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The Movement to Decriminalize Border Crossing

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INGRID V. EAGLY

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THE MOVEMENT TO DECRIMINALIZE BORDER CROSSING

INGRID V. EAGLY*

Abstract: Should it be a crime to cross the border into the United States? This Article explores the growing resistance to the politics and practices of mass border criminalization. In doing so, it makes three central contributions. First, it dissects the varied strands of the punitive practices of the U.S. Department of Justice, including policies of zero-tolerance prosecution for first-time unauthorized border crossers and enhanced punishments for those who reenter after deportation. Second, it traces how growing public awareness of the previously hidden practices occurring in Border Patrol holding cells and federal criminal courts along the Southwest border have sparked new and outspoken criticism of the illegal entry and reentry laws. These laws have resulted in the forced separation of families, interfered with the rights of asylum seekers, and fostered a racially segregated and substandard court process. Third, this Article analyzes the nascent movement by immigrant rights groups, prominent politicians, and grassroots coalitions of community members to decriminalize border crossing by repealing Sections 1325 and 1326 of the immigration law that have punished unauthorized border crossing since 1929. Although critics maintain that such a legislative change would create so-called open borders, irregular entry would remain a civil violation of the immigration law and be handled by the civil deportation system. As this Article argues, the call to decriminalize border crossing exposes the racialized harm imposed by current policing practices and inspires discussion of additional reforms that would make the civil side of immigration law more humane and equitable.

INTRODUCTION

More immigrants were prosecuted for border crossing under the Obama administration than any prior presidency.¹ In the last year of President Barack

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Obama's second term in office, immigration crime constituted a staggering forty-three percent of all crimes prosecuted by the U.S. Department of Justice (DOJ).² President Donald Trump nonetheless sought to outdo his predecessor.

During his first month in office, President Trump issued a pair of Executive Orders on immigration enforcement that announced an unprecedented focus on criminally prosecuting migrants crossing the Southwest border.³ Then-Attorney General Jefferson Sessions soon instructed U.S. Attorneys to demonstrate a "renewed commitment" to making immigration crimes for illegal entry and reentry even "higher priorities."⁴ Such an "updated" approach to charging criminal cases was necessary, according to the Attorney General, to "establish lawfulness in our immigration system" and to "accomplish the goal of deterring first-time improper entrants."⁵ Within the five federal district courts along the Southwest border, courtrooms began to overflow with defendants charged with unlawfully entering the United States.

Most academic commentary to date regarding President Trump's immigration policies has focused on the administration's ramped-up efforts to enforce the civil immigration law.⁶ The civil immigration law refers to the body

¹ See *infra* Figure 2 and Table 1 (tracing the rise in misdemeanor and felony immigration crime prosecutions over President Barack Obama's eight years in office); see also Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1321–36, 1353 & fig.4 (2010) (discussing the increasing focus on immigration crime under both President Obama and President George W. Bush).

² See JUDICIAL BUSINESS OF THE U.S. COURTS, ADMIN. OFFICE OF THE U.S. COURTS tbls.D-4 & M-2 (Sept. 30, 2016), <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [<https://perma.cc/3CEP-PKXS>] (enter table number in "search by table number," select month, day, year of reporting period, and then select "apply") (reporting that in the fiscal year ending September 30, 2016, immigration crime constituted 47,962 out of 79,969 criminal cases disposed of by federal magistrate courts and 20,352 out of 77,318 criminal cases disposed of by federal district courts).

³ Exec. Order No. 13,768, 82 Fed. Reg. 8799, *Enhancing Public Safety in the Interior of the United States*, § 11 (Jan. 25, 2017) [hereinafter Interior Enforcement E.O.] (instructing the Secretary of Homeland Security and Attorney General to ensure that "adequate resources are devoted to the prosecution of criminal immigration offenses in the United States"); Exec. Order No. 13,767, 82 Fed. Reg. 8793, *Border Security and Immigration Enforcement Improvements*, § 13 (Jan. 25, 2017) [hereinafter Border Security E.O.] (ordering the Attorney General to "take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to" immigration crimes along the southern border).

⁴ See Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, to All Fed. Prosecutors, *Renewed Commitment to Immigration Enforcement 1* (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/FM98-EXNC>] (implementing President Donald Trump's Executive Orders on interior immigration enforcement and border security).

⁵ *Id.* at 1, 2.

⁶ For important examples of scholarship addressing President Trump's civil immigration policies, see Lenni B. Benson, *Administrative Chaos: Responding to Child Refugees—U.S. Immigration Process in Crisis*, 75 WASH. & LEE L. REV. 1287, 1288–89 (2018) (arguing that immigration court is the wrong forum to consider the protection needs of migrant children); Ming H. Chen, "Not a One-Person Show": *Trump as Administrator-in-Chief of the Immigration Bureaucracy*, 36 YALE J. ON

of statutes, rules, and precedents that formally govern who can enter the United States and the terms under which individuals may be removed.⁷ By comparison, President Trump's agenda to enforce the criminal immigration law has received scant scholarly attention.⁸ This Article advances the conversation by analyzing how the administration's criminal immigration policies have shaped the on-the-ground practices of federal prosecutors during the Trump presidency. By exposing the mechanisms of the system that punishes border crossers, this Article also unearths something perhaps less expected: a mounting wave of resistance to the politics and practices of border criminalization.

REG.: NOTICE & COMMENT (June 21, 2017), <http://yalejreg.com/nc/not-a-one-person-show-trump-as-administrator-in-chief-of-the-immigration-bureaucracy-by-ming-h-chen/> [<https://perma.cc/8FX4-WTJA>] (explaining how President Trump's "travel ban" threatened prudential norms of coherence, consistency, and coordination); Kati L. Griffith & Shannon Gleeson, *Trump's 'Immigration' Law Agenda: Intensifying Employment-Based Enforcement and Un-Authorizing the Authorized*, 48 SW. L. REV. 475, 480–91 (2019) (documenting how the Trump administration is intensifying reliance on workplace-based enforcement tools such as raids); Geoffrey A. Hoffman, *Contiguous Territories: The Expanded Use of "Expedited Removal" in the Trump Era*, 33 MD. J. INT'L L. 268, 273–82 (2018) (analyzing legal challenges to President Trump's proposed expansion of the power of expedited removal); Kari Hong, *The Costs of Trumped-up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 124–40, <http://cardozolawreview.com/wp-content/uploads/2018/07/HONG.38.symposium.pdf> [<https://perma.cc/8YQP-Y9T6>] (discussing the financial costs of the Trump administration's heightened immigration enforcement measures); Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 628–51 (2017) (outlining the civil enforcement components of the immigration-related Executive Orders issued during President Trump's first weeks in office); Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1324–27 (2018) (raising concerns regarding the Trump administration's planned expansion of expedited removal); Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, 53 U. MICH. J.L. REF. 139, 141 (2019) (relying on case studies to show how the Trump administration has "rejected oversight and transparency regarding when favorable discretion is to be exercised" in the civil immigration system); Jayashri Srikantiah, *Resistance and Immigrants' Rights*, 13 STAN. J. C.R. & C.L. 5, 5–12 (2017) (encouraging lawyers, law students, and community members to resist the anti-immigrant and racist Trump agenda by planning an immigrant rights advocacy agenda).

⁷ Of course, the formal civil and criminal immigration law is embedded within a broader informal system for regulating migration in the United States. For example, Eisha Jain, K-Sue Park, and Hiroshi Motomura have called attention to the many ways that the constant threat of deportation facilitates powerful indirect forms of participation by states, localities, and other actors in immigrant selection and exclusion. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019) (elucidating the array of actors, including local police and employers, that participate in the immigration enforcement system); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008) (showing how states and cities work outside the formal immigration law to define the meaning of unlawful presence); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019) (exploring the role that "self deportation" plays as an "indirect mode of regulation" within the larger U.S. immigration system).

⁸ For two important exceptions, see Natasha Arnpriester, *Trumping Asylum: Criminal Prosecutions for "Illegal" Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 3–9 (2017), and Evan J. Criddle, *The Case Against Prosecuting Refugees*, 115 NW. U. L. REV. (forthcoming 2020).

Since the law criminalizing unauthorized entry and reentry was first adopted in 1929,⁹ its enforcement has taken place largely in the shadows. To be sure, civil and human rights organizations have investigated and critiqued the mass prosecutions that exploded along the U.S.-Mexico border over the past two decades.¹⁰ Scholars have similarly warned of the overcriminalization of migrants,¹¹ the subordination and racialization of immigrant groups caused by criminalization,¹² and the questionable effectiveness and considerable expense of border prosecutions.¹³ Yet, the day-to-day practices associated with these cases had continued, hidden behind closed doors in overcrowded Border Patrol holding cells¹⁴ and border courts with no public audience.¹⁵ As a result, the

⁹ See Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551, 1551 (“Any alien who hereafter enters the United States . . . shall be guilty of a misdemeanor . . .”).

¹⁰ See, e.g., JUDITH A. GREENE ET AL., INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER (2016), https://grassrootsleadership.org/sites/default/files/reports/indefensible_book_web.pdf [<https://perma.cc/7EK5-MWXW>]; JOANNA LYDGATE, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CALIF., BERKELEY LAW SCH., ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 3 (2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf [<https://perma.cc/3T35-ACUQ>]; GRACE MENG, HUM. RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS (2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf [<https://perma.cc/BNK3-K69R>].

¹¹ See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 613–16 (2012); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1449–51 (2015); Daniel Ibsen Morales, *In Democracy’s Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 56–61 (2009); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 157 (2012); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–79 (2006).

¹² See, e.g., Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOC. RACE & ETHNICITY 82, 82 (2016) (identifying “organizational practices and laws” that “converge to systemically criminalize and punish Latinos in the United States”); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 998 (2016) (discussing the disparate impact that results from deportation efforts focused on those who first enter the racially biased criminal justice system).

¹³ See, e.g., Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 550–75 (2004); Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 1–7 (2007); Kit Johnson, *A Cost-Benefit Analysis of Federal Prosecution of Immigration Crimes*, 92 DENV. U. L. REV. 863, 863–65 (2015); Douglas Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 65 (2012); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 105 (2012); Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1257–64 (2014); Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 275 (2010).

¹⁴ In 2019, the Office of Inspector General of the Department of Homeland Security (DHS) gained access to these Border Patrol holding cells and issued a scathing report urging DHS “to take immediate steps to alleviate dangerous overcrowding and prolonged detention of children and adults[.]” OFFICE OF INSPECTOR GEN., U.S. DEP’T HOMELAND SEC., MANAGEMENT ALERT—DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AMONG SINGLE ADULTS AT EL PASO DEL NORTE

criminalization of border crossing had sparked little mainstream public concern or serious national policy discussion.

This Article traces how the current administration's aggressive public stance has moved border prosecution practices into public view and exposed federal officials to heightened scrutiny, moral condemnation, and legal challenge. Broad coalitions of community members, elected officials, clergy, legal experts, and media have come forward to denounce the administration's prosecution scheme as nativist, immoral, and unlawful. Marking the building momentum to resist border criminalization, former Secretary of Housing and Urban Development Julián Castro made headlines at the opening debate of the 2019 Democratic presidential primary when he challenged "every single candidate on this stage to support the repeal of Section 1325,"¹⁶ the section of the federal criminal code that makes unlawful entry into the United States a misdemeanor punishable by up to six months in jail.¹⁷ Other Democratic presidential contenders joined in the call to decriminalize border crossing.¹⁸ At the end of 2019, a historic bill (called the New Way Forward Act) was introduced in the U.S. Congress proposing to do just that: end border crossing prosecutions by repealing the illegal entry and reentry laws.¹⁹

This Article interrogates the idea of border decriminalization as a possible avenue for immigration reform. It does so by first examining how President Trump's Executive Orders and related policy statements on immigration enforcement have influenced on-the-ground practices in U.S. Attorneys' Offices and federal courts. As Part I develops, the most significant shift in policy was the adoption of a "zero-tolerance" approach by which prosecutors placed an

PROCESSING CENTER (REDACTED), OIG-19-46 (May 30, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-05/OIG-19-46-May19.pdf> [<https://perma.cc/F8AA-ACMU>].

¹⁵ Jocelyn Simonson has pointed out the important role that local community members who attend urban criminal courts play in holding the criminal justice system accountable. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014). With crimes of migration playing out in federal border courts, however, there is rarely a public audience of community members.

¹⁶ *Full Transcript: Democratic Presidential Debates, Night 1*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/democratic-debate-transcript.html> [<https://perma.cc/3HFC-WFKG>] [hereinafter *Full Transcript: Democratic Presidential Debates, Night 1*].

¹⁷ 8 U.S.C. § 1325 (2018).

¹⁸ See *infra* notes 266–268 and accompanying text.

¹⁹ New Way Forward Act, H.R. 5383, Title VI, Decriminalize Migration, § 601 (2019). The New Way Forward Act would repeal the illegal entry and reentry laws, and also achieve a number of other reforms in the immigration system, including ending mandatory detention and summary forms of removal for immigrants with criminal convictions. See Press Release, Representatives García, Pressley, Jayapal and Bass Introduce the New Way Forward Act to Fight the Criminalization of Immigrants (Dec. 10, 2019), <https://chuygarcia.house.gov/media/press-releases/representatives-garc-presley-jayapal-and-bass-introduce-new-way-forward-act> [<https://perma.cc/E8W4-B6GZ>] [hereinafter Press Release: New Way Forward Act].

increasing number of border crossers in mass federal court proceedings known as “Operation Streamline.”²⁰ Zero tolerance abandoned prior commitments to exercising prosecutorial discretion that funneled most first-time border entrants into the civil immigration system.²¹

Part II scrutinizes three controversial aspects of the administration’s zero-tolerance policy that have stoked the national debate over the propriety of using the criminal justice system to punish border crossers. First, ending prosecutorial discretion meant that even parents traveling with young children could be prosecuted, resulting in the tragic separation of these parents from their children.²² As Part II develops, the visible and heart-wrenching forced separations of families activated individuals across the political spectrum to question whether the government’s interest in petty law violations should supersede its moral obligation to promote family unity and the best interests of children. Second, zero tolerance meant that even vulnerable asylum seekers were swept into criminal courtrooms as they fled violent circumstances.²³ These alarming prosecutions launched a deeper evaluation of the propriety of using the criminal law against migrants arriving in search of refuge. Third, insistence on zero tolerance expanded the Operation Streamline program to the federal court in San Diego where it was met with a series of robust legal challenges.²⁴ Part II tells the story of how federal public defenders have pulled back the curtain on

²⁰ See *infra* notes 79–82 and accompanying text.

²¹ See *infra* notes 77–82 and accompanying text. Although the Trump administration has claimed that “zero tolerance” means that every border crosser would be prosecuted, total prosecutions have not come close to the number of border apprehensions. For example, in fiscal year 2018 the DOJ obtained 80,117 convictions in the Streamline program, but the U.S. Customs and Border Protection reported 521,090 southwest border apprehensions. Compare Figure 2, *infra*, with *Southwest Border Migration FY2018*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> [<https://perma.cc/QX4Q-RGG4>].

²² See *infra* notes 117–120 and accompanying text. In focusing on the policy of family separation as executed by the Trump administration against migrants, I do not mean to suggest that family separation is isolated within the context of border prosecution. Rather, as Stephen Lee has argued, “the principle of ‘family separation’ pervasively defines our entire immigration system,” as families are torn apart through a range of types of enforcement. Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2319 (2020); see also NAT’L IMMIGRANT JUSTICE CTR., THE U.S. GOVERNMENT’S SYSTEMATIC SEPARATION OF IMMIGRANT FAMILIES 1 (2018), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-10/NIJC-policy-brief_family-separation-Oct2018.pdf [<https://perma.cc/W78D-9CYS>] (arguing that family separation is a “central component of U.S. immigration policy—at the border, in our communities, and in the discriminatory policies that determine who can and cannot immigrate”). The criminal legal system also imposes family separation on thousands of citizens each day. See, e.g., Shaila Dewan, *Family Separation: It’s a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html> [<https://perma.cc/A657-MK4G>].

²³ See *infra* notes 149–154 and accompanying text.

²⁴ See *infra* notes 189–219 and accompanying text.

this racially segregated and subpar court system that fails the basic constitutional and decency standards demanded of federal courts.

Family separation, the prosecution of asylum seekers, and courtrooms that erode due process have kindled a growing movement that questions the legitimacy of border criminalization. Greater public awareness and grassroots mobilization has shifted the standard debate from one about how best to exercise prosecutorial discretion to one that interrogates the propriety of a criminal law that has enabled such human suffering. Part III outlines the proposal contained in the New Way Forward Act to end these prosecutions once and for all by repealing the laws criminalizing illegal entry and reentry. Repeal would not mean open borders, but rather would center the formal regulation of migration within the civil immigration system. Herein lies an important lesson of the decriminalization movement: by opening space to imagine the civil immigration system severed from its criminal counterpart, decriminalization invites exploration of how the civil law regulating migration might evolve in a post-prosecution era. Looking forward to these additional civil reforms is necessary to ensure that the systemic issues now occurring in the criminal legal system are not simply replicated within the existing machinery of the civil enforcement system. Part III begins that essential dialog by suggesting what such changes might look like. Innovations could include updating the registry date to allow more recent entrants to apply for lawful permanent resident status, expanding the availability of discretionary relief from deportation, and recalibrating civil removal to encompass intermediate sanctions short of deportation.

I. IMMIGRATION PROSECUTION IN THE TRUMP ERA

Before proceeding, it is necessary to outline the basic structure of migrant criminalization on the border. Under the federal criminal law adopted by the U.S. Congress, it is a misdemeanor to enter the United States without permission.²⁵ Based on the federal code section where it is found, this misdemeanor crime of first-time improper entry is often referred to as “illegal entry” or “Section 1325.” Illegal entry is punishable by up to six months of incarceration,²⁶ although judges most often sentence defendants who plead guilty to a sentence of time served.²⁷ Because these illegal entry cases are petty misde-

²⁵ 8 U.S.C. § 1325(a).

²⁶ *Id.*

²⁷ Reporters for *USA Today* inspected 2,598 written judgments in illegal entry cases filed in the summer of 2018 and found that judges issued “time served” sentences in nearly 70% of cases and probation in 13% of cases. Brad Heath, *Trump Administration’s ‘Zero Tolerance’ Border Prosecutions Led to Time Served, \$10 Fees*, USA TODAY (June 21, 2018), <https://www.usatoday.com/story/news/2018/06/21/trumps-zero-tolerance-border-prosecutions-led-time-served-and-10-fee/722237002/>

means, they typically proceed in courts presided over by U.S. magistrate judges.²⁸ After completion of the criminal process, migrants are transferred to the civil immigration system for deportation proceedings.

The federal law also makes it a felony to reenter the United States without permission after deportation.²⁹ This felony of reentry after deportation is also referred to as “illegal reentry” or “Section 1326.” As felonies, reentry cases proceed before U.S. district court judges and are punishable by up to twenty years in prison, depending on the severity of the individual’s prior criminal record.³⁰ Sentencing in reentry cases is informed by the rules set forth in the U.S. Sentencing Guidelines, as well as by the discretionary sentencing factors set forth in the U.S. Code.³¹

Federal prosecutors in ninety-three regional U.S. Attorneys’ Offices prosecute immigration crimes, under the umbrella of the DOJ.³² This structure, led by the U.S. Attorney General, means that the President and his administration have direct authority over how criminal immigration enforcement proceeds in practice. Across presidential administrations, the executive branch makes important decisions about how to treat border crossers—including whether to file criminal charges and, if so, what type of criminal sentence to seek.³³

The lion’s share of federal immigration convictions occur in the five federal judicial districts along the Southwest border of the United States. These districts are the Southern District of California, the District of Arizona, the District of New Mexico, and the Western and Southern Districts of Texas (Fig-

[<https://perma.cc/39DD-BVE5>]. Time served refers to the length of time that the individual has been held in pretrial detention. *Id.*

²⁸ U.S. magistrate judges are appointed to the court through a merit selection process. See Peter G. McCabe, *A Guide to the Federal Magistrate Judges System* (Oct. 2016), <https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf> [<https://perma.cc/4TPS-KMN9>]. Magistrate judges may handle petty offense cases with possible sentences of six months or less without requiring the consent of the defendant. *Id.*; see also FED. R. CRIM. P. 58(b)(3)(A) (“A magistrate judge may take the defendant’s plea in a petty offense case.”).

²⁹ 8 U.S.C. § 1326.

³⁰ *Id.* § 1326(b).

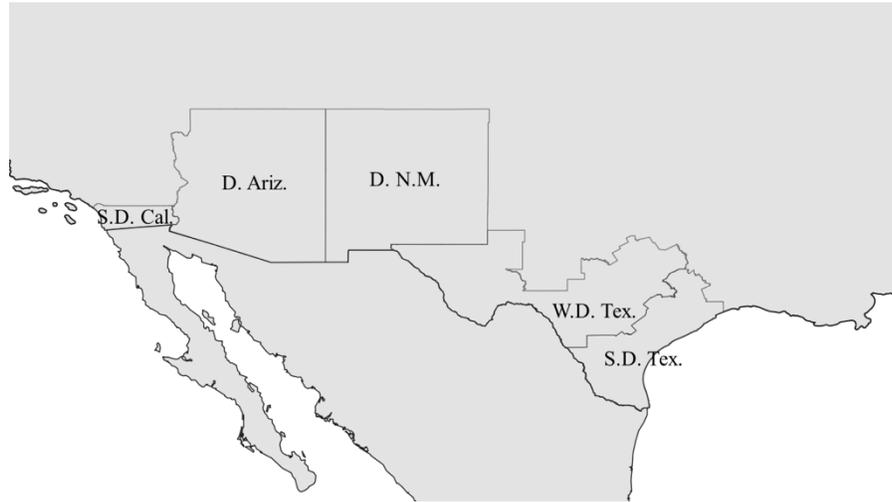
³¹ 18 U.S.C. § 3553(a) (2018) (imposition of sentence); *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (instructing federal judges to consult a wide range of sentencing factors and to not treat the Sentencing Guidelines as mandatory). The Federal Sentencing Guidelines were promulgated by the U.S. Sentencing Commission following the Sentencing Reform Act of 1984. 18 U.S.C. § 3553.

³² See *Offices of the United States Attorneys, Mission*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/usao/mission> [<https://perma.cc/L7KV-U6AU>].

³³ See generally Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823–29 (2017) (outlining the important role that the executive branch plays in shaping federal criminal law practices such as charging and sentencing). In the parallel context of civil immigration law, Adam Cox and Cristina Rodríguez have shown how the President has considerable power over civil enforcement decisions. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

ure 1).³⁴ Each of these districts is headed by a local U.S. Attorney who is nominated by the President and confirmed by the Senate.³⁵

Figure 1. Federal Court Districts on Southwest Border of the United States³⁶



Together, illegal entry and reentry are the most prosecuted crimes in federal courts today. In fiscal year 2019, 59% of all cases terminated in magistrate and district courts in the United States were immigration crimes, primarily il-

³⁴ As Chief Justice of the United States John G. Roberts Jr. noted in his annual review of the federal judiciary, the southwestern border districts received 78% of the new filings for immigration crime in 2018. CHIEF JUSTICE JOHN G. ROBERTS JR., 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY 14 (2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf> [<https://perma.cc/6DE3-FMYA>].

³⁵ For example, President Trump nominated Ryan Patrick, a former Harris County District Attorney, to the post of U.S. Attorney for the Southern District of Texas. *See Meet the U.S. Attorney Ryan K. Patrick*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/usao-sdtx/meet-us-attorney> [<https://perma.cc/NVQ5-BR5T>].

³⁶ Figure 1 depicts the five federal district court jurisdictions with the largest volume of immigration cases in fiscal year 2018. The District of Arizona and the District of New Mexico both cover the entire state. The Southern and Western Districts of Texas cover the Texas borderlands, while two additional districts (Northern and Eastern) cover the rest of the state. The Southern District of California covers the smallest geographic ground, including only the counties of San Diego and Imperial, California. Counties included in each district were obtained from the Public Access to Court Electronic Records (PACER) system of the U.S. Courts. *See County/District Locators*, PACER, <https://www.pacer.gov/psco/cgi-bin/county.pl> [<https://perma.cc/ZBZ3-7REL>] (select county from drop-down menu of "search for all counties in a district" and select "submit"); *see also* 28 U.S.C. § 5 (2018) (setting out the geographic boundaries of the federal judicial districts).

legal entry and reentry.³⁷ In the five border districts, the caseloads of U.S. Attorneys are almost exclusively focused on immigration. For example, in 2019, 75% of all district court cases filed in the Southern District of Texas were for immigration crime.³⁸ In the District of New Mexico, 80% of all district court cases filed in 2019 were for immigration crime.³⁹

The remainder of Part I sets forth the border prosecution policies articulated during the Trump presidency. It begins by summarizing the formal policies announced in the President's Executive Orders, government documents, and statements by government officials. Next, this Part introduces the two main pillars of the DOJ's border crime policy under President Trump, zero tolerance for Section 1325 violations and enhanced punishment for Section 1326 violations.

A. Executive Orders on Immigration Crime

Despite the fact that border apprehensions had reached all-time lows,⁴⁰ President Donald Trump made border enforcement a central talking point during his presidential bid. On the campaign trail, he sought to garner support for his punitive immigration proposals by linking Mexican and Central American migration to crime. For instance, in the rally where he announced his run for President, he explicitly tied Mexican migration to crime: "When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems . . . They're bringing drugs. They're bringing crime. They're rapists."⁴¹

³⁷ Across both the magistrate and district courts, in fiscal year 2019 immigration crimes constituted 121,589 out of 206,448 criminal cases terminated. See JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 2, tbls.D-4 & M-2 (Sept. 30, 2019).

³⁸ In 2019, immigration crimes constituted 7,018 out of 9,409 cases filed in the district court for the Southern District of Texas. JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 2, tbl.D-3 (Sept. 30, 2019).

³⁹ Immigration crimes constituted 3,573 out of 4,454 new district court cases filed in the District of New Mexico in 2019. *Id.*

⁴⁰ See U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH (2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf [<https://perma.cc/U8LH-AUWY>] (reporting Southwest border apprehensions by fiscal year and showing a decline from 1,643,679 in 2000 to only 303,916 in 2017). A 2018 study by the Vera Institute for Justice concluded that there was "no evidence to support the conclusion that Operation Streamline succeeded in deterring unauthorized border crossings, nor that it had any effect whatsoever on immigrants' decisions to come to the United States." MICHAEL CORRADINI ET AL., VERA INST. OF JUSTICE, OPERATION STREAMLINE: NO EVIDENCE THAT CRIMINAL PROSECUTION DETERS MIGRATION (June 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/operation-streamline/legacy_downloads/operation_streamline-report.pdf [<https://perma.cc/H6UR-CHQP>].

⁴¹ Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult> [<https://perma.cc/U9QW-XLV6>].

Immediately upon taking office, President Trump signed two Executive Orders on immigration: one on interior enforcement and the other on border security.⁴² The interior-focused Executive Order announced a massive enforcement expansion within the borders of the United States, directing federal agencies to employ “all lawful means” to execute the country’s immigration laws against “all removable aliens.”⁴³ The border-focused Executive Order directed federal agencies “to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”⁴⁴

Both Executive Orders included clear language prioritizing the use of the federal criminal law to punish border crossers. Section 11 of the interior enforcement Executive Order declared: “The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States.”⁴⁵ Section 13 of the border security Executive Order instructed the Attorney General to “take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.”⁴⁶ To further these goals, President Trump announced that he would support the hiring of an additional ten-thousand immigration officers.⁴⁷

In the months that followed the President’s Executive Orders, members of the administration took steps to implement his prosecutorial agenda. On February 20, 2017, then-Secretary of Homeland Security John Kelly authored two detailed memoranda, one on interior enforcement and the other on border security. Secretary Kelly’s interior enforcement memorandum clarified that all Department of Homeland Security (DHS) personnel “have full authority . . . to

⁴² See generally Interior Enforcement E.O., *supra* note 3; Border Security E.O., *supra* note 3. Two days after he issued Executive Orders on interior enforcement and border security, President Trump issued a third Executive Order, often referred to as the “Muslim ban” or “travel ban.” Exec. Order No. 13,769, 82 Fed. Reg. 8,977, *Protecting the Nation from Foreign Terrorist Entry into the United States*, § 5(a) (Jan. 27, 2017).

⁴³ Interior Enforcement E.O., *supra* note 3, § 4.

⁴⁴ Border Security E.O., *supra* note 3, § 1.

⁴⁵ Interior Enforcement E.O., *supra* note 3, § 11.

⁴⁶ Border Security E.O., *supra* note 3, § 13.

⁴⁷ Interior Enforcement E.O., *supra* note 3, § 7 (stating that funding for immigration enforcement will increase); see also Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al., Enforcement of the Immigration Laws to Serve the National Interest 5 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/XTV4-44VT>] (instructing “all appropriate action to expeditiously hire 10,000 agents and officers”).

refer appropriate cases for criminal prosecution.”⁴⁸ Similarly, Secretary Kelly’s border security memorandum underscored that the agency would “prioritiz[e] criminal prosecutions for immigration offenses committed at the border.”⁴⁹

More detailed information on the administration’s ramp-up of criminal prosecutions at the border soon followed from the DOJ. On April 11, 2017, Attorney General Sessions delivered a public statement in Nogales, Arizona. Standing before U.S. Customs and Border Protection personnel, Sessions declared: “For those that continue to seek improper and illegal entry into this country, be forewarned: This is a new era. This is the Trump era. The lawlessness, the abdication of the duty to enforce our immigration laws, and the catch-and-release practices of old are over.”⁵⁰

On the same day as his Nogales speech, Sessions wrote a memorandum to all federal prosecutors urging them to “increase [their] efforts” to make “immigration offenses higher priorities.”⁵¹ The Attorney General ordered the U.S. Attorney for each Southwest border district to create a set of “guidelines” that “aim to accomplish the goal of deterring first-time improper entrants.”⁵² In addition, each border district was instructed to designate a “Border Security Coordinator” to oversee the investigation and prosecution of illegal entry and reentry, maintain statistics regarding these cases, and attend immigration-specific training programs.⁵³

⁴⁸ Memorandum from John Kelly, *supra* note 47, at 4.

⁴⁹ Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al., Implementing the President’s Border Security and Immigration Enforcement Improvement Priorities 11 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/79GW-G66X>] [hereinafter Border Security Implementation Memo] (claiming that “[t]he surge of illegal immigration at the southern border has produced a significant increase in organized criminal activity in the border region”).

⁵⁰ Alan Neuhauser, *Sessions Enhances Criminal Penalties for Immigration Violations: “This Is the Trump Era,”* U.S. NEWS & WORLD REP. (Apr. 11, 2017), <https://www.usnews.com/news/national-news/Articles/2017-04-11/sessions-mandates-felony-prosecutions-for-immigration-violations> [<https://perma.cc/Y5H6-L72U>].

⁵¹ Memorandum from Jefferson B. Sessions, *supra* note 4, at 1. The Sessions memorandum to prosecutors also categorized specific immigration crimes as top priorities: illegal entry, illegal reentry, identity theft, fraud and misuse of visas, and assaulting, resisting, or impeding officers. *Id.* at 1–2.

⁵² *Id.* As part of the research for this Article, I requested copies of these guidelines produced by each border district pursuant to the Freedom of Information Act. The DOJ refused to produce its prosecution guidelines, however, claiming that such materials are “not public.” Letter from Kevin Krebs, Assistant Dir., Exec. Office for U.S. Attorneys, to author (July 27, 2018) (on file with author).

⁵³ Memorandum from Jefferson B. Sessions, *supra* note 4, at 2. Three months later, in a training bulletin published by the Executive Office of U.S. Attorneys, Attorney General Sessions reiterated that “[o]ne of the Department’s top priorities is criminal immigration enforcement.” U.S. Dep’t of Justice, Exec. Office for U.S. Att’ys, *Prosecuting Criminal Immigration Offenses*, 65 U.S. ATT’YS’ BULL., July 2017, at 1, <https://www.justice.gov/usao/page/file/986131/download> [<https://perma.cc/M3UR-6NZJ>].

In pursuing these and other policies to criminalize migrants, President Trump and members of his administration continually tried to justify their border policies by associating immigrants of color with crime. Administration officials have characterized Mexicans and Central Americans coming to seek asylum as a “stampede”⁵⁴ of “dangerous”⁵⁵ criminals that threaten to overwhelm the United States. President Trump has also referred to countries such as Haiti and El Salvador as “shithole” countries and expressed a preference for admitting immigrants from predominately white European countries like Norway.⁵⁶ President Trump has even said that “people trying to come in” are “not people,” but “animals.”⁵⁷ These and other comments have been found by several courts to reflect animus on the basis of both race and national origin.⁵⁸ As a district court judge in Maryland wrote in 2018, “[o]ne could hardly find more direct evidence of discriminatory intent towards Latino immigrants.”⁵⁹

Characterizing targeted groups as subhuman has long served as a strategy for subordination.⁶⁰ The process of dehumanization is associated with perceiving the out-group as a threat,⁶¹ and thus justifying the use of the criminal law as a form of regulation. As historian Khalil Gibran Muhammad has shown, Southern criminal codes following the Civil War were crafted as racial codes,

⁵⁴ Jefferson B. Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/EKC3-KBE9>] (“People are not going to caravan or otherwise stampede our border.”).

⁵⁵ In a Twitter post, President Trump warned that the border was “[g]etting more dangerous. ‘Caravans’ coming.” Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 1, 2018, 6:56 AM), <https://twitter.com/realDonaldTrump/status/980443810529533952> [<https://perma.cc/6644-C2LN>].

⁵⁶ Ibram X. Kendi, *The Day ‘Shithole’ Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/> [<https://perma.cc/CV7A-RJDX>].

⁵⁷ Dara Lind, *Trump on Deported Immigrants: ‘They’re Not People. They’re Animals.’* VOX (May 17, 2018), <https://www.vox.com/2018/5/16/17362870/trump-immigrants-animals-ms-13-illegal> [<https://perma.cc/R9M9-DGUF>].

⁵⁸ See, e.g., *Saget v. Trump*, 375 F. Supp. 3d 280, 369 (E.D.N.Y. 2019) (finding that the record contains direct evidence of animus against non-white immigrants that influenced the administration’s immigration decision making); *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568, 578 (D. Md. 2019) (discussing the significance of President Trump’s alleged statements of animus targeting Haitians); *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1132 (N.D. Cal. 2018) (concluding that the plaintiffs “plausibly allege that President Trump harbored racial and national origin/ethnic animus”).

⁵⁹ *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 325 (D. Md. 2018) (“Defendants do not suggest that President Trump’s alleged statements are not evidence of discriminatory motive on his part, nor could they.”).

⁶⁰ See generally Nick Haslam & Steven Loughnan, *Dehumanization and Infrahumanization*, 65 ANN. REV. PSYCHOL. 399 (2014) (providing an in-depth discussion of the psychological process of dehumanization).

⁶¹ *Id.* at 404–05.

designed to establish “notions about blacks as criminals.”⁶² Widespread racial violence and discrimination was justified by prosecuting black citizens and marking them as criminals.⁶³

A similar ideology of racial subordination undergirds the criminalization of migration control. Since the time of Chinese exclusion, U.S. immigration law was constructed as an anti-abolitionist project, one that restricted migration along racial lines and marked those excluded from entry as “aliens.”⁶⁴ The illegal entry and reentry laws were first deployed as part of an explicit policy of racial exclusion that resulted in the criminal prosecution of thousands of Mexican immigrants in the 1930s.⁶⁵ Research by historian Kelly Lytle Hernández has uncovered that the original 1929 law, called the Undesirable Aliens Act, was sponsored by Senator Coleman Livingston Blease, a white supremacist who sought to exclude Mexicans from the United States.⁶⁶ Up to a million Mexicans and their children, many of whom were U.S. citizens, were forcibly repatriated to Mexico in the decade following the adoption of Senator Blease’s law.⁶⁷

Viewed in this historical lens and in the context of the racially charged statements made by President Trump, current border policies are increasingly understood as part of the country’s painful legacy of nativism and racial exclusion. Indeed, according to one nationally representative survey, almost half of voters now agree that “racist beliefs” motivate the president’s immigration pol-

⁶² KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN AMERICA* 4 (2010).

⁶³ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (revealing how the U.S. criminal justice system functions to create a racial caste system, rather than to prevent and control crime); MUHAMMAD, *supra* note 62, at 15–88 (documenting how, since the late nineteenth century, the criminalization of blacks has been used to justify racial prejudice and discrimination).

⁶⁴ Kelly Lytle Hernández, *Amnesty or Abolition? Felons, Illegals, and the Case for a New Abolition Movement*, 1 *BOOM: J. CAL.*, 54, 54 (2011).

⁶⁵ Kelly Lytle Hernández, “Persecuted Like Criminals”: *The Politics of Labor Emigration and Mexican Migration Controls in the 1920s and 1930s*, 34 *AZTLÁN: J. CHICANO STUD.*, 219, 219–39 (2009); see also Eagly, *supra* note 1, at 1296–98, 1352–53 & fig.4.

⁶⁶ Kelly Lytle Hernández, *How Crossing the US-Mexico Border Became a Crime*, *THE CONVERSATION* (Apr. 30, 2017), <https://theconversation.com/how-crossing-theus-mexico-border-became-a-crime-74604> [<https://perma.cc/RVN7-JYLH>]; see also Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 *U.C. DAVIS L. REV.* 171, 193 (2018) (describing Senator Livingston Blease’s involvement in passage of the 1929 law).

⁶⁷ FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 339 (2006); see also Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 *UCLA L. REV.* 615, 658–63 (1981) (chronicling the history of U.S. restrictions on Mexican migration in the post-World War I period); Park, *supra* note 7, at 1917–18 (tracing the emergence of a “voluntary departure” program to promote the “self-deportation” of Mexicans in the 1920s and 1930s).

icies.⁶⁸ Sixty percent think that the policy discussed in Part II, family separation, violates human rights.⁶⁹

B. “Zero Tolerance” for Illegal Entry

In April 2017, the Justice Department ordered U.S. Attorneys’ Offices along the Southwest border “to accomplish the goal of deterring first-time improper entrants.”⁷⁰ Under this directive from headquarters, regional prosecutors were expected to shift their practices and more rigorously enforce the law against first-time border crossers.⁷¹ Although the DOJ policy was not yet formally one of zero tolerance, prosecutors began to decline fewer illegal entry charges.⁷² This indicated a change from prior presidential administrations that made first-time entrants the lowest priority for criminal prosecution.⁷³ Instead, U.S. Attorneys were encouraged to focus their attention on cases of individuals with criminal records and prior deportations.⁷⁴

Court observers soon began to descend on federal courts where these cases were being filed and share information about what was happening. Members of the press attending court in Tucson, Arizona documented courtrooms filled with individuals who were trying to enter the United States for the first time, including women traveling with young children.⁷⁵ Human rights re-

⁶⁸ *Harsh Words for U.S. Family Separation Policy, Quinnipiac University National Poll Finds; Voters Have Dim View of Trump, Dems on Immigration*, QUINNIPIAC UNIVERSITY POLL (July 3, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2554> [<https://perma.cc/MMN3-MEPK>] (finding, based on a survey of 1,020 registered voters, that 44% of respondents believed that the “main motive” behind President Trump’s immigration policies is “racist beliefs,” rather than “a sincere interest in controlling our borders”).

⁶⁹ *Id.* (reporting that 60% of respondents thought that “the policy of separating children from their parents at the border was a violation of human rights”).

⁷⁰ Memorandum from Jefferson B. Sessions, *supra* note 4, at 2.

⁷¹ *Id.*

⁷² For helpful background on the importance of prosecutorial discretion in the criminal justice system, see Kay Levine, *Prosecutorial Discretion*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 4081, 4081–88 (Gerben Bruinsma & David Weisburd eds., 2013).

⁷³ See Jeh Johnson, Opinion, *Trump-Era Politics Are Drowning Out Consensus Immigration. It’s Time for Some Straight Talk*, WASH. POST (July 6, 2019), <https://www.washingtonpost.com/opinions/2019/07/06/trump-era-politics-are-drowning-out-consensus-immigration-its-time-some-straight-talk/> [<https://perma.cc/8RLT-X2CG>] (noting that except for the Trump administration’s “‘zero-tolerance’ policy,” first-time entrants have rarely been prosecuted for illegal entry).

⁷⁴ See generally PATRISIA MACÍAS-ROJAS, FROM DEPORTATION TO PRISON: THE POLITICS OF IMMIGRATION ENFORCEMENT IN POST-CIVIL RIGHTS AMERICA 95, 192 n.53 (2016) (quoting a November 22, 2005, internal memorandum from the Executive Office for U.S. Attorneys explaining that along the southwest border first-time entrants with no prior criminal or immigration history are “almost certainly” not prosecuted criminally so that prosecutors may instead “spend their resources on the more serious offenses”).

⁷⁵ See Curt Prendergast, *Trump Immigration Policies Take Root in Tucson Federal Court*, ARIZ. DAILY STAR (June 29, 2017), <http://tucson.com/news/local/trump-immigration-policies-take-root-in->

searcher Natasha Arnpriester similarly observed court sessions along the border in which individuals were criminally prosecuted even after informing the judge that they had come to the United States to seek asylum.⁷⁶

On April 6, 2018, Attorney General Sessions officially directed the U.S. Attorneys' Offices along the Southwest border to adopt a policy of "zero tolerance for [illegal entry] offenses under 8 U.S.C. § 1325(a)."⁷⁷ In the press release accompanying the announcement, Sessions warned that "illegally entering this country will not be rewarded, but will instead be met with the full prosecutorial powers of the Department of Justice."⁷⁸ Following this new protocol meant that prosecutors could no longer exercise discretion to decline prosecutions in favor of allowing the civil immigration system to handle the return of illegal entrants.

The Trump DOJ built its zero-tolerance program on the existing structure for high-volume border prosecutions established under President George W. Bush.⁷⁹ Under a program known as Operation Streamline, federal prosecutors greatly increased the number of illegal entry convictions by relying on federal magistrate courts to implement a system of mass guilty pleas.⁸⁰ After beginning in the Del Rio, Texas, sector of the border, Operation Streamline gradually spread across more Southwest border districts and fueled unmanageably large caseloads.⁸¹ Although during some periods Streamline was said to be a zero-tolerance program, no jurisdiction ever prosecuted all entrants. There were clear carve-outs, such as for parents traveling with minor children and persons with health conditions.⁸²

tucson-federal-court/Article_59fa7c29-bcc2-5b49-8311-0310249a05f0.html [https://perma.cc/GK4R-ZRFA] (discussing the Trump administration's Operation Streamline program in Arizona).

⁷⁶ See HUM. RIGHTS FIRST, BRIEF, THE RISE IN CRIMINAL PROSECUTIONS OF ASYLUM SEEKERS (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-criminal-prosecution-of-asylum-seekers.pdf> [https://perma.cc/AGY5-Q87M] (documenting a rise in the criminal prosecution of asylum seekers in the U.S. District Court for the District of Arizona).

⁷⁷ Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, to Fed. Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [https://perma.cc/AF4U-2CNT].

⁷⁸ Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/NNB8-86ZL].

⁷⁹ ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER 16 (2008) (on file with author) [hereinafter REPORT ON SOUTHWEST BORDER].

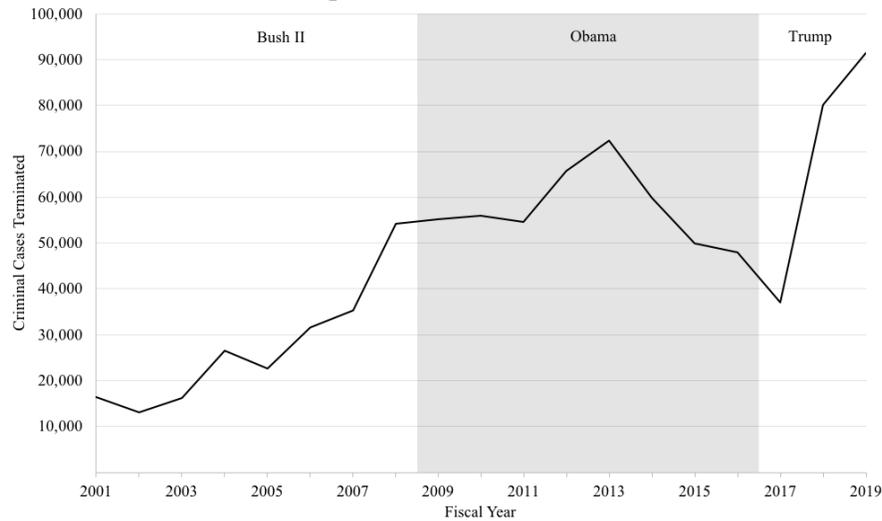
⁸⁰ See Eagly, *supra* note 1, at 1325–30 (discussing the development of Operation Streamline).

⁸¹ REPORT ON SOUTHWEST BORDER, *supra* note 79, at 16–18 (documenting how federal border courts responded to surging immigration caseloads, including by requesting additional clerks, probation and pretrial service officers, and defense attorneys).

⁸² LYDGATE, *supra* note 10, at 3 n.11.

Figure 2 tracks prosecutions for illegal entry in federal magistrate courts since the beginning of the George W. Bush administration. As Figure 2 highlights, after the Streamline program was announced in 2005, the number of illegal entry cases skyrocketed, more than doubling by the time President Obama took office. President Obama did not discontinue Streamline.⁸³ In fact, during the first half of his presidency, illegal entry cases ballooned to a high of 72,278 (Figure 2).

Figure 2. Federal Prosecutions for Illegal Entry in U.S. Magistrate Courts, 2001–2019⁸⁴



This substantial rise in illegal entry cases during the early years of the Obama administration coincided with a failed 2013 effort to achieve comprehensive immigration reform.⁸⁵ Under the political negotiations at the time, securing the border through criminal enforcement was considered crucial to achieving bipartisan support for the legalization of millions of undocumented

⁸³ See Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES (Feb. 11, 2014), <https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html> [<https://perma.cc/8ZAG-E94D>] (discussing the growth of Operation Streamline the Obama administration).

⁸⁴ Figure 2 includes all petty immigration offenses disposed of by U.S. magistrate court judges. Data reported in Figure 2 were obtained from JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 2, tbl.M-2 (Sept. 30, 2001–Sept. 30, 2019).

⁸⁵ In 2013, a bipartisan group of Senators known as the “Gang of Eight” announced a pathway to comprehensive immigration reform, culminating the passage of S. 744 in the Senate. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). The bill was never passed by the House.

individuals.⁸⁶ As hope for an immigration overhaul faded, President Obama began to gradually shrink his administration's involvement in the Streamline initiative. He did so primarily by shifting the focus of the DOJ away from prosecution of first-time border crossers with no criminal or immigration history.⁸⁷ The result, as shown in Figure 2, was a steep decline in the number of misdemeanor illegal entry cases between 2013 and 2017.

During President Trump's administration, misdemeanor illegal entry cases brought before federal magistrate judges took off once again. After zero tolerance was announced, convictions for fiscal year 2018 reached 80,117, a level higher than under any other president (Figure 2).⁸⁸ In 2019, under Attorney General William Barr's leadership, that record was shattered once again, reaching 91,466 cases (Figure 2).⁸⁹ In a sudden turn of events at the beginning of 2020, concerns about the rapid spread of the pandemic caused by the coronavirus have triggered U.S. Attorneys' Offices along the Southwest border to suspend at least some of the administration's illegal entry prosecutions.⁹⁰ Whether the pandemic will have a lasting impact on prosecution patterns remains to be seen.

⁸⁶ See *A Guide to S.744: Understanding the 2013 Senate Immigration Bill*, AM. IMMIGRATION COUNCIL (July 10, 2013), <https://www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill> [<https://perma.cc/D6KX-LY6S>] (summarizing how S. 744 would have balanced securing the border with creating a legalization program for individuals who were already here).

⁸⁷ See, e.g., CARLA N. ARGUETA, CONG. RES. SERV., BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 8 (2016), <https://fas.org/sgp/crs/homesec/R42138.pdf> [<https://perma.cc/2QRH-YTFD>] (pointing out that as of 2014, the U.S. Attorney's Office in Arizona ceased prosecuting first-time unauthorized border crossers); see also *Sen. Jeff Flake Calls for 'Zero Tolerance' of Illegal Border Crossing*, KTAR NEWS (June 23, 2017), <https://ktar.com/story/1634732/flake-jeff-operation-streamline/> [<https://perma.cc/87SQ-EPMG>] (quoting former U.S. Senator Jeff Flake's letter to Attorney General Sessions as stating, "[u]nfortunately, despite (Operation Streamline's) effectiveness, the previous administration sought to water down its deterrent effect by shifting its policy to targeting only first-time illegal border crossers whom had a known criminal history or were otherwise a threat to public safety").

⁸⁸ Shortly before being appointed as the new Attorney General, William Barr published an op-ed in the *Washington Post* praising Attorney General Sessions for "breaking the record for prosecution of illegal-entry cases." William P. Barr et al., Opinion, *We Are Former Attorneys General. We Salute Jeff Sessions*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762_story.html [<https://perma.cc/XU6D-SF8W>].

⁸⁹ Immigration crime was 76% (91,466 out of 120,970) of all cases disposed of by U.S. Magistrate Judges during fiscal year 2019. See JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 2, tbl.M-2 (Sept. 30, 2019).

⁹⁰ Due to concerns over social distancing in federal courts, U.S. Attorneys in California, Arizona, and New Mexico announced that they would no longer prosecute first-time border entrants. Ryan Devereaux, *Mass Immigration Prosecutions on the Border Are Currently on Hold. What Comes Next Is Uncertain*, THE INTERCEPT (Mar. 18, 2020), <https://theintercept.com/2020/03/18/immigration-border-prosecution-coronavirus/> [<http://perma.cc/RDF6-SKF7>].

C. Enhanced Punishment for Illegal Reentry

The Trump administration's policy priorities have included not only illegal entry prosecutions but also reentry prosecutions. As explained the earlier, individuals are subject to the reentry statute when they cross the border without permission after previously being deported.⁹¹ On October 8, 2017, President Trump delivered a letter to House and Senate leaders titled "Immigration Principles and Policies" that set forth his goal to increase criminal punishment for "repeat illegal border crossers and those with prior deportations."⁹²

Attempting to increase penalties for illegal reentry signaled a clear break from prior administrations. Since the 1990s, illegal reentry cases have been part of the DOJ's sentence reduction program known as the "fast track."⁹³ The fast track began in the border districts that had high volumes of immigration crime cases, out of a need to prosecute these cases more quickly.⁹⁴ It eventually spread to every district in the nation.⁹⁵ Under the fast track, defendants in illegal reentry cases are offered a significant reduction in their applicable Guideline sentencing range.⁹⁶ In exchange, defendants must plead guilty on an expedited timetable and waive other important rights, such as the right to appeal.⁹⁷

⁹¹ See *supra* notes 29–31 and accompanying text.

⁹² See generally Letter from Donald J. Trump, President of the U.S., to House and Senate Leaders, Immigration Principles and Policies, § 1.F (Oct. 8, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies> [<https://perma.cc/9ZW2-YCAU>] ("Many Americans are victims of crime committed by individuals who have repeatedly entered the United States illegally, which also undermines the integrity of the entire immigration system. Therefore, the Administration proposes increasing penalties for repeat illegal border crossers and those with prior deportations.").

⁹³ Memorandum from Attorney Gen. John Ashcroft, to All U.S. Attorneys, Department Principles for Implementing an Expedited Disposition or "Fast-Track" Prosecution Program in a District 1 (Sept. 22, 2003), <http://www.lb7.uscourts.gov/documents/09-39321.pdf> [<https://perma.cc/2NKB-PRKB>].

⁹⁴ See Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 517 (2006) (explaining how several federal district courts in the Southwest region have created "fast-track" or "early disposition" programs in an effort to expand the number of prosecutions and combat the challenges of limited resources).

⁹⁵ See Memorandum from Deputy Attorney Gen. James M. Cole, to All U.S. Attorneys, Department Policy on Early Disposition or "Fast-Track" Programs 3 (Jan. 31, 2012), <https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf> [<https://perma.cc/ED96-AUWQ>] ("Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326) the largest category of cases authorized for fast-track treatment—shall implement an early disposition program . . ."); U.S. Sentencing Comm'n, Written Testimony from Maria E. Stratton, Fed. Pub. Def. for the Cent. Dist. of Cal., 1, 3 (Sept. 18, 2003), <https://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20030923/stratton.pdf> [<https://perma.cc/2TDA-WC7C>] (noting that when the "fast track" was rolled out in the Central District of California, the U.S. Attorney's Office was "very candid in notifying court and counsel that under the fast track, the government anticipated that it would double or triple the number of illegal reentry/improper entry prosecutions in the district").

⁹⁶ See U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (U.S. SENTENCING COMM'N 2018) (authorizing a downward departure on motion of the government); see also Thomas Bak, *Illegal Immi-*

Shortly after Attorney General Sessions issued his April 2017 memorandum to prosecutors instructing them to renew their “commitment to criminal immigration enforcement,”⁹⁸ districts began to change their immigration fast-track programs to make them less generous. Defense attorneys reported that prosecutors replaced their standard recommendation of a four-level downward variance in sentencing range with a smaller two-level variance.⁹⁹ In border districts, public defenders also disclosed that “flip-flop” pleas¹⁰⁰—which allow a defendant charged with a felony under Section 1326 to instead plea to a misdemeanor Section 1325 charge—became less frequent.¹⁰¹ Importantly, however, data reveal that these harsher sentencing recommendations by prosecutors have not resulted in higher sentences. Although prosecutors may recommend a sentence to the court, they do not have ultimate authority over the sentence applied—such discretion rests with the sentencing judge.

Table 1 tracks the average and median sentence for illegal reentry convictions sentenced under the U.S. Sentencing Guidelines since 2000. These data show a steady decline over time in the length of sentences imposed by federal judges for illegal reentry. The median sentence for illegal reentry has plummeted by eighty-two percent, from a high of thirty-three months in 2000 to only six months in 2018.¹⁰²

gration and the Southwest Border District Courts, 22 GEO. IMMIGR. L.J. 569, 573 n.19 (2008) (discussing the effect of plea bargaining on sentencing in illegal reentry cases); Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT’G REP. 254, 256 (1996) (explaining the requirements for an illegal reentry defendant to receive a more favorable disposition under the fast-track program in the Southern District of California).

⁹⁷ See generally Eagly, *supra* note 1, at 1321–25 (documenting the speed of the fast-track plea process in § 1326 cases); Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 220 (2005) (elucidating how plea waivers are used by prosecutors in plea bargaining to avoid appeals).

⁹⁸ Memorandum from Jefferson B. Sessions, *supra* note 4.

⁹⁹ E-mail from Milagros Cisneros, Assistant Fed. Pub. Def., Fed. Pub. Defs.’ Office for the Dist. of Ariz., to author (May 16, 2018, 07:12 AM) (on file with author) (“With regards to the 1326 fast-track, it used to be that pretty much everyone would get a 4-level reduction, but now AUSAs have more discretion to decide that some defendants are more unsavory and they only offer two levels off.”); E-mail from Alexander E. Ramos, Assistant Fed. Pub. Def., Fed. Pub. Defs.’ Office for the Dist. of Utah, to author (May 17, 2018, 06:37 AM) (on file with author) (explaining that although both prior to and leading up to the election, the standard was a four-level reduction “across the board,” today, individuals with prior illegal reentries and no other criminal history only receive two level reductions); E-mail from Kim Savo, Deputy Fed. Pub. Def., Fed. Pub. Defs.’ Office for the Cent. Dist. of Cal., to author (May 9, 2018, 08:13 AM) (on file with author) (noting that “the new program was not rolled out until the Trump Administration came into office”).

¹⁰⁰ Eagly, *supra* note 1, at 1329 (discussing “flip-flop” plea agreements in the immigration crime context).

¹⁰¹ See, e.g., Cisneros, *supra* note 99 (noting that although “[t]owards the end of the Obama Administration we had tons of flip-flops,” they are “now harder to come by”).

¹⁰² See *infra* Table 1. The average sentence also declined from thirty-six months in 2000 to only ten months in 2018. *Id.*

Table 1. Average and Median Sentence Length for Illegal Reentry Cases Under the Federal Sentencing Guidelines (Fiscal Years 2000–2018)¹⁰³

Fiscal Year	Average Sentence (Months)	Median Sentence (Months)	Total 1326 Cases
2018	10	6	18,241
2017	12	8	15,895
2016	14	9	15,813
2015	16	10	15,815
2014	17	12	16,674
2013	18	12	18,658
2012	19	13	19,463
2011	19	13	21,488
2010	20	14	19,910
2009	21	15	17,308
2008	23	18	13,622
2007	26	21	10,949
2006	27	24	11,346
2005	27	24	10,494
2004	29	24	9,684
2003	28	24	9,244
2002	30	26	7,052
2001	35	30	6,041
2000	36	33	6,415

¹⁰³ Table 1 analyzes U.S. Sentencing Commission data for cases sentenced under the illegal reentry Guideline (§ 2L1.2). Data for fiscal years 2016 through 2018 were downloaded from the Sentencing Commission's web page. *Commission Datafiles*, U.S. SENTENCING COMM'N, <https://www.ussc.gov/research/datafiles/commission-datafiles> [<https://perma.cc/T9AV-L2FB>]. Data for fiscal years 2000 to 2015 were obtained from the Inter-University Consortium for Political and Social Research at the University of Michigan. *Monitoring of Federal Criminal Sentences Series*, ICPSR, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/83> [<https://perma.cc/4JJF-5VTL>]. In order to conduct this analysis, data for 2000 through 2018 was limited to those federal district court cases ($n = 269,707$) where the primary Sentencing Guideline category (GDLNEHI) was § 2L1.2, the Guideline for illegal reentry convictions. The sentences reported in Table 1 (SENSPLT0 variable) includes all imprisonment imposed by the sentencing judge. Cases with incomplete sentencing values ($n = 304$) were not included in the analysis. To make the measurement comparable to that reported by the U.S. Sentencing Commission, two cases with outlier sentences were also removed from the analysis (one with a 777 month sentence, and the other with a 1,009 month sentence). *See generally* CHRISTINE KITCHENS, ANALYZING FEDERAL SENTENCE LENGTH & TYPE, U.S. SENTENCING COMM'N, RESEARCH NOTES, ISSUE #2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-notes/20190926_Research-Notes-Issue2.pdf [<https://perma.cc/8WPA-V7QJ>]. The author thanks Henry Kim of UCLA's Empirical Research Group and the Office of Research and Data of the U.S. Sentencing Commission for assistance with this analysis.

This downward slide in sentencing severity, which has continued during the Trump administration, reflects a gradual agreement by sentencing judges that reentry cases should receive lighter sentences. This trend has been facilitated in part by the U.S. Supreme Court's 2005 decision in *United States v. Booker* finding that mandatory application of the federal Sentencing Guidelines to constrain sentencing judges was unconstitutional.¹⁰⁴ To remedy this problem, the Court did not abolish the Sentencing Guidelines, but rather clarified that they are only advisory.¹⁰⁵ This discretion has allowed sentencing judges to deviate from the advisory range of the Guidelines and instead dispense a sentence that they believe is reasonable in light of the conduct and any mitigating circumstances. In practice, federal judges have consistently chosen reentry sentences below the advisory range.¹⁰⁶

The decline in sentencing lengths also reflects the shared wisdom of sentencing experts that illegal reentry sentences had become unduly harsh. In 2016, the U.S. Sentencing Commission rolled back the recommended sentencing exposure for many defendants charged with violating Section 1326.¹⁰⁷ In justifying the need for the amendment, the Commission was particularly critical of the “overly severe” sixteen-level sentencing enhancement that applied to some illegal reentry cases.¹⁰⁸ As the Commission explained, many people reenter the United States to reunite with family, find employment, or escape horrific conditions in their own country.¹⁰⁹ The Commission further noted that

¹⁰⁴ 543 U.S. at 245.

¹⁰⁵ 18 U.S.C. § 3553. Federal judges must consider the advisory sentencing range calculated by applying the matrix in the Guidelines, but retain ultimate authority over federal sentencing.

¹⁰⁶ U.S. SENTENCING COMM’N, QUARTERLY DATA REPORT, FISCAL YEAR 2017, at 32 fig.I (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2017_Quarterly_Report_Final.pdf [<https://perma.cc/PNE3-3UYU>] (tracking the average sentence imposed by federal judges in illegal reentry cases, as compared to the average Guideline minimum).

¹⁰⁷ See *Public Data Briefing: 2016 Illegal Reentry Amendment*, U.S. SENTENCING COMM’N, <http://www.ussc.gov/policymaking/amendments/illegal-reentry-data-briefing> [<https://perma.cc/LG3F-Z49A>] (summarizing descriptive statistics on past illegal reentry cases and explaining how the 2016 amendment to the illegal reentry Guideline was predicted to reduce the overall average Guideline minimum by three months).

¹⁰⁸ U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 24 (Apr. 28, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160428_RF.pdf [<https://perma.cc/CJ4Y-QTAD>]. For additional critique of the enhancements for prior convictions in illegal reentry cases, see Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 719–24 (2010).

¹⁰⁹ See Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Approves Significant Changes to the Federal Sentencing Guidelines (Apr. 15, 2016), <http://www.ussc.gov/about/news/press-releases/april-15-2016> [<https://perma.cc/V4CS-T9NY>] (discussing reasons for compassion in sentencing). For a moving chronicle of the reasons why many deportees return to the United States, see BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* (2019).

judges were rejecting the advisory Guideline range in the majority of cases.¹¹⁰ After completing a multi-year study, the Commission concluded that basic fairness demanded a revised Guideline.¹¹¹ The amendment, which was approved by Congress, significantly reduced the harshest standard that was previously applied when calculating some defendants' total offense level for illegal reentry.¹¹² This Guideline revision has further contributed to the continuing downturn in illegal reentry sentences (Table 1).¹¹³

In conclusion, President Trump inherited a federal criminal system that already prosecuted huge numbers of immigration cases.¹¹⁴ Yet, although these

¹¹⁰ In 2015, only 29.7% of defendants with sixteen-level enhancements were sentenced within range. See U.S. SENTENCING COMM'N, AMENDMENT TO THE ILLEGAL REENTRY (§ 2L1.2) GUIDELINE 8 (2015), https://www.ussc.gov/sites/default/files/illegal_reentry_briefing.pdf [<https://perma.cc/S4L5-M2NZ>] (providing sentencing statistics for immigration crimes). The original illegal reentry Guideline went into effect in 1991 without the benefit of any empirical research regarding whether the recommended sentences were consistent with the goals of sentencing in reentry cases. See Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases*, 8 FED. SENT'G REP. 275, 276 (1996) (stating that there was no study done to support the amendment).

¹¹¹ See generally U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 108, at 25 (explaining that the amendments to the illegal reentry Guideline were warranted and informed by the multi-year study of immigration offenses conducted by the Commission); U.S. SENTENCING COMM'N, ILLEGAL REENTRY OFFENSES 27–29 (Apr. 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf [<https://perma.cc/7FC5-QC6D>] (summarizing key findings based on the Commission's analysis of data from a sample of 18,498 illegal reentry cases).

¹¹² See U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 108, at 36–39 (presenting the text of the 2016 amendment to the manner in which illegal reentry sentences are enhanced, including by reducing the prior sixteen-level enhancement to a ten-level enhancement).

¹¹³ President Trump's DOJ has, however, begun to chip away at this sentencing reform effort by pursuing amendments to the Guidelines that increase the advisory sentencing range for illegal reentry. See, e.g., Letter from Kenneth A. Blanco, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n 10 (July 31, 2017), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf> [<https://perma.cc/PDY8-5KW7>] (advocating for technical amendments to the illegal reentry Guideline). For example, an amendment adopted in 2018 will effectively increase the recommended Guideline range for some illegal reentry defendants. See U.S. SENTENCING COMM'N, ILLEGAL REENTRY GUIDELINE ENHANCEMENTS (2018), <https://www.ussc.gov/education/training-resources/2018-illegal-reentry-amendment> [<https://perma.cc/8A9L-3MFB>] (click on "Illegal Reentry Amendment").

¹¹⁴ As legal scholars Jennifer Chacón, Bill Ong Hing, and Kevin Johnson have persuasively shown, rigorous immigration enforcement was already a prominent element of the Justice Department's work when President Trump took office. Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 245 (2017), https://harvardlawreview.org/wp-content/uploads/2017/05/vol130_Chacon.pdf [<https://perma.cc/GP2S-J3V5>] (arguing that President Trump's immigration enforcement agenda as announced in his Executive Orders represents a "doubling down" on enforcement policies already in place under the Obama administration); Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 272 (2018) ("So far, the criminal enforcement efforts under the Trump Administration—and its collateral

prosecutions had dominated border courts for decades, in the past they took place quietly, without much public knowledge of their impact. As Part I established, the Trump administration's "renewed focus" on immigration crime resulted in record numbers of convictions, but did not succeed in dispensing harsher penalties. More importantly, as Part II develops further, the Trump era has exposed deep flaws in the existing system for border policing and ignited a grassroots campaign to repeal the illegal entry and reentry laws.¹¹⁵

II. THE MOVEMENT TO RESIST BORDER CRIMINALIZATION

Part II is structured around three flash points that have been central to the decriminalization movement—the separation of families, the prosecution of asylum seekers, and the segregation of Latinx defendants in an inferior, immigrant-only court system. These three areas of resistance have not emerged separately, but rather are each components of the growing tension between the federal government's evolving immigration crime agenda and the rights and values inherent in the U.S. justice system.

A. Ending the Forced Separation of Families

In the summer of 2017, reports began to emerge of parents being separated from their children and prosecuted for illegal entry in El Paso, Texas.¹¹⁶

consequences—strongly simulate that of the Obama Administration.”); Johnson, *supra* note 6, at 615 (characterizing President Obama's policies as “the foundation” of “President Trump's systematic efforts to dramatically escalate immigration enforcement”).

¹¹⁵ The current wave of resistance to border criminalization has taken many forms, including community mobilization, political action, in-depth reporting, and strategic lawyering. As Rebecca Sharpless has argued, often it is not “rationale dialogue” with government and civil society that results in transformative immigration policy change, but rather “strategic” lawyering, mobilizing, and resistance strategies. Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M. L. REV. 19, 49–53 (2017); see also Sameer Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1464–66 (2017) (showing how “movement-centered organizations,” community members, and lawyers have played essential roles in resisting immigration enforcement).

¹¹⁶ Transcript of Motion Hearing at 33, Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Feb. 21, 2019), <https://www.aclu.org/legal-document/ms-l-v-ice-hearing-transcript> [<https://perma.cc/A78R-JWHQ>] (quoting counsel for the plaintiffs informing the court that the family separation policy “now appears to date back to El Paso, Texas in July of 2017”); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES, OIG-20-06, at 5 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf> [<https://perma.cc/79T4-FQR7>] (finding that the Border Patrol's El Paso Sector began to prosecute parents and separate them from their children in July 2017). As the Office of Inspector General for the Department of Health and Human Services would later reveal, thousands of children were in fact separated from their parents by the administration before the official disclosure of a family separation policy on May 7, 2018. OFFICE OF INSPECTOR GEN., U.S. DEP'T HEALTH & HUM SERVS., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE, OEI-

Although there was no official announcement of a policy of family separation, there had been hints that such a strategy would be pursued. Shortly after President Trump was elected, then-DHS Secretary Kelly told CNN's Wolf Blitzer in an interview that he "would do almost anything to deter" Central American migration, including separating children from their parents and placing them in detention facilities or foster care "as we deal with their parents."¹¹⁷ On May 7, 2018, just over a month after first announcing zero tolerance, Attorney General Sessions spoke to state and local law enforcement officers on the California border with Mexico. In a speech punctuated by the cries of protestors, Sessions announced that "100 percent of illegal Southwest Border crossings [are now being reported] to the Department of Justice for prosecution."¹¹⁸ He also used the public event to remind border crossers of his agency's zero-tolerance posture: "I have put in place a 'zero tolerance' policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple."¹¹⁹ Importantly, Sessions added that parents crossing the border with their children would be separated: "If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."¹²⁰

The administration's family separation policy quickly became a central focus of opposition to the Trump administration's border practices. While parents were prosecuted for misdemeanor illegal entry, their children were moved to detention centers in different locations, sometimes thousands of miles away. News reports contained images of children separated from their parents being housed in unsanitary, crowded chain-link cages.¹²¹ An audio recording of children screaming "Mami" and "Papa" over and over again as they were mocked by a Border Patrol agent went viral,¹²² as did a photograph of a toddler sobbing

BL-18-00511 (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/MV7M-R629>]. According to the OIG investigation, the precise number of children separated is "unknown" due to the lack of an effective system for identification. *Id.* at 1.

¹¹⁷ Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN (Mar. 7, 2017), <https://edition.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border> [<https://perma.cc/F6CS-QS8R>].

¹¹⁸ Sessions, *supra* note 54.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ David A. Graham, *Are Children Being Kept in 'Cages' at the Border?*, THE ATLANTIC (June 18, 2019), <https://www.theatlantic.com/politics/archive/2018/06/ceci-nest-pas-une-cage/563072> [<https://perma.cc/BHX9-LJ83>] (reporting children held in "cages" or "chain-link pens").

¹²² Ginger Thompson, *Listen to Crying Children Who've Just Been Separated from Their Parents at the Texas-Mexico Border*, TEX. TRIB. (June 18, 2018), <https://www.texastribune.org/2018/06/18/listen-children-whove-just-been-separated-their-parents-texas-mexico-b> [<https://perma.cc/F32D-FBN5>].

as her mother was searched.¹²³ Under pressure to explain what was happening to families, DHS disclosed in May 2018 that approximately 1,273 children had been separated from their parents due to the adult being prosecuted.¹²⁴ By the summer of 2018, as many as three-thousand children had been forcibly separated from their parents under the administration's zero-tolerance policy.¹²⁵

Public reaction was swift. There was immediate opposition from civil rights experts on the ground. Lee Gelernt, a seasoned ACLU attorney, told the *New Yorker*: "Little kids are begging and screaming not to be taken from parents It's as bad as anything I've seen in twenty-five-plus years of doing this work."¹²⁶ Human Rights First, a nonprofit organization that provides legal assistance for asylum seekers, called the practice of separating children "unlawful and cruel."¹²⁷ The American Bar Association concluded that parent-child separation offends basic standards of "family integrity and due process."¹²⁸ And, the United Nations High Commissioner for Human Rights

¹²³ News reports subsequently clarified that the young girl in the photograph was not separated from her mother. See Laura M. Holson & Sandra E. Garcia, *She Became a Face of Family Separation at the Border. But She's Still with Her Mother.*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/immigration-toddler-trump-media.html> [<https://perma.cc/SEM2-4PPS>].

¹²⁴ *Trafficking Victims Protection Reauthorization Act and Exploited Loopholes Affecting Unaccompanied Alien Children: Hearing Before the Subcomm. on Border Sec. and Immigration*, 115th Cong. (May 23, 2018) (testimony of the Honorable Richard Hudson, Deputy Chief of the Operations Program, Law Enforcement Operations Directorate, U.S. Customs & Border Protection), <https://www.judiciary.senate.gov/imo/media/doc/Hudson%20Responses%20to%20QFRs.pdf> [<https://perma.cc/E7F6-6WEJ>] (testifying that 1,273 children, with an average age of eleven, were separated from their parents between April 19 and May 23, 2018 due to the adult being prosecuted).

¹²⁵ WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY (2019), <https://fas.org/sgp/crs/homsec/R45266.pdf> [<https://perma.cc/8SAE-4X7Z>]. In addition, thousands more children were separated from their parents before the administration announced the family separation policy on May 7, 2018. *Id.*

¹²⁶ Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents*, NEW YORKER (May 30, 2018), <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents> [<https://perma.cc/GLB4-ECKF>].

¹²⁷ Robyn Barnard & Natasha Arnpriester, *Separating Children from their Parents to Deter Other Asylum Seekers Is Unlawful and Cruel*, HUM. RIGHTS FIRST (Mar. 13, 2017), <https://www.humanrightsfirst.org/blog/separating-children-their-parents-deter-other-asylum-seekers-unlawful-and-cruel> [<https://perma.cc/R4XW-HMSF>].

¹²⁸ Letter from Hilarie Bass, President, Am. Bar Ass'n, to the Honorable Jeff Sessions, Attorney Gen., U.S. Dep't of Justice & the Honorable Kirstjen Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 12, 2018), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABALetterFamilySeparation%20061218.authcheckdam.pdf> [<https://perma.cc/TC77-M7LR>]. An investigation by Physicians for Human Rights concluded that the practice of separating families meets the criteria for torture. HAJAR HABBACH ET AL., "YOU WILL NEVER SEE YOUR CHILD AGAIN": THE PERSISTENT PSYCHOLOGICAL EFFECTS OF FAMILY SEPARATION (Feb. 2020), <https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf> [<https://perma.cc/8J94-5E9L>].

judged President Trump's policy of "inflicting such abuse" on children "unconscionable."¹²⁹

As news of separated families spread, the policy began to draw fire from individuals who do not usually comment on federal immigration policy. Hundreds of laity and clergy of Attorney General Sessions' own United Methodist Church signed a forceful statement condemning his family separation policy and charging Sessions with child abuse, immorality, racial discrimination, and "dissemination of doctrines contrary to the standards of doctrine of the United Methodist Church."¹³⁰ Federal Magistrate Judge Ronald Morgan of the Southern District of Texas openly empathized with parents being prosecuted in his courtroom, admonishing the Assistant U.S. Attorney on duty that the government was responsible for children left without their parents: "If you can imagine there's a hell," he scolded the prosecutor, "that's probably what it looks like."¹³¹ Mayors of Los Angeles, Houston, Tucson, and Albuquerque decried family separation as "morally reprehensible" and "utterly inconsistent with our values of decency and compassion."¹³² U.S. District Court Judge Robert Brack of the District of New Mexico, who had presided over more misdemeanor illegal entry prosecutions than any other federal judge in the country, lamented: "I have presided over a process that destroys families for a long time, and I am weary of it And I think we as a country are better than this."¹³³ Even Republican lawmakers expressed their disapproval: "I think this is inhumane," a

¹²⁹ United Nations, *2000 Children Forcibly Separated from Their Parents and Other Topics—Human Rights Council Briefing*, at 36:24–37:07, YOUTUBE (June 18, 2018), <https://www.youtube.com/watch?v=1Xkni91tE6Q> [<https://perma.cc/9UB7-6K6J>] (statement of United Nations High Commissioner for Human Rights, Prince Zeid bin Ra'ad Zeid al-Husseini).

¹³⁰ Letter from Laity and Clergy of the United Methodist Church, to Rev. Boykin and Rev. Wines (July 18, 2018), http://s3.amazonaws.com/Website_Properties/news-media/documents/A_Complaint_regarding_Jefferson_Sessions.pdf [<https://perma.cc/6XRR-8EKZ>]; see also Brooke Seipel, *Hundreds of Members at Sessions's Church Write Formal Complaint over Immigration Policy*, THE HILL (June 19, 2018), <http://thehill.com/homenews/news/392928-hundreds-of-members-of-sessionss-church-write-formal-complaint-over-separation> [<https://perma.cc/Z3YJ-PUHH>].

¹³¹ Debbie Nathan, *Hidden Horrors of "Zero Tolerance"—Mass Trials and Children Taken from Their Parents*, THE INTERCEPT (May 29, 2018), <https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children> [<https://perma.cc/99C2-FENN>].

¹³² Letter from Eric Garcetti, Mayor, City of L.A., Sylvester Turner, Mayor, City of Hous., Jonathan Rothschild, Mayor, City of Tucson & Tim Keller, Mayor, City of Albuquerque, to the Honorable Jeff Sessions, Attorney Gen., Dep't of Justice & the Honorable Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec. (June 7, 2018), <https://www.lamayor.org/sites/g/files/wph446/f/page/file/Letter%20on%20family%20separation%20policy.pdf> [<https://perma.cc/4WYD-DHEQ>].

¹³³ Judge Brack made this statement as he announced his resignation from his full-time position on the bench. Lauren Villagran, *Crackdown on Immigrants Takes a Toll on Federal Judge: 'I Have Presided Over a Process That Destroys Families'*, L.A. TIMES (May 24, 2018), <http://www.latimes.com/nation/la-na-border-judge-deportations-20180524-story.html> [<https://perma.cc/PBC4-FKX9>].

Texas Congressman told the press, “the pictures that we have seen—that’s not the face of America.”¹³⁴

In addition to public condemnation, the family separation policy drew serious legal scrutiny. In February 2018, the ACLU brought a national class-action lawsuit on behalf of parents forcibly separated from their children, *Ms. L. v. ICE*.¹³⁵ One of the plaintiffs, Ms. C., told the Border Patrol she and her son were seeking asylum, but her son was sent to a facility in Chicago while Ms. C. was prosecuted for unlawful entry.¹³⁶ Ms. C. pled guilty and served twenty-five days in federal custody before being placed in a series of detention centers in Texas, all while separated from her son.¹³⁷ The lawsuit challenged the government’s separation policy as unlawful and sought to reunite parents with their children.¹³⁸

As public concern and legal challenges mounted, President Trump abruptly announced he was changing the family separation policy. Saying that he didn’t “like the sight or the feeling of families being separated,”¹³⁹ President Trump issued an Executive Order calling for families to be detained together, rather than separately, “during the pendency of any criminal improper entry or immigration proceedings involving their members.”¹⁴⁰ Immediately following the June 20, 2018 announcement, U.S. Attorneys’ Offices in districts along the border began to dismiss misdemeanors brought against parents traveling with their children.¹⁴¹ The next week, U.S. District Judge Dana Sabraw issued a pre-

¹³⁴ Katie Rogers & Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html> [<https://perma.cc/E6QZ-XZPL>] (quoting Republican Representative Michael McCaul of Texas).

¹³⁵ *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

¹³⁶ *Id.* at 1155.

¹³⁷ *Id.*

¹³⁸ The named plaintiff, “Ms. L.,” was reunited with her daughter in March 2018, but the national class-action lawsuit on behalf of separated families has continued. *See generally Ms. L. v. ICE*, ACLU (updated Jan. 13, 2020), <https://www.aclu.org/cases/ms-l-v-ice> [<https://perma.cc/7DX9-U93N>].

¹³⁹ Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html> [<https://perma.cc/9CXH-BGJL>].

¹⁴⁰ Exec. Order No. 13,841, 83 Fed. Reg. 29,435, *Affording Congress an Opportunity to Address Family Separation*, § 3 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation> [<https://perma.cc/2E7R-524K>] [hereinafter Family Separation E.O.].

¹⁴¹ *See* Aaron Martinez, *Western District to Drop Charges Against Immigrants Separated from Children, Email Says*, EL PASO TIMES (June 21, 2018), <https://www.elpasotimes.com/story/news/immigration/2018/06/21/charges-dropped-against-immigrants-separated-children-email-says/723253002> [<https://perma.cc/XS6D-WJYE>] (discussing how the U.S. Attorney’s Office for the Western District of Texas announced its plan to dismiss immigration cases against parents based on the inability to provide housing that keeps families together in accordance with the Executive Order signed by President Trump); *see also* Ron Nixon et al., *Border Officials Suspend Handing Over Migrant Fami-*

liminary injunction in the *Ms. L. v. ICE* case enjoining the government from detaining parents without their children.¹⁴²

Although family separation had long been known to immigrant communities affected by vigorous enforcement policies, zero tolerance brought it fully into public view. As concern mounted, the public became more educated about the lasting negative impacts of separation on the emotional and psychological development of children.¹⁴³ The formal reprieve in the family separation policy was a significant victory for those opposing the President's immigration policies. Still, this victory covered only a small portion of those subject to Operation Streamline, and some children continue to be separated. For example, children traveling with relatives or caretakers other than parents, such as grandparents or aunts and uncles, are still separated in connection with ongoing zero-tolerance prosecutions.¹⁴⁴ Children traveling with parents with criminal records or parents being prosecuted for felony illegal reentry also continue to endure painful separations from their parents.¹⁴⁵

lies to Prosecutors, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html> [https://perma.cc/B94J-LS46] (quoting Kevin K. McAleenan, the commissioner of U.S. Customs and Border Protection, announcing that his agency would in most cases not refer adults with children to U.S. Attorneys).

¹⁴² *Ms. L.*, 302 F. Supp. 3d at 1149 (enjoining the practice of family separation absent a finding that the parent poses a danger or is unfit to care for the child). Judge Sabraw also ordered the government to reunite separated parents with their children and not to deport parents until reunification occurs. *Id.*

¹⁴³ See, e.g., WOMEN'S REFUGEE COMM'N ET AL., BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES 1–13 (2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/BetrayingFamilyValues-Feb2017.pdf> [https://perma.cc/CUB8-T4Q5] (providing examples of emotional trauma suffered by separated children and parents); Letter from Am. Psychological Ass'n, to President Donald Trump (June 14, 2018), <https://www.apa.org/advocacy/immigration/separating-families-letter.pdf> [https://perma.cc/2X6Z-SCB6] (“For children, traumatic events can lead to the development of post-traumatic stress disorder and other mental health disorders that can cause long lasting effects.”). The lasting harms of family separation are further compounded by abysmal conditions in immigration detention. See Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 711–41 (2009) (detailing the harm suffered by women in immigration detention, including the health risks resulting from the lack of adequate medical facilities).

¹⁴⁴ See LAURA PEÑA & EFRÉN OLIVARES, TEX. C.R. PROJECT, THE REAL NATIONAL EMERGENCY: ZERO TOLERANCE & THE CONTINUING HORRORS OF FAMILY SEPARATION AT THE BORDER 15 (2010), <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-Final.pdf> [https://perma.cc/TN8J-VN3N] (documenting cases of the continued separation of children from “non-parental” adults at the border).

¹⁴⁵ *Ms. L. v. U.S. Immigration & Customs Enf't*, 415 F. Supp. 3d 980, 991–94 (S.D. Cal. 2020) (finding that defendants are justified in excluding from the class protected from family separation those parents who are charged under § 1326 or who entered with a prior criminal history); see also Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html> [https://perma.cc/X7JZ-M9G2] (documenting several cases since the official termination

B. Protecting the Rights of Asylum Seekers

A second aspect of President Trump's prosecution program that has been alarming to many observers is that it criminalizes asylum seekers. Since 2014, there has been a sizable increase in people coming to the United States to seek protection.¹⁴⁶ These asylum seekers, primarily from the Central American countries of El Salvador, Guatemala, and Honduras, are fleeing extreme levels of violence in their home countries.¹⁴⁷ Women and children, who are especially vulnerable to gang violence and domestic abuse, are among those now seeking refuge in the United States.¹⁴⁸

Targeting refugees is an intentional design element of the administration's use of criminal law.¹⁴⁹ By securing convictions, the government seeks to mark asylum seekers as "criminals" rather than legitimate protection seekers.¹⁵⁰ In one high-profile example, the U.S. Attorney in San Diego brought criminal charges¹⁵¹ against a group of asylum seekers that President Trump had derided as a "caravan" of dangerous criminals.¹⁵²

of the separation policy in which children have been separated from parents previously convicted of minor and often dated misdemeanors).

¹⁴⁶ See JONATHAN T. HISKEY ET AL., AM. IMMIGRATION COUNCIL, UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS: WHY THEY ARE FLEEING AND HOW U.S. POLICIES ARE FAILING TO DETER THEM 4 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_central_american_refugee_crisis.pdf [<https://perma.cc/BA8Z-KCUU>] (documenting a rise in the number of women and children coming to the United States from Central America to seek asylum during the spring and summer months of 2014).

¹⁴⁷ *Id.* at 4–5. These three countries have some of the highest murder rates in the world. See UN Office on Drugs and Crime's International Homicide Statistics Database, *Intentional Homicides (Per 100,000 People)*, WORLD BANK, https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?end=2014&start=1995&year_high_desc=true [<https://perma.cc/A44L-GUKA>] (reporting Honduras as having the highest murder rate in the world in 2014, El Salvador having the second highest, and Guatemala having the seventh highest).

¹⁴⁸ HISKEY ET AL., *supra* note 146, at 4–5.

¹⁴⁹ President Trump's border security Executive Order specifically referenced stopping the flow of asylum seekers as a priority. See Border Security E.O., *supra* note 3, § 11 (discussing asylum seekers specifically). Similarly, in an October 20, 2017 statement to federal immigration judges, Attorney General Sessions clarified that the administration is going to "close loopholes and clarify our asylum laws" as part of an enforcement agenda. Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/VP6L-HT7M>].

¹⁵⁰ The debate over whether border crossers are criminals or instead legitimate asylum seekers with claims to remain is a central debate in the field. As Hiroshi Motomura has explained, while some argue that unauthorized migrants are "outsiders with no claim to being part of America's future," others believe that they are "Americans in waiting" with claims to future lawful status. Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 360–61 (2012).

¹⁵¹ Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Announces First Criminal Illegal Entry Prosecutions of Suspected Caravan Members (May 1, 2018), <https://www>.

Beyond labeling asylum seekers as criminals, the administration has also sought to make illegal entry convictions a ground to deny asylum. For example, policy guidance released in the summer of 2018 instructed U.S. Citizenship and Immigration Services (USCIS) personnel that they “may find an applicant’s illegal entry . . . including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion.”¹⁵³ In addition, a leaked internal document revealed that the administration was attempting to devise a way to designate misdemeanor illegal entry as a “particularly serious crime” that would serve as an absolute bar to qualifying for asylum.¹⁵⁴

The criminal prosecution of asylum seekers is part of a much broader effort to turn the borders into “asylum free zones” in which due process and international law do not apply.¹⁵⁵ As President Trump advocated in a Twitter post: “When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”¹⁵⁶ Consistent with this goal of eliminating judicial review, former Attorney General Sessions vacated a decision of the Board of Immigration Appeals (BIA) which held that asylum seekers are entitled to full evidentiary hearings before an immigration judge.¹⁵⁷

justice.gov/opa/pr/justice-department-announces-first-criminal-illegal-entry-prosecutions-suspected-caravan [https://perma.cc/E8TN-LCD8].

¹⁵² These asylum seekers received national news coverage after President Trump tweeted that a “caravan” coming from Mexico required that “Republicans must go to Nuclear Option to pass tough laws NOW.” Claudia Dominguez et al., *Immigrant ‘Caravan’ Heading to US-Mexico Border Sparks Trump’s Concern*, CNN POL. (Apr. 2, 2018), <https://www.cnn.com/2018/04/01/politics/trump-mexico-caravan-tweet/index.html> [https://perma.cc/556W-UNQY].

¹⁵³ USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, PM-602-0162, at 8 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [https://perma.cc/L8QM-BE4W].

¹⁵⁴ Dara Lind, *Exclusive: Trump Administration Plan Would Bar People Who Enter Illegally from Getting Asylum*, VOX (June 29, 2018), <https://www.vox.com/policy-and-politics/2018/6/29/17514590/asylum-illegal-central-american-immigration-trump> [https://perma.cc/ZPY8-6V79].

¹⁵⁵ Human rights advocates have used the term “asylum free zones” to refer to immigration courts that systematically deny the claims of bona fide asylum seekers. See JEANNE ATKINSON ET AL., BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: A SPECIAL INTEREST HEARING ON THE HUMAN RIGHTS OF ASYLUM SEEKERS IN THE UNITED STATES 1, 5 (2016), https://cgrs.uchastings.edu/sites/default/files/Human%20Rights%20of%20Asylum%20Seekers%20in%20US%20%5BPetitioners%205D_1.pdf [https://perma.cc/LHM9-9UNQ].

¹⁵⁶ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), <https://twitter.com/realDonaldTrump/status/1010900865602019329> [https://perma.cc/4398-RBVC].

¹⁵⁷ *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018), vacating *Matter of E-F-H-L-*, 26 I. & N. Dec. 319 (B.I.A. 2014). Following the Attorney General’s decision, immigration judges can decline to offer a hearing if they believe that the asylum seeker’s petition fails to make a prima facie case for eligibility. *Id.* Subsequently, the Attorney General overturned a 2014 BIA decision, *Matter of A-B-*, that had firmly established that survivors of domestic violence can be eligible for asylum. 27 I. & N. Dec. 316 (A.G. 2018), vacating *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014). The USCIS

In November 2018, President Trump issued a new Executive Order to deny asylum to anyone not arriving at a port of entry.¹⁵⁸ Two months later, DHS announced the Migrant Protection Protocols, informally known as “Remain in Mexico,” which orders certain asylum applicants to wait in Mexico until their case can be heard by an immigration judge.¹⁵⁹ And, shortly thereafter, DHS and the Attorney General published an interim final rule prohibiting migrants who resided or “transited en route” in a third country from seeking asylum in the United States.¹⁶⁰ All of these policies and legal decisions have been challenged in court.¹⁶¹

policy guidance adopted to comply with *Matter of A-R-C-G* further undercut other previous decisions that were relevant to claims for asylum made by individuals fleeing violence in Central America. USCIS Policy Memorandum, *supra* note 153. For timely analysis of these and other reforms implemented by the Trump administration to reshape how immigration courts function, see Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 18–26 (2018); Jennifer Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48 (2020), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1076&context=dlj_online [<https://perma.cc/CUE5-SAJB>]; Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374 (2010).

¹⁵⁸ Addressing Mass Migration Through the Southern Border of the United States, Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018), <https://www.federalregister.gov/documents/2018/11/15/2018-25117/addressing-mass-migration-through-the-southern-border-of-the-united-states> [<https://perma.cc/N5K8-H6FY>]. At the same time, law enforcement relied on a practice known as “metering” to severely restrict the number of asylum seekers permitted to seek protection at the ports of entry. The Office of Inspector General for DHS has concluded that metering likely contributes to unlawful entry by asylum seekers. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., SPECIAL REVIEW—INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY, OIG-18-84, at 5–7 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [<https://perma.cc/R92E-UNTE>].

¹⁵⁹ Memorandum from Kirstjen M. Nielsen, Sec’y, Dep’t of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigration Serv., Kevin K. McAleenan, Comm’r, U.S. Customs & Border Prot. & Ronald D. Vitiello, Deputy Dir. & Senior Official Performing the Duties of Dir., U.S. Immigration & Customs Enf’t, Policy Guidance for Implementation of the Migrant Protection Protocols 1 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [<https://perma.cc/55GP-YE92>]. The Migrant Protection Protocols is a radical departure from the normal functioning of the asylum system, and places the responsibility for the health, education, and employment of asylum seekers on the Mexican government. Media Note, Office of the Spokesperson, U.S. Dep’t of State, U.S.-Mexico Joint Declaration (June 7, 2019), <https://www.state.gov/u-s-mexico-joint-declaration/> [<https://perma.cc/X6DG-KQ4P>].

¹⁶⁰ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified at 8 C.F.R. pts. 208.13, 1208.13).

¹⁶¹ See, e.g., *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (affirming the district court’s injunction against implementation and expansion of the administration’s Migrant Protection Protocols); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (finding that the President’s asylum ban proclamation, together with the interim final rule, unlawfully conflicts with the text and congressional purpose of the Immigration and Nationality Act); *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019) (granting a nationwide injunction against the administration’s third-country transit bar that categorically denies asylum to almost anyone entering the United States at the southern border if they did not first apply for asylum in a third country), *application for stay granted*, 140 S. Ct. 3 (2019) (staying nationwide injunction pending disposition of the government’s appeal). Legal challenges to social policies are an important part of movement lawyering,

Criminal prosecution quickly became a tool to destabilize the asylum process. The Office of the Inspector General concluded that the Border Patrol routinely referred individuals who requested asylum for prosecution.¹⁶² According to one study, more than one quarter of defendants prosecuted under the Streamline program at the start of the Trump administration were seeking asylum.¹⁶³

Defense lawyers appointed to represent these asylum seekers have argued that their prosecutions violate both domestic and international law.¹⁶⁴ Specifically, attorneys point out that these prosecutions are inconsistent with the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol), which the United States ratified in 1968.¹⁶⁵ Pursuant to the Protocol, the United States is obligated to comply with the terms of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention), which prohibits the imposition of penalties for illegal entry provided that refugees present themselves to authorities without delay at the border.¹⁶⁶ Specifically, Article 31(1) of the Protocol provides:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided

which relies on “integrated” legal and political strategies for change. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1653 (tracing how “movement lawyers” have worked together with grassroots social movement campaigns to advance legal and social change).

¹⁶² OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING, OIG-15-95, at 1, 16 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf [<https://perma.cc/EZ8A-VNRT>] [hereinafter OIG STREAMLINE REPORT].

¹⁶³ NATASHA ARNPRIESTER & OLGA BYRNE, HUM. RIGHTS FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION’S MISUSE OF CRIMINAL PROSECUTIONS 4, 13 (2018), <https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf> [<https://perma.cc/TD5N-627F>] (surveying defense lawyers about the marked increase in the criminal prosecution of asylum seekers under the Trump administration).

¹⁶⁴ See, e.g., Appellant’s Opening Brief at 10–19, *United States v. Henriquez-Villanueva*, No. 18-50309 (9th Cir. May 22, 2019), 2019 WL 2290408, at *10–19 (arguing that the district court erred in refusing to recognize Ms. Hernandez as a protected asylum seeker under the Refugee Convention); *United States v. Ramirez-Ortiz*, 370 F. Supp. 3d 1151, 1154–56 (S.D. Cal. 2019) (summarizing a Section 1325 defendant’s claim that his prosecution violated the Refugee Convention and his domestic statutory right to apply for asylum).

¹⁶⁵ Protocol Relating to the Status of Refugees, art. 1(1), Jan. 31, 1967, 606 U.N.T.S. 267.

¹⁶⁶ United Nations Convention Relating to the Status of Refugees, Introductory Note, July 28, 1951, 189 U.N.T.S. 150 (prohibiting the imposition of penalties on asylum seekers, including “being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum”).

they present themselves without delay to the authorities and show good cause for their illegal entry or presence.¹⁶⁷

Supporting the view that such prosecutions violate international law, in 2015 the Office of Inspector General for DHS warned that “[u]sing Streamline to refer aliens expressing fear of persecution, prior to determining their refugee status” may violate the obligations of the United States under the Refugee Protocol.¹⁶⁸

Defense lawyers also urge that prosecuting asylum seekers contradicts the statutory guarantee that Congress enacted in codifying the Refugee Convention. Under the U.S. Code, “[a]ny alien who is physically present in the United States or who arrives in the United States” must be allowed to apply for asylum, “irrespective of such alien’s status.”¹⁶⁹ Human rights experts maintain that the United States is impermissibly interfering with its non-refoulement obligations by imposing a criminal penalty and subjecting asylum seekers to a bewildering Streamline process that may deter them from actually pursuing their asylum claim.¹⁷⁰ Such prosecutions, they argue, are at odds with the commitment of the United States to avoid penalizing bona fide asylum seekers.¹⁷¹ Thus far, however, challenges to prosecutions of asylum seekers have not gained traction with federal courts, which have generally found that the Refugee Protocol is not self-executing,¹⁷² and does not supersede the illegal entry and reentry statutes.¹⁷³

¹⁶⁷ *Id.* art. 31(1). For a historical discussion of the U.S. approach to mass migrations, see Michael J. Churgin, *Mass Exoduses: The Response of the United States*, INT’L MIGRATION REV., Spring 1996, at 310, 310–24.

¹⁶⁸ OIG STREAMLINE REPORT, *supra* note 162, at 1, 16.

¹⁶⁹ 8 U.S.C. § 1158(a)(1) (2018); *see also id.* § 1225(b) (requiring an immigration officer to refer an alien for an asylum interview if he or she expresses “an intention to apply for asylum . . . or a fear of persecution,” even if the officer determines the alien is otherwise inadmissible).

¹⁷⁰ *See generally* Arnpiester, *supra* note 8, at 8 (arguing that President Trump’s “criminal justice system violates the rights of asylum seekers and other vulnerable immigrants—including the constitutional rights violated for exercising the right to seek asylum and the legal right itself to seek asylum”); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 770 (2019) (“Criminally prosecuting asylum seekers for illegal entry or illegal reentry raises serious concerns under international and U.S. law.”). For a fresh analysis of why border crossing prosecutions against refugees are impermissible, see Criddle, *supra* note 8 (maintaining that the Immigration and Nationality Act’s provisions allowing for criminal punishment for illegal entry and reentry do not apply to refugees).

¹⁷¹ ARNPRIESTER & BYRNE, *supra* note 163, at 1, 3; *cf.* *United States v. Malenge*, 294 F. App’x 642, 644 (2d Cir. 2008) (“This prosecution penalizes [the defendant asylum seeker] for her ignorance, in contradiction of our government’s policy of providing safe haven to refugees fleeing political violence and persecution. Moreover, this prosecution appears to place this U.S. Attorney’s Office at odds with the Executive Branch as a whole, which has committed, through the above-cited international agreements, to avoid such penalties.”).

¹⁷² *See, e.g.*, *Cazun v. Attorney Gen.* U.S., 856 F.3d 249, 257 n.16 (3d Cir. 2017) (characterizing the Convention as a “non-self-executing treaty”); *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009)

C. Challenging Streamline's Segregation of Criminal Process

President Trump's zero-tolerance initiative has also raised serious questions about the propriety of the federal court procedures relied on for lightning-fast guilty pleas. Under the Streamline program, defendants plead guilty in large groups.¹⁷⁴ For example, in my own observations of the Streamline program in California and Texas, I watched defendants plead guilty in groups of twenty or more, with mass waivers of rights followed by individual pleas that took only a few minutes. Judges presiding over these hearings did not have time to consider individualized factors, such as the economic or political forces that led the individuals to come to the United States. Instead, they addressed most all explanations and instructions to the entire group, often accepting a chorus of simultaneous yes-or-no answers as part of the plea colloquy.

Concerns have surfaced about Operation Streamline since it was first established in 2005. Scholars repeatedly called attention to the fact that Streamline—often referred to as “McJustice”¹⁷⁵ or “Operation Steamroller”¹⁷⁶—fostered “assembly-line justice,”¹⁷⁷ threatened basic due process rights,¹⁷⁸ and

(“[T]he Protocol is not self-executing. . . . Therefore, the Protocol does not have the force of law in American courts.”).

¹⁷³ See, e.g., *United States v. Casaran-Rivas*, 311 F. App'x 269, 272 (11th Cir. 2009) (“[A]ny argument that the indictment violated the Refugee Convention . . . is without merit, as the Refugee Convention . . . [is] not self-executing, or subject to relevant legislation, and, therefore, do[es] not confer upon aliens a private right of action to allege a violation of their terms.”); *United States v. Castro-Rivas*, 180 F. App'x 528, 529 (5th Cir. 2006) (finding that a 1326 defendant has no legal foundation “for arguing that the Protocol and Convention trump the statute of conviction”); *United States v. Reyes-Montano*, No. 19-PO-3592 SMV-1, 2020 WL 733041, at *3 (D.N.M. Feb. 13, 2020) (“[T]he Convention is a non-self-executing treaty. It confers no rights upon Defendant absent congressional action.”); *United States v. Velasquez-Luna*, No. 18-MJ-11463-WQH, 2019 WL 338947, at *2 (S.D. Cal. Jan. 28, 2019) (“Defendant cannot rely on Article 31(1) of the Protocol to challenge his prosecution.”).

¹⁷⁴ See Astrid Galvan, *More Border Crossers Prosecuted in 'New Era' of Enforcement*, CHI. TRIB. (Nov. 5, 2017), <http://www.chicagotribune.com/news/nationworld/ct-border-crossing-prosecutions-20171105-story.html> [<https://perma.cc/RN42-NQY4>] (featuring the Streamline court in Tucson, which can accommodate as many as seventy defendants in a single hearing).

¹⁷⁵ Christina DeConcini, Op-Ed, *My Immigrant Grandfather Would Be Appalled at the 'McJustice' in the Courthouse Named for Him*, ARIZ. REPUBLIC (May 17, 2018), <https://www.azcentral.com/story/opinion/op-ed/2018/05/17/jeff-sessions-immigration-court-tucson-adulteration-justice-deconcini/618539002/> [<https://perma.cc/W3HW-G8CQ>].

¹⁷⁶ When I observed the Streamline court in San Diego in August 2018, one of the panel attorneys appearing in court told me that defense lawyers use the “Steamroller” term.

¹⁷⁷ LYDGATE, *supra* note 10, at 3.

¹⁷⁸ See FED. R. CRIM. P. 11(b)(2) (providing that “the court must address the defendant personally in open court”); *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139, 1142 (9th Cir. 2013) (finding that the mass plea proceedings under Operation Streamline violated Federal Rule of Criminal Procedure 11 and vacating the conviction). See generally Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 635–36, 667–68 (2015) (presenting orig-

severely constrained access to counsel.¹⁷⁹ Commentators also pointed out that the program unnecessarily criminalized what could be adequately dealt with by the administrative immigration system.¹⁸⁰ And, a bevy of experts questioned whether the price tag associated with the volume prosecution program could be justified given its limited deterrent effect on unauthorized migration.¹⁸¹

The U.S. Court of Appeals for the Ninth Circuit, where a substantial number of Streamline cases are processed, has also grappled with the program's shortcomings. In a 2009 case involving Tucson's Streamline court, the Ninth Circuit concluded that *en masse* questioning of Streamline defendants violated federal procedural rules that require individualized inquiry prior to entering a guilty plea.¹⁸² And, in a 2017 decision that was later reversed by the U.S. Supreme Court on mootness grounds, the Ninth Circuit found that the mass shackling of defendants in court (a practice relied upon to facilitate Streamline prosecutions) violated basic standards of due process.¹⁸³ As the

inal research showing that “current and prospective unauthorized immigrants view the U.S. immigration system as lacking in basic transparency, predictability, and rule-based qualities”).

¹⁷⁹ See Juan Rocha, *Operation Streamline and the Criminal Justice System*, ARIZ. ATT'Y, Nov. 2011, at 30, https://www.myazbar.org/AZAttorney/PDF_Articles/1111Streamline.pdf [<https://perma.cc/DUG9-MXQH>] (explaining that the Operation Streamline court appoints only one defense attorney to represent all of the defendants presented for prosecution in a single day).

¹⁸⁰ See, e.g., Morales, *supra* note 13, at 1264 (arguing that “incarceration on top of deportation is necessarily excessive because deportation has exhausted the State’s interest—there is simply nothing left for incarceration to vindicate”).

¹⁸¹ See, e.g., RANDY CAPPS ET AL., *ADVANCES IN U.S.-MEXICO BORDER ENFORCEMENT: A REVIEW OF THE CONSEQUENCE DELIVERY SYSTEM* 25 (2017), <https://www.migrationpolicy.org/sites/default/files/publications/ConsequenceDelivery-Report-FINAL.pdf> [<https://perma.cc/M32S-JQK8>] (“The high resource needs of Streamline, coupled with opportunity costs and relatively short prison sentences (six months or less), raise questions about the tradeoffs between effectiveness and efficiency in the program.”); Tara Buentello et al., *Operation Streamline: Drowning Justice and Draining Dollars Along the Rio Grande* (July 2010) (Grassroots Leadership, working paper), <https://derechos.humanosaz.net/wp-content/uploads/2017/11/Operation-Streamline-Green-Paper.pdf> [<https://perma.cc/J46L-A7X3>] (discussing the astronomical cost associated with the Streamline prosecution program and concluding that the program is ineffective); Johnson, *supra* note 13, at 867–76 (weighing the costs and benefits of immigration crime prosecution, particularly when the price of incarceration is significant). A 2015 report by DHS’s Office of Inspector General found that claims by Border Patrol about Streamline’s effectiveness failed to employ accurate empirical measurements. OIG STREAMLINE REPORT, *supra* note 162, at 8–9.

¹⁸² *United States v. Roblero-Solis*, 588 F.3d 692, 699–701 (9th Cir. 2009) (evaluating mass proceedings in which “an indistinct murmur or medley of yeses” is accepted as the guilty plea for a large group of defendants). As Michael Pinard writes in critiquing mass pleas: “The mass plea process is not a quest for truth, but it instead satiates the criminal legal system’s hunger for efficiency.” Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 133 (2020), <https://www.nyulawreview.org/wp-content/uploads/2020/04/NYULawReviewOnline-95-Pinard.pdf> [<https://perma.cc/UP9P-3EVF>].

¹⁸³ *United States v. Sanchez-Gomez*, 859 F.3d 649, 661 (9th Cir.), *cert. granted in part*, 138 S. Ct. 543 (2017), *vacated and remanded*, 138 S. Ct. 1532 (2018) (noting that the shackled defendants who brought the appeal had pled guilty to different offenses, including misdemeanor illegal entry).

Ninth Circuit warned, “[a] presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.”¹⁸⁴

The outpouring of attention surrounding President Trump’s zero-tolerance initiative has exposed the procedural deficits of these mass prosecutions to far greater scrutiny. Press accounts have featured packed courtrooms with overburdened defense attorneys. A leaked photograph of the inside of a plea proceeding in Pecos, Texas captured thirty-seven Latinx defendants crowded into a courtroom, dressed in orange jump suits and lined up in shackles.¹⁸⁵ On a hot day in the summer of 2018, more than one thousand demonstrators gathered outside the federal district court in Brownsville, Texas to protest the Streamline prosecutions happening inside the court.¹⁸⁶

These and other highly publicized moments have mobilized opposition from unexpected places. For instance, a bipartisan group of eighty-eight former U.S. Attorneys denounced the zero-tolerance policy, calling it “a radical departure from previous Justice Department policy” that is also “dangerous, expensive, and inconsistent with the values of the institution in which we served.”¹⁸⁷ Even federal court judges who presided over illegal entry cases condemned President Trump’s Streamline initiative. James Stiven, a retired U.S. Magistrate Judge for the Southern District of California, called the program a “fast-food process that sullies centuries of judicial tradition involving individualized determinations of guilt.”¹⁸⁸

Perhaps most noteworthy is the way that public defenders in San Diego have sounded an alarm regarding Streamline that has brought to light the initiative’s corrosive impact on established criminal justice procedures. Although the Southern District of California had in the past handled large numbers of

¹⁸⁴ *Id.*

¹⁸⁵ This leaked photograph was included in multiple press reports. *See, e.g.*, Alexandra Ma, *Leaked Photo Shows Mass Trial with 37 Accused Unauthorized Immigrants—Shackled Hand and Foot—Being Processed All at Once*, BUS. INSIDER (June 5, 2018), <https://www.businessinsider.com/leaked-photo-shows-alleged-37-illegal-immigrants-at-mass-trial-2018-6> [<https://perma.cc/3DR3-G7KD>]. Because cameras are generally prohibited in federal courtrooms, photographs of Streamline proceedings have not previously been available to the public.

¹⁸⁶ David Yaffe-Bellany, *More than 1,000 Rally in Brownsville to Protest Family Separations*, TEX. TRIB. (June 28, 2019), <https://www.texastribune.org/2018/06/28/crowd-more-1000-rallies-brownsville-protest-family-separations/> [<https://perma.cc/N84H-6SM9>].

¹⁸⁷ Former U.S. Attorneys, *Bipartisan Group of Former United States Attorneys Call on Sessions to End Family Separation*, MEDIUM (June 18, 2018), <https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0df0cf> [<https://perma.cc/2PK4-P3M5>].

¹⁸⁸ James Stiven, *Commentary, Mass Criminalization of Migrants via Operation Streamline Is Costly, Cruel and Unworkable Policy*, SAN DIEGO UNION-TRIB. (June 21, 2018), <https://www.sandiegouniontribune.com/opinion/commentary/sd-oe-utbg-migrants-justice-operation-streamline-2018-0621-story.html> [<https://perma.cc/8J6B-VPYL>].

felony illegal reentry cases, it had not previously embraced the mass misdemeanor Streamline process.¹⁸⁹ Carol Lam, the U.S. Attorney for the district during the G.W. Bush administration, had opposed Operation Streamline, dismissing it as “ineffective” and a symptom of a “deteriorating” criminal justice system.¹⁹⁰ As a result, San Diego never adopted a mass hearing process in magistrate court.¹⁹¹ Instead, immigration crime cases in San Diego were handled in federal district court along with other types of federal criminal matters. Defendants in these cases received the same procedural protections as in other federal cases. Defense lawyers were given time to counsel their clients, review discovery, and engage in motion practice. And judges treated each case individually, from the initial appearance through to trial or sentencing.

All of this changed after President Trump was elected. In the summer of 2018, a “Streamline” court was established for the first time in San Diego.¹⁹² Streamline moved primarily Latinx noncitizen defendants into a segregated courtroom dedicated to hearing only Section 1325 misdemeanor immigration cases.¹⁹³ Substandard procedures were applied to these segregated proceedings, including an expedited timetable, limited time to meet with counsel, and pressure to resolve the case at the initial appearance.¹⁹⁴ Unlike in other misdemeanor cases, defendants in Streamline proceedings were shackled, including during their initial meetings with attorneys.¹⁹⁵ Additionally, unlike other mis-

¹⁸⁹ See generally Bersin, *supra* note 96 (discussing the Southern District of California’s increase in the prosecution of illegal reentry during the 1990s).

¹⁹⁰ Elliot Spagat, *California, Long a Holdout, Adopts Mass Immigration Hearings*, AP NEWS (July 8, 2018), <https://apnews.com/9ad297754bdf46f6bc35c3f4a930d6ec> [<https://perma.cc/36WT-6SAR>].

¹⁹¹ For example, in fiscal year 2016, the Southern District of California handled only 1,426 immigration cases in magistrate court, compared to 12,016 in the District of Arizona and 19,272 in the Southern District of Texas. JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 2, tbl.M-2 (Sept. 30, 2016); see also Galvan, *supra* note 174 (noting that as of 2017 “[f]ederal prosecutors in California, unlike those in Arizona and Texas, have rejected Streamline, considering it an ineffective drain on resources”).

¹⁹² Kristina Davis, *San Diego Soon to Fast-Track Illegal Border Crossing Cases*, SAN DIEGO UNION-TRIB. (June 29, 2018), <https://www.sandiegouniontribune.com/news/courts/sd-me-immigration-caseload-20180629-story.html> [<https://perma.cc/C7CM-W8S5>].

¹⁹³ Letter from Reuben C. Cahn, Exec. Dir., Fed. Defs. of San Diego, to Barry Ted Moskowitz, Chief Judge, U.S. District Court, S.D. Cal. (June 22, 2018) (on file with author) (addressing “the most noxious element of the Executive’s Operation Streamline proposal” in San Diego: “its request for a separate and unequal court to judge misdemeanor immigration violations”) [hereinafter Separate but Equal Courts Cahn Letter].

¹⁹⁴ See Letter from Ruben C. Cahn, Exec. Dir., Fed. Defs. of San Diego, to the Honorable Barry Ted Moskowitz, Chief Judge, U.S. District Court, S.D. Cal. (June 4, 2018), <https://www.voiceofsan-diego.org/wp-content/uploads/2018/06/DSDI-Letter-to-Court-6.4.18.pdf> [<https://perma.cc/M8CQ-ZE5C>].

¹⁹⁵ Separate but Equal Courts Cahn Letter, *supra* note 193, at 1.

demeanants, Streamline defendants were detained as they awaited their initial court appearance.¹⁹⁶

Attorneys from the Federal Defenders of San Diego and members of the Criminal Justice Act Panel vigorously objected to the creation of a Streamline court in San Diego. At the very least, they argued, due process demanded a radical restructuring of the Streamline program that had been allowed to operate in other border districts.¹⁹⁷ For example, rather than be forced to participate in pressurized proceedings, defendants should be given sufficient time with their lawyers to build trusting relationships, benefit from defense investigation, and present relevant factors at sentencing.¹⁹⁸ And, like other misdemeanants in federal court, defendants in illegal entry cases should not be detained, or at least should be given the opportunity for a bond hearing.¹⁹⁹

These and other deficits of the Streamline program have become the subject of a momentous set of legal challenges filed by public defenders in the Southern District of California. One important line of cases focuses on the coerciveness of demanding a guilty plea after holding individuals in squalid conditions in Border Patrol stations.²⁰⁰ Claudia Hernandez-Becerra, the defendant in a case pending before the Ninth Circuit, was only eighteen years old when she was arrested and placed in a frigid Border Patrol cell—known as a “*hielera*,” Spanish for “icebox”—for three days.²⁰¹ Lights in the *hielera* were kept on twenty-four hours a day, no showers or toothbrushes were available, thin mats were used as beds, and food consisted of juice, crackers, and frozen burritos.²⁰² When Ms. Becerra was finally allowed to meet with her lawyer, she was

¹⁹⁶ *Id.*

¹⁹⁷ Letter from Reuben C. Cahn, Exec. Dir., Fed. Defs. of San Diego & Jami L. Ferrara, Representative, S.D. Cal., Criminal Justice Act Panel, to the Honorable Barry Ted Moskowitz, Chief Judge, U.S. District Court, S.D. Cal. 4 (June 22, 2018), <https://www.voiceofsandiego.org/wp-content/uploads/2018/07/BTM-Proposal06.22.18-1.pdf> [<https://perma.cc/92G9-GSHU>] [hereinafter Minimal Constitutional Requirements Cahn Letter].

¹⁹⁸ *Id.* at 1–8.

¹⁹⁹ *Id.*

²⁰⁰ *United States v. Claudia Hernandez-Becerra*, No. 18-MJ-20491-WVG-H, 2018 WL 5830041 (S.D. Cal. Nov. 7, 2018), *appeal docketed*, No. 18-50403 (9th Cir. Nov. 9, 2018). Other related cases raising similar issues are also pending. *See, e.g.*, *United States v. Bartolon-Gomez*, No. 3:18-MJ-20586-JLB-GPC, 2018 WL 5919677 (S.D. Cal. Nov. 13, 2018), *appeal docketed*, No. 18-50407 (9th Cir. Nov. 14, 2018); *United States v. Genchi-Angel*, No. 18-MJ-20277-JMA-CAB, 2018 WL 4468843 (S.D. Cal. Sept. 18, 2018), *appeal docketed*, No. 18-50353 (9th Cir. Apr. 29, 2019).

²⁰¹ Appellant’s Opening Brief at 1, *Hernandez-Becerra*, No. 18-50403 (9th Cir. Apr. 10, 2019), 2019 WL 1644608, at *1. *See generally* Mitzi Marquez-Avila, *No More Hieleras: Doe v. Kelly’s Fight for Constitutional Rights at the Border*, 66 UCLA L. REV. 818 (2019) (introducing the use of “*hieleras*” to the legal scholarship).

²⁰² Appellant’s Opening Brief, *supra* note 201, at 1, 7–9. For additional analysis of the deficits of these short-term holding facilities, see U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN DHS MANAGEMENT OF SHORT-TERM HOLD-

in tears and could barely speak.²⁰³ Attorneys argue that clients like Ms. Becerra suffer from psychological trauma after being held in such miserable conditions. Placed in desperate circumstances, they want to plead guilty to escape detention, but their lawyers question whether they can possibly make a knowing and intelligent plea that same day, as required by the program.²⁰⁴ Defense lawyers contend that Federal Rule of Criminal Procedure 11 requires a deeper and case-specific inquiry by presiding judges into circumstances which could impede a knowing and voluntary plea.²⁰⁵ In Ms. Becerra's case, for example, the judge could have conducted a fuller inquiry concerning her young age, the fact that she had never been incarcerated, and her struggle to answer the judge's questions in court.²⁰⁶

In another set of cases that attack the very legitimacy of the Streamline court process, public defenders argue that Streamline's inferior court system—which is divided along lines of race, alienage, and nationality—denies defendants “basic constitutional guarantees.”²⁰⁷ The central premise of these challenges is that established in the landmark case of *Brown v. Board of Education*: namely, that segregation of a disfavored class of people from the majority, even under circumstances that are “substantially equal,” cannot fulfill the constitutional requirement of equal protection.²⁰⁸ Oscar Chavez-Diaz, one of the first people charged under Operation Streamline in San Diego, brought such a challenge.²⁰⁹ Mr. Chavez had no criminal record or deportation history.²¹⁰ After his arrest in the summer of 2018, he was brought to a Border Patrol station where he was held in freezing conditions and not given sufficient food or water.²¹¹ Mr. Chavez was shackled as he met with his lawyer in a room with several U.S. Marshals present²¹² and was brought to court in a group with twenty-

ING FACILITIES 1–28 (2016), <https://www.gao.gov/assets/680/677484.pdf> [<https://perma.cc/KZ74-VFWT>] [hereinafter IMMIGRATION DETENTION].

²⁰³ Appellant's Opening Brief, *supra* note 201, at 48.

²⁰⁴ *Id.* at 14–21.

²⁰⁵ *Id.* at 24–50. See FED. R. CRIM. P. 11 advisory committee's notes (clarifying that the determination that a plea is knowing and voluntary “may vary from case to case, depending on the complexity of the circumstances and the particular defendant”).

²⁰⁶ Appellant's Opening Brief, *supra* note 201, at 22–24.

²⁰⁷ Minimal Constitutional Requirements Cahn Letter, *supra* note 197, at 1.

²⁰⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954); see also Separate but Equal Courts Cahn Letter, *supra* note 193 (raising concerns about the creation of a “separate but equal” court). As Carrie Rosenbaum has argued, “in spite of facial colorblindness,” enforcement of the criminal and immigration law “have a history of racially disparate enforcement.” Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 548 (2017).

²⁰⁹ Appellant's Opening Brief at 13–16, *United States v. Chavez-Diaz*, 949 F.3d 1202 (9th Cir. 2020) (No. 18-50391), 2019 WL 413093, at *13–16.

²¹⁰ *Id.* at 16.

²¹¹ *Id.*

²¹² *Id.*

five other defendants.²¹³ Although Mr. Chavez pleaded guilty, his lawyer first objected to the “entire system” of the Streamline court as a violation of equal protection.²¹⁴

On appeal, Mr. Chavez argued that the segregated Streamline court system treats defendants in ways that “shock the contemporary conscience,” including by holding defendants in freezing cells, not providing sufficient time to meet with counsel under confidential conditions, shackling defendants in pre-court meetings with counsel and in the courtroom, and denying defendants the opportunity to have their lawyers make robust objections in court.²¹⁵ These suspect procedures that apply to black and brown migrants in Streamline court are inferior to those that apply in district courts, yet the petty misdemeanors that the defendants are charged with are *less* serious than felonies prosecuted in district court. The Streamline procedures are also inferior to those that apply in the regular magistrate court handling misdemeanor criminal cases—where defendants are not detained or chained, meet freely with counsel in confidential settings, and are not pressured to resolve their case at the initial appearance. Mr. Chavez and other Streamline defendants contend that prosecutors treat them differently because of their race, national origin, and alienage. To set forth their claims of animus, defendants rely on racist comments made by President Trump, both before and after he took office.²¹⁶

Although the Ninth Circuit deemed Mr. Chavez’s equal protection claims waived by his unconditional guilty plea,²¹⁷ on remand his conviction was vacated on alternative grounds.²¹⁸ Other appeals making their way to the Ninth

²¹³ *Id.*

²¹⁴ *Id.* at 17.

²¹⁵ *Id.* at 60–62.

²¹⁶ *Id.* at 40–41 (citing to President Trump’s comments—such as complaining “Why are we having all these people from shithole countries come here?” and describing Mexicans and Central Americans as “bad hombres” and “gang members”); *see also supra* notes 54–57 and accompanying text (discussing these and other remarks made by President Trump).

²¹⁷ *Chavez-Diaz*, 949 F.3d at 1202 (concluding that Mr. Chavez’s guilty plea was knowing and voluntary and that he had waived his right to bring due process and equal protection challenges to handling of prosecution by pleading guilty unconditionally).

²¹⁸ Pursuant to *United States v. Corrales-Vazquez*, 931 F.3d 944 (9th Cir. 2019), on April 17, 2020, the government filed a motion in the lower court to dismiss the § 1325(a)(2) charge against Mr. Chavez. Motion to Dismiss, *Chavez-Diaz*, No. 3:18-MJ-20098 (S.D. Cal. July 12, 2018), ECF No. 41. While Mr. Chavez’s appeal was pending, the Ninth Circuit held in *Corrales-Vazquez* that someone like Mr. Chavez who enters through the desert should be charged with § 1325(a)(1) (entering at a place other than a port of entry), rather than § 1325(a)(2) (eluding examination and inspection). 931 F.3d at 954 (“We hold that to ‘elude[] examination or inspection by immigration officers’ in violation of § 1325(a)(2), the alien’s conduct must occur at a designated port of entry that is open for inspection and examination.”). As a result, Mr. Chavez was factually innocent of the charge against him. Many other cases that raised equal protection challenges before the Ninth Circuit were also vacated and remanded pursuant to the Ninth Circuit’s decision in *Corrales-Vazquez*. *See, e.g.*, *United States v. Robles-Arellano*, No. 19-50040, 2020 U.S. App. LEXIS 11658 (9th Cir. Apr. 13, 2020); *United States*

Circuit continue to challenge the unequal treatment of Latinx defendants and call on the government to justify its misdemeanor program as narrowly tailored to achieve a compelling government interest.²¹⁹ At bottom, these equal protection challenges question the very legitimacy of the Streamline process.

In conclusion, before President Trump's election, border enforcement operated without much public knowledge. Streamline courts adjudicated cases behind closed doors and with little media coverage. As Part II has outlined, President Trump's "new era" of immigration prosecution has brought these practices into the limelight. Although current prosecution policies have garnered support from some seeking increased border enforcement,²²⁰ they have also proven unpopular with wide sectors of the American public. Community members, judges, elected officials, clergy, public defenders, and leaders of nonprofit organizations have called the border practices of the Trump administration inhumane, cruel, and unlawful.

III. REVISITING BORDER CRIMINALIZATION

Part III examines the possibility of reforming criminal immigration law and practice. First, it surveys arguments made by scholars in the decade preceding President Trump's election that range from increasing reliance on prosecutorial discretion to ceasing border prosecutions entirely. Next, Part III considers the growing momentum behind the proposal to repeal Sections 1325 and 1326 of the federal criminal code, thereby removing from the books the very law that facilitates the systemic issues highlighted in Part II. Finally, Part III concludes by sketching how the civil immigration law could evolve in the absence of criminal sanctions for border crossing, including by developing a more robust system of graduated civil sanctions.

v. Mezo-Ixtepan, No. 19-50039, 2020 U.S. App. LEXIS 11628 (9th Cir. Apr. 13, 2020); United States v. Cano-Torres, No. 19-50038, 2020 U.S. App. LEXIS 11483 (9th Cir. Apr. 10, 2020).

²¹⁹ For example, *United States v. Ayala-Bello*, a case involving an illegal entry defendant convicted at trial, raises the equal protection challenge and is currently on appeal to the Ninth Circuit. No. 19-50366 (9th Cir. Dec. 2, 2019); *see also* United States v. Velez-Gonzalez, No. 19-50368 (9th Cir. Dec. 4, 2019) (case consolidated with *Ayala-Bello* on appeal). *See generally* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1212–19 (2017) (arguing that "traditional indigent defense representation" on individual cases can serve as a tool for influencing public debate and fueling systemic reform).

²²⁰ The Center for Immigration Studies is a conservative nonprofit organization that advocates increasing border prosecutions. For a sampling of their views on various topics related to immigration crime prosecution, *see Illegal Immigration*, CTR. FOR IMMIGRATION STUDIES, <https://cis.org/Immigration-Topic/Illegal-Immigration> [<https://perma.cc/2EJR-3UU4>].

A. Frameworks for Reform

Prior to the current political moment, legal scholars had already begun to ponder how the system for border prosecution might be reformed. These varied policy proposals provide a helpful starting point for discussion.

Immigration scholar and former government official David Martin calls for a more constrained and strategic use of criminal prosecution to enforce migration laws. His approach is rooted in a belief in the importance of an effective system for enforcing the immigration law, which he explains is necessary to sustain public confidence in America's system for lawful migration.²²¹ According to Martin, the ongoing vitality of a generous system for lawful permanent residence is dependent on providing sufficient assurance that unauthorized migration is controlled.²²² Although Professor Martin does not favor eliminating border prosecutions, he does warn that "the use of criminal sanctions needs to be carefully modulated."²²³ Martin also suggests that the definition of some criminal statutes could be narrowed and criminal sanctions could be revisited to ensure proportionate sentencing.²²⁴

Professor Mary Fan offers an alternative vision for change, informed by her view that illegal entry prosecutions result in "bafflingly wasteful expenditures" because they are a "quick and easy way to rack up massive conviction statistics to meet case processing and conviction quotas."²²⁵ "Fast and easy" immigration prosecutions, she points out, are associated with an overall decline in other types of criminal cases that federal prosecutors have traditionally pursued, including narcotics violations and white collar crime.²²⁶ As a solution, Fan advocates recalibrating the baseline for appropriate federal prosecution of illegal entry. Guidelines could be put in place so that prosecutors pursue only individuals with a preexisting criminal record.²²⁷ Properly implemented, her

²²¹ David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 411–12 (2015).

²²² David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 551 (2007); see also Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 473 (2009) (arguing that national immigration policy must balance "the goal of deterring illegal immigration against the goal of facilitating lawful immigration").

²²³ David A. Martin, *Immigration Enforcement: Beyond the Border and the Workplace*, 19 MIGRATION POL'Y INST. 1, 3 (July 2006), <https://www.migrationpolicy.org/research/immigration-enforcement-beyond-border-and-workplace> [<https://perma.cc/BL78-WEXA>].

²²⁴ *Id.* at 6–9.

²²⁵ Mary D. Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 134 (2013).

²²⁶ *Id.* at 110–11, 121.

²²⁷ *Id.* at 135. Aspects of Fan's approach were adopted by the Obama administration. In particular, by issuing directives on prosecutorial discretion, President Obama prioritized using limited enforcement resources against those who had prior criminal convictions. See Hing, *supra* note 114, at 253, 271 (discussing President Obama's approach and comparing it to President Trump's).

proposal would reallocate prosecutorial resources to those who “may be in greater need of deterrence and incapacitation and may pose a greater risk.”²²⁸ At its core, Fan’s proposal rests on the idea that “criminal punishment and its costs should not turn just on the status of being an alien.”²²⁹

Professor Victor Romero goes a step further and advocates decriminalizing illegal entry and reentry.²³⁰ According to Romero, merely crossing the border should not be treated as a crime, even for repeat border crossers, because such crimes do not include an element of specific intent.²³¹ An important caveat to this rule is that Romero believes that an unauthorized border crosser could still “be deemed a criminal” if she “engaged in an act aside from crossing the border that would constitute a crime.”²³² For example, under Romero’s approach, someone crossing the border while bringing in illegal narcotics should still be prosecuted because the act of transporting narcotics across the border constitutes a separate crime. Eliminating criminal penalties for border crossing, Romero contends, would help to “heal our racially-polarized discourse over immigration policy” and “channel scarce resources” on more serious threats, such as “those who smuggle drugs and weapons across the border.”²³³

Like Romero, Daniel Morales challenges the legitimacy of both illegal entry and reentry, but grounds his theory in core tenets of the criminal law and political theory.²³⁴ For Morales, illegal entry and reentry—what he calls “crimes of migration”—fall short of fulfilling the harm principle, a basic requirement for the criminal law.²³⁵ Because deportation ought to extinguish the state’s punitive interest, Morales argues, “incarceration on top of deportation is necessarily excessive . . . [and] there is simply nothing left for incarceration to vindicate.”²³⁶ For this and other reasons, Morales concludes that crimes of migration must not continue because they “are an illegitimate use of the criminal power.”²³⁷ Decriminalization would also, Morales points out, remove the “aura

²²⁸ Fan, *supra* note 225, at 135.

²²⁹ *Id.*; see also Fan, *supra* note 13, at 1–74 (critiquing the criminal justice system’s tendency to measure success based on the number of people prosecuted rather than based on the public values advanced by specific prosecutions).

²³⁰ Romero, *supra* note 13.

²³¹ *Id.* at 300–01.

²³² *Id.* at 275.

²³³ *Id.* at 300.

²³⁴ Morales, *supra* note 13.

²³⁵ *Id.*; see also Ana Aliverti, *The Wrongs of Unlawful Immigration*, 11 CRIM. L. & PHIL. 375 (2017) (arguing that immigration crimes are objectionable because “they fall short in fulfilling the harm principle” of criminal law).

²³⁶ Morales, *supra* note 13, at 1264.

²³⁷ *Id.* at 1323.

of moral legitimacy” that illegal entry gives to the idea that migration is “harmful or wrong.”²³⁸

As this discussion has shown, leading immigration scholars have engaged over the years in an academic debate about the appropriate use of criminal sanctions to enforce the immigration law. While some have sought to enhance prosecutorial discretion to insulate sympathetic migrants from prosecution, others have advocated ending illegal entry and reentry prosecutions entirely. This dialog about reforming the criminal immigration system parallels a broader conversation within the criminal law field regarding how to confront the ever-expanding realm of prisons, jails, and criminal codes. As Ben Levin cogently explains, although a consensus has emerged that criminal justice reform is needed, scholars frame what is wrong with the criminal legal system quite differently. Some define the problem as one of “overcriminalization” that requires shrinking an otherwise legitimate system by incarcerating fewer, while others define the problem as one of “mass incarceration” that necessitates a fundamental shift away from reliance on the criminal law.²³⁹ Borrowing from Levin’s helpful typology, an “overcriminalization” approach sees the problem at the border as one of prosecutorial overreach, while a “mass incarceration” approach focuses on the racialization of migration and other systemic inequities fueled by reliance on the criminal law. In other words, divergent views about what is wrong with the existing state of affairs invite different solutions. As the next Section develops, the swelling attention brought to the border under the Trump administration has moved this conversation about problem definition and solution into the national spotlight.

B. Repeal of Sections 1325 and 1326?

On June 20, 2018, the day that President Trump announced the “end” to family separation,²⁴⁰ the *Texas Observer* published a powerful op-ed announcing that “it’s time to decriminalize immigration.”²⁴¹ The widely circulated essay was penned by the leaders of two influential nonprofit organizations, Judy Greene, Executive Director of Justice Strategies, and Bob Libal, Executive Director of Grassroots Leadership. Greene and Libal called out the DOJ’s bor-

²³⁸ *Id.* at 1261.

²³⁹ Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262–63 (2018). For example, those who subscribe to the “overcriminalization” critique might seek to reduce sentencing exposure for marijuana possession, while those who adhere to the “mass incarceration” critique might advocate ending cash bail. *Id.* at 311–17.

²⁴⁰ See Family Separation E.O., *supra* note 140.

²⁴¹ Bob Libal & Judy Greene, *It’s Time to Decriminalize Immigration*, TEX. OBSERVER (June 20, 2018), <https://www.texasobserver.org/its-time-to-decriminalize-immigration/> [<https://perma.cc/Z84S-4KDV>].

der prosecutions as an “appalling” practice that has created “a new mass incarceration crisis.”²⁴² “The best solution,” they concluded, “is to repeal the laws that allow for this injustice in the first place.”²⁴³

In the week following the *Texas Observer* op-ed, the grassroots organizing group Mijente released a new agenda for the future of immigration policy.²⁴⁴ Ending Operation Streamline was featured as a central part of the organization’s platform.²⁴⁵ Also included as essential to any future immigration reform was the repeal of “8 U.S.C. § 1325 and 8 U.S.C. § 1326, the laws that criminalize migration and punish immigrant families.”²⁴⁶ Shortly thereafter, more than two hundred immigrant, faith, and racial and criminal justice groups came together to demand the repeal of Sections 1325 and 1326.²⁴⁷ In a letter to members of Congress, the coalition explained that the “heart-breaking separation of parents and children” had made clear that repeal is necessary.²⁴⁸

Prioritizing the decriminalization of migration marks a significant departure from the agendas of most pro-immigration groups in years past. Traditionally, the immigrant rights movement has supported a comprehensive immigration reform that carves out immigrants with criminal justice involvement from their agenda. In 1999, Peter Schuck and John Williams called the removal of so-called “criminal aliens” the least controversial of any immigration policy.²⁴⁹

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Press Release, Mijente, Leading Latinx Racial Justice Organization Releases “Free Our Future” Policy Platform in Wake of War Waged Against Immigrants (June 28, 2018), <https://mijente.net/2018/06/28/leading-latinx-racial-justice-organization-releases-free-our-future-policy-platform-in-wake-of-war-waged-against-immigrants-policy-calls-for-full-scale-decriminalization-of-immigrant/> [<https://perma.cc/VTN5-5MEL>] (announcing the release of a “comprehensive immigration policy platform” that includes a call for a “full-scale decriminalization of immigration”).

²⁴⁵ MIJENTE, FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA 3 (June 2018), https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf [<https://perma.cc/U4DM-84FH>].

²⁴⁶ *Id.*

²⁴⁷ Julie Mao, *Congress Must Decriminalize Migration in Order to End Family Separation*, NAT’L IMMIGRATION PROJECT NAT’L LAW. GUILD (July 11, 2018), http://nipnlg.org/pr/2018_12Jul_decrim-migration.html [<https://perma.cc/JQP7-W9ED>].

²⁴⁸ *Id.*; see also Letter from National Organizations to the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny Hoyer, House Democratic Majority Leader & the Honorable Kevin McCarthy, House Republican Minority Leader (June 19, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/Open-Letter-to-Congress-FINAL.pdf> [<https://perma.cc/SR2P-33LG>]; *Free to Move, Free to Stay: A New Framework on Immigration for Progressives*, UNITED WE DREAM ACTION (June 26, 2019), <https://unitedwedreamaction.org/framework-2020/> [<https://perma.cc/3FZ3-ERCT>] (bringing together a coalition of eight community groups to support a new immigration platform that includes ending “the criminalization of immigrants” by “repeal[ing] these racist policies and laws that send immigrants to prison and subsequently to their deportation”).

²⁴⁹ Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 372 (1999) (“It is hard to think of any public policy that is less controversial than the removal of criminal aliens.”).

This type of conventional wisdom has, by extension, legitimated the criminal prosecution of those who enter without permission. By moving border crossers into the “criminal” category, they are marked as those undeserving of relief.²⁵⁰

Consider, for example, President Obama’s Deferred Action for Childhood Arrivals (DACA) initiative to regularize the status of children who came to the United States through no fault of their own.²⁵¹ In the same Rose Garden speech where President Obama announced DACA, he touted that his administration was prioritizing “border security, putting more boots on the southern border that at any time in our history.”²⁵² Criminal immigration prosecutions remained at historic highs,²⁵³ underscoring the administration’s comfort with a good-bad immigrant narrative that promoted some immigrants for legalization while incarcerating others for seeking to enter.²⁵⁴ By doubling down on enforcement against those with criminal records, the Obama administration built “credibility in the push for comprehensive immigration reform.”²⁵⁵

Similar patterns of compromise are present elsewhere in immigration law. As Rachel Rosenbloom has identified, over the past few decades deportation relief for immigrant victims of crime has proliferated with bipartisan support.²⁵⁶ At the same time, these victim-focused initiatives have solidified the positioning of those convicted of crimes as destined for swift deportation.²⁵⁷ Guidance on enforcement discretion adopted during the Obama administration revealed the same fault line.²⁵⁸ Although the guidance was promoted as pro-

²⁵⁰ Susan Bibler Coutin, *The Rights of Noncitizens in the United States*, 7 ANN. REV. L. & SOC. SCI. 289, 294–99 (2011) (documenting how legal reforms have drawn “legal lines” between those with criminal convictions and other migrants).

²⁵¹ See generally Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 WASHBURN L.J. 129, 129–30, 135 (2015) (pointing out that the DACA executive action was not universal, but rather excluded many young people from qualifying for relief); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1757–801 (2009) (discussing the background of the DREAM Act, including the politics that influenced its development).

²⁵² President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/2YX5-RZ5H>].

²⁵³ See *supra* note 84 and accompanying Figure 2; *supra* note 103 and accompanying Table 1.

²⁵⁴ For a thoughtful critique of the “good vs. bad” immigrant narrative, see Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 226–34 (2012).

²⁵⁵ Rebecca Sharpless, “Immigrants Are Not Criminals”: Respectability, Immigration Reform, and Hyperincarceration, 53 HOUS. L. REV. 691, 704 (2016).

²⁵⁶ Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 770 (2018).

²⁵⁷ *Id.*

²⁵⁸ See Memorandum from Jeh C. Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t et al. 4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/2YX5-RZ5H>].

protecting deserving migrants from enforcement, it ushered in a record high number of deportations for those deemed undeserving. Illegal entry, along with traffic offenses and marijuana possession, were among the common criminal offenses that triggered deportation under these civil enforcement priorities.²⁵⁹ The Trump DOJ's prosecutions of mothers and vulnerable asylum seekers is the latest in this rising tide of constructing migrants as "criminals" and thus unworthy of lawful entry into the United States.²⁶⁰

The dramatic shift to a decriminalization stance took the national stage in the summer of 2019 when Democratic presidential candidate Julián Castro challenged all Democratic candidates to support the repeal of Section 1325. As he put it, the United States should "go back to the way we used to treat this" by regarding illegal entry as a civil violation.²⁶¹ Congressman Beto O'Rourke responded to Castro with a more modest proposal that relied on prosecutorial discretion, rather than legislative reform. According to O'Rourke, prosecutors should simply refrain from charging "any family who was fleeing violence and persecution."²⁶² But, Castro shot back, critiquing O'Rourke's prosecutorial discretion approach as ignoring the reality that the Trump administration is "using section 1325 of that Act . . . to incarcerate the parents and then separate them."²⁶³ "Your policy would still criminalize a lot of these families, your policy would still criminalize them because it does not call for the repeal of Section 1325."²⁶⁴ For Castro, "if you truly want to change the system," it is necessary to "repeal that section."²⁶⁵

cc/RCY5-6VGF]. For analysis of a precursor program to effectuate removal of immigrant gang members, see Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 321.

²⁵⁹ Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 622 (2016).

²⁶⁰ In a forthcoming article, Juliet Stumpf explores how the 2018 family separation policy pushed asylum and discretionary forms of immigration relief "out of sight and out of reach." Juliet P. Stumpf, *Justifying Family Separation*, WAKE FOREST L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587315 [<https://perma.cc/G4XF-GCZK>].

²⁶¹ *Full Transcript: Democratic Presidential Debates, Night 1*, *supra* note 16.

²⁶² *Id.* As prominent immigration scholars have argued, the on-the-ground discretion of immigration officers and local police has a profound impact on enforcement outcomes. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1833–36 (2011); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 31 IMMIGR. & NAT'LITY L. REV. 961, 962 (2010).

²⁶³ *Full Transcript: Democratic Presidential Debates, Night 1*, *supra* note 16.

²⁶⁴ Nidhi Prakash, *Beto O'Rourke Defended His Immigration Record as He Visited a Detention Center*, BUZZFEED NEWS (June 27, 2019), <https://www.buzzfeednews.com/article/nidhiprakash/beto-orourke-immigration-homestead-debates> [<https://perma.cc/7NBH-RXTV>].

²⁶⁵ *Full Transcript: Democratic Presidential Debates, Night 1*, *supra* note 16. In his published policy statement on immigration, Castro elaborated on why he believes that Section 1325 should be repealed:

During and following the opening debate, other leading Democratic candidates agreed with Castro's policy proposal to decriminalize border crossing. Congressman Cory Booker spoke out in favor on the debate stage, agreeing that "we have the power to better deal with this problem through the civil process than the criminal process."²⁶⁶ Senator Elizabeth Warren similarly supported ending criminal prosecutions for illegal entry, so as to refocus "limited resources on actual criminals and real threats to the United States."²⁶⁷ Senators Kirsten Gillibrand and Kamala Harris also both agreed border crossing should be reduced to a civil violation.²⁶⁸

This emerging consensus among many Democratic politicians closely tracks public opinion polls. The majority of Americans now oppose the way that Section 1325 is being used. For example, 62% of those surveyed by CNN in 2019 disapproved of "the way migrants attempting to cross the U.S. border are being treated by the U.S. government[.]"²⁶⁹ Moreover, 60% favored allowing refugees from Central American countries to seek asylum in the United States.²⁷⁰ A 2018 CNN poll found that 66% of respondents thought that the

This provision has allowed for separation of children and families at our border, the large scale detention of tens of thousands of families, and has deterred migrants from turning themselves in to an immigration official within our borders. The widespread detention of these individuals and families at our border has overburdened our justice system, been ineffective at deterring migration, and has cost our government billions of dollars.

Julián Castro, *People First Immigration*, JULIÁN CASTRO (Apr. 2, 2019), <https://www.julianforthe future.com/news-events/people-first-immigration/?source=medium> [<https://perma.cc/2BDQ-UWYX>].

²⁶⁶ *Full Transcript: Democratic Presidential Debates, Night 1*, *supra* note 16; see also Kevin Uhrmacher et al., *Where 2020 Democrats Stand on Immigration*, WASH. POST (Dec. 19, 2019), <https://www.washingtonpost.com/graphics/politics/policy-2020/immigration/> [<https://perma.cc/J9H9-DHMY>] (quoting U.S. Senator Cory Booker explaining that he supports civil penalties for those who cross the border illegally, but opposes criminal prosecution).

²⁶⁷ Elizabeth Warren, *A Fair and Welcoming Immigration System*, MEDIUM (July 11, 2019), <https://medium.com/@teamwarren/a-fair-and-welcoming-immigration-system-8fff69cd674e> [<https://perma.cc/CTF7-S5K5>] ("We should repeal this criminal prohibition to prevent future abuse.").

²⁶⁸ *Democratic Debate Transcript: July 31, 2019*, NBC NEWS (July 31, 2019), <https://www.nbcnews.com/politics/2020-election/democratic-debate-transcript-july-31-2019-n1038016> [<https://perma.cc/BX7W-S53X>] [hereinafter *Full Transcript: Democratic Presidential Debates, Night 2*] (quoting U.S. Senator Kirsten Gillibrand arguing that because the "law on the books" can "be so misused," border crossing "should be a civil violation and we should make sure that we treat people humanely"); Susan Jones, *Kamala Harris: No Jail for Illegal Border Crossers, 'But I Believe in Border Security'*, CNSNEWS.COM (July 16, 2019), <https://www.cnsnews.com/news/Article/susan-jones/kamala-harris-no-jail-illegal-border-crossers-i-believe-border-security> [<https://perma.cc/6XCV-NZK7>] (quoting U.S. Senator Kamala Harris stating her view that border crossing should be "a civil enforcement issue, but not a criminal one").

²⁶⁹ *Immigration/Border Security*, POLLINGREPORT.COM, <https://www.pollingreport.com/immigration.htm> [<https://perma.cc/532K-PXRZ>] (citing a CNN poll conducted by SSRS on 1,613 adults nationwide on June 28–30, 2019).

²⁷⁰ *Id.*

United States “should do everything it can” to keep families crossing the border illegally together, “even if it means that fewer face criminal prosecution.”²⁷¹ Another voter survey taken in 2019 found that 65% of all respondents (and 92% of Democrats) believed separating families was “unacceptable.”²⁷²

Senator Bernie Sanders and Democratic Presidential nominee Vice President Joe Biden have not, however, followed other Democrats in calling for repeal. Sanders has explained that he supports ending Operation Streamline and returning to a system that handles nearly all border crossings as civil violations, but he believes that criminal prosecutions should remain a tool for “security threats and extenuating circumstances.”²⁷³ In Biden’s view, the problem is not the existence of the border crossing law on the books, but rather how the law is being used by the Trump administration.²⁷⁴ Biden’s immigration platform envisions a return to exercising prosecutorial discretion, including refraining from prosecuting parents and asylum seekers for “minor immigration violations as an intimidation tactic.”²⁷⁵

Castro’s groundbreaking proposal only included repeal of illegal entry under Section 1325. Section 1326, which was part of the same initial Undesirable Aliens Act first adopted in 1929,²⁷⁶ was not discussed on the debate stage. Illegal reentry prosecutions also swelled through 2019,²⁷⁷ but they have not

²⁷¹ *Id.* (citing a CNN poll conducted by SSRS on 1,002 adults nationwide on August 9–12, 2018).

²⁷² Shibley Telhami & Stella Rouse, *New Poll: Despite Partisan Divides on Immigration, Americans Oppose Family Separation*, LAWFARE (Apr. 10, 2019), <https://www.lawfareblog.com/new-poll-despite-partisan-divides-immigration-americans-oppose-family-separation> [<https://perma.cc/NU5R-Q6JN>].

²⁷³ Uhrmacher et al., *supra* note 266.

²⁷⁴ As Vice President Joe Biden emphasized in the second democratic presidential debate, he views the problem with border prosecutions as one about prosecutorial practices, not as an issue with the law itself:

The fact of the matter is that, in fact, when people cross the border illegally, it is illegal to do it unless they’re seeking asylum. People should have to get in line. That’s the problem. And the only reason this particular part of the law is being abused is because of Donald Trump. We should defeat Donald Trump and end this practice.

Full Transcript: Democratic Presidential Debates, Night 2, supra note 268.

²⁷⁵ *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN FOR PRESIDENT, <https://joebiden.com/immigration/> [<https://perma.cc/5HDC-K4V3>].

²⁷⁶ *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551 (making reentry after a prior deportation a felony); *see also* 8 U.S.C. § 1326 (2018) (same).

²⁷⁷ The number of individuals convicted of illegal reentry has increased each year that President Trump has been in office, from 16,690 in 2017 to an all-time high of 24,530 in 2019. JUDICIAL BUSINESS OF THE U.S. COURTS, *supra* note 2, tbl.D-4 (Sept. 30, 2017–Sept. 30, 2019). DOJ officials have publicly characterized this increase in the number of felony illegal reentry prosecutions as a major achievement. William P. Barr, Attorney Gen., Opening Statement Before the House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies (Apr. 9, 2019), <https://www.justice.gov/opa/speech/opening-statement-attorney-general-william-p-barr-house-appropriations-subcommittee> [<https://perma.cc/Y2YY-NXTB>].

garnered as much national attention as the zero-tolerance prosecutions of first-time border crossers under Section 1325. Democratic politicians may consider repealing Section 1326 to be a riskier political proposition. Since 2006 the number of Americans who think it is extremely important to control the border “to halt the flow of illegal immigrants into the U.S.” has remained relatively constant, between forty-two and fifty-three percent.²⁷⁸

The New Way Forward Act proposed by Democratic members of Congress at the end of 2019 takes the bold step of repealing both Section 1325 (illegal entry) and Section 1326 (illegal reentry). The bill was sponsored by Representative Jesús García of Illinois, as well as forty-three other members of Congress, and supported by over 145 advocacy organizations and community representatives.²⁷⁹ As Congressman García noted on the House floor when introducing the bill: “We must end the labels of the ‘good’ versus ‘bad’ immigrant used to dehumanize and divide communities. At this moment in history, we are called to uphold our values of compassion, common humanity, and racial justice.”²⁸⁰ Critiquing the growing number of federal immigration crime prosecutions over the past two decades, supporters of the bill explain that such prosecutions have “fueled mass incarceration despite growing consensus that it must end.”²⁸¹ They call for ending the “assembly-line” style hearings, the separation of families at the border, and the application of “extra punishment” to those in the immigration system.²⁸²

If Sections 1325 and 1326 were both repealed, crossing the border without permission would no longer be a crime.²⁸³ Ending these illegal entry crimes would necessarily stop the prosecution of first-time border crossers who have clogged magistrate courts and endured painful separation from their families. Ending illegal reentry prosecutions would also mend the harm from the growing incarceration of Latinx migrants who return to the United States after prior

²⁷⁸ *Immigration*, GALLUP POLL, <https://news.gallup.com/poll/1660/immigration.aspx> [<https://perma.cc/GB9Z-Y9E8>].

²⁷⁹ See *Cosponsors: H.R. 5383—116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/5383/cosponsors?searchResultViewType=expanded&KWICView=false> [<https://perma.cc/9QQ9-FNWT>]; Press Release: New Way Forward Act, *supra* note 19.

²⁸⁰ Introduction of the New Way Forward Act, 165 CONG. REC. E1571–72 (daily ed. Dec. 10, 2019) (statement of Rep. Jesús G. “Chuy” García of Illinois).

²⁸¹ ASIAN AMERICANS ADVANCING JUSTICE, WHY WE NEED A NEW WAY FORWARD 3 (2019), <https://advancingjustice-aajc.org/sites/default/files/2019-12/New%20Way%20Forward%20Backgrounder%20%28F%29.pdf> [<https://perma.cc/ZU3G-ZSTZ>].

²⁸² *Id.*

²⁸³ The New Way Forward Act proposes what Alexandra Natapoff calls “full” decriminalization, meaning that it takes all of the conduct out of the criminal code. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1067–69 (2015).

deportations to reunite with family or to seek refuge.²⁸⁴ Moreover, decriminalization would restructure the role of federal prosecutors and free up their dockets to pursue more serious crimes, such as drug smuggling and gun crimes. Federal magistrate judges could return to the other important work of the federal bench and abandon the diluted application of federal procedural norms that has come to characterize the mass Streamline proceedings.

Although much of criminal law's development can rightly be characterized as a "one-way ratchet" of expanding severity,²⁸⁵ decriminalization is also part of the story. As Darryl Brown's work underscores, "when majority preferences change about conduct that is criminalized, legislatures often find their way to repealing such provisions."²⁸⁶ In the case of border crossing, the #NewWayForward platform to #DecriminalizeMigration has garnered considerable approval from some Democratic voters. A 2019 poll by NPR and PBS found that forty-five percent of Democrats thought decriminalizing border crossing was a good idea.²⁸⁷

Support for decriminalization follows in the footsteps of the demand by many immigrant rights groups to abolish Immigration and Customs Enforcement (ICE), the interior enforcement arm of DHS.²⁸⁸ The campaign to #AbolishICE swiftly gained endorsements of major nonprofit organizations²⁸⁹ and became the centerpiece of Alexandria Ocasio-Cortez's sensational ouster of Joe Crowley, the Democratic congressional incumbent in New York.²⁹⁰ Congresswoman Ocasio-Cortez's unexpected victory solidified that a platform

²⁸⁴ As Professor Cházaro has warned, the process of first prosecuting for illegal entry and later for reentry can be conceptualized as one in which the Executive Branch "makes its own inmates." Cházaro, *supra* note 259, at 613.

²⁸⁵ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

²⁸⁶ Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 274 (2007).

²⁸⁷ By comparison, only 10% of Republicans thought that decriminalizing illegal entry was a good idea. The survey was conducted by The Marist Poll, in collaboration with NPR and PBS NewsHour. See HOW THE SURVEY WAS CONDUCTED 3, http://maristpoll.marist.edu/wp-content/uploads/2019/07/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_1907190926.pdf#page=3 [<https://perma.cc/EF7U-JL6L>].

²⁸⁸ See generally Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130 (2019), https://www.yalelawjournal.org/pdf/Markowitz_AbolishICEandThenWhat_p1ypl1i9.pdf [<https://perma.cc/325E-VHEX>] (identifying a grassroots movement to abolish ICE and exploring what a new enforcement scheme might look like).

²⁸⁹ Sean McElwee, *It's Time to Abolish ICE: A Mass-Deportation Strike Force Is Incompatible with Democracy and Human Rights*, THE NATION (Mar. 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice/> [<https://perma.cc/5F5B-Y87N>] ("The call to abolish ICE is, above all, a demand for the Democratic Party to begin seriously resisting an unbridled white-supremacist surveillance state that it had a hand in creating.").

²⁹⁰ *Ocasio-Cortez Wants to Abolish ICE*, CNN POL. (June 27, 2018), <https://www.cnn.com/videos/politics/2018/06/27/alexandria-ocasio-cortez-abolish-ice-newsroom-sot-vpx.cnn> [<https://perma.cc/6HV6-XJD3>].

built on abolition of current immigration enforcement systems can draw public support, at least in Democratic strongholds. Reflecting growing momentum for the “abolish ICE” concept, in 2018 a bill was introduced in Congress to end the agency and establish a bipartisan commission to create a more humane immigration enforcement system.²⁹¹

At the same time, voters in the United States do remain deeply divided along party lines regarding immigration enforcement. While 75% of registered Republicans said illegal migration was a very big problem, only 19% of Democrats agreed.²⁹² Those who favor stronger border enforcement oppose repealing the criminal immigration laws.²⁹³ They contend that removing the criminal sanction from irregular migration would result in so-called “open borders.”²⁹⁴ Indeed, after several Democrats came forward in the presidential debates to endorse decriminalizing border crossing, President Trump’s campaign manager tweeted: “Now Democrats are for OPEN BORDERS! These debates are great,

²⁹¹ Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. (2d Sess. 2018), <https://www.congress.gov/115/bills/hr6361/BILLS-115hr6361ih.pdf> [<https://perma.cc/M3K7-BXGQ>]. A more recent grassroots movement seeks to end deportation entirely. See Movimiento Cosecha, *Stop All Deportations on Day 1*, #DIGNITY2020, <https://dignityplan2020.com/stop-deportations> [<https://perma.cc/X28A-SBX8>] (calling on politicians to “stop all deportations”); see also Angélica Cházaro, *The End of Deportation*, UCLA L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415707 [<https://perma.cc/XX7L-82W3>] (interrogating the idea of deportation abolition).

²⁹² *Little Partisan Agreement on the Pressing Problems Facing the U.S.*, PEW RESEARCH CTR. (Oct. 15, 2018), <https://www.people-press.org/2018/10/15/little-partisan-agreement-on-the-pressing-problems-facing-the-u-s> [<https://perma.cc/E5YG-QUGV>] (citing a 2018 national survey by the Pew Research Center on 10,683 registered voters).

²⁹³ For example, Juliette Kayyem, a DHS official under President Obama, opposes repeal of Section 1325 and argues in favor of “rigorous” enforcement that includes “a criminal delineation between those who come to this country through legal means and those who do not.” Juliette Kayyem, *Opinion, Decriminalizing the Border Is Not in Anyone’s Interest*, WASH. POST (July 1, 2019), https://www.washingtonpost.com/opinions/decriminalizing-the-border-is-not-in-anyones-interest/2019/07/01/27292360-9c36-11e9-85d6-5211733f92c7_story.html [<https://perma.cc/A6YX-EPAP>].

²⁹⁴ See, e.g., Congressman Bradley Byrne of Alabama, *The New Way Forward Act Is an Assault on Our Borders*, BRADLEY’S BLOG (Feb. 18, 2020), <https://byrne.house.gov/media-center/columns/the-new-way-forward-act-is-an-assault-on-our-borders> [<https://perma.cc/4NBE-QDCF>] (arguing that the New Way Forward Act has “one goal – open borders”). Although the “open borders” critique has often been used by restrictionists to critique reform efforts, scholars have offered robust arguments in favor of more open border policies. See, e.g., Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251–56 (1987) (drawing upon contemporary approaches to political theory to challenge the legitimacy of conventional arguments for strong border protections); Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 215–63 (2003) (outlining how more open border policies would help to reduce racial discrimination, promote the integration of immigrants, and provide economic benefits); Sarah Song, *Political Theories of Migration*, 21 ANN. REV. POL. SCI. 385, 388–91 (2018) (summarizing scholarly theories in favor of open borders, including appeals to the “value of freedom” and “liberal egalitarian ideals of moral equality and equality of opportunity”).

the American people can now see how far left the candidates are.”²⁹⁵ Immigration scholar Peter Schuck warned readers of *The New York Times* that Democrats have “invite[d these] charges that they favor ‘open borders’” by failing to endorse firm policies for immigration enforcement.²⁹⁶

Supporters of continued criminal enforcement argue that criminal sanctions are necessary to punish and deter illegal migration and to protect the lawful system for immigration from political attack.²⁹⁷ Conventional immigration law scholarship has for a long time assumed that criminal sanctions are necessary to “deter moral hazard” in cases where removal alone is not “an adequate remedy.”²⁹⁸ Prosecuting irregular border crossers, as Professor Kit Johnson points out, has an important “signaling effect” in that it sends a clear message that unlawful border crossing will not be tolerated.²⁹⁹ These arguments are particularly applicable in the context of repeat border crossers.

Others have characterized the deterrence rationale as deeply problematic. As K-Sue Park warns, the “commitment to spectacle” surrounding border crime prosecutions is “clearly and openly intend[ed] to harness the indirect effects of direct enforcement” by terrorizing immigrant communities living in the United States so that they “self-deport.”³⁰⁰ Eisha Jain similarly cautions that the deterrence rationale put forth by the administration imposes “systemic costs” that have been under-appreciated.³⁰¹ The painful forced separations of families inflicted as part of a prosecution policy is one of the most graphic examples of these human costs. Removing the tool of criminal prosecution for border crossing would prevent this harmful use of low-level prosecutions.³⁰² It would also, as Stephen Lee’s work underscores, help to insulate federal prosecutors from serving as the “gatekeeper” to removal.³⁰³

²⁹⁵ Brad Parscale (@parscale), TWITTER (June 26, 2019, 6:46 PM), <https://twitter.com/parscale/status/1144059402628075520> [<https://perma.cc/6AWY-F6BX>].

²⁹⁶ Peter H. Schuck, Opinion, *On Immigration, the Democrats Are Playing into Trump’s Hands*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/opinion/on-immigration-the-democrats-are-playing-into-trumps-hands.html> [<https://perma.cc/GH8V-DJYJ>].

²⁹⁷ Martin, *supra* note 221, at 412–21 (providing examples of “how widespread and visible failures of immigration enforcement, especially when they lead to rapidly rising populations of unauthorized migrants in local communities throughout the nation, create momentum for new restrictive legislation”).

²⁹⁸ Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 298–99 (2013).

²⁹⁹ Johnson, *supra* note 13, at 870–71.

³⁰⁰ Park, *supra* note 7, at 1929.

³⁰¹ Jain, *supra* note 7, at 1467–68 (elucidating why the Trump administration’s “theory of deterrence is oversimplified”).

³⁰² For additional development of the ways in which overcriminalization causes harm, see Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1281, 1281–88 (2018).

³⁰³ Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 553 (2013).

Even if Sections 1325 and 1326 were to remain in place, future reform efforts could focus on creating guidelines for exercising prosecutorial discretion, along the lines advocated by Professor Fan.³⁰⁴ Such guidelines could counsel prosecutors to forego prosecuting persons who arrive with young children or who enter the United States to seek asylum.³⁰⁵ Guidelines could also advise prosecutors to refrain from low-level border prosecutions altogether, in favor of other, more serious crimes. One important example of a federal policy of prosecutorial discretion is that of the Obama administration to not prosecute low-level marijuana violations.³⁰⁶ Citing “limited investigative and prosecutorial resources,” the DOJ policy made clear that federal prosecutors would instead focus on offenses such as interstate trafficking of marijuana and cartel and gang activity.³⁰⁷ A future border enforcement policy could follow this model, providing some level of reassurance as to how limited enforcement budgets will be allocated along the border.

Another refinement that could be advanced is a reduction in the maximum sentence for border crossing.³⁰⁸ Violations of Section 1325 can garner up to six months, while the statutory maximum for Section 1326 is currently twenty years for those who reenter after a criminal conviction and ten years for those without a criminal record.³⁰⁹ Federal judges have already rejected such lengthy sentences in their day-to-day practice of sentencing 1325 and 1326 defendants. While most illegal entry defendants receive sentences of time served,³¹⁰ the median sentence for illegal reentry in federal courts is now only six months.³¹¹ Short of repeal, reducing the statutory maximums would reflect the collective judgment of federal judges who evaluate these cases and help to ensure that judges in the future are restrained within a narrower range. Even

³⁰⁴ See Fan, *supra* note 225. Jordan Woods has called this kind of move to rely on law enforcement to refrain from enforcing the criminal law “de facto decriminalization.” Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 686–89 (2015); see also Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801 (2012) (arguing that the rule of law is advanced when prosecutors overtly state the “rules or principles that will be used in exercising prosecutorial discretion”).

³⁰⁵ Ending the prosecution of asylum seekers could also be accomplished by a narrower amendment to the criminal law. For example, the Refugee Protection Act introduced in 2019 proposes to bar the criminal prosecution of those expressing fear of persecution. Refugee Protection Act, S. 2936, Title I, Subtitle D, Protections Relating to Removal, Detention, and Prosecution, § 137 (2019).

³⁰⁶ Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys 1 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/7PMV-BF93>].

³⁰⁷ *Id.*

³⁰⁸ Reforms that simply reduce the punishment associated with a conviction are what Alexandra Natapoff calls “partial” decriminalization. Natapoff, *supra* note 283, at 1067–69.

³⁰⁹ 8 U.S.C. § 1326(b)(1), (2).

³¹⁰ See Heath, *supra* note 27.

³¹¹ See *supra* note 103 and accompanying Table 1 (median sentence for fiscal year 2018).

with a reduced statutory maximum, the DOJ could still encourage its prosecutors to seek minimal sentences, including probation, for border crossing.³¹²

C. Rethinking Civil Immigration Law

What might the civil immigration law look like if Sections 1325 and 1326 were successfully excised from the criminal code? Although border crimes may not be abolished in the short term, thinking in abolitionist terms helps to provoke deeper inquiry into alternative structures for the immigration system.³¹³ This last Section aims to clarify what would change if Sections 1325 and 1326 were repealed and also to identify some ways in which the civil immigration law, if decoupled from its criminal counterpart, might be further revised to better regulate the complexity of issues that occur at the border.

In the absence of laws criminalizing illegal entry and reentry, irregular migration would not become lawful. Instead, it would remain a civil violation of the immigration law.³¹⁴ Under the Immigration and Nationality Act, unlawful entry is subject to a civil fine of up to \$250.³¹⁵ Entering the United States without permission also makes individuals inadmissible.³¹⁶ Unauthorized entry can also subject migrants to a quick administrative removal process that does not include a hearing before an immigration judge known as “expedited removal.”³¹⁷ None of this would change with the repeal of the criminal penalties

³¹² See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 298 (2017) (arguing that, short of decriminalization, prosecutors could be pressured to reduce the length of the prison sentences they seek).

³¹³ For a timely discussion of what justice means “in abolitionist terms,” see Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019). As Amna Akbar argues, movements to change the law can “offer alternative frameworks for the way forward,” even if they ultimately fail to achieve the aimed result. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 476 (2018); see also Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017) (arguing that “an abolitionist approach” to criminal law would include reforms such as ending police stop and frisk policies and decriminalizing drug crimes).

³¹⁴ Because unauthorized border crossing is already a violation of both the civil and criminal immigration law, decriminalizing illegal entry is distinct from decriminalization efforts that are accompanied by the invention of new civil violations. See Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 4 (2016).

³¹⁵ 8 U.S.C. § 1325(b)(1) (“Any alien who is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of . . . at least \$50 and not more than \$250 for each such entry (or attempted entry) . . .”).

³¹⁶ 8 U.S.C. § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”).

³¹⁷ 8 U.S.C. § 1225(b)(1)(A)(i), (iii); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004). See generally Jennifer Lee Koh, *Anticipating Expansion, Committing to Re-*

contained in Sections 1325 and 1326. Nor would current proposals to decriminalize border crossing make federal immigration law entirely civil. Other federal immigration crimes would remain, such as bringing in or harboring aliens and fraudulent use of immigration documents.³¹⁸

For skeptics concerned about the abandonment of criminal sanctions for border crossing, an important question to consider is whether the civil immigration system could dispense graduated civil sanctions akin to those the criminal system now offers. For example, first-time entrants generally only receive time served sentences,³¹⁹ but sentences do become more severe with successive entries.³²⁰ Could the civil immigration system incorporate a similar kind of graduated structure?

The prevalence of prosecutions for border crossings has overshadowed the fact that the current civil system does already have some flexibility in terms of how the administrative sanction of deportation is meted out. For example, at the least severe end of the spectrum, an immigration judge may allow some individuals to leave “voluntarily.” Voluntary departure allows the noncitizen to avoid certain harsh consequences of a judge-issued removal order, such as bars to lawful readmission.³²¹ In addition to voluntary departure, there is a somewhat graduated structure for deportation. Depending on the reason for exclusion, a noncitizen may be permanently barred from being readmitted to the United States, or barred for shorter periods of five, ten, or twenty years.³²²

Importantly, decriminalizing border crossing could encourage exploration of a wider range of types of deportation, including the addition of mechanisms that fall short of deportation. Immigration scholar Adam Cox has argued that

sistance: Removal in the Shadows of Immigration Court Under Trump, 43 OHIO N.U. L. REV. 459, 460–63 (2017) (discussing the growing reliance on expedited removal since 1996).

³¹⁸ See, e.g., 8 U.S.C. § 1324 (prohibiting bringing and harboring certain aliens); 8 U.S.C. § 1327 (prohibiting aiding or assisting aliens to enter the United States); 18 U.S.C. § 1546 (prohibiting fraud and misuse of visas and other documents).

³¹⁹ Heath, *supra* note 27.

³²⁰ *Supra* note 103 and accompanying Table 1 (calculating average sentence by year for illegal reentry after deportation convictions); see also 8 U.S.C. § 1325(a) (providing for a sentence of up to two years for a second unlawful entry conviction).

³²¹ See 8 C.F.R. § 1240.11(b) (2019) (authorizing individuals in removal proceedings to “apply to the immigration judge for voluntary departure in lieu of removal”).

³²² See, e.g., 8 U.S.C. § 1182(a)(9)(A) (permanently barring those convicted of aggravated felonies from reentry, while limiting the time period of exclusion to five years for those previously denied entry, to ten years for those previously deported, and to twenty years for those with two or more deportations). See generally POST-DEPORTATION HUMAN RIGHTS PROJECT, RETURNING TO THE UNITED STATES AFTER DEPORTATION: A GUIDE TO ASSESS YOUR ELIGIBILITY 1, 12–13 (2011), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Returning%20to%20the%20US%20After%20Deportation-%20self-assmt%20guide_UPD.pdf [<https://perma.cc/2GST-3B55>] (providing guidance for deported individuals seeking legal reentry and explaining the different laws barring readmission as they relate to unlawful time spent in the United States).

deportation law could be revised to include a “temporary deportation rule.”³²³ Temporary deportation could give the noncitizen the right to reenter the United States after a set period of time, such as a year. Other conditions could be attached, similar to those used in the criminal system for probation. For example, a noncitizen deported after a drug conviction could be required to provide proof of successful completion of a rehabilitative program prior to applying for readmission.³²⁴

Building on Cox’s idea of temporary deportation, Professor Michael Wishnie has described a number of ways that the severity of sanctions in removal cases could be varied. For instance, in lieu of deportation, immigration judges could be allowed to give a warning or a suspended sentence of deportation.³²⁵ Civil fines could also be further developed.³²⁶ In lieu of deportation, Juliet Stumpf has proposed another form of graduated sanction: allowing immigration judges to delay privileges, such as by requiring a longer time period before a lawful permanent resident becomes eligible for citizenship, or before an undocumented migrant becomes eligible for lawful permanent residence.³²⁷ And, as Dan Kanstroom has noted, judges could be given the discretion to dispense these lesser sanctions to certain groups of individuals, such as children or those who come to the United States seeking asylum.³²⁸ The basic takeaway here is that, by borrowing from the graduated system for sanctions in the criminal justice system, policymakers could design a broader menu of options that would include intermediate sanctions short of deportation.³²⁹

Another concept that could be borrowed from the criminal justice system is that of a statute of limitations. For example, both the illegal entry and

³²³ Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 391–92 (2008).

³²⁴ *Id.*

³²⁵ Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 424–36 (2012).

³²⁶ See Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT’G REP. 264, 266, 267 (2006) (proposing a civil fine as an adequate sanction for illegal entry). As Professor Natapoff has warned, however, decriminalization reformers should exercise caution in creating new civil fines, so as to prevent turning decriminalization into “a kind of regressive economic policy masquerading as progressive penal reform.” Natapoff, *supra* note 283, at 1059–60. Any system for civil fines would also need to be consistent with the Eighth Amendment’s protection against excessive fines. See Beth A. Colgan, *Revising the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014).

³²⁷ Stumpf, *supra* note 326, at 266.

³²⁸ Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 488–92 (2015).

³²⁹ As scholar Angela Banks has put it, the sanction of deportation should be proportional. See Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1266 (2013); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1663 (2009).

reentry statutes are subject to a five-year statute of limitations.³³⁰ Research by Adam Cox and Cristina Rodríguez has clarified that civil deportation rules used to be subject to statutes of limitations.³³¹ Few grounds for removal, however, have retained a time bar.³³² The New Way Forward Act recently introduced in the House would adopt a five-year statute of limitations for civil removal proceedings.³³³ If adopted, the government would have a five-year deadline for pursuing grounds of deportability and inadmissibility.³³⁴ Reviving the concept of statute of limitations in this way would protect noncitizens from ongoing exposure to the constant threat of deportation. For example, under such a change, deportations for old criminal convictions could be time barred.³³⁵ Doing so would help to promote finality and clarity in immigration status, as well as a clear path to citizenship.

Another modest proposal for reviving the time bar concept would be to update the registry date under the Registry Act of 1929, which currently only provides a path to lawful status for individuals who have been present in the United States since January 1, 1972.³³⁶ As Donald Kerwin and Robert Warren have argued, the registry system is sorely out of date: a simple fix would be to allow legalization for those who have been present in the United States for a set term of years.³³⁷

³³⁰ Brian L. Owsley, *Distinguishing Immigration Violations from Criminal Violations: A Discussion Raised by Justice Sonia Sotomayor*, 163 U. PA. L. REV. ONLINE 1, 4 (2014), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1131&context=penn_law_review_online [<https://perma.cc/23L6-AHNL>].

³³¹ Cox & Rodríguez, *supra* note 33, at 512–15. See generally MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (William Chape et al. eds., 2004).

³³² One remnant of the former time bars is the rule subjecting lawful permanent residents to removal for a single crime involving moral turpitude, but only for crimes committed within five years of admission. 8 U.S.C. § 1227(a)(2)(A)(i)(I).

³³³ New Way Forward Act, H.R. 5383, Title II, Statute of Limitations, § 201 (2019).

³³⁴ For an in-depth discussion of how statutes of limitations could be incorporated in the deportation context, see Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 543–47 (2017).

³³⁵ For additional development of this concept of a time bar for crime-based removal, see Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 715 (2015) (“Limiting the possibility of removal to a statutorily determined period following the date of conviction would account for youthfulness, redemption, and the accumulation or strengthening of social bonds in this country over time.”).

³³⁶ Registry Act of 1929, Pub. L. No. 70-962, 45 Stat. 1512 (1929) (codified as amended at 8 U.S.C. § 1259); see also ANDORRA BRUNO, CONG. RESEARCH SERV., RL30578, IMMIGRATION: REGISTRY AS MEANS OF OBTAINING LAWFUL PERMANENT RESIDENCE (2001), <https://crsreports.congress.gov/product/pdf/RL/RL30578> [<https://perma.cc/G348-PDUL>]. See generally HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014).

³³⁷ Donald Kerwin & Robert Warren, *Fixing What’s Most Broken in the US Immigration System: A Profile of the Family Members of US Citizens and Lawful Permanent Residents Mired in Multiyear Backlogs*, 7 J. ON MIGRATION & HUM. SEC. 36 (2019).

Severed from the criminal law, immigration law could also be refined to incorporate the concept of mercy. In his trailblazing memoir which was recently made into a feature film, Alabama Equal Justice Initiative founder Bryan Stevenson argues in favor of shifting the criminal justice paradigm to embrace mercy.³³⁸ Stevenson pushes his readers to think of “justice” as requiring mercy, which he explains requires treating individuals with human dignity and appreciating the holistic set of circumstances that the individual confronts.³³⁹ In the context of criminal sentencing, practicing mercy requires abandoning mandatory sentencing regimes in favor of a system in which judges take into account personal background and context in order to reach a just sentencing outcome. In the immigration context, as Allison Tirres has shown, mercy would mean moving away from bright-line removal rules and instead evaluating individualized factors before making the threshold decision on whether someone is subject to removal.³⁴⁰ Immigration judges, like sentencing judges, could engage in a more nuanced balancing test that would weigh the severity of any conduct as well as the stake that the noncitizen has in the country.³⁴¹ Rather than treating removal as a certain sanction, a shift toward mercy would make the outcome context specific.

Restructuring the civil sanction of deportation to incorporate mercy—and making removal time-limited and graduated—are important insights that are brought into sharper relief by the movement to decriminalize border crossing. Removing the shadow of criminal prosecution would also open the door to related reforms to expand the availability of relief from deportation.³⁴² Over time, eligibility for relief has become exceedingly constrained.³⁴³ As this Article has shown, the current administration has sought to chip away even further at even the most basic forms of relief that remain, such as asylum. Thinking of the immigration system as one that is purely civil, rather than divided across civil and criminal courts, welcomes consideration of whether immigration

³³⁸ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

³³⁹ *See id.* at 3–18.

³⁴⁰ *See generally* Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 *BYU L. REV.* 1563, 1563–81.

³⁴¹ Stumpf, *supra* note 326, at 266. For additional development of these ideas, see Juliet Stumpf, *Fitting Punishment*, 66 *WASH. & LEE L. REV.* 1683, 1728–38 (2009).

³⁴² In this way, the current deportation process can be thought of as involving two steps. In the first step, the immigration judge makes the threshold decision on whether the individual is subject to removal. In the second step, the respondent who is subject to removal may seek relief in order to gain lawful status to remain in the United States. *See generally* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 *NW. U. L. REV.* 933, 957 (2015) (describing the two stages of immigration removal proceedings).

³⁴³ For a review of the ways in which Congress has reduced the availability of relief from removal, see Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 *HARV. LATINO L. REV.* 129, 146–51 (2012).

judges should be given wider discretion in going about their work. There is precedent in earlier versions of the immigration law for giving judges more latitude to weigh equities in granting relief from removal. For example, under the former Section 212(c) of the Immigration and Nationality Act, judges could weigh discretionary equities to waive the deportation of certain individuals who had lived in the United States for at least seven years.³⁴⁴ Factors such as military service, family ties in the United States, and evidence of value and service to the community were among the factors that judges considered in deciding whether to grant this form of relief.³⁴⁵ The current system for cancellation of removal,³⁴⁶ as Jill Family has persuasively shown, is far narrower.³⁴⁷ Reviving 212(c), and creating other similar discretionary relief mechanisms, would help to bring discretion and forgiveness back into the immigration law.

In conclusion, growing support for a fundamental rethinking of the criminal immigration law and its prosecution system opens new possibilities for imagining the civil immigration system. Two aspects of removal decisions are particularly ripe for review: greater discretion could be embedded into the threshold decision of whether someone is subject to removal, and relief from removal could be broadened. In addition, as this Section has developed, deportation itself could be scaled to create a wider range of civil remedies, including by offering warnings, temporary deportation, or instituting a statute of limitations. Doing so would empower decisionmakers to weigh the individual circumstances and equities of every case.

CONCLUSION

Although immigration crime has been a central feature of the federal criminal system for decades, few questioned the propriety of these prosecutions. The current moment has unveiled problematic border prosecution practices and spurred intensive critique. Among Democrats, the discussion about border enforcement has shifted from a predictable one about the proper exercise of prosecutorial discretion to one that questions the appropriateness of criminalizing migration in the first place. Issues now being debated on the na-

³⁴⁴ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952) (codified as amended at 8 U.S.C. § 1182(c)) (repealed 1997). For additional background on the development and 1997 repeal of Section 212(c), see Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 781–801 (1997).

³⁴⁵ *Yepes-Prado v. INS*, 10 F.3d 1363, 1365–66 (9th Cir. 1993).

³⁴⁶ See 8 U.S.C. §§ 1229b(a) (cancellation of removal for lawful permanent residents); 1229b(b) (cancellation of removal for non-permanent residents).

³⁴⁷ See generally Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 398–403 (2017).

tional stage concern the ways that these prosecutions threaten other core American values of due process, family unity, and racial justice.

Repealing the laws that have allowed these prosecutions to proliferate is a powerful proposal—and one that this Article has argued also invites rethinking of the civil immigration law to ensure that a more just and equitable system is in fact achieved. Immigration enforcement will no doubt remain a contested and evolving area of immigration policy, and the resolution of the pivotal debates mapped out in this Article remains uncertain. Decision making in Congress and courts, as well as in the minds of the public, will be central to how—indeed, whether—the criminal justice system will continue to manage migration.

