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## A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes

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# A COST-BENEFIT ANALYSIS OF THE FEDERAL PROSECUTION OF IMMIGRATION CRIMES

KIT JOHNSON<sup>†</sup>

## ABSTRACT

Immigration crimes are the most prosecuted federal crimes in America. This Article examines the benefits of the federal prosecution of immigration crimes (training, deterrence, and signaling/expression) and balances those benefits against the costs of such prosecutions (court-house costs, alternative prosecution, and incarceration). I conclude that deportation immediately following a conviction for an immigration crime appears to capture the key benefit of this system (signaling/expression) while alleviating its greatest expense (incarceration).

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## INTRODUCTION

Immigration crimes are the most prosecuted federal crimes in America. In 2014, they accounted for 56.5% of all federal prosecutions.<sup>1</sup>

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1. *Prosecutions for 2014*, TRAC REPORTS, INC., (Jan. 23, 2015), <http://tracfed.syr.edu/results/9x2054c27815cd.html>. For ease of readability, I will refer to all statis-

Defendants in such cases are nearly always convicted and go on to serve sentences in federal prisons. This Article asks a simple question: Is it worth it?<sup>2</sup>

Criminal law enforcement is routinely justified in explicitly economic terms. Prosecution and punishment are, according to the prevailing argument, the least costly means of deterring and incapacitating socially undesirable behavior.<sup>3</sup> But for this to be true, there must be no other less costly alternative. And immigration crimes have a preexisting, low-cost alternative: the civil deportation scheme. Therefore, to determine whether the prosecution of immigration crimes is worthwhile, despite the existence of a civil deportation process, we must weigh the system's principal benefits and costs.

This Article is not the first scholarly work to question the economic sensibility of immigration prosecution.<sup>4</sup> My analysis is different, however, in that it gives far more credence to claims that prosecution pays large dividends in terms of training prosecutors, deterrence, and signaling/expression. Other writers have downplayed these claimed advantages or dismissed them altogether. I find, by contrast, that the proffered benefits—particularly the signaling/expression benefits—are not so easily dismissed.

Giving pro-prosecution economic arguments the full benefit of the doubt leads to what may be a surprising conclusion: Even then, the benefits do not outweigh the costs. Yet the prescription is not necessarily to abandon the prosecution of immigration crimes altogether. Another alternative is to prosecute these crimes but not to jail those convicted of them. Deportation immediately following a conviction for an immigration crime appears to capture the key benefit of this system (signaling/expression) while alleviating its greatest expense (incarceration).

It goes without saying that the weighing of benefits and costs is not the only way or even necessarily the best way to evaluate the desirability

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tics in this Article as concerning 2014. In fact, these statistics concern fiscal year 2014, which runs from October 1, 2013 through September 30, 2014.

2. In asking this question, I implicitly accept the validity of immigration crimes. Other scholars do not. *See, e.g.*, Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1323 (2014) (“Crimes of migration are an illegitimate use of the criminal power. They fail for not being consented to, for violating thoughtful theories of the criminal law, and for being imposed on top of deportation.”).

3. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 267 (9th ed. 2014); Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 284–85 (2014).

4. *See, e.g.*, Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 487 (2010) (noting the “substantial cost” of prosecuting immigration crimes); *see generally* Nuno Garoupa & Fernando Gomez-Pomar, *Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties*, 6 AM. L. & ECON. REV. 410, 410 (2004) (offering an economic theory in support of the combined use of criminal sanctions and regulatory penalties to deter the same underlying illegal behavior).

of criminal enforcement. There are purely moral questions to ask ourselves: Is prosecuting unauthorized entry ethical? What kind of society do we want to live in? And what do we say about our American character by prioritizing the prosecution of people whose essential crime is trying, in some sense, to join us? I do not intend to disparage such questions. But in this Article, I do mean to set them to one side. Given that economic arguments hold so much sway in policymaking arenas, it seems helpful to focus on them and to engage with them on their own terms. That is what this Article attempts to do.

Here is a preview of what follows: In Part I, I provide some background on federal immigration crimes, looking at the charges, evidentiary requirements, and sentencing guidelines. In Part II, I examine the benefits of prosecuting federal immigration crimes: training, deterrence, and signaling/expression. In Part III, I look at the costs of prosecution, including courthouse time, alternative prosecution, and incarceration, with incarceration being the single most important cost. Finally, in Part IV, I weigh the benefits and costs, which leads me to observe, in Part V, that deportation following conviction obtains all the claimed benefits of prioritized prosecution while accumulating very large fiscal savings.

### I. IMMIGRATION CRIMES

At the outset, it's important to understand the nature of the crimes we are discussing. Immigration crimes include a wide range of conduct, from misuse of a U.S. passport<sup>5</sup> to falsely claiming U.S. citizenship.<sup>6</sup> The two most prosecuted federal crimes, however, are unauthorized entry of an alien<sup>7</sup> and reentry of a deported alien.<sup>8</sup> In 2014, 43,652 migrants were prosecuted for unauthorized entry (a misdemeanor) and 37,929 were prosecuted for reentry after deportation (a felony).<sup>9</sup> The yield on these prosecutions is tremendous. Prosecutors obtained 43,079 convictions for unauthorized entry and 36,507 convictions for reentry.<sup>10</sup>

Unauthorized entry and post-deportation reentry have been called the "low-hanging fruit of the federal legal system."<sup>11</sup> The description is apt. Both are crimes with few elements and minimal evidentiary burdens.

Take unauthorized entry, also known as "a 1325" in reference to its statutory basis in 8 U.S.C. § 1325. Conviction requires proof that the

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5. 18 U.S.C. § 1544 (2015).

6. *Id.* § 911; *see also id.* § 1546(a) (counterfeiting visas); *id.* § 1428 (failing to surrender a canceled naturalization certificate); 8 U.S.C. § 1324 (2015) (harboring aliens).

7. 8 U.S.C. § 1325.

8. *Id.* § 1326.

9. *Prosecutions for 2014*, *supra* note 1.

10. *Convictions for 2014*, TRAC REPORTS, INC., (Jan. 24, 2015), <http://tracfed.syr.edu/results/9x2054c3f5284f.html>.

11. John Schwartz, *Immigration Enforcement Fuels Rise in U.S. Cases*, N.Y. TIMES (Dec. 21, 2009), [http://www.nytimes.com/2009/12/22/us/22crime.html?\\_r=0](http://www.nytimes.com/2009/12/22/us/22crime.html?_r=0).

defendant (1) is not a U.S. citizen, (2) was found in or trying to enter the United States, and (3) did not have permission to be in the country.<sup>12</sup> Reentry, correspondingly called “a 1326” because of its basis in 8 U.S.C. § 1326, does not require much more. In addition to the elements above, § 1326 cases require proof that the defendant (4) had previously been removed or deported from the United States.<sup>13</sup>

The evidence required to prove these elements is not hard to come by.<sup>14</sup> To prove citizenship, a prosecutor might have the defendant’s own admission, a birth certificate, or fingerprint data.<sup>15</sup> To prove presence, a prosecutor can simply point to the defendant in the courtroom—though, in practice, prosecutors generally use the arresting officer’s testimony.<sup>16</sup> For lack of permission, the prosecutor might present a Certificate of Non-Existence from the USCIS indicating a lack of any paperwork regarding formal admission.<sup>17</sup> As for prior removal, the prosecutor need only introduce certified copies of the prior order of removal and warrant of removal.<sup>18</sup> To do all this, a prosecutor would need, at most, two witnesses—a records custodian and the arresting officer.<sup>19</sup>

It should come as no surprise that prosecution of § 1325 and § 1326 cases are “lightning quick.”<sup>20</sup> And the process moves even faster with routine plea agreements.<sup>21</sup> Many defendants who might be tried for felony reentry are offered the following deal: Don’t fight prosecution, and receive instead a misdemeanor conviction for unauthorized entry.<sup>22</sup> Such pleas can take prosecutions from a two-day endeavor<sup>23</sup> to a process last-

12. 8 U.S.C. § 1325(a) (2015) (“Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . .”). Alternatively stated, § 1325 requires that: “1. [t]he defendant was an alien; and 2. [t]he defendant knowingly [entered][attempted to enter] the United States; and 3. [t]he defendant [entered][attempted to enter] at a place other than a designated port of entry.” THE COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 123 (2012) [hereinafter PATTERN CRIMINAL JURY INSTRUCTIONS], available at [https://www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/7th\\_criminal\\_jury\\_instr.pdf](https://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf).

13. 8 U.S.C. § 1326(a); see also PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 12, at 130.

14. See DENNIS CANDELARIA, IMMIGRATION: DEFENDING AGAINST THE ILLEGAL ENTRY AND ILLEGAL REENTRY CHARGES, 2–3 (2008), available at [http://www.fd.org/pdf\\_lib/MT08/MT08\\_DefendIllegalEntryReentry.pdf](http://www.fd.org/pdf_lib/MT08/MT08_DefendIllegalEntryReentry.pdf).

15. See *id.*

16. See *id.*

17. See *id.* at 2, 5.

18. See *id.* at 2.

19. See *id.*

20. Schwartz, *supra* note 11.

21. Lydgate, *supra* note 4, at 484 (“Defense attorneys estimate that 99 percent of Streamline defendants plead guilty.”).

22. See, e.g., Joshua Partlow, *Under Operation Streamline, Fast-Track Proceedings for Illegal Immigrants*, WASH. POST (Feb. 10, 2014), [http://www.washingtonpost.com/world/the\\_americas/under-operation-streamline-fast-track-proceedings-for-illegal-immigrants/2014/02/10/87529d24-919d-11e3-97d3-f7da321f6f33\\_story.html](http://www.washingtonpost.com/world/the_americas/under-operation-streamline-fast-track-proceedings-for-illegal-immigrants/2014/02/10/87529d24-919d-11e3-97d3-f7da321f6f33_story.html).

23. Schwartz, *supra* note 11.

ing just seconds.<sup>24</sup> That's not hyperbole. Section 1325 pleas are handled en masse in many courts along the southern border<sup>25</sup> where the initial appearance, arraignment, plea and sentencing all take place in one hearing.<sup>26</sup> Magistrate Judge Bernardo P. Velasco of the U.S. District Court for the District of Arizona can routinely process seventy pleas to § 1325 charges in thirty minutes, averaging out to just under twenty-six seconds per defendant.<sup>27</sup>

The quickness of prosecution contrasts strongly with the length of incarceration. The maximum sentence for a § 1325 conviction is six months for a first offense,<sup>28</sup> and a second unauthorized entry conviction can result in a two-year prison term.<sup>29</sup> The maximum sentence for a § 1326 conviction is two years.<sup>30</sup> But there's a hitch: If the defendant was removed on the basis of a conviction for three or more misdemeanors involving drugs, crimes against the person, or certain felonies, the maximum sentence jumps to ten years.<sup>31</sup> And if the defendant was removed on the basis of a conviction for an aggravated felony,<sup>32</sup> the maximum sentence is twenty years.<sup>33</sup>

## II. THE BENEFITS OF PROSECUTING IMMIGRATION CRIMES

The potential benefits of the federal prosecution of § 1325 and § 1326 crimes include training, deterrence, and signaling/expression.

### A. Training Benefits

A seasoned federal prosecutor does not fall from the sky. She is grown within the ranks. And immigration crimes provide a training ground for junior U.S. Attorneys to gain the skills and confidence needed to tackle more complex federal cases.<sup>34</sup> After all, immigration crimes are numerous, but there's not much to them. They offer a means for untested U.S. Attorneys to get comfortable in the courtroom in a not-too-challenging context.

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24. Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES (Feb. 11, 2014), [http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html?\\_r=0](http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html?_r=0).

25. *See id.*

26. Lydgate, *supra* note 4, at 486.

27. *See Santos, supra* note 24.

28. 8 U.S.C. § 1325(a) (2015).

29. *Id.*

30. *Id.* § 1326(a).

31. *Id.* § 1326(b)(1).

32. *See id.* § 1101(a)(43). For a nice summary of the scope of aggravated felonies, see Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS L. REV. 387, 393–98 (2007).

33. 8 U.S.C. § 1326(b)(2).

34. *Cf.* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 596 (2013) (noting misdemeanor cases have been the traditional training ground for inexperienced prosecutors and defenders).

One reason to doubt that training is a significant benefit in these contexts is that there is a limit to the training U.S. Attorneys can gain from § 1325 and § 1326 prosecutions. Former U.S. Attorney Carol Lam has explained that young prosecutors in immigration cases “may not have the opportunity to learn how to do a wiretap case, or learn how to deal with the grand jury, or how to use money laundering statutes or flip witnesses or deal with informants and undercover investigations.”<sup>35</sup> Yet these skills are necessary for more complex prosecutions.

Another reason to question the significance of the training benefit is that many U.S. Attorneys are hired not straight out of law school, as a state prosecutor might be, but from the ranks of seasoned state prosecutors.<sup>36</sup> Experienced attorneys require less training, which tends to diminish the marginal benefit of using immigration crimes for training. Even so, immigration crimes would continue to function as a training ground for those with less overall experience.

### *B. Deterrence Benefits*

Officially, the primary goal of prosecuting § 1325 and § 1326 crimes is to “increase the consequences for illegally crossing the border.”<sup>37</sup> In other words, it aims to deter.<sup>38</sup> If individuals know that unauthorized migration is subject to criminal prosecution—the argument goes—they will be deterred from attempting it.

The Department of Homeland Security (DHS) believes so strongly in the deterrence value of prosecution that, since 2005, it has made prosecution of § 1325 and § 1326 cases mandatory under its Operation Streamline.<sup>39</sup> And DHS has cited mandatory prosecution as one factor explaining decreased border apprehensions.<sup>40</sup>

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35. Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, N.Y. TIMES, Jan. 11, 2009, <http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=all> (quoting Carol Lam) (internal quotation mark omitted).

36. For example, see the recent hiring announcement for an Assistant U.S. Attorney in the Northern District of California. *Assistant United States Attorney Job Announcement*, USAJOBS.GOV, <https://usao.usajobs.gov/GetJob/ViewDetails/392037300> (last visited Mar. 19, 2015). One required qualification is “3 years post-J.D. legal or other relevant experience.” *Id.* And among the preferred qualifications is “good judgment and courtroom skills.” *Id.*

37. Janet Napolitano, Sec’y, Dep’t of Homeland Sec., Remarks before the Senate Committee on Homeland Security and Governmental Affairs, *Securing the Border: Progress at the Federal Level* (May 3, 2011), available at <http://www.dhs.gov/news/2011/05/03/secretary-janet-napolitano-senate-committee-homeland-security-and-governmental> (“Operation Streamline . . . aims to increase the consequences for illegally crossing the border by criminally prosecuting illegal border-crossers.”).

38. Lydgate, *supra* note 4, at 496; see also Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 126–27 (2012).

39. See Lydgate, *supra* note 4, at 493.

40. Napolitano, *supra* note 37 (“[A]pprehensions have decreased 36 percent in the past two years, and are less than one third of what they were at their peak.”); see also Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., on Southern Border and Approaches Campaign to R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Admiral Paul F. Zukunft, Commandant, U.S. Coast Guard, Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., W. Craig Fugate, Adm’r, Fed. Emer-

Critics dispute the deterrence value of immigration prosecutions.<sup>41</sup> One argument is that for deterrence to work, would-be offenders must have knowledge of the possible criminal consequences of their actions.<sup>42</sup> Yet this claim rests on an untested assumption that those outside the United States have good information about potential criminal consequences inside the United States.<sup>43</sup> Evidence indicates they may not.<sup>44</sup>

Of course, this line of argumentation only goes so far. First-time participants in the criminal justice process may not be aware of the criminality of their conduct. Repeat offenders, however, certainly are. As noted earlier, unauthorized reentry is the second most prosecuted federal crime in America.<sup>45</sup> Data shows that the recidivism rate for migrants convicted of immigration crimes is just over 10%—in contrast to 27% for migrants who are not prosecuted criminally.<sup>46</sup> Such statistics provide a strong inference that prosecution deters repeated attempts at crossing the border without authorization.

Another criticism rests on the claim that immigration crimes are not capable of being deterred because of their social context. The argument is this: Family members separated by borders will not be deterred from undertaking unauthorized migration even when fully informed of the possibility of lengthy prison sentences.<sup>47</sup> This reasoning is plausible, and it is indirectly supported by some empirical evidence.<sup>48</sup> But it seems equally plausible that many migrants motivated by family ties might nonetheless be deterred if they figure that a lifetime of Skype messaging beats decades of once-a-month prison visits. And even taken on its own

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agency Mgmt. Agency, Alan D. Bersin, Acting Assistant Sec'y for Policy 2 (Nov. 20, 2014), *available* at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_southern\\_border\\_campaign\\_pla\\_n.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_southern_border_campaign_pla_n.pdf) (“This Nation’s long term investment in border security has produced significant, positive results over the years . . . Illegal migration into this country has dropped considerably . . .”).

41. See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 147 n.70 (2009); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1888–89 (2007).

42. Lydgate, *supra* note 4, at 519.

43. *Id.*

44. *Id.*

45. See *supra* Part I.

46. LISA SEGHEITTI, CONG. RESEARCH SERV., BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 11 tbl.1 (2014), *available* at <https://www.fas.org/spp/crs/homsec/R42138.pdf>. Others challenge this statistic. See ALISTAIR GRAHAM ROBERTSON ET AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES 16 (2012), *available* at [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Sept2012\\_Report-final.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf). But note that the 85% recidivism rate for criminal defendants highlighted in the Grassroots report rests on an NPR interview of just 35 individuals. See Ted Robbins, *Claims of Border Program Success Are Unproven*, NPR (Sept. 13, 2010, 3:35 PM), <http://www.npr.org/templates/story/story.php?storyId=129827870>.

47. Lydgate, *supra* note 4, at 519; see also HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS 4, 47, 72 (2013), *available* at [http://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf).

48. Robbins, *supra* note 46.



terms, this argument of critics does not refute the claim that deterrence works for migrants without such family ties.

Perhaps the most effective argument questioning the deterrence benefit centers on cause and effect. Critics argue that lower apprehensions at the border are unrelated to prosecutions. Rather, they say border entries fluctuate in response to wholly different factors, such as the U.S. economy<sup>49</sup> and conditions in the migrants' home countries.<sup>50</sup> It is undoubtedly true that cause and effect relationships are complex, and a hard conclusion about deterrence is precarious given great and shifting forces of economics, politics, and social order. But that fact cuts both ways. Observing that other driving forces in migration flows are larger does not indicate that criminal prosecution has *no* deterrent effect.<sup>51</sup>

### C. Signaling/Expression Benefits

Perhaps the most significant claimed benefit to the federal prosecution of immigration crimes is signaling or expression. That is to say, stepped-up prosecution is a way for the federal government to send a message about how it perceives the seriousness of unauthorized migration. This message is directed both to migrants (which I'll call "signaling" since it sends a signal to potential migrants about the likelihood and severity of criminal consequences) and voters (which I'll call "expression" since it is an expression of the federal government to the body politic about its mission and priorities).

Consider the language used by President Barack Obama. He routinely talks about the need for "secure borders."<sup>52</sup> He emphasizes the role law enforcement has played to "stem the flow of illegal crossings,"<sup>53</sup> which he touts have been "cut by more than half" over the past six years.<sup>54</sup> Congressional debate similarly focuses on "[b]order security."<sup>55</sup>

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49. Lydgate, *supra* note 4, at 515–16.

50. See Johnson, *supra* note 40, at 2 ("Much of illegal migration is seasonal . . . . The poverty and violence that are the 'push factors' in Honduras, Guatemala and El Salvador still exist. The economy in this country—a 'pull factor'—is getting better.").

51. See, e.g., Robbins, *supra* note 46 (noting one out of 35 interviewees convicted of immigration crimes would not return to the United States out of fears regarding future jail time).

52. See, e.g., President Barack Obama, Remarks by the President on Immigration at Del Sol High School (Nov. 21, 2014), available at <http://whitehouse.gov/the-press-office/2014/11/21/remarks-president-immigration>; President Barack Obama, Remarks by the President at Democratic Congressional Campaign Committee Dinner (July 9, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/07/09/remarks-president-dccc-dinner>.

53. President Barack Obama, Remarks by the President on Immigration -- Chicago, IL (Nov. 25, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il>; see also President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (Jan. 29, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform> ("[W]e strengthened security at the borders so that we could finally stem the tide of illegal immigrants.").

54. President Barack Obama, Remarks by the President on Immigration at Del Sol High School, *supra* note 52; see also President Barack Obama, Remarks by the President on Comprehensive Immigration Reform, *supra* note 53 ("We put more boots on the ground on the southern border

And prosecution of immigration crimes plays a key role in that narrative.<sup>56</sup>

In this way, signaling/expression is a different kind of benefit. It's less tangible than training or deterrence. Taken in its most favorable light, it's a collective benefit for voters—a way for the federal government to make a public statement on behalf of the polity about migration.<sup>57</sup> Its value is in the statement itself.<sup>58</sup> And this is a benefit that scholars have ignored to date.<sup>59</sup> Of course, quantifying this benefit for a cost-benefit analysis is difficult. But for the moment, we can assume that these signaling/expression benefits have some significance. Even if thin, such a benefit might affect a conclusion about whether prosecutions are economically worthwhile.

#### D. Beyond the Benefits

It is worth taking just a moment to step back and provide some skeptical context. A good question to ask is: Why does the U.S. government invest so heavily in federal prosecution of immigration crimes if the benefits are somewhat flimsy? After all, the training benefit seems minimal and the deterrence value, while not nonexistent, also appears to be slight. There is the signaling/expression benefit, but its value is hazy. So, putting aside for a moment the question of “Is it worth it?,” let's ask this question: Why is it worth it from the government's perspective?

One happy side effect of prosecuting immigration crimes (from the government's perspective) is fabulous criminal justice statistics. Immigration prosecutions bloat the total number of prosecutions undertaken and convictions obtained. This enables U.S. Attorneys to project a message of not only being tough on crime, but also wildly successful.

The story of Carol Lam, former U.S. Attorney for the Southern District of California, is illustrative. Appointed in 2002, Lam resigned in

than at any time in our history. And today, illegal crossings are down nearly 80 percent from their peak in 2000.”)

55. See, e.g., SEGHETTI, *supra* note 46, at 1–2.

56. See Napolitano, *supra* note 37; see also ROBERTSON *supra* note 46, at 6, 8; cf. Edwin Mora, *Eight Out of Ten Illegal Aliens Apprehended in 2010 Never Prosecuted, Says Border Congressman*, CNSNEWS.COM (Mar. 17, 2011, 3:26 AM), <http://cnsnews.com/news/article/eight-out-ten-illegal-aliens-apprehended-2010-never-prosecuted-says-border-congressman> (reporting on Congressman Culberson's assertions that unauthorized border crossings were under prosecuted despite the fact that such prosecutions were “‘the key’ to securing the nation's border with Mexico”).

57. Cf. Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 435 (2000) (discussing expressive benefits in the context of interest groups).

58. It is, of course, important to acknowledge that statements made on behalf of voters are not intrinsically good. As I've discussed in prior work, immigration law itself has often derived from racist motives. See Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1217 & nn.16–17 (2014).

59. *But cf.* Margaret H. Taylor, *Symbolic Detention*, in 20 IN DEFENSE OF THE ALIENS 153, 153–159 (Lydio F. Tomasi ed., 1998) (discussing and rejecting the symbolic component of immigration detention).

2007 after significant political pressure.<sup>60</sup> She directed a “shift in the nature of border crimes” prosecuted, pursuing “[m]ore serious, more sophisticated and larger organizational rings” instead of low-level offenders.<sup>61</sup> As a result, overall prosecutions fell during her tenure.<sup>62</sup> Even though the number of immigration defendants receiving longer sentences actually rose while Lam was U.S. Attorney,<sup>63</sup> many speculated that the overall decline in prosecutions played a role in her departure.<sup>64</sup>

The message is that numbers matter. They help to shape the image of the efficacy of the federal prosecutorial system—both its image to others and its self-image.

### III. THE COSTS OF PROSECUTING IMMIGRATION CRIMES

Having looked at the benefits, we need now to look at the costs. If teaching, deterrence, and signaling/expression are key benefits to the federal prosecution of immigration crimes, the key factors on the cost side are courthouse costs, alternative prosecution costs, and, most significantly, incarceration costs.

#### A. Courthouse Costs

Every prosecution takes time. Prosecution of immigration crimes, like all crimes, requires a prosecutor, a defense attorney (provided at government expense),<sup>65</sup> a judge, a U.S. Marshall (to transport the defendant), a courtroom deputy, a court reporter, and an interpreter.<sup>66</sup> Increasing the prosecution of these crimes necessarily incurs these associated costs.

Yet immigration crimes are different than other crimes, and these differences in substance entail differences in cost. Courts have responded to immigration crimes with unique procedural mechanisms, such as the en masse hearings discussed earlier.<sup>67</sup> This sort of structural change may ameliorate at least some of the courthouse costs. At the same time, these

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60. See Greg Moran & Onell R. Soto, *Lam's Legacy*, SAN DIEGO UNION-TRIB. (Jan. 21, 2007), <http://legacy.utsandiego.com/news/politics/20070121-9999-1n21lam.html>.

61. *Id.* (quoting Carol Lam) (internal quotation marks omitted).

62. *Id.*

63. Letter from William E. Moschella, Assistant Attorney Gen., U.S. Dep't of Justice, to Congressman Darrell Issa, U.S. House of Representatives, available at [http://www.epluribusmedia.org/documents/DOJDocsPt1-2070319\\_epm.pdf](http://www.epluribusmedia.org/documents/DOJDocsPt1-2070319_epm.pdf).

64. Moran & Soto, *supra* note 60.

65. Several studies have noted that the defense of immigration crimes has largely fallen on private Criminal Justice Act panel attorneys due to insufficient resources within the Federal Public Defender offices impacted by zero-tolerance prosecutions. See, e.g., ROBERTSON, *supra* note 46, at 8.

66. SEGHETTI, *supra* note 46, at 14 n.68; see also Lydgate, *supra* note 4, at 522–24.

67. See *supra* Part I.

new mechanisms may lead to different costs in the form of reduced constitutional protections for criminal defendants.<sup>68</sup>

It must be pointed out that arguments about courthouse costs are, in some ways, circular. Federal courts haven't moved to the big-city courthouse system of night court. They are only open so many hours a day and so many days a week. And a large portion of the time and money spent on prosecution is going to be spent in any event. The main difference, therefore, is yield and focus. Any given twelve months of courthouse time might yield thousands of immigration convictions or a handful of some other type of criminal conviction.<sup>69</sup>

### B. Alternative Prosecution Costs

One of the strongest criticisms leveled at the prosecution of immigration crimes is that such prosecutions divert resources from more serious crimes.<sup>70</sup> Under Operation Streamline, all immigration crimes are to be prosecuted.<sup>71</sup> Yet not all districts participate in the program, leaving overall prosecution rates at around 97%.<sup>72</sup> That contrasts with, for example, white collar crimes, where only about half of the cases referred to federal prosecutors are pursued.<sup>73</sup>

Critics of low-level immigration prosecution, such as Carol Lam, argue that with “more difficult investigations, the number of prosecutions might not be as high, but you have a larger impact on crime in the community.”<sup>74</sup> This criticism is well-placed. But it does not take account of the signaling/expression benefits of prosecuting immigration crimes discussed earlier. The federal government, standing in as it does for the voting public, is prioritizing a particular category of crime; it is saying that immigration crimes deserve more attention than other crimes. Viewed through this lens, the “impact” mentioned by Lam, is irrelevant.

### C. Incarceration Costs

Incarceration is the single greatest cost to federal prosecution of immigration crimes, and it is growing. Immigration-related incarceration is changing the shape of the federal prison population. For instance, the number of federal prisoners increased 77% from 1998 to 2010,<sup>75</sup> and

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68. See generally Lydgate, *supra* note 4, at 530–39 (discussing problems of due process, effective assistance of counsel, separation of powers, prosecutorial independence, and delayed initial appearances).

69. Schwartz, *supra* note 11 (contrasting white collar prosecutions, which might take 460 days, and narcotics cases, which take on average 333 days, with immigration cases that can be disposed of in 2 days).

70. See Lydgate, *supra* note 4, at 519–22.

71. See *id.* at 483–84.

72. See Schwartz, *supra* note 11.

73. *Id.*

74. Moran & Soto, *supra* note 60 (quoting Carol Lam) (internal quotation mark omitted).

75. KAMALA MALLIK-KANE, BARBARA PARTHASARATHY & WILLIAM ADAMS, URBAN INST. JUSTICE POLICY CTR., EXAMINING GROWTH IN THE FEDERAL PRISON POPULATION, 1998 TO 2010, at

17% of that increase is due entirely to immigration crimes.<sup>76</sup> Currently, nearly 25% of current federal inmates are noncitizens.<sup>77</sup> And around 10% of federal inmates are incarcerated for immigration crimes.<sup>78</sup>

The average time served for these crimes varies. Unfortunately, good statistics for § 1325 crimes are hard to come by. One study indicates that first-time offenders typically receive a sentence of time served, having spent between two and fifteen days in detention prior to sentencing.<sup>79</sup> Individuals who plea to a § 1325 in lieu of a § 1326 prosecution, on the other hand, might serve the full six months allowed under the statute.<sup>80</sup> The study concludes that the average sentence for a § 1325 conviction is thirty days.<sup>81</sup>

In contrast to the paucity of § 1325 data, there are solid government statistics regarding § 1326 convictions. The average sentence for § 1326 offenders in 2013 was 18 months.<sup>82</sup> In 2009, that figure was 21 months.<sup>83</sup>

The Federal Bureau of Prisons estimates that each inmate costs \$30,619.85 per year.<sup>84</sup> We can, therefore, estimate that the annual cost of § 1326 inmates alone is \$1,274,597,186.<sup>85</sup> We can also estimate that the annual cost of § 1325 convicts is \$54,208,460.<sup>86</sup> In total, incarceration for these immigration crimes may cost \$1,328,805,646 per year.

Not only is incarceration expensive in dollars and cents, but as Professor Peter Schuck recently argued, incarcerating individuals convicted of immigration crimes contributes to a nationwide problem of prison

1 (2012), available at <http://www.urban.org/uploadedpdf/412720-examining-growth-in-the-federal-prison-population.pdf>.

76. *Id.* at 4.

77. See *BOP Statistics: Inmate Citizenship*, FED. BUREAU OF PRISONS, [http://www.bop.gov/about/statistics/statistics\\_inmate\\_citizenship.jsp](http://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp) (last updated May 30, 2015).

78. *BOP Statistics: Inmate Offenses*, FED. BUREAU OF PRISONS, [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last updated May 30, 2015).

79. Lydgate, *supra* note 4, at 508.

80. *Id.* at 509.

81. *Id.* at 528.

82. U.S. SENTENCING COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2014), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Illegal\\_ReentryFY13.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_ReentryFY13.pdf) (last visited Mar. 7, 2015).

83. *Id.*

84. Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12,523, 12,523 (Mar. 9, 2015). Professor Shuck notes that this number may be “higher than the actual average cost” given that the “BOP has a practice of housing non-U.S.-citizen inmates in private facilities, and private facilities are generally operated at lower cost.” Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, 27 GEO. IMMIGR. L.J. 597 app. 6 at 727 (2013) (footnote omitted).

85. This \$1.27 billion figure can be calculated in the following manner: Multiply the total number of § 1326 convictions in 2014 (27,751) by 1.5 (to account for the total inmate population in any given year as not only those convicted in that 12 months but those serving the final six months of their convictions in the prior year) by the cost of each inmate per year (\$30,619.85).

86. This \$54 million figure can be calculated in the following manner: Multiply the total number of § 1325 convictions in 2014 (43,079) by 15/365 (representing the average of 15 days in custody post-sentencing) by the cost of each inmate per year (\$30,619.85).

overcrowding.<sup>87</sup> Such overcrowding can result in “human rights threats; violence against prisoners and guards; breakdown of order and discipline; obstacles to prisoner rehabilitation and good health; . . . and violation of constitutional or statutory rights.”<sup>88</sup> While hard to quantify, these are additional and significant costs of incarceration.

#### IV. WEIGHING THE BENEFITS AND COSTS

Having set out the benefits and costs of prosecuting federal immigration crimes, we can now weigh them.

On the benefits side, we have two items that appear to be of minimal value: training and deterrence. It’s not to say that they have no value, but their value appears to be small given that U.S. Attorneys do not typically need nor receive training through immigration prosecutions and that such prosecutions do not appear significantly to deter immigration crimes.

Then there is the signaling/expression benefit to prosecution. This is harder to weigh. Perhaps signaling/expression is of great value. After all, Professor H.L.A. Hart has described criminal punishment as expressing the “formal and solemn pronouncement of the moral condemnation of the community.”<sup>89</sup> And prosecution is the mode by which the federal government expresses “moral condemnation” for immigration crimes. But even if we value the signaling/expression benefit highly, does it outweigh the costs of prosecution?

As there are two items on the benefits side that appear minimal, there are two costs to immigration prosecution that appear to be minimal: courthouse costs and alternative prosecution costs. Note that, to some extent, immigration prosecutions are a zero-sum game. They may take more courthouse resources and divert attention from other crimes—although that reflects policy choice and budgeting practice and is not a cost per se.

On the other hand, incarceration costs are concrete and very substantial. Thus, we can focus our question. “Is it worth it?” can be reduced and simplified to this: Does the signaling/expression benefit outweigh the \$1.3 billion tab for annual incarceration of those convicted of immigration crimes? Once the question is phrased that way, it becomes clear that the answer is the benefits do not outweigh the costs.

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87. See Schuck, *supra* note 84, at 599.

88. *Id.* at 660.

89. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

This conclusion, however, does not mandate either reducing the prosecution of immigration crimes<sup>90</sup> or eliminating such crimes altogether.<sup>91</sup> There is an alternative: Deportation after conviction.

#### V. DEPORTATION AFTER CONVICTION

Deporting defendants immediately after their conviction for immigration crimes is one way the United States could capture whatever signaling/expression benefits there are to prosecuting immigration crimes while ameliorating the lion's share of the costs. After all, once convicted of a federal crime, few noncitizens will have a defense to their inevitable deportation.<sup>92</sup> Deportation removes an individual from society as incarceration does, but it's cheaper for the government. So why isn't this standard practice?

Under current law, "the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment."<sup>93</sup> This is known as the imprisonment-before-deportation rule.<sup>94</sup> The most straightforward way this hurdle could be addressed would be to repeal the imprisonment-before-deportation rule—something that has been unsuccessfully tried before.<sup>95</sup> Another option would be to take advantage of the rule's exception for "nonviolent offenders," who, upon the determination of the Attorney General, can be removed prior to serving their sentence if it is determined that the removal is "in the best interest of the United States."<sup>96</sup> This would be a particularly attractive method for handling § 1325 convictions, and it could be extended to all § 1326 convictions that are based wholly on prior § 1325 convictions. Imprisonment-before-deportation could also be relaxed by changing the sentencing guidelines for § 1325 and § 1326 cases to make it easier for federal judges to sentence those convicted to time served. If this change were made, deportations after convictions could be achieved while maintaining adherence to the imprisonment-before-deportation rule.

Opponents of such a plan might argue that deportation following conviction would offer insufficient punishment for the underlying crimes.<sup>97</sup> Or they might argue that it would hinder the deterrence benefit

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90. See, e.g., Lydgate, *supra* note 4, at 540–42; Schuck, *supra* note 84, at 605–06 & nn. 32–33 (noting the range of scholars opposed to increased criminalization of immigration as well as efforts to make the enforcement system more effective).

91. See Morales, *supra* note 2, at 1323.

92. Schuck, *supra* note 84, at 612.

93. 8 U.S.C. § 1231(a)(4)(A) (2015).

94. Schuck, *supra* note 84, at 631.

95. *Id.* at 638–41.

96. 8 U.S.C. § 1231(a)(4)(B)(i) (2015).

97. See, e.g., Schuck, *supra* note 84, at 638–39 (discussing opposition to a 1993 plan by then-Representative Schumer to eliminate the imprisonment-before-deportation rule). This is a distinctly retributivist view resting, as it does, on the idea that the conduct underlying the immigration crime both justifies and compels punishment. See, e.g., Michael S. Moore, *The Moral Worth of Retribu-*

of prosecuting immigration crimes and thereby promote additional unauthorized reentries.<sup>98</sup> My response to these potential challenges is this: Yes, deportation following conviction may insufficiently punish and deter, but it does capture the strongest benefit to prosecuting immigration crimes (signaling/expression) while addressing its largest cost (incarceration). As such, it seems worthy of significant consideration.

#### CONCLUSION

The United States prosecutes immigration crimes at a rate that far outstrips other federal crimes, even drug crimes and firearms offenses. The approach of this Article has been to evaluate the sensibility of this trend by weighing the benefits and costs of prosecuting immigration crimes, accepting as valid, for purposes of the analysis, the claims of proponents of strong criminal enforcement of immigration crimes. I conclude that even stipulating to the benefits of prosecution, those benefits do not outweigh the associated \$1.3 billion of incarceration costs. Thus, I suggest that the strongest arguments of those in favor of prioritized prosecution of immigration crimes point to deportation of those convicted of immigration crimes immediately following their conviction and before they are put in prison. This approach would capture the claimed benefits of prosecuting immigration crime while alleviating its greatest cost.

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*tion*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 181–82 (Ferdinand Schoeman ed., 1987).

98. See, e.g., Schuck, *supra* note 84, at 639 (discussing opposition to a 1993 plan by then-Representative Schumer to eliminate the imprisonment-before-deportation rule). This is a distinctly consequentialist view resting, as it does, on the idea that punishment ought to have deterrent value. See, e.g., Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 351–52 (1983) (discussing utilitarian goals of general deterrence and specific deterrence).



