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### Alienating Criminal Procedure

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# ALIENATING CRIMINAL PROCEDURE

AMY F. KIMPEL\*

## ABSTRACT

*The paradigmatic federal criminal case is not the prosecution of Elizabeth Holmes or John Gotti, but rather that of a poor immigrant of color for a low-level border offense. There persists a perception that federal criminal court is reserved for complex crimes that require robust resources to prosecute and defend. These resources are said to fund procedural rigor and afford a dignity to the proceedings that state courts cannot match. If this mythologized federal criminal court ever existed, it no longer does. Immigration cases overwhelm the federal criminal docket, making up more than half of all filed cases. The majority of those recently prosecuted in federal court are noncitizens, most of whom are Latinx. The changed composition of the docket has a profound impact on the operation of the federal criminal courts. Those charged with federal immigration crimes are canaries in the proverbial coal mine, and federal immigration prosecutions are an underexamined driver of the racialized phenomenon of mass incarceration.*

*This Article argues that immigration cases have remade federal criminal procedure to the detriment of citizen and noncitizen defendants alike. “Operation Streamline” prosecutions, where dozens charged with misdemeanor immigration crimes are counseled, plead guilty, and sentenced in mass proceedings, are now a frequent feature of federal criminal practice. The expedited procedures refined in Streamline migrated from the low-level immigration cases for which they were designed and now feature in gang and drug trafficking cases far from the Southern border. A right that is diminished due to the executive’s plenary power over immigration and the border is a right that remains diminished for us all. For example, Fourth Amendment jurisprudence developed in the realm of immigration cases offers us little protection near the border, regardless of citizenship status. This Article documents these trends and argues that, collectively, they debase the federal*

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*criminal courts and erode constitutional and procedural norms in a way that harms us all. Finally, it advocates for substantive changes to immigration law and policy to begin to reverse these troubling trends.*

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## INTRODUCTION

*The history of liberty has largely been the history of observance of procedural safeguards.<sup>1</sup>*

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1. *Corley v. United States*, 556 U.S. 303, 321 (2009).

*Even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.*<sup>2</sup>

Though legal scholars, public defenders, and activists have shone a light on the way the criminal legal system operates as “assembly-line justice,” where largely poor people and people of color are coerced into quick guilty pleas en masse,<sup>3</sup> federal criminal courts have often gotten a pass. This “pass” is based on the conventional wisdom that, as compared to state and local courts, the procedure afforded to those accused of crimes in federal court is more robust and resource-intensive<sup>4</sup> and that the accused themselves are more affluent or powerful—white collar criminals, terrorists, drug kingpins and corrupt government officials. Even scholars generally critical of the criminal legal system at times hold the federal system out as a model.<sup>5</sup> For example, Law Professor Alexandra Natapoff wrote of her time as a federal public defender handling misdemeanors:

Federal court is the top of the pyramid, there were lots of resources, and everything mattered, even misdemeanors. My misdemeanor case-load consisted of dozens, not hundreds, of cases. I had plenty of time to talk to my clients, investigate, and prepare. Every official player in the courtroom—me, the prosecutor, the judge—had the wherewithal to take each case seriously. My office expected me to litigate zealously when issues arose, and the prosecutors and judges expected that to happen. There were motions and hearings and trials and appeals. . . .

It would be naïve to think that the whole criminal system could work like that courtroom. After all, the top of the pyramid is expensive; federal courts do not face the crush of cases and resource deprivations that state and local courts do. But much of that positive culture flowed not just from material resources but from habits and commitments of the legal players involved. Everyone agreed that the people and their cases mattered, and everyone acted that way to the best of their abilities. . . .

It wasn't perfect—people were jerks, made mistakes, overreached, and occasionally slacked off. And it wasn't always fair. But in that

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2. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

3. See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 20–22 (2018) (explaining how courts use “assembly-line justice” in the criminal courts as a means of social control and marking); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 248, 250 (2018); NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* 4–5 (2016) (describing how the criminal courts engage in the “doing of racism” by processing “a racialized underclass of marginalized offenders”).

4. See, Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 *Nw. L. Rev.* 1261, 1275 (2021).

5. This is not to say there have not been critics of the federal system and its lack of procedural rigor and fairness. See, e.g., Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 *ARIZ. L. REV.* 1 (2021); BABE HOWELL & PRISCILLA BUSTAMANTE, *REPORT ON THE BRONX 120 MASS 'GANG' PROSECUTION* (April 2019), <https://perma.cc/B3XD-6VH9>; Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Law*, 154 *U. PENN. L. REV.* 79 (2005).

particular [federal] misdemeanor court, I got a glimpse of what justice could look like. The culture was respectful and law-abiding. The commitment to fairness felt alive even when it didn't necessarily prevail.<sup>6</sup>

If this was ever an accurate description of federal criminal court, then much has changed since Natapoff was a federal public defender twenty years ago.

“Operation Streamline” proceedings occur daily in federal courtrooms at the southern border. In these proceedings, those accused of misdemeanor immigration crimes are arraigned, are counseled, plead guilty, and are sentenced often all in the same day—at times in groups as large as fifty.<sup>7</sup> Even far from the southern border, defendants in immigration and drug cases are offered “fast track” plea agreements with incentives for waiving core procedural rights and disposing of cases quickly.<sup>8</sup> These proceedings look nothing like the dignified, procedurally rigorous proceedings we associate with federal criminal court and which Natapoff described.



Figure 1. Photograph of an Operation Streamline proceeding in the Federal Courthouse in Pecos, Texas, May 2018. Image Courtesy of Debbie Nathan.

Immigration prosecutions are now the most common prosecutions in federal court, and immigration violations are now the quintessential federal

6. NATAPOFF, *supra* note 3, at 248, 250.

7. See also Max Rivlin-Nadler, *Federal Public Defenders in San Diego Challenge Constitutionality of ‘Operation Streamline’*, KQED (Oct. 31, 2018), <https://perma.cc/2RYM-24HZ>. See generally Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481 (2010).

8. See U.S.S.G § 5K3.1 (2022) (authorizing sentencing departures of 4 levels under the federal sentencing guidelines for early disposition programs); see, e.g., Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT’G. REP. 311 (2009); Memorandum from Deputy Attorney General David W. Ogden to all U.S. Att’ys entitled “Authorization for Early Disposition Programs” (Mar. 31, 2009), (reprinted in 21 FED. SENT’G. REP. 318 (June 2009)).

crime.<sup>9</sup> When federal criminal law primarily targets a disfavored class, like noncitizens,<sup>10</sup> pressure is exerted on the rights, both procedural and substantive, of those accused of crimes. Our commitment to due process is tested in the federal prosecutions of noncitizens. Pretrial release for noncitizens is undermined by the presence of immigration detainers and biased assumptions about risk of flight and safety.<sup>11</sup> The robustness of the Fourth Amendment dampens when race is equated with alienage and guilt and the border becomes a nearly Fourth-Amendment-free zone.<sup>12</sup>

The crush of the expanded immigration and border docket also has spill-over effects. Overburdened by cases, the federal courts have begun to take short cuts on due process. This has devastating consequences for the courts and for all defendants, citizens and noncitizens alike.

Drawing from both “cimmigration”<sup>13</sup> and procedural justice scholarship, this Article argues that the prosecution of low-level offenses against noncitizens has profoundly impacted procedural law and norms in federal court. Building on the work of scholars working at the intersection of immigration and criminal law such as Ingrid Eagly<sup>14</sup> and Jennifer Chacón,<sup>15</sup> this is the first article to squarely address how the increased prosecution of immigration crime is changing criminal procedure in the federal courts—both within and outside the immigration docket. Moreover, relying on Derrick Bell’s interest convergence theory, this Article posits that every American who cares about the legitimacy of the federal courts should care about the treatment of the immigration and border docket because current trends undermine collective commitments to due process and the rule of law.<sup>16</sup>

This Article proceeds in four Parts. Part I describes the rise in immigration prosecutions from the racist origins of the principal federal criminal immigration statutes in 1929 to the current day, where immigration prosecutions comprise over half of the federal criminal docket<sup>17</sup> and 46% of those sentenced

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9. See William La Jeunesse, *Immigration Violations are Majority of Federal Cases for First Time*, FOX NEWS (Nov. 29, 2016), <https://perma.cc/872N-GVUW> (discussing TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION NOW 52 PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS, <https://perma.cc/WWG9-5QQN> (last visited Aug. 21, 2021)) (hereinafter “TRAC Report”).

10. This article uses the term “noncitizen” to refer to individuals who are not citizens of the United States. Obviously, almost all “noncitizens” in this context are citizens of countries other than the United States, and this usage centers and privileges U.S. citizenship. However, for the sake of readability I have chosen not to use the clunkier but more accurate term “non-U.S. citizen,” or an unfamiliar acronym like “non-USC.” Similarly, when I use the term “citizen,” it refers to an individual who is a citizen of the United States.

11. See *United States v. Ayala-Bello*, 995 F.3d 710 (9th Cir. 2021).

12. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

13. “Cimmigration” is a term coined by scholar Juliet Stumpf in *The Cimmigration Crisis: Immigrations, Crime, and Sovereign Power*, 56 AM. U. LAW. REV. 367 (2006), and it is used to refer to the criminalization of immigration law or the intersection between and merger of criminal law and immigration law. See, e.g., César Cuauhtémoc García Hernández, *Cimmigration Realities & Possibilities*, 16 OHIO ST. J. CRIM. L. 1 (2018).

14. See, e.g., Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (hereinafter “*Prosecuting Immigration*”).

15. See, e.g., Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009).

16. See *infra* IV.A.

17. See *infra* I.B.

for felonies in federal court are noncitizens.<sup>18</sup> Part II describes special courts and procedures for immigration cases at the border, focusing on Operation Streamline and the Fast Track program. These programs have been expanded and adopted in new jurisdictions—even outside the southern border region. Part III documents how the increased presence of immigration prosecutions and prosecutions of noncitizens has begun to erode federal criminal procedural norms. This part begins describing persistent problems with prompt presentment in border districts—delays caused by the vast number of border prosecutions. The Article then describes how the border and immigration docket is reshaping law and norms in the context of both bail and the Fourth Amendment. Part IV considers how the abbreviated procedures now employed in federal criminal court reshape our collective understanding of constitutional values and argues that the status quo undermines the prestige of the federal court itself. Part IV concludes that due to the rise in the immigration case load, the federal criminal courts risk a crisis of legitimacy and that a robust commitment to procedural justice dictates substantive changes to our immigration law and policy.

#### I. RISE IN IMMIGRATION AND BORDER PROSECUTIONS

The two major immigration crimes are illegal entry<sup>19</sup> and illegal reentry.<sup>20</sup> Illegal entry, typically a misdemeanor crime, requires proof that the accused is an “alien” who crossed the border into the United States without authorization.<sup>21</sup> Illegal reentry, a felony with penalties up to twenty years in prison, requires proof that the accused is an “alien” who was previously removed from the United States but subsequently reentered the United States.<sup>22</sup> Not only are these the two primary immigration crimes, but, in recent years, they were the most frequently prosecuted crimes in federal court.<sup>23</sup> Both crimes

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18. UNITED STATES SENT’G COMM’N, FEDERAL JUDICIAL CASELOAD STATISTICS FY2020 OVERVIEW at 11, <https://perma.cc/5EV9-RJB9> (both total cases and immigration cases were lower than previous years due to the COVID-19 pandemic) (hereinafter “FY 2020 OVERVIEW.”) As discussed below, this is despite the fact that research demonstrates that generally noncitizens commit crimes at lower rates than their citizen counterparts. See *infra* III.B.

19. 8 U.S.C. § 1325.

20. 8 U.S.C. § 1326.

21. 8 U.S.C. § 1101(a)(3) (“The term ‘alien’ means any person not a citizen or national of the United States.”); see also *Trump v. Hawaii*, 138 S.Ct. 2392, 2443 n. 7 (2018) (Sotomayor, J., dissenting) (“It is important to note, particularly given the nature of this case, that many consider ‘using the term “alien” to refer to other human beings’ to be ‘offensive and demeaning.’ I use the term here only where necessary ‘to be consistent with the statutory language’ that Congress has chosen and ‘to avoid any confusion in replacing a legal term of art with a more appropriate term.’”).

22. See Ninth Circuit Jury Instructions Committee, *Model Criminal Jury Instructions: For the District Courts of the 9th Circuit*, U.S. CTS FOR THE NINTH CIR. 9.7, 9.8 (March 2022), <https://perma.cc/22DF-ZKWG>.

23. See TRAC Report, *supra* note 9 (discussing that in FY 2016 illegal entry was the most prosecuted and illegal reentry the second most prosecuted). For example, in FY 2018, federal prosecutors charged 71,818 people with illegal entry and 23,426 people with illegal reentry. U.S. DEP’T OF JUST., REPORT TO CONGRESS ON IMMIGRATION CRIMES 2, 2 n.5, 3 (Aug. 2019), <https://perma.cc/L69N-AJ2A>. This was in a year when 81,888 individuals were charged with federal felony offenses total and less than 20,000 were sentenced for felony drug crimes (the second most common type of felony charge after immigration crimes). U.S. SENT’G COMM’N, FY 2018, OVERVIEW OF FEDERAL CRIMINAL CASES 5 (June 2019), <https://perma.cc/BW5K-WDJH>.

were enacted into law in 1929 as part of the Undesirable Aliens Act.<sup>24</sup> As legal scholar Eric Fish has demonstrated, the authors of the Act were white supremacists who “sought to preserve the purity of the white race by preventing Latin American immigrants from settling permanently in the United States.”<sup>25</sup> The statute these white supremacists created is now one of the primary drivers of federal criminal prosecutions and federal incarceration. Immigration prosecutions are also a key driver of the incarceration of Latinx people, who now make up the majority of those prosecuted in federal court.<sup>26</sup>

In the past two decades, immigration crime has been used to expand the scope of the federal criminal legal system in a similar way to how the federalization of drug crime expanded it in the 1980s and 1990s. Some might liken the War on Drugs and the War on Immigrants to a one-two punch that knocked federal criminal procedure off of its feet. Both “wars” targeted poor defendants of color, and in these settings, it becomes apparent that the robust commitment to procedural justice in the federal courts is contingent on the status of the accused. Once the defendant is less powerful, the procedural rigor falters.

#### A. *The Racist History of Immigration Prosecutions*

The 1920s marked a shift in immigration regulation. It was at this juncture that the United States established a national quota system which drastically limited immigration by setting quotas based on the number of immigrants from each country present in the United States in the 1890 census.<sup>27</sup> However, the quota system had a gap in that it failed to impose quotas on immigration from Western Hemisphere countries.<sup>28</sup> Efforts to close this perceived loophole culminated in the passage of the Undesirable Aliens Act of 1929, the Act that first criminalized illegal entry and illegal reentry.

Proponents of the law were blatant in their animus towards Mexicans. One architect of the law described other legislative efforts to prevent Mexican migration by characterizing Mexicans as a “mixture of Mediterranean-blooded Spanish peasant with low-grade Indians... [and] negro slave blood,” and explaining that “[t]he prevention of such mongrelization and the degradation it causes is one of the purposes of our laws which the admission of these people will tend to defeat.”<sup>29</sup> Other proponents discussed the “eugenical aspects of

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24. Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1054 (2022).

25. *Id.* at 1051; see also Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L. J. 2134, 2154–58 (2014) (explaining the same rationale was aimed at Asian immigrants); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 529 (2000).

26. FY 2020 OVERVIEW, *supra* note 18, at 6.

27. Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1391-92 (2019); see also DEP'T OF STATE, OFFICE OF THE HISTORIAN, THE IMMIGRATION ACT OF 1924 (THE JOHNSON-REED ACT), <https://perma.cc/A2V7-85UC> (last visited Jan. 30, 2023).

28. Fish, *supra* note 24, at 1055.

29. *Id.* at 1068 (quoting *Restriction of Mexican Immigration*, 69 Cong. Rec. 2817-18 (1928) (statement of Mr. Box)).



deportation,” noting that “immigration looks more and more like a biological problem.”<sup>30</sup> Another proponent of the law indicated he was concerned with “racial hybrids” like Mexicans who posed an existential threat to the racial homogeneity of the United States and could “[jeopardize]” the “racial integrity of the white races.”<sup>31</sup> During the congressional debates about the Undesirable Aliens Act, these statements and the broader discussion made it clear that the law was targeted towards Mexican migration.<sup>32</sup> Recently, a federal district court in Nevada found the illegal reentry statute to violate the Equal Protection Clause because its passage was motivated by racially discriminatory intent towards Mexicans and Latinx people and the law continues to have a disparate impact on these same populations.<sup>33</sup>

Shortly after the passage of the Undesirable Aliens Act, the United States repatriated hundreds of thousands of Mexicans, including thousands of citizens of Mexican ancestry.<sup>34</sup> Simultaneously, thousands were prosecuted for illegal entry and reentry under the new laws—the majority of whom were Mexican nationals.<sup>35</sup> Over the years, prosecution levels waxed and waned,<sup>36</sup> but by and large, immigration prosecution numbers were low—many years under 2,000.<sup>37</sup> In 1952, illegal entry and reentry were recodified and placed in their current position in the code.<sup>38</sup> In 1988, Congress raised the potential penalties for illegal reentry.<sup>39</sup> But immigration prosecutions remained low, particularly prosecutions for illegal reentry, which hovered around 1,000 annually.<sup>40</sup>

Under the Clinton administration, after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, prosecutions began to increase again.<sup>41</sup> In 1995, there were fewer than 4,500 prosecutions for illegal entry or reentry, but by 1998 that number had more than doubled to nearly 10,000.<sup>42</sup> The numbers continued to ramp up after the terrorist

30. *Id.* at 1071–72 (quoting *Eugenical Aspects of Deportation: Hearings Before the H. Comm. on Immigr. and Naturalization*, 70<sup>th</sup> Cong. (1928) (statement of Harry H. Laughlin)).

31. *Id.* at 1078.

32. *Id.* at 1089.

33. *See* *United States v. Carrillo-Lopez*, 555 F.Supp.3d 996 (D. Nev., 2021) (on appeal, Case. No. 21-10233).

34. Fish, *supra* note 24, at 1074.

35. *Id.* at 1090; *see also* Decl. of Prof. Kelly Lytle Hernandez at 7–8, *United States v. Carrillo-Lopez*, 555 F.Supp.3d 996 (D. Nev., 2021) No. 3:20-cr-00026-MMD-WGC.

36. Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L. J. 65, 87 fig. 1, 89, 92 (2012) (citing U.S. DEPT. OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATIONS AND NATURALIZATION SERVICE 90 tbl. 49A (1958)).

37. *Id.*

38. Doug Keller, *Why Prior Conviction Sentencing Enhancement in Illegal Re-Entry Cases are Unjust and Unjustified (and Unreasonable too)*, 51 B.C. L. REV. 719, 729 n. 57 (2010) (describing the “patchwork of laws” governing illegal reentry prior to the 1952 when it was codified as 8 U.S.C. § 1326). The 1952 version also added the “found in” component of illegal reentry, which meant that the prosecutor no longer had to prove an illegal entry or find the venue of that illegal entry—venue would be proper wherever the noncitizen was “found in” the United States. *See* Keller, *supra* note 36, at 85.

39. Keller, *supra* note 36, at 96 (citing TRAC Immigration); *see also* 8 U.S.C. § 1326 (1988).

40. Keller, *supra* note 36, at 103 (citing TRAC Immigration).

41. Clinton increased funding for border security, doubling the number of Border Patrol agents, and expanding the use of border security technologies. *See* Keller, *supra* note 36, at 104–05.

42. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, LEAD CHARGES FOR CRIMINAL IMMIGRATION PROSECUTIONS FY 1986 - FY 2011 (2011), <https://perma.cc/V5BA-EXTG>.

attacks of September 11, 2001 and the creation of the Department of Homeland Security. By 2004, there were more than 30,000 immigration prosecutions annually.<sup>43</sup> The exponential growth in immigration prosecutions continued under the Obama administration with over 60,000 prosecutions in 2008 and more than 80,000 in 2009.<sup>44</sup>

### B. *Modern Immigration Prosecution Trends*

In recent years, illegal entry and reentry have been the two most prosecuted federal crimes.<sup>45</sup> The Obama administration prosecuted more people for border crossing than any prior presidency.<sup>46</sup> By 2016, in the final months of the Obama presidency, more than half of federal criminal prosecutions were for immigration offenses.<sup>47</sup> After taking office in 2017, Trump’s attorney general, Jefferson Sessions, directed U.S. Attorneys to make a “renewed commitment” to prosecuting immigration crimes and make illegal entry and reentry prosecutions “higher priorities.”<sup>48</sup> The administration also issued two Executive Orders on immigration (both on border enforcement and enforcement in the interior) which encouraged aggressive immigration enforcement.<sup>49</sup> Trump’s directives caused the expansion of a “zero-tolerance” immigration prosecution program called “Operation Streamline.”<sup>50</sup>

Immigration is now the quintessential federal crime. Of the 64,565 cases reported to the U.S. Sentencing Commission in Fiscal Year (“FY”) 2020, 41.1% were immigration crimes.<sup>51</sup> Courts only report on felony and Class A misdemeanor convictions to the Commission, so this figure necessarily excludes illegal entry misdemeanor prosecutions.<sup>52</sup> In FY 2019, there were 80,886 individuals charged with illegal entry<sup>53</sup>—eclipsing the total number

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43. *Id.*

44. *Id.* Obama cracked down on immigration as part of a bid to gain credibility with Republicans with an eye towards bipartisan immigration reform. See Josie Duffy Rice & Clint Smith, *Justice in America Episode 8: Crimmigration*, APPEAL (Sept. 12, 2018), <https://perma.cc/BY45-H7G9>.

45. Fish, *supra* note 24, at 1053. Despite these robust prosecution numbers, some argue immigration laws are underenforced because the U.S. government lacks the resources to fully enforce immigration laws and because “full enforcement of restrictive entry laws would harm the economy.” Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1736 (2006).

46. Ingrid Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. Rev. 1967, 1968 (2020) (hereinafter “*Decriminalize*”).

47. TRAC Report, *supra* note 9.

48. *Decriminalize*, *supra* note 46, at 1969 (citing Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors, Renewed Commitment to Immigration Enforcement 1 (Apr. 11, 2017), <https://perma.cc/6BWP-SJKH>).

49. *Decriminalize*, *supra* note 46, at 1978.

50. *Id.* at 1973.

51. FY 2020 OVERVIEW, *supra* note 18, at 11.

52. *Id.* at 1, n. 2.

53. Press Release, Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019, Dep’t of Just. Off. of Pub. Affs. (Oct. 19, 2019), <https://perma.cc/22N-M539>.

FY 2020 OVERVIEW, *supra* note 18, at 2 (64,565 cases in FY 2020 reflect a decline of 11,973 from previous year).

of cases reported to the Sentencing Commission that same year.<sup>54</sup> In FY 2019, 59% of all terminated federal prosecutions in district and magistrate court were for immigration crimes—primarily illegal entry and reentry.<sup>55</sup> This means that in FY 2019, more immigration cases were prosecuted than all other crimes put together—and by no small margin. In FY 2020, illegal entry misdemeanor prosecutions fell to 27,630 because of policies related to the COVID-19 pandemic, but immigration cases remained dominant in the federal caseload.<sup>56</sup> Of those charged with illegal entry, the vast majority are Mexican nationals.<sup>57</sup> Moreover, immigration prosecutions are not geographically limited solely to the five districts along the southern border with Mexico. Though 83% of immigration prosecutions reported to the Commission were in the five southern border districts, the only districts where no reentry cases were prosecuted in FY 2020 were the districts of Guam and the Northern Mariana Islands.<sup>58</sup> Even illegal entry cases, which must occur at a border or point of entry, were charged in seven districts apart from the southern border districts.<sup>59</sup>

The federal criminal legal system is now also overwhelmingly in the business of handling the prosecutions of noncitizens. Back in 1998, citizens constituted 63% of federal arrests. But by 2018, that had flipped with noncitizens comprising 64% of federal arrests.<sup>60</sup> This represented a more than tripling of federal arrests for noncitizens in a twenty-year period.<sup>61</sup> Of those prosecuted for felonies in 2018, 57% were citizens and 43% were noncitizens, driven in large part by increased immigration prosecution rates under President Obama and President Trump.<sup>62</sup> By 2020, noncitizens were 46.2% of those sentenced for felony and Class A misdemeanors in federal court<sup>63</sup> and presumably if one were to include Class B misdemeanors like illegal entry, where nearly all of those charged are noncitizens, it is likely we now charge more noncitizens than citizens in the federal criminal courts. This dynamic is unique to federal prosecutions, because typically noncitizens commit crimes at lower rates

54. U.S. SENT'G COMM'N, FEDERAL JUDICIAL CASELOAD STATISTICS FY2020 OVERVIEW 2, n.2, <https://perma.cc/5EV9-RJB9> (64,565 cases in FY 2020 reflect a decline of 11,973 from previous year).

55. *Decriminalize*, *supra* note 46, at 1976–77 (immigration crimes were 121,589 of 206,448 criminal cases terminated in magistrate and district court, *see* JUDICIAL BUSINESS OF THE U.S. COURTS, tbls.D-4 & M-2 (Sept. 30, 2019)).

56. U.S. DEP'T OF JUST., PROSECUTING IMMIGRATION CRIMES REPORT, 8 USC 1325 DEFENDANTS CHARGED: MAGISTRATE COURT – MISDEMEANORS ONLY (2020), <https://perma.cc/4875-561X>.

57. There are also sizeable groups from Guatemala, Honduras, and El Salvador. *See id.*

58. U.S. CTS., FED. JUD. CASELOAD STATISTICS FY2020 TABLES, tbl.D-3 (Mar. 31, 2020), <https://perma.cc/RQ7I-XCKG>.

59. U.S. DEP'T OF JUST., PROSECUTING IMMIGRATION CRIMES REPORT, 8 USC 1325 DEFENDANTS CHARGED: MAGISTRATE COURT – MISDEMEANORS ONLY (2020), <https://perma.cc/7AKX-266M> (noting prosecutions in Maine, the Northern and Western Districts of New York, North Dakota, Southern District of Ohio, Vermont, Eastern District of Washington).

60. Mark Motivans, *Immigration, Citizens, and the Federal Justice System, 1998-2018*, U.S. DEP'T OF JUST.: OFF. OF JUST. PROGRAMS 1 fig.1 (Jan. 27, 2021), <https://perma.cc/OF89-FNMS>.

61. *Id.*

62. *Id.* at 18 tbls. 13 & 14.

63. FY 2020 OVERVIEW, *supra* note 18, at 7.

than citizens.<sup>64</sup> Notably, most crimes are prosecuted in the state system where citizens far outnumber noncitizens.

These federal prosecution trends, where immigration crime has become the primary focus of the federal courts, are occurring during major demographic shifts in both the U.S. population and the federal defendant population. In 1970, only 4.8% of the U.S. population was foreign born (an all-time low).<sup>65</sup> In the past 50 years, that rate has tripled to 13.7% of the population.<sup>66</sup> When it comes to the undocumented immigrant population, there has been even swifter growth with the number of undocumented immigrants, more than tripling from 3.5 million in 1990 to a peak of 12.2 million in 2007.<sup>67</sup> Despite a slight decline since 2007, undocumented immigrants still make up 3.2% of the U.S. population and about a quarter of all immigrants.<sup>68</sup>

The U.S. immigrant population is more racially and ethnically diverse than the non-immigrant population. More than half of immigrants identify as non-white, and 44% are Hispanic or Latinx.<sup>69</sup> Ten percent of Black people in the United States are foreign-born, up from just 3% in 1989.<sup>70</sup> Black and Latinx immigrants often live in over-policed neighborhoods where they are more likely to be stopped,<sup>71</sup> arrested, and then funneled into what advocates call the “prison-to-deportation pipeline.”<sup>72</sup> These trends, coupled with the prioritization of immigration prosecutions in federal court, have converged. The result is that now the majority of defendants in federal court are Hispanic or Latinx.<sup>73</sup> Even amongst those convicted of federal felonies, more than half were Hispanic in FY 2020.<sup>74</sup>

The focus on immigration cases has also shifted the center of gravity of the federal courts. Though the civil docket remains larger in districts encompassing large metropolitan areas like New York and Washington D.C., the criminal case load has moved to the border. There are ninety-four federal judicial districts in the nation. But 43% of cases of all cases reported to the U.S.

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64. See Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO INST. (Mar. 15, 2017), <https://perma.cc/YK66-H8FH>; Christopher Ingraham, *Two Charts Demolish the Notion That Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018), <https://perma.cc/47QY-LTKR>.

65. Jeanne Batalova, Mary Hanna & Christopher Levesque, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFO. SOURCE (Feb. 11, 2021), <https://perma.cc/XVQ8-KHAS>.

66. *Id.*

67. Jens Manuel Krogstad, Jeffrey S. Passel & D’Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), <https://perma.cc/RFY5-V7A9>; see also Abby Budiman, *Key Findings about U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://perma.cc/W59P-L3LS> (noting that unauthorized immigrants comprise 23% of the U.S. foreign-born population).

68. *Id.*

69. Batalova, Hanna & Levesque, *supra* note 65.

70. Jeremy Raff, *The ‘Double Punishment’ for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), <https://perma.cc/2SUM-XEVI>.

71. According to BJS data from 2015, Black people are more likely to be subject to traffic and street stops than their white counterparts. See Elizabeth Davis, Anthony Whyde & Lynn Langton, *Contacts Between Police and Public, 2015*, U.S. DEP’T. OF JUST. 4 tbl.3 (Oct. 2018), <https://perma.cc/837Z-7XAC>.

72. See, e.g., Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story is a Common One for Black Immigrants*, VOX (Feb. 5, 2020, 11:58 AM), <https://perma.cc/2Z3Z-Y7N7>.

73. FY 2020 OVERVIEW, *supra* note 18, at 6.

74. *Id.*

Sentencing Commission in FY 2020 were from just five districts—those along the southern border.<sup>75</sup> Again, because misdemeanor illegal entry cases, which are primarily charged along the southern border, are not reported to the Commission, the extent to which the federal criminal docket is now dominated by border cases is vastly understated.

The trends are also not limited to immigration cases. The districts along or adjacent to the southern border districts lead those handling “hard drug” prosecutions as well.<sup>76</sup> In FY 2020, the three top districts for drug prosecutions were the Southern District of California, the Southern District of Texas, and the Western District of Texas.<sup>77</sup> More than a fifth of drug cases came from the five southern border districts, and nearly a third came from those districts and three adjacent districts.<sup>78</sup>

Though increased penalties for maritime drug trafficking implemented in the 1980s shifted the drug trade to the U.S.-Mexico land border,<sup>79</sup> this large number of cases is also the result of intense policing along the southern border and at nearby border patrol checkpoints.<sup>80</sup> The federal government has prioritized border enforcement and reactive prosecutions of those smuggling drugs at the border (called “border busts”<sup>81</sup>) and at checkpoints, where Fourth Amendment protections do not apply or are weakened, over more resource-intensive drug prosecutions and investigations in the interior.

### C. *How The War on Drugs Set the Scene*

The expansion of immigration prosecutions is not the first shift in the federal criminal docket. In the first half of the 1900s, prosecution of drug crimes was primarily left to the state systems. In 1969, President Nixon declared a “War on Drugs”; this resulted in the passage of comprehensive federal drug laws and the creation of the Drug Enforcement Administration in 1973.<sup>82</sup> But still, drug prosecution numbers did not dominate the federal court docket. That began to change in the 1980s under President Reagan amidst concerns about a perceived “crack cocaine epidemic” in Black inner-city neighborhoods. The number of those convicted of federal drug offenses more than doubled in the first six years of the 1980s.<sup>83</sup> Then Congress passed the Anti-

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75. *Id.* at 3.

76. Meaning, non-marijuana drug prosecutions.

77. *Table D-3—U.S. District Courts—Criminal Federal Judicial Caseload Statistics*, U.S. CTS (Mar. 31, 2020), <https://perma.cc/J668-WMUH>.

78. *Id.* (22.1% of hard drug cases arose from the 5 southern border districts and 30.2% arose from the 5 border districts and 3 adjacent districts).

79. Walter I. Gonçalves, *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 2, 55 (2020).

80. See Andrea Flores & Shaw Drake, *Border Patrol Violently Assaults Civil Rights and Liberties*, ACLU (July 24, 2020), <https://perma.cc/GV2E-YL3Y>.

81. Caleb Mason & David Bjerck, *Inter-judge Sentencing Disparity on the Federal Bench: An Examination of Drug Smuggling Cases in Southern California*, 25 FED. SENT’G REP. 190, 190 (2013).

82. CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 5–6 (Oct. 2, 2014), <https://perma.cc/9W42-8JX4>.

83. *Id.* at 8 (from 5,244 in 1980 to 12,285 in 1986).

Drug Abuse Act of 1986, which established mandatory minimum penalties for many drug trafficking offenses, including the infamous 100:1 ratio between crack and powder cocaine sentences.<sup>84</sup> In 1985, fraud was still the most prosecuted crime in federal court,<sup>85</sup> but by 1986, drug prosecutions had surpassed fraud to become the most common federal prosecution.<sup>86</sup>

The next ten years saw a massive expansion of federal prosecution—including an almost doubling of staffing in U.S. Attorneys Offices.<sup>87</sup> Drug prosecutions continued to become an increasingly large slice of the pie—by 1996 they were over 40% of the cases reported to the U.S. Sentencing Commission.<sup>88</sup> Drug cases remained the largest category of prosecutions reported to the Commission until being surpassed by immigration cases in 2009—after which point immigration and drug offenses have remained the most commonly prosecuted with more than 60% of the case load for the past fifteen years.<sup>89</sup>

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84. *Id.* at 8–9.

85. U.S. DEP'T. OF JUST., U.S. ATTORNEY'S OFFICE, STATISTICAL REPORT FISCAL YEAR 1986, 3 (1987) (9,017 out of 88,640 total prosecutions), <https://perma.cc/WJV9-ZXDE>.

86. *Id.* (10,211 out of 94,512 prosecutions)

87. U.S. DEP'T. OF JUST., U.S. ATTORNEY'S OFFICE, STATISTICAL REPORT FISCAL YEAR 1996, 1 (Mar. 1997) (hereinafter "USAO 1996 REPORT").

88. U.S. SENT'G COMM'N, 1996 ANNUAL REPORT 6, Fig. A (1997), <https://perma.cc/2QV2-7VGS>.

89. See U.S. SENT'G COMM'N, 2021 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, 45 Fig. 2 (2022) (Drugs 31.3%, Immigration 29.6%); U.S. SENT'G COMM'N, 2020 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, 45 Fig. 2 (2021) (Drugs 26.1% of cases, Immigration 41.1%); U.S. SENT'G COMM'N, 2019 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, 45 Fig. 2 (2020) (Drugs 26.6%, Immigration 38.4%); U.S. SENT'G COMM'N, 2018 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, 45 Fig. 2 (2019) (Drugs 28.1%, Immigration 34.4%); U.S. SENT'G COMM'N, 2017 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, S-12 Fig. 2 (2018) (Drugs 30.8%, Immigration 30.5%); U.S. SENT'G COMM'N, 2016 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, S-11 Fig. A (2017) (Drugs 31.6%, Immigration 29.6%); U.S. SENT'G COMM'N, 2015 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2016) (Drugs 31.8%, Immigration 29.3%); U.S. SENT'G COMM'N, 2014 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2015) (Drugs 31.7%, Immigration 29.3%); U.S. SENT'G COMM'N, 2013 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2014) (Drugs 31.2%, Immigration 31.2%); U.S. SENT'G COMM'N, 2012 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2013) (Drugs 30.2%, Immigration 32.2%); U.S. SENT'G COMM'N, 2011 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2012) (Drugs 29.1%, Immigration 34.9%); U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2011) (Drugs 28.9%, Immigration 34.4%); U.S. SENT'G COMM'N, 2009 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2010) (Drugs 30.3%, Immigration 32.2%); U.S. SENT'G COMM'N, 2008 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2009) (Drugs 32.6%, Immigration 28.2%); U.S. SENT'G COMM'N, 2007 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2008) (Drugs 34.4%, Immigration 24.3%); U.S. SENT'G COMM'N, 2006 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2007) (Drugs 35.5%, Immigration 24.5%); U.S. SENT'G COMM'N, 2005 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2006) (Drugs 34.2%, Immigration 25.0%); U.S. SENT'G COMM'N, 2004 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2005) (Drugs 34.7%, Immigration 22.9%); U.S. SENT'G COMM'N, 2003 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2004) (Drugs 37.4%, Immigration 21.9%); U.S. SENT'G COMM'N, 2002 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2003) (Drugs 40.5%, Immigration 18.6%); U.S. SENT'G COMM'N, 2001 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2002) (Drugs 41.2%, Immigration 17.8%); U.S. SENT'G COMM'N, 2000 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2001) (Drugs 39.8%, Immigration 19.9%); U.S. SENT'G COMM'N, 1999 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (2000) (Drugs 41.7%, Immigration 17.5%); U.S. SENT'G COMM'N, 1998 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (1999) (Drugs 40.7%, Immigration 15.9%); U.S. SENT'G COMM'N, 1997 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (1998) (Drugs 39.2%, Immigration 13.7%); U.S. SENT'G COMM'N, 1996 SOURCEBOOK OF FEDERAL SENT'G STATISTICS, Fig. A (1997) (Drugs 40.7%, Immigration 11.6%);

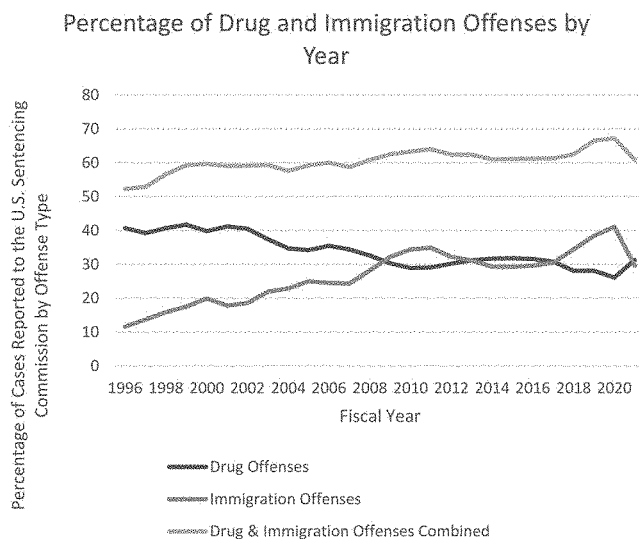


Figure 2. Percentage of Drug and Immigration Offenses by Year.

With the threat of mandatory minimum drug sentences and the advent of initially mandatory U.S. Sentencing Guidelines,<sup>90</sup> prosecutors weaponized drug crimes to expand prosecutorial power in federal practice. Because judges lacked power to mitigate sentences, defendants were increasingly at the mercy of prosecutors if they wanted to avoid a harsh mandatory minimum. The rise in drug prosecutions resulted in higher rates of pretrial detention,<sup>91</sup> guilty pleas,<sup>92</sup> conviction,<sup>93</sup> and lower rates of trials.<sup>94</sup> The adversarial system was becoming a system of guilty pleas. By 2002, more than 95.2% of defendants in adjudicated cases had pleaded guilty and trials were becoming a relic of the past.<sup>95</sup> As fewer defendants went to trial and more people pleaded guilty, the sentences also became harsher. By 1996, 73% percent of guilty defendants were sent to prison, up from just 52% in 1986.<sup>96</sup> These trends have continued today as immigration cases grow.

90. The guidelines were mandatory until *United States v. Booker*, 543 U.S. 220 (2005).

91. Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate*, in *Context*, 82 FED. PROB. J. 13, 13, Fig. 1 (2018) (pretrial detention rates rose from around 30% in 1988 to around 50% by 1998.).

92. In 1974, 61% of defendants pleaded guilty, whereas by 1996, 79% did. See Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 301 (1975); USAO 1996 REPORT, at 7–8 (1997). But see Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 27 (1979) (federal plea rate rose to almost 90 percent in 1925 during prohibition).

93. Conviction rates rose from 66% in 1974 to 87% in 1996. See U.S. DEP'T. OF JUST., U.S. ATTORNEY'S OFFICE, STATISTICAL REPORT FISCAL YEAR 1974, tbl. 2 (1975); USAO 1996 REPORT, *supra* note 87, at 8 (1997).

94. Trial rates declined from thirteen percent in 1974 to nine percent in 1996. See Finkelstein *supra* note 92, at 301 (1975); USAO 1996 REPORT, *supra* note 87, at 8 (1997).

95. Wright, *supra* note 5, at 90.

96. USAO 1996 REPORT, *supra* note 87, at 7–8 (1997); DOUGLAS C. McDONALD & KENNETH E. CARLSON, BUREAU OF JUSTICE STATISTICS: FEDERAL SENTENCING IN TRANSITION, 1986-90, 1 (June 1992).

The demographics of those prosecuted in federal court also changed due to the War on Drugs. Prior to the rise in drug prosecutions, most federal defendants were white.<sup>97</sup> But by 2001, only about 30% of federal defendants were white, with about 25% being Black and 40% Hispanic—in large part driven by drug prosecutions.<sup>98</sup> Due in no small part to drug prosecutions, the federal prison population exploded from 24,640 in 1980 to a high of 219,298 in 2013—a more than eightfold increase.<sup>99</sup> The federal defendant population became larger and less white at the same time as defendants were losing procedural power.

The War on Drugs expanded the federal law enforcement and federal prosecution apparatus, setting the stage for the influx of immigration cases and the further erosion of rights. With the rise in drug prosecutions, federal prosecutions were less likely to be “white collar” and defendants less likely to be white. The War on Immigrants continued the work begun by the War on Drugs, continuing the trend of targeting racialized minorities for prosecution while simultaneously eroding procedural protections in federal criminal court.<sup>100</sup>

Today, John Gotti and Elizabeth Holmes are not typical federal defendants. The typical federal criminal case is an immigration or border-related prosecution brought against a Latinx immigrant from Mexico or Central America. The primary crimes that are prosecuted in federal court, illegal entry and illegal reentry, were enacted into law to criminalize Mexican migrants and preserve the racial homogeneity of the nation. Those prosecuted under these laws today are still overwhelmingly Mexican and Latinx and the rise in immigration and border-related prosecutions has resulted in a federal defendant population that is majority noncitizen and majority Latinx. Most federal prosecutions occur in “border courts.” The dominance of “border cases” is changing the way cases are processed throughout the federal criminal justice system all across the nation.

## II. BORDER COURTS AND BORDER PROCEDURES

“Like most of us, line prosecutors are likely to seek to make their jobs easier, to reduce or limit their workload where possible.”<sup>101</sup> As such, when immigration crime was first prosecuted, the U.S. government argued that noncitizens were not entitled the panoply of constitutional rights afforded to

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97. See, e.g., PATRICK A. LANGAN, U.S. DEP’T. OF JUST., RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926-86, 5 tbl. 2 (May 1991).

98. U.S. SENT’G COMM’N, 2001 SOURCEBOOK OF FEDERAL SENT’G STATISTICS, 14 tbl. 4 (2002).

99. FED. BUREAU OF PRISONS, FEDERAL PRISON SYSTEM POPULATION ACTUALS, <https://perma.cc/69U6-HD4N>.

100. See Jennifer M. Chacon, *Criminalizing Immigration in REFORMING CRIMINAL JUSTICE* (Erik Luna Ed. 2017) (describing how “systemic choices around migrant criminalization are increasingly fueling the wide-scale criminalizations and incarceration of Latinos”).

101. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001).



criminal defendants, like the right to a jury trial and grand jury indictment.<sup>102</sup> In 1896, the United States Supreme Court rejected the Government's argument, holding that those facing prosecution for immigration crimes were entitled to the procedural rights afforded to criminal defendants under the Fifth and Sixth Amendments.<sup>103</sup> But despite this doctrinal equality, the way prosecutions of immigration crime are operationalized creates a procedural divide in the way in which noncitizens, particularly those charged with immigration offenses, are treated compared to their citizen counterparts.<sup>104</sup>

In 1973, discussing the efficient immigration prosecutions occurring in San Diego, Federal District Judge Schwartz told Congress 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 judicial process."<sup>105</sup> The "assembly line" Judge Schwartz feared has materialized. The two main interventions designed to increase the efficiency of the prosecution of immigration offenses in the past few decades are the Fast Track program and Operation Streamline. Both of these "efficient" programs were designed by the Executive branch to facilitate a higher volume of immigration prosecutions in federal court. Generally speaking, the judiciary has accommodated these programs with little resistance.

The Fast Track program was designed in the 1990s to handle high-volume illegal reentry caseloads in border districts. Prosecutors offer sentencing discounts to defendants in exchange for waiving procedural rights and pleading guilty quickly. Eventually the program was codified in the Sentencing Guidelines, which approved sentencing reductions, known as guidelines departures, of up to four levels for the "early disposition" of cases in Fast Track programs.<sup>106</sup> Often Fast Track programs require defendants to waive their right to appear before a district court judge and agree to proceed before a magistrate for all of the case aside from the sentencing (which cannot be performed by a magistrate in a felony case). Since its inception as a means to handle immigration cases in border districts, Fast Track programs have been established in non-border districts and for non-immigration crimes like drug trafficking, money laundering, and fraud.<sup>107</sup>

Operation Streamline began in 2005 in Del Rio, Texas, to process "zero tolerance" illegal entry prosecutions along the southern border.<sup>108</sup> Operation

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102. *Wong Wing v. United States*, 163 U.S. 228, 234, 239 (1896) (J. Field, concurring and dissenting in part) (characterizing the government's argument as "harsh and illegal assertions . . . as to the right of the court to deny the accused the full protection of the law and constitution against every form of oppression and cruelty to them").

103. *Id.* at 238.

104. *Prosecuting Immigration*, *supra* note 14, at 1291–94.

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

106. U.S.S.G. § 5K3.1 (2003).

107. *Infra* II.A.

108. See Juan Rocha, *Operation Streamline and the Criminal Justice System*, 35 CHAMPION 48 (Nov. 2011).

Streamline spread to the other border districts, but it was not implemented in the Southern District of California until after Trump took office.<sup>109</sup> In Streamline prosecutions, defendants are processed in groups of up to forty or seventy a day, depending on the jurisdiction.<sup>110</sup> The accused have mere minutes to communicate with counsel—who often represent as many as forty clients at a time—rarely with enough time to speak to clients individually.<sup>111</sup> Prosecutors offer “same day” plea deals with limited access to discovery. Defendants are brought into court in shackles (often in the clothes in which they were arrested) to plead guilty and to be sentenced the same day they first appear in court.<sup>112</sup> The mass plea colloquies and sentencing hearings little resemble the dignified proceedings recounted by Professor Natapoff from her days in federal misdemeanor court. How these programs managed to abbreviate the due process afforded to a federal defendant so dramatically will be described in detail below. By reducing due process, the Department of Justice reduced the cost of an individual prosecution and was able to process many more cases at no additional cost. Both Fast Track and Operation Streamline have been used to widen the net for immigration and other border prosecutions, subjecting vastly more immigrants to criminal penalties than in prior eras.

#### A. *Fast Track Programs*

In the 1990s, Border Patrol grew in size and budget, causing dramatic increases in the numbers of immigration-related cases.<sup>113</sup> At first, only a small number of those apprehended were prosecuted, usually for the misdemeanor crime of illegal entry.<sup>114</sup> But the misdemeanor prosecutions had little deterrent effect.<sup>115</sup> Federal prosecutors developed Early Disposition Programs, referred to as “Fast Track” programs to obtain mass illegal reentry felony convictions.<sup>116</sup> As the Department of Justice prosecuted more immigration cases, “it recommend[ed] substantial sentencing discounts for defendants who quickly plead guilty and waive important constitutional and procedural rights” to “alleviate the resulting strain on the criminal justice system[.]”<sup>117</sup> These sentencing discounts typically required defendants waive

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109. Natasha Ampriester, *Trumping Asylum: Criminal Prosecutors for Illegal Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 20 (2017).

110. *Id.* at 24 (noting that in 2017 Tucson attorneys represented a maximum of six clients, in Del Rio, Texas that maximum was 80); Rocha, *supra* note 108, at 49 (in 2011, Yuma capped daily prosecutions at 40, Tucson at 70).

111. Rocha, *supra* note 108, at 49.

112. *Id.* at 49–50.

113. *See* United States v. Heredia, 768 F.3d 1220, 1225 (9th Cir. 2014); *see also* Gorman, *supra* note 8, at 311–12.

114. Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT’G REP. 254, 254 (1996).

115. *Id.*

116. *See* Gorman, *supra* note 8, at 311–12; *see also* Bersin, *supra* note 114, at 256.

117. *Heredia*, 768 F.3d at 1237.

procedural rights such as the right to file motions, the right to a grand jury indictment, the right to appeal, and the right to make arguments for departures or variances at sentencing.<sup>118</sup>

Fast Track allowed for quick prosecutions that did not use up many prosecutorial or judicial resources. These quick and cheap prosecutions in turn allowed for more immigration cases to be prosecuted;<sup>119</sup> and as one judge explained, “fast-track plea programs are both a response to and a cause of this rise in prosecutions.”<sup>120</sup> For example, in 1991, prior to the implementation of Fast Track programs, only 245 of the 565,000 undocumented immigrants apprehended in the Southern District of California were charged with a felony of any kind.<sup>121</sup> But by 1995, two years after implementing a Fast Track program for illegal reentry cases, the U.S. Attorney’s Office in that district processed more illegal reentry cases than it had in the past ten years combined.<sup>122</sup> Immigration-related cases grew from 6.9% of the federal felony caseload in 1991 to 17.5% in 2001.<sup>123</sup> By 2001, ten percent of the entire federal felony caseload was fast tracked in the southern border districts.<sup>124</sup> In 2010, one judge in the San Diego credited Fast Track with enabling her district to efficiently process 308 cases per district judge—meaning an average judge in her district processed more felony cases than “all of the other California districts combined.”<sup>125</sup> And those cases moved quickly, with a median case processing time of 3.9 months compared to 7.5, 10.9, and 11.2 months in the Central, Eastern, and Northern Districts of California, respectively.<sup>126</sup> Fast Track’s efficient case processing is a key reason that more than 40% of federal criminal cases now arise from the five districts along the southern border.<sup>127</sup>

At first, Fast Track programs were limited to immigration cases (typically illegal reentry, but also alien smuggling charges) in border districts.<sup>128</sup> In 2003, Fast Track programs were sanctioned by Congress through legislation

118. Gorman, *supra* note 8, at 312. Sentencing “departures” are departures under the federal sentencing guidelines, while “variances” are deviations from the sentencing guidelines pursuant to 18 U.S.C. § 3553(a).

119. Branding more noncitizens as criminals had many potential logistical and political benefits. After the passage of major immigration reform in 1996, it became easier to deport noncitizens who had criminal convictions, and many were subject to mandatory detention while awaiting deportation hearings. Likewise, there was less political pushback for deporting an immigrant once the deportee could be described as a “criminal alien.”

120. *Heredia*, 768 F.3d at 1225.

121. *Id.* at 1224–25 (noting that many of those 245 were charged with felonies other than reentry).

122. *Id.* at 1225–26.

123. Gorman, *supra* note 8, at 311.

124. *Id.*

125. *Testimony of District Judge Marilyn Huff, Southern District of California before the United States Sentencing Commission Concerning Fast Track of Early Disposition Programs*, U.S. SENT’G COMM’N (Jan. 20, 2010), <https://perma.cc/PV2K-ZN9S>.

126. *Id.* at 2.

127. See U.S. SENT’G COMM’N, FEDERAL CRIMINAL OVERVIEW: FISCAL YEAR 2020 3 (Apr. 2021), <https://perma.cc/YB7X-WYJK> (detailing that 43.8% of all individuals sentenced in FY 2020 were from the five districts along the southern border).

128. Gorman, *supra* note 8, at 314 (detailing that, at first, the deals were also relatively generous).

which directed the Sentencing Commission to authorize Fast Track programs.<sup>129</sup> By 2008, there were 39 programs operating in twenty districts—the majority for illegal reentry offenses.<sup>130</sup> There were Fast Track programs for illegal reentry in the border districts, but also in Nebraska, Oregon, Kansas, and the Middle District of Florida.<sup>131</sup> In 2012, to address concerns about sentencing disparities between illegal reentry defendants prosecuted in Fast Track districts and those prosecuted in non-Fast Track districts, the Department of Justice authorized a nation-wide Fast Track program for illegal reentry cases.<sup>132</sup>

With congressional approval in 2003, Fast Track programs began to grow and spread. Initially, Attorney General Ashcroft set limitations on which U.S. Attorneys Offices could create Fast Track programs and in which types of cases.<sup>133</sup> Most of the non-immigration programs continued to be located at the border for drug smuggling cases. But eventually, Fast Track spread to drug courier cases arising from JFK airport in New York, and specific types of document fraud cases in the Northern District of Georgia, the Southern District of Florida, the District of Kansas, and the District of Oregon.<sup>134</sup>

In FY 2020, 20.8% of noncitizen defendants sentenced under the guidelines received a departure under the Fast Track program.<sup>135</sup> And 10.8% of all defendants sentenced under the guidelines received a departure for participation in the Fast Track program—including 7.1% of those sentenced for drug offenses.<sup>136</sup> Though most Fast Track departures were in immigration cases, with a sizeable number in drug trafficking cases, there were also individuals who received Fast Track departures for administration of justice, assault, fraud, money laundering, and prison offenses.<sup>137</sup> What this means is that in one out of every ten felony cases in federal court, the accused waives the right to grand jury indictment, pleads guilty before filing any motions, makes limited sentencing arguments, and waives the right to appeal their sentence.<sup>138</sup>

129. Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003); *see also* U.S. SENT'G GUIDELINES MANUAL § 5K3.1 (U.S. SENT'G COMM'N 2003).

130. Gorman, *supra* note 8, at 314.

131. Memorandum from Acting Att'y Gen. Craig Morford to U.S. Att'ys on the Reauthorization of Early Disposition Programs (Feb. 1, 2008), <https://perma.cc/3A99-9F24>.

132. Elizabeth Weber, *Fast-Track Sentencing*, 77 MO. L. REV. 1227, 1246–47 (2012); *see also* Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Justice, to all U.S. Att'ys Regarding Department Policy on Early Disposition or “Fast-Track” Programs 2 (Jan. 31, 2012), <https://perma.cc/63LM-CXGA>; United States v. Heredia, 768 F.3d 1220, 1226 (9th Cir. 2014).

133. Memorandum from Att'y Gen. John Ashcroft to “All Federal Prosecutors” entitled “Department Principles for Implementing an Expedited Disposition or ‘Fast-Track’ Prosecution Program in a District 1 (Sept. 22, 2003) *reprinted in* 16 FED. SENT'G. REP. 134 (2003) *and* 21 FED. SENT'G. REP. 318 (Jun. 2009).

134. *Id.* at 6–7.

135. U.S. SENT'G COMM'N, QUICK FACTS ON NON-U.S. CITIZEN OFFENDERS 2 (2021), <https://perma.cc/6899-LJSM>.

136. U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 tbl.29 (2020), <https://perma.cc/NQ8Q-DHGC>.

137. *Id.* at 99 tbl.38.

138. *See, e.g.*, United States v. Heredia, 768 F.3d 1220, 1228 (9th Cir. 2014).

This is not the robust process we think of as the hallmark of the federal system.

Fast Track contributes to rising rates of guilty pleas in federal court. Notably, the guilty-plea rate reached 95.5 percent in 2000, when Fast Track was gaining momentum, and has not fallen below that rate ever since; in 2020, it was 97.8 percent.<sup>139</sup> Increasingly, Fast Track defendants are required to consent to plead guilty before magistrate judges rather than before district court judges.<sup>140</sup>

Fast Track practices have impacted non-Fast Track cases as well. Pleas before magistrate judges are becoming increasingly common across all cases.<sup>141</sup> In FY 2019, magistrate judges conducted almost 35,000 felony guilty plea proceedings—meaning that nearly half of defendants sentenced for felonies in that year plead guilty before a magistrate rather than district court judge.<sup>142</sup> That was more than triple the roughly 10,000 pleas before a magistrate from 2000, the first year such data was measured.<sup>143</sup> Prior to 2000, pleas before the magistrate were so rare that “guilty plea proceedings” was not a category included in the statistics kept on the judicial business conducted by magistrates.<sup>144</sup> Increasingly, the first time a district judge sees the defendant is at the sentencing hearing—that did not used to be the case.

Similarly, Fast Track contributes to the rising rates of prison sentences imposed in federal court. In 1990, only 60% of those sentenced received a prison sentence, while in 2020, that number had risen to nearly 90%.<sup>145</sup> Admittedly, Fast Track is not the sole cause of these ailments in federal criminal court, which are also the product of the Sentencing Guidelines and the increased prosecutorial power through the expansion of mandatory minimum sentences.<sup>146</sup> But illegal reentry, which does not have mandatory minimum sentencing, still remains a charge for which there are high rates of guilty pleas and sentences of imprisonment.

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139. U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2020, 8, 24 n.7. (Apr. 2021), <https://perma.cc/A86L-HJ3N> [hereinafter “USSC FY2020 OVERVIEW”].

140. See, e.g., *United States v. Cueto Núñez*, 869 F.3d 31, 36 (1st Cir. 2017).

141. See, e.g., *United States v. Garcia*, 936 F.3d 1128, 1130 (10th Cir. 2019); *United States v. Harden*, 758 F.3d 886 (7th Cir. 2014).

142. U.S. MAGISTRATE JUDGES—JUDICIAL BUSINESS 2019, TABLE S-17, MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES, <https://perma.cc/5UCG-H6VY>.

143. U.S. MAGISTRATE JUDGES—JUDICIAL BUSINESS 2000, TABLE S-17, MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES, <https://perma.cc/K6NR-DBYJ> (noting 10,614 guilty pleas before magistrates).

144. See e.g., U.S. MAGISTRATE JUDGES—JUDICIAL BUSINESS 1999, TABLE S-18, MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES, <https://perma.cc/5UHX-A84A> (listing additional duties for magistrates in criminal cases as “Motions [], Evidentiary Hearings, Pretrial Conferences, Calendar Calls, Motion Hearing/Arguments, Other.” The equivalent table in the present day includes a separate category for “guilty plea proceedings”).

145. See USSC FY2020 OVERVIEW, *supra* note 139, at 8 (chart noting that “prison only” sentences stand in contrast to probation only sentences or probation with alternatives to prison sentence, fine only sentences, and prison along with alternatives sentences); see also MCDONALD & CARLSON, *supra* note 96, at 2 tbl.1 (showing that in the first half of 1990, 60.4% of offenders were sentenced to prison).

146. See *supra* I.C. (describing how prosecutorial power in federal court expanded with the advent of the Sentencing Guidelines and mandatory minimum sentences for drug crimes).

Despite these concerning signs, the Supreme Court blessed the Fast Track program in its 2002 opinion, *United States v. Ruiz*.<sup>147</sup> Angela Ruiz was a single mother and United States citizen who was arrested at the Tecate, California Port of Entry when marijuana was discovered in the car she was driving.<sup>148</sup> Prosecuted in the Southern District of California, she was offered a standard Fast Track plea agreement, with a reduction of two levels in the sentencing guidelines.<sup>149</sup> Ruiz was willing to waive indictment, trial, and appeal, but she declined to accept the Fast Track deal because the agreement required her to waive her right to exculpatory impeachment evidence—a right Ruiz did not think was waivable.<sup>150</sup> Ultimately Ruiz pleaded guilty absent a plea agreement and then asked the district judge to “grant her the same two-level downward departure the Government would have recommended had she accepted the fast track agreement.”<sup>151</sup> The judge denied her request and sentenced her—without the two level reduction—to a term of eighteen months in prison.

In upholding the denial of Fast Track, the Supreme Court took stock of the competing interests, and concluded that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”<sup>152</sup> In so holding, the Court took note that:

[A] constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could *seriously interfere with* the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help secure the efficient administration of justice. . . . It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government to instead abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases.<sup>153</sup>

In essence, the Supreme Court was concerned that due process would be too expensive and inefficient and would overburden federal prosecutors and courts. The *Ruiz* decision has been cited by at least 1,707 other cases—both in federal and state courts. It limited defendants’ rights to pretrial discovery and approved of expansive plea bargaining power for prosecutors. It also provided a green light to cheaper, more “efficient” procedures in federal prosecutions.

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147. *United States v. Ruiz*, 536 U.S. 622 (2002).

148. See Complaint at 4, *United States v. Ruiz*, No. 99-cr-02604 (S.D. Cal. Aug. 16, 1999); Letters in Supp. of Sent’g at 3, *Ruiz*, No. 99-cr-02604 (Doc. No. 13).

149. *Ruiz*, 536 U.S. at 625.

150. *Id.*

151. *Id.* at 626.

152. *Id.* at 633.

153. *Id.* at 631–32 (emphasis added).

Currently, Fast Track plea agreements require waivers of the same type blessed by the Court in *Ruiz*—explicitly waiving a right to impeachment evidence.<sup>154</sup> Some agreements contain more expansive waivers of the defendant’s right to discovery. One plea agreement from the Northern District of California waives a right to “any further discovery from the [G]overnment.”<sup>155</sup> Another plea agreement from the Southern District of New York requires the defendant to “waive all rights to discovery other than receiving a copy of his prior criminal record.”<sup>156</sup> But the waivers in current Fast Track agreements are more extensive than just waiving rights to discovery. Standard terms include requirements that the defendant:

- waive their right to indictment or preliminary hearing and agreement to proceed by information;
- waive their right to file any pretrial motions;
- consent to an order of removal (deportation) and agree not to challenge the order of removal in any future proceedings;
- waive the right to request departures or variances from the Sentencing Guideline range stipulated in the plea agreement;
- waive the right to the appeal or collateral challenge of the conviction<sup>157</sup> or sentence, so long as the defendant is sentenced within or below the stipulated guidelines range;
- waive the right to seek a sentencing modification in the future under 18 U.S.C. § 3582(c) (colloquially referred to as a “compassionate release” motion);<sup>158</sup>
- waive their rights under Fed. R. Evid. 410 and allow admission of the plea agreement and plea colloquy at trial if the guilty plea is not entered or is later withdrawn;<sup>159</sup>
- waive the right to request the Government preserve any evidence seized in the case; and
- waive the right to contest the forfeiture of any property seized by the Government in connection with the case.<sup>160</sup>

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154. See Plea Agreement in S.D. Cal. (Nov. 20, 2021) (on file with author).

155. Plea Agreement ¶ 3, at 2, *United States v. Lara-Vargas*, No. 16-cr-264 (N.D. Cal. Nov. 19, 2020) (Doc. No. 43).

156. Plea Agreement in 8 U.S.C. § 1326 case, at 1 (S.D.N.Y. Nov. 21, 2018) (on file with author).

157. See *Gregorczyk v. United States*, 142 S. Ct. 2580, 2580 (2022) (denying *cert* to 997 F.3d 743 (7<sup>th</sup> Cir. 2021)). Some illegal reentry plea agreements include an explicit waiver of the right to bring later “constitutional challenges to the statute of conviction [8 U.S.C. § 1326].” See Plea Agreement in *United States v. Montoya* ¶ 4, at 3 (May 14, 2020) (on file with author).

158. One court rejected a plea agreement with this waiver as unconscionable. See *United States v. Osorto*, 445 F. Supp. 3d 103, 105 (N.D. Cal. 2020). But see *United States v. Bridgewater*, 995 F.3d 591, 596 (7<sup>th</sup> Cir. 2021). See generally Ellen A. Wiencek, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. CHI. L. REV. ONLINE (Aug. 5, 2021), <https://perma.cc/K8FP-JWF8>.

159. See *United States v. Mezzanatto*, 513 U.S. 196, 196 (1995) (holding that rights under Rule 410 are waivable). *Mezzanatto* is a drug case arising from the Southern District of California—though seemingly not a fast-track case.

160. See Plea Agreement in S.D. Cal., *supra* note 154.

These waivers are spelled out in ever-longer plea agreements, which often total over ten pages.

But comprehensive waivers like those from Fast Track agreements are also seen in non-Fast Track plea agreements. For example, in a firearms case in the District of Maryland, a district which handles few Fast Track cases, the plea agreement contained a similarly extensive waiver of the right to appeal or collaterally challenge the conviction, a similar forfeiture agreement, and an agreement to not file pretrial motions.<sup>161</sup> The Maryland plea agreement also included a waiver of “any and all rights under the Freedom of Information Act relating to the investigation and prosecution of the above-captioned matter” and a clause stating that the defendant “agrees not to file any request for documents from this Office or any investigating agency.”<sup>162</sup>

As the Supreme Court has stated, “Ours is for the most part a system of pleas, not a system of trials.”<sup>163</sup> And nowhere are the limits of plea bargaining being explicitly pushed as they are in federal court in Fast Track cases. Because of mandatory minimums, sentencing guidelines, and the vast resources of the Department of Justice, federal prosecutors are in a superior bargaining position to those accused of federal crimes. Because of the “enormous power of the United States Attorney,” one federal judge has even described plea agreements as “contracts of adhesion.”<sup>164</sup> The Offices of the U.S. Attorneys can push new plea agreement terms to make federal prosecutions even more “efficient” and cheaper to process, and it can do this through nationwide coordination and development of federal case law favorable to the prosecution.<sup>165</sup> The two or four point sentencing guidelines reduction awarded in Fast Track plea agreements has an increasingly high cost, and most defendants, even in non-Fast Track cases, have few options other than to pay the price and accept the terms offered in plea agreements.

## B. *Operation Streamline*

Fast Track programs apply to felony offenses, but misdemeanor proceedings are even more abbreviated thanks to Operation Streamline.<sup>166</sup> In 2005, the George W. Bush administration and the newly formed Department of Homeland Security (DHS) began Operation Streamline in Del Rio, Texas.<sup>167</sup>

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161. Plea Agreement 4(e), 4(g), 12, *United States v. Jackson*, No. 20-cr-00236 (Sept. 15, 2021) (Doc No. 35).

162. *Id.* 11(c), at 6.

163. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)); see also Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 152 (2012) (predicting that few convictions will be invalidated due to *Lafler* or *Frye*).

164. *United States v. Osorto*, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020) (citing Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010)).

165. See, e.g., *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (allowing waivers of impeachment evidence); *United States v. Mezzanatto*, 513 U.S. 196, 196 (1995) (allowing Fed. R. Evid. 410 waivers).

166. See Debbie Nathan, *Hidden Horrors of “Zero Tolerance” — Mass Trials and Children Taken from their Parents*, INTERCEPT (May 29, 2018), <https://perma.cc/18XB-RPX7>.

167. See Gonçalves, *supra* note 79, at 39.



Prior to the implementation of Streamline, migrants caught crossing for the first time were either returned to Mexico without a formal deportation or processed for a civil removal through the immigration system.<sup>168</sup> Prosecution had been reserved for migrants with significant immigration history or a prior criminal record.<sup>169</sup> But, with Streamline, even first-time entrants were targeted for criminal prosecution.<sup>170</sup> Operation Streamline and its “zero-tolerance”<sup>171</sup> approach to immigration violations spread rapidly to other border districts and courtrooms.<sup>172</sup>

In Streamline courtrooms, federal magistrates preside over proceedings where up to eighty defendants charged with illegal entry are arraigned, plead guilty, and are sentenced to time in jail—usually in the same day over the course of an hour or two.<sup>173</sup> Unlike the lengthy plea agreements with extensive written waivers that are the trademark of Fast Track programs, the plea agreements are typically oral in Streamline cases.<sup>174</sup> After serving time in jail, Streamline defendants are processed for removal and deported—typically to Mexico.<sup>175</sup> Those accused in Streamline cases are represented by either federal public defenders or Criminal Justice Act panel attorneys.<sup>176</sup> Assistant United States Attorneys generally prosecute the cases, but, at times, attorneys from Border Patrol are deputized as special assistant U.S. Attorneys to handle the Streamline docket.<sup>177</sup> Migrants charged in Streamline cases are typically shackled and often require the assistance of court-appointed interpreters to communicate with counsel and the judge.<sup>178</sup> Streamline results in “staggering caseloads” for the magistrate judges involved.<sup>179</sup> Sometimes, for efficiency’s sake, magistrate judges travel to the jail to conduct the proceedings there rather than transporting dozens of individuals to court.<sup>180</sup> Holding court in jail is far from what one expects of the dignified federal courts.

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168. Lydgate, *supra* note 7, at 484, 488–91.

169. *Id.* at 484.

170. *Id.*

171. Though Streamline is purportedly a “zero-tolerance” program, many of those apprehended are not prosecuted even under the Streamline regime due to prosecution priorities and resource limitations. In the Tucson border patrol sector in 2008 there were 870 apprehensions a day, but prosecution cases were capped at 70. *See id.* at 500.

172. *Id.* at 494–95 (noting that Streamline came to Yuma Border Patrol sector in December 2006, to Laredo in November 2007, to Tucson in January 2008, El Paso in February 2008, in New Mexico in March 2008, Brownsville, Texas in June 2008, and in McAllen, Texas in late 2009).

173. *Id.* at 481–82.

174. E-mail from Chloe Dillon, Trial Att’y, Fed. Defs. of San Diego, Inc., to Amy F. Kimpel, Assistant Professor of L., Univ. of Ala. Sch. of L. (Feb. 13, 2022, 3:30 PM) (on file with author).

175. *See Lydgate, supra* note 7, at 495 (noting that DHS generally uses expedited removals to remove Streamline defendants once their criminal proceedings have concluded).

176. *Id.* at 481.

177. *Id.* at 486.

178. *See id.* at 508.

179. *Id.* at 501–02 (explaining that in Del Rio, the caseloads were 160 a day when Streamline began, but by 2010, had fallen to about 80 a day during “peak season” and that in El Paso, Streamline cases added an average of 330 cases per month each to the already swollen dockets of magistrate judges).

180. *Id.* at 502.

Operation Streamline resulted in a 500% increase in illegal entry prosecutions from FY 1997 to FY 2013.<sup>181</sup> This was despite the fact that apprehensions by Border Patrol fell markedly during the same time period.<sup>182</sup> Obama continued to rely on Streamline prosecutions in border districts throughout his presidency, and Trump expanded Streamline to California and used the program to prosecute record numbers of migrants for misdemeanor offenses.<sup>183</sup> The COVID-19 pandemic has temporarily suppressed the federal government's urge to prosecute low-level immigration offenses, but it is far from clear that Streamline is over for good.<sup>184</sup>

Streamline is facilitated by two key legal mechanisms. The first is the reduction in the maximum penalty for illegal entry from one year (as it had been under the 1929 version of the law) to six months when the provision was recodified in 1952.<sup>185</sup> This change converted illegal entry to a petty offense where the accused is entitled to a bench trial rather than a jury trial.<sup>186</sup> This legislative change was made after Texas immigration officials voiced concerns that juries would be “hostile to criminal enforcement of immigration laws against Mexican economic migrants.”<sup>187</sup> These officials were feeling the sting of grand jury proceedings in El Paso, Texas, that had “no billed”<sup>188</sup> 90% of immigration cases.<sup>189</sup> Regardless of whether that was the sole reason for the change in penalty, it certainly made illegal entry prosecutions faster and cheaper.

The second statutory provision that facilitated Streamline was the Federal Magistrates Act, which was passed by Congress in 1968.<sup>190</sup> The Federal Magistrates Act created the position of a “magistrate judge” who was not an Article III judge, but who was empowered to handle petty offenses from arrest to sentencing.<sup>191</sup> The impact of magistrates on illegal entry misdemeanor cases was by design. Immigration officials and district court judges

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181. *Id.* (representing an increase of illegal entry prosecutions, from 15,392 to 90,067).

182. See U.S. BORDER PATROL TOTAL APPREHENSIONS, <https://perma.cc/ZXT3-FKN7> (noting that during this time period, apprehensions fell from 1.4 million in FY 1997 to roughly 420,000 in FY 2013, while there were over a million apprehensions in 1954, 1983-1987, 1990-2001, and 2004-2006).

183. See Stan Alcorn, *California Starts Streamlining Prosecution for People Who Cross Border Illegally*, NPR (July 13, 2018, 4:20 PM), <https://perma.cc/T2RC-WYWS>.

184. Ryan Devereaux, *Mass Immigration Prosecutions on the Border are Currently on Hold. What Comes Next is Uncertain.*, INTERCEPT (Mar. 18, 2020), <https://perma.cc/W8UV-3FDU>; see also *infra* IV. C (describing the Biden administration's handling of immigration prosecutions in more detail).

185. Keller, *supra* note 36, at 83.

186. *Id.* at 84; for a thorough critique of the petty offense exception, see generally Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, 72 DUKE L. J. 599 (2022); see also *Baldwin v. New York*, 399 U.S. 66, 74–75 (Black, J., concurring).

187. Keller, *supra* note 36, at 84.

188. See UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, HANDBOOK FOR FEDERAL GRAND JURORS, <https://perma.cc/W2KR-BSPW> (explaining that when the Grand Jury finds there is not sufficient evidence to proceed with charges against a defendant, that is called a “no bill”).

189. *Prosecuting Immigration*, *supra* note 14, at 1327.

190. Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-39); see also Keller, *supra* note 36, at 89–90; *Prosecuting Immigration*, *supra* note 14, at 126.

191. See 28 U.S.C. § 636(a)(4), 18 U.S.C. § 3401(a)-(b).

along the border saw magistrates as a way to “alleviate their crowded dockets, where immigration prosecutions still dominated”—even during the 1960s when immigration prosecutions were at record lows.<sup>192</sup> Magistrate judges do not have to go through the increasingly difficult vetting process and Senate confirmation process that district court judges do.<sup>193</sup> Rather, magistrates are selected by a majority of the active district court judges in a judicial district.<sup>194</sup> Because magistrate judges are appointed for a term of eight years rather than for life, they are less insulated from political pressure and more accountable to the district judges that select them.<sup>195</sup>

These two changes laid the groundwork for Operation Streamline. Because of the reduced penalty for illegal entry working in combination with the Federal Magistrates Act, illegal entry can be prosecuted without jurors or district court judges. And district court judges and their time is at a premium.<sup>196</sup> Operation Streamline exploits the lack of procedural protections for those charged with petty offenses. It allows cases to be processed on the cheap.

At first, Streamline prosecutions were typically reserved for defendants who had felony liability and could be charged with illegal reentry due to a prior deportation.<sup>197</sup> These were called “flip flops”—the defendant would be charged with both misdemeanor illegal entry and felony illegal reentry. If the defendant would plead guilty the same day as arraignment, the prosecutor would let them plead to the misdemeanor and drop the felony.<sup>198</sup> But as Streamline prosecutions evolved, particularly during the Trump era, even first-time entrants and asylum seekers were not spared from prosecution.<sup>199</sup>

Under the constraints of Streamline prosecutions, the right to counsel becomes almost a farce in courtrooms where attorneys are assigned to represent as many as eighty defendants at a time.<sup>200</sup> This makes maintaining confidentiality with a client logistically impossible.<sup>201</sup> Ensuring that waivers of rights are made knowingly, voluntarily, and intelligently is insurmountably

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192. Keller, *supra* note 36, at 89–90; *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) (comment on proposed changes to U.S. Commissioner system by Fred J. Morton, U.S. Att’y for the Western District of Texas).

193. See Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What has He Done with Them?*, BROOKINGS (June 4, 2018), <https://perma.cc/F5GL-CTG3>.

194. 28 U.S.C. § 631(a).

195. 28 U.S.C. § 631(e).

196. See Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, ‘Desperation’ Hits the Bench*, LAW360 (Mar. 19, 2019), <https://perma.cc/P9QZ-LULF>.

197. Armpriester, *supra* note 109, at 22.

198. *Id.*

199. *Id.*

200. JUDITH A. GREENE, BETHANY CARSON & ANDREA BLACK, *INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER* 35 (2016) (“In Laredo and Del Rio, [the] court staff had observed that judges were appointing a single lawyer to represent all 80 defendants in a single hearing. Obviously, if you’ve got 80 clients, all you’re doing is lecturing to a mass of people.”).

201. Armpriester, *supra* note 109, at 24.

challenging—particularly when the agreements are not even reduced to writing and defendants face language and literacy barriers. Defendants are often visibly confused during the proceedings. Many ask the magistrate judge for immigration relief like asylum, only to be told that this is a criminal court rather than an immigration court.<sup>202</sup> Moreover, given the assembly-line style proceedings, attorneys often fail to properly advise defendants about the adverse immigration consequences of illegal entry convictions, which can be devastating to one’s chances of winning an asylum claim.<sup>203</sup>

Appeals courts have set some limits on the procedural flimsiness of Streamline—but not many. In *United States v. Roblero-Solis*, the Ninth Circuit held that the court’s questioning of defendants *en masse* violated Rule 11 of the Federal Rules of Criminal Procedure, which requires the court to “address the defendant personally in open court.”<sup>204</sup> But in *United States v. Escamilla-Rojas*, the Ninth Circuit found that defendants could be advised *en masse* so long as the court individually questioned each defendant to determine they understood their rights.<sup>205</sup> In the typical Streamline courtroom, the Magistrate Judge will ask the same series of questions to defendants in a row—each guilty plea and sentence taking a minute or less.<sup>206</sup>

Though Streamline as an official program is limited to border districts, features of the Streamline model can be implemented in other areas involving immigrants. In 2008 in Postville, Iowa, federal magistrate judges set up emergency courtrooms in trailers at a nearby fairground to handle criminal cases from an immigration raid of a local meatpacking plant.<sup>207</sup> Prosecutors gave appointed counsel a script to prepare for the proceedings and advised defense attorneys they would likely be appointed to more than two dozen cases each.<sup>208</sup> The court held sessions from eight in the morning until ten at night with the recently arrested migrants brought out in shackles.<sup>209</sup> Within days, nearly 300 defendants had pleaded guilty in groups of ten and had been sentenced in groups of five.<sup>210</sup> Postville is not an aberration—just one of the most striking examples of a new era in the federal courts where immigration crimes and noncitizens are increasingly common and efficiency trumps due process. More recently, federal prosecutors in Mississippi used lessons

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202. *Id.* at 28.

203. *Id.* at 25–28; see also *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010).

204. *U.S. v. Roblero-Solis*, 588 F.3d 692, 699 (9th Cir. 2009).

205. *U.S. v. Escamilla-Rojas*, 640 F.3d 1055, 1063 (9th Cir. 2011).

206. *Amprister*, *supra* note 109, at 23.

207. Julia Preston, *Immigrant’s Speedy Trials After Raid Become Issue*, N.Y. TIMES (Aug. 8, 2008),

<https://perma.cc/8MB3-9GSE>.

208. *Id.*; see also ACLU, GOVERNMENT “MANUAL” DISTRIBUTED TO IOWA DEFENSE LAWYERS (2008), <https://perma.cc/FM3M-Q2S8>.

209. Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in US History: A Personal Account* 4 (2009), <https://perma.cc/3QE2-H72D>.

210. Preston, *supra* note 207.

learned from Streamline to facilitate prosecutions of nearly 120 of those encountered in an immigration raid at a poultry plant in 2019.<sup>211</sup>

Mass prosecutions have also begun to be used by federal prosecutors in non-immigration cases, like mass gang indictments, and surprisingly similar methods are used. Rather than select only the high-value defendants for prosecution in federal court, prosecutors engage in the same “zero-tolerance” charging as in Operation Streamline. For example, in the Bronx 120 take-down prosecution in 2016, “gang” indictments swept up many low-level individuals. Of the 120 indicted, half were not even alleged to be gang members, one-third were convicted of marijuana sales as the most serious charge, and twenty-two defendants were ultimately sentenced to time served (excluding cooperators), suggesting limited involvement.<sup>212</sup> Similar to Streamline defendants, the vast majority of the defendants were detained pretrial.<sup>213</sup> And out of the 120 defendants, 116 pleaded guilty.<sup>214</sup>

Professor Babe Howell explains, “prosecutors can use mass conspiracy indictments to round up local crews and gangs and to erase the difference between bad actors and their friends and peers. But they should not.”<sup>215</sup> Streamline acculturates federal prosecutors and judges to “zero-tolerance” prosecutions where low-level offenders are targeted alongside recidivists and those who pose a danger to the public. Streamline also teaches federal prosecutors and courts how to process high-volume caseloads and gives them strategies and mechanisms for doing so. In a world where the federal criminal law is so vast that each of us likely commits three federal felonies a day, the death of prosecutorial discretion in favor of a zero-tolerance mindset should trouble us all.<sup>216</sup>

For these reasons, cheap and fast prosecutions enable a phenomenon called “net-widening.” Because cases are so cheap for the government to process, it can process a far greater number of cases than previously possible.<sup>217</sup> Rather than using its discretion to target the most dangerous offenders, the government can prosecute a much larger class, ensnaring people who previously would have been dealt with outside the criminal legal system. In an

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211. Press Release, U.S. Att’y’s Off., S. Dist. of Miss., 119 Illegal Aliens Prosecuted for Stealing Identities of Americans, Falsifying Immigration Documents, Fraudulently Claiming to be U.S. Citizens, Other Crimes, (Nov. 7, 2019), <https://perma.cc/4UU5-H6TC> (noting that 47 of the 119 pleaded guilty to felony charges stemming from the August 7, 2019 raid).

212. HOWELL & BUSTAMANTE, *supra* note 5, at 2, 17.

213. *Id.* at 24 (detailing that 101 of the 120 defendants were detained pre-trial).

214. *Id.* at 21 (noting that two cases went to trial and two cases were dismissed by the prosecutor).

215. *Id.* at 29.

216. See generally HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011); see also MIKE CHASE, *HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER* (2019).

217. See Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 333 (2020) (describing net-widening in the context of diversion programs); see NATAPOFF, *supra* note 3, at 219; see also Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2001 (2021) (quoting a prosecutor describing how the frequent use of plea bargaining enables him to process vastly more cases).

individual case, a defendant being granted a reduced sentence under Operation Streamline or the Fast Track program can seem like a victory. But this myopic focus on individual case outcomes ignores the fact that most people receiving discounted sentences under these programs would never have been prosecuted at all two decades ago. Instead, they would have been processed civilly for deportation or simply turned away at the border. This net-widening creates a new class of “criminal aliens”—predominantly Latinx—who previously would have been spared the label of “criminal.”

Some may view this innovation as a net positive because more “law-breakers” are being held accountable. But having “zero-tolerance” for those accused of immigration offenses seems less justifiable given that a great share of both serious and low-level crime goes unaddressed outside of the immigration context. For example, less than half of violent crime is even reported to the police.<sup>218</sup> And of the 38% of teens who report having texted while driving,<sup>219</sup> very few have been ticketed. Likewise, as explained above, our criminal immigration laws had explicitly racist goals.<sup>220</sup> More than half of undocumented people present in the United States are those who have overstayed a visa.<sup>221</sup> But because our criminal immigration laws were designed to target Mexican border crossers rather than European migrants, visa overstays are treated civilly rather than criminally. The new focus on prosecuting immigration offenses does more to further racialized ideas about criminality than to address lawbreaking or illegal immigration.

### III. EROSION OF CONSTITUTIONAL PROCEDURAL RIGHTS

This Part will describe how the presence of immigration and border cases have transformed criminal practice by looking at the impact on prompt presentment, bail, and the Fourth Amendment. Because of both the “othering” of noncitizen defendants<sup>222</sup> and the federal government’s plenary power over immigration and the border, federal criminal case law is being altered in ways that erode the core constitutionally-based procedural rights of criminal defendants. This has happened incrementally, but the federal criminal landscape has shifted in ways that consolidate the power of federal law enforcement and chip away at the power and rights of those within the jurisdiction of the United States.

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218. ALEXANDRA THOMPSON & SUSANNAH N. TAPP, BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., NJC No. 305101, CRIMINAL VICTIMIZATION, 2021 at 5 (2022).

219. Li Li, Ruth A. Shults, Rebecca A. Andridge, Merissa A. Yellman, Henry Xiang & Motao Zhu, *Texting/Emailing While Driving Among High School Students in 35 States, United States, 2015*, 63 J. ADOLESCENT HEALTH 701, 703 (2018).

220. See *supra* Section I.A.

221. Those who overstay visas have outnumbered illegal border crossers amongst the undocumented immigrant population. Richard Gonzales, *For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings*, NPR (Jan. 16, 2019, 7:02 PM), <https://perma.cc/GC8D-5J9J>.

222. For a discussion of how animus against immigrants has operated at the intersection of criminal and immigration law, see Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018).

Importantly, the changes wrought by the border cases are not self-contained. The erosion of procedural rights and norms is not cabined to the immigration docket, but instead spills over, impacting all defendants.

A. *Delaying Presentment at the Border*<sup>223</sup>

Operation Streamline and Fast Track sentencing programs are about expediting prosecutions, particularly the prosecutions of noncitizen defendants. But not all the procedural dampening that happens as a result of the increased presence of noncitizen defendants is about speeding things up. The glut of immigration and border prosecutions also causes delays that erode the rights of all criminal defendants. Rule 5 of the Rules of Federal Criminal Procedure requires that defendants be presented before a magistrate without unnecessary delay.<sup>224</sup> But in border districts there are persistent patterns of delay due to the processing of those arrested at the border.<sup>225</sup> Defendants are routinely held in substandard conditions for days—sleeping on the floor in frigid cells and denied access to basic hygiene items.<sup>226</sup>

The typical remedy for a Rule 5 violation is suppression of statements. This remedy was established by two federal cases, *McNabb v. United States* and *Mallory v. United States*, and is sometimes referred to as the “McNabb-Mallory rule.”<sup>227</sup> In 1968, Congress limited relief for Rule 5 violations by creating a statutory “safe-harbor” preventing suppression of statements based on delays in presentment when the statement is taken within six hours of a defendant’s arrest.<sup>228</sup> Case law was mixed as to whether the statute limited or did away with suppression for delays in presentment, but in 2009, in *Corley v. United States*, the Court confirmed that suppression remained a remedy so long as a statement was taken outside the safe-harbor period.<sup>229</sup> The Court explained that holding otherwise would “leave the Rule 5 presentment requirement without any teeth, for if there is no *McNabb-Mallory* there is no apparent remedy for delay in presentment.”<sup>230</sup> The Court continued, “One

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223. The author was defense trial counsel for several cases mentioned in this section, representing Mr. Minero-Rojas, Mr. Pimental, Mr. Chavez-Tello, Ms. Rios, and Ms. Lauina’s co-defendant Ms. Liufau.

224. FED. R. CRIM. P. 5(a)(1)(A) (“A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge . . .”).

225. See, e.g., Order Denying Defendant’s Motion to Dismiss the Indictment and to Issue a Writ of Prohibition at 3, *United States v. Minero-Rojas*, No. 11CR3253-BTM, 2011 WL 5295220 (S.D. Cal. Nov. 3, 2011) (describing a “substantial failure to comply with Rule 5(a)(1)(A) in the San Diego Division” where most defendants’ presentment occurred two to six court days from the time of their arrest) [hereinafter *Minero Order*]; see also Order at 1, *United States v. Lauina*, No. 15CR1932-BTM, 2016 WL 1573195 (S.D. Cal. Apr. 18, 2016) (“delays persist”) [hereinafter *Lauina Order*].

226. See *Minero Order*, *supra* note 225, at 5 (describing conditions of confinement); see also *Lauina Order*, *supra* note 225, at 5 (describing detainees sleeping on a pad on the floor with the lights on all night in a large cell with many other detainees).

227. *McNabb v. United States*, 318 U.S. 332 (1943), *superseded by statute*, 18 U.S.C. § 3501; *Mallory v. United States*, 354 U.S. 449 (1957), *superseded by statute*, 18 U.S.C. § 3501.

228. 18 U.S.C. § 3501.

229. *Corley v. United States*, 556 U.S. 303, 306 (2009).

230. *Id.* at 320.

might not care if the prompt presentment requirement were just some administrative nicety, but in fact the rule has always mattered in very practical ways and still does.”<sup>231</sup>

Presentment is an important protection against unlawful arrest, and it is also the point when “the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant a chance to consult with counsel; and deciding between detention or release.”<sup>232</sup> When the government delays presentment, the timelines for a detention hearing and a preliminary hearing are pushed back.<sup>233</sup>

But Rule 5’s impact is muted at the border. Despite the “speed” of Streamline prosecutions, many defendants are often not presented promptly and wait days to see a judge.<sup>234</sup> Border-related delays are systemic, and this is apparent when one looks at the case law about Rule 5’s prompt presentment requirement, given that the Court reaffirmed its vitality in *Corley*. Though *Corley* was not a border or immigration-related case, many of the significant post-*Corley* cases about Rule 5 delay address delays in presentment due to border-related processing.<sup>235</sup>

The most cited post-*Corley* circuit court opinion on Rule 5 delay is *United States v. Boche-Perez*.<sup>236</sup> In *Boche-Perez*, the Fifth Circuit addressed a delay in presentment of a lawful permanent resident arrested for possession of child pornography while entering the United States at the Laredo, Texas, port of entry.<sup>237</sup> In finding the delays in presentment reasonable, the court excused delay resulting from “routine administrative processing and search procedures at the border.”<sup>238</sup> The court also approved of time spent to process Boche-Perez for immigration purposes, noting that “added complications for law enforcement procedures created by the need for immigration processing at ports of entry” might reasonably delay presentment.<sup>239</sup>

The second-most-cited Rule 5 delay case is *United States v. Valenzuela-Espinoza* from the Ninth Circuit.<sup>240</sup> *Valenzuela-Espinoza* is not a border case—Valenzuela was arrested for marijuana-related charges at his home—

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231. *Id.*

232. *Id.*

233. *Minero Order*, *supra* note 225, at 2 n.2.

234. See JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 15 (2010) (describing how Streamline defendants in Del Rio, Texas waited as long as 14 days).

235. The other significant Rule 5 cases involve cooperation and the impact of written waivers of the right to prompt presentment. See, e.g., *United States v. McDowell*, 687 F.3d 904, 910 (7th Cir. 2012) (allowing written waivers); *United States v. Thompson*, 772 F.3d 752, 763 (3d Cir. 2014) (holding that delay for pursuit of cooperation is not reasonable).

236. *United States v. Boche-Perez*, 755 F.3d 327 (5th Cir. 2014) (cited 141 times according to Westlaw).

237. *Id.* at 331.

238. *Id.* at 339.

239. *Id.* at 341.

240. *United States v. Valenzuela-Espinoza*, 697 F.3d 742 (9th Cir. 2012) (cited 61 times).



but the case arises from a border district and a border court in Tucson, Arizona.<sup>241</sup> Valenzuela-Espinoza was arrested at 11:15 a.m. but was not presented until the following day at 2:00 p.m. due to a “paperwork” policy that paperwork for initial appearances had to be turned in by 10:30 a.m.<sup>242</sup> Ultimately the Ninth Circuit suppressed the statements at issue, determining that delay due to the paperwork policy alone was unreasonable.<sup>243</sup> In some ways, this is a victory, suggesting that border prosecutions have not completely gutted adherence to the Federal Rules of Criminal Procedure. But the paperwork policy which unreasonably delayed presentment for defendants had been in effect for fourteen years before the Ninth Circuit declared it unreasonable in 2012.<sup>244</sup> The Ninth Circuit had mentioned the same paperwork policy in a 2002 case where it found delay of 31 hours reasonable based both on the policy and the need to obtain a Spanish-speaking FBI agent to conduct an interrogation.<sup>245</sup> Countless defendants—citizen and noncitizen alike—were impacted by the policy prior to *Valenzuela-Espinoza*. And some of them, like Mr. Valenzuela, were not charged with immigration offenses or arrested at the border but were delayed just the same.

A border case, *United States v. Garcia-Hernandez*, finds a delay reasonable because of the border officers’ “heavy caseload” due to a “shortage of personnel necessary to process” arrestees.<sup>246</sup> “It was an unusually busy day for the El Centro [Border Patrol] station; agents apprehended nearly five times as many people as they would have on an average day.”<sup>247</sup> The opinions in *United States v. Liera*<sup>248</sup> and *United States v. Pimental*<sup>249</sup> suggest a similar routineness to delays in presentment in border districts. In *Liera*, the defendant was arrested for bringing undocumented migrants to the United States at about 4:15 a.m. at Calexico West Port of Entry, but not presented until the following afternoon more than 30 hours later.<sup>250</sup> The delay was found unreasonable and a second set of statements taken outside the six-hour safe harbor period was suppressed.<sup>251</sup> In *Pimental*, two citizens arrested for importation of marijuana at 9:30 a.m. on a Friday were not presented until the following Tuesday (after a holiday weekend) despite being a twenty-two minute drive from the courthouse in San Diego—a delay the court found unreasonable, resulting in the suppression of a second set of statements made by Pimental at the time he was booked into jail.<sup>252</sup>

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241. *Id.* at 744–46.

242. *Id.* at 749.

243. *Id.* at 752.

244. *Id.* at 750 (noting a February 1998 memorandum from the Tucson magistrate judges to the U.S. Attorney’s office describing the policy).

245. *United States v. Gamez*, 301 F.3d 1138, 1143 (9th Cir. 2002).

246. *United States v. Garcia-Hernandez*, 569 F.3d 1100, 1106 (9th Cir. 2009).

247. *Id.* at 1101.

248. *United States v. Liera*, 585 F.3d 1237 (9th Cir. 2009).

249. *United States v. Pimental*, 755 F.3d 1095 (9th Cir. 2014).

250. 585 F.3d at 1239–40.

251. *Id.* at 1241–44.

252. 755 F.3d at 1097–102.

What was unusual about *Liera* and *Pimental* was not the length of delay in presentment, but the fact of a second interrogation outside the six-hour safe harbor period resulting in statements which could be suppressed. These second sets of statements gave the Rule 5 presentment requirement “teeth” that it often lacks when delays occur after a prompt interrogation. Moreover, these statements mattered to the government’s proof in the case. Often, suppressible statements are merely cumulative of earlier statements or evidence in the government’s possession.

In thousands of cases, the unlawful delays occur without any recourse or remedy. And the government is unapologetic about routinely violating the law. For example, in one hearing on a Rule 5 suppression motion in San Diego in 2011, District Judge Hays and a federal prosecutor had the following exchange:

The Court: So it is the government’s view that “well, we haven’t violated Rule 5,” or is it the position that “well, we may have violated Rule 5, but it’s unavoidable because of the number of people we have the limitations we have based on the [federal jail], so it’s not our fault, but we would like to comply, but the [local federal jail] gives us these limitations. We have a lot of people and we’re doing the best we can. . . .

Prosecutor: The latter one, yes.

The Court: . . . Is it the view then that the Court is supposed to apply the analysis with respect to [whether] Rule 5 has been violated sort of on a sliding scale to say “well, they have a lot of cases, the [local federal jail] gives them some restrictions, and so some of these are violations, but they’re excusable violations?”

Prosecutor: Yes.<sup>253</sup>

The judge then pointed out that the lack of resources, space at the jail, and the number of cases prosecuted were all within the control of the executive branch. The exchange continued.

The Court: I understand the government’s position to be that, “well” – that you concede that there are delays but that it’s based upon the practicalities of what’s occurring. Is it the government’s view that that circumstance will just continue for an unknown period of time?

Prosecutor: Right. As long as people are violating the law, they’re going to be arrested. The dismissal [of a case based on patterns of Rule 5 delay] is not really an appropriate remedy because they shouldn’t be granted immunity because of a lack of resources.<sup>254</sup>

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253. Transcript of Hearing at 11, *United States v. Chavez-Tello*, No. 11CR3249-WQH, 2016 WL 1573195 (S.D. Cal. Oct. 24, 2011) (No. 19).

254. *Id.* at 15–16.

The judge went on to summarize the government's position:

If it's a case where the government is saying, "look, we know we're violating the rule and we're telling you now candidly we're going to continue to violate in the future, and in those circumstances where there may have been a statement given by the defendant under the rules, perhaps that's an appropriate remedy, perhaps you can suppress it, but that's all you can do. And for all those other defendants who suffer a Rule 5 violation... there's no remedy that the court can issue."<sup>255</sup>

In response to defense motions, one judge in San Diego issued orders in two separate cases, *United States v. Minero-Rojas* in 2011 and *United States v. Lauina* in 2016, to address delays.<sup>256</sup> In both cases the defendants requested dismissal based on staggering numbers of delays in the Southern District of California. The judge denied the requests to dismiss but did use his supervisory powers to monitor and improve delays in presentment.<sup>257</sup>

Catarino Minero-Rojas was arrested for illegal reentry but was not presented before a magistrate until nine days after his arrest.<sup>258</sup> Minero-Rojas presented data that defendants were experiencing delays between five and eleven calendar days, and in his order, the judge found that even excluding weekends and court holidays, defendants were routinely delayed between two and six court days.<sup>259</sup> After the order to have the court monitor delays in *Minero-Rojas*, delays abated for some time. But in 2015, Crystal Lauina was arrested for importation of methamphetamine at the port of entry along with two other women—all three were citizens and Lauina was legally blind.<sup>260</sup> Despite being arrested at 5:15pm on a Thursday, the women were not presented before the magistrate until the following Monday.<sup>261</sup> Again the judge felt compelled to intervene to mitigate the persistent delays.

But it is not just these two cases that illustrate the problem. One citizen mother, who was arrested with her son, was told by federal agents that she would not see a judge for four or five days during which time she would not be able to see her children or talk to anyone.<sup>262</sup> After sleeping on the floor in

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255. *Id.* at 21.

256. See *Minero* Order, *supra* note 225; *Lauina* Order, *supra* note 225.

257. *Id.*

258. Defendant's Motion to Dismiss the Indictment and to Issue a Writ of Prohibition, *United States v. Minero-Rojas* App'x K, No. 11CR3253-BTM, 2011 WL 5295220 (S.D. Cal. 2011) (No. 24); Declaration of Mr. Minero-Rojas at 2, *United States v. Minero-Rojas*, No. 11CR3253-BTM, 2011 WL 5295220 (S.D. Cal. Sept. 6, 2011); see also Supplemental Filing, *United States v. Minero-Rojas*, No. 11CR3253-BTM, 2011 WL 5295220 (S.D. Cal. Sept. 27, 2011) (No. 31).

259. *Minero* Order *supra* note 225, at 3–4.

260. *Lauina* Order, *supra* note 225; see also Defendant's Motion to Return Property, *United States v. Lauina*, at 3–4 (S.D. Cal. Aug. 28, 2015) (No. 18) (noting all three defendants are United States citizens of Samoan descent and that Ms. Lauina is legally blind and Ms. Liufau is diabetic).

261. *Lauina* Order, *supra* note 225, at 3.

262. Declaration of Susan Rios, *United States v. Susan Rios* app. A, at 3 (S.D. Cal. Sept. 7, 2011) (No. 14).

a cell at the Port of Entry for several days, she was finally taken before the magistrate five days after her arrest.<sup>263</sup> Other citizens arrested at the border were delayed so long that family members filed missing persons reports with the police only to find that the missing family members were in federal custody.<sup>264</sup>

The delays impacted both citizens and noncitizens, and during the delays both citizens and noncitizens were held in abysmal conditions. In his 2011 order in *Minero*, the judge described recent arrestees—including citizens—sleeping on concrete floors and metal benches in freezing cells with over twenty people and lights that stayed on all night.<sup>265</sup> He described arrestees being given only two meals a day and not provided access to hygiene items like soap even after using the toilet and before meals.<sup>266</sup> In 2019, the public was shocked to learn of the substandard conditions in which unaccompanied minors apprehended at the border were held. The public was appalled when an attorney for the United States defended these conditions in court, arguing against giving kids necessities like toothbrushes.<sup>267</sup> But federal prosecutors had been defending those same sorts of conditions for years in criminal cases like *Minero-Rojas*. We should not have been surprised when children were treated the same way by the same agencies less than a decade later.

These examples are not aberrational. They are the result of a federal criminal legal system overwhelmed by the logistics of processing and caging so many individuals and federal prosecutors who are willing to violate procedural rules on a massive scale to pursue border prosecutions. The shortcuts developed in Operation Streamline and the Fast Track program are likely necessary to process defendants quickly through the federal criminal courts. But these same shortcuts are also responsible for cheapening the process afforded to all federal defendants. Similarly, when procedural rights erode in the federal context, this has spillover effects for those in the state court system.<sup>268</sup>

## B. Alienating Bail<sup>269</sup>

The share of people being detained pretrial is increasing as immigration prosecutions increase.<sup>270</sup> In *Stack v. Boyle*, the Supreme Court announced

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263. *Id.* at 4.

264. Defendant's Motion to Dismiss the Indictment and to Issue a Writ of Prohibition, United States v. Minero-Rojas App'x I, No. 11CR3253-BTM, 2011 WL 5295220 (S.D. Cal. 2011) (No. 24); Missing Person Reports from Orange Police Dep't and Baldwin Park Police Dep't, United States v. Minero-Rojas, No. 11CR3253-BTM, 2011 WL 5295220 (S.D. Cal. Sept. 6, 2011) (No. 24).

265. *Minero Order*, *supra* note 225, at 5.

266. *Id.*

267. Ken White, *Why a Government Lawyer Argued Against Giving Immigrant Kids Toothbrushes*, ATL. (June 23, 2019), <https://perma.cc/9A88-1AEH>.

268. See, e.g., Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 394–95 (2020).

269. This section is adapted from Amy F. Kimpel & James M. Chavez, *Pretrial Release for Non-U.S. Citizen Clients: One Front of the War for Racial Justice*, CHAMPION 16 (July 2021) <https://perma.cc/CD7V-LEP4>.

270. Rowland, *supra* note 91, at 14.

that “[u]nless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>271</sup> In 1979, decades after *Stack*, only 17% of federal defendants were detained pretrial.<sup>272</sup> Today, the rate is 75%.<sup>273</sup> This has devastating consequences for the commitment to the presumption of innocence and the right to bail.

Noncitizens are more likely to be detained pretrial than their citizen counterparts, and these disparities exacerbate racial disparities in pretrial detention rates<sup>274</sup> and ratchet up pretrial detention rates for Latinx people accused of crimes.<sup>275</sup> In illegal entry and reentry cases, the presumption of innocence undergirding the right to bail collapses because alienage is viewed as nearly synonymous with guilt.<sup>276</sup> Because immigration prosecutions are such a large part of the docket, judges have become acculturated to pretrial detention and to a cramped version of the presumption of innocence.

Scholar Stephanie Diwania described bail determinations in federal courts as being “highly individualized,”<sup>277</sup> but she excluded noncitizen defendants and defendants prosecuted in districts bordering Mexico from her analysis.<sup>278</sup> As careful readers now know, that excludes more than half of federal cases. Rather than being highly individualized, bail determinations in border cases are often *pro forma*. In cases of noncitizen defendants, defense practitioners often resign themselves to defeat and do not bother to advocate for bail. Likewise, judges often categorically assume that these defendants pose a flight risk and subsequently choose to deny bail.

Generally, there are two permissible reasons to detain the accused pretrial: risk to public safety and risk of flight or non-appearance.<sup>279</sup> On both measures, data suggests that noncitizens should be released pretrial at least as often as citizens. Noncitizens tend to commit crimes at rates lower than the citizen population.<sup>280</sup> Similarly, there is no evidence to suggest that noncitizens or those with foreign ties are at greater risk of non-appearance in court

271. 342 U.S. 1, 4 (1951).

272. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRETRIAL RELEASE AND MISCONDUCT 1 (1985), <https://perma.cc/Q27L-DPAI>.

273. ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS: FEDERAL PRETRIAL SERVICES TABLES tbl. H-14 (2019) <https://perma.cc/B8HB-FZXI>.

274. Rowland, *supra* note 91, at 13–14 (explaining how 45% of white defendants, 60% of Black defendants, and 88% of Hispanic defendants are detained, and 53% of U.S. citizens are detained as compared to 71% of noncitizens).

275. Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, CHAMPION 46 fig.2 (July 2020), <https://perma.cc/KZ79-A9ER>.

276. Though the burden is on the prosecution to prove alienage, courts and prosecutors often have a hard time conceptualizing that and presume alienage. *See, e.g.*, *United States v. Hernandez-Meza*, 720 F.3d 760, 764–67 (9th Cir. 2013).

277. *See, e.g.*, Diwania, *supra* note 4, at 1275.

278. *Id.* at 1284.

279. *United States v. Salerno*, 481 U.S. 739 (1987).

280. Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PROC. NAT’L ACAD. SCI. 32340 (2020).

or are more likely to flee.<sup>281</sup> In fact, people released on bond who are charged with immigration crimes (who are more likely to be noncitizens) perform better on pretrial release than those charged with property crimes, drug crimes, violent crimes, or weapons offenses.<sup>282</sup> This makes sense because even undocumented noncitizens often have strong community ties to the United States—about two-thirds have been in the United States for over ten years.<sup>283</sup> During their time in the United States, immigrants “enrolled in degree programs, started businesses, purchased homes, and married and had children.”<sup>284</sup> These ties, rather than the incorrect categorical assumptions about immigrants, are more predictive of risk of flight.

When a federal defendant is undocumented, has an expired visa, or has criminal convictions that can trigger deportation, they likely face an “ICE detainer” along with their criminal charge. An ICE detainer is a request from Immigration and Customs Enforcement (ICE, a division of DHS) that the jail permit ICE to assume custody of the defendant for non-criminal immigration purposes after they are released. Specifically, the ICE detainer allows ICE to decide whether to initiate immigration proceedings and possibly hold an individual in immigration custody as they process them for deportation, or to hold them while effectuating a prior order of removal.<sup>285</sup> Prosecutors often ask judges to deny pretrial release based on a defendant’s immigration status or the presence of an ICE detainer, arguing that because a person accused of a crime is deportable, they present an increased risk of non-appearance.

The Federal Bail Reform Act (BRA) allows for a brief initial detention to notify ICE when a noncitizen is charged in federal court so that ICE can lodge a detainer.<sup>286</sup> But other than that, the BRA treats citizens and noncitizens the same and applies the same factors to be considered in determining whether they pose the requisite risk of flight or dangerousness to warrant pretrial detention.<sup>287</sup> Federal courts have overwhelmingly held that the risk of non-appearance in the BRA context must have an “element of volition” and cannot be solely based on the “specter” of deportation.<sup>288</sup> Courts generally conclude risk of flight should not include the risk that ICE will involuntarily

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281. Allyson Theophile, *Pretrial Risk Assessment and Immigration Status: A Precarious Intersection*, 73 FED. PROB. J. 95, 97 (2009); Michael Neal, *Zero Tolerance for Pretrial Release of Undocumented Immigrants*, 30 PUB. INT. L.J. 1, 45 (2021).

282. MARK MOTIVANS, FEDERAL JUSTICE STATISTICS, 2016 – STATISTICAL TABLES, U.S. DEP’T OF JUST. 18 (2020), <https://perma.cc/VC49-86XZ>.

283. Mark Hugo Lopen, Jeffrey S. Passel & D’Vera Cohn, *Key Facts about the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://perma.cc/S6PY-JM3A>.

284. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1914 (2020) (describing DACA recipients).

285. State v. Lopez-Carrera, 247 A.3d 842, 859 (N.J. Sup. Ct. 2021).

286. 18 U.S.C. § 3142(d).

287. 18 U.S.C. § 3142(g).

288. United States v. Santos-Flores, 794 F.3d 1088, 1091 (9th Cir. 2015); United States v. Ailon-Ailon, 875 F.3d 1334 (10th Cir. 2017); see also United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1176–78 (D. Or. 2012) (citing related cases); United States v. Espinoza-Ochoa, 371 F. Supp. 3d 1018 (M. D. Ala. 2019); U.S. v. Marinez-Patino, No. 11-CR-064, 2011 WL 902466, at \*1 (N.D. Ill. Mar. 14, 2011); United States v. Flores, No. 5:18-MJ-00043, 2018 WL 3715766 (W.D. Va. Aug. 3, 2018); United States

remove the defendant.<sup>289</sup> Likewise, courts have rejected the suggestion that an ICE detainer creates a rebuttable presumption that a defendant presents an unreasonable risk of flight.<sup>290</sup> That's not to say that the risk of deportation cannot factor into the court's analysis. Courts can consider that a person accused of a crime may be less likely to stay in the country and fight a criminal case if they can self-deport and avoid prison time—particularly when it seems inevitable that the person will lose both the criminal and immigration cases.

Once a person accused of a crime has been released on bail in federal court, ICE has two options. It can detain the person and proceed with the deportation process, permanently jeopardizing the criminal case if the deportation happens before the criminal case resolves. Or it can release the person and allow the criminal case to proceed with the defendant on bond. What it cannot do is hold a person in immigration custody solely to circumvent release under the BRA.<sup>291</sup> This means that the Department of Justice (DOJ) must prioritize the criminal or immigration case. Unless the criminal case can conclude before the person is deported, DOJ cannot have its cake and eat it too. If the U.S. government deports a person accused of a federal crime outside the jurisdiction of the United States, the court will likely dismiss the criminal charges based on the violation of the person's due process rights.<sup>292</sup>

Noncitizen defendants who do make bail are often transferred to immigration detention rather than being released.<sup>293</sup> Some noncitizens don't bother seeking bail for fear of being transferred to immigration detention where they will not get custody credit towards their sentence and where they may be hundreds of miles from court and defense counsel.<sup>294</sup>

A recent report by the University of Chicago Law School's Federal Criminal Justice Clinic concluded that "a culture of detention pervades the federal courts."<sup>295</sup> The report relied on observations of 600 bail hearings from

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v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009); *United States v. Morales*, No. 11-CR-20132-09-KHV-DJW (D. Kan. Feb. 24, 2012).

289. *Ailon-Ailon*, 875 F.3d at 1337.

290. *Espinoza-Ochoa*, 371 F. Supp. 3d 1018.

291. See *United States v. Soriano Nunez*, 928 F.3d 240, 245 (3d Cir. 2019); *United States v. Vazquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019) ("So long as ICE detains the alien for the permissible purpose of effectuating his removal and not to 'skirt [the] Court's decision [in] setting the terms of [his] release under the BRA,' [] ICE's detention does not offend separation-of-powers principles simply because a federal court, acting pursuant to the BRA, has ordered that same alien released pending his criminal trial.").

292. See, e.g., *United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128 (M.D. Fla. 2015); *United States v. Munoz-Garcia*, 455 F. Supp. 3d 915 (D. Ariz. 2020).

293. LENA GRABER & AMY SCHNITZER, NAT'L IMMIGR. PROJECT, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS 1 (2013).

294. *Id.* Some defendants have requested injunctions to prevent DHS from transporting them out of state, but those requests are typically denied. See, e.g., *United States v. Balthazar-Sebastian*, 990 F.3d 939 (5th Cir. 2021); *United States v. Barrera-Landa*, 964 F.3d 912 (10th Cir. 2020); *United States v. Pacheco-Poo*, 952 F.3d 950, 952 (8th Cir. 2020); *Soriano Nunez*, 928 F.3d at 247; *Vazquez-Benitez*, 919 F.3d at 553–54 (D.C. Cir. 2019); *United States v. Veloz-Alonso*, 910 F.3d 266, 270 (6th Cir. 2018).

295. ALISON SIEGLER, UNIV. CHI. L. SCH., FREEDOM DENIED: HOW THE CULTURE OF DETENTION CREATED A FEDERAL JAILING CRISIS 16 (2022), <https://perma.cc/9BUP-F15A>.

four federal districts far from the southern border, and concluded that “the federal pretrial detention system is in crisis” and that judges and prosecutors “frequently ignore” the law as set out in the BRA.<sup>296</sup> Routinely, prosecutors requested detention when it wasn’t legally justified, defense attorneys failed to object, and judges granted detention.<sup>297</sup> This troubling pattern occurred more frequently when defendants were people of color or were identified as noncitizens.<sup>298</sup>

Generally speaking, the presumption in favor of bail has been eroded because of the increased presence of immigration cases on the federal criminal docket. Many defendants are unable to secure release either because judges order them detained or because the logistics of immigration detainees make release unattainable. In courthouses where defendants charged with immigration status offenses are unable to secure release, it becomes difficult to see the injustice in pretrial detention of those charged with drug, firearms, or violent offenses. From 2008 to 2018, a decade when immigration prosecutions began to dominate the docket, pretrial detention rates rose for every demographic category of defendant despite there being no major changes to the Federal Bail Reform Act during that period.<sup>299</sup> In that decade, the pretrial detention rate for noncitizens rose ten percentage points while the rate for citizens rose eleven percentage points. Today, one is more likely than not to be detained pretrial in federal court—regardless of citizenship status. The right to bail is eroding much like the right to trial did during the drug war.<sup>300</sup>

### C. *Alienating the Fourth Amendment*

The border can fairly be characterized as an almost “Fourth Amendment-free” zone. The border search doctrine is expansive and deeply rooted in the plenary powers of the federal government to control its borders and immigration. The doctrine allows for suspicion-less searches of people and their belongings at the border.<sup>301</sup> This includes invasive searches, like searches of digital devices (cell phones and laptops) and the complete disassembly of a vehicle.<sup>302</sup> In fact, the Supreme Court has expressed “no view on what level of suspicion, *if any*, is required for nonroutine border searches such as strip,

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296. *Id.* at 17, 27 (the four districts were the District of Massachusetts, the District of Maryland, the Southern District of Florida, and the District of Utah).

297. *Id.* at 29, 32.

298. *Id.* at 33.

299. Rowland, *supra* note 91, at 15 fig.5 (explaining that during this time, pretrial detention rates for noncitizens rose from 61% to 71% and those for citizens rose from 42% to 53%).

300. Admittedly, correlation is not causation. This Article does not claim to prove definitively that the surge in immigration prosecutions caused pretrial detention rates to rise. The aim is rather to demonstrate federal procedural norms have changed as the rates of immigration prosecutions rise.

301. *See, e.g.*, *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *United States v. Montoya-Hernandez*, 473 U.S. 531, 538 (1983).

302. *See, e.g.*, *United States v. Tousey*, 890 F.3d 1227 (11th Cir. 2018); *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (en banc); *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019) (affirming *Cotterman* post-*Riley v. California*, 573 U.S. 373 (2014)); *Alasaad v. Mayorkas*, 988 F.3d 8 (1st Cir. 2021).



body cavity, or involuntary x-ray searches.”<sup>303</sup> Recently, the border search doctrine has been used to stop, question, and search journalists, activists, and attorneys critical of U.S. immigration policy.<sup>304</sup> The border search doctrine also gives rise to the “extended border search doctrine,” which allows for searches based on reasonable suspicion rather than probable cause where there is reasonable certainty of a recent border crossing.<sup>305</sup> Two-thirds of the U.S. population lives within one hundred miles of a U.S. international border where Fourth Amendment protections are lessened.<sup>306</sup>

At the same time, suppression is generally not a remedy for Fourth Amendment violations in immigration proceedings—so even evidence that would be suppressed in criminal court under the border search doctrine will generally not be suppressed for the purposes of deportation proceedings.<sup>307</sup> This exception to the exclusionary rule has allowed for routine violations of the Fourth Amendment by federal immigration agents.<sup>308</sup> Moreover, identity evidence (a person’s name, date of birth, fingerprint, and country of origin) is generally not suppressible based on a Fourth Amendment violation, even in criminal proceedings.<sup>309</sup> In many illegal reentry and document fraud cases, identity evidence is all the government needs to prove the charge.<sup>310</sup>

Congress enacted laws permitting federal immigration agents to stop and question “any alien or person believed to be an alien as to his right to be or remain in the United States.”<sup>311</sup> Federal law and regulation constrains the exercise of this authority to within one hundred miles of the U.S. border.<sup>312</sup> In *United States v. Brignoni-Ponce*, the Court found that roving border patrol stops in this 100-mile zone based *solely* on a person’s apparent Mexican ancestry violated the Fourth Amendment.<sup>313</sup> In rejecting the government’s request to allow immigration enforcement stops based solely on the appearance of Mexican ancestry, the Court explained:

303. Montoya-Hernandez, 473 U.S. at 541 n.4 (emphasis added).

304. See, e.g., Salvador Hernandez, *The U.S. Compiled A Secret List of Journalists, Attorneys, and Activists to Question at the Border*, BUZZFEED NEWS (Mar. 6, 2019), <https://perma.cc/F4XK-KS1J>.

305. *United States v. Stewart*, 729 F.3d 517, 524–25 (6th Cir., 2013) (noting that seven circuits recognize extended border search doctrine).

306. ACLU MICH., *THE BORDER’S LONG SHADOW: HOW BORDER PATROL USES RACIAL PROFILING AND LOCAL AND STATE POLICE TO TARGET AND INSTILL FEAR IN MICHIGAN’S IMMIGRANT COMMUNITIES 14* (2021), <https://perma.cc/K43B-EX6C>.

307. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984). There is an exception to this exception for particularly egregious violations of the Fourth Amendment which “may” warrant the remedy of suppression. *Id.* at 1050.

308. Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 582–97 (2009); see, e.g., *Cotzoy v. Holder*, 725 F.3d 172 (2d Cir. 2013).

309. *Lopez-Mendoza*, 468 U.S. at 1034.

310. See, e.g., *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1185 (11th Cir. 2009). For a discussion of identity evidence in cases involving immigrant defendants, see Eda Katharine Tinto, *Policing the Immigrant Identity*, 68 FLA. L. REV. 819 (2016).

311. 8 U.S.C. 1357(a)(1).

312. See *id.*; 8 C.F.R. § 287.1(a) (1975).

313. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975).

The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.<sup>314</sup>

The Court recognized that even though estimates were that “85% of the aliens illegally in the country are from Mexico,” “[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.”<sup>315</sup> The Court concluded that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”<sup>316</sup> So while the Court’s holding favored the defendant, the Court also established that “Mexican appearance” was a relevant factor to the analysis of reasonable suspicion in immigration cases. The Court also suggested other factors, like “mode of dress or haircut” that could amount to reasonable suspicion to justify a stop when coupled with “Mexican appearance.”<sup>317</sup> The Court failed to mention that Brignoni-Ponce himself was not actually Mexican in ancestry (as the federal agents perceived him to be), but rather Puerto Rican, and therefore a United States citizen.<sup>318</sup>

A year later, in *United States v. Martinez-Fuerte*, the Court addressed fixed Border Patrol checkpoints in the U.S. interior rather than roving patrols.<sup>319</sup> The Court found no constitutional violation in having fixed Border Patrol checkpoints to facilitate immigration enforcement, even if motorists would be stopped and questioned “in the absence of any individualized suspicion.”<sup>320</sup> The Court declared that “it is constitutional to refer motorists

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314. *Id.* at 883–84.

315. *Id.* at 879, 886.

316. *Id.* at 886–87.

317. *Id.* at 885.

318. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1012 (2010).

319. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

320. *Id.* at 562.

selectively to the secondary inspection area at the . . . checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.<sup>321</sup> That means that at fixed border checkpoints—which can be up to one hundred miles from the border—an officer can refer someone for further inspection simply because the officer thinks that person looks Mexican. As Justice Brennan warned in his dissent, “[t]he process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same ‘suspicious’ physical and grooming characteristics of illegal Mexican aliens.”<sup>322</sup> Because “[t]he cornerstone of this society, indeed of any free society, is orderly procedure,” such a ruling, Justice Brennan continued, serves to “undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of government[.]”<sup>323</sup>

Two-thirds of the U.S. population lives within one hundred miles of a U.S. international border—that is, in this zone of fixed border checkpoints and roving patrols.<sup>324</sup> There are entire states, like Florida or Michigan, that fall completely within this border zone.<sup>325</sup> Moreover, there is substantial evidence that even near the Canadian border, Border Patrol is more much likely to stop people who are Black or Brown for immigration checks.<sup>326</sup> These practices disproportionately impact U.S. citizens of color and lawful immigrants of color.<sup>327</sup> They also impact white citizens who associate with people who could be mistaken for “aliens” because of their race or appearance.<sup>328</sup> Moreover, the factual underpinnings relied upon by the Court in *Brignoni-Ponce* and *Martinez-Fuerte* are outdated and have not been updated to reflect an increasingly racially diverse nation. The appearance of Mexican ancestry was arguably relevant to reasonable suspicion analysis in the 1970s when Latinos made up only 12% of the population of California.<sup>329</sup> But today, when Latinos make up nearly 40% of the state population, outnumbering all other demographic groups, continued reliance on “apparent Mexican ancestry” to justify reasonable suspicion casts far too wide a net, subjecting millions of U.S. residents to unwarranted immigration enforcement scrutiny.<sup>330</sup>

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321. *Id.* at 563.

322. *Id.* at 572 (Brennan, J., dissenting).

323. *Id.* at 578 (Brennan, J., dissenting).

324. ACLU MICH., *supra* note 306, at 14.

325. *Id.* at 14, 27.

326. *Id.* at 4.

327. *Id.* (explaining that one third of those stopped are United States citizens).

328. Shalini Bhargava Ray, *Harboring and the Freedom of Association*, 101 N.C. L. REV. (forthcoming 2023).

329. Javier Panzar, *It's Official: Latinos Now Outnumber Whites in California*, L.A. TIMES (July 8, 2015), <https://perma.cc/JWG3-N22B>.

330. *QuickFacts: California*, U.S. CENSUS BUREAU, <https://perma.cc/G4TR-ZLHC> (last visited Nov. 30, 2022).

Likewise, in regions of the Southwest that were previously part of Mexico, these racialized ideas about citizenship seem similarly misplaced.<sup>331</sup>

The erosion of rights extends beyond the immigration enforcement context. Legal scholar Kevin R. Johnson has convincingly drawn a line from *Brignoni-Ponce* and *Martinez-Fuerte* to the Court's approval of pretextual stops in *Whren v. United States*.<sup>332</sup> Johnson argues that the Supreme Court's sympathy to the governmental interest in "controlling the seemingly uncontrollable undocumented migration from Mexico" resulted in immigration authorities being afforded "great leeway" in *Brignoni-Ponce* and *Martinez-Fuerte* and ushered in an era of racial profiling.<sup>333</sup> That leeway set the stage for the Court's opinion in *Whren v. United States* in the midst of the drug war.<sup>334</sup> The *Whren* Court found no Fourth Amendment violation when police used a traffic stop as a pretext to investigate another crime.<sup>335</sup> The Court also suggested that even if the stop were racially motivated, that was merely selective enforcement rather than a Fourth Amendment concern.<sup>336</sup> The same term, the Court set an almost impossibly high bar to raise claims of selective enforcement based on race, essentially extinguishing any hope that a defendant could successfully challenge a stop as racially motivated.<sup>337</sup>

It is overly simplistic to say that all federal prosecutions are now cheaper and faster. At the same time as federal prosecutors push immigration and border cases through the courts with increasing efficiency, the Supreme Court's case law has made white collar charges more difficult to prove, and therefore slower and more costly to prosecute.<sup>338</sup> The difference in the process and procedure afforded to defendants based on geographic location and case type is vast. The few white collar prosecutions now take up more resources, while at the same time, the bulk of the federal criminal docket—consisting of immigration and drug crimes—is processed ever more "efficiently." Looking at judicial district caseload statistics, the contrast is stark. In the Southern and Western Districts of Texas, each district judge processes over 400 felony cases a year and the median time between filing and disposition is just five months.<sup>339</sup> Far from the border, in the districts encompassing Washington D.C., Boston, New York City, Chicago, Los Angeles, and San Francisco, the average felony caseload is less than forty annually and cases take between

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331. See, e.g., *Treaty of Guadalupe Hidalgo*, HIST., <https://perma.cc/GS5B-1XDE> (Sept. 21, 2022) (noting that as part of the Treaty of Hidalgo, land that later became all or part of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming was transferred from Mexico to the U.S.).

332. See generally Johnson, *supra* note 318.

333. *Id.* at 1011.

334. *Whren v. United States*, 517 U.S. 806 (1996). *Whren* cited both *Brignoni-Ponce* and *Martinez-Fuerte*. *Id.* at 810, 818.

335. *Id.* at 813.

336. *Id.*

337. *United States v. Armstrong*, 517 U.S. 456 (1996).

338. See *Kelly v. United States*, 140 S. Ct. 1565 (2020); *Ruan v. United States*, 142 S. Ct. 2370 (2022).

339. U.S. CTS., UNITED STATES DISTRICT COURTS – NATIONAL JUDICIAL CASELOAD PROFILE, <https://perma.cc/X/G6-VJDI> (hereinafter JUDICIAL CASELOAD).

fifteen and twenty-two months to process.<sup>340</sup> In these cities,<sup>341</sup> there is still some semblance of the old days where cases were handled with time and attention, but this is not the norm.<sup>342</sup>

“Substituting an easy-to-prove crime for one that is harder to establish obviously makes criminal litigation cheaper for the government.”<sup>343</sup> By replacing white collar prosecutions and fraud cases with immigration and drug cases, the Department of Justice can prosecute cases more easily. Likewise, by prosecuting cases in the nearly “Fourth Amendment-free” border zone as well as by prosecuting noncitizens who are unlikely to be able to be released pretrial, federal prosecutors can obtain convictions more cheaply. And the cost savings are large given that guilty pleas are much cheaper than trials, and defendants often respond to easily proven charges by pleading guilty.<sup>344</sup>

Former U.S. Attorney General Eric Holder once called the rule of law “one of the United States’ greatest exports.”<sup>345</sup> But in federal courtrooms around the nation, courts are introducing people to a cheapened version of procedural due process. And most of those people are noncitizens interacting with the American legal system for the very first time. Rather than exporting the rule of law, U.S. courtrooms are providing accused noncitizens a firsthand experience of the assembly-line procedures which have been utilized to marginalize poor people and people of color in state courts for the past half of a century. The citizens in these same courtrooms and proceedings are learning the same thing—that our laudatory cultural narrative about the criminal legal system fails to describe how it actually operates.

#### IV. ADDRESSING THE DYSFUNCTION IN FEDERAL CRIMINAL COURT

As Professor Derrick Bell Jr. explained decades ago, racial progress usually occurs when minority interests converge with those of the white majority.<sup>346</sup> “[T]he number who would act on morality alone [is] insufficient to bring about the desired racial reform.”<sup>347</sup> For example, though racial disparities in the prosecution of drug crimes were well-documented, momentum to reform harsh drug laws and pass the bipartisan First Step Act was in part the result of the opioid epidemic and an uptick in the rates of prosecution of

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340. *Id.*

341. Many legal scholars practiced in these areas before entering legal academia.

342. *See* JUDICIAL CASELOAD, *supra* note 338 (averaging 99 felony cases annually).

343. Stuntz, *supra* note 100, at 520.

344. *Id.*

345. Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 *YALE L. & POL’Y REV.* 83, 83 (2010) (citing *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Eric H. Holder, Jr., Att’y Gen. of the United States)).

346. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 522–25 (1980).

347. *Id.* at 525.

white drug users.<sup>348</sup> Likewise, while it is apparent that the procedural rights of mostly Latinx noncitizens are being eroded in federal court, until the white majority has an interest in seeing the situation change, it will not.

There are two reasons that addressing the dysfunction in federal criminal court is in the interests of the white majority and in the interest of all Americans. First, the majority has a vested interest in maintaining the legitimacy of the federal courts. And second, the erosion of procedural rights does not only affect noncitizens, but it has begun to impact citizens accused of crimes as well. As discussed in detail above in Parts II and III, procedural norms and case law that begin with noncitizen defendants in border districts tend to migrate and infect proceedings of USCs, first in border districts, then in non-border districts, and then to state court proceedings. Over half of Americans have a family member who has been incarcerated in jail or prison.<sup>349</sup> Likewise, if people lose respect for the court of law because of perceived illegitimacy, it can have catastrophic consequences, like a breakdown in the rule of law, which can threaten public safety. So, inevitably, we are all impacted.

#### A. *The Importance of Federal Court Legitimacy*

During her confirmation hearings, then Supreme Court nominee Ketanji Brown Jackson stated, “Public confidence in the Court is crucial. . . . the Court doesn’t have anything else. That is the key to our legitimacy in our democratic system.”<sup>350</sup> Jackson was speaking about the Supreme Court, but the same logic applies to the entire federal court system—including the federal criminal courts.<sup>351</sup>

Procedural justice theory posits that meaningful participation in legal proceedings, and a commitment to due process, engenders confidence in the legal system even when outcomes are not substantively changed by the procedural rigor afforded to litigants.<sup>352</sup> “[P]rocedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.”<sup>353</sup> Procedural justice theorists argue that “people are motivated to comply with the law, cooperate with authorities, and engage with them when they are treated fairly.”<sup>354</sup> When legal systems are

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348. Josh Bowers & Daniel Abrahamson, *Kicking the Habit: The Opioid Crisis and America’s Addiction to Prohibition*, CATO INST. (June 29, 2020), <https://perma.cc/W88E-XGT9>; see also Mary Crossley, *Opioids and Converging Interests*, 49 SETON HALL L. REV. 1019, 1022–28 (2019).

349. FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES 13 (2018), <https://perma.cc/5JMK-8RT1>.

350. Oriana Gonzalez, Jackson: “Public confidence in the court is crucial”, AXIOS (Mar. 22, 2022), <https://perma.cc/9CV6-RVWG>.

351. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1986).

352. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004).

353. *Id.*

354. Tracey Meares, *Policing and Procedural Justice: Shaping Citizens’ Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1531 (2017).

perceived as arbitrary or biased, that undermines faith in the rule of law and leads to less compliance with the law in affected communities.<sup>355</sup>

The criminal legal system has a particularly impactful role, affecting not just those who are subject to criminal legal proceedings, but also educating and informing all community members about their relationship to governmental power and law enforcement. Professor Tracey Meares explains that criminal legal systems “powerfully and pervasively provide both people who are processed by the system and those who are not with a formal education in what it means to be a citizen.”<sup>356</sup> Continuing, she explains:

[The] criminal justice system offers a formal curriculum. To see it, we point to lessons found in one part of the “syllabus” of criminal justice: the Bill of Rights in the U.S. Constitution. The Supreme Court has drawn on the Fourth, Fifth, and Sixth Amendments to create a set of “codes” for criminal procedure, and we might point to these Amendments as “lessons” that convey concern for rights and protections of individual autonomy, privacy, and bodily integrity against the unconstrained discretion of legal authorities. That is, we might conclude that, by enshrining the protection of the interests just listed into constitutional guarantees against [government] overreach, the Court provides foundational lessons about our value as individual citizens. . . . But the formal and overt curriculum is only one part of the story.<sup>357</sup>

Those who interact with the criminal legal system also learn lessons from the “day-to-day operation” of the criminal legal system “both in courtrooms and on the streets”—which provides “a hidden curriculum” that “sends certain members of the polity signals that they are marked as an undesirable and dangerous class of people different from everyone else—‘anti-citizens.’”<sup>358</sup>

The expressive or pedagogical function of the federal criminal courts is particularly critical to reifying our conceptions of American criminal law. In processing a vast number of noncitizen defendants, many of whom have little experience with the American legal system, the courts act as ambassador. We fancy the American legal system to be the envy of many other countries—something to aspire to. What does it mean for noncitizens to encounter this system as a defendant going through a Streamline proceeding? Rather than witnessing robust due process and procedural rigor, federal defendants—particularly noncitizen defendants—are experiencing, at best, the cliff notes version of the Bill of Rights. Does that tarnish the reputation of just the border

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355. See also Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2073–89 (2017) (arguing that the crisis in policing is not a crisis of legitimacy but rather a case of legal estrangement).

356. Meares, *supra* note 354, at 1527. In this essay, Meares uses “citizen” in the sense of an inhabitant in a civic community rather than the immigration-related definition delineated in 8 U.S.C. §§ 1401, 1421. *Id.*

357. *Id.* at 1527–28.

358. *Id.* at 1528–30.

courts, the American legal system, or of the United States more generally? Right now, observers of the federal criminal legal system can rightly say that the federal prosecutors are primarily in the business of prosecuting low-level victimless crimes through the use of laws that were enacted to target Mexican and Latinx noncitizen individuals.<sup>359</sup> Federal prosecutors mark these individuals as criminals as quickly and efficiently as possible with as little due process (or perhaps less due process) as is constitutionally permitted.<sup>360</sup> The majority of criminal cases processed in federal court demarcate boundaries between citizens and noncitizens while further entrenching racial norms about citizenship and criminality.<sup>361</sup>

Recently, law Professor Ingrid Eagly argued that Trump’s “zero-tolerance” prosecutions at the border with the accompanying “family separation, prosecution of asylum seekers, and courtrooms that erode due process have kindled a growing movement that questions the legitimacy of border criminalization.”<sup>362</sup> The racist origins of our primary immigration statutes further call into question border criminalization.<sup>363</sup> And when over half of federal prosecutions are for immigration crimes, that lack of legitimacy taints the whole system—not just border criminalization. Since 2011, Latinx people have been the majority of those sentenced to prison for federal felonies.<sup>364</sup> This is even though Latinx people make up less than a fifth of the U.S. population.<sup>365</sup> Over half of the prosecutions in federal court are furthering the goals of the white supremacists who drafted the Undesirable Aliens Act back in 1929 with a stated purpose of curbing Mexican migration.

The situation in the federal border courts arguably presents a national security risk. “U.S. foreign policy has long supported the advancement of international law and human rights, since doing so promotes peace, security, and the rule of law overseas; encourages the spread of democracy; and shores up popular support for American values.”<sup>366</sup> The U.S. military’s mistreatment of detainees at Abu Ghraib and Guantanamo Bay proved to be an effective recruitment tool for Al Qaeda and ISIS during the War on Terror.<sup>367</sup> The military’s actions also “sour attitudes” towards the United States among allies

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359. This seems particularly perverse when research indicates that immigration, on balance, has a positive impact on the American economy. See Arloc Sherman, Danilo Trisi, Chad Stone, Shelby Gonzales & Sharon Parrott, *Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s “Public Charge” Rule Rationale*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 15, 2019), <https://perma.cc/CWT4-D64A> (compiling sources).

360. For a conversation how the criminal legal system “marks” individuals, see KOHLER-HAUSMAN, *supra* note 3, at 80; see also Aisha Jain, *The Mark of Policing*, 73 STAN. L. REV. 162, 165 (2021).

361. See Marissa Jackson Sow, *Whiteness as Guilt*, 69 UCLA L. REV. 100, 104–05 (2022).

362. *Decriminalize*, *supra* note 46, at 1974.

363. See *Order in United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. Aug. 18, 2021) (No. 60).

364. Gonçalves, *supra* note 79, at 60.

365. Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, *Who is Hispanic?*, PEW RSCH. CTR. (Sept. 23, 2021), <https://perma.cc/GX7X-KMOA>.

366. Douglas A. Johnson, Alberto Mora & Averell Schmidt, *The Strategic Costs of Torture: How “Enhanced Interrogation” Hurt America*, 95 FOREIGN AFFS. 121, 129 (2016).

367. *Id.* at 122–23.



and provided a convenient excuse for other governments seeking to “justify their own human rights abuses.”<sup>368</sup> Looking even further back, Jim Crow laws were used in Russian propaganda during the Cold War to paint the United States as a racist country and to recruit communist sympathizers in the American Black community and in the Global South.<sup>369</sup> Scholar Derrick Bell posits that this interest in restoring American legitimacy abroad and muting communist propaganda motivated the opinion in *Brown v. Board of Education* as much as any commitment to racial justice.<sup>370</sup> Similarly, the racialized nature of border prosecutions and the lack of adherence to procedural due process in Streamline proceedings can be used as examples to undermine stated American commitments to the rule of law and equal protection to tarnish the U.S. reputation abroad and diminish its status as a world leader.

To those who care about the legitimacy of the federal courts and procedural justice, the description of how immigration cases have remade federal procedure should be great cause for alarm. But increasingly, there are those who are not concerned with preserving the legitimacy of the criminal courts. Prison abolitionists who believe that the criminal legal system perpetuates white supremacy can point to federal immigration prosecutions as an example of the deeply problematic, racist underpinnings of criminal legal systems.<sup>371</sup> For abolitionists, the tarnishing of the federal court’s legitimacy caused by immigration prosecutions presents an opportunity for transformative change rather than a moment for fleeting reform.<sup>372</sup>

Assuming that there is an answer that falls short of abolition, the question of how to repair the federal criminal courts is complex. Is the problem solely the immigration prosecutions themselves? Or is the problem broader and more entrenched, requiring a more complete reimagining of federal prosecutions or the federal criminal legal system at large?

## B. *Proposals to Repair the Federal Criminal Courts*

Let’s first consider that the problem can be solved by focusing solely on the prosecution of immigration cases. The immigration docket could be

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368. *Id.* at 127; see also Harold Hongju Koh, *The Wolfgang Friedmann Lecture: A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 661 (2005).

369. Bell, *supra* note 346, at 524.

370. *Id.*

371. See, e.g., MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 2 (2021) (“Today, more and more people are discussing and contemplating prison abolition than ever before. Decades of collective organizing have brought us to this moment: some are newly aware that prisons, policing, and the criminal punishment system in general are racist, oppressive, and ineffective.”); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159 (2015); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020).

372. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 848, 862 (2021) (describing social movements as responding to “a crisis of legitimacy of the status quo”).

shifted out of federal criminal court and into civil immigration court.<sup>373</sup> This would likely require an overhaul of immigration law or policy. The move to civil immigration court could be realized by a shift in prosecutorial discretion which falls short of decriminalizing illegal entry but reduces the number of immigration prosecutions substantially, to pre-1996 levels. All this would take is a memorandum from the Attorney General, similar to Eric Holder's 2013 memorandum directing prosecutors not to charge mandatory minimum drug offenses or the 2009 memorandum directing prosecutors not to charge marijuana offenses if marijuana businesses were operated in compliance with state law.<sup>374</sup> A similar memorandum could delineate prosecution priorities for immigration cases and focus prosecutions just on those defendants with significant criminal histories or who pose unique threats to public safety or national security—as was done in the 1990s in San Diego.<sup>375</sup>

Alternatively, illegal entry (and possibly reentry) could be decriminalized, removing Streamline prosecutions and other immigration cases from the criminal docket altogether.<sup>376</sup> Overstaying a visa or otherwise being in the United States without permission is generally not a crime.<sup>377</sup> Historically, American law has dealt with undocumented white European immigrants civilly while criminalizing undocumented Latinx immigrants.<sup>378</sup> Politicians, scholars, defense attorneys, and activists are increasingly calling for the repeal of the illegal entry statute—8 USC § 1325. Repeal of section 1325 would not mean that America adopt “open borders,” but it would migrate border enforcement from the criminal to civil immigration court system.<sup>379</sup> Border crossers would be treated like their visa overstay counterparts.<sup>380</sup>

Rather than modifying criminal immigration law, immigration law could be modernized to allow for more legal immigration from Mexico and Central America. Currently, there are many barriers to lawful immigration and naturalization of migrants from neighboring countries to the south. Waitlists for

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373. *Decriminalize*, *supra* note 46, at 2023–28. This is not a comprehensive solution because it fails to address the problems in processing cases in the civil immigration cases. *See, e.g.*, Laila Hlass & Mary Yanik, *Studying the Hazy Line Between Procedure and Substance in Immigrant Habeas Petitions*, 58 HARV. C.R.-C.L. L. REV. (forthcoming 2022). Some have argued for abolition of the deportation system entirely. *See* Laila Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. 1597, 1658 (2022); Angélica

Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1113–16 (2021).

374. *See, e.g.*, Stephanie Holmes Didwania, *Charging Leniency and Federal Sentences 7–9* (U. Wis. Legal Studs. Rsch., Paper No. 1746, 2022) (describing the Holder memo); *see also* Memorandum from David W. Ogden, Deputy Att’y Gen., on Investigations and Prosecutions in States Authorizing Medical Use of Marijuana to Selected U.S. Att’y’s (Oct. 19, 2009), <https://perma.cc/5S4E-2Y3W>.

375. This leaves open the possibility that states will step in to fill the gaps in federal enforcement, as Governor Greg Abbott claims to do in Texas with “Operation Lone Star.” *See* Amy F. Kimpel, *Operation Lone Star* (forthcoming n.d.) (on file with author).

376. *Decriminalize*, *supra* note 46, at 2016–18 (describing calls to repeal 1325 and 1326).

377. Gonçalves, *supra* note 79, at 7.

378. *Id.* at 43.

379. *Decriminalize*, *supra* note 46, at 1974.

380. Those who overstay visas have outnumbered illegal border crossers amongst the undocumented immigrant population. Richard Gonzales, *For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings*, NPR (Jan. 16, 2019), <https://perma.cc/2SN8-2AUH>.

family visas for those from Mexico are extremely lengthy—in many cases over two decades for certain types of family-sponsored visas.<sup>381</sup> And Mexicans who are in the United States legally are less likely to naturalize and become USCs than other lawful immigrants (due to cost and language barriers), making them more likely to be at risk for deportation in the future.<sup>382</sup> When lawful immigration or citizenship are so unattainable for most Mexicans seeking to enter the United States, it should come as no surprise that some resort to unlawful migration. If lawful migration were facilitated, through increased immigration quotas, amnesty programs like Deferred Action for Childhood or Parents of Americans (DACA and DAPA), or simply by the reduction of visa processing fees and wait times, the number of potential immigration prosecutions would be greatly reduced.

Another possibility would be to maintain immigration prosecutions at current levels but to have specialty immigration courts or special immigration procedures for criminal immigration cases—perhaps special procedural rules that apply only in immigration cases such as increased utilization of video conference proceedings. This might shore up the damage to the federal courts and prevent further erosion of non-immigration cases. But it is also profoundly unsatisfying as a solution. Not only does this solution raise significant equal protection concerns,<sup>383</sup> but it also is unlikely to work given the steady erosion of procedural rigor that has been spawned by the existence of Streamline and Fast Track, as described above.

Finally, the federal government—both the Department of Justice and the Administrative Office of the Courts—could devote more resources to federal prosecutions to ensure that all defendants—including those in immigration prosecutions—are afforded robust procedures and due process.<sup>384</sup> This final possibility seems unlikely. Not only does the federal government already spend vast sums on criminal prosecutions and immigration prosecutions, but reaching a political consensus to spend more on federal immigration prosecutions seems unlikely given recent movements to “defund” carceral systems on the left and shrink the footprint of the federal administrative state on the right.<sup>385</sup> Moreover, it is unlikely that a better-funded federal criminal apparatus would use the additional resources to fund increased procedural rigor

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381. U.S. DEP'T OF STATE, VISA BULLETIN (Mar. 2022), <https://perma.cc/3SX3-S1L4>.

382. Ana Gonzalez-Barrera, *Mexican Lawful Immigrants Among the Least Likely to Become US Citizens*, PEW RSCH. CTR. (Jun. 29, 2017), <https://perma.cc/X2WP-KDJQ>.

383. Under current equal protection jurisprudence, policies that distinguish citizens from noncitizens are subject to strict scrutiny if enacted by states, but only rational basis scrutiny if enacted by federal authorities. See Kaufman, *supra* note 27, at 1429 (compiling cases); see also *United States v. Ayala-Bello*, 995 F.3d 710 (9th Cir. 2021). Even if differential procedures withstand constitutional scrutiny, they still smack of unfairness when considering the values animating the Equal Protection Clause and raise the same procedural justice and court legitimacy concerns discussed above.

384. For a convincing critique of proposals to add resources to enhance due process in deportation proceedings, see Angélica Cházaro, *Due Process Deportations*, N.Y.U. L. REV. (forthcoming n.d.).

385. See Amy F. Kimpel, *Coordinating Community Reintegration Services for “Deportable Alien” Defendants: A Moral and Financial Imperative*, 70 FLA. L. REV. 1019, 1042 (2018) (estimating a cost of \$750 million for incarcerating illegal reentry defendants in FY 2013 alone).

rather than using the funds to enable the prosecution of additional cases. Historically, that has not been the case.

Of these proposals, the most promising seems to be eliminating or reducing the number of immigration prosecutions through a combination of law and policy changes—exercises of prosecutorial discretion, decriminalization, and the modernization of immigration laws. Immigrants “deserve to be treated with dignity and humanity. Unfortunately, our laws and our courts don’t always do that.”<sup>386</sup> Perhaps if immigration prosecutions were reduced, our courts would treat defendants, both noncitizens and citizens, with more dignity and humanity. In federal court, even non-violent white collar fraud defendants in their fifties and sixties sometimes appear in court in five-point restraints due to U.S. Marshal staffing shortages in border districts.<sup>387</sup> Reducing the volume of cases by driving down the number of immigration prosecutions might change this.

As mentioned above, the influx of immigration cases in the past two decades is not the first shift in the federal court’s caseload. A true return to the prestige of the federal criminal justice system may require a further winding back of the clock. During the drug war, state drug crime was federalized. Drug prosecutions were the first step in the current erosion of procedural norms and expansion of the federal docket. Leaving states to prosecute more drug crime could also help reduce the federal case load, resulting in more attention and focus on cases that really require federal resources.

### C. *The Biden Administration Response*

Is the Biden administration already moving in the right direction? Illegal entry prosecutions dipped in the final year of the Trump administration due to policies related to the COVID-19 pandemic. Based on the public health threat purportedly posed by immigration during the pandemic, many migrants were turned away at the border by means of Title 42 expulsions rather than being funneled for criminal prosecution.<sup>388</sup> By and large, Biden has continued to prosecute immigration cases at the same levels as the final year of the Trump presidency—with similar strikingly low numbers of illegal entry prosecutions.<sup>389</sup> Illegal reentry prosecution numbers have “bounced back slightly after the start of the pandemic but have also remained at consistently low levels.”<sup>390</sup> The dip in immigration prosecutions is not driven by a

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386. PBS NewsHour, *Watch: Judge Ketanji Brown Jackson on What Helped Her ‘Persevere’ as a Black Student at Harvard*, YOUTUBE (Mar. 23, 2022), <https://perma.cc/8RJW-LGNZ>.

387. See *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1536 (2018).

388. John Gramlich, *Key Facts about Title 42, the Pandemic Policy that Has Reshaped Immigration Enforcement at U.S.-Mexico Border*, PEW RSCH. CTR. (Apr. 27, 2022), <https://perma.cc/RVE2-THBX>; see also *Major Swings in Immigration Criminal Prosecutions During Trump Administration*, TRAC IMMIGR. (Dec. 18, 2020), <https://perma.cc/34EQ-6Q2V>.

389. *Federal Immigration Prosecutions at Record Lows*, TRAC REPS. (Nov. 1, 2021), <https://perma.cc/5EW7-2A8R>.

390. *Id.*

reduction in apprehensions of migrants at the border—in fact, apprehension numbers were at a record high in FY 2021, in part because Title 42 expulsions may encourage repeat border crossings.<sup>391</sup>

The COVID-19 pandemic has also corresponded with a huge drop in the number of federal prosecutions overall.<sup>392</sup> Unburdened by the large volume of immigration cases, the DOJ prosecuted greater numbers of drug trafficking, firearms, child pornography, and money laundering offenses in FY 2021.<sup>393</sup> Drug cases edged out immigration prosecutions as the most common felony offense.<sup>394</sup> Likewise, the proportion of noncitizens prosecuted dropped to roughly a third of all federal defendants.<sup>395</sup>

Biden somewhat reluctantly attempted to end the operation of Title 42 at the border, but thus far his actions have been blocked by federal court injunction and the policy remains in place.<sup>396</sup> It remains to be seen whether the trends in federal prosecutions since the COVID-19 pandemic began will be sustained. Despite the passage of nearly three years at the time of this publication, the pandemic persists. Perhaps this public health crisis blunts the desire to process migrants into the United States simply to prosecute, imprison, and then expel them. Perhaps the option of Title 42 expulsion—an option that is cheap, efficient, and informal—is appealing enough to outweigh the perceived benefits of criminal prosecution. Or perhaps the lower numbers signal that Biden is really committed to reducing the levels of immigration prosecutions. Either way, these changes could portend a permanent reduction in the immigration case docket in federal criminal court. Or, this could be no more than a temporary reprieve that will end with (or before) the Biden presidency.

#### CONCLUSION

Historically, “federal offenses were at once very grave and few in number” but that is no longer the case.<sup>397</sup> In 1970, there were about 20,000 people

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391. Joel Rose, *Border Patrol Apprehensions Hit a Record High. But That's Only Part of the Story*, NPR (Oct. 23, 2021), <https://perma.cc/SJD9-FEGR> (explaining that 1.7 million apprehensions represented encounters with only 1.1 million individuals).

392. Cases reported to the Sentencing Commission dropped from 76,538 in FY 2019 to just 57,287 in FY 2021. *See* U.S. SENT'G COMM'N, FISCAL YEAR 2021: OVERVIEW OF FEDERAL CRIMINAL CASES 3 (2022), <https://perma.cc/J3PY-4JR3>.

393. *Id.* at 2.

394. *Id.* at 4 (illustrating that drug cases represent 31.3% of reported cases and immigration cases represent just 29.6%).

395. *Id.* at 7.

396. Uriel J. Garcia, *Judge Blocks Biden Administration from Lifting Public Health Order Used to Quickly Expel Migrants*, TEX. TRIB. (May 20, 2022), <https://perma.cc/7ZGD-CBW2>; *see also* Order Granting Preliminary Injunction, *Louisiana v. Ctrs. for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 5, 2022).

397. Felix Frankfurter & Thomas G. Concoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 976 (1926) (but noting that “the last two decades have progressively imposed upon the federal courts an intolerable amount of trivial business”).

caged in federal prisons.<sup>398</sup> Fifty years later, there are over 200,000.<sup>399</sup> And in 1970, the federal criminal courts were markedly different than they are today. Perhaps there is something to be learned from the past that can inform the future of the federal criminal justice system.

This is a moment for a reimagination of the role of the federal criminal justice system. Some progressive movements are calling for defunding of the police, the abolition of ICE, and the decriminalization of immigration and drug crimes. At the same time, conservatives decry the behemoth size of the federal administrative state. Perhaps there is common ground. Our federal criminal justice system has grown too unwieldy and too haphazard. More importantly, our federal criminal justice system no longer teaches our citizenry or the world the lessons we claim to want to impart.

Alexandra Natapoff described federal criminal court as the “top of the pyramid”—what the criminal legal system is supposed to look like.<sup>400</sup> Right now, the American criminal legal system has no pinnacle. The day-to-day operations of the federal courts illustrate a Bill of Rights replete with short-cuts—the cliff notes versions of the Fourth, Fifth and Sixth Amendments. Today, those prosecuted by federal authorities and processed by our federal courts bear witness to our prioritization of efficiency over due process. They see the criminal legal system being used to demarcate racial norms about citizenship and criminality. With the vast resources available to the United States of America, we can and must do better. If we cannot, then the abolitionists are right.

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398. PATRICK A. LANGAN, JOHN V. FUNDIS, LAWRENCE A. GREENFELD & VICTORIA W. SCHNEIDER, U.S. DEPT. OF JUST., BUREAU OF JUST. STATS., HISTORICAL STATISTICS ON PRISONS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 11 (1988), <https://perma.cc/YJ64-XACM>.

399. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://perma.cc/EC57-QH23> (including 145,000 convicted and 64,000 pretrial defendants).

400. NATAPOFF, *supra* note 3, at 250.