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## *SIDEBAR*

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### MANAGING MIGRATION THROUGH CRIME

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In recent years, an increasing number of scholars and commentators have turned their attention to the criminalization of migration in the United States.<sup>1</sup> These scholars have focused on three distinct trends: the increasingly harsh criminal consequences attached to violations of laws regulating migration,<sup>2</sup> the use of removal as an

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1. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827, 1827–32 (2007) [hereinafter Chacón, *Unsecured Borders*] (outlining “origins and consequences of the blurred boundaries between immigration control, crime control, and national security”); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. Int’l L. & Com. Reg. 639, 640 (2004) [hereinafter Kanstroom, *Criminalizing the Undocumented*] (considering “convergence between the immigration and criminal justice systems”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469, 471–72 (2007) [hereinafter Legomsky, *Asymmetric Incorporation*] (describing “growing convergence” of criminal justice and immigration control systems); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. Third World L.J. 81, 83–86 (2005) (describing consequences of interaction between criminal justice and immigration law); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 Geo. Immigr. L.J. 611, 616–20 (2003) [hereinafter Miller, *Citizenship & Severity*] (describing criminalization of immigration law); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 376–77 (2006) [hereinafter Stumpf, *Crimmigration Crisis*] (noting “intense interest” in “crimmigration law”).

2. See, e.g., Chacón, *Unsecured Borders*, supra note 1, at 1844 (noting 1996 immigration laws “impos[ed] a system of tough penalties that favor removal even in cases involving relatively minor infractions or very old crimes”); Kanstroom, *Criminalizing the Undocumented*, supra note 1, at 640 (noting post-9/11 push to criminalize “unlawful presence in the United States”); Legomsky, *Asymmetric Incorporation*, supra note 1, at 476–82 (describing expansion of immigration-related criminal offenses); Miller,

adjunct to criminal punishment in cases involving noncitizens,<sup>3</sup> and the rising reliance on criminal law enforcement actors and mechanisms in civil immigration proceedings.<sup>4</sup> One major effect of these three trends has been the incorporation of criminal law methodologies into the realm of civil immigration enforcement and adjudication. Recently, Stephen Legomsky has theorized the asymmetric nature of this incorporation.<sup>5</sup> As he explains, the “theories, methods, perceptions, and priorities” of criminal law enforcement have been incorporated into immigration proceedings, while the procedural protections of criminal adjudication have been explicitly rejected.<sup>6</sup> His analysis focuses on how the criminalization of migration is reshaping the realm of civil immigration proceedings.

In contrast, this Essay centralizes and attempts to theorize the criminal prosecutions of migration-related offenses.<sup>7</sup> Part I of this Essay describes this trend. Specifically, Part I.A highlights the ways in which the regulation of migration has increasingly become a subject of the criminal law. Part I.B discusses the explosion of migration-related criminal prosecutions over the past few years.

Part II of this Essay provides several examples of the use of criminal prosecutions in the migration context in order to explore an

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Citizenship & Severity, *supra* note 1, at 617 (describing “stiff criminal penalties” for immigration violations); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. Rev. 1557, 1589–92 (2008) [hereinafter Stumpf, *States of Confusion*] (describing imposition of criminal penalties for violations of immigration-related laws).

3. See, e.g., Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member”*, 2007 U. Chi. Legal F. 317, 321–24 [hereinafter Chacón, *Whose Community Shield?*] (describing use of revised immigration laws and removal proceedings to disrupt gangs); Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 653 (“After the criminal justice system has completed its work, the removal system begins.”); Legomsky, *Asymmetric Incorporation*, *supra* note 1, at 482–86 (describing “proliferation of new crime-related deportation grounds”); Miller, *Citizenship & Severity*, *supra* note 1, at 614 (“[C]riminal grounds for deporting non-citizens that were previously quite limited and enforced with laxity have been greatly expanded in scope and are now strictly enforced through a variety of mechanisms and institutional arrangements that have produced unprecedented cooperation between criminal and immigration law enforcement.”).

4. See, e.g., Chacón, *Whose Community Shield?*, *supra* note 3, at 339–43 (describing participation of criminal enforcement officers in immigration proceedings); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. Davis L. Rev. 1137, 1161–63 (2008) (describing increased role of state and local officials in enforcement of immigration laws); Legomsky, *Asymmetric Incorporation*, *supra* note 1, at 489–500 (describing importation of criminal law enforcement strategies to immigration law); Stumpf, *States of Confusion*, *supra* note 2, at 1595 (“Several post-September 11, 2001 federal actions have had the effect of drawing state and local police into indirectly enforcing immigration law.”); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1084–88 (2004) (discussing entry of civil immigration violations into NCIC database).

5. See generally Legomsky, *Asymmetric Incorporation*, *supra* note 1.

6. *Id.* at 472.

7. Legomsky discusses these prosecutions, but they are not central to his analysis. *Id.* at 481.

undertheorized effect of this trend, namely, that the protective features of criminal investigation and adjudication are melting away at the edges in certain criminal cases involving migration-related offenses. Part II.A explores the border-centered prosecutions of Operation Streamline and the more geographically diffuse Fast Track program aimed at felony reentries. Part II.B focuses upon the use of criminal prosecutions in worksite immigration enforcement efforts. Part II.C diagnoses the ways in which these proceedings reflect declining procedural protections in the realm of criminal prosecutions for immigration-related offenses.

As these examples make clear, not only are we seeing what Stephen Legomsky has termed the asymmetric incorporation of criminal justice norms into civil removal proceedings, but we are also witnessing the importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm.

### I. REGULATING MIGRATION THROUGH CRIME

The regulation of migration has long taken place primarily in the civil sphere.<sup>8</sup> In recent years, however, the U.S. government has increasingly handled migration control through the criminal justice system. Part I.A discusses the legislation that Congress and various state legislatures have enacted to criminalize acts associated with migration. Part I.B. describes the recent upward spike in prosecutions of these migration-related offenses.

#### A. *Creating and Enhancing Criminal Sanctions for Offenses Relating to Migration*

Since the 1980s, Congress has passed legislation subjecting more and more acts associated with migration to criminal penalties, or increasing the severity of criminal sanctions imposed for the commission of those acts.<sup>9</sup> Criminal offenses newly created in the 1980s included the hiring of unauthorized noncitizen workers,<sup>10</sup> reliance on false documents to evade employer sanctions laws,<sup>11</sup> and marriage fraud.<sup>12</sup> In the late 1980s and the 1990s, illegal reentry provisions were added and

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8. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 *Harv. L. Rev.* 1890, 1899–913 (2000) [hereinafter Kanstroom, *Hard Laws*] (discussing early history of migration regulation).

9. See sources cited *supra* note 2; see also Hiroshi Motomura, *Immigration Outside the Law*, 108 *Colum. L. Rev.* 2037, 2087–88 (2008) (“Criminalization has been the trend since the 1990s, when Congress increased penalties for existing immigration-related crimes, such as smuggling and various types of document fraud, and added several new immigration-related crimes.”).

10. Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. § 1324a (2006).

11. IRCA § 103(a).

12. Immigration Marriage Fraud Amendment of 1986 § 2(d), 8 U.S.C. § 1325(c) (2006).

strengthened,<sup>13</sup> as were various fraud provisions relating to the processes of seeking immigration benefits and citizenship.<sup>14</sup> And in 2000, penalties were raised for various offenses relating to trafficking in persons.<sup>15</sup>

Although the criminalization of migration-related offenses used to be entirely federal in nature, in recent years, states and localities have added a host of anti-loitering laws and other similar ordinances that are clearly intended to—and have been used to—facilitate the criminal prosecution of unauthorized migrants at the state and local level.<sup>16</sup> One example is Arizona’s version of the identity theft law. The crime—entitled “Taking identity of another person or entity”—creates criminal culpability for the use of an alternate identity whether or not the defendant knows that he is using the identity of an actual person and whether or not another person with such an identity actually exists.<sup>17</sup> This offense, which does not require theft of an actual identity, can be deployed as a means of prosecuting noncitizens who have used false identities to obtain employment in cases where there is no loss to anyone as a result of the use of that identity. Several other states have also

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13. See, e.g., Anti-Drug Abuse Act of 1988 § 7345, 8 U.S.C. § 1326 (2006) (increasing criminal sentences for unlawful reentry); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023 (codified as amended at 8 U.S.C. § 1326(b)(1) (2006)) (criminalizing reentry after commission of three or more enumerated misdemeanors).

14. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C. §§ 213–215, 110 Stat. 3009 (codified at 8 U.S.C. § 1324c(e) (2006), 18 U.S.C. § 1546(a) (2006), and 18 U.S.C. § 1015(e)–(f) (2006)).

15. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *Fordham L. Rev.* 2977, 2992–93 (2006) [hereinafter Chacón, *Misery and Myopia*] (discussing criminal provisions added or enhanced by Trafficking Victims Protection Act (TVPA) of 2000).

16. See Legomsky, *Asymmetric Incorporation*, *supra* note 1, at 496–98 (discussing IIRIRA encouragement of “use of state and local criminal enforcement machinery to bolster the INS civil immigration enforcement efforts”); Karla Mari McKanders, *Welcome to Hazelton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 *Loy. U. Chi. L.J.* 1, 6–13 (2007) (discussing municipal legislation in Hazelton, PA, Altoona, PA, and San Bernardino, CA); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 *U. Chi. Legal F.* 27, 31–33 (“[F]rom January through June, 2006, almost 500 immigration-related bills had been introduced in state legislatures, and 44 had been enacted, in 19 states.”); Christina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *Mich. L. Rev.* 567, 581–90 (2008) (discussing examples in Illinois, North Carolina, and Iowa); Stumpf, *States of Confusion*, *supra* note 2, at 1596–600 (discussing examples of local criminal enforcement in North Carolina, Illinois, Oklahoma, California, Wyoming, New York, and Pennsylvania); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 *N.C. L. Rev.* 1619, 1642–49 (2008) (using Town of Hazelton in Eastern Pennsylvania to discuss theory of indirect regulation at local level).

17. See *Ariz. Rev. Stat. Ann.* § 13-2008 (Supp. 2008) (criminalizing “Taking identity of another person or entity; knowingly accepting identity of another person; classification”); § 13-2009 (criminalizing “Aggravated taking identity of another person or entity; classification”); § 13-2010 (criminalizing “Trafficking in the identity of another person or entity; classification”).

enacted provisions that mirror federal prohibitions on immigration crimes like smuggling and harboring of unauthorized migrants and false proof of citizenship or immigration status.<sup>18</sup> These statutes take advantage of federally created immigration categories to create a space for local enforcement.<sup>19</sup>

### B. *Increasing Prosecutions for Immigration Offenses*

Related to, but even more striking than the steady increase in migration-related criminal offenses is the rising tidal wave of immigration-related criminal prosecutions of the past decade. After remaining relatively flat in the period from 1986 to 1996, the number of immigration prosecutions almost quadrupled over the next ten years.<sup>20</sup> The prosecution of migration-related offenses exploded in the wake of September 11, 2001. In 2004, U.S. magistrates convicted 15,662 noncitizens of immigration crimes, and U.S. district court judges convicted another 15,546.<sup>21</sup> The numbers continued to climb thereafter.<sup>22</sup> Since 2004, immigration prosecutions have topped the list of federal criminal prosecutions, outstripping federal drug and weapons prosecutions, and dwarfing many other forms of federal criminal prosecutions.<sup>23</sup> This trend has continued even with the change in presidential administrations.<sup>24</sup> And, as previously noted, states and localities—long thought to be excluded from the enforcement of

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18. See Stumpf, *States of Confusion*, supra note 2, at 1599 n.224 (citing examples from Oklahoma, Tennessee, California, Oregon, and Wyoming). An expanding number of states and localities have also targeted employers and landlords who hire or enter into contracts with unauthorized migrants. See *id.* (discussing ordinances in Escondido, California, Suffolk County, New York, and Hazleton, Pennsylvania); see also McKanders, supra note 16, at 6–13 (discussing ordinances in Hazleton, PA, Altoona, PA, and San Bernardino, CA).

19. See Su, supra note 16, at 1642 (describing trend as “indirect regulations of immigration”).

20. TRAC, *Graphical Highlights: DHS Criminal Enforcement Trends (2005)*, at <http://trac.syr.edu/tracins/highlights/v04/dhstrendsG.html> (on file with the *Columbia Law Review*).

21. TRAC, *Graphical Highlights: Offenses Differ by Court (2005)*, at <http://trac.syr.edu/tracins/highlights/v04/dhsoffcourtG.html> (on file with the *Columbia Law Review*). The vast majority of these prosecutions are for illegal entry and illegal reentry. *Id.*

22. Spencer S. Hsu, *Immigration Prosecutions Hit New High*, *Wash. Post*, June 2, 2008, at A1.

23. TRAC, *New Findings: Department of Homeland Security (2005)*, at <http://trac.syr.edu/tracins/latest/131/> (on file with the *Columbia Law Review*) (“[I]mmigration matters now represent the single largest group of all federal prosecutions, about one third (32%) of the total. By comparison, narcotics and drugs, for many years the government’s dominant enforcement interest, dropped to about a quarter of the total (27%) and weapons matters to slightly less than one out of ten (9%).”).

24. TRAC, *ICE Criminal Prosecutions Continue to Rise Under Obama (2009)*, at <http://trac.syr.edu/immigration/reports/216/> (on file with the *Columbia Law Review*) (“[A]t least through the first five months of the Obama Administration there has been no let up in the increase in criminal prosecutions as a result of ICE’s enforcement activities.”).

immigration law—have found ways to use their own criminal laws to supplement these federal prosecutions.

These trends have attracted the notice of immigration scholars,<sup>25</sup> but have not received much concerted attention from criminal law scholars. Indeed, the restoration of some semblance of rationality to the discourse on the war on crime has perhaps drawn attention away from the parallel trend whereby the tools formerly used to fight the war on crime are increasingly put to use against noncitizens.<sup>26</sup> The lack of attention to the unprecedented criminalization of migration by scholars of criminal law and procedure is unfortunate because, like the war on drugs that preceded it,<sup>27</sup> the emerging use of the criminal justice system to attack the social problem of unauthorized migration carries with it distinct procedural and social consequences that are worthy of sustained attention. In the next Part, I provide a few examples to illustrate this point.

## II. DECLINING PROCEDURAL PROTECTIONS IN THE CRIMINAL SPHERE

The well-known constitutional maxim that deportation (now “removal”)<sup>28</sup> is not punishment provides longstanding precedent for

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25. See, e.g., Chacón, *Unsecured Borders*, *supra* note 1, at 1847 (describing “new enforcement actions that . . . feed and fuel the notion of dangerous classes of aliens”); Legomsky, *Asymmetric Incorporation*, *supra* note 1, at 479 (noting escalation of immigration-related criminal prosecutions beginning in 1980s); see also Stumpf, *The Crimmigration Crisis*, *supra* note 1, at 388 (“For the first time, immigration prosecutions outnumber all other types of federal criminal prosecutions, including prosecutions for drugs and weapons violations.”); Abby Sullivan, Note, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 *Hastings Race & Poverty L.J.* 101, 117 (2009) (providing statistics showing “notable leap” in immigrants serving federal prison terms).

26. For examples of literature that examine the former phenomenon, see *After the War on Crime 2* (Mary Louise Frampton, Ian Haney López & Jonathan Simon eds. 2008).

27. For discussion of the procedural and social consequences of the war on drugs, see, e.g., Erik Luna, *Drug Exceptionalism*, 47 *Vill. L. Rev.* 753, 754–57 (2002) (discussing procedural consequences of war on drugs); Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 340–42 (1998) (addressing social impact of procedural changes); William J. Stuntz, *Local Policing After the War on Terror*, 111 *Yale L.J.* 2137, 2160 (2002) (noting war on crime transformed criminal procedure and hypothesizing that war on terror will do same); Loïc Wacquant, *The Place of the Prison in the New Government of Poverty*, *in After the War on Crime*, *supra* note 26, at 27 (discussing social consequences of mass incarceration).

28. Until 1996, immigration proceedings to prevent noncitizens from entering the country were termed “exclusion” proceedings, while proceedings to remove a noncitizen that had already entered the country were termed “deportation” proceedings. See Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 420–21 (5th ed. 2009). IIRIRA consolidated exclusion and deportation, and labeled the resulting proceedings “removal” proceedings. IIRIRA, Pub. L. No. 104-208, §§ 304, 308, 110 Stat. 3009, 3009–597 (codified at 8 U.S.C. § 1324c(e) (2006), 18 U.S.C. § 1546(a) (2006), and 18 U.S.C. § 1015(e)–(f) (2006)) §§ 304, 308. Now, 8 U.S.C. § 1229a(3) indicates that the *removal* proceedings defined in that section are for determining “whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”

important legal distinctions between civil immigration proceedings and criminal proceedings.<sup>29</sup> Noncitizens in removal proceedings are not entitled to counsel at the government's expense.<sup>30</sup> Evidence obtained in violation of a noncitizen's constitutional rights generally is not subject to suppression in civil removal proceedings.<sup>31</sup> And immigration detention—which is also not legal “punishment”—is not subject to the same constitutional constraints as criminal detention.<sup>32</sup> These distinctions have frequently caused immigration attorneys to yearn for the constitutional protections of criminal proceedings,<sup>33</sup> even while acknowledging the inadequacies of those protections.

Unfortunately, recent developments suggest that the lower standards of procedural protections that apply in removal proceedings have made *ultra vires* incursions into the criminal realm. For purposes of this Essay, a few examples suffice to illustrate the problem. Part II.A outlines two programs aimed at addressing the crimes of entry without inspection and felony reentry. Part II.B discusses prosecutions arising out of a worksite raid. Part II.C addresses the declining procedural protections in the realm of criminal prosecutions for migration-related offenses.<sup>34</sup>

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29. See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (distinguishing hard labor, which is punishment, from deportation, which is not); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (suggesting congressional power with regard to deportation is virtually limitless); see also Kanstroom, *Hard Laws*, *supra* note 8, at 1895 (discussing and contesting *maxim*).

30. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

31. See *id.* at 1050 (holding exclusionary rule generally does not apply in deportation proceedings, but could apply if constitutional violations were “egregious”). The Court also discussed the possibility of applying the exclusionary rule in removal proceedings if violations became “widespread.” *Id.* For arguments that this threshold has been reached, see Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 *Wis. L. Rev.* 1109, 1109 (arguing that “constitutional violations by immigration officers have become . . . geographically and institutionally widespread in the years since *Lopez-Mendoza*”); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 *U. Pa. J. Const. L.* 1084, 1114 (2004) (noting that “[u]nder the logic of *Lopez-Mendoza* itself, the exclusionary rule may now be appropriate in immigration proceedings” given widespread evidence of racial profiling in immigration enforcement).

32. Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 *Loy. L. Rev.* 149, 150 (2004) (discussing uses of immigration detention since September 11, 2001 to circumvent constitutional limitations on detention).

33. See, e.g., Burch Elias, *supra* note 31, at 1114 (arguing for adoption of exclusionary rule in removal proceedings); Wishnie, *supra* note 31, at 1114 (same).

34. Not discussed here, but also relevant, is the development of case law concluding that certain undocumented migrants in the United States—such as felony reentrants—are not entitled to the protections of the Fourth Amendment at all. See, e.g., *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1273–74 (D. Utah 2003) (denying motion for suppression of evidence under Fourth Amendment due to alien defendant's “lack of substantial sufficient connection” to United States); see also M. Isabel Medina, *Exploring the Use of the Word “Citizen” in Writings on the Fourth Amendment*, 83 *Ind. L.J.* 1557 (2008) (discussing Fourth Amendment jurisprudence that incorrectly suggests right is limited to citizens).

### A. *Criminal Prosecutions for Unlawful Entries*

Because there are hundreds of thousands of unauthorized border crossings each year,<sup>35</sup> prosecuting every misdemeanor unlawful border crossing would require a prohibitive outlay of additional governmental resources. Nevertheless, in recent years the Department of Justice (DOJ) has made an effort to significantly increase the number of immigration prosecutions.<sup>36</sup> Consequently, the number of such prosecutions ballooned—from just over 18,000 in 2001 to over 35,000 in 2007.<sup>37</sup>

1. *Operation Streamline*. — A significant portion of these prosecutions have taken place under the auspices of Operation Streamline.<sup>38</sup> Under the Operation Streamline program, all unlawful entrants interdicted by Customs and Border Protection (CBP) in a designated sector of the border region are criminally prosecuted.<sup>39</sup> In Tucson, Arizona, for example, about fifty to one hundred defendants are prosecuted for illegal entry every single day.<sup>40</sup> The picture is similar in

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35. Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Ctr., Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow, at i (2008), available at <http://pewhispanic.org/reports/report.php?ReportID=94> (on file with the *Columbia Law Review*) (“[I]nflows of unauthorized immigrants averaged 800,000 a year from 2000 to 2004, but fell to 500,000 a year from 2005 to 2008 with a decreasing year-to-year trend”).

36. John Grasty Crews, II, The Executive Office for United States Attorneys’ Involvement in Immigration Law Enforcement, U.S. Attorney’s Bull., Nov. 2008, at 1, 2, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5606.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5606.pdf) (on file with the *Columbia Law Review*) (describing “increase[d] misdemeanor prosecutions along the southwest border”).

37. *Id.*

38. See, e.g., Press Release, U.S. Customs & Border Prot., Operation Streamline Nets 1,200-Plus Prosecutions in Arizona (June 24, 2007), available at [http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/archives/2007\\_news\\_releases/072007/07242007\\_3.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/072007/07242007_3.xml) (on file with the *Columbia Law Review*) (noting 1,200 of 2,800 immigration prosecutions in Yuma sector of Arizona took place under auspices of Operation Streamline).

39. The designated sector is not fixed, but changes over time, and usually covers a fifteen to twenty mile stretch of the border region. The notion is that all entrants in that sector will be prosecuted, but because available criminal detention facilities (and the courts) are not designed to accommodate such a mass of pretrial inmates, apprehended individuals who pose particular challenges (such as women and individuals who speak languages other than Spanish) are often released without being prosecuted. Telephone Interview with Jon Sands, Fed. Pub. Defender, Dist. of Ariz. (Oct. 21, 2009) [hereinafter Sands Interview] (notes on file with the *Columbia Law Review*).

40. *Id.*; see also *United States v. Roblero-Solis*, No. 08-10396, 2009 WL 4282022, at \*1 (9th Cir. Dec. 2, 2009) (describing one particular mass plea agreement and noting that “in twelve months’ time the court has handled 25,000” of these pleas); Brief of Defendant-Appellants at 6, *United States v. Roblero-Solis*, Nos. 08-10396, 08-10397, 08-10466, 08-10509, 08-10512, 08-10543 (consolidated) (9th Cir. Apr. 6, 2009) (on file with the *Columbia Law Review*) [hereinafter *Roblero-Solis* Brief] (describing Streamline plea proceeding); Oversight Hearing on the Executive Office for United States Attorneys, Before the H.R. S. Comm. on Commercial & Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 10 (2008) (Statement of Heather E. Williams, Federal Public Defender, District of Arizona), available at <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf> (on file with the *Columbia Law Review*) [hereinafter Williams Testimony] (tracking prosecution caseloads after



other jurisdictions where Streamline has been implemented.<sup>41</sup> During these proceedings, defense counsel represents anywhere from six to eight defendants to as many as thirty or forty defendants.<sup>42</sup> Defense counsel typically converses briefly with each defendant to establish whether they might have any defenses (such as citizenship, authorization to enter, or claims of entering pursuant to a lawful inspection), but if no such issue is raised, counsel generally participates in the entry of mass pleas on behalf of his or her multiple clients.<sup>43</sup>

2. *“Fast Track” Proceedings.* — Illegal entry cases are not the only cases fueling the upward spiral in immigration-related prosecution. Previously removed individuals who are apprehended after returning to the United States can be charged with felony reentry—a crime that now carries a sentence of up to twenty years if the prior removal was a result of conviction for an aggravated felony.<sup>44</sup> Felony reentry prosecutions and convictions are already rapidly on the rise throughout the United States.<sup>45</sup> In districts that demonstrate to the DOJ that they have “an exceptionally large number” of illegal reentry cases that will “significantly strain[]” prosecutorial resources, the DOJ can authorize prosecutors to offer “Fast Track” sentences in illegal reentry cases that are significantly below the federal guidelines.<sup>46</sup> As in the Streamline context, the relatively light sentences generate ready pleas from the vast majority of those apprehended and charged with felony reentry.

#### B. *Postville: Aggravated Identity Theft Pleas*

The routinized mass plea agreements that characterize border justice are not limited to the southern border. Attorneys from ICE and CBP who have been cross-designated as “Special Assistant United States

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implementation of Operation Streamline); David Bacon, *Railroading Immigrants*, *The Nation*, Oct. 6, 2008, at 20 (same).

41. See Williams Testimony, *supra* note 40, at 5–7 (discussing developments in Del Rio, TX, Laredo, TX, and Yuma, AZ); see also David McLemore, *Border Patrol Gets Tough in Laredo*, *Dallas Morning News*, Nov. 1, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories/110207dntexplaredo.3584a01.html> (on file with the *Columbia Law Review*) (describing twenty-seven defendants in South Texas Streamline prosecution “lined up three deep” and entering plea in unison after brief discussion with federal defender).

42. Sands Interview, *supra* note 39.

43. *Id.*; see also *Roblero-Solis*, 2009 WL 4282022, at \*2 (describing one such mass plea agreement); *Roblero-Solis* Brief, *supra* note 40, at 10–14 (describing mass plea system). Sentencing also takes place en masse, in smaller groups of fifteen or twenty. *Id.* at 15.

44. 8 U.S.C. § 1326 (2006).

45. See, e.g., TRAC, *Immigration Convictions for July 2009*, at <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyjul09/gui/> (last visited Nov. 13, 2009) (on file with the *Columbia Law Review*) (noting convictions under § 1326 comprise about ten percent of convictions by magistrate judges for immigration violations).

46. See Alison Seigler, *Disparities and Discretion in Fast-Track Sentencing*, 21 *Fed. Sent’g Rep.* 299, 299, 303 (2009) (noting DOJ arguments in favor of Fast-Track program). One result of the program is massive sentencing disparities between Fast-Track and non-Fast-Track jurisdictions. *Id.* at 299.

Attorneys” (SAUSAs) have been assigned to the southern border regions to assist with illegal entry and felony reentry prosecutions, but they have also been dispatched to assist in criminal prosecutions at the sites of interior workplace raids<sup>47</sup> like the one that took place at the Agriprocessors plant in Postville, Iowa on May 12, 2008.<sup>48</sup>

Of the approximately 1,000 workers in the Postville plant, ICE officers arrested about 390 workers on the day of the raids.<sup>49</sup> A number of these arrestees were released for humanitarian reasons, but the rest—just over 300 people—were detained for prosecution.<sup>50</sup> Over the course of the next few days, 297 of them pled guilty to aggravated identity theft based on their use of false documents to obtain employment.<sup>51</sup>

In reality, many of those who pled guilty to aggravated identity theft probably did not satisfy the *mens rea* requirement of the charge because they had no knowledge that they were taking the identity of an existing person. The legal soundness of charging identity theft in cases where there is no evidence of such knowledge was in doubt even at the time of the Postville raids, and less than two years after these events, the Supreme Court affirmed the lower courts that had required such knowledge as an element of the federal identity theft provision.<sup>52</sup>

As with the border prosecutions, however, the government proceeded on the theory—in hindsight, a seemingly erroneous one—that few of the arrestees would have valid legal defenses to the charges. Yet the combined threat of lengthy pretrial detention, coupled with the threat of a two-year prison sentence, prompted almost all of the arrestees to plead guilty in exchange for a five-month sentence.<sup>53</sup> The defendants who pled guilty were also ordered removed by the same judge even though the provisions of immigration law allowing for such judicial orders of removal did not actually apply in these cases.<sup>54</sup> The Postville

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47. Crews, II, *supra* note 36, at 3.

48. Nigel Duara, William Petrosky & Grant Schulte, Claims of ID Fraud Lead to Largest Raid in State History, *Des Moines Reg.*, May 12, 2008, available at <http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20080512/NEWS/80512012/1001> (on file with the *Columbia Law Review*).

49. Erik Camayd-Freixas, Interpreting After the Largest ICE Raid in US History: A Personal Account, 7 *J. Latino Stud.* 123, 125 (2009). Warrants existed for an additional 300 workers who were not present at the time of the raid and were not arrested. *Id.*

50. *Id.*

51. See Julia Preston, 270 Illegal Immigrants Sent to Prison in Federal Push, *N.Y. Times*, May 24, 2008, at A1 (“The unusually swift proceedings, in which 297 immigrants pleaded guilty and were sentenced in four days, were criticized by criminal defense lawyers, who warned of violations of due process.”).

52. *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1888 (2009) (holding aggravated identity theft statute requires showing that defendant knew identification used belonged to another person).

53. Camayd-Freixas, *supra* note 49, at 5. But cf. Peter R. Moyers, Butchering Statutes: The Postville Raids and the Misinterpretation of Federal Criminal Law, 32 *U. Seattle L. Rev.* 651, 673–74 (2009) (taking issue with Camayd-Freixas’s conclusion that pleas were “coerced,” noting that this was not true in strict legal sense, although pleas “were the product of a subtle systemic coercion”).

54. Moyers, *supra* note 53, at 688 (noting entire plea arrangement relied upon

prosecutions are the clearest example to date of the ways in which mass plea agreements can be deployed in immigration-related prosecutions even outside of the border context.

### C. *Diagnosing the Harms*

Arguably, the mass plea agreements used as a means of migration control can do little harm since many defendants probably have no good legal defenses to the charges, particularly in cases involving entry without inspection or felony reentry. Moreover, most defendants who have valid defenses such as derivative citizenship or an invalid prior removal order will presumably be identified by the defenders who meet briefly with the client prior to entry of the plea.<sup>55</sup> Nevertheless, even if these assumptions are true, these mass plea proceedings have a corrosive effect on the administration of justice. I address three specific problems here, but there are many others.<sup>56</sup>

First, this approach ensures that abuses that take place at the stage of investigation and detention are not addressed by the courts. For example, with regard to Operation Streamline, it may be fair to assume that many of the arrests made by CBP officials comport with CBP's internal regulations and the requirements of the Fourth Amendment, but that is certainly not always the case.<sup>57</sup> Yet, when allegations of misconduct surface in the context of Streamline's mass plea agreements, the affected migrant is generally released and charges dropped—otherwise, the government has to take a border patrol officer off the line to testify.<sup>58</sup> With thousands of potential defendants crossing the border each day, it is simply easier to drop charges against one migrant than defend against allegations of constitutional violations.<sup>59</sup> From a resource perspective, this makes perfect sense. The problem is that it removes any

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misinterpretations of federal identity theft provision and relevant removal provisions); see also Sioban Albiol, R. Linus Chan & Sarah J. Diaz, *Re-Interpreting Postville: A Legal Perspective*, 2 *DePaul J. Soc. Just.* 31, 64 (2008) (arguing reliance on judicial removal provision of immigration law was inappropriate in these cases).

55. The amount of time spent by an attorney with a particular client varies. In Arizona, public defenders typically represent six or seven defendants at each Streamline hearing and are able to spend around fifteen minutes talking to each client before a plea is entered. Williams Testimony, *supra* note 40, at 4; Sands Interview, *supra* note 39. Resources are stretched more thinly in places like the Southern District of Texas, where there are fewer panel lawyers to represent Streamline defendants, and defense counsel can represent as many as thirty to forty defendants in a proceeding. See Sands Interview, *supra* note 39; see also McLemore, *supra* note 41 (“27 people were brought before U.S. Magistrate Adriana Arce-Flores to enter a plea for misdemeanor illegal entry. A federal public defender visited briefly with each one as they lined up three deep . . .”).

56. See Williams Testimony, *supra* note 40, at 10–16 (listing numerous administrative costs, health risks and potential constitutional violations resulting from Streamline system).

57. See, e.g., *United States v. Rangel-Portillo*, No. 08-40803, 2009 WL 3429563, at \*5 (5th Cir. Oct. 27, 2009) (holding CBP lacked reasonable suspicion to stop defendant's car and therefore conducted illegal search).

58. Sands Interview, *supra* note 39.

59. *Id.*

possibility of deterrence through suppression in the course of criminal proceedings. Rogue agents have a much greater chance of non-detection in this system, particularly because there is almost no chance of an impoverished migrant bringing—much less winning—a civil suit from outside of the country after removal.

Second, the proceedings engage the justice system in a process that is, at best, tremendously dehumanizing. Individuals picked up along the border, many of them who have been in the elements for some time, are brought in shackles en masse to a courthouse after a period of detention (usually overnight), often in the same clothes they wore over the course of their journey.<sup>60</sup> Their only individualized contact in a foreign criminal justice system is a very brief conversation with a public defender. These prosecutions have already changed the face of federal prisons. As a result of aggressive immigration prosecutions, Latinos are increasingly overrepresented in U.S. prisons.<sup>61</sup> The “browning” of federal prisons<sup>62</sup> ironically feeds the erroneous but rampant perception that immigrants have a higher propensity to commit crimes,<sup>63</sup> thus generating a feedback loop of popular pressure that drives even more aggressive immigration enforcement.<sup>64</sup>

Finally, the group setting of the Streamline and Postville style processes creates an inherently pressured situation where individuals may well be reluctant to speak up to raise individual concerns. Such an effort would be an aberration and would seem to run contrary to the preferences of judges seeking to run expedient proceedings.<sup>65</sup> Moreover, even if most pleas are legitimate, serious questions remain as

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60. One visitor to the courthouse recalls being told by the bailiff to sit far away from the mass of defendants because of “the smell.” Interview with Doralina Skidmore, President, Immigration Law Student Ass’n, Univ. of Ariz., in Tucson, Ariz. (Oct. 3, 2009). Defendants “can smell pretty ripe.” Sands Interview, *supra* note 39.

61. Mark Hugo Lopez & Michael T. Light, Pew Hispanic Ctr., *A Rising Share: Hispanics and Federal Crime*, at i (2009), available at <http://pewhispanic.org/files/reports/104.pdf> (on file with the *Columbia Law Review*) (noting by 2007, Hispanics accounted for forty percent of federal prisoners, which was triple their representation in general population, and tracing trend to rise in immigration prosecutions).

62. Ian Haney-López, *Post-Racial Racism: Policing Race in the Age of Obama* 133 (U.C. Berkeley Pub. Law Research Paper No. 1418212, 2009), available at <http://ssrn.com/abstract=1418212> (on file with the *Columbia Law Review*).

63. See, e.g., Ruben G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, Migration Information Source, June 2006, at <http://www.migrationinformation.org/Feature/display.cfm?ID=403> (on file with the *Columbia Law Review*) (finding immigrants have lower rates of criminal convictions than native-born Americans).

64. See Chacón, *Whose Community Shield?*, *supra* note 3, at 348–49 (discussing ways in which migrants are perceived as criminals and how those perceptions increase support for harsh immigration laws); see also Legomsky, *Asymmetric Incorporation*, *supra* note 1, at 507 (describing disconnect between reality of immigrant propensity toward criminal behavior and public opinion polls).

65. Williams Testimony, *supra* note 40, at 4.

to whether all of these pleas are actually “considered and intelligent.”<sup>66</sup>

On December 2, 2009, the Ninth Circuit recognized some of these problems, concluding that the mass plea agreement procedures of Operation Streamline violated Federal Rule of Criminal Procedure 11, which requires the court to “address the defendant personally in open court . . . and determine that the plea is voluntary.”<sup>67</sup> Reviewing the mass plea bargaining practice of Operation Streamline, the court concluded that “[n]o judge, however conscientious could have possessed the ability to hear distinctly and accurately fifty voices at the same time.”<sup>68</sup> Nevertheless, in the absence of a finding of prejudice, the convictions on appeal were sustained.<sup>69</sup> So while an appellate court has recognized that Rule 11 violations are taking place on a massive scale, it has concluded that, absent a showing of individual prejudice, the court will not intervene to correct the problem.

Even by the low standards of the American plea bargaining system, the proceedings discussed in this Essay seemingly lack the indicia of basic fairness that the Constitution and federal procedural rules purport to provide in criminal prosecutions. Yet these proceedings have endured a change in administration, and have reshaped the federal criminal docket. Now, courts are showing little inclination to upset these practices, despite their acknowledged procedural flaws.

#### CONCLUSIONS: A CAUSE FOR CONCERN

The retooling of the criminal justice system to manage migration has resulted in some troubling trends. In this brief Essay, I have discussed some features of the plea bargaining systems by which immigration convictions are obtained. Regardless of what one thinks of current restrictions on legal immigration, the wholesale retooling of the criminal justice system to manage migration that is evinced in these examples should raise a host of questions that deserve serious and immediate attention: Is this an effective deterrent to migrants?<sup>70</sup> Is it worth the monetary price tag? Is it worth the procedural consequences?

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66. *Id.* at 11.

67. *United States v. Roblero-Solis*, No. 08-10396, 2009 WL 4282022, at \*7 (9th Cir. Dec. 2, 2009) (discussing requirements of Federal Rule of Criminal Procedure 11).

68. *Id.* at \*8.

69. *Id.* at \*9 (requiring showing of prejudice and finding “[n]one of these defendants has made such a showing or even attempted it”).

70. Although there are reports that crossings are less numerous since the initiation of efforts like Operation Streamline and the proliferation of workplace raids, see, e.g., Passel & Cohn, *supra* note 35, at i, the extent to which this is actually driven by enforcement—as opposed to the economic downturn, or the rise in migrants who stay in the United States without authorization once they have entered rather than risking multiple border crossings—is difficult to ascertain. *Id.* at ii. Given the fact that Streamline, Fast Track, and the workplace prosecutions in raids like Postville rely on vastly reduced sentences (in the case of Streamline, often approximating time served) to induce plea agreements, it is not exactly clear what deterrent effect is served by incarceration. See also Williams Testimony, *supra* note 40, at 17–22 (questioning Operation Streamline’s deterrent effect).

The ongoing erosion of the procedural rights of these criminal defendants thus far has been effectively normalized. Such procedural moves can be framed as nothing more than an extension of long-standing limitations on the due process rights of noncitizens in immigration proceedings. However, it is important not to lose sight of the legal distinctions that separate the criminal from the civil realm. The prosecution of these offenses should not be allowed to reshape the criminal sphere to look more like the less rights-protective civil system where immigration enforcement has typically been centered. Unfortunately, at the moment, this is exactly what is happening.

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