strategy.

The Article concludes with parting thoughts on where the government's illegal entry and re-entry prosecution strategy might go from here. Ultimately, the prognosis is that conditions will likely get much worse before they improve.

I. THE HISTORICAL BACKDROP: THE INEFFECTIVE ATTEMPT TO DETER ILLEGAL IMMIGRATION (1929–1986)

The long opening chapter of the story of the crimes of illegal entry and re-entry covers the years 1929 through 1986. In reviewing this period, this Part places each crime in the broader context of the evolution of U.S. immigration policy. But given the complexity of that policy, the provided context is far from exhaustive. Nevertheless, reviewing each crime in the long shadow of civil immigration enforcement, particularly along the U.S.-Mexico border, reveals that each crime played a supporting role in enforcing U.S. immigration law—a role that scholars have previously ignored.¹⁴ As explained

courts across the country applied the fast-track program and the difficulty in mounting a defense against prosecution under the program).

14. Historical accounts of the crimes are brief and often inaccurate. For example, the most “thorough analysis” concerning the history of illegal re-entry as a crime has been credited to a Judge Posner dissent, which, in its few paragraphs treatment of the issue, gets the history wrong—albeit benignly—by claiming that a 1918 law is the “origin[]” of the crime. See Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry after St. Cyr*, 19 GEO. IMMIGR. L.J. 455, 457 (2005) (citing *United States v. Anton*, 683 F.2d 1011, 1020 (7th Cir. 1982) (Posner, J., dissenting)). Predecessor illegal re-entry provisions were enacted in 1798 and 1910. See *infra* notes 27 and 28. Likewise, a common—but incorrect—assumption about the crimes is that they were not enforced before the mid 1990s and that no more than a couple thousand individuals were prosecuted for either crime in any given year before then. For example, a 2004 U.S. Sentencing Commission report stated that before 1994, “there were relatively few immigration cases sentenced in the

below, just as Congress began to perceive that illegal immigration from Mexico was a threat, it criminalized illegal entry and re-entry. In this new battle, Congress viewed these crimes as powerful weapons to deter illegal immigration. From the beginning, however, intractable problems made achieving deterrence unlikely. Moreover, as illegal immigration exponentially increased to satisfy the nation's need for cheap labor, the number of prosecutions failed to keep pace. Consequently, despite rhetoric from immigration officials about using the criminal justice system to discourage illegal immigration, only a tiny fraction of illegal entrants and re-entrants were prosecuted. This stance reflected the paradox at the center of U.S. immigration policy throughout the century: the purported desire of the United States to reduce illegal Mexican immigration, while at the same time not wanting to discourage it for fear of stalling the country's economic engine. This enigmatic relationship thus resulted in the arbitrary prosecution of a select few, ensuring that prosecutions did not deter illegal immigration. The result was that criminalizing illegal entry and re-entry did not fulfill its articulated purpose.

A. Early Illegal Entry and Re-entry Policy (1929–1951)

The account of the crimes of illegal entry and re-entry begins in 1929 when Congress began to flex its immigration-regulation muscles. While the United States essentially had open borders for most of the nineteenth century, Congress spent the first few decades of the twentieth century creating an ever-growing list of classes of individuals who were barred entry into the United States and subsequently subject to deportation if they entered.¹⁵ This period also reflected a shift in

federal courts,” and noted that there were no more than a couple thousand prosecutions annually in the early 1990s, which contrasted with the late 1990s when each year averaged almost 10,000 prosecutions. U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINE SENTENCING, at viii (Nov. 2004). As discussed below, however, there were over 10,000 illegal entry and re-entry prosecutions combined per year in the early 1950s and the late 1970s.

15. See generally E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 47–213 (1981) (summarizing all immigration legislation enacted between 1860 and 1929); see also Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086 (making deportable anyone who was excludable to begin with). Among Congress's most notable efforts to restrict immigration occurred in 1921 and 1924, when it established quantitative restrictions on who could immigrate to the United States based on national origin and race. See Quota Act of 1921, Pub. L. No. 67-5, ch. 8, § 2, 42 Stat. 5; Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, § 11, 43 Stat. 153, 159 (discussing the 1924 Act and stating that it “fundamentally altered the landscape of U.S. immigration law and policy”). Those restrictions had the effect of curtailing European immigration, as countries from the Western Hemisphere—including Mexico—were exempted from the quotas. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 50 (2004). In 1924, pursuant to the Act of May 28, 1924, Pub. L. No. 68-153, ch. 204, 43 Stat. 240, Congress also created the Border Patrol and

thinking about illegal immigration as a problem stemming from Mexico rather than from Asia and Europe. As noted historian Mae Ngai explained, “[I]mmigration policy [during this period] rearticulated the U.S.-Mexico border as a cultural and racial boundary, as a creator of illegal immigration. Federal officials self-consciously understood their task as creating a barrier where, in a practical sense, none had existed before.”¹⁶

This shift in thinking included the belief that the strong hand of the criminal law had a part to play in the U.S.-Mexico immigration battle. As a result, Congress passed legislation in 1929 that reconceptualized the relationship between immigration law and criminal law by fusing the two and laying the groundwork for the modern crimes of illegal entry and re-entry.¹⁷ In doing so, Congress wedded the crimes with the goal of deterring illegal immigration from Mexico.

One portion of the 1929 legislation made unlawful entry or attempted entry into the United States misdemeanors, punishable by up to a year in jail.¹⁸ According to legislative history, Congress enacted the new offense to help immigration officials with “enforcement of the law,” particularly along the U.S.-Mexico border,¹⁹ and as an extra deterrent to prevent non-citizens from attempting to enter the United States

provided it a small budget and approximately 450 officers. See PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 32–33 (2000). This made it at least nominally more difficult to sneak into the country via the land border. See Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT’L L.J. 1, 33–34 (2001) (summarizing the history of exclusionary immigration laws and the creation of the Border Patrol).

16. NGAI, *supra* note 15, at 67.

17. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1837 (2007) (noting that the 1929 law was a “new mechanism” to enforce a “new policy” on immigration); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 76 (2003) (“The criminalization of unauthorized entry signaled a radical departure from previous immigration policy, which deemed deportation to be a civil, or administrative, procedure.”); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1717 (2009) (“The 1929 legislation pioneered the modern immigration sanctions scheme, employing a range of punitive criminal sanctions paired with deportation.”).

18. See Act of March 4, 1929, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551 (codified at 8 U.S.C. § 180 (1929 sup. III)) (“Any alien who hereafter enters the United States at any time or place other than as designated by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or by both such fine and imprisonment.”). Under the then-prevailing sentencing regime (which lasted until 1987), a judge had complete discretion to select a sentence anywhere from probation to the statutory-maximum penalty. See *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (explaining the sentencing process before 1987).

19. *Hearings Before the H. Comm. on Immigration and Naturalization*, 70th Cong. 28 (1928).

“surreptitiously.”²⁰ Thanks to the legislation, for the first time in U.S. history, the mere act of entering the United States at a non-designated port of entry was a crime, rather than merely a civil offense resulting in deportation. The unlawful entry provision, however, was not entirely without precedent. Under the Passport Act of 1918 (passed at the tail end of World War I), Congress gave the President the authority to restrict the entry of non-citizens into the country “when the United States is at war”; failure to abide by those restrictions could result in prosecution and a sentence of up to twenty years.²¹ Relying on this authority, the President required aliens to present a passport to obtain entry into the United States.²² Thus, “persons entering illegally and found . . . to be without passports were liable to be prosecuted as well as deported.”²³ In effect, the law targeted individuals trying to sneak into the United States.²⁴ The Passport Act was used for several years along the border until courts held that legislation passed in 1921 rendered the Passport Act “inoperative and ineffectual.”²⁵ Congress intended the 1929 unlawful entry prohibition to reinvigorate the practice that had developed under the Passport Act, albeit by expanding the practice such that any unlawful entry (with or without a passport) could be subject to prosecution.²⁶

In another portion of the 1929 legislation, Congress created an illegal *re-entry* provision—the third of the century.²⁷ Earlier illegal re-entry

20. H.R. REP. NO. 70-2418, at 8 (1929).

21. Act of May 22, 1918, Pub. L. No. 65-154, ch. 81, 40 Stat. 559. *See Eagly, supra* note 2, at 1296–97 (drawing this same connection).

22. *See Flora v. Rustad*, 8 F.2d 335, 336 (8th Cir. 1925) (documenting the President’s use of the powers granted to him by the Passport Act of 1918).

23. JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 266 (1969).

24. *Id.* at 265–66.

25. *See United States v. One Airplane*, 23 F.2d 500 (S.D. Cal. 1927) (“[S]ubsequent legislation has supplanted the penal and forfeiture provisions of said War-Time Passport Act of 1918 so as to render such provisions inoperative and ineffectual.” (citation omitted)); CLARK, *supra* note 23, at 266 (citing *Flora*, 8 F.2d at 337) (discussing how the court found that criminal prosecution of illegal immigration under the Passport Act was unlawful and that deportation was the proper procedure). *See also Hearings Before the H. Comm. on Immigration and Naturalization*, 70th Cong. 28 (1928) (immigration official noting that a “circuit court of appeal decision recently [knocked]” out the provision of the Passport Act that had been used to prosecute unlawful enterers and, responding to the proposed language that would become the unlawful entry provision by stating that it would be helpful because “[t]he more teeth you put into the law that way, the better it is for enforcement”).

26. *See CLARK, supra* note 23, at 267 (“[T]he war-time ‘passport act’ has not only been revived by the [1929 unlawful entry provision,] but also extended [it], for now *any* illegal entry, whether with or without passport is a punishable offense.”).

27. The only pre-1900 federal illegal re-entry provision was enacted in 1798, when Congress passed the Aliens Act, which empowered the President to expel any non-citizen from the country

laws targeted a narrow group of illegal re-entrants: a 1910 law had made it a misdemeanor to “attempt . . . to return to or enter the United States” after having been deported for involvement in the prostitution trade,²⁸ and a 1918 law had made it a felony to “return or to enter the United States or attempt to return to or to enter the United States” after having been deported for being an “anarchist.”²⁹ The effect of the two prior illegal re-entry provisions, however, did not extend beyond their symbolic value of congressional concern about prostitution and anarchism. Neither affected the actual administration of immigration policy as the government did not meaningfully enforce either provision and both statutes were ultimately repealed in 1952.³⁰ Unlike those two

if such action was necessary to protect the public. *See* Aliens Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570. The Act, among other things, made it a crime for individuals to “voluntarily return[]” to the United States if they had been “removed or sent out of the United States by the President.” *Id.* Once convicted, imprisonment would last as “long as, in the opinion of the President, the public safety may require.” *Id.* However, no one was ever actually convicted under the provision. *See* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT’L L. 63, 105–10 (2002) (telling the story of the lone individual ordered deported under the Aliens Act). Controversy immediately surrounded the Act’s grant of power, and, two years after its enactment, Congress allowed it to expire. *Id.* at 76–80.

28. Act of March 26, 1910, ch. 128, § 3, 36 Stat. 264, 264–65 (codified at 8 U.S.C. § 138 (1926)). A violation was punishable by up to two years in jail. *Id.* Despite the relative novelty of making it a crime to illegally re-enter, the legislative history contains no discussion of the provision. It appears, however, that the crime was more a statement about prevailing attitudes regarding the wickedness of prostitution, rather than immigration policy; the illegal re-entry ban was passed during a period of “antiprostitution fever.” *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 714 (2005) (noting the “antiprostitution fever” of the first decades of the twentieth century and summarizing various laws passed in response).

29. Act of October 16, 1918, Pub. L. No. 61-107, ch. 186, § 3, 40 Stat. 1012–13 (codified at 8 U.S.C. § 137(h) (1926)). A violation was punishable by up to five years in prison. *Id.* The only light shed on Congress’s thought process emerged during a floor statement, when a supporter of the bill commented that the criminal provision was needed to keep individuals from returning “ad infinitum,” thereby explicitly linking the crime of illegal re-entry to the idea of deterrence for the first time. *See* 56 CONG. REC. 8109 (1918) (statement of Rep. Burnett). Just as the 1910 illegal re-entry provision was passed during a heightened period of concern about prostitution, the 1918 anarchist illegal re-entry provision was passed during the period of heightened concern about anarchism that followed the Bolshevik Revolution of 1917 in Russia. *See* Mary E. Fairhurst & Andrew T. Braff, *William O. Douglas: The Gadfly of Washington*, 40 GONZ. L. REV. 259, 275 (2005) (noting that the 1917 Alien Act and 1918 Sedition Act were passed in response to the first Red Scare). Thus, the anarchist provision likely reflected concerns about anarchism and the anxiety surrounding the Red Scare, rather than reflecting a shift in the thinking about how to deal with illegal re-entrants.

30. Typically no more than a few hundred individuals each year were deported for prostitution. *See* U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE tbl.33 (1954) (documenting the small number of individuals deported for being part of the “immoral class” from 1908 through 1954). Less than one hundred a year were typically deported for anarchist-related conduct. *See id.* (documenting the small number of individuals deported for being “subversive” or being an “anarchist” from 1908 through 1954). Of those who returned, there does not appear to be evidence that more than a tiny number were

provisions, the 1929 illegal re-entry provision was not limited to certain classes of previously deported individuals. Rather, the legislation made it a felony, punishable by up to two years in prison, for a non-citizen to “enter or attempt[] to enter the United States” after having been “deported in pursuance of law.”³¹ The need for the illegal re-entry provision, according to a House Report, was to address the “serious situation[,] particularly on [U.S.] land borders, whereby people deported to contiguous countries turn around and come back again without further penalty than exclusion or another deportation.”³² Another congressional report quoted a letter from the Secretary of Labor (then in charge of immigration),³³ and, in defending the need for the crime of illegal re-entry, stated:

[N]o prohibitive law can successfully be enforced without a deterrent penalty. The fact that possible deportation is not a sufficient deterrent to discourage those who seek to gain entry through other-than-regular channels is demonstrated by the frequency with which this department is compelled to resort to deportation proceedings for the same alien on several succeeding occasions.³⁴

Thus, Congress’s articulated motive in creating the crime was to deter individuals from returning to the United States illegally by providing an additional disincentive beyond deportation.

Immigration officials quickly adjusted to their new weapons in an

prosecuted under either provision before each was repealed in 1952. For example, a 1930 government report documented that only one individual over the past year had been prosecuted for illegally re-entering the country after having been deported for being an anarchist—and that prosecution was dismissed. U.S. DEP’T OF LABOR, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION 21 (1930). There also appears to be only one reported decision involving a prosecution of a defendant who illegally re-entered under either section. *See Mills v. United States*, 273 F. 625, 626–28 (9th Cir. 1921) (affirming the conviction of a defendant for attempting to return to the United States after having been deported for being “connected with the management of a house of prostitution”).

31. Act of March 4, 1929, ch. 690, § 1, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180(a) (1929 sup. III)).

32. H.R. REP. NO. 70-2418, at 6 (1929). *See Hearings Before the H. Comm. on Immigration and Naturalization*, 70th Cong. 27 (1928) (stating, in the context of discussing what would become the 1929 legislation with an immigration official who worked at the U.S.-Mexico border, that “[a] clause in here to the effect that aliens who are deported and attempt to enter again, that that shall be a felony, and they will be imprisoned. Now, you have a lot of trouble down there with these men that you push out of the country coming right back in again, do you not?”).

33. *See* Lauren S. Sasser, *Waiting in Immigration Limbo: The Federal Court Split over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 *FORDHAM L. REV.* 2511, 2513–14 (2008) (“The Treasury Department administered immigration law until 1903, when those duties were transferred to what would become the Department of Labor. In 1940, the Immigration and Naturalization Service (INS)—as it had been known since 1933—was moved to the Department of Justice (DOJ), where it stayed for more than sixty years.” (footnotes omitted)).

34. S. REP. NO. 70-1456, at 2 (1929).

attempt to deter illegal immigration. The government prosecuted hundreds of individuals within a few months after the 1929 legislation took effect.³⁵ That trend continued during 1930; according to one report, the government secured almost 7000 combined convictions for illegal entry and re-entry during 1930.³⁶ This number represented a high percentage of the nearly 21,000 deportable aliens apprehended during the year, most of whom could have been prosecuted for illegal entry or re-entry.³⁷ In light of the number of prosecutions, the report, echoing earlier sentiments about deterrence, stated that this prosecution effort “will provide an effective deterrent and that, as knowledge of its existence becomes more widespread, violations will diminish.”³⁸

A meaningful general deterrent effect from prosecuting illegal entrants and re-entrants, however, was unlikely. Criminologists have chronicled the struggle of criminal law to deter conduct.³⁹ Among the many problems are the underlying assumptions behind obtaining a meaningful deterrent effect—namely, that individuals contemplating committing crimes are also rational actors who know, and take into account, the potential criminal consequences of their actions.⁴⁰ Even setting aside those hurdles, there are special reasons to doubt that prosecuting illegal entrants and re-entrants would deter individuals from coming to the United States.

First, the knowledge hurdle is particularly acute in the context of prosecuting illegal entry and re-entry cases because the target audience is comprised of non-U.S. residents, many of whom neither have any familiarity with U.S. law nor speak English.

Second, the most important ingredient to an effective deterrent

35. See U.S. DEP’T OF LABOR, *supra* note 30, at 21 (noting that the government had initiated 113 illegal *re-entry* prosecutions within the first two months of the law taking effect and that the government initiated 1286 prosecutions for illegal *entry* within the first four months).

36. *Id.* The report documented that the average sentence length for an illegal re-entry conviction was about six months and the average sentence length for an illegal entry conviction was about two months. *Id.*

37. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 91 tbl.33 (2010) [hereinafter 2009 YEARBOOK OF IMMIGRATION STATISTICS], available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

38. U.S. DEP’T OF LABOR, *supra* note 30, at 21.

39. For an overview of the literature and a critique of the relationship between deterrence theory and criminal law, see Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004). See also David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1431–35 (2011) (summarizing criticism of increased sentence severity as a criminal deterrence tool).

40. See Robinson & Darley, *supra* note 39, at 175–81.

scheme—far more important than the potential penalty meted out—is the likelihood of prosecution.⁴¹ The chance of prosecution for illegal entry and re-entry, however, was miniscule. In 1930, although the government prosecuted a large percentage of the deportable aliens it apprehended, the government could not apprehend even a modest percentage of illegal entrants and re-entrants because the borders were still mostly unguarded; indeed, they remained that way until the 1990s.⁴² This condition meant that the ultimate risk of prosecution was trivial.⁴³

Third, individuals who illegally entered in the 1930s were (as they are today) quite motivated to come to the United States because typically they were looking for a better paying job and a better way of life.⁴⁴ Indeed, this motivation explained why immigrants were willing to move to a foreign country—and incur the collateral financial and personal costs of moving—in the first place. If bearing both those costs and the threat of deportation were not enough to dissuade someone from entering the United States illegally, the (particularly weak) threat of criminal prosecution was not likely to dissuade anyone either.⁴⁵

Thus, even in 1929, it was doubtful that prosecuting illegal entrants and re-entrants had a meaningful impact on illegal immigration beyond that provided by the threat of deportation. The result was that the mismatch of using the criminal justice system to deter unlawful border crossings was woven into the fabric of the crimes from the beginning.

41. Substantial research indicates that the certainty of apprehension, rather than the severity of penalty, is by far the most relevant factor in the deterrence calculus. See THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (Nov. 2010) (providing an overview of the relevant literature); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28 (2006) (“Current knowledge concerning deterrence is little different than eighteenth-century theorists such as Beccaria . . . supposed it to be: certainty and promptness of punishment are more powerful deterrents than severity.”); Patton, *supra* note 39, at 1432–35 (discussing the importance of certainty and swiftness of punishment in obtaining a deterrent effect and discussing research regarding the same).

42. See *infra* Part II.B (discussing the development of the illegal entry and re-entry provisions from the early 1990s to the early 2000s).

43. See Robinson & Darley, *supra* note 39, at 182 (noting that the perceived cost of actions affects the deterrence calculus).

44. See NGAI, *supra* note 15, at 70 (noting that many Mexican immigrants in the 1930s entered into the United States to work).

45. This was particularly so because defendants convicted of illegal entry or re-entry were not likely to receive a severe sentence; the maximum sentence could be only one year for illegal entry and two years for illegal re-entry. As a practical matter, most defendants received a sentence of a few months. See U.S. DEP’T OF LABOR, *supra* note 30, at 21 (documenting that the average sentence length for an illegal re-entry conviction was about six months and the average sentence length for an illegal entry conviction was about two months).

In any event, in the 1930s, the tumultuous changes in immigration law over the previous decades gave way to a period of legislative stability. Congress, grappling with the Great Depression, passed almost no immigration bills during the decade and, as one treatise explains, became “disposed to consider the subject [of immigration] adequately cared for.”⁴⁶ Moreover, as the promise of jobs evaporated, legal immigration during the 1930s plummeted.⁴⁷ Approximately a half-million immigrants entered the United States during that decade, the fewest number since the 1820s.⁴⁸ The lack of employment opportunities also meant the United States no longer perceived that it needed cheap, foreign labor.⁴⁹ As a result, immigration officials removed a large number of Mexican nationals from the country—according to one estimate, “[m]ore than [one] million people of Mexican ancestry were forcibly removed from the United States during the Depression years.”⁵⁰ A more limited number of individuals—approximately 5000 a year—were prosecuted and convicted of illegal entry or re-entry before being removed,⁵¹ a number that still reflected a low overall prosecution rate when compared to the large number of individuals that likely entered the United States illegally.

Unlike the 1930s, the 1940s witnessed several important developments in immigration law and policy. Congress both restricted immigration by expanding the list of deportable offenses,⁵² and liberalized it by repealing the Chinese Exclusion Act, which had barred Chinese laborers from entering the United States since 1882.⁵³

46. HUTCHINSON, *supra* note 15, at 249–50.

47. *See* NGAI, *supra* note 15, at 71 (noting that Mexican immigration declined in the 1930s due to the government’s exclusionary policies as well as the Depression).

48. *See* U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2004 YEARBOOK OF IMMIGRATION STATISTICS 5 tbl.1 (2006).

49. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 7 (1992) (noting that Mexicans provided a “critical supply of cheap labor” to American agriculture and industry, and that early twentieth century immigration restrictions provided specific exceptions for Mexicans); NGAI, *supra* note 15, at 135 (noting that the flood of cheap Mexican labor resulted in both depressed wages and market prices, and that many white farmers felt they were hurt economically by Mexican immigrant labor).

50. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 215 (2007).

51. *See* NGAI, *supra* note 15, at 60 n.14 (“Between 1930 and 1936 the service brought over 40,000 criminal cases against unlawful entrants, winning convictions in some 36,000, or [ninety] percent, of them.”).

52. *See, e.g.*, Alien Registration Act of 1940, Pub. L. No. 76-670, ch. 439, § 20, 54 Stat. 670, 671 (making it a deportable offense when one, “within five years after entry . . . knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law”).

53. Act of December 17, 1943, Pub. L. No. 78-199, ch. 344, § 1, 57 Stat. 600.

Congress also codified the practice of “voluntary departure,” whereby immigration authorities allowed individuals with “good moral character,” who would otherwise be deported, to leave the country voluntarily.⁵⁴ Granting an alien voluntary departure saved the government the time and expense of deportation proceedings, and aliens could avoid having an order of deportation entered against them.⁵⁵ This benefit was valuable to the alien, in part, because a defendant who illegally returned to the United States after having been granted voluntary departure could not be prosecuted for illegal re-entry—by definition, committing illegal re-entry requires the defendant to have previously been ordered deported.⁵⁶ Instead, this individual could be prosecuted only for illegal entry—a crime that carried a lower statutory-maximum penalty.⁵⁷

The early 1940s also saw a phenomenon that had serious reverberations throughout immigration policy: the country’s labor shortage—particularly of agricultural workers—due to World War II.⁵⁸ This labor shortage led to an unprecedented influx of Mexican workers, many of whom were welcomed back after their earlier removal during the Great Depression.⁵⁹ Many laborers entered the United States legally through a worker program called the Bracero program.⁶⁰ Through the Bracero program, the United States actively encouraged Mexican migration as “a cheap source of labor for southwest agribusiness

54. See Alien Registration Act (ARA) of 1940, ch. 439, § 20, 54 Stat. 670, 671–73 (codified as amended at 8 U.S.C. § 155 (1940)).

55. See, e.g., Chelsea Walsh, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 *FORDHAM L. REV.* 2857, 2868 (2005) (“For the government, voluntary departure expedites and reduces the cost of removal. In addition, the relief of voluntary departure is an important benefit to a deportable alien because he avoids the stigma of deportation, is able to select his own destination, and can leave the United States at his own expense without being subject to the penalties and restrictions that deportation imposes.” (footnotes, quotations, and citation omitted)).

56. See Act of March 4, 1929, ch. 690, § 1, 45 Stat. 1551, 1551 (codified at 8 U.S.C. § 180(a) (1929 sup. III)).

57. Compare 8 U.S.C. § 180a (1940) (one-year statutory-maximum penalty for illegal entry), with *id.* § 180 (1940) (two-year statutory-maximum penalty for illegal re-entry).

58. See Ediberto Román, *The Alien Invasion*, 45 *HOUS. L. REV.* 841, 878–79 (2008) (discussing the creation of the Bracero program in response to labor shortages during the war); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615, 664 (1980) (“As the economy grew stronger with the approach of World War II, most of the ‘Okies’ and ‘Arkies’ relocated to better paying industrial jobs. Their exodus and the new agricultural expansion renewed the need for domestic labor.”); see also S. REP. NO. 81-1515, at 574 (1950) (discussing the shortage of agricultural workers that followed World War II).

59. S. REP. NO. 81-1515, at 584.

60. See Román, *supra* note 58, at 879; Lopez, *supra* note 58, at 664. For a discussion of the Bracero program, see KANSTROOM, *supra* note 50, at 219–24.

interests.”⁶¹ “An immediate consequence of the Bracero program,” however, “was that the promise of guaranteed employment unintentionally encouraged illegal border crossings,”⁶² meaning many Mexican laborers entered the United States illegally, outside the channels provided by the program.⁶³ In fact, government reports about immigration during the late 1940s and early 1950s are replete with references to illegal Mexican immigration. One report refers to the “outstanding problem” of Mexican nationals “crossing the borders illegally.”⁶⁴ Another report discusses the “problem” of “illegal entrants from Mexico,” connecting this influx to the “shortage of agricultural laborers during World War II.”⁶⁵ Indeed, apprehensions along the U.S.-Mexico border in the 1940s increased by a factor of ten.⁶⁶

In response to the increasing number of Mexican migrants who came to the United States to work, the Department of Justice (“DOJ”), which had just taken over immigration from the Department of Labor,⁶⁷ began prosecuting more immigration cases. These prosecutions, DOJ claimed, acted as a “deterrent”—the prosecutions would dissuade at least some individuals from entering the United States illegally and outside the confines of the Bracero program.⁶⁸ By 1948 (the first year the annual number of illegal entry and re-entry convictions became regularly available), there were around 8000 combined convictions for illegal entry and re-entry.⁶⁹ That number increased to 10,000 by 1949⁷⁰ and grew to nearly 15,000 by 1951.⁷¹ But nearly all individuals caught illegally entering or re-entering were still strictly funneled through the

61. See ANDREAS, *supra* note 15, at 33.

62. *Id.*

63. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 489 (2009) (“In 1950, President Truman had established a Commission on Migratory Labor, whose final report documented the high levels of illegal immigration that had accompanied the Bracero Program . . .”); ANDREAS, *supra* note 15, at 33–34.

64. U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 6 (1950).

65. *Id.* at 2. See ANDREAS, *supra* note 15, at 33–34 (discussing the relationship between the Bracero program and illegal immigration).

66. S. REP. NO. 81-1515, at 584 (1950).

67. See Act of June 14, 1940, Pub. L. No. 76-75, § 3, 54 Stat. 230, 231.

68. U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 2–4, 9–11 (1951).

69. U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 81 tbl.49A (1957) (noting that there were nearly 3500 convictions for illegal entry and over 4100 convictions for illegal re-entry).

70. See *id.* (documenting that there were 5108 illegal entry convictions and 4416 illegal re-entry convictions in 1949).

71. See *id.* (documenting that there were nearly 13,000 illegal entry convictions and 2000 illegal re-entry convictions).

civil enforcement system and granted voluntary departure.⁷² Around 500,000 aliens were apprehended every year, most of whom could have been prosecuted for illegal entry or re-entry.⁷³ DOJ, then, was prosecuting an insignificant number of cases, compounding the earlier problem that criminalizing illegal entry and re-entry were unlikely to deter illegal immigration—there was still a small chance of being apprehended and the benefits to illegal immigration were still large. Thus, to the extent that individuals in Mexico considered the risk of prosecution when deciding whether to come to the United States illegally, it was implausible that individuals were dissuaded by this risk.⁷⁴ Therefore, DOJ's prosecution strategy made little sense.

While DOJ claimed it wanted to prosecute cases, a practical problem held them back: insufficient resources. According to an immigration official who testified before the Senate Judiciary Committee in 1950, “many flagrant violators of the immigration laws” were not prosecuted because of the “crowded conditions prevalent in most prisons and penitentiaries.”⁷⁵ At a budget hearing, a DOJ representative also acknowledged the huge number of immigration violators along the U.S.-Mexico border, most of whom were “Mexican laborers” that were “seek[ing] employment,” but that the agency “couldn't begin to prosecute all of the people who [had] come in.”⁷⁶

But aside from DOJ's rhetoric about deterrence and being stymied by a lack of resources, nothing indicates that DOJ officials actually wanted to discourage Mexican migrants from filling the employment needs of the United States. Indeed, immigration officials were under tremendous pressure from both business leaders and at least some politicians to not stand in the way of this cheap source of labor.⁷⁷ Too much enforcement, in fact, occasionally led members of Congress to threaten to cut the budget of the Immigration and Naturalization Service

72. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 95 tbl.36.

73. See *id.* at 91 tbl.33.

74. Of course, if individuals in Mexico possessed no information about the threat of prosecution, or if they did not take such information into account—both of which seem likely—DOJ's prosecution strategy would likely have no meaningful deterrent effect anyway. See Robinson & Darley, *supra* note 39, at 175–79 (discussing the legal-knowledge hurdle that prevents criminal law from deterring bad behavior, along with the fact that individuals often do not make “rational choices” and so therefore do not take into account criminal law when making decisions, even if they are aware of the relevant criminal law rules).

75. S. REP. NO. 81-1515, at 654 (1950).

76. *Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 82d Cong. 161 (1952) (statement of J.M. McNerney).

77. See CALAVITA, *supra* note 49, at 34–35 (noting that farmers frequently criticized immigration officials who zealously enforced immigration laws).

(“INS”), the division of DOJ that dealt with civil immigration enforcement.⁷⁸ The result was that immigration officials—far from trying to discourage illegal immigration—facilitated it. While the law required that Mexican laborers obtain permission from INS officials before coming to the United States to work, most laborers would first enter unlawfully and immigration officials would then “parole[]” the individual directly to a U.S. employer.⁷⁹ As word spread that the way to take part in the Bracero program was to enter unlawfully, most who took part during the late 1940s and early 1950s entered the United States in this manner.⁸⁰ Thus, INS’s administration of the Bracero program actively encouraged illegal immigration, and “the preference given to illegal aliens for bracero employment provided little incentive for aspiring braceros to remain in Mexico until they were legally contracted.”⁸¹ Rather than prosecute individuals for illegally entering, immigration officials rewarded the conduct in the form of a job.

Given DOJ’s complicity in fostering illegal immigration, it is perhaps surprising that DOJ prosecuted anyone for illegal entry or re-entry at all. If DOJ did not want to deter illegal immigration, why did it prosecute anyone?

One possible answer is supplied by Peter Andreas, who has written extensively about what he views as the strictly symbolic purpose of border enforcement. Andreas has argued that border enforcement is not really about deterring illegal immigration—rather, it is about “projecting an image of progress toward that goal,” thereby allowing politicians to affirm to the public the symbolic importance of the border as a divide.⁸² Thus, this “audience-directed nature of border enforcement” requires border-enforcement efforts to be understood as a message to the public, rather than as a message to individuals considering coming to the United States illegally.⁸³ And while Andreas has focused on civil enforcement, his argument resonates much more strongly with the use of the criminal justice system. After all, “the traditional view is that criminal law carries a unique stigma and moral message not associated with other symbolic legal actions.”⁸⁴ By

78. *See id.* at 29, 35–37 (noting that Congressional representatives constantly reminded INS that rigid enforcement of immigration law was undesirable if it resulted in “the reduction of the farm labor supply”).

79. *Id.* at 28–29.

80. *See id.* (noting that, in 1950, “over 96,000 illegal aliens were paroled to local farmers”).

81. *Id.* at 32.

82. ANDREAS, *supra* note 15, at 9–11 (discussing the “audience-directed nature” of border enforcement).

83. *See id.* at 10.

84. Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for*

prosecuting more cases, the Executive Branch could send a particularly loud message to the public affirming the importance of the border, while at the same time not actually discouraging illegal immigration, thereby allowing the United States to reap the benefits of the cheap supply of labor.

B. The Development of the Modern Statutory Framework (1952–1986)

In 1952, Congress passed (over presidential veto) comprehensive immigration reform.⁸⁵ The McCarran-Walter Act re-codified all of immigration law, repealing large swaths of prior law and creating a bevy of new provisions along the way.⁸⁶ The Act also included updated illegal entry and re-entry provisions.

The illegal entry provision made it a crime for an “alien” (i.e., a non-citizen) to “(1) enter[] the United States at any time or place other than as designated by immigration officers, or (2) elude[] examination or inspection by immigration officers, or (3) obtain[] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.”⁸⁷ Thus, consistent with prior law, the Act did not criminalize mere presence in the United States without legal permission; rather, it criminalized illegal *entry*. Individuals who legally entered the United States (for example, with a valid visa) but who thereafter lost legal permission to be in the country (for example, if their visas expired) would not have committed a crime.⁸⁸ Under the Act, a first illegal entry offense was a misdemeanor, punishable by up to six months in prison; a second illegal entry conviction was a felony, punishable by up to two years in prison.⁸⁹ Of particular significance is that Congress decreased the penalty for a first illegal entry offense to six months—it had been one year under the 1929 law⁹⁰—which meant that the first illegal entry offense became a “petty offense.”⁹¹ This change

Criminal Enforcement?, 80 B.U. L. REV. 1227, 1266 (2000).

85. See HUTCHINSON, *supra* note 15, at 303–07.

86. See generally Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 275, 66 Stat. 163. See also H.R. REP. 82-1365, at 27 (1951) (“[This bill] represents the first attempt to bring within one cohesive and comprehensive statute the various laws relating to immigration, naturalization, and nationality.”); Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 314–16 (1956) (discussing the Act’s various provisions).

87. 66 Stat. 163 at 229.

88. See 8 U.S.C. § 1227(a)(1)(C)(i) (providing that a nonimmigrant visa holder who violates the terms of the visa is subject to deportation); *Matter of Santos*, 19 I. & N. Dec. 105, 109 n.2 (1984) (“No crime is implicated when an alien overstays his allotted time [in his visa].”).

89. Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 275, 66 Stat. 163, 229. The illegal entry provision was codified at 8 U.S.C. § 1325, where it remains.

90. Act of March 4, 1929, Pub. L. No. 70-1018, ch. 690, § 2, 45 Stat. 1551.

91. See *Lewis v. United States*, 518 U.S. 322, 326 (1996) (stating that offenses for which the

was perhaps enacted in response to a concern of Texas immigration officials that jurors might be hostile to criminal enforcement of immigration laws against Mexican economic migrants.⁹² Defendants charged with petty offenses do not have a constitutional right to a jury trial.⁹³ The legislative history, however, does not reveal a reason for the penalty decrease.⁹⁴ Nevertheless, the decision to reduce the maximum penalty for illegal entry to six months had important reverberations down the road, which this Article will explore later.⁹⁵

In addition to the illegal entry provision, the Act also took the three scattered criminal illegal re-entry provisions (i.e., the anarchism, prostitution, and general illegal re-entry statutes) and mashed them into one general illegal re-entry provision, thereby eliminating any distinction between illegal re-entrants:

(a) . . . [A]ny alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless [the alien establishes he received permission from the Attorney General to return or the alien can demonstrate he did not need such permission] shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than \$1,000, or both.⁹⁶

In essence, Congress had replicated the former general illegal re-entry provision, with one primary exception: Congress included, for the first time, a “found in” provision, which meant that the act of being in the country illegally was itself a crime if the defendant was “found in” the United States after having been deported.⁹⁷ Thus, mere presence in

statutory-maximum penalty was six months or less were presumptively “petty offenses” for which the constitutional right of a jury trial did not attach).

92. See *Immigration and Naturalization: Hearing Before the S. Subcomm. on Immigration of the S. Comm. on the Judiciary*, 80th Cong. 30 (1948) (noting the local hostility to enforcing immigration law, particularly against farmers and employees of farmers).

93. *Lewis*, 518 U.S. at 325.

94. A 1950 Senate report does note that the committee rejected a suggestion made “for a more severe penalty for illegal entry and smuggling” to resolve the problem of individuals returning to the United States illegally right after they had been deported; the committee noted that the problem was with the “administration of present statutes,” rather than a problem with the statutes themselves. S. REP. NO. 81-1515, at 654–55 (1950). A harsher penalty scheme, the Committee noted, would therefore “not solve the problem.” *Id.*

95. The lower statutory-maximum penalty meant a first-time illegal entry offense could be deemed a “petty offense,” which meant the defendant would not have the right to a jury trial and the cases could be prosecuted by magistrate judges. See *infra* Part III.

96. Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, § 276, 66 Stat. 163, 229. The provision was codified at 8 U.S.C. § 1326, where it remains.

97. See 8 U.S.C. § 1326 (2006) (stating that any alien who is found in the United States

the country without legal permission could be a crime, but *only if* the defendant had previously been deported and had not obtained the Attorney General's permission to return.⁹⁸ The only legislative history that discusses either the illegal entry or re-entry provision indicates that adding the "found in" provision to the illegal re-entry statute was intended to fix a flaw in prior law.⁹⁹ Without the "found in" provision, immigration officials had experienced difficulties in "establish[ing] the place of re-entry, and hence the prior venue," for prosecuting illegal re-entry cases,¹⁰⁰ given that the Sixth Amendment requires defendants to be tried in the district in which the "crime shall have been committed."¹⁰¹ With the "found in" provision, venue would be proper in any district in which the defendant was found, instead of just the district in which the defendant illegally re-entered.

As the Act took effect, "attention shifted to the increasingly vexing problem of illegal immigration."¹⁰² A presidential commission on immigration, for example, likened the situation along the U.S.-Mexico border to an "invasion."¹⁰³ The Attorney General himself toured the U.S.-Mexico border, calling the scale of illegal immigration "shocking" and declaring that it "constituted one of the nation's gravest law-enforcement problems."¹⁰⁴ Despite these concerns—and reflective of the contradictory attitudes toward illegal immigration—the Attorney General recommended a decrease in the United States Border Patrol ("Border Patrol") budget.¹⁰⁵

In 1954, General Joseph Swing was put in charge of INS and tasked with resolving this contradiction. Swing pledged to "stop this horde of invaders."¹⁰⁶ At the same time, however, he recognized the urgent need

following a lawful deportation shall be fined or imprisoned). Congress also eliminated the requirement that the deportation be "in pursuance of law." See 8 U.S.C. § 180(a) (1929 sup. IV) (noting that any alien who attempts to re-enter the United States following a lawful deportation shall be subject to a fine of imprisonment).

98. *United States v. Garcia*, No. 6:08-cr-81-Orl-19GJK, 2008 U.S. Dist. LEXIS 63478, at *54 n.26 (M.D. Fla. July 22, 2008), *aff'd*, 606 F.3d 1317 (11th Cir. 2010).

99. The only other piece of legislative history concerning the two provisions merely documents their existence. See *United States v. Ortiz-Martinez*, 557 F.2d 214, 216 (9th Cir. 1977) (reviewing the Act's legislative history and citing 1952 U.S.C.C.A.N. 1724).

100. *Revision of Immigration, Naturalization, and Nationality Laws; J. Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong. 716 (1951) (discussing section 276 of the law, which became 8 U.S.C. § 1326 in the final legislation).

101. U.S. CONST. amend. VI.

102. CALAVITA, *supra* note 49, at 46.

103. *Id.* at 47.

104. *Id.* at 48.

105. *Id.* at 52.

106. *Id.* at 51.

for Mexican labor. He thus reached something of a compromise. On the one hand, he made it clear to employers that if they needed cheap Mexican labor, they could obtain it through the legal channels of the Bracero program.¹⁰⁷ And on this promise, Swing came through: by the mid-1950s, the Bracero program doubled in size as over 400,000 Mexican laborers a year were given permission to work in the United States.¹⁰⁸ On the other hand, Swing launched a nationwide roundup of Mexican migrants and returned them to Mexico—an effort plagued by widespread claims of abuse, including that the United States removed many individuals with legal permission to live in the country.¹⁰⁹ The roundup, dubbed “Operation Wetback,” resulted in the removal of hundreds of thousands of individuals.¹¹⁰ Many migrants also left voluntarily, “as Swing capitalized on the sensationalism of the media coverage and a few well-placed and highly visible displays of force to create the illusion of a far greater presence than the Border Patrol could actually muster.”¹¹¹ Along with Operation Wetback, and the rising concern over illegal immigration, DOJ also ramped up its prosecution effort. In 1954, there were nearly 14,000 convictions, double the annual convictions just a decade before,¹¹² but still less than the 2% of deportable aliens who were apprehended for that year.¹¹³

After Operation Wetback ended, Swing essentially declared victory over illegal immigration. In a 1955 report, he wrote that “[f]or the first time in more than ten years, illegal crossing over the Mexican border was brought under control.”¹¹⁴ A year later, he wrote that illegal entries from Mexico had “stopped,” crediting Operation Wetback and the large expansion of the Bracero program.¹¹⁵ He also pointed out that the sharp decrease in immigration prosecutions—illegal entry and re-entry prosecutions had dropped below 3000 by 1956¹¹⁶—was “directly

107. *Id.* at 53.

108. *Id.* at 55.

109. *Id.* at 54.

110. NGAI, *supra* note 15, at 155–56.

111. *See* CALAVITA, *supra* note 49, at 54.

112. U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 90 tbl.49A (1958) [hereinafter 1958 INS ANNUAL REPORT] (noting that there were around 11,000 illegal entry convictions in 1954); U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 99 tbl.54 (1961) [hereinafter 1961 INS ANNUAL REPORT] (documenting the illegal re-entry convictions from 1952 to 1961).

113. *See* 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 91 tbl.33.

114. ATT’Y GEN. ANN. REP. 399 (1955).

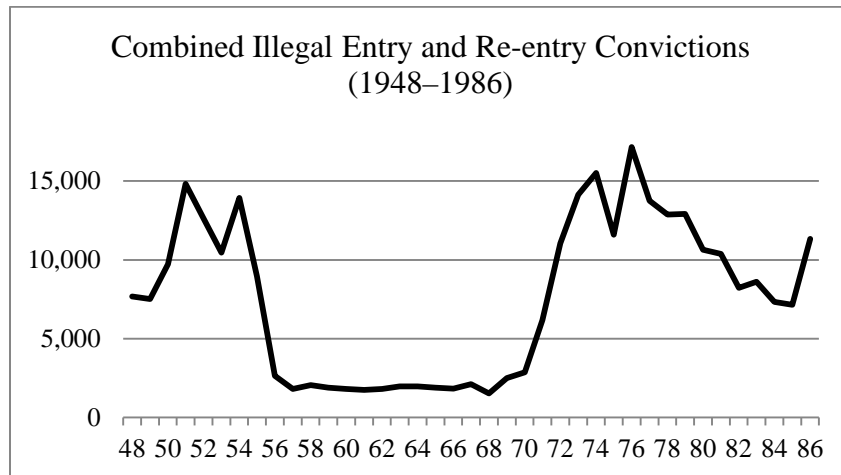
115. ATT’Y GEN. ANN. REP. 408–10, 414 (1956).

116. *See* 1958 INS ANNUAL REPORT, *supra* note 112, at 90 tbl.49A (noting that there were around 11,000 illegal entry convictions in 1954); 1961 INS ANNUAL REPORT, *supra* note 112, at 99 tbl.54 (documenting the illegal re-entry convictions from 1952 to 1961).

attributable to the successful control maintained on the Mexican Border.”¹¹⁷ Swing had a similarly triumphant message a year later, when he wrote that “[t]he arrest of a greater proportion of aliens while in the act of entering, together with the prosecution of the most flagrant violators, with accompanying publicity, was the principal factor which brought about a continued reduction in apprehensions along the Mexican border.”¹¹⁸ Prosecutions for illegal entry and re-entry continued to drop, totaling less than 2000 combined convictions in 1957, one-seventh the average number of annual prosecutions around the time of Operation Wetback.¹¹⁹ Indeed, throughout the next ten years, the government continued to show little interest in using the criminal justice system to regulate immigration.¹²⁰ But the belief that immigration officials had successfully deterred individuals from entering the United States illegally would not persist.

Figures 1 and 2, below, compare the combined illegal entry and re-entry convictions and deportable aliens apprehended between 1948 and 1986, respectively.

FIGURE 1



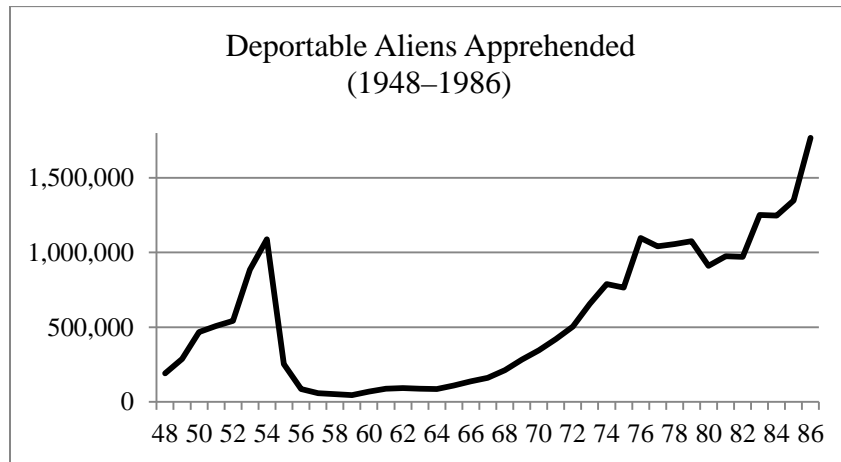
117. 1956 ATT’Y GEN. ANN. REP. 431.

118. 1957 ATT’Y GEN. ANN. REP. 439.

119. 1958 INS ANNUAL REPORT, *supra* note 112, at 90 tbl.49A.

120. *See* U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE tbl.54 (1969) (documenting convictions from 1960 until 1969); U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE tbl. 53 (1978) [hereinafter 1978 INS ANNUAL REPORT] (documenting convictions from 1969 to 1978); *see also* 1958 ATT’Y GEN. ANN. REP. 395 (observing that the decrease in illegal entry convictions “follows the trend of fewer illegal entries and is attributable to the successful control of the Mexican border”).

FIGURE 2



By the early 1960s, as the Bracero program became more politically controversial, the government allowed fewer and fewer Bracero laborers to enter into the United States. Illegal immigration started to once again proliferate,¹²¹ indicating that Swing's confidence had been misplaced. Shortly thereafter, two events occurred that dramatically accelerated the number of illegal entrants from Mexico, resulting in aftershocks felt in illegal entry and re-entry policy to this day. First, in 1964, the Bracero program became controversial enough that it ended.¹²² The demand of U.S. business for cheap Mexican labor, however, did not. The predictable consequence was that while Mexican laborers continued to remain a prime source of cheap labor, they would no longer have legal status to work in the United States.¹²³ Thus, Mexican laborers were transformed overnight from legal workers to "illegal aliens." Second, Congress passed the Immigration Act of 1965, ending the national-

211. See CALAVITA, *supra* note 49, at 142–51; 1964 ATT'Y GEN. ANN. REP. 420 ("Principal contributing factors to the 13 percent increase in the number of Mexican nationals found to be here unlawfully were the expected termination of the 'Bracero' program . . . and the far reaching effects of a continued severe drought in Mexico, accompanied by a marked deterioration of the ranch economy there. These factors probably will result in continued efforts to cross the border surreptitiously.").

122. NGAI, *supra* note 15, at 158.

123. Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1429 (2007); see also David A. Martin, *Eight Myths about Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 534–35 (2007) ("In the absence of effective [immigration] enforcement [after the Bracero program ended], employers were glad to continue using workers who by then were well-trained and familiar with the farm or business. Workers likewise found it convenient to continue the cycle by sneaking across the border. Moreover, they often brought friends or family members along to replenish the worker pool.").

origin-based quota system that had been in place since the 1920s.¹²⁴ In its place, Congress erected a system that placed country quotas on immigration, including a 20,000 annual quota on Mexican immigrants, a mere fraction of what the quota had been under the Bracero program.¹²⁵

With the sharp reduction of legal immigration from Mexico, individuals from Mexico continued to enter the United States illegally in numbers large enough to meet the United States' demand for cheap labor. Nevertheless, DOJ kept illegal entry and re-entry convictions at historically low levels. These convictions consistently numbered less than 2000 a year through the 1960s, a fraction of what they had been a decade before.¹²⁶ The pointlessness of arbitrarily prosecuting a few individuals in the name of promoting deterrence was not lost on everyone. For example, a district court judge along the border testified before Congress in 1969 that the "token prosecution of aliens [along the U.S.-Mexico border] is not a way to achieve effective observance of the law or respect for the law."¹²⁷ He further lamented the fact that neither DOJ nor INS "seem to have any policy as to when a repeated offender is to be prosecuted, nor do they have any means of prompt identification of the individual through the FBI to determine his prior record, federal or state."¹²⁸ But given that immigration officials were apprehending hundreds of thousands of deportable aliens a year,¹²⁹ a coherent prosecution policy was perhaps impossible—at least if the purpose of the policy was deterrence.

In the midst of these depressed criminal enforcement efforts, Congress contemplated creating the position of "magistrate judge," who would be empowered to (among other things) deal with petty offenses such as illegal entry cases. In fact, immigration officials lobbied Congress to create the new position so that illegal entry cases could avoid congested district court dockets, thereby allowing both immigration and non-immigration cases to be dealt with more

124. Act of October 3, 1965, Pub. L. No. 89-236, § 18, 79 Stat. 911.

125. See CALAVITA, *supra* note 49, at 218 (providing statistics about the Bracero program).

126. See 1978 INS ANNUAL REPORT, *supra* note 120, at 103 tbl.53 (documenting the illegal convictions from 1969 to 1978); U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 1985 YEARBOOK OF IMMIGRATION STATISTICS 213 (1985) (documenting the convictions from 1978 to 1985).

127. *Migrant and Seasonal Farmworker Powerlessness, Hearings Before the S. Subcomm. on Migratory Labor of the S. Comm. on Labor and Pub. Welfare*, 91st Cong. 2800 (1969) (statement of Hon. Edward M. Kennedy).

128. *Id.* at 2801.

129. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 91 tbl.33 (listing the number of deportable aliens apprehended per year).

swiftly.¹³⁰ Immigration officials had the support of district court judges along the border, who thought magistrates could help to partially alleviate their crowded dockets, where immigration prosecutions still dominated.¹³¹ Eventually, in 1968, Congress relented and passed the Federal Magistrates Act.¹³²

During the early 1970s, as magistrates were being staffed along the border,¹³³ DOJ once again started to increase the number of illegal entry and re-entry prosecutions. By 1973, there were once again nearly 14,000 combined prosecutions.¹³⁴ Unlike earlier years, however, nearly all of the convictions were for illegal entry, which could be quickly processed with the help of magistrates (since, unlike illegal re-entry charges, illegal entry charges could be deemed a petty offense).¹³⁵ The total number of prosecutions still represented a tiny percentage of the nearly 600,000 deportable aliens who were apprehended in 1973.¹³⁶

This surge in prosecutions once again put tremendous pressure on border districts. Illegal entry cases were overrunning the dockets of judges in Southern California, and civil cases could not go to trial because the judges lacked necessary courtroom time.¹³⁷ To help alleviate this pressure—and foreshadowing DOJ's present-day strategy—prosecutors in the district developed a way to process illegal entry cases more quickly, labeling it the “flip flop.” Apprehended individuals who had been previously deported would be charged with a two-count complaint—one count of misdemeanor illegal entry (with its

130. See Eagly, *supra* note 2, at 1326 (citing *Hearing on H.R. 9970 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 102 (1968) (statement of Glenn L. Weatherman, INS, Del Rio, Texas)) (stating that the immigration agency asked Congress to establish a “misdemeanor court” that would allow for more effecting and less expensive criminal investigation enforcement).

131. *Hearings Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 89th Cong. 603–05 (1967); *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the S. Subcomm. on Migratory Labor of the S. Comm. on Labor and Pub. Welfare*, 91st Cong. 2802–03 (1969).

132. Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631–39 (2006)); see Eagly, *supra* note 2, at 1325–26 (discussing the creation of the position of magistrate).

133. *Hearing Before the Subcomm. on Improvements in Judicial Mach. of the H. Comm. on the Judiciary*, 93d Cong. 747 (1973) [hereinafter *Hearing*, 93d Cong.] (written statement of Hon. Edward J. Schwartz, C.J. of the S.D. of Cal.).

134. See 1978 INS ANNUAL REPORT, *supra* note 120, at 103 tbl.53 (documenting the illegal convictions from 1969 until 1978).

135. See *supra* note 95 and accompanying text.

136. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 91 tbl.33 (noting that more than 655,000 deportable aliens were located in 1973).

137. *Hearing Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary on S. 1064*, 93d Cong. 751 (1973).

six-month statutory-maximum penalty) and one count for felony illegal re-entry (with its two-year statutory-maximum penalty).¹³⁸ If the defendant quickly agreed to plead guilty to the misdemeanor count of illegal entry, the prosecutor dropped the felony illegal re-entry count.¹³⁹ The “flip flop” benefitted both parties—the defendant avoided a felony conviction and received a lower statutory-maximum penalty, while the government could more efficiently process the case by avoiding the crowded district court docket and avoiding having to obtain a grand jury indictment.¹⁴⁰ Thus, to grow the number of prosecutions by a small fraction of a percent, DOJ was content to both reduce the process afforded defendants and put a strain on border districts.

This tradeoff was not without its detractors, especially since DOJ had not given a rationale for determining which persons, among the hundreds of thousands of people it apprehended, should be prosecuted and then deported, and those who should just be deported. As the head federal public defender in San Diego explained in 1973:

It is obvious that there is broad discretion in the handling of [illegal entry and re-entry cases], and in our experience cases are seldom prosecuted for first offenders. Often the initiation of the charges depends upon the whim of the Border Patrol officer (in forwarding the case to the United States Attorney’s Office) and the policy discretion of the United States Attorney.¹⁴¹

Thus, he recommended to a congressional committee charged with reforming the federal criminal code that the offense of illegal entry be abolished, reasoning that “the greatest deterrent to illegal aliens is the expectation of apprehension and return to Mexico. The criminal penalty over the years has not proved effective in deterring illegal entry.”¹⁴² Judges were likewise concerned. For example, Judge Schwartz, from the Southern District of California, testified before Congress in 1973 that he “hope[d] that in improving the judicial machinery we don’t reach the point where we are making an assembly line out of our judicial process. Because then, unlike Detroit, we can’t recall a few thousand of our mistakes to straighten them out again.”¹⁴³

138. *Id.* at 748.

139. *Id.*

140. *Id.*

141. *Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 96th Cong. 298 (1979) (written statement of John J. Clearly).

142. *Id.* at 298–99.

143. *Hearing Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary on S. 1064*, 93d Cong. 751 (1973).

Judge Schwartz's worries were prophetic, as DOJ would eventually funnel tens of thousands of illegal entrants and re-entrants quickly through the criminal justice system like cars on a conveyor belt. But in the beginning, his worries about "assembly line" justice were not realized, as illegal entry and re-entry convictions, after a brief increase to 17,000 combined convictions in 1976, steadily declined over the next two decades, consistently numbering less than 10,000 a year.¹⁴⁴ Thus, even as the number of deportable aliens who were apprehended soared,¹⁴⁵ DOJ became less inclined to prosecute immigration offenders. DOJ had perhaps recognized the futility of prosecuting a tiny fraction of illegal entrants and re-entrants as a means to deter illegal immigration, and the department backed off its escalating prosecution policy. It was about time to devise a new prosecution strategy.

II. A SHIFT IN STRATEGY: TARGETING "DANGEROUS" ALIENS, INCLUDING PERJURERS, SHOPLIFTERS, AND BAD-CHECK WRITERS (1987–2004)

Starting in 1987, the United States charted a radically different course regarding the way with which illegal entrants and re-entrants were dealt. The crimes of illegal entry and re-entry saw a shift at the conceptual level, as the crimes were reconceived as a way to target individuals likely to commit crimes while in the United States illegally—to specifically deter and incapacitate these individuals—rather than as tools to discourage illegal immigration generally. This new strategy led

144. In 1986, Congress passed legislation that required employers to attest to their employee's immigration status, made it illegal to knowingly hire an individual without legal status to work, and provided a path toward legalization for some individuals who had been living in the country without permission. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). See Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 688–95 (1997) (discussing the ineffectiveness of the Act in deterring attempts at unauthorized entry into the U.S.); Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 357–69 (1994) (same). The employer penalty was the first real attempt to regulate the demand side of illegal immigration. By disincentivizing employers to hire individuals without legal status, it was intended that economic migrants from Mexico would no longer be able to find work in United States, drying up their primary justification for coming to the United States. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1112–13 (2009); Phi Mai Nguyen, Comment, *Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions while Solutions Are Just a Few Words Away*, 13 CHAP. L. REV. 615, 615–16, 624–27 (2010). The system, however, has never been meaningfully enforced, and most scholars believe it has been irrelevant in curbing illegal immigration. See, e.g., ANDREAS, *supra* note 15, at 38–39, 86–87; Nguyen, *supra*, at 632–44.

145. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 95 tbl.36 (documenting the increasing number of civil enforcement actions taken during the late 1970s and early 1980s); *id.* at 91 tbl.33 (documenting the increasing number of deportable aliens apprehended during the late 1970s and early 1980s).

to a record increase in the number of prosecutions. Unfortunately, the proxy used to determine if an apprehended alien would likely commit a crime was dreadfully designed. The consequence was that truly dangerous individuals were not in the vast majority of those targeted. Moreover, and perhaps even more troubling, defendants received increasingly harsh and arbitrary sentences. In short, DOJ went from employing a failed deterrence strategy to using an ineffective and poorly conceived general crime-control strategy.

A. *Congress and the Sentencing Commission Plant the Seeds for a New Criminal Enforcement Strategy (1987–1992)*

Between 1987 and 1992, not much changed with respect to enforcing the crimes of illegal entry and re-entry, as DOJ prosecuted between 3500 and 6500 such cases a year.¹⁴⁶ In addition, the U.S.-Mexico border remained mostly unpatrolled.¹⁴⁷ Moreover, around a million deportable aliens a year were apprehended, and nearly all of those who were sent back to their country of origin were granted voluntary departure.¹⁴⁸ But even though enforcement did not change considerably, Congress planted the seeds for a new prosecution strategy by creating a penalty scheme in illegal re-entry cases that would provide for an increased sentence for the supposedly “dangerous” aliens who tried to enter the United States illegally.

Before 1987, the process of federal sentencing could mostly be summed up in three words: district court discretion. That is to say, the federal sentencing process merely involved the district court judge selecting a sentence from probation to the relevant statutory-maximum penalty.¹⁴⁹ In illegal re-entry cases, for example, district court judges could sentence defendants to penalties ranging from probation to the

146. *Lead Charges for Criminal Prosecutions, FY 1986–FY 2011*, TRAC, http://trac.syr.edu/immigration/reports/251/include/imm_charges.html (last visited June 29, 2011) [hereinafter TRAC Immigration]. For prior Parts, this Article relied on government reports that documented the number of illegal entry and re-entry convictions DOJ had secured. See, e.g., 1978 INS ANNUAL REPORT, *supra* note 120, at 103 tbl.53 (documenting the illegal convictions from 1969 until 1978). Starting with this Part, this Article relies on the number of prosecutions for illegal entry and re-entry cases as gathered by the Transactional Record Access Clearinghouse (TRAC), which compiles prosecution numbers through Freedom of Information Act requests. See *About Us*, TRAC, <http://trac.syr.edu/aboutTRACgeneral.html> (last visited July 5, 2011). This appears to be the best way to track the number of misdemeanor illegal entry cases.

147. ANDREAS, *supra* note 15, at 89–90 (noting the still relatively small size of the Border Patrol in 1993).

148. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 91 tbl.33.

149. *Mistretta v. United States*, 488 U.S. 361, 363 (1989); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–26 (1993).

two-year statutory-maximum penalty.¹⁵⁰ This discretion, however, led to complaints about unwarranted sentencing disparity since two defendants who committed identical acts could receive radically different sentences.¹⁵¹

These concerns (among others) prompted Congress, in the mid 1980s, to create an expert sentencing commission and task it with developing a mandatory guideline regime to reign in district court discretion.¹⁵² In creating the U.S. Sentencing Commission (“Commission”), Congress made it an “independent” agency within the judicial branch.¹⁵³

The Commission, in developing this new regime, attempted to ground the U.S. Sentencing Guidelines (“Guidelines”) in pre-Guideline practice, such that average sentence lengths would remain largely unchanged.¹⁵⁴ Based on its past-practice study, the Commission assigned nearly every federal crime a base offense level. Within any particular case, this number could change, based on “specific offense characteristics” relevant to the way the defendant committed the offense—the offense level could increase based on aggravating circumstances or decrease based on mitigating circumstances relevant to the offense.¹⁵⁵ The Commission also developed a criminal history score—a number that mostly hinged on the defendant’s recent criminal convictions.¹⁵⁶ The criminal history score was calibrated to correspond to a defendant’s likelihood of committing future crimes.¹⁵⁷ The Commission’s final product, completed in 1987, is a regime that revolves around a sentencing chart. The vertical axis of the chart is the defendant’s adjusted offense level;¹⁵⁸ the horizontal axis is the

150. See 8 U.S.C. § 1326 (1988) (listing the criminal penalties for re-entry of removed aliens).

151. Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence about the Purpose of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1049–56 (2003); Stith & Koh, *supra* note 149, at 231; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988).

152. See Breyer, *supra* note 151, at 5–6 (describing the creation of the United States Sentencing Commission).

153. 28 U.S.C. § 991(a) (2006) (establishing the Commission “as an independent commission in the judicial branch of the United States”).

154. *Id.*

155. See U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL chs. 2–3 (1988) [hereinafter U.S.S.G.] (listing offense conduct and adjustments to sentencing).

156. See U.S.S.G. ch. 4 (1988) (delineating the calculation methods and results of criminal history scores).

157. See U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 13 (2004) (relating sentencing types to recidivism rates).

158. See U.S.S.G. ch. 5, pt. A, sentencing tbl. (1988) (establishing appropriate sentencing based on the offender’s offense level and criminal history category).

defendant's criminal history score.¹⁵⁹ At the intersection of a defendant's adjusted offense level and criminal history score is a Guideline range, expressed in months.¹⁶⁰ The district court judge would have to sentence the defendant within that range unless the specific case involved an extraordinary circumstance that the Guidelines failed to take into account.¹⁶¹ In such a case, the judge could give a "departure" from the otherwise mandatory Guideline range.¹⁶² The Guidelines, then, would constrain sentencing discretion. Defendants who had similar criminal histories and who committed similar criminal acts would receive similar sentences.

Section 2L1.2 of the Guidelines covered illegal entry and re-entry. When the Guidelines went into effect, the Commission assigned both crimes a base offense level of six.¹⁶³ The Commission also added a two-level enhancement for defendants who had previously unlawfully entered or unlawfully remained in the United States.¹⁶⁴ Thus, as a practical matter, defendants convicted of illegal re-entry started with an offense level of eight. A year later, in 1988, the Commission eliminated the two-level enhancement and re-assigned illegal re-entry a base offense level of eight, an offense level that remains to this day.¹⁶⁵ Furthermore, the Commission dropped illegal entry from the Guidelines altogether.¹⁶⁶ Plugging an offense level of eight into the Commission's chart meant that, in 1988, defendants convicted of illegal re-entry had a Guideline range anywhere from zero to six months (if they had no criminal history) to eighteen to twenty-four months (if they were in the

159. *Id.*

160. *Id.*

161. *See* 18 U.S.C. § 3553(b)(1) (2006) ("[T]he court shall impose a sentence [according to this statute] unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission . . .").

162. *See* *Koon v. United States*, 518 U.S. 81, 94–96 (1996) (discussing when a district court could use a departure); *id.* at 96 (noting that the Commission expected departures to be "highly infrequent" (quoting 1995 U.S.S.G. ch. 1, pt. A, p. 6)).

163. U.S.S.G. § 2L1.2(a) (1987).

164. *See* U.S.S.G. § 2L1.2(b)(1) ("If the defendant previously has unlawfully entered or remained in the United States, increase by 2 levels.").

165. U.S.S.G. app. C, amend. 23 (1988).

166. *See* U.S.S.G. § 2L1.2 (1988) (establishing a single base offense level in subsection (a) after the deletion of subsection (b)). Nevertheless, defendants convicted of felony illegal entry who could have been convicted of illegal re-entry still had to be sentenced under the illegal re-entry Guideline provision; for other illegal entry defendants, sentencing judges essentially had the same unbridled discretion they had pre-Guidelines. *See* U.S.S.G. § 2X5.1 ("If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control . . .").

highest criminal history category).¹⁶⁷ According to the Commission, punishments generated under this scheme reflected the sentences given pre-Guidelines.¹⁶⁸ Those ranges also fit neatly with the overarching penalty scheme Congress had created, since the statutory-maximum penalty for illegal re-entry was two years.¹⁶⁹

In 1988, however, Congress dramatically ratcheted up the potential sentence a defendant could receive for illegal re-entry. Congress increased the statutory-maximum penalty to five years for illegal re-entry defendants who had previously been convicted of a “felony”¹⁷⁰—any felony, no matter how minor¹⁷¹—and to fifteen years for defendants who had previously been convicted of an “aggravated felony,”¹⁷² which encompassed prior convictions for murder, drug trafficking, or weapons trafficking.¹⁷³ (The term “aggravated felony” did not apply to illegal

167. See U.S.S.G. ch. 5, pt. A, sentencing tbl. (1988) (establishing appropriate sentencing based on the offender’s offense level and criminal history category).

168. According to the Commission, before the Guideline-era, those convicted of illegal re-entry served the equivalent months of an offense level seven (zero to twenty-one months imposed). See U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 34 tbl.1(a) (1987) (establishing estimated time served for baseline offenses by first-time offenders).

169. See 8 U.S.C. § 1326 (1988) (providing for “imprisonment of not more than two years” for deported aliens who re-entered the U.S.).

170. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a)(2), 102 Stat. 4181, 4471 (codified at 8 U.S.C. § 1326(b)(1) (1988)) (providing that an illegal re-entry defendant “whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony) . . . shall be fined under title 18, United States Code, imprisoned not more than 5 years, or both”). In *Almendarez-Torres v. United States*, the Supreme Court held that 8 U.S.C. § 1326(b), the provision that contained the statutory-maximum penalty increases, did not set out a separate crime, but rather a sentencing factor, and the government could therefore establish an illegal re-entry defendant’s sentencing that he or she had previously been convicted of a prior offense that triggered the increased maximum penalty. 523 U.S. 224, 228–47 (1998).

171. While, historically, there was a meaningful distinction between the seriousness of felonies and non-felonies, that is no longer the case. See *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (observing that, while “the gulf between the felonies and the minor offences was broad and deep, today the distinction is minor and often arbitrary” (internal citation and quotation marks omitted)).

172. See Anti-Drug Abuse Act § 7345(a)(2), 102 Stat. at 4471 (codified at 8 U.S.C. § 1326(b)(2) (1988)) (providing that an illegal re-entry defendant “whose deportation was subsequent to a conviction for commission of an aggravated felony . . . shall be fined under [title 18, United States Code], imprisoned not more than 15 years, or both”).

173. See Anti-Drug Abuse Act § 7342, 102 Stat. at 4469–70 (codified at 8 U.S.C. § 1101(a)(43) (1988)) (“The term ‘aggravated felony’ means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.”). To determine whether a defendant’s prior conviction qualifies as a generic offense like “murder” or as a “drug trafficking” offense, courts must use the categorical approach, where they compare the elements of the offense for which the defendant was convicted with the generic definition of the federal crime at issue. See generally *Taylor v. United States*, 495 U.S. 575 (1990) (laying out the

re-entry sentencing only; a conviction for such a crime had, and to this day has, a slew of collateral consequences for non-U.S. citizens.¹⁷⁴)

Legislative history from the 1988 Act provides some insight into why Congress increased the statutory-maximum penalty for illegal re-entry cases. In introducing the legislation, Senator Lawton Chiles stated that the penalty increase would allow law enforcement officials to use the crime of illegal re-entry as a way to target “alien drug traffickers who are considering illegal entry into the United States.”¹⁷⁵ In particular, he cited—as the type of defendant for which he thought the heightened potential penalty was needed—the example of a drug kingpin, wanted for around fifty murders, who had illegally returned to the United States.¹⁷⁶ Senator Chiles also believed the government could use the crime of illegal re-entry just as it had used the tax code to go after the mob.¹⁷⁷

Senator Chiles’s comments reflected a new rationale for prosecuting illegal re-entry cases. Rather than just focusing on deterring illegal immigration—the long-held view of the purpose of illegal entry and re-entry prosecutions—Senator Chiles thought that the enhancement-penalty scheme could target illegal re-entrants who came to the United States to commit crimes. In this way, the penalty scheme sought to protect the public from dangerous individuals, rather than to deter

categorical approach). In other words, courts must determine whether a particular crime, as a categorical matter, is a qualifying offense. Courts are not to look at the actual facts, however, that led to the conviction to begin with. I have previously argued that use of the categorical approach is superior, as a policy matter, to a fact-based approach and worth its costs. See Doug Keller, *Causing Mischief for Taylor’s Categorical Approach: Applying ‘Legal Imagination’ to Duenas-Alvarez*, 18 GEO. MASON L. REV. 625, 658–67 (2011). See also Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of a Crime*, 26 GEO. IMMIGR. L.J. (forthcoming 2012) (defending the categorical approach as superior to a fact-driven approach in the immigration context).

174. For example, non-citizens, including legal permanent residents, who are convicted of an aggravated felony are subject to mandatory detention during their removal proceedings and lose the ability to apply for various forms of discretionary relief from removal. See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 483–84 (2007) (discussing the immigration consequences for a non-citizen if he or she is convicted of an aggravated felony).

175. See 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles); see also 133 CONG. REC. H8961-01 (daily ed. Oct. 22, 1987) (statement of Rep. Smith) (introducing the legislation in the House of Representatives and also connecting the legislation with the problem of “illegal aliens” who commit series crimes).

176. See 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles).

177. *Id.* (stating that the higher penalty provision would “give law enforcement authorities a broader arena for prosecuting the drug offender as current tax fraud and mail fraud violations provide”). Senator Chiles also initially suggested that illegal re-entry defendants who had been convicted of an aggravated felony should receive a fifteen-year mandatory minimum sentence, *id.*, but that provision did not make it into the final legislation.

illegal immigration per se, and the types of prior convictions that triggered the enhanced penalty would act as a proxy for dangerousness.

Despite its announced rationale, however, the structure of Congress's penalty scheme guaranteed that it would struggle to target individuals who were likely to commit crimes while in the United States. Even the most sophisticated proxies for predicting future criminal conduct that rely *solely* on an individual's criminal history are, at best, "rough approximations of actual dangerousness," and using criminal history alone to predict future dangerousness "guarantees errors of both inclusion and exclusion."¹⁷⁸ But Congress did not rely on a sophisticated dangerousness proxy. Instead, it created a system whereby a single prior conviction could trigger the statutory-maximum penalty increase. No research suggests, however, that using a *single* prior conviction is even a vaguely sound way to determine whether someone is likely to commit a future crime.¹⁷⁹ Congress compounded the problem by not including a "freshness" requirement on the prior conviction, meaning that a single, dated conviction could trigger the statutory-maximum increase, even though it would be dubious to infer that the defendant had returned to the United States to commit crimes because of conduct that occurred years or even decades before. In fact, the Commission recognized that convictions which occurred over fifteen years before the defendant's present offense did not correlate to future criminality, which is why it excluded such convictions from its criminal history score.¹⁸⁰

Nevertheless, a sentencing scheme designed to prevent individuals from committing crimes by locking them up for longer periods is bound to be successful in the limited sense in which all incapacitation schemes are successful. As noted criminologist David Patton explained, "Inmates cannot commit crimes outside of prison while inside prison."¹⁸¹ The more difficult policy question, however, is whether the "financial, social, and moral" costs of a particular incapacitation scheme outweigh the benefits¹⁸²—including whether the incapacitation scheme

178. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1450 (2001) (describing the problems with preventative detention).

179. For a discussion of factors that *do* indicate if a defendant is likely to commit future crimes, see generally MEASURING RECIDIVISM, *supra* note 157.

180. See U.S.S.G. § 4A1.1 n.1 (2011) ("A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted [in criminal history point calculation] . . .").

181. See Patton, *supra* note 39, at 1435–36 (describing the sentencing theory of incapacitation).

182. *Id.* at 1436.

results in resources being allocated away from more effective crime-prevention strategies. When viewed through a cost-benefit lens, most incapacitation schemes quickly lose their appeal.

For crimes of any significant seriousness, we are not very good at predicting which offenders will commit them in the future. For every “true positive” who will, three or four others predicted to do so will not. From a cost-benefit perspective, locking up all those people is not an obviously good investment of public resources. From a moral perspective, many people are troubled by the thought of lengthy confinement of individuals not because of their current crime but because they might commit another, especially when we know most will not.¹⁸³

Thus, while the congressional scheme was bound to snag at least *some* truly dangerous aliens (like the ones Senator Chiles had identified), the question Congress should have been struggling with was whether the costs associated with longer sentences were worth the benefits to public safety. By creating such a terrible proxy for dangerousness, Congress guaranteed a large number of false positives, thereby ensuring its incapacitation scheme would flunk any cost-benefit analysis.

Not only was Congress’s scheme over-inclusive, it was bizarrely under-inclusive with respect to the goal of targeting dangerous individuals in two ways. First, in the case of a defendant who illegally returned to the United States and was convicted of another crime, the defendant’s latest conviction would not trigger the enhanced penalty if he were prosecuted for illegal re-entry. Only convictions that occurred *before* the deportation could trigger the increase.¹⁸⁴ Thus, the one set of defendants for which a proxy was unnecessary to determine whether they were a threat to commit a crime after they illegally returned—individuals who had illegally returned and actually committed a crime—would not have their statutory-maximum penalty changed. Second, Congress’s penalty scheme did not apply to dangerous aliens convicted of illegal *entry*, as the statutory-maximum penalty for illegal entry remained at six months for the first conviction and two years for the second.¹⁸⁵ For example, the mass murderer in Senator Chiles’s

183. See Tonry, *supra* note 41, at 32 (describing this issue as the “false-positive problem”); see also Patton, *supra* note 39, at 1435–38 (discussing the costs of incapacitation schemes).

184. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a)(2), 102 Stat. 4181, 4471 (codified at 8 U.S.C. § 1326(b)(1) (1988)) (providing an increased statutory-maximum penalty for an illegal re-entry defendant “whose deportation was *subsequent to a conviction*” for a felony or an aggravated felony) (emphasis added).

185. See 8 U.S.C. § 1325 (1988) (“[I]llegal entry by an alien is a misdemeanor on the first offense, punishable by] imprisonment for not more than six months [and a felony on subsequent offenses, punishable by] imprisonment for not more than two years.”).

example could not receive a sentence greater than six months if, when he illegally entered, he had not been previously deported. Thus, Congress ensured that some truly dangerous aliens would not qualify for the statutory-maximum increase.

A year after Congress created its new penalty scheme, the Commission responded by creating a specific offense characteristic for illegal re-entry cases: a four-level enhancement for defendants who were previously deported after having been convicted of a felony offense—other than an offense involving a violation of immigration laws—regardless of the age of the conviction.¹⁸⁶ The enhancement was unique, as the Commission had previously designed enhancements that pertained to the way in which defendants committed the offense for which they were being sentenced. The role of criminal history was limited to a defendant's criminal history score.¹⁸⁷ In creating the enhancement, the Commission did not perform a study to determine if the enhancement was needed, nor did the Commission explain the sentencing rationale for the enhancement.¹⁸⁸ Thus, rather than function in its role as an independent, expert agency, the Commission apparently chose this particular enhancement scheme to parrot Congress's decision to increase the statutory-maximum penalty for illegal re-entry defendants who had previously been convicted of a felony.¹⁸⁹

186. See U.S.S.G. app. C, amend. 193 (1990) (amending § 2L1.2).

187. Previously, the only other prior conviction enhancement the Commission had created was for alien-smuggling cases, where a defendant who had previously been convicted of the same offense could receive a two-level enhancement because the Commission believed that committing the same offense more than once indicated that the defendant was likely involved in "ongoing criminal conduct." See Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 730, 736–37 (2010) [hereinafter Keller, *Prior Conviction Sentencing Enhancements*] (describing how the Commission removed the two-level enhancement in 1992 as it found it to be an inappropriate proxy for "ongoing criminal conduct," but then reinstated the enhancement four years later at the bequest of Congress).

188. See *id.* at 730–33 (discussing the "fundamental and unprecedented" alterations to the illegal re-entry Guideline and the Commission's failure to demonstrate the value of or reasoning behind them).

189. *Id.* at 731–33. In defending the illegal re-entry Guideline, the Second Circuit claimed that the Guideline is not as flawed as the much-maligned child-pornography Guideline because the child-pornography Guideline was directly amended by Congress, whereas the illegal re-entry Guideline was amended by the Commission and of its own volition. See *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011). But the Second Circuit never addressed why a Guideline directly amended by Congress deserves less respect than a Guideline in which the Commission merely copies what Congress did, but without a congressional order. Indeed, the Commission's decision to follow Congress's lead follows its much-maligned decision to replicate Congress's statutory structure in creating the drug guidelines. See *Kimbrough v. United States*, 552 U.S. 85, 96 (2007) ("The Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the [Anti-Drug Abuse Act of 1986's]

Two years later, in 1991, the Commission dramatically increased the harshness of its prior-conviction scheme by creating a sixteen-level enhancement for illegal re-entry defendants who had been deported after a conviction for an “aggravated felony.”¹⁹⁰ The Commission defined “aggravated felony” by relying on the term’s statutory definition, which Congress had just changed to include money laundering and “crime[s] of violence.”¹⁹¹ Congress broadly defined a “crime of violence” to include any “offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”¹⁹² But such crimes, whether against person or property, qualified as a crime of violence only if the defendant’s “term of imprisonment” was at least five years.¹⁹³ That qualification, however, contained a loophole: a suspended sentence counted as a term of imprisonment.¹⁹⁴ Consequently, a defendant who received no jail time and a suspended sentence of five years could be convicted of an aggravated felony.

The Commission once again did not examine whether its new prior-conviction enhancement was necessary, nor did it explain what penal purposes it vindicated with the enhancement.¹⁹⁵ Rather, a single

weight-driven scheme.”). Similar to its drug-penalty scheme, Congress never ordered the Commission to follow its lead with respect to illegal re-entry sentencing, let alone follow its lead by making nearly all defendants who qualified for the higher statutory-maximum penalty also qualify for an enhancement. Moreover, while Congress seemed intent on targeting a specific type of illegal re-entry defendant—individuals who returned to the United States to continue committing crimes—the Commission made no attempt to connect its prior-conviction-enhancement scheme with that penal purpose. Indeed, Congress might have simply believed that it would subject a large group of defendants to a statutory-maximum penalty increase and that it was the job of the expert Commission to determine who, among that group, was most likely to re-offend and therefore deserved an actual sentencing increase. The Commission, however, apparently did not see it that way.

190. See U.S.S.G. app. C, amend. 375 (1992) (amending § 2L1.2(b)(1) to provide a sixteen-level increase for defendants previously deported for aggravated felonies).

191. *Id.*

192. 18 U.S.C. § 16 (2006).

193. See U.S.S.G. app. C, amend. 375 (adding commentary to § 2L1.2 that defines “aggravated felony” as “any crime of violence . . . for which the term of imprisonment . . . is at least five years”).

194. See *id.* (noting that the term of imprisonment imposed was independent of whether the sentence was “suspended”).

195. See Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felony Re-entry Cases*, 8 FED. SENT’G REP. 275, 276 (1996) (“The Commission did no study to determine if such sentences [based on the sixteen-level increase] were necessary—or desirable from any penal theory.”). The only thing the Commission stated about the increase was this conclusory statement: “The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.” See U.S.S.G. app. C, amend. 375 (1991) (adding the offense characteristic that provided an increase of sixteen levels above the base offense level under §2L1.2 for defendants

commissioner suggested the enhancement, and it was passed with “little discussion”¹⁹⁶ and with the support of DOJ, which believed the change was needed to reflect congressional will.¹⁹⁷

The Commission’s lack of explanation was particularly peculiar given that the enhancement was unquestionably extraordinary when compared with the rest of the Guidelines and the way in which every other federal crime was treated. As noted earlier, the idea of a prior-conviction enhancement itself was something of a novelty. But the fact that the new enhancement included such a dramatic increase made the enhancement all the more exceptional.¹⁹⁸ Elsewhere in the Guidelines, the Commission typically used enhancements that modestly increased a defendant’s base level by one to six levels.¹⁹⁹ Of the limited number of enhancements that could trigger a greater than six-level enhancement, almost none could trigger a sixteen-level increase.²⁰⁰ That framework

who re-entered the United States after being convicted for an aggravated felony); *see also Public Hearing Before the U.S. Sentencing Comm’n*, San Diego, Cal., at 22 (Mar. 6, 2006) (statement of Comm’r Ruben Castillo) (“When we [the members of the U.S. Sentencing Commission] were out in Texas, the Federal Defenders gave some, I thought, compelling testimony that said, in the first instance, the Commission has never articulated a justification for the 16-level enhancement.”).

196. *See* McWhirter & Sands, *supra* note 195, at 276 (“Commissioner Michael Gelacak suggested the sixteen-level increase and the Commission passed it with relatively little discussion.”).

197. When the Commission held a hearing on its proposed amendment to the illegal re-entry Guideline—alongside many other amendments—the illegal re-entry amendment came up only once, by a DOJ representative who stated that DOJ supported the amendment. *Public Hearing on Proposed Amendments to the Sentencing Guidelines Before the U.S. Sentencing Comm’n*, Washington, D.C., at 31–32 (Mar. 5, 1991). In written comments in support of the illegal re-entry Guideline’s alteration, DOJ stated that the amendment was needed to reflect the “will of Congress.” *Public Hearing on Proposed Amendments to the Sentencing Guidelines Before the U.S. Sentencing Comm’n*, Washington D.C., at 8 (Mar. 5 1991) (statement of Joe B. Brown). The representative noted that the amendment was “an urgent Departmental priority” and explained that “[i]n the ordinary case, an alien drug dealer who illegally returns to the United States to practice his trade will continue this pattern of conduct until there is a substantial disincentive to do so.” *Id.* Thus, DOJ championed the enhancement under the belief that it would target individuals who came to the United States to commit crimes.

198. *See* McWhirter & Sands, *supra* note 195, at 275 (“The 16-level adjustment is unlike any in the guidelines. There is neither a gradual increase in severity of the offenses, such as in drug or fraud crimes, nor is the increase pegged to a more serious element in the offense itself.”).

199. *See, e.g.*, U.S.S.G. § 2A2.4(b)(1) (1991) (providing a three-level enhancement for defendants who were convicted of obstructing or impeding officers and who used “physical contact”); U.S.S.G. § 2A3.1(b)(2) (1991) (providing a four-level increase for defendants who were convicted of criminal sexual abuse where the victim was under twelve); U.S.S.G. § 2A5.1(b)(1) (1991) (providing for a five-level increase for defendants who were convicted of aircraft piracy where “death resulted”).

200. The lone exception was financial crimes, which typically included an enhancement scheme that tied the money involved to the magnitude of the offense level increase. For example, in a fraud conviction, a defendant’s base offense level of six could increase based on the amount of loss the fraud caused; to incur a sixteen-level increase, the loss would have to total more than

meant most enhancements added a few months to a few years to a defendant's sentence; the sixteen-level prior-conviction enhancement, however, resulted in an illegal re-entrant's sentence swelling "by anywhere from five to fourteen times,"²⁰¹ adding from four to nine years to a defendant's sentence.²⁰² In more concrete terms, illegal re-entry defendants—ostensibly being punished for a non-violent, regulatory crime—who received the sixteen-level increase had a Guideline range from 51 to 63 months (if the defendant was in the lowest criminal history category) to as high as 100 to 125 months (if the defendant was in the highest criminal history category).²⁰³

The "proxy" problem also still existed with the Commission's scheme—there was a poor fit between the existence of a defendant's single prior conviction (no matter how dated) and the conclusion that he or she had returned to commit crimes. But given the low number of illegal re-entry prosecutions—in 1992, there were only around 1000 such cases²⁰⁴—few total defendants in any given year received the enhancement. Consequently, concerns about the Commission's poorly designed punishment scheme were mostly theoretical—at least for the time being.

B. Targeting "Dangerous" Defendants and Placing Them on the Fast Track (1993–2004)

Between 1993 and 2004, DOJ took the hints from Congress and shifted strategies by making it the top priority to prosecute individuals who had a prior conviction that triggered a prior-conviction enhancement. In abandoning its failed deterrence strategy, DOJ took a step forward. DOJ, however, used Congress's poorly designed scheme as a map to determine who should be prosecuted, thereby trading one failed strategy that would likely never achieve its goal for another

\$20,000,000. U.S.S.G. § 2F1.1(b)(1)(Q) (1991). There is a clear relationship, however, between the amount of loss and the crime of fraud. That relationship is not clear with respect to an illegal re-entry defendant and a prior conviction. In short, compared to the rest of the Guidelines, the prior-conviction enhancement scheme looked different—*really* different. See James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation?*, 9 GEO. IMMIGR. L.J. 451, 462 n.57 (1995) (noting the uniqueness of the sixteen-level enhancement for illegal re-entry cases).

201. Lynn Adelman & Jon Deitrich, *Improving the Guidelines through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 589 (2009).

202. A defendant's adjusted offense level would go from eight to twenty-four with the sixteen-level increase, meaning the defendant's sentence could increase by as few as 51 months to as many as 125 months, depending on the criminal history score. See U.S.S.G. ch. 5, pt. A, sentencing tbl. (1991).

203. *Id.*

204. TRAC Immigration, *supra* note 146.

strategy whose goal was attainable (targeting dangerous individuals), but improbable.

By 1993, the United States had a long-standing policy of allowing most illegal entrants and re-entrants to return to their country of origin through voluntary departure, in which case no order of deportation was entered against them and they were not prosecuted.²⁰⁵ Moreover, a large number of individuals escaped apprehension altogether since the border was still mostly unguarded.²⁰⁶ According to one researcher, the chance of being arrested trying to cross into the United States illegally was around 30%, and successfully obtaining entry into the United States typically took, at most, a few tries.²⁰⁷ As two federal prosecutors from Southern California summed up the situation: “Everyone—prosecutors, aliens, defense counsel, and the court—accepted that the border was a revolving door and that most of the aliens prosecuted as well as those immediately returned to their country of origin would attempt to reenter as soon as possible.”²⁰⁸

This policy started to change when President Clinton made control of the U.S.-Mexico border a top priority.²⁰⁹ In 1993, President Clinton dispatched the Attorney General and the INS Commissioner to tour the Southwest border, where they made a “commitment to Border Patrol that sufficient resources would be provided to permit satisfactory management of the border.”²¹⁰

205. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 95 tbl.36 (documenting the number of “removals” and “returns” of inadmissible or deportable aliens).

206. CHAD C. HADDAL, CONG. RESEARCH SERV., BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 4 (2010) (citing a 1993 study commissioned by the Officer of National Drug Control Policy that concluded the Southwest border was “being overrun”).

207. Thomas J. Espenshade, *Does the Threat of Border Apprehension Deter Undocumented US Immigration?*, 20 POPULATION & DEV. REV. 872, 886–88 (Dec. 1994).

208. Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 287 (1997) [hereinafter Bersin & Feigin, *The Rule of Law*]; accord Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT’G REP. 254, 254 (Mar./Apr. 1996) [hereinafter Bersin, *Reinventing Immigration Law Enforcement*] (“When Attorney General Janet Reno visited San Diego in August 1993, she observed a border that was virtually out of control.”).

209. See ANDREAS, *supra* note 15, at 89 (discussing Clinton’s initiatives, including hiring 600 more Border Patrol Agents and increasing INS’s budget). Many have credited President Clinton’s sudden interest in immigration control to crass politics; an anti-immigration backlash in California had led Clinton’s political team to worry that he was vulnerable to attack as being soft on illegal immigration in that key electoral state. See Wayne Cornelius, *Controlling ‘Unwanted’ Immigration: Lessons from the United States, 1993–2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 777–78 (2005).

210. Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 299.

The primary goal of this new strategy was “prevention through deterrence,” whereby officials believed they could deter individuals from unlawfully immigrating to the United States by making it more difficult to enter the country illegally.²¹¹ As one report stated, “[t]he strategy’s goal was to place [Border Patrol] agents and resources directly on the border in order to deter the entry of illegal aliens, rather than attempting to arrest aliens after they have already entered the country,” as had long been the understood mission of Border Patrol.²¹² The shift in strategy resulted in a massive investment in border assets. The number of Border Patrol agents, for example, doubled in the Southern District of California, one of the most popular locations for Mexican nationals to attempt to enter the United States illegally.²¹³ The agents were armed with sophisticated equipment, including night vision scopes, radios, ground sensors, and helicopters.²¹⁴ A metal fence was constructed in some stretches.²¹⁵ Law enforcement started to use “IDENT,”²¹⁶ a database in which the fingerprints and photograph of each person Border Patrol apprehended would be entered, allowing immigration authorities to identify individuals more quickly.²¹⁷ Thus, for the first time, immigration authorities made a dramatically increased effort to reduce the ease with which an individual could enter the United States illegally.

Thereafter, DOJ launched its new effort to prosecute illegal entry and re-entry cases along the border, but “it was readily apparent,” the U.S. Attorney for the Southern District of California explained, that DOJ “could not, even were it deemed desirable, arrest, prosecute, and convict a half million or more people annually.”²¹⁸ Thus, DOJ, with the help of

211. See ANDREAS, *supra* note 15, at 92; HADDAL, *supra* note 206, at 3–4.

212. HADDAL, *supra* note 206, at 3.

213. Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 299–300; ANDREAS, *supra* note 15, at 90.

214. Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 299–300; ANDREAS, *supra* note 15, at 90.

215. ANDREAS, *supra* note 15, at 91.

216. IDENT is the acronym for the Automated Biometric Identification System. See U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM 2 (2006), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf. IDENT is a

Department of Homeland Security (DHS)-wide system for the storage and processing of biometric and limited biographic information for DHS national security, law enforcement, immigration, intelligence, and other DHS mission-related functions, and to provide associated testing, training, management reporting, planning and analysis, or other administrative uses.

Id.

217. See HADDAL, *supra* note 206, at 10–11 (discussing IDENT).

218. See Bersin, *Reinventing Immigration Law Enforcement*, *supra* note 208, at 254 (noting

IDENT, focused on what it called “criminal alien[s]”—which it “guess-estimated” made up 1% of the unlawful entrants and re-entrants—rather than “the economic migrant,” who had previously made up most prosecutions.²¹⁹ DOJ therefore abandoned the goal of using the criminal justice system to deter illegal immigration and shifted its resources to the 1% it believed were entering the United States to commit crimes—the individuals Senator Chiles wanted targeted.

DOJ understood “criminal alien,” however, in light of Congress’s definition of aggravated felony. Thus, DOJ took Congress’s (and therefore the Commission’s) formula for identifying dangerous individuals and used it to filter who should be prosecuted,²²⁰ meaning that Congress’s poorly calibrated proxy for likelihood to commit crimes was being used not only to determine who should receive a higher sentence, but who should be prosecuted in the first place.

DOJ’s strategy also raised a more fundamental concern—a concern that its public comments never addressed. DOJ’s plan to use criminal history as a proxy for determining dangerousness and then to prosecute those who were deemed dangerous, meant illegal entrants and re-entrants were not being prosecuted for their decision to illegally enter or re-enter, as this decision alone would typically not result in their prosecution. Rather, they would be selected for prosecution because of what DOJ thought they might do—i.e., commit a crime. In essence, DOJ was employing a preventive detention scheme to incapacitate dangerous people, rather than prosecuting people to punish them for their criminal conduct.²²¹ It was no different than prosecuting anyone caught speeding who had been convicted of an aggravated felony and giving them a lengthy sentence on the theory that they were likely to commit a more serious offense in the future.

that up to 600,000 individuals were arrested each year at the border and nearly all could be charged with—at the least—unlawful entry).

219. See Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 300 (explaining how the new system allowed for more “efficient detection and identification” of those aliens who posed the biggest threat to the U.S., thereby allowing a narrower prosecutorial focus).

220. See Susan Katzenelson, Kyle Conley & Willie Martin, *Non-U.S. Citizen Defendants in the Federal Court System*, 8 FED. SENT’G REP. 259, 259–60 (1996) (noting that, in fiscal year 1995, 62% of defendants sentenced under the illegal re-entry Guideline received the sixteen-level increase).

221. As DOJ began using a preventive detention scheme in the criminal context to target supposedly dangerous individuals, Congress mandated a preventive detention scheme in immigration cases as well. See Legomsky, *supra* note 174, at 490–91 (discussing how the grounds for mandatory detention, as opposed to discretionary detention, have multiplied since 1996, when the Anti-Drug Abuse Act only required mandatory detention for those people convicted of “aggravated felonies”).

Using the criminal justice system in this way is what Paul Robinson has described as “cloaking . . . preventive detention as criminal justice.”²²² The criminal act (speeding, illegally entering, etc.) is used to justify placing the supposedly dangerous individual in the criminal justice system, where the government can detain the individual based on his or her supposed future dangerousness but “bypass the logical restrictions on preventive detention.”²²³ For example, under a true preventive detention scheme, the government must justify the detainee’s ongoing dangerousness on a regular basis; once a detainee can establish that he or she is no longer a danger, the government’s interest in detention vanishes, and the individual must be released.²²⁴ But using the criminal justice system as a “cloak” allows the government to avoid having to establish that the defendant is dangerous, as well as detain someone when they could no longer establish that they are dangerous. That meant illegal entry and re-entry defendants could not secure their own release by proving that they were not a danger because the criminal justice system operated under the fiction that the defendant was being punished for the decision to illegally enter or re-enter. This “cloaking” is also what allowed the government to use a terrible proxy for determining dangerousness—the prior-conviction scheme—since the government would not be forced to justify its detention on the basis that the individual was a danger to society. The government could instead rely on the defendant’s conviction for illegal entry or re-entry to justify its detention decision.

DOJ soon put its new plan into practice. The flashpoint was the Southern District of California. Despite its desire to escalate the number of prosecutions in that district, DOJ “recognized . . . that the system as structured was ill equipped to handle the large number of additional criminal alien cases,”²²⁵ reflecting that DOJ had learned something from its attempt in the 1970s to flood the district with immigration prosecutions. But rather than have Congress spend more money to pay for its new strategy, DOJ figured out a shortcut, devising the aptly named “fast track” program—a more formalized version of the flip-flop plan that had been used in the district starting in the 1970s.²²⁶

Under the fast-track program, an illegal re-entry defendant received a “charge bargain” plea offer within twenty-four hours of arraignment.²²⁷

222. Robinson, *supra* note 178, at 1446.

223. *Id.*

224. *Id.* at 1447.

225. Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 300.

226. *See supra* text accompanying notes 137–40.

227. *See* Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 301 (describing this plea offer

The offer allowed the defendant to plead guilty to illegal re-entry without the felony or aggravated felony enhancement. Thus, the defendant's statutory-maximum penalty was two years, rather than ten or twenty.²²⁸ Alternatively, prosecutors allowed some defendants—those with a heightened criminal history—to plead guilty to either two counts of illegal *entry*, which carried a statutory maximum of two-and-a-half years, or three counts, which carried a statutory-maximum penalty of four-and-a-half years.²²⁹ Regardless of the deal offered, the statutory-maximum penalty would be substantially lower than it otherwise would have been—so low, in fact, that the deals would blunt the effect of the sixteen-level prior-conviction enhancement. Thus, unlike defendants charged with other federal crimes, illegal re-entry defendants would receive a special chance to receive a significant sentencing discount (sometimes equaling several years of prison time).

as the “centerpiece” of the new fast-track program).

228. *Id.*

229. See Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 ARIZ. ST. L.J. 517, 523 (2006) (discussing this version of charge bargaining). In addition to this charge-bargain form of fast track, the Southern District of California also allowed defendants to receive the benefits of fast track through direct manipulation of their Guideline range. This occurred through use of the catch-all departure provision in U.S.S.G. § 5K2.0, which the Supreme Court, in *Koon v. United States*, made clear authorized departures when something about the facts of a case removed it from the “heartland” of cases. 518 U.S. 81, 94–95 (1996). Relying on this catch-all departure, prosecutors allowed defendants to receive an offense level reduction if the defendant met the requirements of fast track. See, e.g., *United States v. Ruiz*, 241 F.3d 1157, 1169–70 (9th Cir. 2001) (Tashima, J., concurring) (describing how the government used the catch-all departure provision in the fast-track context), *rev'd on other grounds*, 536 U.S. 622 (2002). It is not clear how often this form of fast track (as opposed to the charge-bargaining form of fast track) was used. But as Judge Tashima from the Ninth Circuit commented in *Ruiz*, it was “highly doubtful, to say the least, that such a departure is authorized by the Guidelines,” *id.* at 1169, as, among other things, “there is no requirement in the fast track departure policy of a finding that the case falls outside of the heartland of illegal reentry cases; indeed, the policy seems to target precisely the run-of-the-mill, heartland case.” *Id.* at 1170. Interestingly, when the legality of the fast-track program was challenged in the late 1990s and early 2000s by defendants who did *not* receive a fast-track offer, courts uniformly rejected their challenges by viewing fast track strictly as a *charge-bargaining program* and, therefore, as part of the Executive Branch's significant charging discretion. There did not appear to be any recognition that charge bargaining was not the only way in which the government facilitated fast track. For example, the Second Circuit, in rejecting an argument by an illegal re-entry defendant that the district court could grant a downward departure to remedy the geographic disparity caused by fast track, quoted a Supreme Court decision that stated “the decision *whether or not to prosecute*, and *what charge to file or bring before a grand jury*, generally rests entirely in [the] discretion [of the prosecutor].” *United States v. Bonnet-Grullon*, 212 F.3d 692, 701 (2d Cir. 2000) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). As discussed below, with the support of legislation passed in 2003, the Commission made a specific departure provision for fast track, thereby obviating the need to rely on the catch-all departure provision to facilitate fast track. See *infra* notes 282–84 and accompanying text (discussing the 2003 PROTECT Act, a reformation of the previous fast-track program of criminal pleading).

In return, the defendant would have to, among other things: (1) waive being indicted; (2) waive the right to file motions; (3) agree to a sentence (usually the statutory-maximum sentence); (4) consent to removal from the country; and (5) waive the right to appeal the conviction, sentence, and removal order.²³⁰ The defendant also needed to accept or reject the offer in a relatively short timeframe.²³¹ This process allowed the government to process people quickly, thereby clearing detention bed space.

Fast-track programs quickly spread, including along the rest of the U.S.-Mexico border where the overwhelming majority of prosecutions occurred.²³² While the exact scope of the plea offer differed from district to district, the basic idea remained the same: the government allowed some defendants to receive a shorter sentence in exchange for a quick guilty plea, which allowed the government to prosecute more people with fewer resources.²³³ The potential cost saving of a quick guilty plea was substantial to the government. Indeed, the Ninth Circuit, in rejecting a constitutional challenge to the fast-track program, perhaps best captured the prevailing wisdom about the program: “[W]e find absolutely nothing wrong (and, quite frankly, a great deal right) with [the fast-track program]. The policy benefits the government and the court system by relieving court congestion.”²³⁴

With the aid of fast track, the number of illegal re-entry prosecutions reached levels not seen in decades. In 1993, DOJ prosecuted about 2000 illegal re-entry cases; in three years, that number doubled to over

230. See Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 301 (explaining that while entering a preindictment plea agreement allowed defendants to serve less time in prison, the practical effect of doing so was that defendants would be sent back to their country of origin immediately upon completion of their prison term; this plea agreement was the alternative to a protracted hearing and appeals process, which accompanied those cases where defendants were charged under 8 U.S.C. § 1326(b) (2006)).

231. See McClellan & Sands, *supra* note 229, at 532 (“[Once a prosecutor makes a fast track plea offer,] [t]ime becomes of the essence because the deal is only held open until the deadline for holding the preliminary and detention hearings, and to take advantage of the deal, the defendant must waive these hearings.”).

232. *Id.* at 523–25.

233. See *id.* (describing the differences among fast-track programs and plea policies and the resulting differences in sentencing ranges); see also Bersin, *Reinventing Immigration Law Enforcement*, *supra* note 208, at 255–57 (describing the changes in the program that occurred in the Southern District of California and the diversity of fast-track opinions used in the Southern District alone).

234. *United States v. Estra-Plata*, 57 F.3d 757, 761 (9th Cir. 1995).

4000,²³⁵ the highest it had been since the 1950s. The number of illegal entry cases, however, remained static, with fewer than 1000 per year.²³⁶

In 1996, Congress once again expanded its definition of “aggravated felony,” adding (among other crimes) gambling offenses, passport fraud, and bribery.²³⁷ Congress also broadened the characteristics of the listed crimes, so that more crimes qualified as aggravated felonies. For example, a prior conviction for a “crime of violence” (which itself had been broadly defined to include even property crimes) previously constituted an aggravated felony only if the sentence imposed was five years; under the new legislation, the sentence imposed needed to be only one year.²³⁸ Congress added these new crimes to an almost comically bloated list of other crimes—tax fraud, theft offenses, child pornography, treason, and fraud, among others—that it had previously incorporated in 1994.²³⁹ Congress also increased the statutory-maximum penalty for illegal re-entry defendants who had been deported following a conviction for an aggravated felony (from fifteen to twenty years) and following a conviction for a felony (from five to ten years).²⁴⁰

235. See TRAC Immigration, *supra* note 146 (showing that the government prosecuted 2361 illegal re-entry cases in 1993, as opposed to 4986 in 1997).

236. See *id.* (showing that the government prosecuted 832 illegal entry cases in 1997, as opposed to 801 in 1993).

237. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 321, 110 Stat. 3009, 627–28; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 439, 110 Stat. 1214, 1277–78; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 1796, 202–28. Congress also created another procedural device to remove someone from the United States, the “expedited removal,” which allowed immigration authorities—without a hearing before an immigration judge—to remove aliens from the country when, among other things, they arrive at the border without proper documents or with fraudulent documents. See generally David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673, 678–82 (2000) (analyzing the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)). The procedure was called “expedited removal” rather than “expedited deportation” because Congress shifted terminology, calling “removals” what had previously been known as “deportation.” For the sake of continuity, however, this Article will carry on with the term “deportation.”

238. See Omnibus Consolidated Appropriations Act of 1997, 110 Stat. at 627–28 (providing additional eleven amendments to the definition of “aggravated felony”).

239. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4305, 4320–22 (codified at 8 U.S.C. § 1101(a)(43) (2006)) (stating that additional crimes included certain offenses related to RICO, ransom, and prostitution).

240. See Violent Crime Control and Law Enforcement Act, 108 Stat. at 2023. It is not clear what led Congress to raise the statutory maximum penalties. But, as Professor Bowman noted, “[b]ecause few defendants ever receive the maximum possible sentence,” congressional increases of the statutory-maximum penalty “are primarily symbolic.” Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 250 (2005).

The outcome of the congressional action was that more prior convictions triggered the sixteen-level enhancement, which meant longer prison sentences and more aliens falsely deemed “dangerous.” Indeed, the definition of aggravated felony included many crimes that were neither “aggravated” nor “felonies.”²⁴¹ Shoplifting or writing a bad check, for example, could qualify as an aggravated felony.²⁴² Moreover, many convictions classified as aggravated felonies had likely been punished by relatively short sentences.²⁴³ The result was that illegal re-entry defendants who received the sixteen-level increase likely served more time in federal prison for their prior conviction than they originally spent in state prison for that conviction.²⁴⁴ Thus, individuals who had criminal records—even minor ones that showed no indication that the person was returning to the United States to commit a crime—were being prosecuted by DOJ and then receiving a harsh sentence because the individuals had been deemed dangerous. The cloak over DOJ’s preventive detention scheme, however, kept aliens from contending that they were not dangerous and therefore, should not receive a lengthy prison term. The relevant fact for the sentencing judge was whether the alien had previously been convicted of a particular offense rather than whether the alien was actually dangerous.

In the wake of the latest congressional broadening of the “aggravated felony” definition, DOJ became even more aggressive with its fast-track program. In 1997, DOJ prosecuted about 800 illegal entry cases and approximately 5000 illegal re-entry cases.²⁴⁵ By 2000, those numbers were approximately 4000 and 8000 respectively.²⁴⁶ Sentence lengths also reached record levels for illegal re-entry cases, as the average

241. See William J. Johnson, Note, *When Misdemeanors Are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419, 424 (2008) (“[T]he definition of what constitutes an aggravated felony has steadily grown and now includes conduct that is neither ‘aggravated’ nor ‘felonious,’ as those words are commonly understood.”); Legomsky, *supra* note 174, at 485 (noting that the expansion of the term “aggravated felony” has resulted in a definition that includes crimes that are not “aggravated or a felony”).

242. See *United States v. Pacheco*, 225 F.3d 148, 149–50 (2d Cir. 2000) (holding that a Massachusetts shoplifting conviction qualified as an aggravated felony); Anwar K. Malik, Note, *Implications of the Small v. United States Decision*, 94 KY. L.J. 715, 727–28 (2005) (discussing the story of a legal permanent resident who was convicted of writing a bad check for less than \$20, a conviction which had been deemed an aggravated felony).

243. See *infra* note 276 and accompanying text (discussing how most defendants who received a sixteen-level increase had served less than two years for their aggravated felony).

244. As noted above, defendants who received the sixteen-level increase could see their illegal re-entry Guideline range increase by between four and nine years. See *supra* note 202.

245. See TRAC Immigration, *supra* note 146 (showing that illegal entry prosecutions increased by 240 cases between 1996 and 1997).

246. See *id.* (showing that since 2000, the number of illegal re-entry prosecutions has continued to steadily increase).

illegal re-entry defendant received a sentence of three years, *doubling* what the sentence had been a decade before.²⁴⁷ This surge occurred because approximately 60% of illegal re-entry defendants received the sixteen-level increase,²⁴⁸ confirming that DOJ was primarily targeting individuals who had a prior conviction that triggered the sixteen-level increase.

Figures 3 and 4, below, compare the illegal entry and re-entry prosecutions and deportable aliens apprehended between 1987 and 2004, respectively.

FIGURE 3

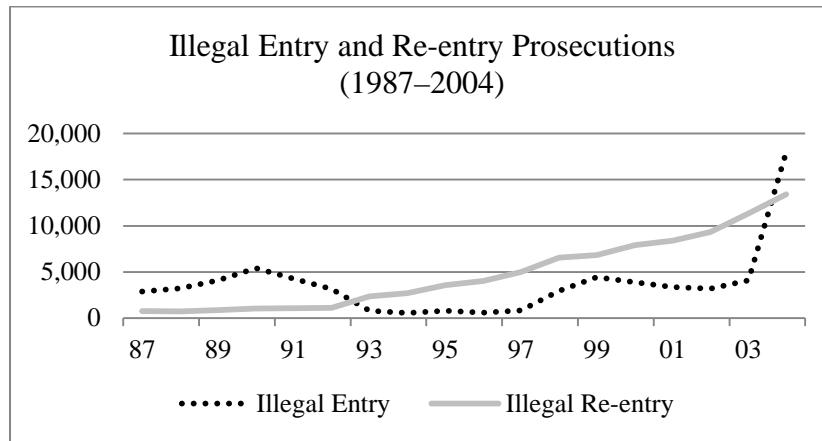
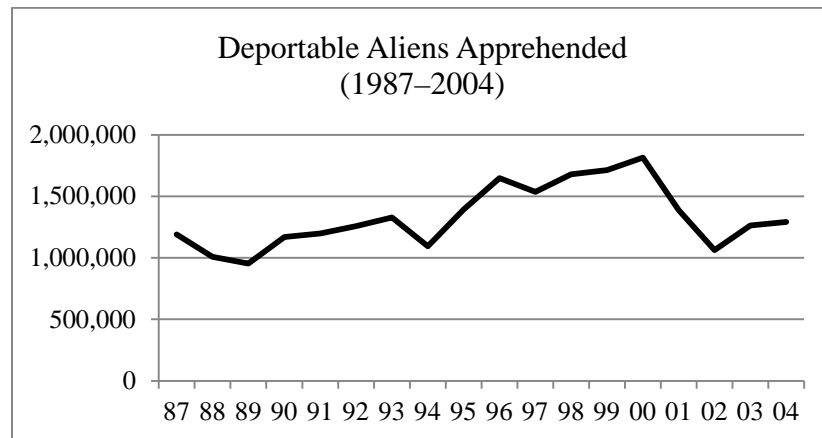


FIGURE 4



247. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.50 (2000) (documenting the mean and median sentences of offenders who had been sentenced under the immigration guidelines for fiscal year 2000).

248. Katzenelson, *supra* note 220, at 259.

Apart from prosecutions, the government continued its “prevention through deterrence” program. As a result, by 2000, Congress doled out over a billion dollars per year for Border Patrol’s budget,²⁴⁹ an increase of more than \$650 million from the 1993 budget.²⁵⁰ The number of agents increased, and physical barriers dotted the Southwest border.²⁵¹ Entering the United States illegally had become substantially more difficult.

Two notable collateral consequences resulted from the placement of more Border Patrol agents along the border. First, immigrants started to more heavily “rel[y] on alien smugglers” and alien smuggling organizations, which were becoming increasingly “sophisticated, complex, organized, and flexible.”²⁵² Such services also became increasingly expensive, as the inflation-adjusted cost of a smuggler grew on average between 6% to 8% per year, reaching around \$2,000 per person by 2000.²⁵³ Second, since Border Patrol’s enforcement efforts were mostly focused near urban areas, immigrants started to cross into the U.S. via dangerous patches of desert, particularly those near Tucson.²⁵⁴ This change was catastrophic for many—by 2000, over 300 migrants a year died trying to enter the United States illegally.²⁵⁵ In short, apart from the threat of prosecution, both the cost and risk of an illegal entry attempt multiplied.

249. HADDAL, *supra* note 206, at 6.

250. ANDREAS, *supra* note 15, at 89.

251. *Id.* at 90–91.

252. U.S. GOV’T ACCOUNTABILITY OFFICE, ALIEN SMUGGLING: MANAGEMENT AND OPERATIONAL IMPROVEMENTS NEEDED TO ADDRESS GROWING PROBLEM 6–7 (May 2000). In response, DOJ started to make prosecuting alien smugglers a higher priority. *Id.* at 12. Thus, by 2000, DOJ prosecuted nearly 3000 alien smuggling cases per year, almost 2.5 times the number of cases prosecuted a decade earlier. *See Convictions for 2010, Lead Charge: 08 USC 1324 – Bringing In and Harboring Certain Aliens*, TRAC, <http://tracfed.syr.edu/results/9x204dac373029.html> (report generated Apr. 18, 2011) (charting the number of alien smuggling prosecutions from 1990 through 2010).

253. Bryan Roberts et al., U.S. Dep’t of Homeland Sec., *An Analysis of Migrant Smuggling Costs along the Southwest Border* 5 (Office of Immigration Statistics, Working Paper, Nov. 2010); *see* Pia M. Orrenius, *Illegal Immigration and Enforcement along the U.S.-Mexico Border: An Overview*, FED. RES. BANK OF DALL. ECON. & FIN. REV. FIRST QUARTER 7 (2001) (documenting the increase in smuggler use rates and fees from 1965 to 1997).

254. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL’S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED 3–4 (Aug. 2006) [hereinafter BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995] (“The increase in deaths due to heat exposure over the last 15 years is consistent with our previous report that found that evidence that migrant traffic shifted from urban areas like San Diego and El Paso into the desert following the implementation of the Southwest Border Strategy in 1994.”).

255. *Id.* at 16.

At the beginning of the twenty-first century, there were widespread complaints about both the fast-track program and the Commission's prior-conviction scheme. Fast track was attacked as arbitrary, since the program varied across districts, and many districts—approximately half²⁵⁶—did not have a program at all, meaning a defendant's sentence could be “radically different” depending on the place of apprehension.²⁵⁷ For example, an illegal re-entry defendant in Criminal History Category V received a plea offer of twenty-four months if caught in San Diego (which had a fast-track program), a plea offer of thirty months if caught in San Francisco (which had a different fast-track program), and a plea offer of seventy to eighty-seven months if caught in Los Angeles (which had no fast-track program).²⁵⁸ The disparity that had led to sentencing reform in the 1980s was being resuscitated.

The fast-track program was also assailed for turning criminal proceedings into an “assembly-line,”²⁵⁹ a criticism that echoed Judge Schwartz's concerns about the 1970s flip-flop program.²⁶⁰ Perhaps the most concerning aspect of the program was the short amount of time prosecutors gave defendants to accept a fast-track offer. Often, defendants merely had days to decide whether to accept their fast-track offer. The situation placed defense counsel in a difficult ethical position when attempting to advise their clients. As two former federal public defenders explained the quandary in a 1999 article:

You must try to explain [in your initial meeting with clients] that pleading guilty and doing so quickly, in most cases, is going to result in the lowest penalty. You must do this without the benefit of any investigation into the legal and factual issues, often with little or no discovery from the government [to determine if the client has a defense]. You must do it without adequate time to develop any relationship with the client. And unless you are bilingual and speak

256. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 64 (Oct. 2003) [hereinafter U.S. SENTENCING COMM'N, DOWNWARD DEPARTURES] (stating that approximately half of the U.S. Districts did not implement the fast-track program).

257. Jon M. Sands, *Avoiding “Hobson's Choice”—Disparity in Plea Policies as a Departure Basis*, 23 CHAMPION 55, 56 (July 1999); see McClellan & Sands, *supra* note 229, at 524–25 (discussing the “patchwork quality” of plea policies across jurisdictions).

258. See Sands, *supra* note 257, at 56.

259. Daniel P. Blank, Note, *Suppressing Defendant's Identity and Other Strategies for Defending against a Charge of Illegal Reentry after Deportation*, 50 STAN. L. REV. 139, 142 (1997).

260. *Id.* at 158–59.

your client's language, you may be doing it in a language other than his native tongue.²⁶¹

The idea of a defense in an illegal entry or re-entry case might appear to be an oxymoron. The crimes are, for the most part, simple ones. Defendants are typically caught red-handed—i.e., in the act of illegally entering at the U.S.-Mexico border. But there are two technical defenses even for defendants caught red-handed.

First, a complete defense to a charge of illegal entry or re-entry is a claim of U.S. citizenship, since only “aliens” (non-U.S. citizens) can be convicted of illegal entry and re-entry.²⁶² Sometimes an individual will know if he or she is a U.S. citizen; other times, however, an individual will not. For example, some individuals are “derivative” citizens, individuals who automatically became U.S. citizens (even though they were born outside of the United States) because they derived citizenship through a U.S. citizen parent.²⁶³

Second, illegal re-entry defendants can collaterally attack the legality of their predicate deportation order. In 1987, in *United States v. Mendoza-Lopez*, the Supreme Court held that the constitutional guarantee of due process allowed an administrative order, like an order of deportation, to comprise an element of a criminal offense only if the defendant could, at some point, attain judicial review of the legality of the order.²⁶⁴ The Court further held that “where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.”²⁶⁵ Applying those principles to the case before it, the Court held that judicial review had not been previously available to Mendoza-Lopez in his immigration proceeding, given the defects of the earlier proceeding. Mendoza-Lopez had failed to seek judicial review of the immigration judge's deportation order earlier only because the immigration judge had incorrectly told him that he was not eligible for relief from deportation.²⁶⁶ As a result, he could obtain judicial review of the

261. Michael O'Connor & Celia Rumann, *The Death of Advocacy in Re-Entry after Deportation Cases*, 23 CHAMPION 42, 42–43 (Nov. 1999).

262. 8 U.S.C. §§ 1325, 1326 (2006).

263. See 8 U.S.C. § 1401(c), (g) (2006) (defining derivative citizenship requirements).

264. 481 U.S. 828, 837–38 (1987).

265. *Id.* at 838.

266. *Id.* at 842. He had been eligible for “suspension of deportation,” a form of relief. *Id.* at 841.

legality of his deportation order in his illegal re-entry prosecution.²⁶⁷ Subsequently, Congress essentially codified the Court's holding at 8 U.S.C. § 1326(d).²⁶⁸

Both defenses can require time-consuming research.²⁶⁹ Determining whether someone has a potential derivative-citizenship defense may involve significant legal research into the changing derivative citizenship requirements and factual research into the defendant's history.²⁷⁰ For example, the determination can require research into how long a defendant's U.S. citizen parent lived in the United States before giving birth to the defendant.²⁷¹ To determine whether a defendant has a valid collateral attack, the defendant's attorney typically must review what happened at the defendant's deportation hearing, which requires listening to an audiotape of the hearing. In listening to the tape, the attorney must determine whether the hearing involved a due process violation, such as whether the defendant qualified for some sort of relief from deportation that the immigration judge did not mention.²⁷² With the fast-track program, however, a defendant must quickly accept the plea bargain, meaning he or she will not necessarily have enough time to determine whether a potential defense exists, thereby creating the aforementioned ethical dilemma for defense attorneys.

In addition to complaints about the fast-track program, defense counsel, commentators, and judges assailed the Commission's prior-

267. *Id.* at 842.

268. Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1267 (codified at 8 U.S.C. § 1326(d) (1996)). Courts have interpreted the standard to mean not only that the defendant was eligible for relief, but that he or she had at least a reasonable chance of receiving such relief. *See* Wible, *supra* note 14, at 467-80 (explaining various circuit courts' interpretations of the standard).

269. Determining a defendant's sentencing exposure in illegal re-entry cases can also take some time because of the categorical approach, which might require a defendant's attorney to obtain copies of the defendant's conviction records and do significant legal research. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4471 (codified at 8 U.S.C. § 1326(b)(2) (1988)); *see also supra* note 172 (discussing the categorical approach).

270. *See, e.g.,* United States v. Sandoval-Gonzalez, 642 F.3d 717, 724-27 (9th Cir. 2011) (vacating an illegal re-entry defendant's conviction after determining that the district court had improperly required the defendant to prove he was a derivative citizen rather than requiring the government to prove beyond a reasonable doubt that he was not a derivative citizen and, therefore, an alien).

271. *See* 8 U.S.C. § 1401(g) (2006) (defining which persons are United States nationals at birth if born outside the geographical limits of the United States when one parent is a United States citizen and the other is an alien).

272. To competently do so requires a familiarity with immigration law and the various types of relief available. *See, e.g.,* 8 U.S.C. § 1231(b)(3)(A) (2006) (providing the requirements for withholding of removal); *id.* § 1229b(a) (providing the requirements for cancellation of removal); *id.* § 1229c(b) (providing the requirements for voluntary departure).

conviction scheme. The scheme was derided for its harshness and lack of proportionality. Judges, for example, were concerned that the broad definition of “aggravated felony” resulted in too many defendants receiving the sixteen-level increase for relatively trivial conduct.²⁷³ At least some judges “believed that a good number of . . . prior aggravated felonies were nonviolent, and [decisions to return to the United States illegally] were motivated by family separation circumstances rather than sinister criminal intentions.”²⁷⁴ Thus, judges complained about Congress’s proxy for determining who was returning to the United States to commit crimes, particularly serious crimes. Indeed, the Commission’s own research indicated that *over half* of all aggravated felonies that triggered the sixteen-level increase did not involve injury, violence, or a weapon.²⁷⁵ Over 80% of the prior aggravated felony convictions also involved sentences that fell well below the four-or-more years the sixteen-level increase added to the sentence of illegal re-entry defendants.²⁷⁶

In response to these complaints, the Commission studied how it could improve illegal re-entry sentencing.²⁷⁷ Ultimately, the Commission chose to re-craft its scheme so that the illegal re-entry Guideline had a more graduated penalty increase. Rather than just having four- and sixteen-level increases, the Commission created eight- and twelve-level increases.²⁷⁸ The four-level increase would continue to be triggered by a felony prior conviction, the eight-level increase would be triggered by a prior conviction for an aggravated felony, and the twelve-level increase would be triggered by a drug trafficking conviction for which the sentence imposed was thirteen months or less.²⁷⁹ Finally, the Commission re-defined the sixteen-level increase to include a broad array of crimes, including “drug trafficking offenses (for which the sentence imposed was more than thirteen months),” as well as “murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses

273. See Linda Drazga Maxfield, *Aggravated Felonies and § 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 530 (2003) (explaining the general judicial dissatisfaction with the broad definition of “aggravated felony,” particularly among judges within the southwestern districts).

274. *Id.*

275. *Id.* at 542.

276. See *id.* at 535 (noting that, according to the Commission’s research, in one sample of defendants who received the sixteen-level increase, 83% had served less than two years for their aggravated felony).

277. See *id.* at 531 (noting that the Commission, in response to “concerns” about its prior-conviction scheme, “identified the unlawful entry guideline § 2L1.2 consideration during its 2001 amendment cycle”).

278. U.S.S.G. app. C, amend. 632 (2001).

279. *Id.*

(including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling, or any other offense that has as an element the use, attempted use, or threatened use of physical force against another person.”²⁸⁰

Disappointingly, the Commission’s new scheme never addressed what purpose the prior-conviction enhancement was intended to serve. Was it intended to target individuals who planned to come to the United States to commit crimes, as Senator Chiles had suggested in 1988 and as DOJ had assumed? If so, why was the scheme still not tailored to target those sorts of individuals?

Apart from these questions, the Commission also failed to address the proportionality concerns commentators had raised. Even if the scheme were tailored to target individuals who were likely to commit crimes, why was criminal propensity the most important factor in an illegal re-entry defendant’s sentence? Put more concretely, why should prior shoplifting, robbery, or assault convictions not just be *a* factor in sentencing an illegal re-entry defendant, but *the* most important factor? And, if such a prior conviction should be the most important factor, why should it ever have the ability to add nearly a decade to an illegal re-entry defendant’s sentence? Did a former robbery conviction really make the act of illegally re-entering so much worse that it justified increasing a defendant’s sentence from two years to ten?

In short, while the Commission’s re-sculpting made the illegal re-entry Guideline less harsh on average, the Commission’s amendment failed to provide much-needed legitimacy to the Guideline. The amendment, then, underscored the idea that illegal re-entry defendants, unlike every other type of federal defendant, would mostly be punished for what they had previously done, rather than for the immigration crime for which they had been convicted.²⁸¹

With the illegal re-entry Guideline slightly reformed, a response to complaints about the fast-track program came next. In 2003, Congress passed the PROTECT Act, which focused on efforts to reduce the number of downward departures.²⁸² The Act also included a single

280. *Id.* By 2006, around 40% of the defendants sentenced for illegal re-entry received the sixteen-level enhancement; 8% received the twelve-level enhancement; 18% received the eight-level enhancement; and 14% received the four-level enhancement. U.S. SENTENCING COMM’N, INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES 22 (Jan. 20, 2006). About 20% received no prior-conviction enhancement, meaning they have never been convicted of a felony offense. *Id.*

281. For my full critique of the illegal re-entry Guideline, see generally Keller, *Prior Conviction Sentencing Enhancements*, *supra* note 187.

282. See PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified in scattered sections of 18, 28, and 42 U.S.C. (2006)); see also Thomas E. Gorman, *Fast-Track Sentencing*

sentence concerning fast track, giving the Commission 180 days to promulgate “a policy statement authorizing a downward departure of not more than [four] levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.”²⁸³ Thus, Congress expressly blessed a certain kind of fast-track program and delegated to the Attorney General the responsibility of working out the details. The Act’s primary sponsor, Representative Tom Feeney, stated that the program was needed “to avoid unwarranted sentencing disparities within a given district” by requiring that departure be made “pursuant to a formal program that is approved by the United States Attorney and that applies generally to a specified class of offenders.”²⁸⁴

Later that year, Attorney General Ashcroft released a memorandum setting out criteria for fast-track programs.²⁸⁵ According to Ashcroft, the programs would be “reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases.”²⁸⁶ Ashcroft, however, never addressed the disparity caused by the fast-track program—nor did he address the complaints about requiring defendants to quickly accept a plea offer without having adequate time to know whether they were even guilty of the crime to which they were pleading.²⁸⁷

Shortly after, the Commission issued a report concerning the general state of downward departures post-PROTECT Act. With respect to the Act’s approval of the fast-track program, the Commission wrote that it hoped that requiring the Attorney General to approve “all early disposition programs . . . will bring about greater uniformity and transparency among those districts that implement authorized

Disparity: Rereading Congressional Intent to Resolve the Circuit Split, 77 U. CHI. L. REV. 479, 488–90 (2010) (discussing the PROTECT Act and its purposes).

283. PROTECT Act of 2003, § 401(m)(2)(B), 117 Stat. 675.

284. 149 CONG. REC. H2403, H2421 (daily ed. Mar. 27, 2003).

285. Memorandum from Attorney General John Ashcroft Setting Forth Justice Department’s “Fast-Track” Policies (Sept. 22, 2003), *reprinted in* 16 FED. SENT’G REP. 134, 134–35 (Dec. 2003).

286. *Id.* at 134.

287. Thus, even after Ashcroft’s memorandum, defense attorneys continued to complain that they did not have enough time to advise their clients or determine whether their clients had a potentially meritorious defense to an illegal re-entry charge. See Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Policies along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827, 834–35 (discussing the difficulty of exploring possible defenses in a short period of time, particularly in the immigration context, where most of the information necessary to make such a determination is in the hands of the government).

programs.”²⁸⁸ The report also expressed reservations about such programs, stating that the “geographical disparity” it encouraged “appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted sentencing disparity among similarly-situated offenders.”²⁸⁹ The report further expressed concern that “sentencing courts within districts that establish authorized early disposition programs may not have sufficient guidance to apply the departure provision in a uniform manner.”²⁹⁰ Nevertheless, the Commission ultimately promulgated a policy statement that did no more than track the language from the PROTECT Act.²⁹¹

Unsurprisingly, as a consequence of the Ashcroft memorandum and the Commission’s refusal to provide uniform structure to the fast-track program, the status quo persisted, as DOJ continued to institute fast-track programs in a haphazard fashion. Districts in Oregon, Idaho, Nebraska, and North Dakota, for example, were authorized to have fast-track programs, even though these districts saw only two or three illegal re-entry cases per prosecutor per year.²⁹²

The Commission’s recrafting of its prior-conviction scheme and the blessing of DOJ’s fast-track programs had two predictable results: (1) more illegal entry and re-entry prosecutions; and (2) decreased average sentence lengths for illegal re-entry cases. In 2001, DOJ prosecuted over 8000 illegal re-entry cases.²⁹³ Defendants sentenced under the illegal re-entry Guideline received an average sentence of thirty-five months.²⁹⁴ Just three years later, in 2004, DOJ prosecuted over 13,000 illegal re-entry cases.²⁹⁵ Defendants sentenced under the illegal re-entry Guideline in 2004 received an average sentence of twenty-nine months.²⁹⁶ The number of illegal entry prosecutions followed a similar

288. U.S. SENTENCING COMM’N, DOWNWARD DEPARTURES, *supra* note 256, at 66.

289. *Id.* at 67.

290. *Id.*

291. See U.S.S.G., app. C, amend. 651 (2003) (“Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”).

292. See *United States v. Medrano-Duran*, 386 F. Supp. 2d 943, 948 (N.D. Ill. 2005) (noting where DOJ had instituted fast-track programs); see also *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 154 (3d Cir. 2009) (“[I]t does not appear to be clear to the Commission (based on its limited statistical analysis), nor is it evident to us, why some districts have fast-track programs while others do not.”).

293. See TRAC Immigration, *supra* note 146.

294. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.50 (2001) [hereinafter 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS].

295. See TRAC Immigration, *supra* note 146.

296. See 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 294, at tbl.50

pattern. In 2001, there were about 3500 illegal entry convictions; by 2004, there were about 18,000.²⁹⁷ With additional cases, the criminal detention costs soared: the government's annual incarceration costs for illegal entry and re-entry cases ballooned from approximately \$72 million in 1994 to \$576 million by 2004—an incredible eight-fold increase in just one decade.²⁹⁸

Alien-smuggling organizations also continued to proliferate, as more and more immigrants chose to hire someone to guide them into the United States.²⁹⁹ The average inflation-adjusted cost of an alien smuggler also continued to rise.³⁰⁰ Moreover, hundreds of migrants continued to die each year trying to enter the United States illegally through perilous stretches of desert.³⁰¹ Consequently, it was becoming even more expensive and dangerous for many individuals to enter the United States illegally.

III. THE WORST OF BOTH WORLDS: TARGETING “DANGEROUS” ALIENS AND THE RESURRECTION OF THE DETERRENCE RATIONALE (2005–PRESENT)

This final Part brings us to the present day, where eighty years of policy missteps with respect to the crimes of illegal entry and re-entry have culminated in an unprecedented crisis in the administration of federal criminal justice—a crisis that so far has received only modest attention. Starting in 2005, immigration officials launched “Operation Streamline” so that the government could prosecute as many illegal entry and re-entry cases as possible, in an attempt to deter illegal immigration. In essence, immigration officials have resurrected their prior view of the crimes of illegal entry and re-entry along lengthy stretches of the U.S.-Mexico border. But unlike earlier attempts, this one has resulted in a colossal growth in the number of prosecutions—approximately 72,000 a year, a number that constitutes almost half of all

(documenting the number of pre- and post-*Blakely* sentencings for illegal re-entry).

297. See *Convictions for 2010, Lead Charge: 08 USC 1325 – Entry of alien at improper time or place; etc.*, TRAC, <http://tracfed.syr.edu/results/9x204d6ba57d03.html> (report generated Feb. 28, 2011) (documenting illegal entry convictions from 1990 to 2010).

298. ALISTAIR GRAHAM ROBERTSON ET AL., OPERATION STREAMLINE: COSTS AND CONSEQUENCES 24 tbl.3 (2012) [hereinafter OPERATION STREAMLINE], available at http://grassrootsleadership.org/files/GRL_Sept2012_Report%20final.pdf.

299. See Roberts, *supra* note 253, at 5, 9 (analyzing the rise of migrant smuggling).

300. See *id.* at 5 (documenting the rise of real average costs of smuggling Mexican nationals from four data sources).

301. See BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995, *supra* note 254, at 16 (noting an increase in deaths due to heat exposure over the last fifteen years).

federal prosecutions.³⁰² The federal government has accomplished this feat by spending massive amounts of money—\$5.5 billion on detention costs alone from 2005 through 2011—and by drastically reducing the criminal process afforded defendants along much of the U.S.-Mexico border to the extent that the resulting criminal proceedings are unrecognizable as such in the rest of the country.³⁰³ The government has also overwhelmed district courts along the border and forced law enforcement personnel to abandon attempts at dealing with much more serious crimes. Despite this huge growth in prosecutions, it is doubtful that the use of the criminal justice system has meaningfully deterred individuals from coming to the United States illegally and only a small fraction of apprehended deportable aliens continue to be prosecuted. In short, DOJ has resurrected its ineffectual deterrence strategy, just with a heftier price tag, and combined it with its failed policy of targeting dangerous aliens.

A. *The Booker Detour*

Before turning to the launch of Operation Streamline, a quick detour must be taken to note the dramatic change in federal sentencing that has cast a shadow over illegal re-entry sentencing. In 2005, the Supreme Court, in *Booker v. United States*, held that the mandatory nature of the Guidelines could violate a defendant's Sixth Amendment right to trial by jury; to eliminate the possibility of a violation, the Court excised the statutory provision that made the Guidelines mandatory.³⁰⁴ The result was a statutory regime that requires judges to “consider” the Guideline range, along with deterrence, just deserts, incapacitation, and rehabilitation when sentencing a defendant.³⁰⁵ Thus, rather than being bound by the Guideline range, judges are now bound by the statutory minimum and maximum penalties, and they must consider various sentencing factors (including the Guideline range) in selecting a sentence between those two bookends.³⁰⁶

302. See *infra* note 347 and accompanying text (stating that the growth in prosecutions has reached 72,000 per year).

303. See OPERATION STREAMLINE, *supra* note 298, at 3 (“Since the announcement of Operation Streamline in 2005, the federal government has spent \$5.5 billion incarcerating undocumented immigrants in the criminal justice system for unauthorized entry and re-entry, above and beyond the civil immigration system.”).

304. 543 U.S. 220, 232–37, 245 (2005).

305. *Id.* app. at 268–70.

306. Reviewing courts must also ensure that the judge's selected sentence is not substantively unreasonable—i.e., too long or too short. See, e.g., *United States v. Recla*, 560 F.3d 539, 549 (6th Cir. 2009) (outlining the factors that a reviewing court may consider in determining whether the district court's sentence was substantively reasonable); *United States v. Haley*, 529 F.3d 1308,

With the Guidelines rendered advisory, illegal re-entry defendants are now free to argue to district court judges that the judges should remedy some of the defects in illegal re-entry sentencing. In particular, defendants have contended that judges should use their post-*Booker* discretion to give them below-Guideline sentences to make up for the unwarranted disparity between these defendants and defendants who had the option of accepting a fast-track offer.³⁰⁷ Some circuits have held that such arguments are permissible, while others have held that they are not.³⁰⁸

In January 2012, DOJ weighed in on this dispute.³⁰⁹ In a memorandum penned by a deputy attorney general, DOJ noted that prosecutors “in non-fast-track districts routinely face motions for variances based on fast-track programs in other districts.”³¹⁰ In response, DOJ created, for the first time, a national fast-track policy whereby all districts, rather than a haphazard collection of districts, would have an illegal re-entry fast-track program.³¹¹ While DOJ should be applauded for recognizing that significant geographic disparity in a national criminal justice system is a problem worth addressing, DOJ should receive little credit for its solution. The new national policy does little to address geographic disparity, as each of the ninety-three U.S. Attorneys has been granted wide discretion to make large numbers of

1311 (10th Cir. 2008) (finding the district court’s sentence substantively reasonable). Thus, the judge must select a sentence within the statutory range that is not unreasonably long in light of the sentencing factors listed in § 3553(a) of 18 U.S.C.

307. See Gorman, *supra* note 282, at 499–507 (detailing how certain courts of appeal have reassessed their fast-track precedent post-*Kimbrough*).

308. For example, the Tenth Circuit held that a district court has discretion to determine that the geographic disparity caused by fast track constituted “unwarranted sentencing disparity”—a statutory sentencing consideration—and, therefore, sentencing judges could use their post-*Booker* sentencing discretion to give a defendant a below-Guideline sentence to remedy that disparity. *United States v. Lopez-Macias*, 661 F.3d 485, 491–93 (10th Cir. 2011). To receive such a variance, however, the court noted that the defendant “must make a minimum showing that a defendant charged with the same crime in a fast-track district would qualify for fast-track treatment.” *Id.* at 494. Other circuits, however, have held that the geographic disparity caused by fast track is not “unwarranted sentencing disparity” within the meaning of the Sentencing Reform Act because Congress blessed fast track in the PROTECT Act. See Gorman, *supra* note 282, at 499–504 (citing *United States v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008)) (discussing the reasoning employed by courts of appeal that have held that district courts may not remedy the geographic disparity caused by the fast-track program); *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 739–40 (9th Cir. 2009) (reasoning that district courts may not consider geographic fast-track disparities in sentencing because non-fast-track districts are not “unwarranted”).

309. See generally Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys regarding Dep’t Policy on Early Disposition or “Fast-Track” Programs (Jan. 31, 2012) [hereinafter Cole Memo], available at <http://www.justice.gov/dag/fast-track-program.pdf>.

310. *Id.* at 2.

311. *Id.* at 3–4.

illegal re-entry defendants ineligible for fast track based on factors like criminal history and prior immigration contacts.³¹² The national policy, then, is really one of local control with significant local variation. The result has been that districts around the country have developed significantly different policies, and similarly situated defendants *still* receive vastly different sentences depending on the place of apprehension.³¹³ Moving forward, the place of apprehension will still be a primary factor in determining an illegal re-entry defendant's sentence, and district courts will still face regular requests for below-Guideline sentences based on geographic disparity in illegal re-entry cases.

In light of *Booker*, illegal re-entry defendants have also raised policy challenges to the Commission's prior-conviction scheme, claiming that the enhancement results in an unjust and flawed Guideline range that should be given little weight in the sentencing calculus.³¹⁴ Some judges have been sympathetic to the idea that the prior-conviction scheme results in a Guideline range that is too long in at least some cases.³¹⁵ Thus, judges, in an ad-hoc fashion, have sometimes remedied the unfairness of the prior-conviction enhancements.³¹⁶ At least some

312. See *id.* at 3 (defining the bases upon which U.S. Attorneys can exercise their discretion).

313. For a look at the wide diversity of fast-track policies adopted by U.S. Attorneys around the country, see generally OFFICE OF DEFENDER SERVS., MIDDLE DISTRICT OF FLORIDA ILLEGAL REENTRY FAST-TRACK PROGRAM (Mar. 1, 2012), available at <http://fd.org/docs/select-topics---sentencing/Fast-Track-Policies.pdf>.

314. See Keller, *Prior Conviction Sentencing Enhancements*, *supra* note 187, at 764 n.282 (cataloguing cases). See also *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1052 (9th Cir. 2009) (holding that the district court abused its discretion by not giving the defendant a below-Guideline sentence, given the fact that the prior conviction that triggered the sixteen-level increase occurred over twenty years prior).

315. See Keller, *Prior Conviction Sentencing Enhancements*, *supra* note 187, at 764 n.282. According to the Commission, district court judges give illegal re-entry defendants a below-Guideline sentence based on their post-*Booker* discretion in about 8% of cases. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.50 (2010) [hereinafter 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS] (displaying offenders' sentence lengths under immigration guidelines pursuant to the Guideline range).

316. It is worth noting that the Commission has recently attempted to mitigate the harshness of the illegal re-entry Guideline. In November 2011, an amendment took effect that modified the Guideline such that, if a prior conviction that triggered the sixteen-level enhancement occurred more than fifteen years ago (more specifically, if the conviction did not qualify for criminal history points), under the amendment the conviction would increase the defendant's Guideline range by twelve levels rather than sixteen; similarly, a conviction that occurred more than fifteen years ago and that would have triggered the twelve-level enhancement would increase the defendant's Guideline range by eight levels rather than by twelve. See U.S.S.G. app. C, amend. 754 (2011). According to the justification accompanying the amendment, the Commission adopted the amendment in response to "case law and public comment," particularly the Ninth Circuit's decision in *United States v. Amezcua-Vasquez*, which held that an illegal re-entry defendant's within-Guideline range sentence was substantively unreasonable because the range

judges have refused to give a below-Guideline sentence based on the endemic shortcomings of the illegal re-entry Guideline *because* the shortcomings are endemic: If such policy challenges were accepted, a below-Guideline sentence would need to be given in nearly every case.³¹⁷

In short, the upshot of *Booker*, at least with regard to illegal re-entry sentencing, is that district courts are now empowered to soften the harshness of illegal re-entry sentencing—most, however, do not. Regrettably, there appears to be little momentum to rectify the problems of illegal re-entry sentencing beyond DOJ's symbolic fast-track national policy.

B. Operation Streamline

As *Booker* was changing the conceptual framework for sentencing, the Department of Homeland Security (DHS)—now in charge of immigration matters—and DOJ were devising a radical new immigration enforcement plan. This plan became known as Operation Streamline and resurrected the idea that prosecuting illegal entry and re-entry cases could deter illegal immigration.³¹⁸

was driven by the defendant's two-decades old prior conviction that had triggered the sixteen-level enhancement; the Court held that a prior conviction should not "increase[e] a defendant's sentence by the same magnitude irrespective of the age of the prior conviction at the time of reentry." 567 F.3d 1050, 1055 (9th Cir. 2009). The Commission should certainly be applauded for taking this step. Nevertheless, it is not clear why the Commission allows a prior conviction that occurred decades ago to increase an illegal re-entry defendant's Guideline range by *any* amount.

317. For example, in *United States v. Almendares-Soto*, the defendant objected to the underlying reasonableness of the illegal re-entry Guideline, noting the "radical[]" changes the Commission had made to the Guideline. No. CR 10-1922, 2010 WL 5476767, at *3 (D.N.M. Dec. 14, 2010). The court ultimately rejected the defendant's request for a below-Guideline sentence on this basis, noting that if the court accepted his argument, "a large number of defendants would also qualify for variance of indeterminate lengths, and the Guidelines would cease to provide an objective standard for uniformity between similarly situated defendants." *Id.* at *14. While it is perhaps understandable to want to avoid an ad-hoc solution to a system-wide problem, sentencing courts are still statutorily required to give defendants sentences that are not greater than necessary to satisfy the goals of sentencing. See 18 U.S.C. § 3553(a) (2006) (defining the factors to be considered when imposing a sentence). Thus, until a system-wide solution to the illegal re-entry Guideline is implemented, courts must, on an ad-hoc basis, ensure that the shortcomings of the illegal re-entry Guideline are not leading them to give defendants sentences that are greater than necessary. Moreover, the illegal re-entry Guideline's "objective standard" is wholly arbitrary—it does not ensure that like cases are treated *alike*. It merely gives the appearance of uniformity. Thus, by varying from the Guideline range in illegal re-entry cases, courts are not fostering unwarranted sentencing disparity any more than they are by following the Guideline to begin with.

318. See *DHS Launches "Operation Streamline II,"* U.S. CUSTOMS AND BORDER PROTECTION (Dec. 16, 2005), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2005_press_releases/122005/12162005.xml (announcing the launch of

The genesis of Operation Streamline is credited to immigration officials working near the small Texas town of Eagle Pass around 2005.³¹⁹ For many years, Eagle Pass immigration officials struggled with a lack of detention space, mostly because of the detention needs of non-Mexican nationals. While apprehended Mexican nationals could be sent back to Mexico quickly via voluntary departure, it could take immigration officials several months to remove non-Mexican nationals.³²⁰ As the bed-space shortage became more acute, immigration officials started paroling large numbers of non-Mexican nationals into the United States (pending resolution of their immigration cases). Eventually, word spread that non-Mexican nationals could enter the United States through parole in Eagle Pass.³²¹

At first, Eagle Pass immigration officials went to the local U.S. Attorney and asked if he would agree to prosecute all non-Mexican nationals apprehended near Eagle Pass. Doing so, officials claimed, would free up immigration-detention bed space by funneling individuals into the criminal justice system, which had access to more beds.³²² The local U.S. attorney “‘took one look’ at the plan and declined to participate, informing the Border Patrol that prosecuting people on the basis of national origin would be a potential equal protection violation.”³²³ Eventually, a solution to the equal protection problem was devised: prosecute everyone apprehended for illegal entry or re-entry, regardless of nationality. Not long after the plan was implemented, the number of apprehensions near Eagle Pass decreased and DHS declared its program a success.³²⁴

Operation Streamline quickly spread along the border, as first-time offenders with no criminal history—the “economic migrants” who, DOJ had determined in 1993, were no longer worth prosecution

Operation Streamline in Del Rio, Texas in December 2005); *see also* GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: DROWNING JUSTICE AND DRAINING DOLLARS ALONG THE RIO GRANDE 3 (July 2010) [hereinafter GRASSROOTS LEADERSHIP] (discussing the beginning and proliferation of Operation Streamline). For an excellent on-the-ground view of Operation Streamline, *see generally* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481 (2010).

319. Lydgate, *supra* note 318, at 491–92.

320. *Id.* Mexican nationals could be quickly sent back to Mexico through an expedited removal. *Id.* *See generally* Martin, *supra* note 237 (discussing the genesis of expedited removals).

321. *See* Lydgate, *supra* note 318, at 492 (explaining how Border Patrol officers were forced to release many non-Mexican nationals merely with Notices to Appear in immigration court).

322. *Id.* at 493.

323. *Id.*

324. *Id.* at 494.

resources³²⁵—would now once again star in DOJ’s criminal-prosecution production.³²⁶ But how? Nearly sixty years earlier, immigration officials had claimed they wanted to prosecute enough illegal entrants and re-entrants to deter illegal immigration, but they were stifled by the lack of resources. To attempt to solve this perpetual problem, DHS and DOJ planned to build on the earlier fast-track and flip-flop strategies of making it “cheaper” to obtain convictions by reducing the amount of process afforded defendants. Indeed, DHS and DOJ authorities concocted a streamlined process that once again made Judge Schwartz look like a prophet.³²⁷ The linchpin of the system was the magistrate judge, who likely owed her existence to the lobbying of immigration officials in the 1960s. Magistrates can process the “petty” unlawful entry cases in bulk. For example, magistrates in some areas hold mass guilty plea hearings, where a courtroom’s worth of defendants—at times, forty, fifty, or sixty individuals—plead guilty at the same time.³²⁸ In some districts, a single defense attorney represents up to eighty defendants in one hearing.³²⁹ Many defendants meet with their attorney for mere minutes.³³⁰ Because of the streamlined procedures, many defendants “complete the entire proceeding—meeting with counsel, making an initial appearance, pleading guilty, and being sentenced . . . —in a single day.”³³¹ In some districts, cases are prosecuted not by Assistant U.S. Attorneys, but deputized immigration officials.³³² Some immigration officials who shepherd these cases through the system are not even licensed attorneys.³³³

325. See Bersin & Feigin, *The Rule of Law*, *supra* note 208, at 300 (explaining how the new policy shifted focus from the economic migrant to the criminal alien).

326. See Lydgate, *supra* note 318, at 484, 508 (noting that Operation Streamline has fundamentally transformed U.S. border enforcement practice and that “[m]ost Operation Streamline defendants are migrants from Mexico or Central America who have no prior criminal convictions”).

327. See *supra* notes 143–44 and accompanying text.

328. See *supra* notes 143–44 and accompanying text; see also *infra* notes 339–40 and accompanying text.

329. See Lydgate, *supra* note 318, at 496 (noting that, in the Del Rio Border Patrol sector, prosecutions are limited to eighty per day).

330. See *id.* at 505 (noting that, in Tucson, if an attorney receives eighty new clients in one day, and he or she spends eight straight hours interviewing each client, the interview can last only ten minutes); *id.* at 505–06 (noting that, in Del Rio, defense attorneys will often have no more than five to ten minutes to meet with their clients).

331. See *id.* at 486–87 (criticizing these mass hearings as failing to comport with due process).

332. *Id.* at 494.

333. See Eagley, *supra* note 2, at 1332–33 (discussing how unlicensed Border Patrol agents served as prosecutors in Del Rio, and how defendants would only see a licensed prosecutor if they requested a trial).

The substantial reduction in procedural protections for criminal defendants is ironic in light of recent criticisms from immigration scholars about the “asymmetry” of convergence between criminal law and immigration law, whereby “immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.”³³⁴ To balance out this “asymmetry,” the government has made the criminal process more akin to the process provided in immigration proceedings, not the other way around.³³⁵ For example, immigration advocates have long argued that aliens in the immigration system should have the right to a government-paid-for attorney, just as criminal defendants do.³³⁶ Operation Streamline, however, has resulted in watering down the benefit of having an attorney, since defendants might have access to their lawyer for a fleeting period of time.³³⁷ For example, in Laredo, Texas, immigrants arrested over the weekend for illegal entry or re-entry and who are processed in federal court at the beginning of the following work week, typically can meet with their public defender for *less than two minutes*.³³⁸

Many of these procedural shortcuts are of questionable legality. The Ninth Circuit has already held that mass guilty plea hearings violate the Federal Rules of Criminal Procedure, which require the magistrate to address the defendant “personally.”³³⁹ As the court put it, “no judge,

334. Legomsky, *supra* note 174, at 469; see Stumpf, *supra* note 17, at 1686 (“While the enforcement of immigration law has imported substantive criminal law norms, it has left behind the procedural protections of criminal law.”).

335. See Eagly, *supra* note 2, at 1351–52 (noting the similarity between immigration proceedings and Operation Streamline prosecutions).

336. See, e.g., John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death is Different*” and a Refugee’s Right to Counsel, 42 CORNELL INT’L L.J. 361, 382–85 (2009) (discussing some of the arguments in support of aliens having the right to counsel in immigration proceedings, such as the argument that deportation is in effect a criminal punishment and not a civil fine); 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, 309–13 (2000) (explaining how courts have generally concluded that immigration proceedings are civil, and not criminal, thereby not providing defendants in such proceedings with constitutional safeguards inherent in the criminal context, such as the right to effective counsel, but arguing that deportation proceedings should comport with due process).

337. See generally *Oversight Hearing on the “Executive Office for United States Attorneys” Before the H. Subcomm. of Commercial and Admin. Law*, 110th Cong. 10–16 (June 25, 2008) (amended written statement of Heather E. Williams) [hereinafter Williams Statement] (cataloguing the numerous legal and ethical problems of Operation Streamline).

338. See OPERATION STREAMLINE, *supra* note 298, at 14 (explaining that public defenders in Laredo only have two hours to meet with twenty-five to seventy-five clients, giving each client around two minutes).

339. *United States v. Roblero-Solis*, 588 F.3d 692, 700 (9th Cir. 2009).

however alert, could tell whether every single person in a group of 47 or 50 affirmatively answered her questions when the answers were taken at the same time.”³⁴⁰ Despite this problem, these “cattle-call” proceedings lamentably continue.³⁴¹ Other aspects of the program are equally concerning. Border Patrol officials who act as prosecutors “may not adequately preserve prosecutorial independence or give due attention to potential conflicts of interest.”³⁴² Moreover, many defense attorneys who represent defendants in these proceedings are not given enough time to defend their clients competently.³⁴³ How, in minutes, can counsel determine if the client is a derivative U.S. citizen and therefore innocent of the crimes to which the client is pleading guilty? Or whether the client has a mental illness that prevents the knowing waiver of rights? Despite the questionable legality of many aspects of these prosecutions, defendants exercise their constitutional rights at their own peril, as invoking their rights just delays proceedings, so that *regardless* of whether they are ultimately convicted, they will spend substantially more time in detention than they would have if they had just quickly waived their rights.³⁴⁴

With the help of these procedural shortcuts, the number of prosecutions has exploded. In 2005, a near-record 17,000 defendants were convicted of illegal entry; in 2011, that number had more than doubled to about 39,000.³⁴⁵ With respect to illegal re-entry, the government secured a then-record 11,000 convictions in 2005; in 2011, that number had tripled to about 33,000.³⁴⁶ With a total of approximately 72,000 convictions in 2011, the federal government almost prosecuted more illegal entry and re-entry cases than all other

340. *Id.*

341. *See* *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1058–60 (9th Cir. 2011) (noting that Operation Streamline defendants still plead guilty en masse and once again holding that the procedure used, despite slight changes since *Roblero-Solis*, is not legal).

342. Lydgate, *supra* note 318, at 535.

343. *See* Williams Statement, *supra* note 337, at 4, 10–16 (detailing the inadequate amount of time available to defense attorneys to formulate a case for their clients, resulting, for example, in cases involving prison and deportation being resolved in two days or less); OPERATION STREAMLINE, *supra* note 298, at 14 (“In Del Rio, attorneys usually meet with about 80 clients over eight hours, leaving only ten minutes to meet with each Streamline defendant.”).

344. *See* Lydgate, *supra* note 318, at 509 (explaining how first-time entrants are often advised to plead guilty).

345. *See* *Convictions for 2011, Lead Charge: 08 USC 1325 – Entry of alien at improper time or place; etc.*, TRAC, <http://tracfed.syr.edu/results/9x204f7b5dc886.html> (last visited May 15, 2012) (charting out the number of illegal entry convictions from 1991 through 2011).

346. *See id.*

crimes *combined*.³⁴⁷ Indeed, illegal re-entry is now the most prosecuted federal crime.³⁴⁸

Despite its stated goal, Operation Streamline has not implemented a true “zero tolerance” policy—or even anything close to such a policy. The Southern District of California—the second most popular location to enter the United States illegally—has not implemented Operation Streamline’s vision.³⁴⁹ Instead, the district continues to target individuals deemed dangerous based on Congress’ and the Commission’s prior-conviction scheme.³⁵⁰ Moreover, even across the rest of the U.S.-Mexico border, which is ostensibly using a “zero tolerance policy,” the government has fallen well short of its stated goal. For example, near Del Rio, Texas—itsself a popular crossing spot—the government implements a cap of eighty prosecutions a day, since it is not possible to process more cases.³⁵¹ In Tucson, Arizona—the most popular place in the United States to enter illegally, where approximately half of all apprehensions occur³⁵²—immigration officials can prosecute around seventy cases a day, only 8% of the nearly 900 individuals it apprehends daily for unlawful entry.³⁵³ That “is the maximum number of Streamline prosecutions that the Tucson district can handle each day, given the number of holding cells in the building, the volume of other prosecutions, and the capacity of the U.S. Marshals.”³⁵⁴ Consequently, despite the breathtaking number of total prosecutions, an apprehended individual subject to an illegal entry or re-entry charge still has an 84% chance of not being charged.³⁵⁵

347. GRASSROOTS LEADERSHIP, *supra* note 318, at 2.

348. See *Illegal Reentry Becomes Top Criminal Charge*, TRAC, <http://trac.syr.edu/immigration/reports/251/> (last visited June 29, 2011) (charting the rise in illegal re-entry prosecutions over the last four presidencies).

349. See Lydgate, *supra* note 318, at 483, 484 n.13, 491, 540. In 2007, Bush Administration officials ousted the U.S. Attorney in the Southern District of San Diego, Carol Lam, because she was choosing to prosecute fewer immigration cases and focus the office’s resources elsewhere. Jennifer Steinhauer & Eric Lipton, *Ousted California Prosecutor Previously Had Disputes on Strategy*, N.Y. TIMES, Mar. 21, 2007, <http://www.nytimes.com/2007/03/21/us/politics/21lam.html>.

350. See Lydgate, *supra* note 318, at 483, 484 n.13 (noting that rising immigration prosecutions are the result of zero-tolerance immigration enforcement programs).

351. *Id.* at 496.

352. See *id.* at 500 (noting that the late John Roll, former Chief Judge of the U.S. District Court for the District of Arizona, believed that “around 45 percent of all individuals who enter the United States illegally each year do so through the Tucson sector”).

353. See *id.* at 536 (noting the comments of federal defense attorneys about the procedural problems that would occur with a higher-level of individualized attention).

354. *Id.* at 500.

355. See *Illegal Reentry Becomes Top Criminal Charge*, *supra* note 348 (charting the percentage of apprehensions prosecuted from the years 2006 to 2010).

Among the districts attempting to implement Operation Streamline's vision, but which are currently prosecuting substantially less than the total number of apprehended individuals, it is not clear whether these districts will be able to prosecute a larger percentage of defendants anytime soon. Border districts, in fact, are at their breaking point—well beyond the crisis-level seen in San Diego in the 1970s. Courts and their staffs are overwhelmed, as magistrates, court interpreters, probation officers, pre-trial services staff, and the U.S. Marshal Service lack the necessary personnel to deal with current caseloads.³⁵⁶ These problems are particularly acute in the District of Arizona, which recently declared a judicial emergency—the first time a district has had to make such a declaration in almost thirty years—because of the enormous flood of cases.³⁵⁷

The way sentencing works along the border has also varied. Defendants with no criminal history spend, on average, between two and fifteen days in detention; this estimate does not apply to those apprehended outside of Tucson and Southern California, where such defendants are not typically prosecuted.³⁵⁸ The low sentence these defendants receive is an important facet of the system. As noted above, such a sentence essentially eliminates any incentive for a defendant to fight the charges, since fighting would only prolong their time in detention.³⁵⁹ It also frees up bed space. Defendants *with* a criminal history likewise “receive fairly divergent sentences depending on where they are apprehended.”³⁶⁰ An illegal entry defendant with some criminal history might receive a 30-day sentence in one district and a 180-day sentence in another.³⁶¹ Illegal re-entry defendants who qualify

356. *See In re Approval of Judicial Emergency Declared in Dist. of Ariz.*, 639 F.3d 970, 974–75 (9th Cir. 2011) (discussing the problems Operation Streamline is causing for various government officials in Arizona); *see also* GRASSROOTS LEADERSHIP, *supra* note 318, at 8–10 (discussing the strains placed on already limited federal resources as a result of Operation Streamline, particularly with regards to processing and detaining an increasing number of immigrants, which largely falls on only five of the ninety-four federal judicial districts); Lydgate, *supra* note 318, at 522–24 (discussing how Operation Streamline burdens “personnel working in the border district courts, including federal judges and their staff members, AUSAs, federal public defenders, and U.S. Marshals”).

357. *In re Approval of Judicial Emergency Declared in Dist. of Ariz.*, 639 F.3d at 979–80.

358. *See* Lydgate, *supra* note 318, at 483, 484 n.13 (noting that zero-tolerance programs have been implemented in six of the nine Border Patrol sectors).

359. For example, in the Del Rio Border Patrol sector, first-time illegal entrants will receive a six-to-ten day sentence if they plead guilty; contesting the charges will automatically result in at least a thirty-day stay in detention—regardless of the outcome at trial—because the government has the right to prepare for trial for at least thirty days. *Id.* at 509. Given that reality, most federal public defenders in Del Rio advise their clients to plead guilty quickly. *Id.*

360. *Id.* at 508.

361. *See id.* at 509–12 (providing specific examples of sentence variations assigned to illegal

for an eight-, twelve-, or sixteen-level prior-conviction increase can receive a sentence ranging from a few years to a decade.³⁶² Of those who are prosecuted for illegal re-entry, the average sentence is around twenty-one months.³⁶³

Both the exact monetary cost of Operation Streamline and the overall cost of prosecuting illegal entry and re-entry cases remain unknown.³⁶⁴ However, between detention costs and money for defense attorneys, prosecutors, and additional immigration and court personnel, the monetary figure exceeds well over a billion dollars per year.³⁶⁵ Indeed, the detention cost for illegal entry and re-entry cases alone is just over one billion dollars.³⁶⁶ At least one federal judge has called the costs from prosecuting illegal entry and re-entry defendants with no criminal history “simply mind boggling,” stating that “[t]he U.S. Attorney’s policy of prosecuting all aliens presents a cost to the American taxpayer at this time that is neither meritorious nor reasonable.”³⁶⁷ Thus, immigration officials are mitigating the resource problem, in part, with massive amounts of taxpayer money.

DOJ has also diverted resources away from other types of cases along the border, including “serious crimes, [like] gun and drug trafficking and organized crime.”³⁶⁸ The U.S. Attorney in Las Cruces, New

entrants with a criminal background).

362. See *supra* note 202 and accompanying text (discussing how, depending on a defendant’s criminal history score, his or her sentence could increase by anywhere from 51 months to 107 months under the sentencing guidelines).

363. 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 315, at tbl.50.

364. See Lydgate, *supra* note 318, at 527 (“Streamline’s expenditures are difficult to pinpoint, as relatively little information about the program’s costs is publicly available. However, a basic review of the resources required to run the program suggests that its costs are likely significant.”).

365. See GRASSROOTS LEADERSHIP, *supra* note 318, at 8 (“Since there is little clear federal oversight of Operation Streamline (OS), there is no well-documented review of the resources that the policy consumes, financial or otherwise.”). According to one estimate, Arizona alone spends \$10 million per month. *Id.* at 10. In 2009, Texas spent around \$320 million in detention costs due to criminal sentencing of immigration cases in its south and western districts alone. *Id.* Likewise, between 2005 and 2009, Texas spent about \$1.2 billion on detention costs. *Id.* See *In re Approval of Judicial Emergency Declared in Dist. of Ariz.*, 639 F.3d 970, 976 (9th Cir. 2011) (“[T]he Department of Justice asked for a funding increase of \$231.6 million for FY 2010 to support its immigration enforcement along the southwest border, including Operation Streamline.”).

366. See OPERATION STREAMLINE, *supra* note 298, at 24 tbl.3 (depicting immigrant incarceration costs in 2011 at \$1,023,615,633.60—comprised of \$84,399,412.80 in illegal entry costs and \$939,216,220.80 in illegal re-entry costs).

367. See *id.* at 7 (quoting Order, United States v. Ordonez-Soto, No. A-09-CR-590-SS (W.D. Tex. Feb. 5, 2010)).

368. See GRASSROOTS LEADERSHIP, *supra* note 318, at 8–9 (“[Operation Streamline’s] use of resources has a number of consequences, including a shift in focus away from more serious violations of the law.”); Lydgate, *supra* note 318, at 522 (noting the decline in prosecution of

Mexico, for example, has lamented that the increased immigration caseload has prevented his office from being as “proactive” as they would like to be in bringing down drug and human trafficking organizations.³⁶⁹ Likewise, at least some “white collar investigations” have been relegated to the “back burner” to make room for “immigration cases.”³⁷⁰ The U.S. Marshals Service has also complained that, along the border, it is “being forced to balance the apprehension of child predators and sex offenders against the judicial security requirements involved in handling immigration detainees.”³⁷¹ This resource shift caused the Chief Judge of the U.S. District Court for New Mexico, Martha Vazquez, to state publicly that she worried that law enforcement resources and detention space would be taken up by immigration offenders rather than “robbers” and “rapists.”³⁷²

This re-allocation of resources is troubling. For the past decade, DOJ had used the crimes of illegal entry and re-entry to target individuals who it believed were dangerous and likely to commit other, more serious crimes. But while DOJ’s strategy was poorly executed, its overall goal—protecting the public—is obviously an important function of DOJ. By diverting resources away from prosecuting individuals for serious crimes and toward prosecuting economic migrants, it appears that DOJ is undermining its mission of protecting the public for the sake of regulating immigration.

But setting aside the cost and whether the public is safer, is Operation Streamline deterring illegal immigration? The answer appears to be no. While there is no direct way to measure whether Operation Streamline deters illegal immigration, there is little reason to think that its current efforts are providing a meaningful deterrent effect. The same problems that plagued DOJ’s efforts to deter illegal entry and re-entry in the 1950s and 1960s still exist today. First, despite the huge absolute number of prosecutions, the chances of being prosecuted are still low. Researchers estimate that the government currently prosecutes around 16% to 23% of those it apprehends for illegal entry or re-entry.³⁷³

more serious crimes).

369. OPERATION STREAMLINE, *supra* note 298, at 13 (describing the U.S. Attorneys’ Office as more “reactive” than “proactive” due to its large immigration caseload). *See also id.* at 17 (explaining how Streamline detracts from more serious criminal prosecutions).

370. *See* Williams Statement, *supra* note 337, at 7 (recounting a statement the then-U.S. Attorney for Tucson made about being forced to put “white collar investigations” on the “back burner due to the crush of immigration cases”).

371. Lydgate, *supra* note 318, at 524.

372. *Southwest Border Courts Swamped with Immigration-Related Felony Cases*, FOX NEWS (Apr. 27, 2007), <http://www.foxnews.com/story/0,2933,268961,00.html>.

373. *See Illegal Reentry Becomes Top Criminal Charge*, *supra* note 355 (estimating that

Many others escape apprehension altogether. Second, it seems doubtful that the threat of prosecutions can change the cost-benefit analysis for aliens enough that a meaningful number will decide not to immigrate here illegally. Aliens continue to come to the United States for jobs—research shows that they can more than double their annual earnings by working here³⁷⁴—or to reunite with their families.³⁷⁵ That is why many risk their lives by crossing dangerous stretches of desert to enter the United States and hundreds continue to die every year trying to make the journey.³⁷⁶ Others pay smugglers thousands of dollars to guide them into the United States.³⁷⁷ For non-Mexican nationals, their journey to the United States will likely take some time, and they already risk a lengthy stay in immigration detention. Additionally, these individuals risk a civil penalty, in the form of being sent back to their country of origin. If those costs do not dissuade someone from trying to come to the United States illegally, it appears doubtful that the threat of a sentence of a few weeks, or, in many cases, even a few years,³⁷⁸

around 16% of aliens caught sneaking into the United States are prosecuted); Edwin Mora, *77 Percent of Illegals Caught on Mexican Border Were Not Prosecuted*, CNSNEWS (Feb. 29, 2012), <http://cnsnews.com/news/article/77-percent-illegals-caught-mexican-border-were-not-prosecuted> (quoting Rep. John Culberson as stating that, according to DOJ data, about 22.9% of aliens caught along the southwest border during fiscal year 2011 were prosecuted).

374. Kevin H. Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices*, 34 J. LEGIS. 16, 33 (2008) (“The average worker in Mexico earns \$8,340 per year, whereas the average Mexican immigrant worker in the United States earns \$18,952 per year. The difference is so great that the risk of death and deportation from crossing the border appears reasonable. Compared to the risk of a starving family in Mexico, many Mexicans cross the border multiple times after being caught and deported, hoping to one day work enough days in the United States to earn money to provide for the basic necessities of their families back home. Unfortunately the likelihood that they will die in the process is increasing, averaging one death per day over the last four years.” (footnotes omitted)).

375. See Lydgate, *supra* note 318, at 484 (noting that most individuals who cross the U.S.-Mexico border do so “in search of work or to reunite with family in the United States”); *Public Hearing Before the U.S. Sentencing Comm’n*, San Diego, Cal. (Mar. 6, 2006) (statement of Chief Judge Martha Vazquez, Dist. of N.M.) (“[Illegal re-entry defendants] are not terrorists, and the vast majority of them are not violent criminals. Overwhelmingly, they are motivated by poverty to come to the United States to work. They come from Mexico or Central American countries to support their families or to reunite with family members who are already in the United States.”).

376. See, e.g., GRASSROOTS LEADERSHIP, *supra* note 318, at 14 (“[There had been] 419 border-crossing fatalities as of December 2009, already surpassing 2008’s 390 deaths.”); BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995, *supra* note 254, at 16 (documenting the several hundred individuals who died attempting to enter the United States illegally each year from 1985 to 2005); OPERATION STREAMLINE, *supra* note 298, at 16 (explaining how criminal prosecutions and incarceration do not deter immigrants from entering the U.S.).

377. See Lydgate, *supra* note 318, at 524–25 (noting that Operation Streamline actually incentivizes human smuggling).

378. As noted above, substantial research indicates that increasing sentencing severity does little to actually deter conduct. See *supra* note 41 and accompanying text (noting that the certainty of apprehension is more of a deterrent than the severity of punishment). El Paso U.S.

would convince someone not to come to the United States illegally, assuming individuals would even be aware of the threat of criminal prosecution.

Apart from those problems previously discussed, the way DHS and DOJ have employed Operation Streamline provides yet another reason to doubt that the program actually deters illegal immigration. A deterrence strategy makes sense only if it is uniformly applied across the entire U.S.-Mexico border. To the extent that individuals are aware of Operation Streamline, they will know it does not exist in Southern California and near Tucson. The rational response would be to try to enter the United States in those areas. Indeed, given the sophistication of alien smuggling organizations, this is likely exactly what the organizations are doing for the aliens who hire them. Members of at least one border community have started to refer to Operation Streamline as a “coyote employment bill.”³⁷⁹ Prosecuting a meaningful percentage of the individuals apprehended in those two sectors, however, is simply not possible. Both districts are already at their breaking points in terms of the number of prosecutions. Prosecuting a meaningful number of individuals in Southern California and Tucson would likely require prosecuting over 100,000 cases in those districts every year—almost 400 cases each day during the work week³⁸⁰—which would likely require doubling the size of the entire criminal division of DOJ, in addition to massive investments in court and detention facilities.

Nevertheless, DHS maintains that Operation Streamline meaningfully deters individuals from coming to the United States illegally.³⁸¹ The basis for their claim is that apprehensions along the U.S.-Mexico border

Magistrate Judge Norbert Garney aptly stated: “Does it (Streamline) discourage people from crossing the border? Of course it doesn’t. Ten to 14 days [in jail] is a small price to pay for the opportunity to double, triple or even quadruple your income and start a better life for your family.” OPERATION STREAMLINE, *supra* note 298, at 16 (citing Lauren Gambino, *Program Prosecutes Illegal Immigrants Before Deporting Them*, NEWS21, <http://asu.news21.com/2010/prosecuting-illegal-immigrants/> (last visited Oct. 13, 2012)).

379. Lydgate, *supra* note 318, at 525 (citing Interview with Robert Kinney, Supervisory Assistant Fed. Pub. Defender, Las Cruces, N.M. (Mar. 25, 2009)).

380. See 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 93 tbl.35 (documenting that around 150,000 aliens were apprehended in the San Diego and El Centro California Border Patrol sectors in 2009, while around 250,000 aliens were apprehended in the Tucson, Arizona Border Patrol sector).

381. See Williams Statement, *supra* note 337, at 17–18 (raising concern over the claimed success of Operation Streamline); *In re* Approval of Judicial Emergency Declared in Dist. of Ariz., 639 F.3d 970, pt. A (9th Cir. 2011) (noting the immediate impact Operation Streamline has had in deterring illegal border entries and increasing apprehension of drug smugglers).

have slowly decreased since Operation Streamline began in 2005.³⁸² According to DHS, the decrease in apprehensions indicates a decrease in illegal border-crossing attempts, which is being caused by the threat of prosecution.³⁸³

Figures 5 and 6, below, compare the combined illegal entry and re-entry convictions and deportable aliens apprehended between 1991 and 2010, respectively.

FIGURE 5

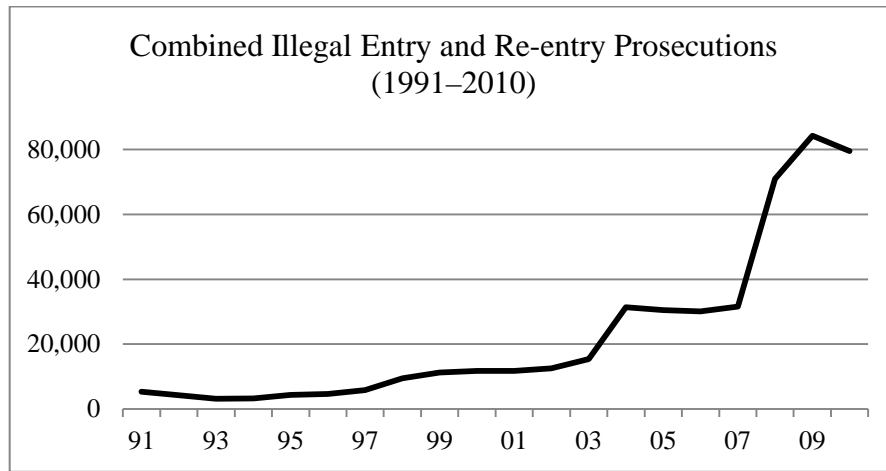
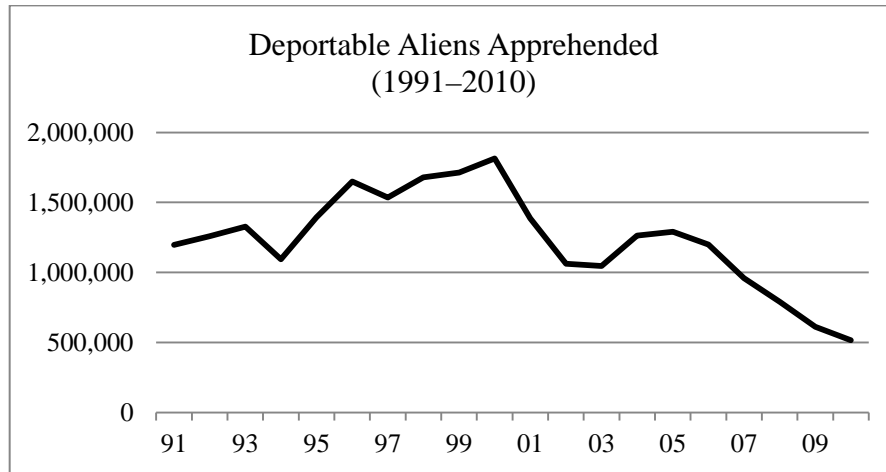


FIGURE 6



382. *In re Approval of Judicial Emergency Declared in Dist. of Ariz.*, 639 F.3d at pt. A.

383. *Id.*

DHS, however, has no data to establish that prosecuting more illegal entry and re-entry cases is the cause in this drop in illegal immigration. There are many reasons to doubt such a link, beyond the reasons given above. For instance, apprehensions have been in decline since 2000, well before Operation Streamline began.³⁸⁴ Moreover, apprehensions have declined in the areas that have not instituted Operation Streamline, including Southern California.³⁸⁵ Studies have also indicated that, to the extent that there are fewer individuals coming to the United States illegally, the decrease has been caused by the economic decline of the United States over the past decade; the unemployment rate, for example, has increased dramatically since 2000.³⁸⁶ Indeed, border apprehensions have largely tracked the U.S. job market since 1991.³⁸⁷ DHS's claim about the success of the prosecution aspects of Operation Streamline also implicitly downplays its other, non-prosecution-related attempts to reduce illegal immigration, particularly its efforts over the previous twenty years to dramatically escalate the presence of Border Patrol agents along the U.S.-Mexico border. In short, there is simply no evidence that the government is meaningfully deterring illegal immigration by prosecuting illegal entry and re-entry cases.

It should not be surprising that a lack of evidence concerning the deterrent effect of prosecuting a larger number of cases has not ended Operation Streamline. As noted earlier, if, as Peter Andreas argues, the primary push for border enforcement is the symbolic effect of the government's efforts, evidence about deterrence is ultimately beside the point.³⁸⁸ But unlike earlier years in which the government's symbolic efforts usually resulted in relatively few prosecutions, its current symbolic effort has come with enormous costs.

CONCLUSION

In reviewing the historical arc of the government's prosecution of illegal entry and re-entry cases, a common theme that runs through the different periods is ineffective policy—a mismatch between strategy

384. See Williams Statement, *supra* note 337, at 17–18; 2009 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 37, at 91 tbl.33 (documenting the number of deportable aliens located between 1925 to 2009).

385. See Williams Statement, *supra* note 337, at 18–19 (noting the decrease in deportable aliens located in all areas, not just the areas in which Operation Streamline was implemented).

386. See Lydgate, *supra* note 318, at 517 (noting the impossibility of isolating Operation Streamline's success when considering other DHS enforcement strategies that have also been enacted).

387. *Id.*

388. See *supra* text accompanying notes 89–91 (describing the change in penalty for first-time illegal entrants).

and the articulated goals. This mismatch is most pronounced with the present policy. Nevertheless, although current policy has been a catastrophic failure and structural reform is desperately needed, little momentum for change exists. Indeed, when policymakers discuss comprehensive immigration reform, discussion about changing the way in which the federal criminal justice system is employed is invariably left out of the conversation. There has been no mention, for example, of reducing the amount of money given to DOJ to prosecute such cases, nor has there been any discussion of whether the illegal entry and re-entry statutes themselves should be amended to re-focus on a narrower subset of individuals—or perhaps even be repealed.

If anything, the coming years will likely see an increase in support for prosecutions because, by prosecuting more aliens who have no prior criminal history, DOJ is, in effect, creating more “criminal aliens.” Thus, in the ensuing years, as some of these individuals are re-apprehended, a higher percentage of apprehended aliens will be classified as “criminals,” thereby providing justification for politicians to claim that prosecutions are necessary to protect the public from these dangerous individuals. In other words, the dangerousness of individuals who illegally enter and re-enter will not change—only the label to describe them will. Indeed, this phenomenon is already happening. In March 2011, the U.S. Government Accountability Office conducted a study on “criminal aliens” at the request of Representative Steve King, an outspoken critic of illegal immigration.³⁸⁹ The study documented that the federal government, over the previous five years, had spent an increasingly large amount of money on incarcerating criminal aliens—now well over a billion dollars a year—and that apprehending criminal aliens increased 85% from 2007 to 2010.³⁹⁰ The study also uncovered the increasing number of criminal aliens in federal prison.³⁹¹ Nowhere in the study, however, is Operation Streamline discussed. Soon after the its release, King touted the report as proof that more needed to be done to combat illegal immigration from Mexico.³⁹² This is likely only the beginning of this particular line of argument, an argument that appears to be winning over U.S. voters.

389. U.S. GOV'T ACCOUNTABILITY OFFICE, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS (Mar. 2011).

390. *Id.* at 16–17, 35.

391. *Id.*

392. See Press Release, Congressman Steve King, Criminal Aliens Increasingly Burden Americans (April 21, 2011), available at http://steveking.house.gov/index.php?option=com_content&task=view&id=4164&Itemid=300100 (suggesting that the U.S. needs to secure the southern border with “a fence, a wall, and a fence”).

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This last point is perhaps the most telling. It is easy to dismiss the government's strategy in pursuing illegal entry and re-entry cases as typical bureaucratic ineffectiveness. But the government's efforts have been ineffective only when judged against their articulated goals of deterrence and protecting the public. As a public relations effort—as *symbolic* enforcement—it is not as clear that the efforts have been ineffective.

Despite the grim outlook, the current climate of reform and the growing chorus of complaints about Operation Streamline present a unique opportunity to persuade relevant stakeholders to come up with a coherent, cost-effective, and realistic illegal entry and re-entry policy for the first time in this nation's history. Thus, it is possible that by pursuing such a self-destructive policy, immigration officials will force the relevant actors to take a much more critical look at the use of the criminal justice system in enforcing the nation's immigration laws along the U.S.-Mexico border.