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ERIC S. FISH

Resisting Mass Immigrant Prosecutions

ABSTRACT. Over the last two decades, U.S. courts have convicted hundreds of thousands of Latin American defendants for misdemeanor immigration crimes. This has mostly happened through a federal program called Operation Streamline. In that program, immigrants are convicted without any semblance of due process. They are charged with the crime of entering the United States, have a brief conversation with a defense lawyer, plead guilty in a mass plea hearing with up to one hundred defendants at once, and receive their sentence – all in a single court appearance. In 2018, this program encountered its first organized resistance. In that year, the Trump Administration tried to bring Operation Streamline to California for the first time. There, immigrant defendants and their lawyers did not acquiesce to a norm of immediate guilty pleas. Instead, they fought their cases by securing release on bond, raising objections, taking their cases to trial, and appealing their convictions. This unexpected resistance prevented federal prosecutors from processing dozens of cases per day. In 2021, something similar happened in Texas. Governor Greg Abbott created a state-law version of Operation Streamline called Operation Lone Star. Immigrant defendants and their lawyers have resisted this program as well, securing release on bond and fighting through motions, writs, and trials.

This Article documents, analyzes, and draws lessons from these immigrants' defiance. It does so using court records, transcripts, and firsthand accounts. In the process, this Article uncovers the institutional logic of these mass immigrant prosecution systems, which have become a major feature of U.S. immigration policy. It shows how these systems prioritize efficiency above all else, resulting in inferior jail conditions, summary court proceedings, and coerced guilty pleas. In particular, it critiques the role defense lawyers typically play in these systems. Defense lawyers are expected to facilitate these prosecutions by coaching their clients to plead guilty quickly. Their presence gives the proceedings a false legitimacy, as these systems are designed to prevent lawyers from providing competent counsel. As this Article argues, defense lawyers should instead undermine these systems by helping defendants assert their rights and litigate. Indeed, immigrant defendants have powerful incentives to fight their cases if their lawyers will help them. The battles in California and Texas reveal several effective legal strategies for immigrant defendants to resist mass criminalization. They also illustrate how criminal defense lawyers can pursue systemic litigation while honoring their duties to individual clients. The keys are to seek out situations where a defendant can safely assert their procedural rights, and to only waive those rights when doing so benefits the defendant.

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INTRODUCTION

In 2018, Attorney General Jeff Sessions announced a “zero-tolerance policy” for undocumented immigration.¹ In a speech in San Diego, he declared, “If you cross this border unlawfully, then we will prosecute you. It’s that simple.”² And through a memorandum, he directed federal prosecutors in the districts along the United States–Mexico border to seek to file criminal charges against every person found crossing the border without permission.³ This meant that tens of thousands of immigrants would be charged with the misdemeanor of unlawfully entering the United States.⁴ And this included, infamously, immigrant parents whom the government would separate from their children.⁵ Federal courthouses near the border had spent over a decade processing tens of thousands of these misdemeanor cases each year through a program called Operation Streamline.⁶

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1. Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/JU8J-VXAD].
 2. Jeff Sessions, Att’y Gen., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [https://perma.cc/UDB5-ZCMA].
 3. See Memorandum from Att’y Gen. Jeff Sessions to Fed. Prosecutors Along the Sw. Border, (Apr. 6, 2018) [hereinafter Memorandum from Att’y Gen. Jeff Sessions], <https://www.justice.gov/opa/press-release/file/1049751/download> [https://perma.cc/H37Y-YBBC]; see also Press Release, Off. of Pub. Affs., *supra* note 1 (“Today’s zero-tolerance policy further directs each U.S. Attorney’s Office along the Southwest Border (i.e., Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, and the Southern District of Texas) to adopt a policy to prosecute all Department of Homeland Security referrals of § 1325(a) violations, to the extent practicable.”).
 4. 8 U.S.C. § 1325 (2018). Section 1325(a) provides: “Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.” *Id.* § 1325(a).
 5. See Caitlin Dickerson, *The Secret History of the U.S. Government’s Family-Separation Policy*, ATLANTIC (Aug. 7, 2022), <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604> [https://perma.cc/3WPA-3PWD].
 6. See *infra* Figure 1; Michael Corradini, Jonathan Allen Kringen, Laura Simich, Karen Berberich & Meredith Emigh, *Operation Streamline: No Evidence that Criminal Prosecution Deters Migration*, VERA INST. OF JUST. 2, 5-8 (June 2018), https://www.vera.org/downloads/publications/operation_streamline-report.pdf [https://perma.cc/8WQ3-5YED].

That program began in 2005 and features daily court sessions in which dozens of defendants are brought into a courtroom, have a brief conversation with a defense lawyer, plead guilty in a mass plea hearing, and receive a sentence—all at their first court appearance.⁷ But the Southern District of California had not adopted Operation Streamline, because federal prosecutors there did not prioritize misdemeanor entry cases.⁸ According to the Trump Administration, it was time for California to get with the program. The zero-tolerance policy thus brought Operation Streamline to California for the first time. The U.S. Attorney's Office in San Diego announced a plan to prosecute up to 100 people per day for unlawful entry.⁹ The judges of the Southern District of California agreed to create a separate Streamline court, and it began processing defendants on July 9, 2018.¹⁰

Things did not go as planned. From the beginning, defendants and their court-appointed lawyers resisted Operation Streamline in California. In court, defense lawyers repeatedly raised objections to the system and to their clients' treatment.¹¹ These objections and other logistical problems slowed down the

7. *Id.* at 2, 6-7.

8. See JUDITH A. GREENE, BETHANY CARSON & ANDREA BLACK, *INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER* 42-44 (2016); see also *id.* at 67-70 (discussing the U.S. Attorney's Office for the Southern District of California's approach to prosecuting illegal entry and reentry cases).

9. See Richard Marosi, *Feds Plan Mass Prosecution of Illegal Border-Crossing Cases in San Diego, Attorneys Say*, L.A. TIMES (June 6, 2018, 6:50 PM PT), <https://www.latimes.com/local/lanow/la-me-ln-operation-streamline-san-diego-20180606-story.html> [https://perma.cc/V2UM-KCG2] (“The plans were recently announced to members of the Criminal Case Management Committee, a group of attorneys, judges and law enforcement officials convened by the district's chief judge, Barry Moskowitz, to address surging caseloads in the district. The plans have yet to be finalized, but prosecutors told the committee that they want to charge anywhere from 35 to 100 people per day, including first-time crossers . . .”).

10. See All Things Considered, *California Starts Streamlining Prosecution for People Who Cross Border Illegally*, NPR, at 0:23 (June 13, 2018), <https://www.npr.org/2018/07/13/628907270/california-starts-streamlining-prosecution-for-people-who-cross-border-illegally> [https://perma.cc/4UET-SXV6].

11. See, e.g., *id.* at 1:41, 3:12 (noting equal-protection and separation-of-powers objections by defense attorneys); Transcript of New Complaints Calendar at 16-21, 43, 83-91, 116-18, 126-29, *United States v. Gil-Gonzalez et al.*, No. 18-mj-20001 et al. (S.D. Cal. July 9, 2018) (showing defense attorneys making numerous objections to the constitutionality of the proceedings on equal-protection, due-process, Sixth Amendment, and separation-of-powers grounds, as well as objections to the coercive nature of the proceedings and to defendants being shackled, in addition to other legal arguments); Transcript of New Complaints Calendar at 10-13, 15-18, 21-22, 30, 32, 37, 45-52, 73-76, 80-81, 84-89, 126-28, 137-44, 146-48, 172, *United States v. Singh Sidhu et al.*, No. 18-mj-20132 et al. (S.D. Cal. July 16, 2018) (same); Transcript of New Complaints Calendar at 40-41, 62-68, 154-56, 213, 216, *United States v. Santiago-Salvador et al.*,

proceedings, such that court often lasted late into the evening.¹² Because of these long court sessions, the judges announced on September 17 that they would no longer accept same-day guilty pleas.¹³ This change made court much more manageable and also drastically limited the number of cases that prosecutors could bring each day. At the same time, defendants sought and obtained release on bond. For the first several months of California's Streamline system, private individuals and a nonprofit called The Bail Project (TBP) posted bond for most defendants. And because the government elected to deport these defendants as soon as their bonds were posted, their criminal cases were dismissed. Thus, from July to October 2018, over 1,000 Streamline defendants had their cases dismissed after posting bond and being deported.¹⁴ Then in October, the government announced that defendants released on bond would no longer be deported. This meant that hundreds of defendants could stay with their families in the United

No. 18-mj-20472 et al. (S.D. Cal. July 30, 2018) (same); Transcript of New Complaints Calendar at 133-35, 172-74, *United States v. Rodas-Mateo et al.*, No. 18-mj-21131 et al. (S.D. Cal. Aug. 27, 2018) (same); Transcript of New Complaints Calendar at 7-9, *United States v. Hernandez-Cisneros et al.*, No. 18-mj-21590 et al. (S.D. Cal. Sept. 17, 2018) (same).

12. See, e.g., Transcript of New Complaints Calendar at 210, *United States v. Singh Sidhu et al.*, No. 18-mj-20132 et al. (S.D. Cal. July 16, 2018) (proceedings concluded at 7:03 PM); Transcript of New Complaints Calendar at 232, *United States v. Santiago-Salvador et al.*, No. 18-mj-20472 et al. (S.D. Cal. July 30, 2018) (proceedings concluded at 6:47 PM); Transcript of New Complaints Calendar at 210, *United States v. Rodas-Mateo et al.*, No. 18-mj-21131 et al. (S.D. Cal. Aug. 27, 2018) (proceedings concluded at 5:58 PM); see also Maya Srikrishnan, *Border Report: Operation Streamline Is Here*, VOICE OF SAN DIEGO (July 16, 2018), <https://voiceofsandiego.org/2018/07/16/border-report-operation-streamline-is-here> [<https://perma.cc/R2CT-A73A>] (“Court ended at 5:45 p.m. last Monday, later than normal, but a far cry from the worst days under the Department of Justice’s ‘zero-tolerance’ approach. A few weeks ago, the court was in session until 10 p.m., with roughly 100 illegal entry misdemeanor cases on the docket.”).
13. See Transcript of New Complaints Calendar at 42, *United States v. Hernandez-Cisneros et al.*, No. 18-mj-21590 et al. (S.D. Cal. Sept. 17, 2018) (“So counsel and defendants, earlier today over the lunch hour the district court had a meeting and decided effective immediately there will be no same day pleas, so for those of you and your respective clients who are anticipating if time permitted to enter a plea today, that will not occur.”); Max Rivlin-Nadler, *California Border District Reverses Course on a Key Component of Operation Streamline*, INTERCEPT (Oct. 5, 2018, 11:33 AM), <https://theintercept.com/2018/10/05/operation-streamline-san-diego-california-immigration> [<https://perma.cc/QJ3S-QHQK>] (“[T]he decision came after Jan Adler, the head of the magistrate judges (who have been tasked with presiding over the illegal entry courtroom), proposed to the district court judges that the court no longer accept same-day pleas.”).
14. See Email from Patrick Sullivan, Site Manager & Launch Coordinator, The Bail Project, to Defs. Servs. Off. Att’ys for the S. Dist. of Cal. (July 1, 2020, 12:10 PM) [hereinafter Email from The Bail Project] (on file with author); Marcus Bourassa, Spreadsheet of Posted Bonds (last updated Aug. 17, 2018) [hereinafter Spreadsheet of Posted Bonds] (on file with author). The Spreadsheet of Posted Bonds is an internal resource maintained by federal defender Marcus Bourassa, who found individual sureties and connected them with defendants.

States while their criminal cases were ongoing.¹⁵ As a result, at least eighty-six Streamline cases went all the way to trial,¹⁶ and at least twenty of the defendants in those cases won their trials.¹⁷

Defendants also appealed their convictions, many after having pled guilty. In one case alone, *United States v. Corrales-Vazquez*, the Ninth Circuit caused nearly 500 Streamline convictions to be reversed.¹⁸ Because of these efforts, San Diego's Streamline program drained considerable government resources. The Department of Justice released a report in 2021 finding that the Streamline program had placed a "massive burden" on federal prosecutors in California, requiring up to sixty attorney hours for an individual misdemeanor case and diverting resources

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15. See Kristina Davis, *New Ability to Post Bond in Illegal Entry Cases Was Undermining Trump Administration's 'Zero Tolerance' Policy. So Prosecutors Changed Tactics*, SAN DIEGO UNION-TRIB. (Oct. 15, 2018, 5 AM PT), <https://www.sandiegouniontribune.com/news/courts/sd-me-illegal-entry-bond-20181015-story.html> [<https://perma.cc/6ZVP-STCU>]. In the year after the Streamline court began, 299 defendants were released on bond into the community. Appellants' Consolidated Excerpts of Record at 42-43, *United States v. Ayala-Bello*, Nos. 19-50366, 19-50368 (9th Cir. June 8, 2020), ECF No. 10 [hereinafter Excerpts of Record].
 16. To reach this number, I conducted a search on the federal Public Access to Court Electronic Records (PACER) database for all trial cases (bench and jury trials) in the Southern District of California that began as Streamline-court misdemeanor § 1325 prosecutions. I identified sixty-three such cases filed between May 1, 2018, and May 1, 2021. This number is underinclusive, because not every case that went to trial was tagged as a "TRIAL" case in PACER's database. I added a further twenty-three trial cases from the Federal Defenders' internal master trials list that were not tagged as trial cases on PACER. See Fed. Defs., Master Trial List 2002 to Present (Nov. 6, 2020) [hereinafter Master Trial List] (internal spreadsheet) (on file with author). Most likely there were numerous additional trial cases brought by Criminal Justice Act panel lawyers (CJA lawyers) that I was unable to locate.
 17. Of the eighty-six trial cases I identified, thirteen resulted in not-guilty verdicts and a further seven were dismissed on the government's motion after the trial had begun. See, e.g., *United States v. Mazariegos-Ramirez*, No. 18-mj-22276 (S.D. Cal. Mar. 22, 2019) (not guilty verdict in § 1325 bench trial); *United States v. Montanez-Acuna*, No. 19-mj-20703 (S.D. Cal. Apr. 10, 2019) (same); *United States v. Gonzalez-Armenta*, No. 18-cr-5496 (S.D. Cal. Sept. 20, 2019) (same); *United States v. Martinez-Hernandez*, No. 19-cr-03170 (S.D. Cal. Oct. 30, 2019) (same); *United States v. Hernandez-Ortiz*, No. 19-mj-23689 (S.D. Cal. Nov. 11, 2019) (same); *United States v. Ramirez-Perez*, No. 19-cr-02859 (S.D. Cal. Nov. 25, 2019) (same); *United States v. Zeferino-De Jesus*, No. 20-cr-00114 (S.D. Cal. Jan. 8, 2020) (same); *United States v. Corvera-Cruz*, No. 19-mj-10913 (S.D. Cal. Jan. 31, 2020) (same); *United States v. Rocha-Valdez*, No. 19-mj-24175 (S.D. Cal. Feb. 14, 2020) (same); *United States v. Cruz-Figueroa*, No. 19-cr-00377 (S.D. Cal. Oct. 14, 2020) (guilty verdict but dismissed on government motion before sentencing); see also Master Trial List, *supra* note 16 (listing case outcomes).
 18. See Petition for Rehearing En Banc by the United States at 17, *United States v. Corrales-Va[z]quez*, 931 F.3d 944 (9th Cir. 2019) (No. 18-50206); *Corrales-Vazquez*, 931 F.3d at 954.

from other types of cases.¹⁹ By the time the COVID-19 pandemic ended California's Streamline program in 2020, it was processing far fewer cases than it had when it began.²⁰ And federal prosecutors never got close to their initial goal of 100 defendants per day.

A similar conflict is now unfolding in Texas. In March 2021, Governor Greg Abbott announced the creation of Operation Lone Star.²¹ Much like Operation Streamline, Operation Lone Star involves charging undocumented immigrants en masse with misdemeanors – namely, state trespassing charges. Such charges have been brought against thousands of defendants in several Texas counties. The largest number have been brought in Kinney County, which prosecuted more than 3,500 immigrants for misdemeanor trespassing between August 2021 and July 2022.²² Operation Lone Star has processed so many cases by conducting court almost exclusively through the online video communication platform Zoom. Defendants and defense lawyers in Texas have fought these prosecutions with tactics similar to those used in San Diego. They have sought release on bond and have successfully obtained it in thousands of cases. Many defendants have even been released from jail without monetary bail conditions because the government failed to file charges on time.²³ After defendants post bond they are usually deported, but their cases are not dismissed. This has created a bizarre situation in which hundreds of people who were removed from the United States

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19. See Off. of Inspector Gen., *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*, U.S. DEP'T OF JUST. 66-67 (Apr. 13, 2022), https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf [<https://perma.cc/DTJ2-ANYP>].
 20. See Kristina Davis, *Security Tightens Around Low-Level Illegal Entry Court as Number of Defendants Dwindles*, SAN DIEGO UNION-TRIB. (Jan. 2, 2020, 5 AM PT), <https://www.sandiegouniontribune.com/news/courts/story/2020-01-02/security-tightens-around-low-level-illegal-entry-court-as-number-of-defendants-dwindles> [<https://perma.cc/PV2B-33FK>] (“Prosecutions began dipping after the start of 2019. Throughout the year, the rate of filings has dipped by nearly half, with roughly 7,100 cases filed in 2019, according to court officials and a Union-Tribune analysis of court data.”).
 21. Lomi Kriel & Perla Trevizo, *Gov. Greg Abbott Brags About His Border Initiative. The Evidence Doesn't Back Him Up.*, TEX. TRIB. (Mar. 21, 2022, 5 AM CT), <https://www.texastribune.org/2022/03/21/operation-lone-star-lacks-clear-metrics-measure-accomplishments> [<https://perma.cc/HR4V-745K>].
 22. Melissa del Bosque, *The Texas Border County at the Center of a Dangerous Right-Wing Experiment*, INTERCEPT (Oct. 12, 2022, 12:30 PM), <https://theintercept.com/2022/10/12/kinney-county-texas-operation-lone-star> [<https://perma.cc/CK3Q-RLAM>].
 23. See *Ex parte Sifuentes*, 639 S.W.3d 842, 847 (Tex. App. 2022); Suzanne Gamboa, *Hundreds Ordered Released as Texas Border Operation Comes Under Fire*, NBC NEWS (Sept. 28, 2021), <https://www.nbcnews.com/news/latino/hundreds-ordered-released-texas-border-operation-comes-fire-rcna2370> [<https://perma.cc/F4S4-YRD5>].

have ongoing misdemeanor cases in Texas.²⁴ The defendants are currently litigating to force Texas prosecutors to either dismiss their cases or to work with the federal government to admit them into the country for trials.²⁵

Defendants have also brought numerous successful legal challenges to Operation Lone Star. In one case, a Texas state judge found that these prosecutions violate the Supremacy Clause because state governments cannot set immigration policy.²⁶ And in dozens of cases, state judges have dismissed Operation Lone Star prosecutions because of unconstitutional sex discrimination, since until recently only men were being charged under the program.²⁷ These efforts have undermined Governor Abbott's goal of convicting large numbers of immigrants for misdemeanor trespassing. So far, fewer than half of the cases charged have ended with a defendant pleading guilty while in custody.²⁸ Refusing to plead guilty not only allows defendants to potentially avoid the charges, but it also forces the state to pour more time and resources into these cases.

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24. See Jasper Scherer, *Local Prosecutor in Kinney County Hotspot Calls Abbott's Border Arrests a "Waste of Time and Money,"* HOUS. CHRON. (Oct. 6, 2022), <https://www.houstonchronicle.com/politics/texas/article/Prosecuting-attorney-calls-Operation-Lone-Star-17489347.php> [<https://perma.cc/TDU4-WFBH>].
 25. See, e.g., Petition for Writ of Mandamus at 13, *In re Garcia-Escalante*, No. 04-23-00740 (Tex. App. Aug. 10, 2023).
 26. State's Motion to Dismiss Unauthorized Appeal at 2-4, 170-71, *State v. Guzman Curipoma*, 652 S.W.3d 74 (Tex. App. 2022) (No. 03-22-00032-CR) (attaching a transcript of the pretrial habeas hearing below in which the applicant argued that his arrest and detention as part of Operation Lone Star (OLS) violated the Supremacy Clause and the presiding judge gave an oral ruling, stating "I do make the findings requested by the Applicant . . . and award the relief requested by the Applicant"); see Jolie McCullough, *Texas Judge Opens Door for Widespread Constitutional Challenges to Gov. Greg Abbott's Border Initiative*, TEX. TRIB. (Jan. 13, 2022), <https://www.texastribune.org/2022/01/13/texas-migrant-arrest-border-security> [<https://perma.cc/5X43-96BL>].
 27. See *infra* notes 239-240 and accompanying text; *Ex parte Vazquez-Bautista*, 683 S.W.3d 504, 511 (Tex. App. 2023); *Ex parte Aparicio*, 672 S.W.3d 696, 716 (Tex. App. 2023), *discretionary review granted* (Aug. 23, 2023); see also Gerald Harris, *Operation Lone Star: South Texas Judge Dismisses Case of 6 Migrants Accused of Trespassing*, KHOU (Sept. 21, 2022, 6:31 PM CDT), <https://www.khou.com/article/news/local/texas/south-texas-operation-lone-star-sex-based-discrimination/285-5dc99465-a8ce-4631-82a8-14af85f6d49c> [<https://perma.cc/75HR-TNUQ>] ("A South Texas judge has dismissed 6 criminal cases against migrants charged with trespassing, agreeing with defense attorneys alleging sex-based discrimination by only arresting men.").
 28. See *infra* note 257. I was unable to determine how many OLS defendants have pled guilty after being released from custody, which prevents an accurate assessment of the overall conviction rate.

These two stories are instructive case studies in collective resistance to mass criminalization.²⁹ From 2005 to 2018, Operation Streamline’s mass immigrant prosecutions proceeded without disruption. Federal courts in Texas, Arizona, and New Mexico processed dozens of people a day—sometimes up to a hundred—in collective plea hearings without meaningful due process. These prosecutions became a basic feature of U.S. immigration policy and were expanded during the Bush, Obama, and Trump Administrations.³⁰ But the recent events in California and Texas highlight that programs like Operation Streamline and Operation Lone Star *can* be successfully resisted. Such programs only function smoothly if they can coerce defendants into rapid guilty pleas. They achieve this through pretrial detention, exploding plea offers, and denial of effective defense counsel. When a significant number of defendants actually fight their cases, however, it is a disaster for these programs. With so many defendants being processed at once, any adversary litigation slows the system down and wastes significant judicial and prosecutorial resources.³¹ Mass immigrant prosecutions are thus uniquely susceptible to plea-bargain strikes—collective attempts by defendants to refuse immediate plea deals and instead litigate their cases. And many immigrant defendants have strong incentives to fight the government’s efforts to convict them, due to their desire to remain in the United States.

Of course, these systems set up powerful barriers to fighting a case. And they do so, in large part, by creating ethical conflicts of interest for defense attorneys. Court-appointed defense counsel will have a much easier job if they simply meet their clients, convince them to take the plea-bargain offer, and coach them through the guilty plea. If a lawyer tries to fight the system, they make their work more difficult and risk backlash from prosecutors and judges. This lack of incentive to fight may help explain why so few Streamline prosecutions were challenged before 2018. Indeed, these systems depend on defense lawyers being willing to compromise their clients’ rights. Many defendants in these systems do not understand the legal process they are caught in, and a brief conversation with a lawyer through an interpreter is inadequate to provide such understanding.³² But judges demand that defense lawyers acquiesce in defendants’ pleas by

29. They are also case studies in “resistance lawyering,” that is, working as an attorney within a system with the express goal of frustrating and/or destroying that system. See Daniel Farbmán, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880 (2019).

30. See AMERICAN IMMIGRATION COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 4-5 (2020).

31. Cf. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099 (2013) (“More misdemeanor trials, or fewer guilty pleas at an early court appearance, would impose serious strain on the criminal justice system.”).

32. See *infra* Section II.B.

affirming that their clients' rights are being waived knowingly and voluntarily.³³ If a lawyer points out that their client might not understand what is happening, or that their due-process or Sixth Amendment rights have been compromised, then the client could get more jail time. And individual defendants often have strong reasons to plead guilty immediately, especially if they cannot get out on bond.

A defense lawyer cannot, of course, reject their client's desire for a plea deal in order to wage a larger war against the system. It is fundamental that the client chooses the goals of the representation, especially whether to accept any plea offers.³⁴ Thus defense lawyers face a classic prisoner's dilemma—a conflict between individual defendants' interest in getting out of jail sooner, and all defendants' interest in slowing the system down to preserve due process.³⁵ This conflict creates vexing ethical and practical problems for any defense attorneys who wish to protect their clients' rights.

So how can defendants and their lawyers act collectively to resist these systems, which create such powerful incentives to acquiesce? This Article explores that question through detailed qualitative analysis of the fights over Operation Streamline and Operation Lone Star. Its main sources of data are court transcripts, audio recordings, court calendars, legal filings, judicial decisions, participant narratives, and interviews concerning both programs. In addition, the author was a federal public defender in San Diego during the period discussed herein and represented several Operation Streamline defendants. Consequently, some claims in this Article are based on firsthand observation of the system.

This Article makes three main contributions: first, it describes mass immigrant prosecution systems in detail, with a particular focus on Operation Streamline in San Diego and Operation Lone Star in Texas. It explains these systems' internal logic, documents the experiences of defendants caught in them, and situates them in larger scholarly conversations over plea bargaining, mass misdemeanor justice, and the criminalization of immigrants.³⁶

33. This colloquy is conducted to satisfy Federal Rules of Criminal Procedure 11(b)(1) and (2). See *infra* notes 341-345 and accompanying text.

34. See MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N, Discussion Draft 1983) ("A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.")

35. See Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 740 (2009).

36. For prior academic work discussing mass immigrant prosecutions, see, for example, Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142-43

Second, the Article explores the ethical conflicts that mass immigrant prosecutions, and the decision over whether to resist them, create for defense attorneys. These programs pressure defense lawyers to provide system-legitimizing lies: that the defendant understands what is happening, has knowingly waived their rights, and has been given constitutionally adequate counsel. If a lawyer refuses to say these things, judges and prosecutors will threaten their clients with further jail time. But if lawyers decide instead to fight these programs, they risk turning their clients into instruments for a larger system-reform project. While slowing down or breaking these systems may benefit the broad population of clients, it can harm clients in individual cases. Indeed, fast-paced plea systems like these only work if they can create such conflicts of interest. This problem connects with the larger debate over the ethics and practicality of plea-bargain strikes.³⁷ The Article argues that lawyers can, in

(2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1327-29, 1332, 1351-52 (2010) [hereinafter Eagly, *Prosecuting Immigration*]; Walter I. Gonçalves, *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 1, 10-13 (2020); Amy F. Kimpel, *Alienating Criminal Procedure*, 37 GEO. IMMIGR. L.J. 237, 259 (2023); Joanna J. Lydgate, Note, *Assembly Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 483-84 (2010); Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 125-37 (2012); David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 169-75 (2012); Marisol Orihuela, *The Ethics of Collective Action in Zero Tolerance Prosecutions*, 16 OHIO ST. J. CRIM. L. AMICI BRIEFS (2019); César Cuahtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1476; Milan Markovic, *The Legal Ethics of Family Separation*, 57 U. RICHMOND L. REV. 487, 521-25 (2023); Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1274 (2014); Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 2002-09 (2020) [hereinafter Eagly, *The Movement to Decriminalize Border Crossing*]; GREENE, CARSON & BLACK, *supra* note 8, at 1-5; and JESSIE K. FINCH, *LEGAL PROFESSIONALS NEGOTIATING THE BORDERS OF IDENTITY: OPERATION STREAMLINE AND COMPETING IDENTITY MANAGEMENT 1-10* (2022).

37. See, e.g., Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<https://perma.cc/7SPH-MLLQ>] (advocating plea-bargain strikes); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1252-53 (1979) (considering the ethical problem of using clients' cases to overwhelm the system when doing so may harm individual defendants); Bar-Gill & Ben-Shahar, *supra* note 35, at 750-55 (discussing the collective action problems that prevent plea-bargain strikes from working); John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 27-28 (2016) (arguing that defense lawyers should be able to conduct plea-bargain strikes even if doing so harms individual clients); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2017-2024 (2022) (arguing that plea-bargain strikes can be ethical if organized by the defendants themselves or through outside activists, rather than through defense attorneys); Orihuela, *supra* note 36 (calling for plea-bargain strikes in the context of Trump's Zero Tolerance prosecutions); Roberts, *supra* note 31, at 1097-1102 (calling for public defenders to litigate more misdemeanor cases in an effort to "crash" the system).

some circumstances, both ethically represent their individual clients and use their clients' cases as weapons against an unjust system. To do so, defense lawyers must orchestrate a situation where clients' interests are helped (or at least not harmed) by litigating. This means finding ways to impose costs on the system without hurting individual defendants.

Third, by providing detailed accounts of the fights in San Diego and Texas, this Article functions as a kind of how-to guide for defendants and defense lawyers in future mass immigrant prosecution systems. Operation Streamline was discontinued during the COVID-19 pandemic, but it will likely return in any future anti-immigrant presidential administration. And Operation Lone Star has furnished a new model for state governments to emulate. The details of the fights in San Diego and Texas will be useful for defendants, attorneys, and activists who find themselves resisting such programs in the years to come.

This Article is organized into three Parts. Part I chronicles the origins and evolution of Operation Streamline, as well as the Trump Administration's efforts to bring it to California and the Texas government's efforts to create a state-law version with Operation Lone Star. Part II provides an internal account of these mass immigrant prosecution systems, focusing on their use of coerced guilty pleas to eliminate due process, the bewildering experience of Latin American defendants processed through them, and the ethical conflicts they create for defense lawyers. Part III describes strategies that defense lawyers can use to undermine these systems while also honoring their ethical duties to individual clients. It focuses on immigrants' incentives to fight their cases, the importance of bail, the game theory of threatening to go to trial, appellate strategy, and tactics to slow the system down even when pleading guilty. It also considers strategic questions at the institutional level, exploring how defense lawyers can coordinate effectively with one another and with outside groups, the importance of creating external political pressure, and the need to begin fighting these systems fast before they are firmly established.

I. THE EVOLUTION OF MASS IMMIGRANT PROSECUTIONS

This Part chronicles the origins and development of two mass immigrant prosecution systems—Operation Streamline and Operation Lone Star—and describes how immigrant defendants and their lawyers have fought against each. It begins by recounting the creation of Operation Streamline and the program's expansion under the Bush, Obama, and Trump Administrations. It then provides a detailed account of the Trump Administration's attempt to bring Streamline to California from 2018 to 2020. That effort sparked massive and ultimately successful resistance by defendants and their attorneys. This Part then explores Texas's current efforts to prosecute immigrants through Operation

Lone Star, a state-law version of Operation Streamline. Texas's program faces similar resistance, and its story is still unfolding.

A. *Operation Streamline*

Since the early 2000s, the federal criminal-justice system has been prosecuting immigrants en masse for the crime of entering the United States. The law giving rise to these prosecutions was first enacted in 1929, and it created two crimes—the misdemeanor of entering the United States without permission, and the felony of reentering the United States after deportation.³⁸ Today these crimes are codified at 8 U.S.C. § 1325 (misdemeanor unlawful entry) and 8 U.S.C. § 1326 (felony unlawful reentry).³⁹ The number of annual prosecutions for these two crimes fluctuated for most of the twentieth century.⁴⁰ Then, beginning in the 1990s, these prosecutions began a steep climb until they came to dominate the federal criminal-justice system.⁴¹ In particular, prosecutions for misdemeanor unlawful entry skyrocketed beginning in 2004. They jumped from 4,095 cases in 2003 to 17,969 in 2004 and kept increasing from there.⁴² As Figure 1 shows, this upward trend continued through the Bush, Obama, and Trump Administrations, until it was stopped by the COVID-19 pandemic. During this period, misdemeanor unlawful entry was by far the most commonly charged federal crime.⁴³ Indeed, prosecutions for unlawful entry and reentry became so numerous that, during the Obama and Trump

38. On the history of this law, and the racist motivations for its enactment in 1929, see generally Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022).

39. 8 U.S.C. §§ 1325-26 (2018).

40. See Keller, *supra* note 36, at 87 (providing a graph of combined illegal entry and reentry convictions from 1948 until 1986, which shows relatively higher rates of prosecution in the 1950s and 1970s/80s, with relatively lower rates in the late 1950s and throughout the 1960s).

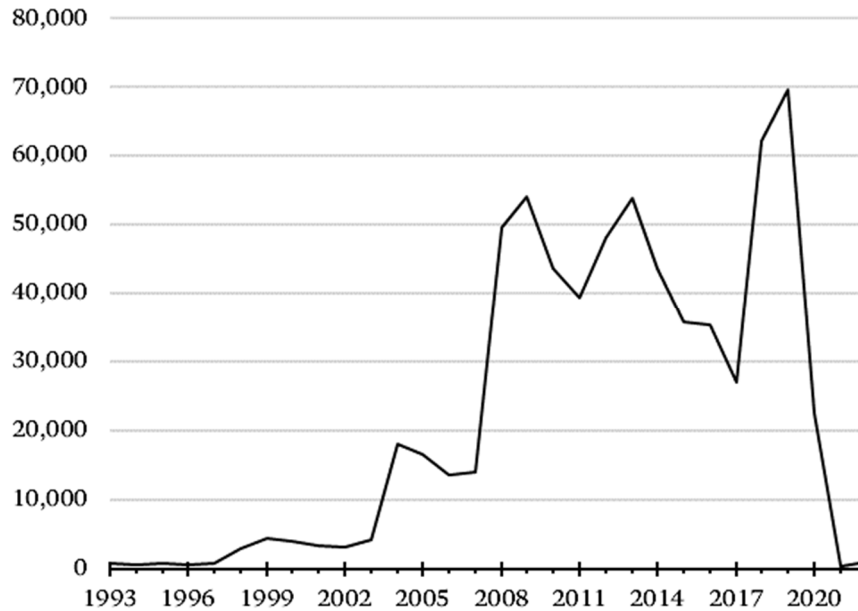
41. See GREENE, CARSON & BLACK, *supra* note 8, at 16-17; Sklansky, *supra* note 36, at 164-75; Jesse Franzblau, *A Legacy of Injustice: The U.S. Criminalization of Migration*, NAT'L IMMIGR. JUST. CTR. 10-12 (2020), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injusticereport_2020-07-22_FINAL.pdf [<https://perma.cc/B9AQ-SEYH>].

42. GREENE, CARSON & BLACK, *supra* note 8, at 17.

43. Jessica Zhang & Andrew Patterson, *The Most Prosecuted Federal Offense in America: A Primer on the Criminalization of Border Crossing*, LAWFARE (July 25, 2019, 8:41 AM), <https://www.lawfareblog.com/most-prosecuted-federal-offense-america-primer-criminalization-border-crossing> [<https://perma.cc/9WW5-VX23>]; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 647 (2013) (“[I]mmigration offenses are now the single most commonly prosecuted federal criminal offenses.”).

Administrations, they came to represent an outright majority of all federal criminal cases.⁴⁴

FIGURE 1. TOTAL MISDEMEANOR UNLAWFUL-ENTRY PROSECUTIONS IN THE FEDERAL SYSTEM⁴⁵



44. See TRAC Reports, Inc., *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, SYRACUSE UNIV. (Nov. 28, 2016), <https://trac.syr.edu/tracreports/crim/446> [<https://perma.cc/F8UM-L8WU>]; *Prosecuting People for Coming to the United States*, AM. IMMIGR. COUNCIL 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [<https://perma.cc/LD69-AF9R>] (“Combined, violations of 8 U.S.C. §§ 1325 and 1326 became the most prosecuted federal offenses in recent years. Indeed, as of December 2018, they constituted 65 percent of all criminal prosecutions in federal court.” (footnote omitted)).

45. This data was compiled from the Transactional Records Access Clearinghouse (TRAC) on January 26, 2023. To generate the data, the author navigated to the page on trends by lead charge and presidential administration and selected “U.S.,” “08 USC 1325,” “Prosecutions (number),” and “Annual Series” from each of the respective drop-down menus. To reach this page, click on Criminal, then Express, then Lead Charge, and finally Trend. The permalink provides the graph TRAC generated from that search. TRAC Reports, Inc., *TRACfed*, SYRACUSE UNIV., <https://tracfed.syr.edu> [<https://perma.cc/7T5Q-QYV9>]. TRAC uses the Freedom of Information Act to obtain data from government databases (for federal prosecutions it accesses Department of Justice databases), then organizes that data and makes it available to the public. See Austin Kocher, *Looking for Non-Partisan, Reliable, and Up-To-Date Immigration Data? TRAC Has What You Need*, MEDIUM (Jan. 21, 2021), <https://austinkocher.medium>

Nearly all of the prosecutions for unlawful entry during this period were brought through Operation Streamline. Streamline began in 2005 in Eagle Pass, Texas.⁴⁶ The Border Patrol in Eagle Pass lacked adequate bed space in immigration detention centers to house all of the immigrants it arrested.⁴⁷ As a consequence, the Border Patrol had to release immigrants from countries other than Mexico into the United States (Mexican nationals could be returned across the border, but immigrants from elsewhere could not).⁴⁸ To keep these immigrants in custody, the Border Patrol proposed that federal prosecutors in the Western District of Texas charge every non-Mexican immigrant with unlawful entry.⁴⁹ If prosecutors did so, immigrants could be kept in federal criminal custody instead of being released. After prosecutors raised concerns about potential national-origin discrimination claims, the program was modified to include undocumented arrestees from Mexico.⁵⁰ Thus Operation Streamline was born. The government began referring all undocumented immigrants arrested near Eagle Pass for prosecution, and these immigrants were processed en masse for misdemeanor § 1325 charges at the federal courthouse in Del Rio, Texas.⁵¹

The government soon expanded Operation Streamline to other courthouses along the United States-Mexico border. From 2005 to 2009, Streamline was adopted by federal courts in eight border cities: Yuma and Tucson in Arizona, Las Cruces in New Mexico, and El Paso, Del Rio, Laredo, McAllen, and Brownsville in Texas.⁵² It thus existed in four federal judicial districts: the Western District of Texas, the Southern District of Texas, the District of New Mexico, and the District of Arizona.⁵³ The only border district that declined to

.com/looking-for-non-partisan-reliable-and-up-to-date-immigration-data-trac-has-what-you-need-4dc5f4b54e38 [https://perma.cc/5NYB-8B2W].

46. See Lydgate, *supra* note 36, at 491-95.

47. See *id.* at 490, 491 n.52.

48. *Id.* at 491-92.

49. *Id.* at 493.

50. *Id.*

51. *Id.* at 493-94.

52. See *id.* at 494-95; Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, CHIEF JUST. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY 3 (Jan. 2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf [https://perma.cc/T3TU-LQP7]; Corradini et al., *supra* note 6, at 2.

53. See Lydgate, *supra* note 52, at 3.

adopt the program was the Southern District of California, which has courthouses in San Diego and El Centro.⁵⁴

As Operation Streamline spread to new courthouses, the number of unlawful-entry prosecutions grew. Figure 1 shows that during the Bush Administration the number of yearly cases jumped from around 4,000 in 2003 to around 15,000 from 2004 to 2007.⁵⁵ The number increased again to a higher plateau in 2008, with around 50,000 cases per year. This level was largely maintained through most of the Obama Administration.⁵⁶ Then in 2013 and 2014, the federal courts in Yuma, El Paso, Las Cruces, McAllen, and Brownsville temporarily discontinued their Streamline programs.⁵⁷ This contributed to a brief decline in unlawful-entry prosecutions from 2015 to 2017.⁵⁸

However, the number of cases exploded again during the Trump Administration, reaching a peak of nearly 70,000 in 2019.⁵⁹ President Trump's Department of Justice brought Operation Streamline to every federal courthouse along the southern border, including the previous holdouts in the Southern District of California.⁶⁰ The Trump Administration also expanded the program to include parents who entered with minor children, creating a policy that took children away from their parents in order to process the parents through criminal court.⁶¹ Operation Streamline was suspended nationwide in 2020 due to the COVID-19 pandemic, which shut down federal courthouses throughout the country.⁶² And today Operation Streamline remains in limbo. The Biden

54. GREENE, CARSON & BLACK, *supra* note 8, at 7, 42-44; Lydgate, *supra* note 36, at 540-42; *see also infra* note 86 (explaining that the U.S. Attorney for the Southern District of California during the Bush Administration declined to adopt the program because she considered it a waste of government resources).

55. The precise number of prosecutions per year are as follows: 4,095 in 2003; 17,969 in 2004; 16,504 in 2005; and 13,643 in 2007. TRAC Reports, *supra* note 45.

56. The precise number of prosecutions per year for this period are: 49,663 in 2008; 54,175 in 2009; 43,688 in 2010; 39,331 in 2011; 48,032 in 2012; 53,822 in 2013; 43,652 in 2014; 35,770 in 2015; and 35,389 in 2016. *Id.*

57. Off. of Inspector Gen., *supra* note 19, at 76; GREENE, CARSON & BLACK, *supra* note 8, at 41.

58. *See supra* Figure 1.

59. The number of prosecutions per year during the Trump Administration were: 27,073 in 2017; 62,185 in 2018; 69,536 in 2019; and 22,578 in 2020. TRAC Reports, *supra* note 45.

60. For a discussion of Operation Streamline in California, *see infra* Section I.B.

61. *See* Dickerson, *supra* note 5 (describing the child-separation policy); *see also* Lydgate, *supra* note 36, at 484 n.14 (noting that, as of 2010, the Border Patrol did not refer parents traveling with minor children for prosecution).

62. Ryan Devereaux, *Mass Immigration Prosecutions on the Border Are Currently on Hold. What Comes Next Is Uncertain*, INTERCEPT (Mar. 18, 2020, 12:06 PM), <https://theintercept.com/2020/03/18/immigration-border-prosecution-coronavirus> [https://perma.cc/FLZ9-FHB5].

Administration has not brought the program back, but it is likely to return if another anti-immigration populist becomes president.

The goal of Operation Streamline is to process immigrant defendants through court as efficiently as possible. To achieve this, the program consolidates an entire criminal case into a single court appearance and conducts dozens of those appearances simultaneously. In a typical Streamline hearing several dozen defendants are arraigned on misdemeanor unlawful-entry charges, waive their trial and appellate rights, plead guilty to the charged crime, and receive a sentence of somewhere between a few days and six months in custody.⁶³ All of this legal business is conducted through a colloquy between the defendants, their court-appointed attorneys, and a federal magistrate judge, normally with the assistance of a Spanish-language interpreter.⁶⁴ In a 2009 decision, the United States Court of Appeals for the Ninth Circuit instructed that magistrate judges needed to address Streamline defendants individually when taking their guilty pleas.⁶⁵ But even with that constraint, courts rapidly process dozens of defendants at once from arraignment through sentence.⁶⁶

63. See Eagly, *Prosecuting Immigration*, *supra* note 36, at 1328; Sklansky, *supra* note 36, at 170; Lydgate, *supra* note 36, at 481-82. For the requirements of a federal guilty-plea colloquy, see FED. R. CRIM. P. 11. For a discussion of sentencing practices in Streamline courts, see Lydgate, *supra* note 36, at 528. A few courthouses, such as El Paso, have at certain times provided two court dates for Streamline cases. See Lydgate, *supra* note 52, at 4 n.19.

64. For an example of such a colloquy, see *United States v. Roblero-Solis*, 588 F.3d 692, 694-96 (9th Cir. 2009).

65. *Id.* at 700 (“[N]o judge, however alert, could tell whether every single person in a group of 47 or 50 affirmatively answered her questions when the answers were taken at the same time. . . . Neither an indistinct murmur or medley of yeses nor a presumption that all those brought to court by the Border Patrol must have crossed the border is sufficient to show that each defendant pleaded voluntarily.”). This ruling only affected Arizona because Texas and New Mexico are not in the Ninth Circuit.

66. See Lydgate, *supra* note 36, at 533 (noting that Tucson’s Operation Streamline was still able to process seventy defendants a day after *Roblero-Solis*).

FIGURE 2. PHOTOGRAPH OF AN OPERATION STREAMLINE PROCEEDING⁶⁷

Different courthouses have allowed varying numbers of defendants to be processed at once in a Streamline hearing. In Tucson, the maximum number of defendants per hearing was set at seventy-five, while in Del Rio it could get up to eighty, and in Las Cruces it periodically reached 100.⁶⁸ Some magistrate judges have even bragged about how quickly they conduct Streamline hearings. Magistrate Judge Bernardo Velasco of Arizona told the *New York Times* that his record was completing seventy cases in thirty minutes.⁶⁹

67. This photograph was taken by an unknown court employee and was first published online by *The Intercept*. It is in the public domain. See Miriam Jordan, *Swift Frontier Justice for Migrants Brought to Federal Courts*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/us/border-immigration-courts.html> [<https://perma.cc/W2C2-JZ38>] (noting that the photograph is a public-domain image); *More Streamlining, More Prisons*, KINO BORDER INITIATIVE (Dec. 18, 2018), <https://www.kinoborderinitiative.org/more-streamlining-more-prisons> [<https://perma.cc/HSW5-TDF5>] (same).

68. GREENE, CARSON & BLACK, *supra* note 8, at 33 (noting that Tucson's Operation Streamline was capped at seventy-five defendants per court session); Lydgate, *supra* note 52, at 4, 12 (noting that Del Rio got up to eighty defendants at once per hearing in 2009, and Las Cruces up to ninety at once); Devereaux, *supra* note 62 (quoting a public defender that "it's not uncommon for attorneys in the state's Las Cruces division to see up 100 defendants in court to face low-level border crossing charges in a single day").

69. Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES (Feb. 11, 2014), <https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html> [<https://perma.cc/K7HH-2C85>].

Defendants in Streamline hearings are normally handcuffed and placed in leg shackles during court.⁷⁰ And because so many people are being processed at once, they fill all of the available space in a courtroom. The rather dramatic image above is the only known photograph of an Operation Streamline hearing, taken by an anonymous photographer. It shows several dozen shackled defendants filling a medium-sized federal courtroom in Pecos, Texas, alongside attorneys and court employees.

There are two types of court-appointed defense lawyers who work on Operation Streamline cases: federal public defenders (FDs) and Criminal Justice Act panel lawyers (CJA lawyers).⁷¹ While FDs work in offices with many other lawyers and support staff, CJA lawyers are generally solo practitioners with more limited resources.⁷² For both types of defense lawyers, representing a Streamline defendant typically means meeting with them once to prepare them for court, and then being present with them in court during the arraignment, guilty plea, and sentencing.⁷³ Each lawyer normally represents multiple Streamline defendants at the same time in these hearings. The number varies by courthouse – in Tucson a lawyer might represent six clients at once, while in Del Rio a lawyer could represent up to eighty in a single hearing.⁷⁴

These lawyers have very limited time to meet with each client before court.⁷⁵ In Laredo, a lawyer could have as little as two minutes with each client; in Del Rio it was about ten minutes; and in Tucson and El Paso each client got up to

70. See Lydgate, *supra* note 36, at 481, 508; GREENE, CARSON & BLACK, *supra* note 8, at 7, 59 (“[I]n nearly all courtrooms defendants remain shackled throughout the entire proceeding . . .”); FINCH, *supra* note 36, at 26 (“[M]igrant defendants all wear numerous chains – wrist manacles, leg irons, and belly chains.”).

71. See Lydgate, *supra* note 52, at 14. The federal court in Brownsville did initially experiment with running Operation Streamline without defense lawyers and having a Spanish interpreter explain the defendants’ rights to them. But Brownsville’s judges ultimately decided that defense counsel was needed. See GREENE, CARSON & BLACK, *supra* note 8, at 31-32. The Criminal Justice Act requires federal courts to establish plans for the provision of indigent defense counsel, which is generally done through a combination of federal defenders (FDs) and panel systems. 18 U.S.C. § 3006A(a) (2018).

72. See Lydgate, *supra* note 36, at 534-35.

73. Lydgate, *supra* note 52, at 14-15.

74. *Id.* at 14.

75. See *Executive Office for United States Attorneys: Hearing Before the H. Subcomm. on Com. & Admin. L.*, 110th Cong. 45 (2008) [hereinafter Williams Testimony] (statement of Heather E. Williams, First Assistant, Federal Public Defender, District of Arizona) (“We have anywhere from 3 to 30 minutes, depending on what courtroom you are in, for these clients to meet with a lawyer.”); Lydgate, *supra* note 36, at 505-06 (“Often, defense attorneys have no more than five to ten minutes for each of these individual meetings.”); GREENE, CARSON & BLACK, *supra* note 8, at 62-64; Lydgate, *supra* note 52, at 14-15.

thirty minutes.⁷⁶ In order to provide adequate counsel before a guilty plea, an attorney must determine the client's native language, explain the charge, evaluate the client's competency, determine the client's immigration status, convey the plea-bargain offer, discuss the consequences of a conviction (both direct and collateral), explain the client's rights and the nature of a criminal trial, explore possible defenses, learn personal information that could mitigate the sentence, and more. It is impossible to do all of this in just a few minutes. This small amount of time thus raises significant Sixth Amendment concerns.⁷⁷ Many lawyers even conduct group meetings with Streamline defendants, which creates confidentiality problems and denies the defendants individualized counsel.⁷⁸

In court, the defense lawyer's job is limited to confirming the guilty plea and, if necessary, coaching the defendant through their responses to the magistrate judge's questions. Defense lawyers very rarely took Streamline cases to trial prior to 2018.⁷⁹ And, despite the fact that hundreds of thousands of Streamline cases were prosecuted from 2005 to 2018, there are barely any published appellate decisions. The only pre-2018 appellate decisions concerning Operation Streamline are a series of Ninth Circuit opinions laying out the procedural

76. Alistair Graham Robertson, Rachel Beaty, Jane Atkinson & Bob Libal, *Operation Streamline: Costs and Consequences*, GRASSROOTS LEADERSHIP 13-14 (Sept. 2012), https://www.grassrootsleadership.org/s/GRL_Sept2012_Report-final.pdf [<https://perma.cc/J66U-JVTY>].

77. See Corradini et al., *supra* note 6, at 7.

78. See Lydgate, *supra* note 36, at 535 (“Given their caseloads, CJA attorneys, who often lack the staff and institutional resources of the FPD, may not always have the capacity to interview defendants individually. Furthermore, some Streamline defendants are called into attorney-client meetings at detention centers in groups; thus, attorneys may not be able to adequately investigate defenses, negotiate dismissals or reduced charges, or attempt to secure bond for individual defendants.” (footnote omitted)); Lydgate, *supra* note 52, at 15.

79. I have not been able to identify any bench trials for unlawful entry from any of the Operation Streamline courts prior to 2018. Searches on Westlaw and Lexis revealed several § 1325 misdemeanor trials in Streamline jurisdictions on or after 2019, but zero before then. See, e.g., *United States v. Gaspar-Miguel*, 947 F.3d 632, 635 (10th Cir. 2020) (affirming conviction after bench trial for § 1325 unlawful entry); *United States v. Montes-De Oca*, 820 F. App'x. 247, 252 (5th Cir. 2020) (same); *United States v. Montes-Guzman*, 2019 U.S. Dist. LEXIS 86123, at *16 (D.N.M. May 22, 2019) (same). I also conducted interviews with three current and former federal public defenders in Arizona. The first said that she thinks there was at least one bench trial in a Tucson Streamline case but could not recall any details about it. Telephone Interview with Vicki Brambl, Fed. Pub. Def., Ariz. (June 16, 2023). The second remembered a number of cases being set for trial but could not recall any where a trial actually happened. Telephone Interview with Saul Huerta, former Fed. Pub. Def., Dist. of Ariz. (Mar. 20, 2023). The third could not remember any Streamline trials happening. Email from Elena M. Kay, Fed. Pub. Def., Ariz., to author (Dec. 3, 2019, 11:05 AM) (on file with author). It does seem probable that at least one Streamline defendant went to trial between 2005 and 2018, simply based on the overwhelming number of Streamline cases in Arizona, Texas, and New Mexico. But the fact that there were no apparent appeals from any Streamline trials suggests that there were very few such trials.

requirements for group guilty pleas.⁸⁰ For all those thousands of cases, Operation Streamline produced virtually no law.

B. *The Battle of San Diego*

The story of California's Operation Streamline program begins on Twitter. In early April 2018, President Donald Trump published numerous tweets about a caravan of Central American immigrants seeking asylum in the United States. On April 1, Trump wrote: "Border Patrol Agents are not allowed to properly do their job at the Border because of ridiculous liberal (Democrat) laws like Catch & Release. Getting more dangerous. 'Caravans' coming."⁸¹ On April 2 he wrote: "Honduras, Mexico and many other countries that the U.S. is very generous to, sends many of their people to our country through our WEAK IMMIGRATION POLICIES. Caravans are heading here. Must pass tough laws and build the WALL."⁸² Three days later, Trump followed up his Twitter rant with a speech in which he declared that the immigrant caravan was causing widespread rapes.⁸³

These statements by Trump seemed to jolt the Department of Justice into action. On April 6, Attorney General Jeff Sessions issued a memorandum and press release directing federal prosecutors to adopt a "zero tolerance" policy towards undocumented immigrants.⁸⁴ This meant that, to the extent possible, prosecutors were directed to charge every single person arrested crossing the border with unlawful entry. One consequence of this new policy was that thousands of children were separated from their parents at the border (because children cannot be kept in custody with their parents while the parents are

80. See *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1138 (9th Cir. 2013); *United States v. Aguilar-Vera*, 698 F.3d 1196, 1197 (9th Cir. 2012); *United States v. Diaz-Ramirez*, 646 F.3d 653, 655 (9th Cir. 2011); *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1058 (9th Cir. 2011); *United States v. Memehua-Mixtecal*, 432 F. App'x 703, 703-04 (9th Cir. 2011); *United States v. Roblero-Solis*, 588 F.3d 692, 694 (9th Cir. 2009). All of these cases were appeals from guilty pleas.

81. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 1, 2018, 9:56 AM), <https://twitter.com/realDonaldTrump/status/980443810529533952> [<https://perma.cc/FF44-ATL8>].

82. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 2, 2018, 8:12 PM), <https://twitter.com/realDonaldTrump/status/980961086546632705> [<https://perma.cc/5GH6-89P5>].

83. Vivian Salama, *Trump Claims Women "Are Raped at Levels Never Seen Before" During Immigrant Caravan*, NBC NEWS (Apr. 5, 2018, 4:02 PM), <https://www.nbcnews.com/politics/white-house/trump-claims-women-immigrant-caravan-being-raped-levels-never-seen-n863061> [<https://perma.cc/39EW-TLSQ>].

84. See Press Release, Off. of Pub. Affs., *supra* note 1; Memorandum from Att'y Gen. Jeff Sessions, *supra* note 3.

prosecuted).⁸⁵ Another consequence was that Operation Streamline would be brought to California for the first time.⁸⁶

The U.S. Attorney's Office in the Southern District of California announced its plan to begin prosecuting significantly more defendants for unlawful entry.⁸⁷ To deal with the strain from this increased caseload, Chief Judge Barry Moskowitz created a "Criminal Case Management Committee" to plan a separate Operation Streamline court.⁸⁸ The Chief Judge ultimately approved a system where defendants would arrive early in the morning to be interviewed by defense lawyers (both FDs and CJA lawyers) in a garage underneath a federal office building, and then be brought to court in shackles for a 2:00 PM hearing where they would plead guilty and receive their sentences en masse.⁸⁹ This system was introduced in both the San Diego and El Centro courthouses, and it was overseen by federal magistrate judges.⁹⁰ Retired magistrate judges were brought in from other districts to help preside over the new system's group plea hearings.⁹¹

85. See Dickerson, *supra* note 5.

86. Carol Lam, who served as U.S. Attorney in San Diego during the Bush Administration, had declined to adopt the program because she considered it a waste of government resources. See Eagly, *The Movement to Decriminalize Border Crossing*, *supra* note 36, at 2005. The Bush Administration ultimately fired Lam, and it cited her refusal to prioritize immigration cases as one of the reasons for her discharge. See Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, N.Y. TIMES (Jan. 11, 2009), <https://www.nytimes.com/2009/01/12/us/12prosecute.html> [<https://perma.cc/SXB6-7WPJ>].

87. See Marosi, *supra* note 9.

88. *In re Crim. Case Mgmt. Comm.*, Gen. Order No. 671 (S.D. Cal. May 18, 2018).

89. See Jason McGahan, *Feds Force Immigrants into Parking Garage for 'Assembly-Line Justice'*, DAILY BEAST (July 13, 2018, 5:13 AM), <https://www.thedailybeast.com/feds-force-immigrants-into-parking-garage-for-assembly-line-justice> [<https://perma.cc/ZD3V-6NLN>]; Srikrishnan, *supra* note 12. The interview area was a medium-sized garage with about fifteen folding tables set up for attorney-client visits. The tables were all within a few feet of each other, and there were no separate areas for private conversations.

90. The Southern District of California has its main courthouse in San Diego, and a smaller courthouse (with only one magistrate judge and no district judges) in El Centro. Cases that begin in El Centro are transferred to San Diego when they are assigned to a federal district judge. However, magistrate judges normally handle misdemeanor unlawful-entry prosecutions from start to finish because they are classified as petty offenses. See Eagly, *Prosecuting Immigration*, *supra* note 36, at 1325-30. Thus, El Centro had its own Streamline calendar.

91. These retired visiting magistrates included Robert Block from the Central District of California and Clinton Averitte from the Northern District of Texas.

In an open letter, the leaders of the federal defense bar urged the court not to adopt a same-day plea system.⁹² They wrote that “we do not believe a one-day plea and sentencing system is feasible or constitutional,” because it would inhibit defendants’ due process and Sixth Amendment rights.⁹³ Nonetheless, San Diego’s Operation Streamline court opened for business on July 9, 2018.⁹⁴ There was internal debate among the San Diego Federal Defenders about whether to participate in Operation Streamline or boycott the new system altogether, but ultimately the office decided that it would represent Streamline defendants.⁹⁵ On the other side, lawyers from Customs and Border Protection were specially assigned to act as prosecutors in Streamline court.⁹⁶

From the beginning of California’s Streamline system, both FDs and CJA lawyers made numerous objections to the nature of the proceedings. These objections slowed down the hearings considerably. On the first day, for example, defense lawyers argued that their clients’ guilty pleas were coerced; that creating a separate Streamline court for only noncitizens violated the Equal Protection Clause; that the Executive’s role in creating Operation Streamline violated the constitutional separation of powers; that the defendants had been kept in inhumane conditions at border-patrol stations; that the lawyers had inadequate time with their clients to provide effective counsel; that the conditions in the garage before court did not permit confidential communications; that the defendants should not be shackled; that they were being denied their right to bail; that it violates international law to prosecute refugees; and that the

92. See Letter from Reuben Camper Cahn, Exec. Dir., Fed. Defs. of San Diego, Inc., & Jami L. Ferrara, SDC CJA Panel Representative, to Barry Ted Moskowitz, C.J., S. Dist. of Cal. 4 (June 22, 2018), <https://voiceofsandiego.org/wp-content/uploads/2018/07/BTM-Proposal06.22.18-1.pdf> [<https://perma.cc/3JZA-NYR9>].

93. *Id.*; see also Letter from Reuben Cahn, Exec. Dir., Fed. Defs. of San Diego, Inc., to Barry Ted Moskowitz, C.J., S. Dist. of Cal. 2 (June 4, 2018) (on file with author) (“For years, we in this District have looked with concern to our neighbors to the east, Arizona, New Mexico, and Texas. We have viewed the mass proceedings, the summary procedures, the inadequate opportunity for consultation with counsel, and the resultant unvarying failure of accused individuals trapped in those coercive systems to challenge the government’s charges with dismay. Many times, this office has investigated and established the citizenship of individuals prosecuted and convicted after plea in those districts’ summary proceedings and have been grateful that this Court is different.”).

94. All Things Considered, *supra* note 10.

95. Telephone Interview with Rebecca Fish, Fed. Pub. Def. (Feb. 3, 2023). The Federal Defender in Tucson faced a similar choice when Operation Streamline began there and initially decided to boycott the program before later participating in it. See GREENE, CARSON & BLACK, *supra* note 8, at 39.

96. See Srikrishnan, *supra* note 12.

unlawful entry statute itself is facially unconstitutional.⁹⁷ Defense lawyers repeatedly raised these objections and many others in court over the subsequent weeks.⁹⁸ Partly as a consequence of these objections, court sessions stretched late into the evening.⁹⁹ Some magistrate judges responded by attempting to prohibit defense lawyers from making objections in court.¹⁰⁰ Attorneys then objected to these judges' refusal to hear legal arguments.¹⁰¹

In addition to these objections, defense attorneys also gave sentencing arguments on behalf of their clients. They did so even for clients whom the prosecutors had offered a "time-served" sentence (meaning no additional jail time).¹⁰² The Federal Rules of Criminal Procedure give defendants and their lawyers a right to speak before any sentence is imposed.¹⁰³ But in other districts with Operation Streamline, defense lawyers normally do not make any

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97. See Transcript of New Complaints Calendar at 16-21, 83-91, 116-19, 126-29, *United States v. Gil-Gonzalez et al.*, No. 18-mj-20001 et al. (S.D. Cal. July 9, 2018) (showing objections by Janice Deaton, Kathryn Thickstun, Lauren Clark, Andrew Nietor, Leila Morgan, Ben Davis, and Kimberly Trimble). Variations on the word "objection" appear forty-two times in the 180-page transcript.
98. See Julie Small, *Attorneys Say 'Streamlined' Hearings in San Diego Court Violate Immigrants' Rights*, KQED (Aug. 24, 2018), <https://www.kqed.org/news/11688241/attorneys-say-streamlined-hearings-in-san-diego-court-violate-immigrants-rights> [https://perma.cc/UV3H-SLUR] ("The lawyers have developed a practice of raising objections to the judge at every possible opportunity. It's a way to put into the court record their belief that the expedited hearings violate their clients' rights. . . . 'Our plan honestly is to keep it up until either we're all held in contempt, or we're shackled ourselves, or until this stops,' . . . said [FD Leila Morgan].").
99. See Rivlin-Nadler, *supra* note 13 ("The magistrate judges have seen their court calendars balloon since the start of Operation Streamline in July, with misdemeanor sentencing stretching well into the evening – often extended by the objections of federal defenders, who have questioned the legality of the arrangement."); see also cases cited *supra* note 12 (citing several transcripts from this time period that note court ending after 5:00 pm and as late as 7:03 pm during this time period).
100. See Small, *supra* note 98 (quoting Magistrate Judge Major refusing to hear oral objections from FD Roxana Sandoval); Transcript of New Complaints Calendar at 2-3, *United States v. Navarette-Chaparro et al.*, No. 18-mj-21049 et al. (S.D. Cal. Aug. 22, 2018) ("[Magistrate Judge Robert Block]: I will not entertain any oral motions to dismiss today unless it is a joint motion with the Government or an unopposed motion. . . . The same applies to oral objections that seek dismissal as a remedy.").
101. See, e.g., Transcript of New Complaints Calendar at 3-6, 65-68, 93-95, *United States v. Navarette-Chaparro et al.*, No. 18-mj-21049 et al. (S.D. Cal. Aug. 22, 2018).
102. The majority of defendants were given time-served sentences. See Srikrishnan, *supra* note 12.
103. FED. R. CRIM. P. 32(i)(4)(A) ("Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence . . .").

arguments at all concerning sentencing.¹⁰⁴ And defendants themselves rarely speak in Streamline cases, aside from one-word answers to the magistrate judge's questions.¹⁰⁵ But many lawyers in California chose to argue at sentencing. Sometimes the judges tried to cut them off or otherwise dissuade them from speaking at length. For example, the following is a partial transcript of a sentencing argument in a San Diego Streamline case:

THE COURT: . . . In any event, the parties have stipulated to a time-served sentence. The Court's prepared to follow the sentencing recommendation. So although I'm willing to hear from Defense counsel, I would like you to keep it brief because we've still got quite a few matters to attend to today. Anything?

DEFENSE COUNSEL: Your Honor, I would like to say something on behalf of Mr. Rivera. I recognize the Court's tentative is time served. But I think it's important to tell his story to the Court as to why he is here.

THE COURT: Make it brief.

DEFENSE COUNSEL: Well, Your Honor, I'm not going to be brief because he's had a tragic story and I think it's important for the Court to —

THE COURT: If it's not relevant to his sentencing, then —

104. See, e.g., Transcript of Mass Plea and Sentencing at 16, *United States v. Roblero-Solis*, No. 08-CR-271-TUC-CKJ (D. Ariz. Mar. 5, 2008) (at a Streamline sentencing for multiple defendants: "THE COURT: Do any counsel wish to be heard? COUNSEL: General 'no' answers."). It would be impossible to process seventy defendants in less than an hour if either the defendant or the defense lawyer spoke at sentencing in each case. See Santos, *supra* note 69. In Tucson, for example, Streamline defendants agreed to stipulated sentences in their plea deals, and there were almost never any sentencing pitches. FINCH, *supra* note 36, at 24; Telephone Interview with Saul Huerta, *supra* note 79; Telephone Interview with Vicki Brambl, *supra* note 79.

105. One defense lawyer I interviewed estimated that only two or three defendants spoke out of every seventy-five. Telephone Interview with Saul Huerta, *supra* note 79. See, e.g., Transcript of New Complaints Calendar at 37-59, *United States v. Santiago-Salvador et al.*, No. 18-mj-20472 et al. (S.D. Cal. July 30, 2018) (showing nine out of ten Streamline defendants answering "no" when asked if they have anything to say at sentencing, and the tenth choosing to speak); Transcript of New Complaints Calendar at 181, *United States v. Rubio-Ruiz et al.*, No. 18-mj-20203 et al. (S.D. Cal. July 25, 2018) (showing judge asking any defendants who wish to speak at sentencing to raise their hands, and none doing so). This is consistent with the Streamline sentencings the author witnessed. In a way, the Streamline defendants' silence is troubling. The court system discourages them from speaking on their own behalf, and the only voices heard speaking about them are those of lawyers. See Bennett Capers, *Bringing Up the Bodies*, 83 U. CHI. L.F. 83, 86-97 (2022) (observing the many ways that the criminal-justice system silences defendants, reducing them to inanimate bodies in their own criminal proceedings). For some context concerning why most Streamline defendants remain silent in court, see *infra* Section II.B.

DEFENSE COUNSEL: It is. It's his history and characteristics, Your Honor.

THE COURT: Well—

DEFENSE COUNSEL: Those are 3553(a) factors. It's something that the Court should consider.¹⁰⁶

THE COURT: Well, how can I consider it if I'm only going to give him a time-served sentence? How is it going to affect my sentence?

DEFENSE COUNSEL: Well, Your Honor, I think that it's important because this is his day in court and he's here facing his first criminal conviction. He's decided to plead guilty. And this is his only day that he will be in these proceedings. And I don't want—I—

THE COURT: The Court has to control its calendar. I'll give you 60 seconds, 60 seconds.

DEFENSE COUNSEL: I can't limit the—

THE COURT: You've just wasted five of them.

DEFENSE COUNSEL: —sorrow and grief that he has gone through because he—

THE COURT: You've just wasted ten of 'em.¹⁰⁷

The lawyer then gave a sentencing pitch on behalf of her client. The client's ten-year-old daughter had recently died. From that death, he had incurred significant medical debt. The lawyer explained that her client had tried to come to the United States to make extra money to support his wife and remaining two daughters.¹⁰⁸ Such sentencing arguments were important, even when they did not affect the ultimate sentence. They gave the defendants an opportunity to hear their stories told in court, created an official record of what happened to them, forced the judges and prosecutors to hear about the lives of the people they processed, and further slowed down the Streamline hearings.

On September 17—just over two months after Streamline began—the magistrate judges announced that they would no longer entertain same-day guilty pleas.¹⁰⁹ This reversal was motivated by the defense lawyers' objections, the burden of lengthy court sessions, and the damage that same-day pleas had

^{106.} 18 U.S.C. § 3553(a) (2018) (laying out the factors a judge must consider before imposing a sentence).

^{107.} Transcript of New Complaints Calendar at 178-79, *United States v. Rubio-Ruiz et al.*, No. 18-mj-20203 et al. (S.D. Cal. July 25, 2018) (colloquy between Magistrate Judge Robert Block and FD Roxana Sandoval).

^{108.} *Id.* at 179-80. The argument took more than a minute, and the judge did not ultimately cut it off. *Id.* at 181.

^{109.} Transcript of New Complaints Calendar at 42, *United States v. Hernandez-Cisneros et al.*, No. 18-mj-21590 et al. (S.D. Cal. Sept. 17, 2018).

done to relations between the court and defense attorneys.¹¹⁰ Under the new system, defendants would have their initial appearance and bond determination at their first court date, followed by a second court date three or four business days later to either plead guilty or ask for a trial.¹¹¹ Requiring at least two court dates for each case significantly limited the number of defendants the government could prosecute.¹¹²

California's Streamline defendants also obtained release on bail. The Eighth Amendment prohibits excessive bail,¹¹³ and the federal Bail Reform Act creates a strong presumption of pretrial release for most federal crimes (including unlawful entry).¹¹⁴ Nonetheless, in other Operation Streamline jurisdictions magistrate judges rarely grant bail and defense lawyers rarely even request it.¹¹⁵ California was different in this respect. At the beginning of San Diego's Streamline program, the magistrate judges set cash bails for defendants who chose not to plead guilty at the first court appearance. The bail amount varied by magistrate judge but was normally between \$1,000 and \$2,500, reflecting the fact that the crimes were petty misdemeanors.¹¹⁶ If a defendant posted bail,

110. See Rivlin-Nadler, *supra* note 13; Email from Benjamin Davis, Fed. Pub. Def., San Diego, to author (Feb. 7, 2023, 10:29 AM) (on file with author). These concerns were raised in a letter from the magistrate judges to the district judges requesting an end to same-day pleas. Email from Benjamin Davis, *supra*.

111. See, e.g., New Complaints Calendar at 11-12, *United States v. Trujillo-Mata et al.*, No. 19-mj-24069 et al. (S.D. Cal. Oct. 10, 2019) (indicating that status dates were set for October 16); New Complaints Calendar at 4-11, *United States v. Ramos-Cortez et al.*, No. 19-mj-24205 et al. (S.D. Cal. Oct. 21, 2019) (indicating that status dates were set for October 24).

112. One major limiting factor for the government was jail beds. Since most Streamline defendants received time-served sentences, they would never have to be booked into jail in a same-day plea system. They would be arrested, kept at a border-patrol station, brought to court, and then either deported or held in immigration detention. Requiring two court dates, however, meant that every defendant needed to be booked into a federal jail. See Srikrishnan, *supra* note 12; Off. of Inspector Gen., *supra* note 19, at 61, 68.

113. U.S. CONST. amend. VIII.

114. See 18 U.S.C. § 3142(b)-(c) (2018). For certain enumerated crimes there is a presumption of detention without bail, but unlawful entry is not one of those crimes. *Id.* § 3142(e)(2), (f).

115. Two FDs in Tucson confirmed that magistrate judges there did not set bail for Streamline defendants, and defense lawyers only sought it on rare occasions. Email from Elena M. Kay, *supra* note 79; Telephone Interview with Saul Huerta, *supra* note 79. I also reviewed docket sheets on PACER for several dozen Streamline prosecutions during 2019 in Tucson, Pecos, McAllen, Las Cruces, Laredo, El Paso, Del Rio, and Brownsville. In the dockets I reviewed from these courthouses, no bail was ever set and no bail hearing (or detention hearing) ever occurred. The one partial exception is Las Cruces, where the magistrates issued formal detention orders when the defendants pled guilty, but bail was not given.

116. McGahan, *supra* note 89; see, e.g., Criminal Duty Log of the New Complaints Calendar at 1, 3, 7-8, 11-13, 15, *United States v. Eusebio-Sanchez et al.*, No. 18-mj-20761 et al. (S.D. Cal. Aug. 10, 2018) (setting \$1,500 appearance bonds with \$150 cash deposits).

Immigration and Customs Enforcement (ICE) would pick them up from jail and process them for deportation.¹¹⁷ The criminal case would then be dismissed and the bail money returned, because the federal government cannot both forcibly remove a person from the United States and continue to prosecute that person for a crime in the United States.¹¹⁸ Posting bail would thus effectively buy a dismissal at no cost. Recognizing this, defense lawyers in San Diego reached out to individuals willing to post bail on behalf of their clients. During the first few months of Streamline, at least seventy-six defendants were bailed out in this manner and nearly all had their cases dismissed.¹¹⁹ Then, beginning in September 2018, The Bail Project began posting bonds for California Streamline defendants.¹²⁰ TBP is a nonprofit that posts bail for criminal defendants free of cost, and describes its mission as “combat[ing] mass incarceration by disrupting the money bail system—one person at a time.”¹²¹ TBP sent several of its employees to San Diego and began systematically posting bail for every Streamline defendant referred to it. As of July 2020, TBP had provided free bail to 983 Streamline defendants, and 95% of them had their cases dismissed.¹²² Thus, between TBP and individual posters, over 1,000 Streamline prosecutions were dismissed in California.

Realizing that most of the Streamline cases were getting dismissed, the San Diego U.S. Attorney’s Office announced in October 2018 that it would stop deporting Streamline defendants released on bond.¹²³ This meant that if a defendant posted bail, they would now walk out the front door of the jail. The magistrate judges responded to this policy change by imposing a new requirement that bail could only be posted by a friend or family member of the

117. Davis, *supra* note 15.

118. See, e.g., *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1170 (D. Or. 2012) (holding that it violates the Bail Reform Act to keep a defendant in ICE custody in order to prosecute them for a crime and using dismissal as a remedy).

119. Spreadsheet of Posted Bonds, *supra* note 14. This spreadsheet does not capture all of the bonds posted, so the real number is probably higher than seventy-six.

120. Davis, *supra* note 15. FD Nora Hirozawa had previously worked with TBP, and reached out to see if they could post bonds in San Diego.

121. The Bail Project, LINKEDIN, <https://www.linkedin.com/company/the-bail-project> [<https://perma.cc/MA6P-2LRS>]; see also *Vision*, BAIL PROJECT, <https://bailproject.org/vision> [<https://perma.cc/K5PK-KVR6>] (explaining TBP’s mission).

122. Email from The Bail Project, *supra* note 14. This effort was a very literal instance of what Jocelyn Simonson has labeled “bail nullification.” Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 585 (2017).

123. See Davis, *supra* note 15.

defendant.¹²⁴ This effectively ended the mass dismissals engineered by TBP. But it did create a new dynamic where defendants with friends or family willing to bail them out could get released into the community and fight their cases. Between July 2018 and September 2019, 299 Streamline defendants were released on bond into the community.¹²⁵ A significant majority of them made all of their court appearances until their cases ended.¹²⁶ Many of these defendants were arrested by ICE in the courtroom on the last hearing date of their criminal case and then sent into deportation proceedings.¹²⁷ However, in November 2020, Judge Dana Sabraw issued an order prohibiting courthouse arrests by ICE on the grounds that they violate the longstanding common-law right to free passage to and from court.¹²⁸ After that order, on-bond Streamline defendants could safely attend court without having to worry about ICE arresting them.

Many of California's Streamline defendants took their cases to trial. A search on the federal PACER database and analysis of the San Diego Federal Defenders' "Master Trial List" showed eighty-six trials of Operation Streamline defendants from June 2018 through April 2021.¹²⁹ This number is probably underinclusive, and the total number of trials is likely closer to one hundred.¹³⁰ Of the eighty-

124. See, e.g., *id.* (discussing a new "third-party custodian" bond condition); Criminal Duty Log of the New Complaints Calendar, *United States v. Santiaguin-Velasquez et al.*, No. 18-mj-22799 et al. (S.D. Cal. Nov. 14, 2018) (imposing a bond condition in every Streamline case that the defendant must reside with the surety).

125. Excerpts of Record, *supra* note 15, at 42-43.

126. *Id.* ("Pretrial Services and various magistrate judges in the Southern District of California have reported that 79 of the 299 § 1325 defendants released on bond into the community have failed to appear for court—an in absentia rate of 26.4 percent."). This is significantly lower than the in absentia rate for federal cases processed through San Diego's Central Violations Bureau in that year, which was thirty-five percent. *Id.* at 43. It is also comparable to the low rate of failure to appear in immigration court. See Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PA. L. REV. 817, 873 (2020) ("83% of all non-detained respondents in completed or pending removal cases attended all their hearings since 2008.").

127. See, e.g., Minute Entry for Proceedings Held Before Magistrate Judge Mitchell D. Dembin, *United States v. Nunez-Soberanis*, No. 18-cr-04781 (S.D. Cal. Sept. 25, 2019), ECF No. 78 (remanding defendant to ICE custody after imposing time-served sentence); Minute Entry for Proceedings Held Before Magistrate Judge Mitchell D. Dembin, *United States v. Siordia-Ibarra*, No. 19-MJ-24221 (S.D. Cal. Dec. 16, 2019), ECF No. 22 (same).

128. *Velazquez-Hernandez v. U.S. Immigr. & Customs Enf't*, 500 F. Supp. 3d 1132, 1148 (S.D. Cal. 2020) (granting plaintiffs' motion for a temporary restraining order).

129. See Master Trial List, *supra* note 16. While new Streamline prosecutions ended with the coronavirus pandemic, some on-bond defendants had trials as late as 2021.

130. Searches on PACER revealed thirty-four cases with FDs and twenty-nine cases with CJA or retained lawyers. This was underinclusive because not all trial cases were locatable via PACER's search function. The much more exhaustive internal Federal Defenders trial list

six trials, eighty-four of them were bench trials before a magistrate or district judge and two were full jury trials.¹³¹ A significant majority of defendants who took their cases to trial – sixty-nine out of ninety-one – were free on bond, and the remaining twenty-two chose to fight their cases while in custody.¹³² A significant number of these defendants even won their trials. Thirteen of the bench trials resulted in acquittals, while a further seven trial cases were dismissed by the government after trial had started.¹³³ One frequently successful trial defense was that the government could not prove the location or manner of entry, especially in cases where the defendant was arrested far from the border.¹³⁴ Another successful defense focused on the government’s inability to prove that the defendant was a noncitizen.¹³⁵ In addition, numerous cases were dismissed by the government before or during trial, often because the arresting agent could not recall or identify the defendant.¹³⁶ And in one dramatic incident, prosecutors dismissed a Streamline case midtrial after the arresting agent lied in court about how long the defendant had been detained prior to interrogation.¹³⁷

Judges in San Diego did not impose higher penalties on Streamline defendants who chose to go to trial. Of those convicted of a misdemeanor at trial, fifty-seven got no additional custody time and only eight received jail

showed fifty-six total FD trial cases, meaning PACER missed about thirty-nine percent of Streamline cases that went to trial. Assuming the same rate of false negatives, PACER would have missed about eighteen non-FD cases. This would make the total number of cases 104.

131. 8 U.S.C. § 1325 is classified as a petty offense, so defendants do not have a right to a jury trial. See generally Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, 72 DUKE L.J. 599 (2022) (describing the petty-offense exception and criticizing it as historically unfounded). And under federal law, magistrate judges can preside over bench trials for petty crimes. See Eagly, *Prosecuting Immigration*, *supra* note 36, at 1325-30. Nonetheless, district court judges in San Diego did choose to take some Streamline bench trials. In the two jury trials, the prosecutor filed a superseding indictment charging a felony-entry crime.
132. Ninety-one defendants had eighty-six Streamline trials because three were multidefendant trials. See Master Trial List, *supra* note 16.
133. See *supra* note 17 and accompanying text. Many Streamline cases were also dismissed prior to trial, but the exact number of these is unknown. One FD, Chloe Dillon, got a remarkable five not-guilty verdicts and another two cases dismissed after the start of trial.
134. See Telephone Interview with Rebecca Fish, *supra* note 95.
135. *Id.* Often this defense involved using the doctrine of *corpus delicti* to argue that the defendant’s admission alone is insufficient. Also of note, in a 2020 bench trial in the Western District of Texas, the defendant was acquitted with an insanity defense. *United States v. Valencia-Mendoza*, No. EP-19-CR-1077, 2020 WL 2198169, at *1 (W.D. Tex. May 6, 2020).
136. See Telephone Interview with Rebecca Fish, *supra* note 95. The author had several cases dismissed for this reason.
137. See Maya Srikrishnan, *The First ‘Zero Tolerance’ Case to Go to Trial Didn’t Go Well for the Government*, VOICE SAN DIEGO (June 25, 2018), <https://voiceofsandiego.org/2018/06/25/the-first-zero-tolerance-case-to-go-to-trial-didnt-go-well-for-the-government> [<https://perma.cc/JA4H-5DWM>].

sentences.¹³⁸ And while the government threatened to charge defendants who fought their cases with felony-reentry charges, only one Streamline trial actually resulted in a conviction for a felony.¹³⁹ Thus Streamline defendants were rarely worse off for going to trial. And they got the benefit of being able to live in the United States while the case was pending. On the other hand, these trials created a significant burden for both the court and the prosecutors. Each trial case required at least a full day of court (sometimes two or three), as well as motion hearings and time preparing witnesses to testify. And these cases came to dominate the Southern District of California's docket. In 2019 alone, Streamline cases accounted for more than half of the San Diego Federal Defenders' trials.¹⁴⁰

California's Streamline defendants also found remarkable success appealing their convictions to higher courts. Of the sixty-six trial convictions, twenty-six were reversed on appeal and dismissed while another twenty-three have appeals still pending.¹⁴¹ These convictions were reversed for trial errors including evidentiary rulings, failure to instruct on lesser-included offenses, and insufficient evidence.¹⁴²

And appeals were not just limited to trial cases. From the beginning of Operation Streamline, the Federal Defenders advised clients who had no prior deportation record (and who thus could not be charged with felony reentry under § 1326) to plead guilty with no plea agreement and preserve the right to appeal.¹⁴³ This practice created hundreds of appeals from guilty pleas. And because the cases were heard by magistrate judges, there were two levels of

138. Of the sentences that were greater than time served, one was fourteen days, five were thirty days, one was forty-five days, and one was four months. This is based on the author's examination of trial cases from PACER and the Master Trial List. *See supra* note 16.

139. *United States v. Martinez-Avila*, No. 19-cr-01045 (S.D. Cal. July 5, 2019), ECF No. 43. The only other Streamline felony conviction at trial I found was reversed on appeal. *United States v. Medina-Suarez*, 30 F.4th 816, 818 (9th Cir. 2022). In most trial cases the government did not charge a felony—either because the defendant had no prior deportation (and so was not eligible for a § 1326 charge), because the prosecutor did not want the extra hassle of a jury trial, or for some other reason. There were also a few trial cases where the government charged a felony and it was later dismissed after litigation. *See, e.g., United States v. Nunez-Soberanis*, No. 18-cr-04781, 2022 WL 7675259, at *3 (S.D. Cal. Oct. 12, 2022).

140. Master Trial List, *supra* note 16 (thirty of fifty-four trials in 2019 were Streamline cases—this does not count trials with CJA lawyers).

141. This means that of the eighty-six San Diego Streamline trials, only seventeen have resulted in final convictions.

142. *E.g., Nunez-Soberanis*, 2022 WL 7675259, at *2-3 (granting government's motion to dismiss after it conceded appeal on a hearsay issue); *United States v. Zepeda-Rodriguez*, No. 19-MJ-24357, 2022 WL 1289691, at *9 (S.D. Cal. Apr. 29, 2022) (vacating conviction and remanding to magistrate judge due to insufficient evidence of noncitizenship); *Medina-Suarez*, 30 F.4th at 818 (reversing conviction for trial court's failure to instruct on lesser-included offense).

143. If a defendant had a prior deportation, the prosecutors threatened to charge a felony.

appeal—first to the district court, and then to the Ninth Circuit.¹⁴⁴ These appeals raised a number of issues: an Equal Protection challenge to the separate Streamline court,¹⁴⁵ a challenge to the voluntariness of Streamline guilty pleas,¹⁴⁶ and an argument that § 1325 requires the government to prove knowledge of citizenship status.¹⁴⁷

The most consequential appeal was *United States v. Corrales-Vazquez*, in which the Ninth Circuit held that the government was charging defendants under the wrong provision of § 1325.¹⁴⁸ For the first year of Operation Streamline in San Diego, defendants arrested near the border were charged with “elud[ing] examination or inspection.”¹⁴⁹ Oracio Corrales-Vazquez’s lawyers argued that this charge should only apply to people entering the United States through a designated port of entry, because that is where entrants are ‘examined’ and ‘inspected.’¹⁵⁰ This interpretation was bolstered by the existence of a more appropriate § 1325 charge: entering the United States at a place not “designated by immigration officers,” that is, entering outside of a port of entry.¹⁵¹ The Ninth Circuit agreed with Corrales-Vazquez’s argument and reversed his conviction.¹⁵² In the process, it also reversed nearly 500 Streamline convictions from California (most of them appeals from guilty pleas) that had been stayed pending the appeal.¹⁵³ According to this decision, basically every conviction for the first year

144. See FED. R. CRIM. P. 58(g).

145. *United States v. Chavez-Diaz*, 949 F.3d 1202, 1204 (9th Cir. 2020) (dismissing challenge as waived by defendant’s unconditional guilty plea); see also Eagly, *The Movement to Decriminalize Border Crossing*, supra note 36, at 2007 (“The central premise of [the Equal Protection] challenges [of Streamline courts] is that established in the landmark case of *Brown v. Board of Education*: namely, that segregation of a disfavored class of people from the majority, even under circumstances that are ‘substantially equal,’ cannot fulfill the constitutional requirement of equal protection.”).

146. Appellant’s Opening Brief at 37–49, *United States v. Hernandez-Becerra*, No. 18–50403 (9th Cir. Mar. 9, 2020), 2020 WL 2319991; see also Eagly, *The Movement to Decriminalize Border Crossing*, supra note 36, at 2006–07 (explaining that “[o]ne important line of cases” challenging Operation Streamline “focuses on the coerciveness of demanding a guilty plea after holding individuals in squalid conditions in Border Patrol stations”).

147. *United States v. Rizo-Rizo*, 16 F.4th 1292, 1293 (9th Cir. 2021) (affirming conviction), cert. denied, 143 S. Ct. 120 (2022) (mem.).

148. 931 F.3d 944, 946 (9th Cir. 2019).

149. 8 U.S.C. § 1325(a)(2) (2018).

150. *Corrales-Vazquez*, 931 F.3d at 945–46.

151. 8 U.S.C. § 1325(a)(1) (2018).

152. *Corrales-Vazquez*, 931 F.3d at 953–54.

153. See Petition for Rehearing En Banc by the United States, supra note 18, at 17 (“Nearly 500 appeals (at the district and appellate courts) are currently being stayed pending the resolution of this petition.”).

of San Diego's Operation Streamline (as well as the Streamline convictions in Arizona, where prosecutors adopted the same charging practice) was legally incorrect.¹⁵⁴

Federal prosecutors stopped charging new Operation Streamline cases when the COVID-19 pandemic hit in March 2020.¹⁵⁵ By that time, California's Streamline program had become a disaster for the government. The Department of Justice's Office of the Inspector General released a report in 2021 concluding that the program had created a "massive burden" for the U.S. Attorney's Office.¹⁵⁶ The report quoted a San Diego prosecutor as observing that "lawyers in other Southwest border districts might spend only 4 hours on a case due to same-day plea agreements," whereas prosecutors in San Diego had to "spend up to 60 hours on a comparable misdemeanor case, which took time away from other priorities."¹⁵⁷ This prevented the government from prosecuting more serious crimes: "[F]elony cases involving other types of crimes dropped in the district during this time. For example, drug-smuggling cases were instead referred to the state for prosecution."¹⁵⁸

154. *Id.* ("[U]ntil recently, nearly every defendant charged with a section 1325 offense in the Southern District of California and the District of Arizona was charged under (a)(2)."); Off. of Inspector Gen., *supra* note 19, at 67 n.81 ("In July 2019, a decision from the Ninth Circuit identified a flaw in the specific illegal entry misdemeanor charge brought by the USAO during nearly all of the Section 1325(a) prosecutions in 2018 and much of 2019."). This argument was not raised in Arizona, so nearly all Streamline defendants in Arizona during this period received convictions despite being legally innocent.

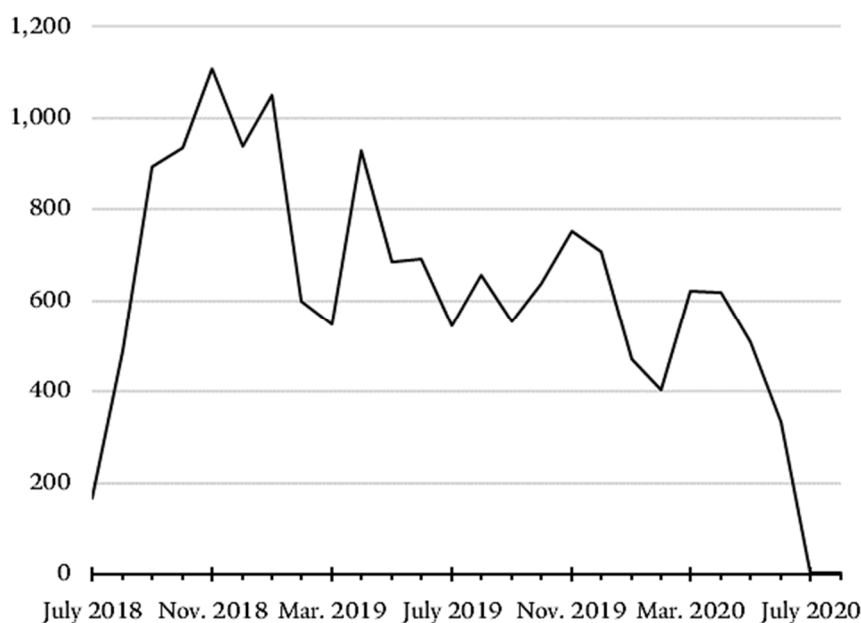
155. Devereaux, *supra* note 62. Some defendants with on-bond cases continued to have court appearances and even bench trials into 2021, but new Streamline cases ended.

156. Off. of Inspector Gen., *supra* note 19, at 66.

157. *Id.* at 66-67.

158. *Id.* at 68 (paraphrasing an interview with a former Chief Judge of the Southern District of California).

FIGURE 3. NUMBER OF § 1325 CASES PROSECUTED PER MONTH IN THE SOUTHERN DISTRICT OF CALIFORNIA¹⁵⁹



This “massive burden” on prosecutors was a direct consequence of defendants choosing to fight. Streamline defendants in California secured release on bond, got their cases dismissed, took the government to trial, and reversed their convictions on appeal. Some, like Mr. Corrales-Vazquez, even chose to stay in jail and go to trial rather than be released with a quick guilty plea.¹⁶⁰ These defendants could fight back like this because their lawyers successfully orchestrated a situation where fighting was in their interest. This contrasts starkly with the other Streamline jurisdictions, which produced few or no trials and few appellate decisions in over a decade prior to 2018 despite

¹⁵⁹. This data was compiled from TRAC on January 26, 2023. To generate the data, the author navigated to the page on trends by lead charge and presidential administration and selected “Cal. S,” “08 USC 1325,” “Prosecutions (number),” and “Monthly Series” from each of the respective drop-down menus. To reach this page, click on Criminal, then Express, then Lead Charge, and finally Trend. The permalink provides the table TRAC generated from that search. TRAC Reports, Inc., *TRACfed*, SYRACUSE UNIV., <https://tracfed.syr.edu> [<https://perma.cc/82Y5-VTWZ>].

¹⁶⁰. Mr. Corrales-Vazquez was arrested on June 5, 2018. *United States v. Corrales-Vazquez*, No. 18-MJ-03051 (S.D. Cal. 2018). He was held in custody until a bench trial on June 26 and then given a time-served sentence. *Id.* at ECF No. 14. This decision made his appeal possible, which overturned nearly 500 convictions. *See supra* note 153 and accompanying text.

processing hundreds of thousands of cases.¹⁶¹ As San Diego CJA lawyer Jami Ferrara observed, “We made a concerted effort to fight this process, and that hasn’t happened in any of the other districts where this process was instituted.”¹⁶² And as Figure 3 above illustrates, these efforts shrunk California’s Streamline system during the Trump Administration. They also prevented the Department of Justice from ever processing 70 to 100 people per day, as it had in places like Tucson and Las Cruces.¹⁶³

C. *Operation Lone Star*

The state of Texas has recently created its own mass immigrant prosecution system. In March 2021, Texas Governor Greg Abbott announced a state-law version of Operation Streamline called “Operation Lone Star.”¹⁶⁴ A few months later, Abbott issued a “disaster” declaration covering several dozen counties in Texas.¹⁶⁵ Under the authority that this declaration provides, Abbott has sent thousands of state police (about a quarter of Texas’s police force) as well as Texas National Guard troops to the Texas-Mexico border to arrest immigrants.¹⁶⁶ Operation Lone Star has been expensive so far: Texas’s legislature has appropriated nearly \$10 billion for the program.¹⁶⁷ Some of this money goes directly to border counties in the form of grants.¹⁶⁸ Many of the border counties participating in Operation Lone Star are poor, with limited resources for policing

161. See *supra* notes 79-80 and accompanying text.

162. Rivlin-Nadler, *supra* note 13.

163. This was the government’s original goal in San Diego. See Marosi, *supra* note 9; see also Devereaux, *supra* note 62 (noting numbers in Tucson and Las Cruces).

164. Kriel & Trevizo, *supra* note 21.

165. Greg Abbott, Governor, Proclamation by the Governor of the State of Texas (May 31, 2021), https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf [<https://perma.cc/XDC5-LHYC>]. The declaration currently covers fifty-three counties. Emily Hernandez, *What Is Operation Lone Star? Gov. Greg Abbott’s Controversial Border Mission, Explained.*, TEX. TRIB. (Mar. 30, 2022, 5:00 AM CT), <https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained> [<https://perma.cc/QS4V-B2B5>].

166. Hernandez, *supra* note 165; Jolie McCullough & Lomi Kriel, *Converted Texas Prison Gets First Immigrant Detainees as Gov. Greg Abbott’s Border Security Effort Ramps Up*, TEX. TRIB. (July 21, 2021, 4:00 PM CT), <https://www.texastribune.org/2021/07/21/texas-prison-immigrant-jail-briscoe> [<https://perma.cc/A72H-A3DH>].

167. See Uriel J. García, *Eagle Pass Residents Sour on Texas Gov. Greg Abbott’s Operation Lone Star*, TEX. TRIB. (Aug. 7, 2023, 5:00 AM CT), <https://www.texastribune.org/2023/08/07/texas-border-eagle-pass-abbott-operation-lone-star> [<https://perma.cc/ay8k-dllg>].

168. See Ariana Perez-Castells, *Gov. Greg Abbott Spends an Additional \$30 Million on Operation Lone Star to Aid Local Governments*, TEX. TRIB. (July 7, 2022, 1:00 PM CT), <https://www.texastribune.org/2022/07/07/greg-abbott-texas-operation-lonestar> [<https://perma.cc/5CYM-AQL2>].

and court systems.¹⁶⁹ These counties have strong financial incentives to cooperate with the program to secure millions of dollars in funding.¹⁷⁰

Operation Lone Star has created an unprecedented degree of direct criminal immigration enforcement by a state government.¹⁷¹ Much like Operation Streamline, the program charges large numbers of immigrant defendants with misdemeanor crimes. And these defendants have the same characteristics as Operation Streamline defendants: nearly all are immigrants from Latin America, and nearly none have previous criminal cases in the United States.¹⁷² Texas prosecutors charge these defendants with the misdemeanor of trespassing on private property.¹⁷³ The defendants are arrested in ranches, trainyards, public parks, and other locations near the border.¹⁷⁴ The government must prove that they entered or remained on a property without consent, and that they had notice they were trespassing.¹⁷⁵ The maximum sentence for misdemeanor

169. Telephone Interview with Amrutha Jindal, Chief Def., Operation Lone Star Defs. (Feb. 3, 2023); ABA Section of C.R. & Soc. Just., *Operation Lone Star: Texas's Costly Attempt to Enforce Federal Immigration Law* at 10:30, YOUTUBE (Feb. 24, 2022), <https://www.youtube.com/watch?v=hmiIk7L1hIk> [<https://perma.cc/T8DW-9E3T>].

170. See Melissa del Bosque, *The Texas Border County at the Center of a Dangerous Right-Wing Experiment*, INTERCEPT (Oct. 12, 2022, 12:30 PM), <https://theintercept.com/2022/10/12/kinney-county-texas-operation-lone-star> [<https://perma.cc/TL5E-DJH6>] (noting that the relatively poor Kinney County has received \$3.2 million from the program).

171. States' involvement in immigration enforcement is normally limited to screening immigrants (commonly during or after an arrest) and sending them to federal immigration authorities. By contrast, Operation Lone Star involves a state directly prosecuting immigrants en masse for criminal charges stemming from their presence in the United States. See Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1347-52 (2019) (discussing various mechanisms of state involvement in immigration enforcement, including ICE detainees sent to state jails, the Secure Communities Program, and 287(g) agreements). The Supreme Court has, indeed, rejected broad assertions of state power over direct immigration enforcement. See *Arizona v. United States*, 567 U.S. 387, 415-16 (2012).

172. Telephone Interview with Amrutha Jindal, *supra* note 169.

173. *Id.* As this Article goes to press, Texas is enacting a state-law version of 8 U.S.C. § 1325, which will likely replace misdemeanor trespassing charges going forward. Armando Garcia, *Texas House Passes Bill that Authorizes Officers to Arrest Migrants, One of Strictest Immigration Proposals in US*, ABC NEWS (Nov. 14, 2023, 10:06 PM), <https://abcnews.go.com/International/texas-house-considers-bill-authorizes-officers-arrest-migrants/story?id=104857797> [<https://perma.cc/343T-MYGB>].

174. See J. David Goodman, *Cases Dismissed, Judges Replaced: Texas Struggles to Prosecute Migrants*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/us/texas-migrants-operation-lone-star.html> [<https://perma.cc/S49X-XLXE>]; ABA Section of C.R. & Soc. Just., *supra* note 169, at 12:20; Telephone Interview with Doug Keller, Legal Dir., Operation Lone Star Defs. (Aug. 23, 2023).

175. See TEX. PENAL CODE § 30.05 (West 2021) (“A person commits an offense if the person enters or remains on or in property of another . . . without effective consent and the person: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.”).

trespassing in Texas is usually six months in custody, but due to Governor Abbott’s “disaster” order it has been increased to one year.¹⁷⁶ In Texas’s normal criminal-justice system, it is uncommon for defendants charged with misdemeanor trespassing to be held in custody or given any jail sentence at all.¹⁷⁷ However, Operation Lone Star defendants generally serve several weeks to two months in jail.¹⁷⁸ The program also prosecutes some defendants for felony charges for transporting undocumented immigrants, but the vast majority of cases have involved misdemeanor trespassing.¹⁷⁹ A total of 8,288 trespassing cases have been brought through Operation Lone Star between July 20, 2021 and August 23, 2023.¹⁸⁰ Nearly all of the defendants in these cases have been men (female defendants only started to be processed through Operation Lone Star facilities in mid-2023), and nearly all of them have been immigrants from Mexico, Honduras, Venezuela, Guatemala, or El Salvador.¹⁸¹

Also much like Operation Streamline, Operation Lone Star establishes a separate court system for immigrant defendants. This separate system has fewer due-process protections than normal criminal court. Its key features are the use of large tented makeshift facilities to hold initial court appearances and the

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176. See TEX. PENAL CODE § 12.50 (West 2021). This provision establishes that trespassing, burglary, robbery, and other crimes get increased maximum penalties if they happen in a designated disaster area. Its main purpose is to punish crime during a natural disaster like a hurricane.
177. ABA Section of C.R. & Soc. Just., *supra* note 169, at 12:34 (“Criminal trespass is a crime that carries almost no jail time ever when people are arrested for it.”); Telephone Interview with Amrutha Jindal, *supra* note 169.
178. Telephone Interview with Amrutha Jindal, *supra* note 169 (explaining that if a defendant wants to plead guilty in exchange for a time-served sentence, it will generally take several weeks to more than a month for them to successfully plead guilty and get released depending on the county).
179. See *id.*; ABA Section of C.R. and Soc. Just., *supra* note 169, at 12:15.
180. Intake Roster for Val Verde Temporary Processing Center (Aug. 23, 2023) (intake roster) [hereinafter Val Verde Intake Roster] (on file with author) (showing 7,181 criminal-trespassing cases); Intake Roster for Jim Hogg Temporary Processing Center (Aug. 23, 2023) (intake roster) [hereinafter Jim Hogg Intake Roster] (on file with author) (showing 1,107 criminal-trespassing cases).
181. Goodman, *supra* note 174 (noting the prior policy of only charging men); Jolie McCullough, *Facing Sex Discrimination Claims, Texas Begins Jailing Migrant Women Under Border Crackdown*, TEX. TRIB. (July 26, 2023, 5:00 AM CT) <https://www.texastribune.org/2023/07/26/women-arrests-texas-border-operation-lone-star> [<https://perma.cc/RJ45-S2UV>]; Val Verde Intake Roster, *supra* note 180 (showing that of 7,181 trespassing cases, 4,073 defendants were from Mexico, 1,210 from Honduras, 1,163 from Venezuela, 149 from Guatemala, 110 from El Salvador, and 439 from other Latin American countries); Jim Hogg Intake Roster, *supra* note 180 (showing that of 1,107 trespassing cases, 673 defendants were from Mexico, 103 from Honduras, 27 from Venezuela, 180 from Guatemala, 97 from El Salvador, and 24 from other Latin American countries).

replacement of physical courtrooms with online court through videoconferencing.¹⁸² Counties near the border that participate in Operation Lone Star send arrested immigrants to two “temporary processing centers” for their initial appearances.¹⁸³ They do this because the governments of these rural border counties lack sufficient judges, lawyers, jail space, and court resources to process so many defendants.¹⁸⁴ One of these processing centers is in Val Verde County, and the other is in Jim Hogg County. Each of them is basically a large, tented facility set up in a parking lot next to a sheriff’s office.¹⁸⁵

After arrest, immigrants are transported to these centers (often a drive of several hours), brought into a larger storage container, and processed through an online court appearance with a judge presiding by video through a laptop computer.¹⁸⁶ The judges who participate in Operation Lone Star are mostly retired and from other counties, and they can be replaced at will by the local judges (indeed, three of them were dismissed for releasing too many defendants).¹⁸⁷ Defense lawyers are not present at these initial appearances.¹⁸⁸ The judge informs the defendants of their criminal charges and gives them a bail amount.¹⁸⁹ Bail for most cases is set somewhere between \$1,000 and \$5,000, with the average bail being around \$3,000.¹⁹⁰ Unlike Operation Streamline,

182. Telephone Interview with Amrutha Jindal, *supra* note 169.

183. Seven counties have participated in Operation Lone Star: Kinney County, Val Verde County, Maverick County, Uvalde County, Jim Hogg County, Zapata County, and Webb County. Val Verde Intake Roster, *supra* note 180; Jim Hogg Intake Roster, *supra* note 180. However, Uvalde County and Val Verde County have both stopped participating in the misdemeanor program. Email correspondence between Doug Keller, Legal Dir., Operation Lone Star Defs., and author (Nov. 8, 2023) (on file with author).

184. Telephone Interview with Amrutha Jindal, *supra* note 169. Such attorney shortages are very common in rural legal communities in the United States. See Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15, 120-26 (2018).

185. Jolie McCullough, *Webb County, a Democratic Stronghold, Is Set to Welcome Texas Gov. Greg Abbott’s Controversial Migrant Arrests*, TEX. TRIB. (Mar. 10, 2022, 2:00 PM CT), <https://www.texastribune.org/2022/03/10/texas-border-migrant-arrests-webb-county> [<https://perma.cc/38MT-X7SN>].

186. Telephone Interview with Amrutha Jindal, *supra* note 169.

187. Jolie McCullough, *Hundreds of Migrants Accused of Trespassing Languish in Texas Prisons. A County Judge’s New Approach Might Prolong Their Detention*, TEX. TRIB. (Dec. 10, 2021, 5:00 AM CT), <https://www.texastribune.org/2021/12/10/texas-border-security-migrant-prisons> [<https://perma.cc/Z2LZ-G37F>].

188. Telephone Interview with Amrutha Jindal, *supra* note 169.

189. *Id.*

190. Val Verde Intake Roster, *supra* note 180 (demonstrating an average bail of \$3,077 in trespass cases); Jim Hogg Intake Roster, *supra* note 180 (demonstrating an average bail of \$2,659 in trespass cases).

there are no same-day guilty pleas in Operation Lone Star. If a defendant wishes to plead guilty, they must generally wait at least two weeks to do so.¹⁹¹

After finishing at the processing center, male defendants are sent to one of two Texas state prisons that have been converted into jails for Operation Lone Star: the “Briscoe Unit” and the “Segovia Unit.”¹⁹² On average, 900 of them are held in these prisons at a time.¹⁹³ And starting in July 2023, the “Lopez State Jail” has been used to house up to 200 female defendants.¹⁹⁴ Operation Lone Star defendants are then given attorneys through a nonprofit called “Lone Star Defenders,” which hires the defense lawyers who work on these cases.¹⁹⁵ The assigned lawyers are supposed to talk with their clients within three business days of receiving a case.¹⁹⁶ Early on in the program, there were many instances of lengthy delays before the defense lawyers were even informed about a case. This resulted in some defendants spending several months in custody without a lawyer being appointed.¹⁹⁷ There were also instances of defendants being coerced into waiving their right to an attorney.¹⁹⁸ But today, defense counsel is appointed relatively quickly—two public-defender offices and several individual attorneys take the cases.¹⁹⁹

191. Telephone Interview with Doug Keller, Legal Dir., Operation Lone Star Defs. (Feb. 22, 2023); Telephone Interview with Amrutha Jindal, *supra* note 169. Some judges in Operation Lone Star also permit guilty pleas *in absentia* without a second court appearance. Telephone Interview with Amrutha Jindal, *supra* note 169.

192. María Ramos Pacheco, *Detainees Under Abbott’s Operation Lone Star in Texas Lack Proper Legal Access*, DALL. MORNING NEWS (May 12, 2022, 12:09 PM CDT), <https://www.dallasnews.com/news/politics/2022/05/12/detainees-under-abbotts-operation-lone-star-in-texas-lack-proper-legal-access> [https://perma.cc/GY4B-UMNN].

193. *Id.*

194. McCullough, *supra* note 181.

195. See *Indigent Defense Program*, LONE STAR DEFS., <https://www.olsdefense.org/indigent-defense-program> [https://perma.cc/3MYC-GXHN]; Email from Doug Keller, *supra* note 183. Prior to October 2023, defense lawyers were assigned through the Lubbock Private Defenders Office.

196. Pacheco, *supra* note 192.

197. *Id.*; Jolie McCullough, *Migrants Arrested by Texas in Border Crackdown Are Being Imprisoned for Weeks Without Legal Help or Formal Charges*, TEX. TRIB. (Sept. 27, 2021, 5:00 AM CT), <https://www.texastribune.org/2021/09/27/texas-border-migrants-jail/#:~:text=Hundreds%20of%20migrants%20arrested%20under,many%20don%27t%20speak%20English> [https://perma.cc/53K5-YVYR].

198. McCullough, *supra* note 197.

199. Telephone Interview with Doug Keller, *supra* note 191. The two public-defender offices are Texas RioGrande Legal Aid and Neighborhood Defender Service, both of which are assigned cases by Lone Star Defenders (and previously were by the Lubbock Private Defenders Office). *Id.*

Most of the defense lawyers are not local – they come from all over Texas and a few even live in other states.²⁰⁰ The Texas Supreme Court issued an emergency order in January 2022 permitting lawyers licensed in other states to act as court-appointed defense lawyers for Operation Lone Star cases.²⁰¹ Nearly all communications with the defense lawyers happen via telephone or Zoom (usually through an interpreter), because traveling to these two prisons is not feasible for the lawyers.²⁰² The defendants thus never meet their lawyers in person in most cases. And because court happens over Zoom, the defendants are never brought to a physical courtroom either. Everything that happens in these cases happens virtually. Nearly all defendants in the program are given an offer by the prosecutor to plead guilty to misdemeanor trespassing for a time-served sentence (meaning no additional jail time).²⁰³ The defendants who cannot post bond normally accept these plea-bargain terms.²⁰⁴ They then generally wait for at least two weeks in custody to plead guilty and be released.²⁰⁵

As in San Diego, defendants in Operation Lone Star are securing release on bail. In the first year of the program, hundreds of defendants were released on their own recognizance because prosecutors failed to file criminal charges in a timely manner.²⁰⁶ But the majority of those released on bail have had friends or family pay the bond set at their initial appearances.²⁰⁷ As of August 2023, at least 3,387 Operation Lone Star Defendants charged with trespassing have obtained release on bond.²⁰⁸ As happened in San Diego during the first few months of Operation Streamline, the Texas government sends people released on bail directly to federal immigration authorities to be deported.²⁰⁹

However, unlike in San Diego, Texas is not dismissing criminal cases after deportation. At the beginning of the program, deported defendants would not

200. Telephone Interview with Amrutha Jindal, *supra* note 169; *Find My Attorney*, LONE STAR DEFS., <https://www.olsdefense.org/attorneys> [<https://perma.cc/7WEK-2MKQ>] (providing names and business addresses for the OLS defense lawyers).

201. Emergency Order Regarding Indigent Defense and the Border Security State of Disaster Permitting Out-of-State Lawyers to Practice in Texas Temporarily, Misc. Dkt. No. 22-9007 (Tex. Jan. 21, 2022).

202. Pacheco, *supra* note 192.

203. Telephone Interview with Amrutha Jindal, *supra* note 169.

204. *Id.*

205. *Id.*; Telephone Interview with Doug Keller, *supra* note 191.

206. Gamboa, *supra* note 23 (noting that 243 defendants were released on their own recognizance because of delays).

207. Telephone Interview with Amrutha Jindal, *supra* note 169.

208. Val Verde Intake Roster, *supra* note 180 (recording 2,763 defendants released on bail); Jim Hogg Intake Roster, *supra* note 180 (recording 624 defendants released on bail).

209. Del Bosque, *supra* note 170.

be given information about a next court date and would simply forfeit the bond money.²¹⁰ But more recently, defendants have been given a court date and Zoom link and been required to attend court virtually after being deported to Mexico, Honduras, El Salvador, or somewhere else.²¹¹ These virtual court appearances have been a logistical challenge—they can last six hours or more and feature long delays, poor Internet connections, and difficulties with court interpreters.²¹² If a defendant fails to appear, the judge will order their bail money forfeited. As of October 2022, Kinney County, which has prosecuted the majority of Operation Lone Star cases, had taken around \$3 million in bond money from defendants' families.²¹³ The courts have also required that bonds be transferred to the defendant's name, even when posted by someone else, which makes it harder to get the money back at the end of a case.²¹⁴ While hundreds of defendants have continued to attend court via Zoom from abroad, others have chosen to plead guilty even after being deported in order to try to recoup the bond money.²¹⁵ In some cases, prosecutors have even required forfeiture of a large portion of the bond money through a fine as part of the plea deal.²¹⁶

Defense lawyers and defendants in Operation Lone Star—both those in custody and those on bond—have fought their cases in a variety of ways. Lawyers have sought dismissal of the trespassing charges, either from a judge or from the prosecutor, and have obtained it in hundreds of cases.²¹⁷ In one case, for example, a prosecutor dropped charges against eleven men after they stated that police had marched them to a fenced ranch before arresting them for trespassing on that ranch.²¹⁸ In a similar incident in January 2023, over sixty cases were

210. Telephone Interview with Amrutha Jindal, *supra* note 169.

211. *Id.*

212. Email from Doug Keller, *supra* note 183; Telephone Interview with Amrutha Jindal, *supra* note 169. The author observed one such court session in February 2023, which featured several lengthy delays due to missing attorneys, logistical problems with the court interpreter, and other issues.

213. Del Bosque, *supra* note 170.

214. Telephone Interview with Amrutha Jindal, *supra* note 169. Part of the problem is that courts refuse to mail bond checks to foreign countries, so defendants who are deported cannot receive the money. *Id.*

215. *Id.*

216. *Id.*

217. The intake rosters show that cases have been dismissed voluntarily by the prosecutor, dismissed for lack of probable cause by a judge, or dismissed for some other reason. Val Verde Intake Roster, *supra* note 180 (recording 301 dismissals); Jim Hogg Intake Roster, *supra* note 180 (recording twenty-nine dismissals).

218. Jolie McCullough, *Texas Prosecutor Drops Charges After Migrants Claim They Were Marched to Private Property, Then Arrested for Trespassing*, TEX. TRIB. (Oct. 5, 2021, 3:00 PM CT), <https://>

dismissed because officers had directed the defendants to go to private ranchland.²¹⁹ This is a recurring tactic used by officers in Operation Lone Star—they tell immigrants to go to a specific place, such as a public park or a ranch, and then arrest the immigrants for trespassing there.²²⁰ The officers thus basically funnel immigrants to locations that will support trespassing charges. Other cases have been dismissed by judges because prosecutors failed to provide sufficient evidence for the charges, or even to allege which land the defendant had trespassed on.²²¹

In addition to pretrial dismissals, many of these cases also have strong trial defenses. To prove trespassing, prosecutors would have to establish beyond a reasonable doubt that a defendant had actual notice that they were intruding on private land. This would be difficult to do unless the defendant was arrested near a fence or a sign, or was told by a landowner not to enter the property.²²² But only one defendant has actually taken a case to trial so far: Lester Hidalgo Aguilar, an asylum seeker from Honduras who spent his childhood in the United States.²²³ Mr. Aguilar chose to remain in custody for eight months awaiting his trial rather than plead guilty and be released.²²⁴ He was convicted by a jury and

www.texastribune.org/2021/10/05/texas-migrants-arrest-charges-dropped [https://perma.cc/H9WV-HX2S].

219. Telephone Interview with Doug Keller, *supra* note 191; Facebook Messenger Correspondence between Jamal Muhammad, Def. Att’y, Operation Lone Star, and author (Feb. 2023) (on file with author).
220. Telephone Interview with Doug Keller, *supra* note 174; Telephone Interview with Amrutha Jindal, *supra* note 169; *see also* Amrutha Jindal (@AmruthaJindal), X (formerly TWITTER) (Aug. 16, 2023, 3:32 PM), <https://twitter.com/AmruthaJindal/status/1691895651737448712> [https://perma.cc/4H2H-2]2T] (recording video of immigrants in Eagle Pass saying that they were told by officers to go to private land in order to report to immigration authorities).
221. Gamboa, *supra* note 23; Jolie McCullough, *In Latest Blunder, Charges Dropped Against Migrants Arrested in Texas Governor’s Border Crackdown Because of Faulty Paperwork*, TEX. TRIB. (Nov. 4, 2021, 5:00 AM CT), <https://www.texastribune.org/2021/11/04/texas-border-migrants-charges-dropped> [https://perma.cc/P4FC-ZPVB].
222. Telephone Interview with Amrutha Jindal, *supra* note 169; TEX. PENAL CODE ANN. § 30.05 (West 2021); Hunter Parnell, *The Fight Against Mass Immigration Prosecutions with Kimberly Simmons and Jamie Spencer*, PUB. DEFENSELESS, at 22:31 (Jan. 23, 2024), <https://www.publicdefenseless.com/episodes/4l8cpb3n9r56tkz-364fg-b9cd4-dzcr9-7mcag-2fa4m-m8e7r-yrngw-hnmw8-rfjsd-wrswf-bdpw8-85gy8-822rt-j9je6> [https://perma.cc/55DC-MHV2] (interviewing Jamie Spencer, managing attorney at the Texas Rio Grande Public Defender, who observes that, “The vast majority of [OLS defendants] didn’t jump any fences. They’re just wandering through a bunch of fields. . . . I have more innocent clients now than I’ve ever had in twenty-five years.”)
223. Jolie McCullough, *A Minor Trespassing Case Gives Gov. Greg Abbott’s Border Initiative Its First Courtroom Win*, TEX. TRIB. (May 10, 2022, 10:00 AM CT), <https://www.texastribune.org/2022/05/10/texas-border-migrant-trespassing-trial> [https://perma.cc/4F8C-WVU2].
224. *Id.*

Judge Roland Andrade sentenced him to a full year in prison, the maximum possible sentence.²²⁵

By contrast, the hundreds of on-bond defendants who have been deported have not received trials. They are in a strange position. In San Diego's Operation Streamline, once defendants were released on bail into the community they were able to fight their cases all the way to trial.²²⁶ However, Operation Lone Star defendants cannot exercise their right to trial because they are deported after posting bond.²²⁷ The judge orders them to appear in person before trial, and when they are unable to do so (because they cannot enter the United States), the judge forfeits their bond money.²²⁸ Texas is thus sending defendants to the immigration authorities to be deported, and then treating them as if they absconded. The defendants' lawyers petition the prosecuting counties to request that the federal government allow the defendants back into the United States for trial, but the counties have refused to do so.²²⁹ The defense lawyers have also filed a request for a mandamus with Texas's Fourth District Court of Appeals, asking it to order that the counties either make efforts to help defendants return for trial or else dismiss their cases.²³⁰ Further, the defense lawyers have sought a mandamus to let them appoint lawyers to argue that the bond money should be returned because Texas prevented the defendants from appearing for trial.²³¹

225. *Id.* Because Mr. Aguilar had already served eight months prior to his conviction, this meant he would spend four more months in custody. *Id.*

226. See *supra* notes 125-137 and accompanying text.

227. See *In re Santiago Villalobos*, No. 04-23-538, 2023 WL 4750833, at *1 (Tex. App. July 26, 2023) (Martinez, C.J., concurring) ("What remains after removal, is a pending criminal charge in state court but a defendant who is outside of the country and without current federal authorization to return.").

228. Telephone Interview with Amrutha Jindal, Chief Def., Operation Lone Star Defs. (Aug. 24, 2023); Telephone Interview with Doug Keller, *supra* note 174. Remote trials are not possible because Operation Lone Star defendants have not waived their right to appear in person at trial. See *In re Santiago Villalobos*, 2023 WL 4750833, at *1 (Martinez, C.J., concurring) ("However, if the trial court were to allow pretrial appearances by videoconference, trials nevertheless appear unlikely in the foreseeable future. The record does not show that relators have waived their physical presences at trial, and records from other Operation Lone Star appeals suggest they will not.").

229. Telephone Interview with Amrutha Jindal, *supra* note 228; *In re Santiago Villalobos*, 2023 WL 4750833, at *1 (Martinez, C.J., concurring) ("In their filing, each relator petitions Maverick County to submit a parole request to Federal Immigration and Customs Enforcement to enter the country and attend [his/her] in-person jury proceeding.").

230. See Petition for Writ of Mandamus, *In re Garcia-Escalante*, No. 04-23-740-CR, at 13 (Tex. App. Aug. 10, 2023).

231. See Petition for Writ of Mandamus, *In re Paz-Estrada*, No. 04-23-318-CR, at 2 (Tex. App. Apr. 4, 2023).

Both of these mandamus requests are currently pending before Texas's appeal courts.

Operation Lone Star defendants have also pursued constitutional arguments for dismissal. Hundreds of them have raised these arguments through pretrial writs of habeas corpus, which allow them to seek dismissal from a Texas state judge without going to trial first.²³² These writs have for the most part only been filed by defendants who are out on bail, because arguing a writ while in custody requires staying in prison for significantly longer than pleading guilty.²³³ Two arguments in particular have found some success.

First, Judge Jan Soifer dismissed one case on the grounds that Operation Lone Star prosecutions violate the Constitution's Supremacy Clause.²³⁴ In 2012, the U.S. Supreme Court struck down an Arizona law that criminalized undocumented immigrants because it interfered with the federal government's exclusive power to regulate immigration.²³⁵ Soifer found Operation Lone Star prosecutions unconstitutional on the same basis: they involve the state of Texas usurping the federal government's exclusive power to set immigration policy.²³⁶ Over four hundred defendants subsequently filed applications for writs making the same argument, but these were rejected by the Texas Court of Criminal Appeals for jurisdictional reasons.²³⁷

Second, defendants have pursued an Equal Protection Clause argument—that these prosecutions are unconstitutional because only men are charged. For the first few years of Operation Lone Star, only men were prosecuted for misdemeanor trespassing while women were instead sent directly to

232. Telephone Interview with Amrutha Jindal, *supra* note 169; see *In re Smith*, 665 S.W.3d 449, 452 (Tex. Crim. App. 2022) (noting that hundreds of Operation Lone Star defendants have filed habeas applications).

233. It generally takes six to eight weeks to receive a hearing for a writ. Telephone Interview with Amrutha Jindal, *supra* note 169.

234. State's Motion to Dismiss Unauthorized Appeal, *supra* note 26, at 170-71; see McCullough, *supra* note 26; see also *State v. Guzman Curipoma*, 652 S.W.3d 74, 74, 77 (Tex. App. 2022) (referencing the dismissal by Judge Soifer in the court below).

235. *Arizona v. United States*, 567 U.S. 387, 416 (2012); see Chacón, *supra* note 43, at 621-27.

236. See State's Motion to Dismiss Unauthorized Appeal, *supra* note 26, at 170-71; McCullough, *supra* note 26.

237. Katie Hall, *After District Court Success, Lawyers Challenge More Than 400 Operation Lone Star Arrests*, AUSTIN AM.-STATESMAN (Jan. 20, 2022, 2:38 PM CT), <https://www.statesman.com/story/news/2022/01/20/operation-lone-star-tx-400-arrests-challenged-travis-county/6586179001> [<https://perma.cc/9CSY-RDBC>]. The Texas Court of Criminal Appeals ruled that these writ applications had to be heard in Kinney County rather than Travis County. See *In re Smith*, 665 S.W.3d at 452, 461. It does not appear that Operation Lone Star defendants have continued to pursue this argument.

immigration authorities.²³⁸ Defense lawyers have argued—and multiple Texas state judges have agreed—that this policy is unconstitutional sex discrimination.²³⁹ At least thirty-seven cases in four counties have been dismissed under this theory.²⁴⁰ And Texas’s Fourth Court of Appeals agreed with the sex-discrimination argument in *Ex parte Aparicio*, ruling that the defendant’s prosecution was unconstitutional because only men have been charged.²⁴¹ This means that every Operation Lone Star conviction for the first year and a half of the program was unconstitutional. The issue is currently on appeal before the Texas Court of Criminal Appeals, which will decide whether the sex-discrimination argument can be raised prior to trial.²⁴² Because of defendants’ victories in these cases, Operation Lone Star’s misdemeanor program was effectively shut down for about four months in two of the participating counties.²⁴³ Then, in July of 2023, the Lopez State Jail was made available to house female defendants and Operation Lone Star began to process women for misdemeanor trespassing charges.²⁴⁴

In addition to writs and appeals in the criminal cases, several attorneys have filed a federal class-action lawsuit against Operation Lone Star seeking to enjoin the prosecutions as unconstitutional.²⁴⁵ The complaint in this case argues that Operation Lone Star unconstitutionally discriminates by race, gender, and nationality; that it denies defendants due process of law and the right to counsel; and that it violates the Fourth Amendment by detaining defendants who are

238. Harris, *supra* note 27 (“According to attorneys representing the migrants, under Operation Lone Star, 4,000 people, all men, have been arrested for criminal trespassing despite women and children being in the same circumstances as the men that are jailed.”).

239. See, e.g., State v. Gregeda, No. 13784CR (Tex. Cnty. Ct. Dec. 20, 2022) (granting relief).

240. I obtained a list of equal-protection dismissals from Neha Dubey and Amrutha Jindal, two defense attorneys working on these cases. It shows twenty-two dismissals in Kinney County, six in Zapata County, eight in Webb County, and one in Uvalde County. Email from Amrutha Jindal, Chief Def., Operation Lone Star Defs., to author (Feb. 16, 2023, 4:11 PM) (on file with author).

241. *Ex parte Aparicio*, 672 S.W.3d 696, 716 (Tex. App. 2023), *petition for discretionary review granted*, 672 S.W.3d 696 (Tex. App. 2023); see also *Ex parte Vazquez-Bautista*, 683 S.W.3d 504, 514-515 (Tex. App. 2023) (en banc) (recognizing a selective-prosecution claim at the habeas stage), *petition for discretionary review filed* (Feb. 5, 2024).

242. *Ex parte Aparicio*, 672 S.W.3d 696; Telephone Interview with Doug Keller, *supra* note 174.

243. These were Zapata County and Webb County. Telephone Interview with Amrutha Jindal, *supra* note 228; Telephone Interview with Doug Keller, Legal Dir., Operation Lone Star Defs. Program (Mar. 7, 2023).

244. Telephone Interview with Amrutha Jindal, *supra* note 228; McCullough, *supra* note 181.

245. See Plaintiffs’ Revised Complaint, Sanchez-Jimenez v. McCraw, No. 22-cv-397 (W.D. Tex. June 18, 2023).

entitled to release.²⁴⁶ Texas has raised several arguments for the lawsuit's dismissal, and the litigation is ongoing.²⁴⁷

Outside of the courtroom battles, there has been a major shift in community sentiment against Operation Lone Star.²⁴⁸ This shift has been driven, in part, by distress over the militarization of riverbanks and public land through police patrols, fencing, and razor wire.²⁴⁹ This shift has interfered with prosecutors' ability to bring trespassing cases. The owners of several large ranches have recently announced that they will no longer cooperate with the prosecutions.²⁵⁰ Since prosecutors depend on these ranchers' cooperation to bring trespassing charges, this decision to opt out has led to hundreds of dismissals and a significant decrease in cases.²⁵¹ Further, in August 2023, the city council of Eagle Pass voted to rescind permission to make trespassing arrests at a large public park in the city.²⁵² State police had been directing immigrants to this park using boats, razor wire, and floating obstacles in the Rio Grande and then arresting them.²⁵³ Once the park was no longer available to Operation Lone Star, the program's weekly trespassing caseload dropped from around 200 cases to around ten.²⁵⁴ Operation Lone Star's dwindling support has thus undermined the

246. *Id.* at 2, 43-46.

247. See, e.g., Motion to Dismiss Plaintiffs' Revised Complaint, *Barcenas v. McCraw*, No. 22-cv-397-RP (W.D. Tex. June 23, 2023).

248. Telephone Interview with Amrutha Jindal, *supra* note 228.

249. See García, *supra* note 173.

250. See Benjamin Wermund, *Prosecutors Drop Trespassing Charges Against 150 Migrants That Ranch Owner Says He Never Authorized*, HOUS. CHRON. (Oct. 20, 2023, 6:07 PM), <https://www.houstonchronicle.com/politics/texas/article/eagle-pass-border-arrests-18435858.php> [<https://perma.cc/X5KW-98M3>]; Rick Jervis & John C. Moritz, *Texas Arrests Separating Migrant Families May Hinge on a Key Element: Landowners' Permission*, USA TODAY (Aug. 11, 2023, 12:29 PM ET), <https://www.usatoday.com/story/news/investigations/2023/08/09/texas-dps-separating-migrant-families-near-border-buoys/70551637007> [<https://perma.cc/8GPM-LSB9>].

251. See Jervis & Moritz, *supra* note 250 (noting that landowners need to either sign a release or file a complaint for prosecutors to bring trespassing charges); Wermund, *supra* note 250 (noting 150 cases dismissed); Telephone Interview with Amrutha Jindal, *supra* note 228; Telephone Interview with Doug Keller, *supra* note 174.

252. John C. Moritz, *Eagle Pass Reverses Course, Drops Private Property Designation DPS Wanted for Public Park*, USA TODAY (Aug. 2, 2023, 12:05 PM ET), <https://www.usatoday.com/story/news/local/texas/state-bureau/2023/08/02/eagle-pass-council-rescinds-mayors-order-making-public-park-private/70504838007> [<https://perma.cc/TRU7-NY73>]; Jervis & Moritz, *supra* note 250.

253. Jervis & Moritz, *supra* note 250; Telephone Interview with Doug Keller, *supra* note 191.

254. Telephone Interview with Amrutha Jindal, *supra* note 228; see also Benjamin Wermund & Jhair Romero, *Migrant Arrests Plummet in Eagle Pass After Backlash over 'Inhumane' Treatment at*

strategy of funneling immigrants to specific land and then arresting them for trespassing on that land. Several county prosecutors have also decided to leave Operation Lone Star. Uvalde County stopped bringing trespassing cases through Operation Lone Star shortly after a local judge found the policy of only arresting men unconstitutional, and Val Verde County has also dropped out of the program.²⁵⁵ This decline of prosecutorial support is likely motivated, at least in part, by a perception that Operation Lone Star is going poorly. One Texas prosecutor noted at a hearing that the program has had “very little logic” and has been “a waste of time and money.”²⁵⁶

While the fight over Operation Lone Star continues, defendants and their attorneys have had success so far in slowing down the system. Between securing release from custody and pursuing various legal challenges, they have prevented Texas’s government from building a mass-plea system with anything close to the scale or efficiency of Operation Streamline. As of August 2023, the best available evidence reflects that less than half of Operation Lone Star’s misdemeanor trespassing defendants—3,786 out of 8,288—have pled guilty while in custody.²⁵⁷ The state of Texas has thus spent billions of dollars to obtain a few thousand misdemeanor convictions and to take millions in bond money from immigrants’ families. Meanwhile, the system is losing key community support as mayors, ranchers, and county prosecutors decide to stop cooperating with it. While the story of Operation Lone Star is still unfolding, it seems to be following a similar trajectory to San Diego’s Streamline system.

II. HOW MASS IMMIGRANT PROSECUTIONS WORK

Systems like Operation Streamline and Operation Lone Star represent an important innovation in American criminal law. This Part explores how these systems function by focusing on their internal logic, the experience of defendants processed through them, and the conflicts of interest they create for defense lawyers. In short, these systems’ purpose is to criminalize large numbers

Border, HOUS. CHRON. (Sept. 20, 2023, 12:13 PM), <https://www.houstonchronicle.com/politics/texas/article/border-abbott-migrant-arrests-18362592.php> [<https://perma.cc/P8T4-MFJ8>] (“Between Aug. 17 and last week, the state arrested only nine migrants in Maverick County, according to lawyers for those charged in Operation Lone Star. That’s compared to nearly 1,200 arrests from July to mid-August.”).

255. Telephone Interview with Doug Keller, *supra* note 191.

256. Scherer, *supra* note 24.

257. Val Verde Intake Roster, *supra* note 180 (showing 3,376 sentenced defendants out of 7,181 trespassing cases); Jim Hogg Intake Roster, *supra* note 180 (showing 410 sentenced defendants out of 1,107 trespassing cases). Some additional defendants plead guilty after posting bond, but I have no way of confirming the exact number because that information has not been made available by the Texas courts.

of undocumented immigrants. To do so efficiently, they use uniquely inferior jail facilities and uniquely summary court procedures. And these systems rely on defense lawyers' structural incompetence to operate smoothly. The presence of defense lawyers helps legitimize mass immigrant prosecutions. But if these systems are running as intended, lawyers do nothing more than meet briefly with their clients and coach them through guilty pleas. The result is that immigrant defendants are rushed through a dehumanizing legal process with little understanding of what is happening to them.

A. *Separate and Procedurally Unequal Courts*

The United States' criminal and immigration systems are deeply intertwined.²⁵⁸ Criminal convictions trigger immigration consequences such as loss of status, detention, deportation, and denial of relief from removal.²⁵⁹ And the immigration system has come to resemble the criminal-justice system in many respects, incarcerating large numbers of immigrants and relying on police and jails to screen people for deportation.²⁶⁰ Mass immigrant prosecution programs represent a new dimension of this entanglement. They impose criminal consequences for the very act of coming to the United States and create criminal courts that resemble procedurally deficient immigration courts.²⁶¹ Absent these programs, federal prosecutors normally only charge unlawful entry and reentry crimes against defendants with significant deportation or criminal histories.²⁶² Operation Streamline and Operation Lone Star expand this pool of defendants to include immigrants who have little to no experience with the U.S. legal system.²⁶³ They thus potentially sweep in all undocumented immigrants

258. For in-depth discussions of the convergence between criminal and immigration law, see generally César Cuauhtémoc García Hernández, *Deconstructing Cimmigration*, 52 U.C. DAVIS L. REV. 197 (2018); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Allegra McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Chacón, *supra* note 43; and Eagly, *Prosecuting Immigration*, *supra* note 36.

259. See Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1389-90 (2021).

260. See García Hernández, *supra* note 258, at 219-23; Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1704-10 (2021).

261. As Ingrid V. Eagly has observed, their summary court procedures bear a strong resemblance to the uncounseled and procedurally deficient hearings of the immigration system. See Eagly, *Prosecuting Immigration*, *supra* note 36, at 1320-37.

262. See Lydgate, *supra* note 52, at 1.

263. See Lydgate, *supra* note 36, at 508 ("The majority of migrants prosecuted under Operation Streamline are first-time entrants with no prior criminal convictions."); Telephone Interview with Amrutha Jindal, *supra* note 169.

who cross the border, rather than just focusing on those with prior records.²⁶⁴ This is what makes these programs so appealing to anti-immigrant populists like former President Trump and Governor Abbott. As a matter of political symbolism, they establish that being an undocumented immigrant will be treated as a crime.

To saddle so many thousands of immigrants with criminal convictions, courts must process a lot of cases quickly. That is why Operation Streamline and Operation Lone Star both built separate and more efficient court systems. The institutional specifics differ with each program: Streamline uses same-day guilty pleas to produce convictions en masse, while Lone Star uses virtual court sessions to ease the burden of prosecuting so many people. But both programs relegate Latin American immigrants to a separate system with a lower quality of justice. In this respect, they function like extreme versions of procedurally deficient state misdemeanor courts. Legal scholars have recently produced much important work documenting the problem of mass misdemeanor justice in state legal systems.²⁶⁵ Misdemeanor courts process cases rapidly, give defendants limited access to counsel, coerce defendants into guilty pleas, impose significant consequences on those convicted, and disproportionately harm people of color.²⁶⁶

Programs like Operations Streamline and Lone Star exhibit these defects to an extreme degree. Their designers systematically use pretrial detention, summary court proceedings, and ineffective defense counsel to process convictions as efficiently as possible. They are able to do this because undocumented defendants lack political power and are seen as deserving a lower quality of justice due to their race and immigration status. And this pattern of giving immigrant defendants minimal due process has even extended to felony cases. In 2008, federal agents raided a meatpacking plant in Postville, Iowa and

264. One notable exclusion is that these programs do not prosecute visa overstayers, who account for a large percentage of the undocumented population but who come from a wider range of countries than do border crossers. Robert Warren, *U.S. Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, CTR. FOR MIGRATION STUD. 1 (Jan. 2019), <https://cmsny.org/wp-content/uploads/2019/01/US-Undocumented-Population-Continued-to-Fall-from-2016-to-2017-and-Visa-Overstays.pdf> [<https://perma.cc/F5PQ-MRJA>].

265. See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018); Roberts, *supra* note 31; Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017).

266. See Joe, *supra* note 265, at 756-70; NATAPOFF, *supra* note 265, at 55-86, 149-70.

charged hundreds of undocumented Latin American employees with felonies for using false identification.²⁶⁷ Prosecutors forced these employees to plead guilty to felony charges within a few days of arrest and to agree to five-month prison sentences and deportation, or else face two-year mandatory-minimum sentences.²⁶⁸ As in Operation Streamline, the defendants were not given a bail hearing and had to decide on the plea offer after meeting briefly with a lawyer.²⁶⁹ Within a few days, 270 defendants accepted the deal.²⁷⁰ These are extremely summary procedures for federal felony cases, and it is difficult to imagine them being imposed on nonimmigrant defendants.²⁷¹ Such separate systems for immigrants are invariably unequal.²⁷²

Due to this emphasis on efficiency, mass immigrant prosecution systems are not designed for legal arguments or factfinding. They share this feature with many state misdemeanor systems. While studying misdemeanor courts in New York City, Issa Kohler-Hausmann noted that they follow a logic of “marking” rather than a logic of adjudication.²⁷³ That is, these misdemeanor systems do not actually decide a defendant’s guilt or innocence, but instead memorialize the defendant’s encounters with the police and the courts. Each new case’s outcome is determined in part by the defendant’s prior record of such encounters.²⁷⁴ That is also how mass immigrant prosecutions work.²⁷⁵ Judges and prosecutors decide someone’s punishment based on that person’s previous encounters with

267. See Chacón, *supra* note 36, at 143-45; Eagly, *Prosecuting Immigration*, *supra* note 36, at 1301-04.

268. Eagly, *Prosecuting Immigration*, *supra* note 36, at 1302-03.

269. *Id.* at 1302.

270. *Id.* at 1301.

271. In the normal federal criminal process, a preliminary hearing is held up to fourteen days after the arrest, and the government has thirty days to file a formal charging document. 18 U.S.C. § 3161(b) (2018); FED. R. CRIM. P. 5.1(c).

272. It is also instructive to compare Operation Streamline prosecutions with other federal misdemeanor prosecutions. In San Diego, for example, the Streamline system existed alongside a misdemeanor court for people charged with crimes like trespassing on military bases or federal land. Defendants in the latter system (called Central Violations Bureau court) are released without bail, given several months between court appearances, and almost always receive dismissals or deferred-prosecution agreements that result in no conviction or jail time. See Appellant’s Opening Brief at 5, *United States v. Chavez-Diaz*, 949 F.3d 1202 (9th Cir. 2020) (No. 18-50391). That contrasts starkly with Streamline defendants’ treatment, even though both systems prosecute petty misdemeanors.

273. KOHLER-HAUSMANN, *supra* note 265, at 143-59.

274. *Id.* at 159-172 (describing this dynamic as the “additive imperative”).

275. With the notable difference that while Kohler-Hausmann’s New York misdemeanor courts mostly mark defendants with dismissals (meaning that most cases don’t result in actual convictions, though the dismissals are counted against a defendant in future cases), *id.* at 146, mass immigrant prosecution systems are designed only to generate convictions.

the criminal and immigration systems. In Tucson's Streamline program, for example, people with no prior criminal or deportation record are normally given time-served sentences, those with one prior deportation are normally sentenced to thirty days, those with multiple deportations or criminal history can get up to six months, and if a defendant's record is serious enough they can be charged with felony reentry.²⁷⁶ Each new prosecution marks a defendant for future cases, subjecting them to increasingly severe punishments. If an immigrant comes back repeatedly, they can eventually receive felony charges and lengthy prison sentences.²⁷⁷ And because defense lawyers so rarely litigated these cases prior to 2018, there were few opportunities to generate leverage or negotiate better outcomes.²⁷⁸

There was so little litigation because these systems, when they function as intended, create a closed loop. Each defendant is arrested, meets their lawyer, pleads guilty, and waives all their legal rights. The case ends in a quick conviction. Prosecutors use three main tools to maintain this dynamic: (1) pretrial detention, (2) ineffective defense counsel, and (3) threat of greater punishment.

First, the most powerful tool in prosecutors' arsenal is simply keeping defendants in jail. The equation is simple: you can plead guilty and be released today (or after a few days or weeks), or you can choose to stay in custody for longer awaiting your trial.²⁷⁹ When bail is unavailable and the case takes significantly longer than the sentence, most defendants plead guilty quickly to get released.

276. See FINCH, *supra* note 36, at 24; Email from Elena M. Kay, *supra* note 79; GREENE, CARSON & BLACK, *supra* note 8, at 36-38. Prosecutors in Tucson used plea agreements with stipulated sentences, so the magistrate judges had no discretion at sentencing. GREENE, CARSON & BLACK, *supra* note 8, at 36-38. In other jurisdictions (like San Diego and Texas), judges retained sentencing discretion but still used prior deportations and convictions as the primary determinants of the sentence. See, e.g., GREENE, CARSON & BLACK, *supra* note 8, at 57. This ramping-up dynamic is also present in Operation Lone Star. Telephone Interview with Amrutha Jindal, *supra* note 169.

277. If a defendant has a prior § 1325 conviction, prosecutors can charge the next one as a felony carrying up to two years in prison. 8 U.S.C. § 1325(a) (2018). And because Streamline defendants are usually deported, they are also eligible for felony reentry charges under § 1326 if they return. These felonies carry sentencing enhancements under the Federal Sentencing Guidelines for prior immigration convictions. U.S. SENT'G GUIDELINES MANUAL § 2L1.2(b)(1) (U.S. SENT'G COMM'N 2021).

278. Due to this lack of litigation or negotiation, these systems are governed purely by prosecutorial charging discretion. Cf. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 93-94 (2002) (observing a similar dynamic in New Orleans, where prosecutorial screening decisions dictated case outcomes in the absence of effective defense counsel).

279. See Eagly, *Prosecuting Immigration*, *supra* note 36, at 1329; Lydgate, *supra* note 36, at 509.

Second, these systems are designed to render defense lawyers unable to help their clients litigate. Operation Streamline does this by giving defense lawyers too many clients at once – at the most extreme end, up to eighty in a single day.²⁸⁰ Such lawyers simply don't have time to adequately explore litigation options with each client, or really to do anything more than explain the offer and advise the client to accept it because fighting would be pointless. Complacent defense lawyers also make the proceedings run more smoothly by waiving bond hearings, declining to argue at sentencing, and guiding their clients through the plea process.

Third, prosecutors use the classic tools of plea-bargain leverage – the threat of a higher charge or a longer sentence – to secure compliance. In the federal system, prosecutors can threaten some defendants (those with prior deportations) with felony immigration charges if they refuse to plead guilty.²⁸¹ And in Operation Lone Star, they can use the threat of a higher sentence post-trial – the only defendant who took a case to trial got a year in prison.²⁸² With these three tools, prosecutors can create court systems where defendants will predictably plead guilty at the first opportunity.

Once prosecutors know they will secure rapid guilty pleas in basically every case, they can turn criminal courts into fast-paced conviction factories. They do so by substituting lower-cost features and personnel than are provided in the normal criminal-justice system. For example, Operation Streamline does not use normal federal prosecutors or judges – it instead assigns Border Patrol attorneys (who generally refuse to negotiate with defense lawyers) and non-life-tenured magistrate judges (who are accountable to district judges for reappointment every eight years and thus less able to act independently), as well as visiting and retired magistrate judges (who have even less independence because they can be dismissed at any time).²⁸³ Operation Lone Star, for its part, employs retired Texas judges from other counties who hold court via Zoom and can be replaced at will (indeed, several were dismissed for releasing too many defendants).²⁸⁴

280. See *supra* text accompanying notes 74-78.

281. Lydgate, *supra* note 36, at 509-10.

282. See *supra* notes 223-225 and accompanying text.

283. See Eagly, *Prosecuting Immigration*, *supra* note 36, at 1326, 1330; GREENE, CARSON & BLACK, *supra* note 8, at 112-14; *In re Approval of the Jud. Emergency Declared in the Dist. Ariz.*, 639 F.3d 970, tab D, app. at 1 (9th Cir. 2011) (noting that Operation Streamline is made possible by Border Patrol lawyers acting as special prosecutors, and that the courts will have to add more magistrate-judge positions and recall retired magistrate judges to hear Operation Streamline cases).

284. See McCullough, *supra* note 187; Telephone Interview with Amrutha Jindal, *supra* note 169; see also JAMES S. LIEBMAN, SHAWN CROWLEY, ANDREW MARKQUART, LAUREN

Both systems use lower-quality detention facilities: defendants are held in border-patrol stations, privately owned jails, converted Texas prisons, and make-shift processing centers.²⁸⁵ These facilities deprive defendants of many basic accommodations present in normal jails.²⁸⁶ But their use facilitates rapid plea processing. Defendants in Operation Streamline are shackled so that dozens of them can be present in court at once for mass guilty pleas.²⁸⁷ And defendants in Operation Lone Star never even see the inside of a courtroom.²⁸⁸

Prosecutors and judges are able to adopt these practices without challenge because mass immigrant prosecution systems, when working as intended, are essentially lawless. Defendants cannot meaningfully contest the court procedures or conditions of confinement because they lack opportunities to raise legal arguments. For example, magistrate judges in San Diego's Operation Streamline system outright refused to hear legal arguments from defense lawyers, even arguments concerning the defendants' treatment in custody, unless the case was set for trial.²⁸⁹ The closed-loop plea system thus creates a

ROSENBERG, LAUREN GALLO WHITE & DANIEL ZHARKOVSKY, *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* 181 (2014) (observing about a retired Texas judge on a state death-penalty case: "Kelly didn't like to have visiting judges in the criminal cases he handled because they're 'getting paid' and 'don't want to cause trouble for the judge whose bench [they're] sitting on. That's number one.' A visiting judge is 'there not to make waves. And the way to do that is to rule for the State and against the defendant. Because he ain't going to be asked back if he does it another way'").

285. GREENE, CARSON & BLACK, *supra* note 8, 102-05; McCullough, *supra* note 185 and accompanying text; Pacheco, *supra* note 192 and accompanying text; Karen Gleason, *Media Members Get Look Inside Migrant Processing 'Tent'*, 830 *TIMES* (Oct. 27, 2021, 9:34 PM), <https://830times.com/news-media-members-get-look-inside-migrant-processing-tent> [<https://perma.cc/GVK4-6XMG>].
286. See, e.g., Michael Garcia Bochenek, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, *HUM. RTS. WATCH* 7-24, 34-37 (2018), https://www.hrw.org/sites/default/files/report_pdf/uscrdo218_web.pdf [<https://perma.cc/V2JX-6HAR>].
287. See *supra* note 70 and accompanying text. The U.S. Marshals who provide security in federal courts have policies that call for shackling in certain circumstances, especially if there are numerous defendants. See, e.g., Order Denying Emergency Motion to Revoke Districtwide Policy Regarding Shackling Pretrial Detained Defendants, *United States v. Morales et al.*, No. 13-cr-04126 et al., 2013 WL 6145601, at *1, *5-6 (S.D. Cal. Nov. 21, 2013).
288. See *supra* Section I.C.
289. See, e.g., Transcript of New Complaints Calendar at 18, *United States v. Rubio-Ruiz et al.*, No. 18-mj-20203 et al. (S.D. Cal. July 25, 2018) ("Second, I will not entertain any oral motions to dismiss today unless it's a joint motion with the Government. Otherwise, if you want to make a motion to dismiss, you'll need to request that the case be assigned for trial at next week's status conference and then file a written pretrial motion to dismiss with the assigned trial judge And, third, I also will not entertain oral objections that do not seek any remedy or relief, such as objections to treatment in custody experienced by your clients. Those can be preserved by filing them on the docket. As far as I'm concerned, they have nothing to do with your client's initial appearance today.").

legal black hole where the government is free to optimize case-processing efficiency by whatever means it chooses.²⁹⁰ The rule of law takes a back seat to the efficient collection of pleas.

B. The Defendant's Experience

Defendants caught in these mass prosecution systems encounter a legal process that is confusing, disempowering, and dehumanizing. These defendants are almost entirely immigrants from Latin American countries, with the majority coming from Mexico.²⁹¹ Nearly all of them have clean records—few or no past criminal convictions or deportation orders.²⁹² Beyond those commonalities, however, they are quite diverse in many respects. While the majority are native Spanish speakers, there are also many who primarily speak Indigenous languages including Mixtec, Triqui, Nahuatl, Zapotec, and others.²⁹³ They also have a variety of different motivations for coming to the United States. Some want to reunite with family members they have been separated from. For example, one man at a Streamline sentencing informed the judge: “The reason that I came over here is because I haven’t seen my daughters in over 11 years, and I’d like to find a way to see them.”²⁹⁴ Some have few connections to the United States, but wish to immigrate here to earn more money and build a better life for themselves and their families. Another Streamline defendant stated at sentencing: “Well, the truth is that I come here out of need. There is no work at my—in my village. There’s—there’s no money to buy maize, to buy corn. It’s an area where it doesn’t grow. There’s no plumbing. There are no jobs. There’s

290. Cf. Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74-83 (2015) (observing that due-process and Sixth Amendment waivers create a similar dynamic); NATAPOFF, *supra* note 265, at 191-92, 206-07 (discussing lawlessness in ordinary misdemeanor courts).

291. See *supra* note 181.

292. Lydgate, *supra* note 36, at 508; Interview with Amrutha Jindal, *supra* note 169.

293. See Hailey Anne Sheldon, *Operation Streamline: The Border Patrol Prosecutions Initiative*, 11 PUB. PURPOSE 89, 108 n.78 (2013). Based on the author’s experience in San Diego, the most common Indigenous languages spoken by defendants were Mixtec, Triqui, and Nahuatl. But the relative prevalence of Indigenous languages likely varies by time and by courthouse.

294. Abby Martin, Empire Files, *Hidden Camera of Mass Deportation Trial and Protest ‘Operation Streamline’* at 02:18, YOUTUBE (Feb. 18, 2016), <https://www.youtube.com/watch?v=IIaouj-DRZV4> [<https://perma.cc/UG9Q-5BWZ>]; see also FRANCISCO CANTÚ, *THE LINE BECOMES A RIVER* 179-90 (2018) (describing a man subjected to Streamline hearings after returning to the United States to reunite with his children). The author of this Article has represented many clients in similar situations.

nothing.”²⁹⁵ And a smaller number of people (commonly from Honduras, Guatemala, Nicaragua, Venezuela, or El Salvador) come to the United States seeking asylum from violence in their home countries.²⁹⁶ In short, the defendants in these cases are generally men and women with no criminal records being prosecuted for victimless misdemeanors that they committed for sympathetic reasons. Nonetheless, they endure a thoroughly dehumanizing process both in jail and in court. And due to the system’s rapid speed, confusing nature, and lack of concern for immigrant defendants, they often do not understand that they are being convicted of a crime.

The jail facilities used in these cases are consistently worse than those found in the normal criminal-justice system. Defendants in Operation Streamline are kept in border-patrol station holding cells, often for multiple days, prior to their first court appearances.²⁹⁷ These facilities feature freezing temperatures, little space (with as many as thirty people crowded into a single cell), constant light, a lack of basic hygiene products or facilities (like toothbrushes, soap, private bathrooms, and showers), concrete floors to sleep on without blankets or mattresses, open toilets in the cells, and insufficient food or clean water.²⁹⁸ Because of these poor conditions, defendants are often severely sleep-deprived when they come to Streamline court.²⁹⁹ Those who remain in custody after court are then usually sent to private, for-profit jails.³⁰⁰ These feature significantly better conditions than the border-patrol stations, but are still overcrowded,

295. Transcript of New Complaints Calendar at 48, *United States v. Hernandez-Gomez et al.*, No. 18-21181 et al. (S.D. Cal. Aug. 28, 2018).

296. See Olga Byrne, *Asylum Seekers Wrongfully Prosecuted at the Border*, HUM. RTS. FIRST (Nov. 17, 2017), <https://humanrightsfirst.org/library/asylum-seekers-wrongfully-prosecuted-at-the-border> [<https://perma.cc/4RZH-2LPU>].

297. See Appellant’s Opening Brief, *supra* note 146, at 5-9 (collecting in-court descriptions of these facilities and showing a photograph of one).

298. See *Unknown Parties v. Nielsen*, 611 F. Supp. 3d 786, 797-98 (D. Ariz. 2020) (describing these cells and finding them constitutionally inadequate); Bochenek, *supra* note 286, at 11-21; Transcript of New Complaints Calendar at 84-86, *United States v. Gil-Gonzalez et al.*, No. 18-20001 et al. (S.D. Cal. July 9, 2018) (showing that defendant was held at a Border Patrol station “in a cell with about 30 or 40 other individuals” and had not slept “in almost a week”); Brief of Nonprofit Organizations et al. as Amici Curiae Supporting Defendant-Appellant app. B at 5, *United States v. Hernandez-Becerra*, No. 18-50403 (9th Cir. Mar. 9, 2020), 2020 WL 2319991 (Report of Dr. Jude Bergkamp) [hereinafter Bergkamp Report] (“The defendant spent one night in immigration holding, which he called the ‘ice box.’ He described it as a cold, crowded, concrete square with only an open toilet. There were no beds, privacy, or decent food. He slept on the floor and did not know when he would be released.”).

299. See Appellant’s Opening Brief, *supra* note 146, at 8-9.

300. See GREENE, CARSON & BLACK, *supra* note 8, at 102-05.

substandard, and more dangerous compared to normal federal jails.³⁰¹ In Operation Lone Star, defendants are first sent to temporary processing centers maintained by a private company where they are held in large metal cages.³⁰² They are then driven hundreds of miles to one of three state prisons where they are kept until they either post bond or serve their sentence.³⁰³ Texas state prisons are notoriously inhumane facilities, featuring poor temperature control, bad sanitation, and inedible food.³⁰⁴ The defendants who speak Indigenous languages other than Spanish face additional difficulties in custody because jail staff cannot communicate with them to understand their medical problems and other needs.³⁰⁵ And for many defendants, especially those from countries other than Mexico, additional lengthy detention awaits them in the immigration system once the criminal process has ended.³⁰⁶

The court procedures in these systems are similarly substandard. While some defendants have spent time in the United States, most have no prior experience in this country or interaction with its legal system.³⁰⁷ Further, many—especially those from rural areas—have had limited formal education and few encounters with the legal systems of their home countries.³⁰⁸ These

301. See Off. of Inspector Gen., *supra* note 19, at 63-64 (noting that Operation Streamline defendants were held in severely overcrowded jails, which a U.S. Marshal described as “concerning because ‘there’s the tendency for prisoner on prisoner assaults, prisoner on staff assaults, those kinds of things’”); cf. Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1408-18 (2019) (describing the harsher conditions of private prison facilities used to house federal immigrant defendants).

302. See Gleason, *supra* note 285.

303. See Pacheco, *supra* note 192.

304. See Keri Blakinger, *Inside Frigid Texas Prisons: Broken Toilets, Disgusting Food, Few Blankets*, MARSHALL PROJECT, (Feb. 19, 2021), <https://www.themarshallproject.org/2021/02/19/inside-frigid-texas-prisons-broken-toilets-disgusting-food-few-blankets> [https://perma.cc/J363-VEAJ]; David Montgomery, *In a Sweltering Texas Jail, Cool Towels but No Air-Conditioners*, N.Y. TIMES (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/texas-prisons-heat-air-conditioning.html> [https://perma.cc/U4MS-44UF]. Because Texas jails are required to be cooled below 85 degrees and prisons are not, the government has had to install makeshift air-conditioning units at the two converted prison facilities. McCullough & Kriel, *supra* note 166. One Lone Star defendant said he lost almost thirty pounds because of the poor food in the Briscoe Unit. Pacheco, *supra* note 192.

305. See Off. of Inspector Gen., *supra* note 19, at 62.

306. Pacheco, *supra* note 192 (describing one Honduran man’s four-month incarceration in both Operation Lone Star jails and immigration detention centers).

307. Lydgate, *supra* note 36, at 508; Interview with Amrutha Jindal, *supra* note 169.

308. See Bergkamp Report, *supra* note 298, at 8 (“Most defendants have less formal education, thus a limited vocabulary and language skills.”); *A Summary Analysis of Education Trends in Latin America and the Caribbean*, U.S. AGENCY FOR INT’L DEV. 17-18 (Aug. 2022),

immigrants experience a court process that is rapid, confusing, and degrading. In Operation Streamline, the first step is a meeting with a defense lawyer. Depending on the courthouse, this meeting might be individualized or in a group, and as brief as two minutes or as long as thirty minutes.³⁰⁹ Often the defendants are sleep deprived in this initial meeting, and many are emotionally distraught.³¹⁰ Depending on their client's familiarity with the U.S. legal system, the defense lawyer may have to explain some very basic features of the process – what a judge is, what a trial is, and how criminal charges work.³¹¹ It is not uncommon for clients to mistake the defense lawyer for the judge, apologize for entering the United States, and ask to be released.³¹²

After meeting with the lawyer and confirming that they want to plead guilty, Operation Streamline defendants are brought to court. Here they appear in groups of several dozen, with metal shackles on their arms and legs and glass barriers separating them from the rest of the courtroom.³¹³ They are commonly still wearing the clothing they were arrested in several days prior, and they often haven't been allowed to clean themselves.³¹⁴ As a group, they are asked a series

https://pdf.usaid.gov/pdf_docs/pa00zk72.pdf [<https://perma.cc/7Y2E-QH8F>]; 4 *Barriers to Quality Education in The Mexico School System*, INT'L CMTY. FOUND. (Nov. 7, 2022) <https://icfdn.org/barriers-quality-education-mexico> [<https://perma.cc/TR87-C6DZ>]; Benedicte Bull, *Governance in the Aftermath of NeoLiberalism: Aid, Elites and State Capacity in Central America*, 43 FORUM FOR DEV. STUD. 89, 92 (2016) (“Most states in Latin America include so-called brown zones in which state presence is notoriously weak.”).

309. See *supra* notes 75-78 and accompanying text.

310. Appellant's Opening Brief, *supra* note 146, at 9-11; McGahan, *supra* note 89.

311. Sheldon, *supra* note 293, at 103; see also Transcript of New Complaints Calendar at 173-74, *United States v. Bello-Marquez et al.*, No. 18-20554 et al. (S.D. Cal. Aug. 1, 2018) (describing a client's difficulty understanding the American legal system: “She has very little formal education. She had her first child at the age of 13. So that she doesn't understand the words and our trial rights and our judicial system, I think it's not surprising. And honestly, I think many of the people who sit in this – who enter pleas – you know, they're nodding, ‘Yes’ and saying, ‘Yes’ without having a full understanding of what's going on.” The judge later replies: “I do feel a little bad about the circumstances because in my heart, I know you're right.”); see also Bergkamp Report, *supra* note 298, at 8 (“The majority of defendants have never been involved in the legal system before and have no frame of reference with the legal system of the United States.”).

312. The author had many such interactions when representing Streamline clients. The author has also confirmed with several other defense lawyers who worked on Operation Streamline that their clients frequently began the initial interview by apologizing for entering the United States and asking to be released. See also Bergkamp Report, *supra* note 298, at 7 (“Often, the defendants were perplexed as to the role of the criminal defense attorney.”).

313. Davis, *supra* note 20; *supra* notes 63-70 and accompanying text.

314. Williams Testimony, *supra* note 75, at 45 (“The courtroom itself smells pungently, because the defendants are wearing the same clothes they were arrested in and had been walking through the desert in, for anywhere from 1 to 2 days to 3 days before.”).

of questions through a court interpreter. The answers to these questions are always “yes,” “no,” or “guilty.”³¹⁵ Only rarely do defendants say more than those three words. The questions feature complicated legalese, and the magistrate judge and court interpreter both speak quickly.³¹⁶ Many defendants are sleep deprived and doze off in court or are otherwise unable to focus.³¹⁷ Some are native speakers of an Indigenous language other than Spanish (such as Mixtec or Triqui), but are made to proceed with a Spanish interpreter.³¹⁸ If someone does not understand a question, it is easy to simply give the same one-word answer that every other defendant gave.³¹⁹ If a defendant accidentally gives the

315. For an example plea colloquy, see Sheldon, *supra* note 293, at 108-10. See also Bryan Schatz, *A Day in the “Assembly-Line” Court That Prosecutes 70 Border Crossers in 2 Hours*, MOTHER JONES (July 21, 2017), <https://www.motherjones.com/politics/2017/07/a-day-in-the-assembly-line-court-that-sentences-46-border-crossers-in-2-hours> [<https://perma.cc/V5NB-DE4Q>].

316. See, e.g., Transcript of New Complaints Calendar at 62, *United States v. Cirilo Munguia-Guilten et al.*, No. 18-MJ-20091 et al. (S.D. Cal. July 12, 2018) (“The Court: If your case were to proceed to trial, the Government would need to prove the elements of the crime. However, since you’re pleading guilty, it’s not necessary for the Government to prove those elements because you’re pleading guilty. Do you understand, Mr. [Defendant]?”).

317. Appellant’s Opening Brief, *supra* note 146, at 9 (collecting examples of defendants falling asleep in court); Bergkamp Report, *supra* note 298, at 9 (“Often, the defendants will appear disoriented, confused, or even asleep.”).

318. Prosecutors in Streamline courts do sometimes dismiss cases against non-native Spanish speakers if an interpreter for the defendant’s language is not available. See Lydgate, *supra* note 36, at 512-13. But the author has witnessed several cases where a defendant who primarily speaks an Indigenous language is processed through a Streamline proceeding in Spanish. Given the difficulty of finding interpreters for Indigenous languages and the intense pressure to process cases efficiently, this is likely a very common occurrence (unfortunately, its exact frequency is impossible to know). See, e.g., Transcript of New Complaints Calendar at 11-12, *United States v. Ayala-Ocampo et al.*, No. 19-mj-22306 et al. (S.D. Cal. June 4, 2019) (In response to the question, “[D]o you understand each of the constitutional/statutory rights that I have just explained to you?” posed through a Spanish interpreter, defendant answers, “Well, more or less, because I speak a different language. I speak Mixe.” After the defendant speaks to his lawyer, the proceeding continues with only a Spanish interpreter.); Memorandum of Points and Authorities in Support of Ms. Bautista-Garcia’s Motion to Dismiss, *United States v. Bautista-Garcia*, No. 19-cr-07045, at 1-2 (S.D. Cal. Apr. 11, 2019) (showing that the defendant was processed through an Operation Streamline hearing in Arizona with a Spanish interpreter even though her native language is Triqui Bajo, and she did not understand what was happening in that hearing). In an interview, an Arizona FD also recalled several instances where clients with poor Spanish skills had been previously processed through the Streamline system in Spanish. Telephone Interview with Vicki Brambl, *supra* note 79.

319. See Bergkamp Report, *supra* note 298, at 2 (“To the short and scripted questions regarding understanding from the judge, all defendants appeared to parrot the previous defendant’s response in the affirmative. Based on observations, it appeared that at least some of the defendants did not understand to what they were responding. In addition, the judge used a flat, monotone voice with somewhat scripted narrative that may have an impact on defendant

wrong answer, the in-court defense attorney hurries over to coach them.³²⁰ And judges even change the order of the defendants, so that those with limited Spanish ability or other comprehension problems will speak later and thus know what word they are supposed to say (i.e. “yes,” “no,” or “guilty”).³²¹ If a defendant truthfully answers that they do not understand what the judge is telling them, they risk having their hearing delayed and being kept in jail until the next available court date.³²²

Operation Lone Star has the benefit that it at least moves more slowly, with fewer defendants per court appearance and more time to meet with lawyers. But

understanding. This is further conflated by language translation.”); *id.* at 17 (“Considering the average number of defendants are approximately 15-20, and applying the concept of responsibility diffusion, the individual defendants are more likely to answer in line with the rest of the group.”).

320. See, e.g., Transcript of New Complaints Calendar at 90, *United States v. Rubio-Ruiz et al.*, No. 18-mj-20203 et al. (S.D. Cal. July 25, 2018) (Clerk: “[H]ow do you now plead to Count 1 of the complaint? Are you guilty or not guilty?” . . . Defendant (through interpreter): “Yes.” Clerk: “Could you answer ‘guilty’ or ‘not guilty’?” Defense Lawyer: “Your honor, may I speak to her briefly?” [pause in proceedings, during which the defense lawyer speaks to the defendant] Defendant (through interpreter): “I am guilty.”); *id.* at 208-09 (reflecting a pause in proceedings so defense lawyer can speak to defendant who didn’t understand a question); *id.* at 210-11 (same); Transcript of New Complaints Calendar at 83, *United States v. Bello-Marquez et al.*, No. 18-MJ-20554 et al. (S.D. Cal. Aug. 1, 2018) (Judge: “And when you entered the United States, did you knowingly and voluntarily elude examination and inspection by immigration officers of the United States?” Defendant: “No.” Defense Lawyer: “I don’t think she understood, Your Honor. Maybe – could I have a moment?” Judge: “Yes.” [counsel and client confer] Defense Lawyer: “She didn’t understand the vocabulary. She understands now.”).
321. See, e.g., Transcript of New Complaints Calendar at 18, *United States v. Rubio-Ruiz et al.*, No. 18-mj-20203 et al. (S.D. Cal. July 25, 2018) (Judge: “I think maybe in light of what you said about Mr. Hernandez [that Spanish is not his first language], he shouldn’t be the lead-off defendant for the questions.”); *id.* at 68 (Defense attorney asking the judge concerning a different defendant: “If possible, maybe you could put [the defendant, a non-native Spanish speaker] towards the end as well, but he didn’t seem to have any difficulty whatsoever understanding Spanish this morning.”); Transcript of Proceedings at 8, *United States v. Zuniga-Lara et al.*, No. 19-mj-22424 et al. (S.D. Cal. June 12, 2019) (After a defendant failed to understand the judge’s question: “[Judge]: All right. Any suggestions, Mr. [defense lawyer]? [defense lawyer]: Well, I mean, you know, what’s been done in our courtrooms has been to move a person like this to the back of the line in answering the questions.”).
322. See, e.g., Transcript of New Complaints Calendar at 65-66, 166-67, 172-73, *United States v. Bello-Marquez et al.*, No. 18-MJ-20554 et al. (S.D. Cal. Aug. 1, 2018) (Judge refuses to take a defendant’s guilty plea after the following exchange: Judge: “Do you understand each of these constitutional rights that I’ve just explained to you, Ms. [Defendant]?” Defendant: “No.” Judge: “Okay. Then I guess I’m not going to be able to take your plea. What – what about – what is it that you don’t understand?” Defendant: “I didn’t understand.” Judge: “Okay. Well, I don’t have time to go into more detail than this.” And then, later in the same hearing – Defense lawyer: “I believe Ms. [Defendant] would still like to plead guilty.” Judge: “She wanted to plead guilty, but I’m not taking it. I’m not going through that again with her.”).

all hearings in that program occur on Zoom, which makes the court proceedings much harder to understand.³²³ Video court appearances are monotonous, long, confusing, difficult to hear, cognitively taxing, and (especially when defendants are in custody) subject to disruptive interruptions.³²⁴ People participating in video court appearances become tired faster, feel more disengaged from the proceedings than do those in a physical courtroom, and are less likely to seek help from their attorneys.³²⁵ And these problems compound with all the other obstacles immigrant defendants face in trying to understand U.S. court procedures.

This combination of features – sleep deprivation, poor jail facilities, language barriers, unfamiliarity with the U.S. legal system, rapid case processing, and (in Operation Lone Star) video hearings – creates a system where defendants commonly have no idea what is happening. Some judges even acknowledge this problem. As Chief Judge Martha Vázquez of the District of New Mexico has noted:

Our magistrate judges try very hard to conduct their hearings in a way that is understandable to the defendants. But most of our defendants have a first or second grade education in their native countries. Some of them are not even able to read in their native languages. And so, we explain to them their constitutional rights in a legal system entirely foreign to them.³²⁶

Defendants, when asked afterward about their experience in these systems, often express confusion. Many did not understand that they were given a lawyer, that they were convicted of a crime, or that this was a criminal court rather than

323. See *supra* notes 211-212 and accompanying text (describing OLS's online court sessions); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 978-83 (2015) (describing the higher cognitive demands and greater confusion that immigrants experience during remote proceedings in immigration court).

324. Eagly, *supra* note 323, at 978-83.

325. *Id.* at 982-83; Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 264 (2022) ("Prior research has also found that defendants are less likely to be engaged and less likely to seek the help of their attorneys when they appear remotely.").

326. César C. García Hernández, *Strickland-Lite: Padilla's Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 916 (2013) (citing ADMIN. OFF. OF THE U.S. CTS., REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER 16 (2008)).

an immigration court.³²⁷ That lack of understanding is a predictable consequence of these systems' design choices.

C. *The Defense Lawyer's Conflicted Role*

Defense lawyers are useful to mass immigrant prosecution systems. They facilitate the rapid disposition of cases through guilty pleas by meeting with defendants, explaining that it is in their interest to plead guilty, and confirming that guilty plea in court.³²⁸ Defense lawyers also serve a system-legitimizing function.³²⁹ Their presence in court symbolizes that, whatever complaints are made about mass immigrant prosecutions, someone is protecting the defendants' rights.³³⁰ Indeed, when judges and prosecutors are pressed to justify these prosecutions, they often fall back on the presence of defense lawyers. For example, the Chief Judge of the Western District of Texas (and a former federal prosecutor) noted in an interview: "They have counsel. They're in court with counsel. . . . They have a copy of their charges. They have a copy of their discovery. I'm not real sure what due process rights we keep supposedly violating."³³¹ And in testimony before Congress, a federal prosecutor noted that if defense lawyers object to the Streamline procedures, "they are free, if they

327. Telephone Interview with Saul Huerta, *supra* note 79 (observing that most Arizona Streamline defendants who spoke at sentencing mistakenly believed they were in immigration court and asked not to be deported); Bergkamp Report, *supra* note 298, at 5 (reporting interview with a Streamline defendant who "stated that he does not understand the difference between the criminal and immigration process"); Bergkamp Report, *supra* note 298, at 8 (reporting interview with a Streamline defense lawyer who noted that defendants are "usually . . . confused as to the difference between the criminal and immigration court proceedings"); Pacheco, *supra* note 192 (describing Operation Lone Star defendant expressing serious confusion about what happened to him); Ted Robbins, *Border Patrol Program Raises Due Process Concerns*, NAT'L PUB. RADIO (Sept. 13, 2010 12:00 AM ET), <https://www.npr.org/2010/09/13/129780261/border-patrol-program-raises-due-process-concerns> [https://perma.cc/D6VM-943B] (describing Operation Streamline defendant who did not understand what happened in court, and mistakenly believed he did not have a lawyer).

328. Courts in Brownsville and McAllen, Texas did initially try to create Streamline courts without defense lawyers present. But these attempts were ultimately abandoned. GREENE, CARSON & BLACK, *supra* note 8, at 31-32.

329. For discussion of appointed defense lawyers' role in legitimizing the broader criminal-justice system, see Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2197 (2013).

330. For example, the recent expansion of defense counsel in Operation Lone Star was motivated in part by optics concerns. Defendants were being kept in jail for months without formal charges, and having outdoor court appearances in orange jumpsuits with policemen present on horseback. Bringing in more well-resourced and effective defense counsel helped improve public perception of the system. Telephone Interview with Doug Keller, *supra* note 191.

331. Robbins, *supra* note 327.

believe that due process is not being accorded to their clients, to make the appropriate motions before the magistrate judge or the district judge, suggesting those deficiencies.”³³² The presence of defense lawyers thus gives judges and prosecutors cover: if the defense lawyers aren’t challenging this system, then it can’t be that bad.

The optimal defense lawyer for mass immigrant prosecutions, then, is one who will lend them the appearance of procedural legitimacy without actually challenging them. These systems secure such defense lawyers by creating two conflicts of interest. The first is straightforward—the defense lawyer’s job is simpler if they choose complacency. The easiest way to approach this work is to meet briefly with clients, inform them of the plea offer, tell them they must take it or stay in jail, neglect to pursue bond, and affirm the plea’s legitimacy in open court.³³³ It is much more work to litigate these cases, especially if you are responsible for dozens or even hundreds of them. Many defense lawyers who embrace complacency adopt a hopeless perspective about the system. One Streamline lawyer, for example, confided to an interviewer: “Sometimes you go in there, or I go in there, thinking ‘Okay I’m here as a lawyer’ but you don’t feel like a lawyer. You kind of feel like a pawn for the government, you’re just there for show.”³³⁴ Others outright embrace the system, such as one who stated: “[A]ctivists are like, ‘Why aren’t you up there yelling about the Constitution? And why isn’t the judge just saying what a brilliant argument that is. Dismissed. Everybody’s free to go’ and stuff like that. Well, no, it’s just—It’s not like television. I think we get plenty of time So as far as the process itself, no, I don’t think I would change anything.”³³⁵ This complacency is tacitly encouraged by the fact that many indigent defense attorneys are directly appointed by the district judges.³³⁶ If such a lawyer decides to go to war with the system, they risk

332. *Oversight of the Executive Office of United States Attorneys: Hearing Before the H. Subcomm. of Com. & Admin. L.*, 110th Cong. 2 (June 25, 2008) (statement of Kenneth E. Melson, Dir., Exec. Off. for U.S. Att’ys).

333. Scholars have long observed this incentive in the broader plea-bargaining system. See, e.g., MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 47-91 (1978).

334. Jessie K. Finch, *Legal Borders, Racial/Ethnic Boundaries: Operation Streamline and Identity Process on the U.S.-Mexico Border* 119 (2015) (Ph.D. Dissertation, University of Arizona School of Sociology).

335. *Id.* at 107.

336. CJA lawyers are directly appointed by judges. See 18 U.S.C. § 3006A(a) (2018) (providing for judicial appointment of CJA lawyers). Federal public defenders, by contrast, are more insulated from judicial control by the existence of a separate office with its own management structure. See Eve Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1794-95 (2016) (observing that public defenders achieve better outcomes than solo

losing a substantial income stream (CJA panel lawyers are paid well over \$100 per hour).³³⁷

The other conflict is more complicated: a conflict between the interest of each individual defendant in being released from jail as soon as possible, and the interest of all defendants in enjoying meaningful due process.³³⁸ If a defense lawyer quickly acquiesces to a plea deal in every case, they will have no chance to litigate the system's procedures. But if a defense lawyer fights a case, they risk harming that individual client in the name of a broader system-reform effort. This conflict is, in one form or another, fundamental to all plea-bargaining-based criminal legal systems.³³⁹ But it is especially pronounced in mass immigrant prosecutions, because they use this collective-action problem to create such acutely deficient procedures. As Albert W. Alschuler has observed, the lawyer's duty to serve their client loyally in each case can "become a device for quieting opposition to injustice and for perpetuating unfairness from one case to the next."³⁴⁰

This conflict is vividly illustrated by a scenario that arose repeatedly in San Diego's Streamline system. Before taking a guilty plea, a federal judge must ascertain that the plea is being made knowingly and voluntarily.³⁴¹ Thus, during the plea colloquy, the judge normally asks the defense lawyer if they agree that the defendant's plea is knowing and voluntary. But, as explained above, in Operation Streamline there are often reasons to doubt that the defendants understand what is happening.³⁴² If the defense lawyer has serious questions about the knowingness and voluntariness of a guilty plea, but their client has

court-appointed lawyers and arguing that the institution of the public defender office contributes to this disparity).

337. Telephone Interview with Jon Sands, Head Fed. Def., Dist. of Ariz. (May 9, 2023) (noting that panel lawyers saw Streamline as an easy way to make money—you show up each day, meet your clients, help them plead guilty, and receive a high fixed salary for the full day's work). As of 2010, CJA lawyers in Tucson were paid \$125 per hour to work on Streamline cases. Lydgate, *supra* note 36, at 528 n.297. As of 2023, CJA lawyers' hourly rate in Tucson has gone up to \$164 per hour. Rates, U.S. DIST. CT. FOR DIST. ARIZ., <https://www.azd.uscourts.gov/attorneys/cja/rates> [<https://perma.cc/G9D5-43YW>]. Prior to 2008, CJA lawyers in Del Rio were paid \$50 per Streamline case rather than an hourly rate, which created extreme incentives to process cases quickly. Lydgate, *supra* note 36, at 506.

338. For a more general discussion of this conflict between (a) the defense lawyer's duties to help individual clients as individuals and (b) their duties to help all (past, present, and future) clients in the aggregate, see Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1253-56 (2005).

339. See Crespo, *supra* note 37, at 2016-24.

340. Alschuler, *supra* note 37, at 1252-53.

341. See FED. R. CRIM. P. 11(b)(1)-(2); Santobello v. New York, 404 U.S. 257, 261-62 (1971).

342. See *supra* notes 287, 307-312, 317-319 and accompanying text.

expressed a clear wish to be released, this creates an ethical quandary. The defense lawyer can either lie to legitimize the system, or object to the guilty plea and (assuming there is a time-served sentence offer) possibly keep the client in custody for longer. The following in-court exchange illustrates this problem:

DEFENSE COUNSEL: But this is a man that basically has not slept since June 11. We are now at June 16. That's a total of . . . four days . . . where he's had maybe a few hours in and out of consciousness, basically, with the noise, the freezing conditions of these cells that he was locked in, being in the desert without food and water and not being able to sleep, as well as just being terrified. When I spoke to him this morning, there was moments where he just looked at me completely blank, unable to really engage with me because he was still in utter shock. So I do have concerns of his ability to be able to understand, one, what is going on—

THE COURT: Ms. Angeles, I am just going to intercede. I don't mean to be impolite by interrupting. I am not going to take the plea of any defendants—any defendants—if counsel or the client believes the defendant is not able to voluntarily, intelligently and competently make that decision If you are telling me that your client hasn't slept in four days and you believe your client, because of that, is not able to rationally consider his alternatives, then I have serious reservations about taking his plea.³⁴³

This situation creates a dilemma. By making a record of these proceedings' coercive nature, the lawyer is pushing the system to treat defendants more humanely. But the judge may choose to keep this specific defendant in custody longer if the defense lawyer does not approve the guilty plea. Indeed, some magistrate judges in the Southern District of California did precisely that.³⁴⁴ If the judge does so, they are essentially holding the defendant hostage to extort legitimacy from the lawyer. The easy thing for the lawyer to do is provide a

343. Transcript of New Complaints Calendar at 129-30, *United States v. Gurdeep Singh Sidhu et al.*, No. 18-mj-20132 et al. (S.D. Cal. July 16, 2018) (colloquy between Magistrate Judge Jan M. Adler and FD Michelle Angeles). For several more transcripts of attorneys facing the same conundrum, see Appellant's Opening Brief, *supra* note 146, at 10-13.

344. See, e.g., Transcript of New Complaints Calendar at 104, *United States v. Jose Isabel Rubio-Ruiz et al.*, No. 18-mj-20203 et al. (S.D. Cal. July 25, 2018) ("If you have any basis for believing that your client's guilty plea is not freely given, without any coercive influence of any kind, and not knowing and voluntary If I don't get an unequivocal 'No' to that question, I won't accept the guilty plea and you can take your chances with the next judge four days from today."); *id.* at 107-08 ("I'm not accepting his guilty pleas. Anyone else want to take the same position? And basically you're then committing your client to more days in custody?").

system-legitimizing lie: that there are no problems with the guilty plea.³⁴⁵ Mass immigrant prosecutions thereby weaponize defense lawyers' ethical duties to maintain the appearance of legality.

It is reasonable to ask whether a defense lawyer can ethically represent defendants in mass immigrant prosecutions. If the system prevents lawyers from providing competent counsel, perhaps they should refuse to participate in the system at all.³⁴⁶ Indeed, the National Association of Criminal Defense Lawyers and some activist groups have called on defense lawyers to boycott Operation Streamline.³⁴⁷ That is one option. But as the next Part will seek to show, there is another.

III. RESISTANCE LAWYERING AND THE INSTITUTIONAL CHESS GAME

Over the past decade, lawyers have been deeply involved in movements for immigration reform. They have assisted activist groups with causes like establishing sanctuary cities, resisting the Trump Administration's travel ban, amending criminal laws to protect immigrants' status, and convincing the executive not to deport certain categories of immigrants.³⁴⁸ Public defenders, however, do not fit neatly into this story. As Marisol Orihuela has noted, "[t]he movement lawyering model and indigent criminal defense may appear to be in tension, if not irreconcilable."³⁴⁹ This is because public defenders are system

345. It is of course a violation of lawyers' ethical duties to lie to the court. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N, Discussion Draft 1983). But the rules of professional conduct provide that the client shall decide how to plead in a criminal case and whether to accept any settlement offers. *Id.* r. 1.2(a). They also provide that a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* r. 1.3 cmt.1. This scenario places these rules in conflict.

346. See CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-1.8(a) (AM. BAR ASS'N 2017).

347. FINCH, *supra* note 36, at 19, 29-31 (citing email sent to Operation Streamline lawyers by activists, stating: "I ask you to resign your participation in this court proceeding that has huge costs for our country in terms of violated constitutional principles and millions of dollars a year in court and prison costs. I urge you to resign from your participation in Operation Streamline, and to encourage your colleagues to join you."); *Adopted NACDL Policy on Operation Streamline*, NAT'L ASS'N CRIM. DEF. LAWS. (May 4, 2008), <https://www.nacdl.org/Content/BoardResolution~05-04-2008> [<https://perma.cc/93RC-HVYB>]; see also GREENE, CARSON & BLACK, *supra* note 8, at 35, 39 (noting that the Arizona federal public defenders initially boycotted Streamline).

348. See Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1473-90 (2017); Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 636-50, 656-58 (2020).

349. Orihuela, *supra* note 348, at 651.

insiders whose power comes from representing individual defendants. And their primary obligation is to help those individual defendants.³⁵⁰ Defense lawyers have ethical duties to convey plea-bargain offers to clients, give clients candid advice, abide by clients' decisions whether to plead guilty, and zealously advocate for clients' goals as defined by the clients themselves.³⁵¹ These duties are normally at odds with using clients' cases to push larger system-reform efforts. A defense lawyer cannot ethically take a case to trial to fight the system when the client wants to plead guilty. And mass immigrant prosecution systems are designed to give defendants an overwhelming incentive to plead guilty. So how can public defenders in these systems also be resistance lawyers?³⁵² That is, how can they both litigate to change these systems and ethically advocate for their clients within these systems?

The academic literature has proposed two potential answers to this question. One is to relax the ethics rules for defense lawyers, allowing them to fight cases against the wishes and interests of their clients.³⁵³ That approach is troublingly paternalistic. It calls for the defense lawyer to treat their client as a means to an end and risk harming the client to pursue a larger mission of disrupting the system.³⁵⁴ The second is to form cartels of defendants and pursue plea-bargain strikes, in which defendants collectively force prosecutors to take every case to trial.³⁵⁵ Such defendant cartels might be organized through defendants

350. See Crespo, *supra* note 37, at 2022-24.

351. MODEL RULES PRO. CONDUCT r. 1.2(a); 1.3 cmt. 1; 1.4(a)(3); 2.1 (AM. BAR ASS'N, Discussion Draft 1983).

352. See Farbman, *supra* note 29, at 1880 (defining a resistance lawyer as one who works "within a procedural and substantive legal regime that she considers unjust and illegitimate" but who "seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself").

353. See, e.g., John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 33 (2016) ("[A]n ethical norm that allowed lawyers to pursue a course of action that benefitted not only the overwhelming majority of their own clients, but also criminal defendants in general, would do more clients (and defendants collectively) substantially more good than the current loyalty to the individual client ethical norms which perpetuate what is, and stymie what could be."); Etienne, *supra* note 338, at 1196-98, 1253-56.

354. Noah A. Rosenblum has explored the idea that lawyers with especially powerless and vulnerable clients should enjoy more ethical latitude than other lawyers. Noah A. Rosenblum, *Power-Conscious Professional Responsibility: Justice Black's Unpublished Dissent and a Lost Alternative Approach to the Ethics of Cause Lawyering*, 34 GEO. J.L. ETHICS 125, 186-89 (2021). Defendants in programs like Operation Streamline are surely among the most powerless imaginable. But the argument cuts both ways in this context. Such defendants do need more zealous lawyers, but they also need greater protection from the harm paternalistic lawyers might cause them.

355. See, e.g., Alexander, *supra* note 37; Crespo, *supra* note 37; Orihuela, *supra* note 36.

themselves, their lawyers, or outside community activists.³⁵⁶ For them to work, defendants would have to collectively reject plea-bargain offers and demand trials despite the likelihood of harsher punishment if they lose. While this approach can avoid the dangers of defense-lawyer paternalism, it also poses major logistical problems.³⁵⁷

The two case studies explored in this Article suggest a third approach: lawyers can orchestrate situations where, from the defendant's perspective, the benefits of fighting outweigh the costs. If lawyers do this, they are free to litigate against the system without betraying their clients. And this approach does not require defendants to act collectively or risk greater punishment. It involves two complementary strategies.

The first is to identify incentive structures where trial is in clients' interests. This happened in San Diego's Streamline system—once defendants were released on bond, there was essentially no reason for them not to demand trials. Consequently, prosecutors and judges in San Diego had to conduct at least eighty-six bench trials.³⁵⁸ The second is to impose costs on the system when you can do so without harming the client. This does not necessarily require full trials. Lawyers in both Operation Lone Star and Operation Streamline raised objections, made sentencing arguments, and took issues up on appeal without the system punishing their clients. Even if the defense is likely to lose these fights, the act of fighting still puts pressure on the system.

Such resistance happens entirely within the bounds of the law, leveraging defendants' procedural rights to disrupt a system designed to be lawless.³⁵⁹ And certain features of mass immigrant prosecution systems make them especially vulnerable to this approach. These systems involve a huge volume of cases, so fighting even a fraction creates major burdens. The cases all involve the same crime, meaning legal victories can benefit all defendants. Prosecutors have relatively little punishment leverage since the cases are misdemeanors. And

356. See Crespo, *supra* note 37, at 2023 (“That gesture is the same gesture made earlier—not toward public defenders, or even lawyers, as the essential actors in a plea bargaining strike, but toward the clients themselves and toward the organizers who might catalyze their collective power.”); Orihuela, *supra* note 36, at 5 (“Applying a client-centered model to this issue, individual defendants should be able to prioritize social change or collective goals over one’s own term of incarceration.”).

357. See, e.g., Bar-Gill & Ben-Shahar, *supra* note 35, at 750-55; Crespo, *supra* note 37, at 2016-24; Alschuler, *supra* note 37, at 1248-55.

358. See *supra* note 16 and accompanying text.

359. See generally Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015) (arguing that strict adherence to the law can function as a strategy to disrupt legal regimes).

immigrant defendants have powerful reasons to fight stemming from their desire to remain in the United States.³⁶⁰

If defense lawyers successfully find opportunities to litigate, prosecutors will make countermoves to try to restore the rapid guilty-plea regime. This creates an institutional chess game. If defense lawyers exploit a weakness in the system, prosecutors will try to change the system to correct that weakness. And their response often opens up new weaknesses to exploit. This final Part explores the dynamics of this power struggle by looking at the San Diego and Texas case studies. It draws out several broad strategic lessons. First, it explains why getting immigrant clients released on bail gives them strong incentives to fight. Second, it explores the bluffing game that arises when a lot of defendants try to demand trials. Third, it shows how lawyers can slow the system down and advocate for their clients even in cases that end in guilty pleas. Fourth, it demonstrates that appeals are an especially powerful weapon for defendants. And finally, it considers broader strategic questions outside the courtroom – the importance of defense lawyers coordinating with one another, working with outside groups like activists and the media, bringing political pressure to bear on judges and prosecutors, and starting the fight immediately before a mass immigrant prosecution system can establish its footing.

A. *Bail and Immigrants' Incentives to Fight*

Pretrial incarceration is these systems' most effective tool for coercing rapid guilty pleas.³⁶¹ Most of the defendants in both Operation Streamline and Operation Lone Star receive plea-bargain offers for time-served sentences.³⁶² This means that they will be released the same day they plead guilty. If defendants reject these offers and are unable to post bail, then they must remain in custody until the case ends. That could take a matter of weeks or even months. At the extreme end, the only defendant to go to trial so far in Operation Lone Star remained in custody for eight months beforehand.³⁶³ The opportunity to

360. While this Article only focuses on mass immigrant prosecutions, it is plausible that this strategy could be adopted in other criminal justice contexts with similar features. See Roberts, *supra* note 31, at 1099 (advocating that defense lawyers “crash” state misdemeanor systems by litigating a substantial number of cases). The author is aware of one state public-defender system that uses this approach in misdemeanor driving-under-the-influence cases, because there is little downside for the defendants in taking most of them to trial.

361. See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714-17 (2017) (observing that pretrial detention creates more guilty pleas and worse case outcomes in misdemeanor systems).

362. See *supra* notes 102, 203 and accompanying text.

363. *Supra* note 225.

get out of custody quickly thus creates overwhelming pressure to accept a plea deal. On the other hand, if a defendant is released on bail, they can meaningfully fight their case. That is why bail has been crucial to the fights in both San Diego and Texas.

Once a defendant is released on bail, prosecutors must choose between arranging for them to be deported and releasing them into the community. If prosecutors opt for deportation, it is very difficult to obtain a conviction. This is how The Bail Project engineered around 1,000 dismissals in San Diego's Streamline system. When San Diego's federal prosecutors decided to stop those deportations as a countermove, they created a different problem. If immigrant defendants are released into the community, they have strong incentives to go to trial.

Prosecutors are then left with only the traditional tools of plea negotiation—threats to impose higher sentences and more serious charges. These threats are relatively weak in mass immigrant prosecution systems, because the defendants are only charged with misdemeanors (unless they have a prior deportation, in which case they could be charged with felony unlawful reentry in the federal system).³⁶⁴ Immigrants also have several uniquely powerful reasons to fight their cases if released. If they can live in the United States while the case is pending, that is a significant benefit. Many defendants have family ties to the United States, including children they could not otherwise visit, and they can spend time with their loved ones while awaiting trial.³⁶⁵ Indeed, this gives the defendants an incentive to make their cases last as long as possible.³⁶⁶ Immigrants released on bond can also meet with immigration lawyers in the United States and look into possible relief from deportation.³⁶⁷ Further, immigrant defendants have special reasons to avoid criminal convictions because

364. 8 U.S.C. § 1326 (2018). For more on the dynamics of felony threats, see *infra* Section III.B.

365. Mostly it is immigrants with personal ties to the United States who are able to post bond, since they are the most likely to have someone who can pay for their bail. This is what happened in San Diego after The Bail Project was cut out of the system. See *supra* notes 124-125 and accompanying text; see also *supra* note 294 and accompanying text (quoting a Streamline defendant who came to the United States to see his daughters after not seeing them for eleven years).

366. This inverts the standard account of misdemeanor cases, which holds that the hassle of repeatedly returning to court is the most significant burden on defendants. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

367. See, e.g., CANTÚ, *supra* note 294, at 186 (a defense lawyer in Operation Streamline explaining that he delayed his client's hearing so the client could contact an immigration lawyer).

these can adversely affect their cases in the immigration system.³⁶⁸ This gives them additional incentive to fight.

But bail is not always necessary to take a case to trial. Some immigrant defendants—most commonly those seeking asylum—choose to remain in custody until their trial date. At least twenty-two San Diego Streamline defendants went to trial in custody, with most being asylum seekers.³⁶⁹ And the only Operation Lone Star defendant who went to trial was an asylum seeker from Honduras.³⁷⁰ For these defendants the calculus is somewhat unique: they will likely spend months or years in the immigration system pursuing asylum claims even after the criminal process has ended, and the additional time in criminal custody can help them prepare for the asylum process by seeking immigration counsel and working with their defense lawyer.³⁷¹ This is especially important for immigrants seeking asylum, because the grant rates more than double if you are represented by an attorney.³⁷² Thus for asylum seekers the additional time in custody is less marginally harmful, and may even help them with their ultimate goal of obtaining asylum in the United States. Such defendants have unique reasons to fight, and lawyers need to look out for these cases.

368. See Fish, *supra* note 259, at 1389–90. Misdemeanor § 1325 and misdemeanor state trespassing charges are not categorical bars to relief in the immigration system, as they do not qualify as crimes of moral turpitude or aggravated felonies. 8 U.S.C. § 1227(a)(2)(A)(i), 1227(a)(2)(A)(iii) (2018). However, misdemeanor convictions can still prevent immigrants from receiving discretionary relief in the immigration system and prevent them from obtaining immigration status in the future. See, e.g., *DACA: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 18, 2023), <https://www.uscis.gov/archive/frequently-asked-questions> [<https://perma.cc/RX5Z-FAKN>] (asserting exclusion from consideration for Deferred Action for Childhood Arrivals for multiple or serious misdemeanor convictions).

369. *Supra* note 132 and accompanying text.

370. McCullough, *supra* note 223.

371. See Gaby Del Valle, *Asylum Behind Bars*, OUTLINE (Oct. 20, 2017), <https://theoutline.com/post/2410/asylum-behind-bars> [<https://perma.cc/65WM-YAVC>] (noting that many asylum seekers spend multiple years in immigration custody). It is also important to note that the immigration system does not normally appoint lawyers to represent immigrants, whereas the criminal-justice system does. See *Access to Counsel*, NAT'L IMMIG. JUST. CTR. <https://immigrantjustice.org/issues/access-counsel#:~:text=Legal%2orepresentation%20often%2omakes%20the,unable%20to%20afford%20a%20lawyer> [<https://perma.cc/6A3A-WVCT>].

372. See Jason Dzubow, *Asylum Seekers Need Pro Bono Lawyers Now More Than Ever*, AM. BAR ASS'N 3 (July 30, 2020) https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/july-2020/asylum-seekers-need-pro-bono-lawyers-now-more-than-ever [<https://perma.cc/J8XS-3D4L>] (“[P]ro se asylum applicants in 2019 and 2020 were granted asylum in about 13 percent of cases. During the same period, represented applicants received asylum in about 30 percent of cases. So, having a lawyer more than doubles the likelihood of a positive outcome.”).

In sum, bail is one of the most important tools for resisting mass immigrant prosecution systems. Most immigrant defendants released on bail have an incentive to fight their cases to the end. And this is indeed what happened in San Diego and Texas—defendants released on bail litigated, demanded trials, and pursued appeals. Fighting these cases serves several complementary goals—helping the client, pursuing legal challenges that may change the system, and taxing the system’s resources.³⁷³

Defense lawyers should therefore not consent to a norm of waiving bond hearings and agreeing to detention, as they did in Streamline courts before the Trump Administration.³⁷⁴ The first step is to request bond in every case. If the judges always deny it, then wait for a client who is willing to fight in custody and appeal the denial of bond. Immigrant defendants have statutory and constitutional rights to bond.³⁷⁵ Indeed, the Ninth Circuit Court of Appeals has held that policies denying bail based on a defendant’s immigration status are subject to heightened scrutiny.³⁷⁶ And beyond direct bail appeals, defense attorneys can also partner with outside legal organizations to file civil suits challenging the unlawful denial of bail. Such suits have been successful in recent years against several state-court bail systems.³⁷⁷

373. It also imposes costs on more powerful actors in the system. Fighting Operation Streamline cases, for example, usually creates work for district judges and assistant U.S. attorneys rather than magistrate judges and Border Patrol lawyers. See *supra* note 283 and accompanying text; *infra* Section III.C.

374. See *supra* note 115 and accompanying text (explaining that, for Streamline defendants, federal magistrate judges rarely set bail and federal defenders do not request it). On the more general problem of public defenders functionally denying their own clients’ right to bail in the criminal-justice system, see Alma Magaña, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. 978, 1002-18 (2023).

375. *Supra* notes 113-114 and accompanying text.

376. See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 774, 780, 791-92 (9th Cir. 2014) (invalidating an Arizona law that denied bail to undocumented immigrants in certain felony cases on substantive-due-process grounds).

377. See *Daves v. Dallas Cnty.*, No. 18-CV-0154, at *1-6 (N.D. Tex., Sept. 20, 2018), ECF No. 165 (order granting preliminary injunction requiring Dallas County to enact specific changes to its bail procedures); *O’Donnell v. Harris Cnty.*, 251 F. Supp. 3d 1052, 1167-68 (S.D. Tex. 2017), *aff’d as modified*, 892 F.3d 147 (5th Cir. 2018); *Shultz v. Alabama*, 330 F. Supp. 3d 1344, 1365 (N.D. Ala. 2018); Jolie McCullough, *Harris County Agreed to Reform Bail Practices That Keep Poor People in Jail. Will It Influence Other Texas Counties?*, TEX. TRIB. (July 31, 2019), <https://www.texastribune.org/2019/07/31/harris-county-bail-settlement-dallas-texas> [<https://perma.cc/PM44-YC7Q>]; see also Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098, 1102-12 (2019) (discussing contemporary civil bail litigation).

B. Playing Chicken

Once a significant number of immigrants are out on bail and fighting their cases, a new dynamic emerges: the game of chicken.³⁷⁸ In this scenario, two opposing sides each want the other to yield. If neither yields, then they both get the worst outcome. But if one yields and the other does not, the nonyielding player gets the best outcome and the yielding player gets the second-best. Prosecutors' best outcome is for the defendants to all plead guilty. To achieve this, prosecutors can try to threaten the defendants with more punishment—felony charges if those are applicable, otherwise longer sentencing recommendations on the misdemeanors. The defendants' best outcome is to fight their cases for as long as possible out of custody, and then either be acquitted or convicted with minimal punishment. The worst outcome for both sides would be fighting every case to a trial that ends in a felony or a significant sentence.

In San Diego's Streamline system, the defendants succeeded at calling the prosecutors' bluff about charging felonies. Prosecutors only brought felony charges in two of the eighty-six identified Streamline trials.³⁷⁹ This makes some sense from the prosecutors' perspective. As costly as a misdemeanor bench trial is, it is significantly more burdensome for both the prosecutors and the courts to have full felony jury trials.³⁸⁰ So if a prosecutor is looking to conserve time and resources, filing a felony charge in every trial case could seriously backfire. Indeed, since many defendants wished to remain out of custody in the United States for as long as possible, felony charges could even be viewed as a benefit because they allow much longer delays. It seems plausible that, believing felony charges were not going to make most on-bond defendants in San Diego plead guilty, the prosecutors backed down from this threat. And a significant majority of the Streamline defendants convicted in misdemeanor bench trials, fifty-seven out of sixty-five, received time-served sentences from the magistrate judges.³⁸¹ The government's threats thus failed to materialize in San Diego.³⁸² This dynamic can be contrasted with the cases stemming from the Postville, Iowa

378. See Gelfer Stone, *Nash Equilibrium in the Chicken Game*, MEDIUM (June 27, 2020), <https://medium.com/@gelferstone/nash-equilibrium-in-the-chicken-game-7ce8b965a009> [<https://perma.cc/W955-W2B4>] (explaining the concept of the “chicken game” in game theory).

379. *Supra* note 131 and accompanying text.

380. Among other things you need to select the jury (which can take a day or more), schedule court around the jury's availability, separate trial from motions hearings that the jury should not see, and have more extensive opening and closing arguments.

381. *Supra* note 138 and accompanying text.

382. This is ironic given that the blanket threat of felony charges is so frequently used to justify rapid guilty pleas in Operation Streamline. Lydgate, *supra* note 36, at 509-10.

meatpacking plant raid.³⁸³ In those cases the prosecutors threatened to bring aggravated identity-theft charges that carried a two-year mandatory minimum sentence.³⁸⁴ That charge creates quite a bit more leverage to force a plea bargain, and it is unlikely many defendants would have risked trial in that context.

In Operation Lone Star, the game of chicken has not yet been resolved. While the defendants who post bond in Texas are still being deported, they are litigating to force Texas to try to bring them back into the state for trial.³⁸⁵ The current equilibrium is that bonded-out defendants have their cases indefinitely delayed and lose their bail money.³⁸⁶ But the one case that went to trial provided an important signal to defendants. In that case Judge Andrade imposed a full year in prison, the statutory maximum sentence.³⁸⁷ This was an exceptionally long sentence for a misdemeanor trespassing charge.³⁸⁸ It was likely designed to deter others from going to trial in Operation Lone Star cases. Notably, judges in Texas are locally elected and thus vulnerable to political pressures, while magistrates in the federal system are appointed by district judges. This may help explain Andrade's decision to trial tax so severely, while the magistrates in San Diego did not trial tax at all.³⁸⁹ Because of Andrade's sentence, every defense lawyer in Operation Lone Star must inform their clients that a year in prison is a possibility if they lose their trial. And this may undermine defendants' willingness to ultimately risk trial. It does, however, seem unlikely that every judge going forward will impose the maximum penalty, and lawyers should give a realistic assessment of that outcome's probability. It is, of course, up to the defendants to decide how much risk they want to take.

383. See *supra* notes 267-272 and accompanying text.

384. Eagly, *Prosecuting Immigration*, *supra* note 36, at 1302.

385. See, e.g., Petition for Writ of Mandamus at 13, *In re Yonatan Garcia-Escalante*, No. 04-23-00740-CR (Tex. Ct. App. 4th Jud. Dist., Aug. 10, 2023).

386. *Supra* notes 226-231 and accompanying text.

387. McCullough, *supra* note 223.

388. *Supra* note 177 and accompanying text.

389. See *supra* note 138 and accompanying text. It is unclear what magistrates in other federal jurisdictions would do if they saw Streamline trials, but I suspect they would behave similarly to the San Diego magistrates. Trial taxing of the sort seen in Texas is commonly a product of state-court judges having a more direct interest in securing rapid guilty pleas, as well as their facing more significant political accountability (including through elections) than federal judges. Compare Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 325 (2016) (describing direct judicial management of plea negotiations in state systems), with FED. R. CRIM. P. 11(c)(1) (prohibiting judicial involvement in plea discussions).

C. *Slowing Down the System*

Trial is not the only way to fight mass immigrant prosecution systems. Resistance is also possible in cases that end with a guilty plea.³⁹⁰ While a lawyer cannot ethically litigate a case if their client wants to take a deal, the lawyer can still determine how to effectuate their client's objectives.³⁹¹ The strategic decisions in a case are delegated to the lawyer, who must make them in consultation with the client and consistently with the client's expressed wishes.³⁹² This creates opportunities for low-cost resistance. Even during a guilty plea, a lawyer can take up the system's resources by pushing it to treat each client as a normal defendant subject to the normal criminal process, rather than as grist for a rapid-fire plea mill. The fight in San Diego provides two examples.

One tactic is objecting. During the first several months of San Diego's Streamline system, defense lawyers raised scores of objections to the coercive nature of the proceedings and the inhumane treatment of the defendants.³⁹³ When judges tried to shut these objections down by refusing to hear them, the lawyers objected to that too.³⁹⁴ These objections were not usually granted, and they did not ordinarily interfere with the defendants' desire to plead guilty and be sentenced. But they did put pressure on the system by causing court sessions to last into the evening. This contributed to the end of same-day guilty pleas, helping revert the Streamline system into something closer to a normal criminal court.³⁹⁵

A second tactic is making arguments at sentencing.³⁹⁶ Defendants and their lawyers have an unqualified legal right to present mitigating evidence in a sentencing hearing.³⁹⁷ Doing so has purposes beyond reducing the sentence — it creates a public record of what happened to the defendants, it forces judges and prosecutors to learn about the people they process, and it gives the defendants a chance to hear their stories told in court. The lawyers in San Diego insisted on giving sentencing pitches even in cases with time-served offers.³⁹⁸ By contrast,

390. Cf. JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE*, at xvi-xvii (1987) (detailing everyday tactics of resistance used by Malaysian villagers and arguing that “foot dragging and evasion” can be potent political techniques).

391. MODEL RULES OF PRO. CONDUCT r. 1.2(a), 1.4 (AM. BAR ASS'N, Discussion Draft 1983).

392. *Id.*

393. See *supra* notes 97-101 and accompanying text.

394. See *supra* notes 100-101 and accompanying text.

395. See *supra* notes 109-110 and accompanying text.

396. See *supra* notes 105-106 and accompanying text.

397. FED. R. CRIM. P. 32(i)(4)(A)(ii).

398. See *supra* notes 102-108 and accompanying text.

lawyers in other Streamline jurisdictions such as Tucson rarely said anything about their clients at sentencing.³⁹⁹ These lawyers' logic, presumably, was that telling their clients' stories would have no purpose since the sentence was already decided. And if there is no tangible benefit to saying something, why waste the court's time? A lawyer seeking to make these prosecutions harder would take the opposite perspective – that they should speak at sentencing unless there is some reason it could hurt the client. It is good to slow the system down and treat it like a regular court proceeding. And if there is a norm that every defense lawyer says something at sentencing in every case, it becomes impossible to process seventy to 100 people in a single afternoon.

D. Appellate Strategy and the Rapid Plea Catch-22

Appeals are another important weapon in the defendants' arsenal. They can undermine mass immigrant prosecution systems in multiple ways. First and most significantly, if a defendant wins one appeal on a legal issue it can send shockwaves through the entire system. Because defendants all have the same charges and are subjected to the same procedures, a ruling that affects one case often affects every other case too. Therefore, if defense lawyers can find just a few clients to pursue legal challenges, the benefits will be shared widely. For example, the Ninth Circuit's ruling in *Corrales-Vazquez* that the wrong elements had been charged caused nearly 500 reversals and meant that almost every conviction during Streamline's first year was illegal.⁴⁰⁰ And the Fourth Court of Appeals' decision in *Aparicio* that Operation Lone Star's policy of only arresting men violated the Equal Protection Clause applied to every case until that policy was changed.⁴⁰¹

Beyond these dramatic victories, appeals also impose costs on mass prosecution systems. They force the courts and the government to expend resources on cases that were meant to be quick convictions. They also engage prosecutors and judges who are not involved in the day-to-day processing of those convictions. This means, for example, trading visiting magistrate judges for district judges and appellate judges, and Border Patrol attorneys for career federal prosecutors. Appeals thus force people with actual power in the system to expend effort and internalize some of its costs. Defendants may also benefit from having judges who aren't engaged in these systems' day-to-day operations, who thus have not bought into their procedural design and can view them with

³⁹⁹. See *supra* note 104 and accompanying text.

⁴⁰⁰. *United States v. Corrales-Vazquez*, 931 F.3d 944, 954 (9th Cir. 2019); Petition for Rehearing En Banc by the United States, *supra* note 18, at 17.

⁴⁰¹. *Ex parte Aparicio*, 672 S.W.3d 696, 715-16 (Tex. App. June 21, 2023).

fresh eyes. And the best feature of appeals from defendants' perspective is that they are not part of the plea negotiation or sentencing process, so there is little risk of an appeal causing harsher punishment. They can usually be pursued without worrying about harm to the defendant.

So how does a lawyer generate appeals from a mass immigrant prosecution system? The most straightforward way is to take a case to trial first, lose, and then appeal the conviction. But that only generates a relatively small number of appeals. To really create burdens for the system, lawyers must find ways to appeal cases that have not gone to trial. The lawyers in San Diego and Texas adopted two different strategies for doing so.

In San Diego, they appealed from guilty pleas. Defense lawyers advised clients with no criminal record or deportation history to plead guilty without a plea agreement, thus preserving the right to appeal.⁴⁰² This gave defense lawyers the ability to challenge the system before both district judges and the Ninth Circuit (because the cases start in magistrate court, there are two levels of appeal).⁴⁰³ This ability was, however, limited by the difficulty of pressing legal arguments after a guilty plea.⁴⁰⁴ When a case goes to trial, the defense is free to make all the legal arguments it likes. But if a defendant pleads guilty and admits they committed the crime, it is harder for the lawyer to also preserve issues for appeal. The key in such cases is to either find creative ways to make arguments for dismissal while also pleading guilty, or else identify legal issues that don't need to be raised in the lower court.⁴⁰⁵ Most of the dismissals caused by *Corrales-Vazquez*, for example, were appeals from guilty pleas.⁴⁰⁶

In Texas, defendants can appeal pretrial writs of habeas corpus or mandamus in order to challenge features of their prosecutions prior to conviction. All of the significant appeals in Operation Lone Star have made use of such writs. These have included the sex-discrimination challenges,⁴⁰⁷ the effort to force Texas to help defendants return to the United States for trial,⁴⁰⁸ the request to have

402. Those with prior deportations were not advised to do this, because the government would threaten to bring a felony-reentry charge under 8 U.S.C. § 1326.

403. In the District of Arizona, defendants also pled guilty without waiving the right to appeal, but their lawyers rarely filed any appeals for them. Telephone Interview with Saul Huerta, *supra* note 79.

404. See, e.g., *United States v. Chavez-Diaz*, 949 F.3d 1202, 1210 (9th Cir. 2020) (dismissing Equal Protection challenge as waived by defendant's unconditional guilty plea).

405. For example, objections to a guilty plea colloquy can be raised for the first time on appeal. See *United States v. Roblero-Solis*, 588 F.3d 692, 701 (9th Cir. 2009).

406. *United States v. Corrales-Vazquez*, 931 F.3d 944, 954 (9th Cir. 2019).

407. E.g., *Ex parte Aparicio*, 672 S.W.3d 696, 713 (Tex. Ct. App. June 21, 2023).

408. Petition for Writ of Mandamus at 13, *In re Yonatan Garcia-Escalante*, No. 04-23-00740-CR (Tex. Ct. App. Dist., Aug. 10, 2023).

attorneys appointed to argue for the return of defendants' bond money,⁴⁰⁹ and the arguments for dismissal under the Supremacy Clause.⁴¹⁰ Because hundreds of Operation Lone Star defendants are out of custody litigating their cases from other countries, their lawyers can freely raise and appeal legal issues with no risk of further jail time. The main limitation is Texas courts' willingness to let an issue be argued in a pretrial writ. For example, prosecutors have now appealed the sex-discrimination issue to the Texas Court of Criminal Appeal, claiming that it can only be raised after trial.⁴¹¹

There is an irony in the Operation Streamline and Operation Lone Star appeals—the major appellate victories have had little to do with the features of these systems that seem the most obviously unjust. One might think that lawyers would bring challenges under the Sixth Amendment because defendants lack adequate access to counsel. Or perhaps there might be a due-process challenge because the extremely summary court proceedings are inadequate. Or maybe an Equal Protection argument against racially segregated court systems that impose a much lower quality of justice on Latin American defendants. But these kinds of arguments were raised by lawyers in San Diego's Streamline system in two cases, and courts rejected them both times. In *United States v. Hernandez-Becerra*, defense attorneys argued that the defendant's guilty plea was not knowing and voluntary due to lack of sleep and the coercive conditions at the border-patrol station where she was held.⁴¹² The district judge denied the appeal, finding that the magistrate judge's pre-plea colloquy was adequate.⁴¹³ And in *United States v. Chavez-Diaz*, defense lawyers argued that the Streamline system violated the Equal Protection Clause and the Due Process Clause.⁴¹⁴ The Ninth Circuit refused to hear the appeal, holding that the defendant had waived such arguments by pleading guilty.⁴¹⁵

409. Petition for Writ of Mandamus at 2, *In re Isaias Paz-Estrada et al.*, No. 04-23-00318-CR (Tex. Ct. App. April 4, 2023).

410. See *State v. Guzman Curipoma*, 652 S.W.3d 74, 76 n.2 (Tex. App. 2022).

411. *Supra* note 241 and accompanying text.

412. *United States v. Hernandez-Becerra*, No. 18-MJ-20491, 2018 WL 5830041, at *4 (S.D. Cal. Nov. 7, 2018); see also Appellant's Opening Brief at 17, *Hernandez-Becerra*, 2018 WL 5830041 (arguing that, in failing to conduct a more searching inquiry regarding the defendant's "coercive pre-plea conditions" of confinement, the magistrate judge failed to ensure that her plea was knowing and voluntary).

413. *Hernandez-Becerra*, 2018 WL 5830041, at *4-5. The case was appealed to the Ninth Circuit, but voluntarily dismissed by both parties in March 2020 when the COVID-19 pandemic hit and Streamline ended. *United States v. Hernandez-Becerra*, No. 18-50403, 2020 WL 2319991, at *1 (9th Cir. Mar. 9, 2020).

414. *United States v. Chavez-Diaz*, 949 F.3d 1202, 1204 (9th Cir. 2020).

415. *Id.*

These cases illustrate a Catch-22. To successfully argue that a mass immigration prosecution system has constitutionally deficient procedures, the appeals court requires you to actually litigate a case. If you plead guilty according to the system's standard procedures, you will not have preserved an objection or developed sufficient facts in the lower court to bring such a challenge on appeal. But if you do decide to litigate, then you are taken out of the Streamline process. You are given more time to meet with a lawyer, and are not rushed through a guilty plea on day one. Now you can't argue a constitutional challenge because you have not been subjected to the procedures you are trying to challenge. So you either plead guilty and lose your ability to argue that the system violated your rights, or else you fight your case and are sent to a different system with more robust rights. There may be a way for defendants to escape this Catch-22 and raise direct constitutional challenges to these programs, especially if they draw sympathetic appellate judges. But this Catch-22 does help explain why the successful appeals have concerned seemingly ancillary issues instead of the fundamental nature of these programs' injustice. Indeed, one of the rapid plea process's most disturbing features is how well it insulates itself from legal challenges.

E. Institutional Coordination, Politics, and Timing

To effectively resist mass immigrant prosecutions, defense lawyers need to coordinate with one another. The prosecutor's office constantly exerts its collective leverage, and defense lawyers will be at a disadvantage if they are siloed.⁴¹⁶ Such coordination has several benefits. The first is information sharing. Many of these strategies work much better if the defense lawyers all know about them. For example, when The Bail Project was posting bond for San Diego's Streamline defendants in 2018 and 2019, defense-lawyer coordination greatly facilitated the process.⁴¹⁷ The bond application procedure was centralized, so that all defense lawyers could access it for their clients. Second, some strategies are simply more effective if more defense lawyers employ them. For example, objecting and making sentencing arguments to slow down the proceedings has much more of an impact if every lawyer is doing it rather than just one or two. Third, it is strategically important to coordinate on legal challenges. When defense lawyers work together, they can ensure that all clients benefit from their motions and appeals. This happened in both San Diego and Texas. In San Diego the federal defenders appealed hundreds of cases, and then used that large backlog of appeals to win hundreds of reversals in *Corrales-*

⁴¹⁶ See Primus, *supra* note 336, at 1794-95.

⁴¹⁷ See *supra* notes 120-122 and accompanying text.

Vazquez.⁴¹⁸ Similarly, in Operation Lone Star defense lawyers have worked with one another to secure dismissals due to issues like sex discrimination and their clients being entrapped into trespassing.⁴¹⁹ Such coordination ensures that when an argument is successful, many more defendants will benefit than just the one whose lawyer came up with it. Fourth, having the support of a group of defense lawyers is helpful when prosecutors and judges become abusive. For example, a lawyer who chooses to argue at sentencing despite the judge's angry pushback is in a much better position if she works for an office that will support her.⁴²⁰

Such defense-lawyer coordination is most effective if done through the formal institutional structure of a public defender's office.⁴²¹ These offices have central command structures, pool resources, and let lawyers share confidential case information with each other. They allow for the kind of intensive strategic planning that the San Diego Federal Defenders engaged in. But such offices are not absolutely necessary for such coordination. Panel systems like that used in Operation Lone Star can also organize collective resistance through less formal structures. Importantly, Lone Star Defenders selects and appoints defense lawyers itself, meaning they are accountable only to other defense lawyers. When defense lawyers are instead directly chosen by judges, however, as with CJA attorneys in the Streamline system, it is more difficult for them to coordinate and effectively resist these systems.⁴²²

It is also vital for defense lawyers to work with outside organizations, including nonprofits, civil attorneys, and the media. Doing so can bring immense strategic benefits. The Bail Project, for example, engineered hundreds of dismissals in San Diego's Streamline program by paying for defendants' bail.⁴²³ Private attorneys successfully ended the practice of courthouse arrests in San Diego, and they can bring civil lawsuits challenging unjust court procedures⁴²⁴ or bail systems that unlawfully deny immigrants bond.⁴²⁵ And

418. *United States v. Corrales-Vazquez*, 931 F.3d 944, 954 (9th Cir. 2019); *see supra* note 18 and accompanying text.

419. *See supra* notes 218-220, 239-241 and accompanying text.

420. *See, e.g., supra* notes 104-107 and accompanying text.

421. *See Primus, supra* note 336, at 1793-94; *see also* 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 168 (Crim. Just. Act Rev. Comm. ed., 2018) (observing that federal districts with centralized federal defender offices have a much higher quality of representation than do those districts with only panel attorneys).

422. *See supra* note 336 and accompanying text.

423. Email from The Bail Project, *supra* note 14.

424. *See, e.g., supra* notes 245-246 and accompanying text.

425. *See supra* notes 113-114 and accompanying text; *see, e.g., Velazquez-Hernandez v. U.S. Immigr. & Customs Enf't*, 500 F. Supp. 3d 1132, 1148 (S.D. Cal. 2020) (granting plaintiffs' motion for a temporary restraining order).

coordinating with immigration attorneys, either nonprofits or individuals, can help immigrant clients use their time productively while fighting their criminal cases. Activist groups and media organizations are also useful, because they can amplify the most unjust features of the system that attorneys experience in their day-to-day practice. This helps generate political opposition to these programs.

If the ultimate goal is to end these mass immigrant prosecution systems, that necessarily involves politics. Defense lawyers and defendants have little power to achieve that goal on their own, because they are not politicians. But as system insiders they can engage with the media and activist groups to highlight their clients' stories and the system failures that their litigation exposes (or creates). Indeed, in San Diego, the defendants' resistance to Operation Streamline from 2018 to 2020 was helped by significant media attention to the Trump Administration's treatment of immigrants (especially the separation of immigrant families) as well as movement-based opposition to its immigration policies. This larger context may help explain why Operation Streamline met far more resistance under the Trump Administration than it did under the Obama or Bush. To date, the Biden Administration has not brought back Operation Streamline. And while there has been no announcement explaining why, it seems relevant that the Office of the Inspector General issued a report concluding that the program created a "massive burden" for prosecutors due to defendants' and their lawyers' recalcitrance.⁴²⁶ There is also growing opposition to Operation Lone Star in the Texas borderlands, which is making the program harder to administer. All the news stories about successful legal challenges are likely feeding the perception that the program is a disaster.

One final point: wherever these programs arise, it is important to start fighting quickly before a norm of rapid pleas becomes calcified. Defense lawyers will never have more leverage than they do when a system is just getting off the ground. Fighting right away allows defense lawyers to help shape the procedures that the system will adopt. In Operation Lone Star, defense lawyers have been working to limit the system's effectiveness from the outset through bail and various legal challenges and have won significant victories. Had the program developed without such resistance, it would likely have generated more than just a few thousand convictions in three years. And in San Diego's Operation Streamline, the judges' decision to end same-day pleas in response to defense complaints was aided by the system's recency.⁴²⁷ It is hard to imagine that similar efforts in places like Tucson or Del Rio, where Operation Streamline had existed for over a decade, would have been nearly as successful. It is also much more difficult to organize defense-lawyer resistance to a system when that system has

426. Off. of Inspector Gen., *supra* note 19, at 66.

427. *Supra* note 13 and accompanying text.

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been functioning for a long time and the defense lawyers have become accustomed to it. This suggests that Operation Streamline's current hiatus is a unique opportunity. Whenever the executive branch decides to bring the program back, it will have to reestablish the norm of a court system without due process. Defense lawyers should be ready when that happens.

CONCLUSION

Operation Streamline has been a major feature of the federal government's criminal and immigration policy since 2005. While it has been on hiatus since the 2020 Coronavirus pandemic, it is likely to return in the next anti-immigrant presidential administration. At the same time, Texas's experiment with Operation Lone Star has furnished a new model of mass immigrant prosecution that ambitious populists in other states may emulate. Systems like Streamline and Lone Star are designed to convict as many immigrants as possible as quickly as possible. They do so by hollowing out normal court procedures and building a norm of rapid-fire guilty pleas. And they rely on defense lawyers' cooperation to keep their conviction factories humming.

Defense lawyers can pursue systemic litigation against these programs while honoring their duties to individual clients. The fights in San Diego and Texas provide a roadmap for how. One key is to seek out situations where fighting is in a client's interest. Another is to impose costs on the system whenever you can do so without harming the client. The traditional tools of litigation—arguing in court, taking cases to trial, and pursuing appeals—are remarkably effective weapons against these systems. Programs like Streamline and Lone Star cannot tolerate due process. If a substantial number of defendants assert their rights and demand the rules be followed, guilty pleas cannot be produced with nearly the same rapidity. Imposing the rule of law destroys a court system designed to be lawless.