Illegal Reentry and Denial of Bail to Undocumented Defendants: Unjust Tools for Social Control of Undocumented Latino Immigrants

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*Patrick "Kirby" Madden is a J.D. Candidate at University of California, Hastings College of the Law, 2014. I wish to thank my Mom, my Dad, Pete, Mari, as well as all of the incredible individuals that I have met during my law school experience that have taught me so much about the law, the world, and myself. I would further like to thank Professor Hadar Aviram for providing me with the mental and physical settings to write this note and everyone at the Hastings Race and Poverty Law Journal, specifically all of those that contributed to the publication of this note.


When we want you, we'll call you; when we don't — git.

— Ernesto Galarza

I. Introduction

Context matters. The more context one has, whether it is historical, structural, statistical, or constitutional, it helps one to better see the true purpose and effects of an action. Superficially, the criminal statute of "Illegal Reentry" seems like a basic rule to deter those that are likely to commit crime from entering the United States. Similarly, a prosecutor's argument at a detention hearing that due to the fact that Immigration and Customs Enforcement ("ICE") may remove a defendant prior to trial, the defendant must be detained for risk of flight may sound like a valid argument. However, once these actions are viewed in the context of the history of undocumented Latino immigrants in the United States, are placed within the structure of a model of social control that has largely dictated that history, are reviewed for their statistical impact on a specific group, and have their reasoning and functions exposed as out of accord with the principles set forth in the Constitution, both this statute and this frequently
utilized argument are seen for what they are: two harsh tools in a larger system of social control of undocumented Latino immigrants.

Section II of this note provides the proper historical context and lens of social control with which to view these two tools. The next two sections focus on the tools themselves. Section III describes the inner workings of Illegal Reentry before delving into its specific history and the injustices it inflicts upon the undocumented community. Similarly, Section IV navigates the details of federal bail and immigration statutes, and then describes how prosecutors systematically deny bail to undocumented immigrants and why it is legally fraudulent. Finally, Section V puts all of this together to explicitly expose this statute and this practice as tools of an ongoing system of social control.

II. The Proper Theory in Which to View Past and Current Tools of Social Control

In order to fully understand the purpose and effect of current tools of social control of undocumented Latino immigrants it is critical to view them in proper historical context. Unfortunately, mainstream America’s analysis of undocumented immigration often lacks this context. While, “[l]ike slavery, conquest tested the ideals of the United States[,] . . . [t]o most twentieth century Americans, the legacy of slavery was serious business, while the legacy of conquest was not.” What is provided here is by no means intended to be a comprehensive historical perspective on the subject; to attempt to recount that long and intricate history here would be unrealistic and perhaps even discourteous. The purpose of this section is simply to provide the requisite historical and theoretical context to understand how current legal tools are a continuation of the policies that, since the time of conquest, distort laws, the Constitution, and human decency in pursuit of social control.

The common theory that explains undocumented Latino immigration is straightforward. It “stresses the economic disparity between the U.S. and Mexico as the ‘but-for’ causal explanation for massive undocumented migration,” by “[d]rawing heavily upon classical ‘push-pull’ theory and presupposingrationally maximizing individuals.” Perpetuated by the media and political actors who emphasize the “threatening impact of undocumented immigrants, especially undocumented Mexicans, on the economic, ecological, and cultural well-being of United States citizens,” the
theory assumes that “well-targeted and vigorously enforced laws can control, and ultimately solve, the undocumented immigration problem.” While there may be accurate elements of this theory, its undoing is that it fails to account for the actual, specific interests that shape immigration policy.

To paint a more detailed picture, a theory must take into account the powerful interests of businesses that rely on cheap labor, the temperature of voters’ opinions regarding undocumented immigrants, and the racism inherent in both. A theory that successfully explains how policymakers balance these interests through a wide-ranging system of social control is what Professor Gerald Lopez titles his “Rival Theory.” The Rival Theory asserts that by intentionally manipulating prohibitions and permissions, policymakers have effectively created a single, overarching immigration regime out of two immigration systems: “[o]ne is documented . . . and the other undocumented.” Permissions are not accidental gaps left in the law, but rather choices made by Congress to allow actors dependent on undocumented immigration to “do what they must in order . . . to serve the [] needs of the U.S.” This apparatus allows the U.S. government to make “theatrical productions of the prohibitions being enforced, of apprehensions at the border and raids, sweeps, and mass deportations inland,” when electoral or economic pressures indicate when to slow undocumented immigration. When these same pressures dictate a need “to increase undocumented Mexican laborers, the U.S. typically emphasizes prohibitions and diverts attention away from permissions, including the de facto sorts signaled through conscious under-enforcement.” By creating an expansive selection of tools in the form of “stock practices, policies, and justifications,” policymakers are able to respond effectively to any circumstance.

Racism runs through and emboldens both of these pressures felt by policymakers. When John O’Sullivan declared that it was “Our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions,” his use of “our” referred to the Anglo-Saxon man. At the time he said those words in 1845, the

5. Lopez, supra note 4 at 1722–23.
6. Id. at 1728.
7. Id.
8. Id. at 1728–29.
9. Id. at 1729.
10. Id.
11. Id. at 1730.
United States was gearing up for the Mexican-American War. The most popular reason, here stated by Congressman Delano of Ohio, to oppose the war was a fear of "Americans mingling with an inferior people who 'embrace all shades of color... a sad compound of Spanish, English, Indian and negro bloods... and resulting, it is said, in the production of a slothful, ignorant race of beings." The same industrious and arrogant expression of racism of O'Sullivan has allowed mainstream America to ignore the conquest and mistreatment of Latinos up to the present day, just as the contemptuous and scared expression of racism of Delano can be seen in the responses to the Latino immigrant presence.

In retrospect, it is easy to spot examples of policy makers condoning the flow of undocumented labor. As employers began to recruit Mexican labor in the late nineteenth century due to the growing scarcity of Asian labor, "the federal government of the U.S. played a role that mingled dejure assertiveness and de facto submissiveness." Initially, Congress imposed a per-head tax on immigrants entering the U.S. and excluded those that could be a burden on taxpayers. However, it left the execution of the law to the states, which had little incentive or capability to follow through. Decades later, in reaction to a rise in anti-immigrant sentiment, Congress, in order "[t]o enable Mexican migrants to come unhindered by formal legal restrictions principally enacted to target southern and eastern Europeans during and after World War I," provided the Ninth Proviso, "which waived the head tax and literacy requirement of the 1917 Immigration Act." This pattern reemerged as the economy gained steam during and after World War II. With the implementation of the Bracero Program and "the federal government abandoning any quality enforcement role" in its oversight of employers, those employers utilized their unsupervised authority to subvert the Program's standards for treatment of workers and increased their hiring of undocumented immigrants, in effect, freeing them from compliance altogether.

In the periods of time between these permitted influxes of immigrants, policymakers reacted to political pressure by amplifying the creation and enforcement of prohibitions. In the years prior to the Great Depression, the

14. Id. at 155.
15. Lopez, supra note 4, at 1756.
16. Id. at 1756-57; Gilbert Paul Carrasco, Latinos in the United States: Invitation and Exile (1997), reprinted in Race and Races: Cases and Resources for a Diverse America, 341 (Juan Parea, Richard Delgado, Angela Harris, Jean Stefancic, Stephanie Wildman, 2007).
17. Lopez, supra note 4, at 1757.
18. Id. at 1760.
19. Id. at 1767.
20. Id. at 1766-69; Carrasco, supra note 16, at 344.
influx of immigrants led to increases in discriminatory tailoring and enforcement of criminal laws,\textsuperscript{21} the elimination of bilingual education,\textsuperscript{22} segregation due to white fears of health risks,\textsuperscript{23} and the exclusion of immigrants from public benefits.\textsuperscript{24} During the Depression, with many white citizens out of work, the reaction to the possibility of Latinos occupying potential jobs was so hostile that through various procedures, "[b]y the end of the Depression, over 400,000 Latinos were 'repatriated' to Mexico without any formal deportation proceedings, including thousands of American citizens."\textsuperscript{25} The nightmares of these injustices were revived a few decades later in the reaction, entitled "Operation Wetback," to the post-war influx of Latino labor, when "[b]etween 1954 and 1959 . . . over 3.7 million Latinos [were] deported."\textsuperscript{26}

To better understand the present, it is crucial to see the history of undocumented Latino immigrants in the U.S. as a history of policymakers reacting to electoral and economic pressures, pressures which are frequently emboldened by racism. This dynamic still exists today. In order to react to these pressures, policymakers have manufactured a multitude of statutes and practices that allow them to manipulate the undocumented Latino immigrant population to their advantage. Viewing the past and present through this lens allows one to more deeply understand that certain criminal offenses and prosecutorial practices are tools in this system of social control.

\section*{III. Illegal Reentry}

\subsection*{A. Definition, Penalties, and Prescribed Defenses of the Statute}

Section 1326 of Title Eight of the United States Code is titled "Reentry of Removed Aliens."\textsuperscript{27} It is often referred to as "Illegal Reentry." While the statute is found in the title generally containing laws regarding aliens and nationality, there is no question that, in action, it is fundamentally a criminal statute. The statute applies criminal sanctions to "any alien who . . . has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or
removal is outstanding, and thereafter . . . enters, attempts to enter, or is at any time found in, the United States." 28

Anyone fitting this description will at least be punished by “fine[s] under Title 18, or imprisoned not more than 2 years, or both.” 29 However, subsection (b) of the statute is tailored to administer four specific punishments to four categories of individuals who have prior offenses. The first, (b)(1), declares that those individuals “whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both.” 30 Additionally, subsection (b)(2) states that individuals “whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.” 31 The latter two of the four punishments are more specific than the first two. The next subsection maintains that individuals who are deported for offenses related to terrorism shall be fined and “imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.” 32 Subsection (b)(4) punishes those individuals that the Attorney General elected to remove before the completion of their prison terms with a sentence of up to 10 years. 33 Relatedly, subsection (c) maintains that, in addition to the terms set out by (b)(4), an individual that returns to the United States after being deported prior to the completion of a term of imprisonment shall be required to complete their previous term of imprisonment. 34

All five potential punishments are not applicable to an individual if “prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien’s reapplying for admission.” 35 Similarly, these punishments are not applicable if the “alien [ ] establish[es] that he was not required to obtain such advance consent under this chapter or any prior Act.” 36

Subsection (d) provides the defendant with potential relief from the penalties of this statute. 37 In 1987, the Supreme Court of the United States

29. Id.
34. 8 U.S.C. § 1326(c) (2012).
36. Id.
heard a challenge to a previous incarnation of § 1326 in the case of United States v. Mendoza-Lopez.\textsuperscript{38} The Court took the case in order to settle a circuit split on whether a defendant could challenge the underlying, original removal order on which a new § 1326 charge is based.\textsuperscript{39} The defense asserted that Congress, when writing §1326, intended to allow the defendant to challenge the original removal order and that not allowing the defendant to challenge the order was a violation of his Due Process Rights.\textsuperscript{40} The Court held that while Congress did not intend to allow the underlying order to be challenged, the order must be challengeable in order for the statute to comport with Due Process.\textsuperscript{41} Applying the fact that “[its] cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding,” the Court found that the defendants were not properly informed of their right to appeal or suspend the deportation, and were therefore denied their Due Process Rights.\textsuperscript{42}

Subsection (d) allows § 1326 to comport with the Right to Due Process, effectively providing the main defense to the offense. In order to utilize this (defense and escape § 1326 sanctions, the defendant must demonstrate that “(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.”\textsuperscript{43}

B. History of the Statute

Illegal Reentry first originated as Section 276 in the Immigration and Nationality Act of 1952 (The McCarran-Walter Act) under the name “Reentry of Deported Alien.”\textsuperscript{44} The primary predecessor to the statute was 8 U.S.C. § 180(a), which was repealed upon § 1326’s passage into law.\textsuperscript{45}

The Immigration and Nationality Act of 1952 was a milestone immigration bill. Famously, it ended the exclusion of Asian peoples from lawfully immigrating to the United States, but upheld a quota system based

\textsuperscript{38} 481 U.S. 828 (1987).
\textsuperscript{39} Id. at 833–34.
\textsuperscript{40} Id. at 834–35.
\textsuperscript{41} Id. at 841–42.
\textsuperscript{42} Id. at 837–40 (alteration in original).
\textsuperscript{43} 8 U.S.C. § 1326(d) (2012).
\textsuperscript{45} 481 U.S. at 835.
on a national origin. The Act was passed at the start of the Cold War, which turned its passage into a battle between two major strategies of U.S. leaders in strengthening the country. Some leaders, led by President Truman, were foreign policy focused and wanted to broaden the United States’ appeal to all parts of the world. Others, led by Senator McCarran of Nevada, were concerned about subversive elements entering the U.S. that could “threaten the foundations of American life.” President Truman vetoed the Bill upon its passage, but overwhelming Congressional support allowed it to supersede his Presidential veto to become law.

In a more equally numbered debate, one would suppose that given the primary concerns of each side, a law ensuring that individuals who had been previously removed would be a relatively uncontroversial statute to insert into the bill. Those concerned with subversive activity would very likely be passionate about its passage and those with the primary concern of broadening U.S. appeal were quite likely not concerned about the U.S.’s appeal to former deportees. So in this real-life debate, where concerns of the subversion of American life were the primary focus of a vast majority of legislators, the statute was likely an obvious, unquestioned inclusion.

Further, the individuals subjected to the statute’s penalties have no political capital to fight it. Those subjected to the statute are most often lacking in financial capital as well, and given the function of the statute, any attempt to speak out against it may result in the statute being applied to the individual speaking out or those that they are advocating on their behalf. The anonymity of those subjected to the statute creates a void that invites Americans and their politicians to insert the faces of the scourge that exists in the mind of the beholder. Thus, arguments against it are not to be taken seriously.

This lack of political capital lies in stark contrast to the employers of Latino laborers, who were able to dampen the criminal penalties on employing aliens during the debate over the Bill. After the defeat of the employer penalties, a New York Times editorial noted that, “[i]t is remarkable how some of the same Senators and Representatives who are all for enacting the most rigid barriers against immigration from Southern Europe suffer from a sudden blindness when it comes to protecting the southern border of the United States.” The editorial sarcastically noticed

47. Id.
48. Id.
49. Id.
50. Id.
51. Lopez, supra note 4, at 1769–70.
52. Editorial, Wetback Problem, N.Y. TIMES, Nov. 28, 1952, at 24 (quoted in Lopez, supra
that, "[t]his peculiar weakness is most noticeable among members from Texas and the Southwest, where the wetbacks happen to be principally employed." The employers who had sufficiently persuaded their representatives to not allow the Bill to contain sanctions that could be utilized against them did not mind sanctions that could be leveled at former deportees, as there was a plentiful supply of labor.

Illegal Reentry was borne out of an Act passed by a legislature that is historically notable for its skepticism of potential entrants into the United States subverting the American way of life. If that is a legislature's primary concern, one of the first logical laws to make is one that punishes an individual who had already been deemed unfit for the United States but attempted to enter illegally. The individuals effected by the law did not have the ability or interest to stand up against it. Their employers had the ability but lacked interest. Given the New York Times editorial's concern with the southern border, the fact that § 1326 was passed, and laws sanctioning employers were even considered, it is fair to wonder if this frustration was at least related to the frustration that led to the 1954 unleashing of Operation Wetback.

Over the sixty-plus years since § 1326's passage, the statute has expanded its net as well as its hammer. Originally, the statute simply stated that an alien who had been deported and then entered, attempted to enter, or was found in the U.S. without permission was guilty of a felony and could be fined up to one thousand dollars and sentenced to a prison term of up to two years. As time passed, the statute was revised, with a few especially relevant changes in the late eighties and early nineties. In 1988, Congress added the increases of five- and fifteen-year limits to those guilty of multiple misdemeanors or felonies, and aggravated felonies, respectively. Congress, in 1994, ensured that the statute applied to deportation orders that were pursuant to stipulations and to those individuals who had committed three or more misdemeanors involving drugs or violence. It also increased the penalty on the newly included misdemeanor defendants and felons to a ceiling of ten years and on defendants with prior aggravated felonies from fifteen to twenty years. Finally, in 1996, Congress included the portion of the statute that pertains to those who have committed terror-

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54. *Lopez*, supra note 4, at 1770.
58. Id.
related offenses. Each amendment to § 1326 has either casted a larger net or added more weight to its punishments.

C. The Current Use and Effects of the Offense

According to the Department of Justice, 44% of all felony cases filed in 2010 were immigration offenses. Of those immigration offenses, an overwhelming amount, 81%, were Illegal Reentry offenses. Thus, in 2010, 35.64% of all federal felony criminal offenses were Illegal Reentry offenses. It is the fastest growing immigration referral to United States Attorneys. The offense was prosecuted 67% of the time. However, once the 33% of the time that a magistrate judge disposed of the matter is taken into consideration, it is clear that when given a § 1326 case, prosecutors decline to prosecute in 1% of all cases.

Relatedly, 97% of all immigration defendants were convicted and 97% of those convictions were obtained through guilty pleas. According to a 2009 DOJ report, the conviction rate for immigration offenses is significantly higher than other categories of offenses. The 2009 report shows that while immigration offenses had a 97% conviction rate that year, all other categories of offenses had conviction rates between 84.3% (acts of violence) and 89.3% (drug offenses). Drug offenses were the only category of offense prosecuted at a similar rate as immigration offenses.

The majority of the growth in prosecution of Illegal Reentry is occurring in the Federal Districts in the Southwest, along the border of the United States and Mexico. In 2010, the Southwest border districts handled 78% of all illegal reentry referrals, up from 73% in 2008.

Of the 23,102 total defendants in Illegal Reentry cases in 2010, 96.5% were male and over 80% were between the ages of 25 and 49. The report

62. Id. at 18.
63. Id. at 19.
64. Id.
65. Id. at 6.
67. Id.
68. 2010 REPORT, supra note 61, at 18.
69. Id.
70. Id. at 22.
states that 98% of those defendants were Latino. A more specific breakdown shows that of the defendants, 84.6% were Mexican, 11.8% were Central American, and 2.3% were Caribbean. No other region or nationality had a representation over 1%. The 2009 report seems to reflect that most defendants of immigration offenses tend to be poor. Of defendants whose immigration cases terminated in 2009, 49% were represented by a public defender and 24.1% were represented by a Criminal Justice Act-appointed attorney.

These demographics are reflected in the corresponding federal incarceration rates and statistics. In 2010, there were 17,720 Mexican citizens in federal prison for immigration offenses, up from 2,074 in 1994. In 2010, 32.5% of all federal prisoners were Hispanic, more than double the percentage, 13%, of Hispanic representation in the United States according to the 2010 U.S. Census. The Southwestern districts are notable again in these statistics, not for their amount of immigration offenders, but for the rate at which immigration offenders are subjected to prison sentences. In 2009, 84.1% of immigration offenders were sent to prison in Southwestern federal districts, compared with an overall imprisonment rate of 75.1% for all immigration offenders.

The median sentence for Illegal Reentry in 2010 was 15 months, which was down from 27 months in 2003-2004 and 37 months in 1999-2000. While that may seem to reflect a more lenient sentencing agenda taking hold, it is important to recall that the prosecution rate for this crime has risen sharply over the same period of time and prosecutors rarely decline to prosecute an Illegal Reentry offense. This decrease in average sentences more likely displays an increase in the prosecution of individuals who are not eligible for the higher sentences set out by the statute, as well as the defendant’s low likelihood of success at trial coupling with the statute’s harsh penalties to create the aforementioned 97% guilty plea rate. The report states that 92.6% of Illegal Reentry defendants had a prior arrest in 2010, 64.8% had felony convictions, 20.6% had misdemeanor convictions, and 14.6% had no prior convictions. Of those felony convictions, around two-thirds dealt with either violence or drugs. A final
important statistic regarding priors and sentencing is that of the 15,234 unlawful entry and reentry prisoners released in 2007, 13% returned to federal prison within three years. Of that number, 8.8% returned due to a violation of their supervision and 91.2% returned because of a new offense. Given the federal jurisdiction, the fact that federal arrests compromise 1% of all arrests in the U.S., and an individual’s likely deportation after release, it is likely that the “new offense” is Illegal Reentry.

Together, all of these statistics paint a detailed picture of how the offense of Illegal Reentry is being used, and tells us a great deal about why it is being used. It is overwhelmingly used against working-age, poor, Latino men. The recidivism rate coupled with the harsh, almost certain sentence and deportation indicate that many individuals are knowingly risking heavy consequences—likely for the few things that are worth risking it for: health, family, and finances. While many defendants do indeed have prior felonies, the DOJ reports do not discuss any information regarding the length of time since the underlying offense or of repeat Illegal Reentry offenders tending to have original underlying offenses of a greater magnitude.

It is clear that due to the overwhelming difficulties of winning at trial and the stiff penalties a conviction carries, defendants enter guilty pleas at a high rate. Due to the fact that the defendant, who is not to be present in the U.S., is present in a courtroom within the U.S., there are only two avenues for a defendant to escape a guilty verdict. The first avenue, as mentioned above, is to challenge the underlying order under 8 U.S.C. § 1326(d). This requires the defendant to show that they exhausted any possible administrative remedies that were available at the time, that the proceeding improperly denied them of judicial review, and that the entry of the order was fundamentally unfair. The other avenue is similar: to remind a jury that in a criminal case the burden is on the government to show that the defendant has no claim to citizenship and hope that the government does not reach that standard. Both avenues are exceedingly difficult.

It is also visible that these strong advantages are not lost on prosecutors. These offenses are charged in great number and are turned down due to prosecutorial discretion a miniscule percentage of the time. It would be naïve to think that this increase in prosecution, especially in the Southwest, is simply a result of a greater number of offenders and not institutional incentives, such as focusing on crimes that are plentiful and

81. 2010 REPORT, supra note 61, at 37.
82. Id.
83. 2009 REPORT, supra note 66, at 1.
easy to prosecute in order to increase prosecution rates. This is reflected in some of the programs in place in the Southwestern border districts. The 2009 DOJ report informs that “Operation Streamline, a federal zero-tolerance prosecutorial initiative, began in the Border Patrol’s Del Rio Sector (located in the Western District of Texas) in December 2005.”

It goes on to explain that under Operation Streamline, authorities made sure to charge first-time offenders crossing the border with a federal criminal offense rather than steering these nonviolent immigration offenders to federal civil deportation proceedings or allowing voluntary removal.

It further discloses that Operation Streamline ensures that those crossing the border “are charged with a misdemeanor and face up to 6 months in prison before being deported. The federal conviction counts toward the more serious charge of illegal reentry if the offender attempts to reenter the U.S. illegally (a felony punishable with up to 20 years in prison).”

Operation Streamline is now active in most of the federal districts along the U.S.-Mexico border.

Another example comes from the Los Angeles County District Attorney’s Office. The Office, which claims to operate under an “immigration-neutral” regime, sends district attorneys “to work for the Office of the United States Attorney on immigration crime cases brought in federal court. Under the program, local district attorneys work exclusively on ‘illegal reentry’ cases—prosecuting felons and suspected gang members who reenter the United States without permission under the federal immigration law.”

The Los Angeles District Attorney utilizes this unique program because “it gives local prosecutors the ability to use federal immigration law to incapacitate persons perceived to pose criminal threats, without infecting local criminal proceedings with immigration concerns.”

These are just two examples, but each displays the zeal with which prosecutors go out of their way to implement Illegal Reentry due to its overpowering combination of punishment and provability.

Both the expansion of the definition of “aggravated felony” in recent years and the fact that an individual may be convicted due to a prior conviction in the distant past cause Illegal Reentry to be at odds with American notions of justice. Over the last twenty to thirty years, the definition of what constitutes an aggravated felony has expanded exponentially. While it has always contained the crimes one would expect

85. 2009 REPORT, supra note 66, at 5.
86. Id.
87. Id.
88. Id.
90. Id. at 1195.
it to, it now includes crimes such as gambling, forgery, passport fraud, trafficking a controlled substance, as well as illegal entry and reentry if the prior removal occurred pursuant to an aggravated felony. Whenever new offenses have been added to the list, their definitions as aggravated felonies apply retroactively. These categorizations are what dictate the sentence of the current Illegal Reentry case and the facts that underlie them are of no consequence. For example, it will not matter whatsoever if a defendant is a drug kingpin or a drug mule, as long as they have the same prior conviction. Additionally, the statute contains no limitations on how far in the past the prior conviction or deportation order occurred and provides no expungement procedure.

The primary action the offense is intended to punish is in its title: Illegal Reentry. It is ostensibly an immigration regulation in that sense. However, given that the incredibly vast differences in maximum sentences depend on the prior offenses, the actual punishment of the offender is dictated by their prior offense. There is often no functionally different characteristics of the proximate crime committed by two individuals, yet one individual faces a maximum sentence ten times the length of the other’s maximum sentence. Considering that these prior offenses could have been committed decades prior to the current offense, could have been overcharged considering the underlying facts, or could have been redefined as an aggravated felony after it was committed, it seems that Illegal Reentry does not only primarily punish the prior offense, but does so recklessly disregarding relevant details. Although it likely does not approach the Supreme Court’s restrictive interpretation of the Double Jeopardy Clause, Illegal Reentry can easily and often violate the basic, everyday notion of justice that the Double Jeopardy Clause represents.

IV. Systematic Denial of Bail to Undocumented Defendants

A. Bail Reform Act of 1966

Congress updated the federal standards by which bail procedures would be governed with the Bail Reform Acts of 1966 and 1984 ("BRA"). Congress’ purpose in passing the BRA was “to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to

92. Warner, supra note 91, at 64.
testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.”94 By enacting the BRA, Congress enacted these notions of fairness into the law. The BRA requires that, “unless the judicial officer determines that [] release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community,” then the “judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court.”95 This requirement is to be adhered to unless the “judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person in the community.”96 The judicial officer’s determination of the suitability of an individual defendant is to be individually tailored to the specific circumstances of that defendant.97 Once again, this does not mean that it is to be tailored to the offense the defendant allegedly committed or tailored to a general trait a defendant may share with a group. It is to be individually tailored to the specific offense and circumstances of the individual defendant. All of these intentions and statutory rules, of course, find their roots in the Eighth Amendment of the U.S. Constitution’s demand that, “[e]xcessive bail shall not be required.”98

While the BRA considers persons in the United States illegally, it at no point dictates that those persons are to be detained upon that basis alone. Subsection (e)(3) describes the crimes that may bring a rebuttable presumption of detention: certain drug offenses where the maximum sentence is over 10 years, specific major violent or potentially violent crimes, crimes that are international in nature, acts of terrorism transcending international boundaries, slavery and international human trafficking offenses, and specific offenses involving minor victims.99 The statute does not list immigration offenses amongst those offenses.100

The BRA explicitly lists the factors that the judge shall use in determining whether the person is a flight risk or a danger to others.101 The judge will make this determination during a detention hearing, which would be prompted by a motion in “a case that involves — (A) a serious risk that such person will flee; or (B) a serious risk that such person will obstruct or

97. Stack v. Boyle, 342 US 1, 4 (1951) (stating that, “[t]he traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant”).
100. Id.
attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.”

The judge is to take into account the nature and circumstances of the offense charged, the weight of the evidence against the person, the person’s history and characteristics, and the nature and seriousness of any danger a release may pose to the community. While some courts read immigration status into the history and characteristics of the person, immigration status is not explicitly mentioned in the text of this subsection. The only place in the BRA that explicitly mentions immigration status is 18 U.S.C. § 3142(d), which allows the judicial officer to impose a ten-day detention for a person who “is not a citizen of the United States or lawfully admitted for permanent residence,” and, “may flee or pose a danger to any other person or the community.” The statute explicitly states that the purpose of this ten-day detention is to provide the appropriate official, in most cases an ICE official, to take the individual into custody. If the official does not take the individual into custody, then “such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings.”

Taken together, the fact that the list of offenses containing a rebuttable presumption of detention does not list immigration status, that immigration status is not explicitly stated as a factor to be considered by a judge, and that the only section mentioning immigration status states that the defendant is to be treated in accordance with the rest of the statute if the specific time-sensitive steps are not followed, strongly suggests that immigration status, in itself, is not a factor that should persuade a judge in his decision of whether to grant a defendant bail. Further, when these provisions are placed in the broader context of the Eighth Amendment, the individualized nature of this sort of inquiry, the multiple options judges have before them in order to ensure a defendant’s appearance, and Congress’ stated purpose for the BRA, it is unequivocally clear that “Congress chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings.”

103. Id.
106. Id.
107. Id.
108. United States v. Adomako, 150 F.Supp.2d 1302, 1304 (M.D.Fla. 2001) (ruling that the court must apply the normal bail procedure when determining the potential detention of a deportable alien).
B. Immigration and Nationality Act

The Immigration and Nationality Act of 1965 ("INA"), as amended, sets out the majority of U.S. immigration law. The primary statute within the INA that lays out the basic parameters of the detention and removal procedure of non-citizens by the U.S. Government, entitled "Detention and Removal of Aliens Ordered Removed," is found at 8 U.S.C. § 1231. The statute states unequivocally that, "[d]uring the removal period, the Attorney General shall detain the alien," and demand that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who" is inadmissible or deportable. A subsection that is especially pertinent to Illegal Reentry defendants, 8 U.S.C. § 1231(a)(5), states that, "[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." It further asserts that, "the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry." Most important in a discussion of the relation of removal procedure and bail procedure is the point at which the removal period begins. Section 1231 attempts to state this clearly, but there is a bit of ambiguity within the statute regarding this issue. It states that,

The removal period begins on the latest of the following: (i) The date the order of removal becomes administratively final. (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order. (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Most important for the criminal context is Section iii. It may dictate that the removal period begin the date an alien is released from detention or confinement, however, in the context of bail the true answer then lays in the definitions of “detention” and “confinement.”

The statute also limits the possibility that detention prior to trial could be the kind of detention or confinement referred to when it explains that

113. Id.
generally "the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal." 115 All of the types of detention and confinement listed are all forms that come after an entry of judgment, which tends to support the idea that being released on bail or on one's own recognizance does not trigger the removal period. This is supported by the fact that all of the exceptions to this general rule require that the defendant is confined "pursuant to a final conviction." 116 The fact that the general rule does not allow the removal of an alien during detention or confinement, that it mentions only forms of detention and confinement that occur after a final conviction as non-valid reasons for deferral of removal, and that the exceptions to this rule still require a final judgment supports a strong supposition that ICE is not required to follow through with the removal period upon release from pretrial confinement.

C. Two Different Maneuvers to Deny Undocumented Defendants Bail

1. Interpreting Removal By ICE to be a Flight Risk Under the BRA

The court in United States v. Trujillo-Alvarez stated what is well known to those that attend arraignments and detention hearings in federal criminal cases and what is less known to those that do not: that "in numerous cases throughout the United States, the government has argued for the retention of persons charged with illegal reentry who are the subject of an ICE detainer." 117 It explains that the reasoning behind the government’s argument is that, “the existence of the ICE detainer and the possibility that the person may be removed or deported by ICE before trial is sufficient under the BRA to satisfy the government’s burden of showing that there are no conditions that will reasonably assure the appearance of the defendant at trial." 118

The idea that this argument is occurring, and succeeding, is frequently supported by the most relevant statistics available. In 2009, according to the aforementioned 2009 DOJ report, 95% of immigration defendants (of which, as mentioned above, Illegal Reentry defendants compromise around 80%) were detained prior to trial. 119 Without context, one may assume that a 95% pretrial detention rate is the norm, but it is not. For comparison,

117. 900 F. Supp. 2d 1167, 1176 (D. Or. 2012) (holding that the Government’s flight argument was constitutionally unsound and ICE’s detention of the defendant during trial was a violation of the defendant’s constitutional rights).
118. Id.
119. 2009 REPORT, supra note 66, at 10.
UNJUST TOOLS FOR SOCIAL CONTROL

defendants with two or more failures to appear are detained 86.3% of the time.120 Those with five or more prior convictions and those charged with violent felonies were detained prior to trial 88.6% and 90.4% of the time, respectively.121 Once again, the Southwestern federal districts, where the caseload is especially immigration heavy, stand out with a pretrial detention rate of 88.3% for all defendants, while other all other districts combined averaged a pretrial detention rate of 67.9%.122

Many courts, even at the district court level rather than at the magistrate level, do not even fully confront this issue before accepting the government’s argument when it is brought before them.123 The courts find that the certainty of the issuance and execution of the removal order upon the defendant’s release deem it necessary to detain the defendant pre-trial.124 This comes from the certainty in the language of the INA regarding the inevitability of removal once the short removal period begins.125 Nevertheless, this is not explicitly listed as something for a judge to consider under the BRA.

Therefore, because immigration issues are not explicitly mentioned as a consideration, the government argues, and courts regularly agree, that it should be swept into the consideration under 8 U.S.C. § 3142(g)(3), which allows for the consideration of the history and characteristics of the defendant.126 This, by itself, is not a stable analysis, as immigration language is explicitly used almost directly before this set of factors in the text of the BRA, but is not explicitly mentioned amongst the factors themselves.127 More importantly, while being an immigrant illegally in the United States may be a characteristic of an individual, being subject to a removal order is more easily described as a status, which is considered more specifically in a judge’s analysis.

The courts and prosecutors that follow this flawed line of reasoning state that to release these defendants and allow them to be deported is akin to issuing them “get out of jail free cards.”128 Beyond the bleak reality that

120. 2009 REPORT, supra note 66, at 10.
121. Id.
122. Id.
126. Brief for Appellee in Response to Brief of Amici Curiae at 3–4, United States v. Millan-Vasquez, No. 13-1324 (8th Cir. 2013), (which is an appeal of Ramirez-Hernandez, supra note 120); 150 F.Supp.2d at 1307.
127. § 3142(g) is close in proximity to § 3142(d).
128. Brief for Appellee, supra note 126, at 3 (citing United States v. Campos, No. 2: 10-mj-
many of the defendants facing removal rather than criminal prosecution will still be punished in the form of removal to a country where they may be in danger or far away from the families and support networks, it is also incorrect because of the legal reasoning discussed at the end of IV(B). ICE may not begin removal proceedings until after a final judgment is reached in a case and the defendant has been released from the detention or confinement that is the result of that judgment.\textsuperscript{129}

In response to a defendant’s common-sense argument that in order for an individual to flee, the individual must flee under their own volition, the government argues that “the plain language of the Bail Reform Act says nothing about volition. See § 3141–3156.”\textsuperscript{130} This assertion is absurd for two reasons. First, there is a subsection in a different, but related portion of the BRA that clearly suggests that volition is an element in flight. The BRA’s affirmative defense for failing to appear reads:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.\textsuperscript{131}

It is arguable that a defendant illegally in the United States originally began the causal chain. However, this theoretical causal chain would break when an executive agency, after the defendant has been ordered released by a judge, transfers the defendant to a different executive agency in order to remove the defendant to a location beyond the U.S. border. Then, if the defendant crosses that border in order to make the court date, the defendant would be risking capture by the latter executive agency and subsequent criminal charges prosecuted by the former executive agency. These circumstances qualify as uncontrollable circumstances beyond the defendant’s control. Also suggesting that the defendant did not contribute to the creation of their failure to appear is that the original entering was not specifically “in reckless disregard of the requirement to appear or surrender.”\textsuperscript{132} This affirmative defense, while in a separate statute within the BRA, directly addresses the question of whether volition is required in the BRA’s definition of flight and counsels that the circumstances in question are beyond the defendant’s control.

\begin{flushleft}\textsuperscript{6-SRW, 2010 WL 454903, at *5 (M.D. Ala. Feb. 10, 2010)).}  
The second reason the assertion that volition is not necessary for flight is absurd can be found in the dictionary. *Webster's Dictionary* defines flight as "an act or instance of running away." The volition that is inescapably implied by this definition is not academic, but critical to the everyday use of the word. However, it is not merely the words of the definition of "flight" that cause this argument to be absurd. It is absurd because the argument entirely undermines the fact that Congress intentionally and specifically used the word "flight" in order to reflect the People's collective notion of justice regarding this specific scenario. Surely, arguing over the definitions and the intended use of words constitutes a great deal of real-world lawyering. Yet, those attorneys that execute the power of our nation's criminal code and begin every court appearance by stating that they represent "the People of the United States of America," may not willfully turn a blind eye to the uncontroversial definition of a commonplace word.

Further, the common sense definition of the word "flight" implies that the entity the individual is running away from should not be the same entity forcing the individual to run away. To state it in clearer terms: the government's argument violates basic principles of the separation of powers. The courts that have rejected the government's flight argument have primarily focused on this issue and have done so in unequivocal language. In *United States v. Castro-Inzunza*, an unpublished order, the Ninth Circuit overturned a district court in holding that a reinstated removal order did not lead to an automatic justification of detention under the BRA. The court stated that one shortcoming of the government's attempt to carry its burden of showing that the defendant was a flight risk was that it failed to show that it was unable to:

enjoin[] the government from interfering with his ability to appear at trial. Additionally, the government has not shown that it lacks the ability to stay or defer defendant's removal through a stay or departure control order if it believes that his removal before trial would be contrary to public interest.

Other district courts across the country have stated this proposition in less gentle terms. In *United States v. Barrera-Omana*, Judge Rosenbaum noted that the true problem in front of him was not whether the defendant would flee, but whether two executive agencies would be able to coordinate their efforts. He then cautioned that, "[i]t is not appropriate for an Article

133. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 870 (1993).
135. *Id.* at *1.
136. 638 F. Supp. 2d 1108, 1111–12 (D. Minn. 2009) (holding that the defendant was
III judge to resolve Executive Branch turf battles.\textsuperscript{137}

The United States v. Marinez-Patino court pushed further and questioned one aspect of Judge Rosenbaum’s statement: his presumption that this problem arises from a lack of coordination.\textsuperscript{138} Generally, in these scenarios a defendant is never physically released from the one agency and then picked up by the next, but simply transferred from one to the other.\textsuperscript{139} The Marinez-Patino court observed that the defendant had been brought before it as a “result of both the United States Attorney’s Office and ICE—two Executive Branch agencies—exercising their discretion in a coordinated effort to serve the public interest as they see it.”\textsuperscript{140} The court then refused to accept an argument that “ICE’s interest in deporting the defendant would suddenly trump the United States Attorney’s interest in prosecuting the defendant,” because it ignored the very cooperation that made the prosecution possible in the first place.\textsuperscript{141}

The argument asserted by prosecutors and often accepted by courts, that an alien defendant is a flight risk due to a chance that a defendant will be removed by ICE against their will, twists laws until they no longer represent their true intent and violates the most basic tenant of our structure of government. The argument’s effect is likely seen in both the contorted detention rates of immigration offense defendants and the detention rates in the region in which most immigration offense defendants are prosecuted. Not only does the argument disregard relevant laws and the separation of powers, but it also violates many individual rights set out in the Constitution, which will be discussed in further detail in IV(C)(3).

2. ICE Disobeys Court Orders to Detain Defendant For Trial

If the defendant prevails at the detention hearing and is allowed to post bail or be released on the defendant’s own recognizance, there remains another common maneuver the government could make to effectively deny the defendant bail. As discussed in IV(A), ICE would have ten days to bring the defendant into their custody before the defendant would be released. While this triggers the removal process, defendants may continue to be criminally prosecuted during this time, effectively a denial of bail. This scenario occurs less often than the previous scenario because undocumented defendants are rarely released from pretrial detention, courts are less receptive to the maneuver, and defense attorneys are typically eligible for bail).

\textsuperscript{137} 638 F. Supp. 2d at 1112.

\textsuperscript{138} No. 11-CR-64, 2011 WL 902466 (N.D. Ill. Mar. 14, 2011) (rejecting the government’s argument that the defendant was a flight risk due to the ICE detainer placed on him).

\textsuperscript{139} Id. at *2; see also 900 F. Supp. 2d at 1172.

\textsuperscript{140} Id. at *7.

\textsuperscript{141} Id.
aware that their clients will not receive criminal custody credits while likely in the ICE custody. While prosecutors seeking this scenario are far less successful in court, the denial of the right to bail generally does not occur in court, but rather is left unaddressed in the courtroom due to either a lack of incentive to challenge the practice or a lack of knowledge of its improper nature.

In *Trujillo-Alvarez*, the government argued in the alternative that, "[t]he Ninth Circuit [in *Castro-Inzunza*] properly concluded that [the ICE detainer] did not [by itself justify detention under the BRA], but the court of appeals said nothing about ICE's ability to take the defendant back into administrative custody." The court stated that the government argument likely has merit but that, "nothing permits ICE (or any other part of the Executive Branch) to disregard the congressionally-mandated provisions of the BRA by keeping a person in detention for the purpose of delivering him to trial when the BRA itself does not authorize such pretrial detention." Rather than reading in favor of ICE detaining individuals for criminal prosecution, the relevant administrative regulations, statutes, and constitutional rights clearly forbid this practice. The purpose of an immigration detainer, which ICE issues to any law enforcement entity when ICE is aware that the entity has an alien in its custody and ICE is seeking custody, is explicitly "for the purpose of arresting and removing the alien." Two other regulations, 8 C.F.R. § 215.2(a) and 8 C.F.R. § 215.3(g), fuse together to suggest that the DOJ prioritizes criminally prosecuting an individual over removing that individual. This interpretation comports with the previously discussed 1231(a)(1)(B)(iii), which demands that removal proceedings begin after the alien is released from the detention or confinement that stems from a final judgment.

Fundamentally, this maneuver to deny bail, like the maneuver discussed above, can be traced back to separation of powers violations. As the court in *Trujillo-Alvarez* states, there is nothing stopping the executive branch from detaining a defendant in ICE custody once the defendant is released on bail. However, it must be for the purposes of removal. To continue the criminal prosecution would be to allow a lack of coordination in the executive branch to violate an order of the judicial branch, a law tailored by the legislative branch, and the Constitution.

142. 900 F. Supp. 2d at 1178 (citing Govt.'s Am. Supplemental Mem. of Law, at 8 (Doc. 24)).
143. *Id.*
144. 8 C.F.R. § 287.7 (2012).
145. 8 C.F.R. § 215.2(a) (2012); 8 C.F.R. § 215.3(g) (2012).
3. Both Maneuvers Violate Individual Rights Enshrined in the Constitution

In *United States v. Salerno*, Chief Justice Rehnquist reaffirmed the notion that, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." This notion is confirmed in the U.S. Constitution in multiple forms across multiple amendments. Both maneuvers described above violate this notion in the context of bail. Therefore, the right they most explicitly deny undocumented immigrants is the Eighth Amendment right to be free of excessive bail. This is abundantly clear in the case of ICE detaining an individual for the purposes of criminal prosecution after the individual has been released on bail. The *Salerno* Court stated that in order "to determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response." Here, Congress has enacted the BRA, an act that prescribes the avenues through which a judge will weigh the proper response to protect the interests the executive may be interested in protecting, namely, public safety and the defendant’s presence at trial. Once a judge determines through these legislated procedures that the interest the government seeks to protect is adequately protected and releases the defendant on bail or on recognizance, to detain the defendant is clearly an excessive response. The threat of this unconstitutional practice coupled with the defendant’s inability to accrue custody credits while in ICE custody chills a defendant’s right against excessive bail, which is equally unconstitutional.

The government’s argument that possible removal constitutes a flight risk is also a violation of the Eighth Amendment for essentially the same reason. Simply, to detain an individual, who would otherwise be released because the interest of assuring the defendant’s appearance is deemed satisfied, due to the executive branch’s unwillingness to coordinate within itself is an excessive response to protect that interest. The proper response to protect that interest is executive branch coordination.

The Due Process Clause is implicated by these maneuvers in two ways. First, as Chief Justice Rehnquist’s aforementioned words imply, it is a fundamental right to be free of detention that lacks due process in the form of a lawful detention hearing or trial. This right is rooted deep in

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146. 481 U.S. 739, 755 (1987) (holding that portions of the Bail Reform Act allowing for specified instances of pretrial detention are not facially unconstitutional).
147. *Id.* at 754.
148. *Id.* at 742.
149. *Id.*
150. *Id.* at 755.
this nation’s history, was important enough to enshrine in the Eighth Amendment, and is integral to the concept of personal liberty. The executive branch detaining an individual, either because of an unconstitutional argument that violates the separation of powers or from a lack of compliance with a ruling of the judicial branch, is a denial of Due Process.

Second, this executive policy violates the Equal Protection Clause, which is applicable to the federal government via the Due Process Clause.151 As displayed in section II, undocumented Latino immigrants are a discrete and insular minority as defined by Justice Stone in the famous Carolene Products footnote.152 The government does not have a compelling interest for this policy because the legislative branch crafted the BRA to provide structure to the weighing of the government’s interests against the individual’s liberty and an officer of the judicial branch weighs those interests in each specific case. Once the defendant is released (or would have been released if it were not for an unconstitutional argument), the government’s interest is no longer compelling because the interest evaporates entirely. If this analysis were done under rational basis scrutiny the result would be the same: once the execution of the apparatus designed to manage these state interests determines that the defendant is to be released, any rational interest within the executive’s policy’s purpose disappears.

Lastly, both of these maneuvers to deny bail violate the defendant’s Right to Counsel. ICE detention facilities are often far away from the federal district in which the defendant was discovered to have committed a crime. To keep a defendant detained in a facility far from where an attorney would be able to contact the defendant and effectively collaborate creates an undue hardship.153 This applies, albeit to a lesser extent, in the context of detaining the defendant for risk of removal. Unnecessary detention places an undue hardship on the client and attorney’s abilities to effectively prepare a case.

V. Conclusions About Illegal Reentry, the Systematic Denial of Bail to Undocumented Defendants, and Their Roles as Tools of Social Control

It is always clearer to view how policies of the past offend our values and violate our laws and Constitution than it is to see these offenses occurring in real time. In the present, these sorts of policies are difficult to

153. 900 F. Supp. 2d at 1180.
fit into an easily comprehendible narrative. The policies are deemphasized as our daily norms tend to encumber both our values and the effort we are willing to expend to achieve the actualization of those values. Moreover, the daily fear of the future’s unknowns weighs much heavier in the present than it ever does in retrospect. To some, the pervasive use of Illegal Reentry and the systematic denial of bail to undocumented defendants may, in the ahistorical traditional immigration “problem” construct, be seen as a rational approach to stop criminals from entering the country and fleeing the prosecution of their crimes. However, once the two practices are appraised through the proper historical context of continued widespread social control and their mechanics are examined, they are readily seen for what they are: two harsh tools of social control that are not in accord with the Constitution or this country’s laws and values.

Racism is frequently a powerful ingredient in this real-time indifference, and is elemental throughout the history of social control of undocumented Latino immigrants. It has promoted the arrogance from O’Sullivan’s claim of Manifest Destiny until present day. A job being described as “Mexican” still implies that it is dangerous, insecure, and unregulated. This has been so since the mid-19th century, through the Bracero Program, and until today because in an immediate moment there is always an assumption that, even if an undocumented immigrant deserves to be treated with respect and dignity under the laws of the United States, they would be lucky to receive that treatment as their mere presence in this territory “conquered by Providence” is an unlawful opportunity.

Additionally, racism can magnify the fear of the future’s unknown. The same backlashes against undocumented migrants are no less deeply felt today as they were in decades past, just as they are no less deeply flawed. The concerns of today are strikingly similar to those of white citizens leading up to the Great Depression mentioned in Section II, such as in bilingual education, public benefits, health risks, and crime, persist and can often lead to similarly discriminatory laws. Whether it be from indifference or ignorance, emboldened by racism or not, injustices resulting from systems of social control that occurred in the past did not seem to be unjust to the majority at the time, just as the injustices resulting from systems of social control that future generations will see occurring in the present may not seem to be unjust in our time.

Over the last half century there has been a vast expansion in the use of

154. Zinn, supra note 12.
criminal laws to provide the social control that previous laws, which were more explicitly based on traits or statuses and therefore legally or morally unacceptable, previously provided. Immigration control is not immune to this trend, and has continuously become further criminalized for the purpose of social control. This has coupled with the "immigrant-crime nexus" that has been a public concern from colonial times to the present, to construct a positive feedback loop. The criminalization of these offenses causes a faux spike in the immigrant crime rate, which, because immigrant crime is a constant hot button issue, begets more criminalization of immigration. Expansion and enhancement of this realm of crimes is effective "both as a tool of social control and as a potential device for demonstrating that the government is effective in removing 'undesirables' to control a manufactured public fear." Applying this proper understanding of the historical social control of undocumented Latino immigrants and the expansive use of the criminal law to achieve this social control to Illegal Reentry and the denial of bail, it becomes clear that they are effective, unjust tools in the current system of social control.

Certainly, a country has a right to enact and enforce a statute that deters serious criminal offenders who do not have a legal right to be in the country from entering its borders. Yet, if that is the primary purpose of Illegal Reentry, it functions like a chainsaw when a scalpel is required. It is frequently used to incarcerate and remove individuals who have lived in the U.S. since shortly after birth and return to reunite with their families and communities after their removal. Out of this group, those with a small number of misdemeanors or a single felony face stiff punishment. Those whose prior offenses can be classified within the ever-expanding classification of what constitutes an aggravated felony face two decades in federal prison before deportation. The fact that these penalties can be levied at an individual who committed their previous offense decades in the past is entirely divorced from the ideal of rehabilitation that, in theory, runs deep in the fabric of the ethos of the United States. This ideal of rehabilitation is further destroyed in one of two ways, depending on which country an individual primarily lives. The individual may be incarcerated in the country their family and community resides in, be removed, and face another lengthy prison sentence if they return to everyone they have ever known. Or if the individual primarily resides outside of the United States, their family or community members will likely be unable to ever visit them

159. Warner, supra note 91, at 72.
160. Id. at 58.
161. Id. at 65.
162. Id. at 72.
while incarcerated and they will then be removed to a family or community they no longer have connections with.

Taking into consideration the data as well as the manner and frequency with which the offense is prosecuted, Illegal Reentry is frequently being utilized, and utilized harshly, against individuals who are not the threat it was originally intended to stop. Prosecutors virtually never turn down an opportunity to prosecute the offense and it is without the built-in considerations of time since prior offenses that could result in more properly tailored sentences. Combining this with the unprecedented frequency with which it is charged and the systems of targeted policing put in place to qualify more and more individuals to be prosecuted under it, it is clear that there is no process put in place to discern between who can be held to answer for this harshly penalized offense and who should be. While it may not apply to each individual case, the pattern and practice of the use of the statute indicates that Illegal Reentry’s primary purpose is to incarcerate, and more importantly remove, undocumented Latino immigrants en masse.

The process of systematically denying bail to undocumented defendants, many of them Illegal Reentry defendants, is a tool of social control that is not only effective, but reflective of a blatant adherence to the values of the social control over the foundational rights of criminal justice. It is effective because “pretrial detention has the latent consequence of increasing the likelihood of conviction and incarceration.”163 With the uninterrupted detention of the defendant, the government provides itself with a 100% chance of the defendant’s capture. This is where the reflection of the values of social control begins to appear. The purpose of the possible removal argument and ICE detention of a defendant for criminal prosecution is not related to a potential harm that may occur, but about absolute assurance of incarceration and removal. If the purpose was truly based on flight alone, then a judge’s determination, guided by the use of a legal instrument designed by Congress to ensure that defendants appear and have a hearing devoted to applying that instrument to an individual defendant, should suffice to assure future apprehension of the defendant. It is not about guilt and innocence when an undocumented defendant is prosecuted, but about absolute certainty that if incarceration and removal are not achieved, then at least removal will be. Whether it is a fraudulent argument posed by the government or ICE holding a defendant awaiting criminal prosecution, the individual rights that are so fundamental that they are enshrined in our laws and our Constitution are bypassed in the incarceration and removal process of unwanted individuals.

The over-prosecution of the imprecise offense of Illegal Reentry and

163. Warner, supra note 91, at 63.
the denial of bail to undocumented defendants are not properly tailored to reduce harms the government is constitutionally permitted to reduce. The data, overly harsh punishments, lack of discretion in how they are utilized, and disregard for individual rights displays that the primary purpose is as a tool to assure the incarceration and removal of undocumented Latino immigrants. The targeted policing and criminalization of immigration enforcement allow increasing amounts of undocumented immigrants to be incarcerated and removed in ways that do not comport with the Constitution or reflect a dedication to removing only those immigrants who society deems truly dangerous. In these times of high unemployment, instead of public skepticism of these inadequate procedures, the mainstream public cannot seem to get enough of what it sees as an effort to answer the illegal immigration “problem.” Immigrants with prior offenses, which are becoming increasingly easy for authorities to create, provide a large pool and an unsympathetic label for those being subjected to these improper processes. Largely because of these two tools, there is currently a massive wave of defendants being incarcerated and removed with little respect to their rights. By no means is this as abhorrent as the repatriation procedures of the Great Depression Era or the deportations during Operation Wetback, but the pervasive use of these two tools demonstrates that this system of responsive social control is still alive and well, is still causing suffering on a massive scale, and is still managing to overcome any hurdles that laws, constitutional interpretation, or societal values place in its path.

There is no magic solution to ending this system of social control or abating these two tools of it, but there are ways to further extinguish the injustices and suffering that are caused by them. It begins, of course, by sustaining and hastening this society’s slow, gradual improvement on the issue of race. Those that clamor for the suffering and removal of undocumented immigrants in the name of their own safety and economic wellbeing can start by remembering that “those who live with us are our brothers; that they share with us the same short moment of life; that they seek—as we do—nothing but the chance to live out their lives in purpose and happiness, winning what satisfaction and fulfillment they can,” and move forward with the realization that they have much more in common with the immigrants illegally crossing the border than they do with those that benefit the most from this system of social control that they each play a role.

More tangibly, the initial steps to ameliorate the current injustices of the overcharging of Illegal Reentry and the denial of bail to undocumented

defendants are three-fold. First, disincentivize prosecutors from charging the offense without care to the facts of the case. This can be achieved by not allowing the resulting convictions to count towards conviction totals or rates, unless one of a select set of prior crimes was involved or the defendant has surpassed a numerical limit of convictions. Second, amend § 1326 to take into account the duration of time that has passed since the prior offense or, alternatively, provide an expungement procedure. Finally, regarding the denial of bail, defense attorneys must actively utilize the few properly reasoned decisions by federal courts around the country to solidify this proper interpretation of the interplay between the BRA and INA, in order to ensure that all undocumented defendants are entitled to the rights they deserve in the criminal process.

The road to reform these specific unjust tools, and this system of social control as a whole, is a long and difficult one. As history shows, it is true that the "arc of the Moral Universe is long, but It bends toward Justice." However, it does not bend itself. That job is left up to those who do not wait to see the injustices in retrospect and work against them in the present.

165. Dr. Martin Luther King, Jr., 10th Annual Session of the Southern Christian Leadership Conference: Where Do We Go From Here? (Aug. 16, 1967).
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