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# SENTENCING IMMIGRANTS

ERIC S. FISH*

ABSTRACT

*The federal government has created a separate and unequal sentencing system for undocumented immigrants. Over a third of all federal felony cases involve immigrants charged with the crime of entering the United States. With Donald Trump returning to the White House, that number will increase significantly. Under the Federal Sentencing Guidelines, defendants in these cases have their criminal history counted against them twice. U.S. citizen defendants only have their criminal history counted once. This results in immigrants suffering significantly larger recidivist enhancements for the exact same prior convictions. And these double enhancements are determined in a confusing and irrational manner, with multi-year swings turning on minor details like the timing of a deportation order or probation violation. Furthermore, under the First Step Act, undocumented defendants are barred from in-custody programs that can reduce sentences by up to one-third. They therefore serve a significantly higher portion of their prison terms than do U.S. citizens.*

*This Article details how federal sentencing law explicitly discriminates against undocumented immigrants. It traces the history of their unequal treatment over the last three decades. It also proposes a framework for judges to remedy this discrimination: sentencing constitutionalism. When judges make discretionary sentencing decisions, they can and should enforce constitutional antidiscrimination principles to a greater degree than they do while reviewing legislation. In keeping with this principle, judges should decline to follow the Sentencing Guidelines in double-counting illegal*

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*reentry defendants' past convictions. They should also reduce immigrants' sentences to account for the fact that they serve a higher portion of their prison terms than do citizens. Equal Protection doctrine erects numerous obstacles to challenging these discriminatory rules. But judges' discretionary sentencing decisions need not be constrained by the deference principles built into formal doctrine. They can and should adhere to a higher standard of equality. The principle of sentencing constitutionalism is illustrated by federal judges' widespread rejection of federal crack cocaine sentencing guidelines. Like crack cocaine sentencing, reentry sentencing is racially discriminatory in design and effect. And, like they have with crack cocaine sentencing, judges should work to counteract that discrimination.*

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## INTRODUCTION

The most commonly charged federal felony is the crime of reentering the United States after deportation.[1] On average twenty thousand people have been prosecuted for it per year since 2010, making unlawful reentry cases about one-third of the federal criminal caseload.[2] And that number is about to dramatically increase. President Trump's Department of Justice has announced a new policy of charging felony unlawful reentry in every available case, and it plans to reassign federal prosecutors working on drug and terrorism cases in order to prosecute more immigrants.[3] Roughly 99% of the defendants in unlawful reentry cases are Latin American.[4] The charge is, by definition, a nonviolent and victimless crime. It involves only entering or being found in the United States after a deportation. Yet defendants in these cases are systematically punished more harshly than comparable U.S. citizen defendants are in other cases. This happens in two ways.

First, the United States Sentencing Guidelines count reentry defendants' criminal history against them twice. The Sentencing Guidelines are a complex set of rules that produce recommended sentences in federal criminal cases. While federal judges are not bound by the Guidelines, they follow the Guidelines about 90% of the time in unlawful reentry sentencings.[5] In a standard criminal case, the Guidelines create a recommended sentence range by quantifying two variables: the defendant's past convictions and facts about the current case. Past convictions create a "Criminal History Category" between one and six, while facts about the current crime create an "Offense Level" between one and forty-three.[6] But in unlawful reentry cases, past convictions increase *both* the Criminal History Category *and* the Offense Level. Reentry defendants thus receive

1. 8 U.S.C. § 1326.

2. *See* AM. IMMIGR. COUNCIL, *Prosecuting People for Coming to the United States* (Aug 23, 2021), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions [https://perma.cc/7MAZ-JJD6]. The reported number of § 1326 prosecutions for fiscal year 2023 was 14,350. OFF. OF THE U. S. ATT'YS, PROSECUTING IMMIGRATION CRIMES REPORT, 8 U.S.C § 1326 MONTHLY DEFS FILED 3 (2023). *See also* U. S. COURTS, *Federal Judicial Caseload Statistics 2023*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/5CZB-E99C] (noting that immigration offenses constituted 29% of federal criminal filings in 2023); U.S. SENT'G COMM'N, 2023 ANNUAL REPORT 14 ("In FY 2023, immigration offenses were most common, accounting for 30.0 percent of the total sentencing caseload.").

3. Memorandum from Acting Deputy Attorney General Emil Bove to All Department Employees, Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement (Jan. 21, 2025).

4. U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY22.pdf [https://perma.cc/VC6S-5L43].

5. *See id.* at 2; U.S. SENT'G COMM'N, FEDERAL SENTENCING OF ILLEGAL REENTRY: THE IMPACT OF THE 2016 GUIDELINE AMENDMENT 9 (2022).

6. *See infra* Appendix (United States Sentencing Guidelines Sentencing Table).

much larger sentence enhancements for their past crimes.

This double counting is worsened by another problem: the arbitrary way prior convictions are used to generate enhancements. The unlawful reentry guidelines make large swings in sentence length turn on obscure details of a person's criminal history. This renders sentencing in these cases uniquely random and uncertain. Multiple years in prison turn on minutiae like the precise timing of a deportation order or probation violation, or whether a state uses a determinate or indeterminate sentencing system. People with similar criminal and immigration histories receive vastly different sentences based on such technical differences. And this problem is further compounded by the difficulty of finding and interpreting state conviction records. Figuring out the recommended sentence is like solving a high-stakes logic game. Defense lawyers are commonly unable to discern what length of sentence a defendant is looking at. And because the system pressures reentry defendants to plead guilty at the first opportunity, defendants often find out at sentencing that their punishment will be more severe than anticipated.

Second, undocumented immigrants serve a substantially larger portion of their sentences than do U.S. citizen defendants. The First Step Act, signed into law by President Trump in 2018, created a new system of "earned time" credits for federal prisoners.[7] Under that law, a federal defendant who is willing to participate in anti-recidivism programs can get up to fifteen days off their prison sentence for every thirty days served.[8] That means their time in prison can be reduced by up to one-third. In addition, defendants receive these credits even if they are not assigned to a program or no program is available. The only requirement is that they not refuse to participate. But deportable immigrants are prohibited from both participating in First Step Act programs and receiving custody reductions.[9] This means that, by law, an undocumented prisoner will serve a significantly higher percentage of their sentence due to their immigration status.

To illustrate how this sentencing discrimination works in practice, consider two federal defendants: X and Y. Defendant X is charged with escaping from a federal prison, while defendant Y is charged with reentering the United States after deportation.[10] Both X and Y have identical criminal histories: two prior felony convictions within the past fifteen years, each resulting in a two-year sentence. Under the Sentencing Guidelines, both X

7. *See* 18 U.S.C. § 3632.
8. 18 U.S.C. § 3632(d)(4)(A).
9. 18 U.S.C. § 3632(d)(4)(D)(lix), (E).
10. The crime of escaping from prison is codified at 18 U.S.C. § 751. This crime was chosen for comparison because, as with § 1326, the defendant is legally excluded from the community and is being prosecuted for violating that exclusion.

and Y will have a Criminal History Category of III due to the two prior felonies.[11] Assuming that there are no aggravating or mitigating facts (like using physical violence or returning to custody voluntarily), X will have an Offense Level of thirteen for escaping from prison.[12] Y will start with a lower Offense Level of eight for reentering the United States. But Y's past convictions will also trigger enhancements of the Offense Level. If Y's first deportation happened either before or after their two felony convictions, their total Offense Level will be sixteen.[13] If their first deportation happened in between the two felony convictions, the Offense Level will be twenty-four.[14] The Guidelines will recommend a sentence of eighteen to twenty-four months for X's prison escape. And for Y's reentry, they will recommend a sentence of either twenty-seven to thirty-three months or sixty-three to seventy-eight months (depending entirely on the timing of the first deportation). Unlawful reentry is the only federal crime for which criminal history is double counted like this. And once in prison, X will qualify for First Step Act programs that will let X spend up to one-third of their sentence out of custody or at a halfway house. Y, as a deported immigrant, cannot benefit from those programs.

As this example shows, these rules create two separate and unequal federal sentencing systems. Undocumented defendants, basically all of them Latin American, are treated more severely for their past crimes and are denied the lenient sentence reductions that U.S. citizens enjoy. And the enactment history of these policies reflects nativist animosity toward Latin American immigrants. The large recidivist enhancement for unlawful reentry was first created in 1991 with no study and little debate.[15] It was enacted in response to Congress increasing the maximum sentence from two to fifteen years. That statutory change, in turn, was driven by racial panic in Florida over Haitian and Cuban refugees causing a supposed crime wave.[16] The initial enhancement focused only on a small number of serious crimes, including murder and drug trafficking. But it evolved over time into a general enhancement for all past crimes. The First Step Act, in turn, was the first Trump Administration's signature criminal justice reform initiative. Since the Trump Administration has been the most anti-immigration presidency in

11. U.S. SENT'G GUIDELINES MANUAL § 4A1.1 (U.S. SENT'G COMM'N 2023) [hereinafter "GUIDELINES MANUAL"] (providing that each of the convictions receives three criminal history points, meaning both X and Y have six total points, which puts them in criminal history category ("CHC") III).

12. *Id.* § 2P1.1 (2023).

13. *Id.* § 2L1.2 (2023).

14. *Id.*

15. *See infra* Section I.B.

16. *See infra* Section I.A.

recent memory, it is not surprising that the law excludes deportable immigrants from its earned time credit system.[17]

These sentencing rules explicitly discriminate against immigrants, and their history reflects racist and nativist antipathies. It might thus be logical to look to the Equal Protection Clause for a remedy, or to the federal statute mandating that the Sentencing Guidelines be "entirely neutral" as to race and national origin.[18] But defendants trying to make such arguments have run into a problem—the Supreme Court's antidiscrimination doctrines erect numerous obstacles to such equality claims.[19] Federal laws that discriminate by immigration status are only subjected to "rational basis" review.[20] While these sentencing rules overwhelmingly burden Latin American defendants, the Supreme Court has disallowed racial discrimination claims that rely on disparate impact.[21] And the Court adopts a strong presumption that government action is not motivated by racial animus.[22]

But sentencing is not like judicial review. In the discretionary sentencing context, the judge is the legally designated decisionmaker. They are not reviewing the work of an agency or legislature. Federal judges are empowered to disregard the Guidelines and sentence a defendant anywhere within the statutory range.[23] The deference concerns that have hollowed out Equal Protection doctrine thus do not apply to discretionary sentencing decisions. In other contexts, scholars have identified circumstances in which executive branch agencies engage in "administrative constitutionalism"—incorporating constitutional norms into policy more robustly than formal legal doctrine requires.[24] Judges should also embrace a version of

17. *See infra* Section I.C.

18. 28 U.S.C. § 994(d).

19. *See, e.g.*, United States v. Osorto, 995 F.3d 801 (11th Cir. 2021) (rejecting an equal protection argument against the Guidelines' double counting of criminal history in unlawful reentry cases); cases cited *infra* note 370.

20. *See* Mathews v. Diaz, 426 U.S. 67 (1976).

21. *See* United States v. Armstrong, 517 U.S. 456 (1996); McCleskey v. Kemp, 481 U.S. 279 (1987); Washington v. Davis, 426 U.S. 229 (1976).

22. *See* Abbott v. Perez, 585 U.S. 579 (2018).

23. *See* United States v. Booker, 543 U.S. 220 (2005).

24. *See, e.g.*, Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603 (2019); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015); Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847 (2017); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163 (2017); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237 (2017); Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 168 U. PA. L. REV. 1783 (2019); Russell Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591 (2013).

administrative constitutionalism at sentencing. Here I call this "sentencing constitutionalism." Employing it, judges should reject sentencing rules that create racial and immigration-status-based hierarchies. And they should do so even if those rules would be upheld in the formal constitutional review context. Justice Kennedy gestured at something like this approach in *Beckles v. United States*.[25] In that case, the Supreme Court held that constitutional vagueness challenges do not apply to the Federal Sentencing Guidelines because they are advisory.[26] But Justice Kennedy wrote a concurrence arguing that quasi-constitutional vagueness arguments still have a place in the discretionary sentencing context.[27] Sentencing constitutionalism is also analogous to the idea of "imperfect" defenses in criminal cases. There are contexts in which a defendant cannot legally argue a defense like duress or self-defense, but the moral justification underlying that defense still clearly applies.[28] Judges will often reduce defendants' sentences due to such imperfect defenses.[29] Sentencing constitutionalism operates the same way, but with constitutional equality claims in place of defenses.

Federal crack cocaine sentencing provides a powerful example of sentencing constitutionalism in practice, as well as a close analogue to the sentencing discrimination faced by immigrants. For sentencing purposes, the Guidelines initially treated one gram of crack cocaine the same as one hundred grams of powder cocaine.[30] This caused crack cocaine traffickers to be punished much more harshly than powder cocaine traffickers for the same volume of basically equivalent drugs. And this had a clear disparate impact by race because crack cocaine defendants were almost entirely African American.[31] Much like the policy of double-counting immigrants' criminal history, these crack sentencing rules were designed without formal deliberation or policy analysis,[32] and were made in response to a congressional statute enacted during a racialized moral panic over crime.[33] The crack sentencing guidelines were ultimately upheld in direct

25. Beckles v. United States, 580 U.S. 256 (2017).

26. *Id.* at 265.

27. *Id.* at 270–71 (Kennedy, J., concurring).

28. *See, e.g.*, GUIDELINES MANUAL, *supra* note 11, at § 5K2.12 (2023) (addressing imperfect defense departures); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 188–91 (2016).

29. Hessick & Berman, *supra* note 28, at 191.

30. *See* GUIDELINES MANUAL, *supra* note 11, at § 2D1.1(c); Kimbrough v. United States, 552 U.S. 85, 96–97 (2007).

31. U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 156, 161 (1995); DEBORAH VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: 20 YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i (2006).

32. *See Kimbrough*, 552 U.S. at 109–10.

33. *See* DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 104–19 (2007).

constitutional challenges.[34] But many federal judges have exercised their authority to disregard the crack guidelines and adopt less discriminatory sentencing practices.[35] In doing so, these judges have adhered to a higher standard of antidiscrimination than formal doctrine requires. Judges should act similarly in the immigrant sentencing context. They should refuse to impose the discriminatory rules built into the Guidelines, and they should counteract the discrimination built into the First Step Act's sentence reductions.[36]

This Article has two goals: to describe how federal sentencing law discriminates against undocumented immigrants, and to propose a framework for judges to counteract that discrimination. It is organized into four Parts. Part I traces the history of federal immigrant sentencing over the last several decades, exploring how and why these unequal rules were adopted. Part II shows that these sentencing rules discriminate explicitly by immigration status, and in effect by race. Part III explains how the Guidelines' double-enhancements for criminal history create a sentencing system where arbitrary details of a defendant's criminal record dictate large (often multi-year) increases in their sentence. It also illustrates the problem with a real-life case. Part IV introduces the concept of sentencing constitutionalism. It argues that judges should exercise their inherent power over discretionary sentencing to counteract punishment rules that discriminate by race and immigration status. It also shows that federal judges have been doing precisely this in the context of crack cocaine sentences—varying downward to mitigate racial discrimination that has gone unredressed in formal legal challenges.

## I. THE EVOLUTION OF UNDOCUMENTED IMMIGRANT SENTENCING

This Part explores how federal law crafted a separate sentencing system for undocumented immigrant defendants. It focuses on three key changes. First, in the late 1980s and early 1990s, three members of Congress from

34. *See, e.g.*, United States v. Clary, 34 F.3d 709 (8th Cir. 1994); United States v. Singleterry, 29 F.3d 733 (1st Cir. 1994); United States v. Byse, 28 F.3d 1165 (11th Cir. 1994); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303–06 (1995) (collecting cases).

35. *See* U.S. SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 18 n.140 (2006) (collecting cases where judges varied from the crack cocaine guidelines); U.S. SENT'G COMM'N, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard [https://archive.ph/qjcmT] (showing that more than half of crack cocaine sentences are downward variances from the guidelines range).

36. Indeed, a few judges have done this. *See, e.g.*, United States v. Zapata-Trevino, 378 F. Supp. 2d 1321 (D.N.M. 2005) (sentencing a reentry defendant below the Guidelines range to offset the discriminatory effects of double counting criminal history and exclusion from in-custody programming); United States v. Santos, 406 F. Supp. 2d 320 (S.D.N.Y. 2005) (same).

Florida—Lawton Chiles, Bob Graham, and Bill McCollum—successfully pushed to increase the maximum penalty for unlawful reentry from two to twenty years.[37] These legislators justified the increase by arguing that immigrants were causing a crime wave. They did so in reaction to a nativist panic in Florida over Cuban and Haitian immigration. Second, in response to this increase in the maximum penalty, the United States Sentencing Commission amended the unlawful reentry guidelines in 1991 to provide double sentence enhancements for prior convictions.[38] Those guidelines have changed significantly in the intervening years, most notably in 2001 and 2016. But they still punish unlawful reentry defendants more severely for past convictions than other federal defendants. Third, in 2018 Congress enacted the First Step Act with support from the Trump Administration.[39] Among other things, that law created a system of earned time credits that let federal prisoners reduce their custody time by up to a third. But, due to the Trump Administration's antipathy toward Latin American immigrants, prisoners with deportation orders were excluded from earning such credits.

### A. FLORIDA'S REFUGEE CRISIS AND REENTRY SENTENCES

Congress originally criminalized unlawful reentry in 1929, as part of the "Undesirable Aliens Act."[40] The legislators who enacted it believed in scientific racism, and their goal was to limit immigration from Latin America in order to preserve the purity of the white race.[41] The law established, among other things, that any noncitizen convicted of reentering the United States after deportation would face up to two years in prison.[42] That unlawful reentry provision is now codified at 8 U.S.C. § 1326.

The sentences for unlawful reentry remained unchanged from 1929 until the late 1980s, when three members of Congress from Florida—Senator Lawton Chiles, Senator Bob Graham, and Representative Bill McCollum—

37. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a)(2), 102 Stat. 4181, 4471 (codified at 8 U.S.C. § 1326(b)(1) (1988)); Immigration Act of 1990, Pub. L. No. 101-649, § 543(b)(3), 104 Stat. 5059 (codified at 8 U.S.C. § 1326(b)(1) (1990)).

38. GUIDELINES MANUAL, *supra* note 11, at app. C, amend. 375 (1991).

39. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified at 18 U.S.C. § 3632(d)(4)).

40. An "act making it [a] felony with penalty for certain aliens to enter [the] United States [of America] under certain conditions in violation of law," S.5094, 70th Cong. (1929) (enacted).

41. On the racist enactment history of the Undesirable Aliens Act, see, e.g., Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051 (2022); KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES 1771–1965 (2017); BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA (2018); CÉSAR CUAHTÉMOC GARCÍA HERNÁNDEZ, WELCOME THE WRETCHED 44–71 (2024).

42. In a separate provision, the law also criminalized unlawful entry without a prior deportation as a misdemeanor with a six-month maximum penalty. That provision is codified at 8 U.S.C. § 1325.

sponsored a series of amendments that made the law harsher. To understand these legislators' focus on punishing unlawful reentry more severely, one must appreciate Florida's immigration politics in the 1980s and early 1990s.[43] During that period, large influxes of refugees from Cuba and Haiti sparked a racial panic.[44] In 1980, the Mariel boatlift brought nearly 125,000 Cubans and Haitians to Florida.[45] Thousands more Haitians arrived in Florida as refugees from the Duvalier regime, and later from the military government that overthrew President Aristide in a coup.[46] The presence of these immigrants caused a racist and nativist backlash among Floridians. The refugees were seen as carrying infectious diseases and creating a public health crisis.[47] They were also viewed as committing widespread crime.[48] Especially salient in Floridians' minds was the specter of Latin American and Caribbean drug trafficking networks.[49] Florida's politicians (including Chiles, Graham, and McCollum) stoked these nativist fears and responded to them with anti-immigrant measures.[50] The federal government incarcerated thousands of Cuban and Haitian immigrants in detention centers and jails.[51] And Florida's representatives in Congress sought, among other things, to increase the penalties for unlawful reentry.

The maximum sentence for unlawful reentry stayed at two years until 1988, when Senator Lawton Chiles proposed an amendment to increase it.[52] Chiles's amendment, which was attached to the Anti-Drug Abuse Act of 1988, increased the maximum penalty to five years for any defendant who was deported after a felony conviction.[53] It also increased the maximum to

43. *See* Aff. of Dr. S. Deborah Kang, United States v. Munoz-De La O, No. 20-cr-134-RMP, ECF No. 78–2, 24–54 (E.D. Wash., Dec. 22, 2021) [hereinafter Kang Affidavit]; Br. of Prof. S. Deborah Kang as Amicus Curiae in Supp. of Defs-Appellants, United States v. Ferretiz-Hernandez, No. 21-cr-00063 (11th Cir., Oct. 26, 2023).

44. *See* CARL LINDSKOOG, DETAIN AND PUNISH: HAITIAN REFUGEES AND THE RISE OF THE WORLD'S LARGEST IMMIGRATION DETENTION SYSTEM (2018); Alexander Stephens, *Making Migrants "Criminal": The Mariel Boatlift, Miami, and U.S. Immigration Policy in the 1980s*, 17 ANTHURIUM 4 (2021); Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582–94 (1998); Evelyn Cartright, *The Plight of Haitian Refugees in South Florida*, 12 J. OF HAITIAN STUD. 112 (2006).

45. Stephens, *supra* note 44, at 1; Simon, *supra* note 44, at 579.

46. Cartright, *supra* note 44, at 112–14.

47. LINDSKOOG, *supra* note 44, at 16–17, 53–54; Kang Affidavit, *supra* note 43, at 32–33, 64.

48. Jillian Jacklin, *The Cuban Refugee Criminal: Media Reporting and the Production of a Popular Image*, 11 INT'L J. CUBAN STUD. 61 (2019); LINDSKOOG, *supra* note 44, at 53, 81, 131–37; Stephens, *supra* note 44, at 1–5.

49. Stephens, *supra* note 44, at 10; Jacklin, *supra* note 48, at 66.

50. *See* Kang Affidavit, *supra* note 43, at 24–90; Stephens, *supra* note 44 at 11–13; LINDSKOOG, *supra* note 44, at 53–54.

51. *See* Simon, *supra* note 44, at 582–90; Stephens, *supra* note 44 at 4–13.

52. *See* Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 96–97 (2012).

53. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a)(2), 102 Stat. 4181, 4471

fifteen years for any defendant deported after an "aggravated felony" conviction (Senator Chiles's original proposal was for a fifteen-year *mandatory minimum* sentence, but this was changed to an increased maximum in the final statute).[54] The term "aggravated felony" was introduced in the same legislation, as a way to designate crimes that will almost certainly result in deportation.[55] The term initially only applied to a small list of crimes—murder, drug trafficking, and firearms trafficking—but it was later expanded.[56] Along with the increase in reentry penalties, Chiles introduced a number of other amendments to make immigration enforcement more punitive. These included a provision increasing the penalties for immigrant smuggling, a provision making it a crime not to appear at deportation proceedings, and a provision denying bond in the immigration system for people with aggravated felony convictions.[57]

In arguing for his amendments, Senator Chiles explicitly connected them to Florida's panic over immigrant crime. In the committee hearing that he chaired presenting the proposals, he asserted in his opening statement that "an expansive drug syndicate established and managed by illegal aliens" was "so widespread and lucrative that they are attracting other aliens just to come into the illegal enterprise."[58] He also claimed that "one of the largest and most widespread crack operations is run by illegal Haitians."[59] Chiles elicited testimony from several Florida law enforcement witnesses, who testified that Haitian immigrants play a major role in the Florida drug trade, and that it is difficult to prosecute such immigrants due to them skipping bond or leaving the United States.[60] For example, one witness, an undocumented Haitian immigrant who was a police informant in Orlando, testified: "Many Haitians are brought into the United States illegally for the

(codified at 8 U.S.C. § 1326(b)(1) (1988)).

54. *Id.*; *see* 133 CONG. REC. S8772 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles) ("any deported alien (aggravated felon) who reenters: mandatory 15 years"). *See also* Letter from H. Allen Moye, Assistant U.S. Attorney, to Ray Rukstele, First Assistant U.S. Attorney, Northern District of Georgia re Sentencing Guidelines: Re-Entry After Deportation of Aggravated Felons, Title 8, U.S.C. § 1326 Sept. 27, 1990 (on file with author) ("Unfortunately, during the House Sub-Committee hearings on this legislation, the minimum mandatory provision of this section was deleted from the original language.").

55. Anti-Drug Abuse Act § 7342, 102 Stat. at 4469–70 (codified at 8 U.S.C. § 1101(a)(43) (Nov. 18, 1988)); *See* AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW (Mar. 2021).

56. *See* Keller, *supra* note 52, at 110; 8 U.S.C. § 1101(a)(43) (current list of aggravated felonies).

57. 133 CONG. REC. S8772 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles).

58. *Illegal Alien Felons: A Federal Responsibility: Hearing Before the S. Subcomm. on Fed. Spending, Budget, and Acct. of the Comm. on Governmental Affs.*, 100th Cong. 1–2 (1987) (statement of Sen. Chiles).

59. *Id.* at 2.

60. *Id.* at 3–41.

sole purpose of dealing drugs and to recruit other Haitians for the drug business. These dealers are mixed with political refugees to hide their identity."[61]

In Chiles's speech introducing his proposed amendments on the Senate floor, he stated that "the number of illegal aliens who deal in crack in the Orlando area has increased 300 percent in the last year," and that "these numbers are being duplicated throughout Florida."[62] He further warned that Florida was facing "expansive drug syndicates established and managed by illegal aliens."[63] He claimed that "these syndicates operate many of the drug networks—crack, cocaine, and heroin—in Florida and throughout the United States."[64] And also that "illegal alien felons . . . have no fear of or respect for our legal system."[65] Chiles's claims about the scope of immigrant drug activity were exaggerated and implausible.[66] Nonetheless, they were the major motivation behind his successful effort to increase reentry penalties. Chiles said the goals of the law were "creating a greater deterrent to alien drug traffickers who are considering illegal entry into the United States" and to "give law enforcement authorities a broader arena for prosecuting the drug offender."[67]

Several other legislative changes sponsored by Florida congressmen in the early 1990s also made § 1326 more punitive. In 1994, Representative McCollum successfully advocated an additional hike in the maximum sentences for unlawful reentry.[68] His amendment increased the maximum penalty to ten years for a defendant deported after a felony conviction, and to twenty years for a defendant deported after an aggravated felony conviction.[69] In addition, Representative McCollum and Senator Graham successfully sponsored several amendments that expanded the definition of "aggravated felony" to include a significantly longer list of crimes, many of them less serious.[70] Senator Graham also co-sponsored a provision that

61. *Id.* at 13.
62. 133 CONG. REC. S8771 (daily ed. Apr. 9, 1987) (statement of Sen. Chiles).
63. *Id.*
64. *Id.*
65. *Id.*
66. *See* Kang Affidavit, *supra* note 43, at 46–48; *Implementation of Immigration Reform: Hearing Before the Subcomm. on Immigr. and Refugee Affs. of the Comm. on the Judiciary*, 100th Cong. 32–50 (1988).
67. 133 CONG. REC. at S8772.
68. *See* 139 CONG. REC. E749–50 (Mar. 24, 1993) (remarks of Rep. McCollum proposing increase in maximum penalties); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 1796, at 2023 (1994) (enacting Rep. McCollum's proposal).
69. These are still the maximum penalties today. *See* 8 U.S.C. § 1326.
70. *See* 139 CONG. REC. E749–50 (Mar. 24, 1993) (remarks of Rep. McCollum proposing to expand the definition of aggravated felony); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-21 (1994) (enacting Rep. McCollum's

would have required the U.S. Sentencing Commission to increase unlawful reentry sentences for people deported after aggravated felony convictions.[71] The proposal called on the Commission to "assign[] an offense level . . . that constitutes a meaningful deterrence to the commission of such offense."[72] Graham added this provision to Senate Bill 1711, titled "Implementing the President's 1989 National Drug Control Strategy," which passed in the Senate but did not ultimately become law.[73] A prosecutor testifying before a congressional subcommittee later described Graham's proposal as "a 'sense of the Congress' recommendation to the Federal Sentencing Commission that would upgrade the penalty for an aggravated criminal felon who after conviction returns to the United States."[74] Like Senator Chiles, Senator Graham and Representative McCollum were both focused on indulging Florida's anti-refugee backlash.[75] They made unlawful reentry punishments harsher in response to the perceived immigrant crime wave in their home state. As the next Section will show, these three politicians' efforts had enormous consequences for unlawful reentry sentencing.

### B. WRITING AND REWRITING THE REENTRY GUIDELINES

In 1984, Congress enacted the Sentencing Reform Act and created the United States Sentencing Commission.[76] Three years later, the Commission published the first version of the United States Sentencing Guidelines.[77] The main purpose of these new Guidelines was to reduce sentencing disparities between judges.[78] They created a complex formula that takes facts about the defendant's crime and past convictions as inputs, quantifies them into points,

proposal); 136 Cong. Rec. S17117-18 (Oct. 26, 1990) (remarks of Sen. Graham proposing to expand the definition of aggravated felony); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (Nov. 29, 1990) (enacting Sen. Graham's proposal); *see also* Kang Affidavit, *supra* note 43, at 50–54, 74–80.

71. 135 CONG. REC. S23608 (daily ed. Oct. 5, 1989).

72. *Id.*

73. Implementing the President's 1989 National Drug Control Strategy, S. 1711, 101st Cong (1989–1990).

74. *Criminal Aliens: Hearing Before the Subcomm. on Immigr., Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong. 1, 120 (1989) (statement of John Fried, Chief of the Trial Division, Manhattan District Attorney's Office).

75. *See* Stephens, *supra* note 44; Kang Affidavit, *supra* note 43 at 24–54.

76. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

77. GUIDELINES MANUAL, *supra* note 11 (1987).

78. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–6 (1988); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–36 (1993); Eric Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 561–62 (2015).

and produces a sentencing range that judges were (until 2005) required to follow.[79]

The Guidelines' sentencing ranges are arrayed on a two-dimensional six by forty-three cell grid called the "Sentencing Table."[80] The Sentencing Table's Y-axis ranges from one to forty-three, and a defendant's level is determined by facts about the current crime. Each crime is given a "base offense level" of a certain number of points, for example eight points for unlawful entry and thirteen points for escaping from prison.[81] Additional points are then added (or subtracted) for "specific offense characteristics," which are facts particular to the defendant's crime. If someone escaping from prison uses or threatens to use force, for example, they get five additional points.[82] The Sentencing Table's X-axis provides the defendant's "criminal history category," which ranges from category I to category VI. Where a defendant lands on this dimension is determined by the number, severity, and recency of their past convictions.[83] The Guidelines thus take facts about the defendant's current case and facts about their criminal history, plug those facts into two distinct formulas, and map the resulting numbers onto a two-dimensional grid to produce a sentence range.[84]

When the Guidelines were first promulgated in 1987, a defendant convicted of unlawful reentry received a base offense level of six.[85] If the defendant had previously "unlawfully entered or remained in the United States," they received two additional points as a specific offense characteristic.[86] The maximum offense level for unlawful reentry was thus eight. With eight offense level points, the sentence range varied from zero to six months (for those in criminal history category I) to eighteen to twenty-four months (for those in criminal history category VI).[87] According to the Sentencing Commission, this initial version of the reentry guideline was designed to reflect then-existing sentencing norms for immigration cases.[88]

79. *See* Stith & Koh, *supra* note 78, at 269–70.

80. *See infra* Appendix.

81. GUIDELINES MANUAL, *supra* note 11, at § 2P1.1(a)(1) (2023); *id.* at § 2L1.2(a).

82. *Id.* at § 2P1.1(b)(1).

83. *Id.* at § 4A1.1.

84. *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1144–45 (2010).

85. GUIDELINES MANUAL, *supra* note 11, at § 2L1.2 (1987).

86. *Id.*

87. *See infra* Appendix. For those with just 6 points (meaning no 2-point enhancement), the range went from 0–6 months in CHC I to 12–18 months in CHC VI.

88. The Commission conducted an empirical study showing that in 1987, defendants convicted of immigration crimes (including but not limited to unlawful reentry) served an average of 5.7 months in custody. U.S. SENT'G COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 69 (1987). The Commission estimated that prior to the Guidelines, unlawful reentry defendants were sentenced as though they had 7 offense level points. *Id.* at 34. A later analysis by

A year later, in 1988, the Commission wrote a new version of this guideline that simply had a base offense level of eight, with no specific offense characteristics.[89]

In 1989, the reentry guideline was amended to double-count defendants' criminal history. The Commission added a four-point enhancement applying to any defendant who "previously was deported after sustaining a conviction for a felony."[90] This was the first time that the Commission created a specific offense enhancement for simply having a past conviction.[91] This enhancement applied regardless of the prior conviction's age—a felony from fifty years ago would still trigger the four-point enhancement.[92] By contrast, the Guidelines' standard criminal history score formula stops counting convictions after ten or fifteen years (depending on the prior sentence length).[93]

The Commission enacted this enhancement without conducting any studies or hearings, and without providing any apparent explanation for the change.[94] The Commission's commentary only notes that "this specific offense characteristic is in addition to, and not in lieu of, criminal history points added for the prior sentence."[95] The enhancement closely tracks the language in Senator Chiles's 1988 amendment to § 1326, which increased the maximum penalty to five years for any defendant "whose deportation was subsequent to a conviction for commission of a felony."[96] The

the Commission concluded that the original immigration guidelines "did not deviate substantially from past practice." U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING 65 (2004). *See also* Breyer, *supra* note 78, at 17–18 (explaining the Commission's decision to use past practice to inform the initial Guidelines); Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 729–30 (2010) (describing the creation of the initial reentry guideline).

89. GUIDELINES MANUAL, *supra* note 11, at § 2L1.2 (1988).

90. GUIDELINES MANUAL, *supra* note 11, at § 2L1.2(b)(1) (1989). The enhancement excluded any felony "involving violation of the immigration laws."

91. Keller, *supra* note 89, at 730. The Commission did also create a two-level enhancement in the immigrant smuggling guideline for people who had committed the same crime previously, but this enhancement was limited to defendants who had committed the exact same crime previously. GUIDELINES MANUAL, *supra* note 11, at § 2L1.1(a)(2) (1989).

92. *See* GUIDELINES MANUAL, *supra* note 11, at § 2L1.1(a)(2) (1989); *see also* United States v. Olmos-Esparza, 484 F.3d 1111, 1116 (9th Cir. 2007).

93. GUIDELINES MANUAL, *supra* note 11, at § 4A1.1 (1989). For criminal history score, the Guidelines count convictions with sentences that were imposed within the last ten years, unless the sentence was more than one year and one month. Convictions with a sentence over one year and one month count if the defendant was incarcerated within the last fifteen years. *Id.*

94. There is some very basic enactment history in the minutes for a meeting of the Commission in April 1989. These contain the following entry: "Motion made by Commissioner Breyer to adopt staff proposal of (4) level increase, amended to include departure for violent felony; seconded by Commissioner Nagel. Passed unanimously." U.S. SENT'G COMM'N, MINUTES OF APRIL 18 & 19, 1989 COMMISSION BUSINESS MEETING, at 4; *see also* Keller, *supra* note 89, at 730–31.

95. GUIDELINES MANUAL, *supra* note 11, at app. C at C.111 (1989) (describing amendment 193).

96. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a)(2), 102 Stat. 4181, 4471.

Guidelines' commentary also mentions aggravated felonies, and suggests that "an upward departure may be warranted" in cases involving "a defendant previously deported after sustaining a conviction for an aggravated felony."[97] The four-point enhancement in the 1989 Guidelines Manual is thus properly seen as a response to Senator Chiles's amendment increasing the maximum sentences for defendants with prior felonies and aggravated felonies.[98]

In 1991, the Commission added a much larger sixteen-point enhancement for any defendant who "previously was deported after a conviction for an aggravated felony."[99] This was a very punitive change. For a reentry defendant in criminal history category I, it brought the sentencing range from zero to six months to fifty-one to sixty-three months.[100] For a defendant in category VI, it created a range of one hundred to one hundred twenty-five months. With this new enhancement, a single prior felony conviction for drug trafficking (or any other aggravated felony) would add multiple years to a defendant's reentry sentence. This amendment was adopted a little over a year after Senator Graham's proposal to mandate that the Commission increase penalties for reentry after an aggravated felony.[101] While the Commission's records do not reference Graham's amendment, it was likely a motivating factor.[102]

The Commission conducted hearings in 1991 on various proposed Guidelines amendments, including the enhancement for a prior aggravated felony.[103] At those hearings, a federal prosecutor named Joe Brown testified on behalf of the Department of Justice.[104] Brown recommended that the Commission adopt a twenty-point enhancement for defendants deported after committing an aggravated felony.[105] He connected this proposed enhancement to Senator Chiles's amendment, noting that "[a]n increased penalty of this magnitude—two years to [fifteen] years—and limited to particularly defined offenses must, in our view, be reflected in the sentencing

97. GUIDELINES MANUAL, *supra* note 11, at § 2L1.2 cmt. 3 (1989).

98. *See id.* at § I.A.

99. GUIDELINES MANUAL, *supra* note 11, at § 2L1.2(b)(2) (1991).

100. *See infra* Appendix (moving from 8 points to 24 points). For a defendant in criminal history category VI, the enhancement would take them from 18 to 24 months to 100 to 125 months.

101. 135 CONG. REC. S23608 (daily ed. Oct. 5, 1989).

102. *Cf.* Implementing the President's 1989 National Drug Control Strategy, S. 1711, 101st Cong. (1989) (prosecutor testifying before a congressional committee that Sen. Graham's proposal reflected the views of Congress).

103. U.S. SENT'G COMM'N, Transcript of Public Hearing on Proposed Amendments to the Sentencing Guidelines at 31–32 (Mar. 5, 1991) [hereinafter Public Hearing].

104. Joe B. Brown, U.S. Attorney, Middle District of Tennessee, Statement before the United States Sentencing Commission Concerning Proposed Sentencing Guidelines Amendments (Mar. 5, 1991). Mr. Brown was the chairman of the Attorney General's Subcommittee on Sentencing Guidelines.

105. *Id.* at 7–8.

guidelines if the will of Congress is to be effectuated."[106] Brown also emphasized the need to deter immigrant drug dealers, claiming that "[i]n the ordinary case, an alien drug dealer who illegally returns to the United States to practice his trade will continue this pattern of conduct until there is a substantial disincentive to do so."[107] Brown was the only witness to discuss this enhancement at the hearings.[108] His analysis of it was perfunctory, taking up only two pages of the 171-page hearing transcript. By way of comparison, the Commission was simultaneously considering proposals for its corporate crime guidelines.[109] For those it held a public hearing with fourteen witnesses (including a former attorney general and two assistant attorneys general) that generated a 267-page transcript.[110]

The Commission conducted no policy analysis to justify the "aggravated felony" enhancement to the reentry guideline.[111] The Commission's own staff declined to endorse the enhancement due to a lack of data.[112] No defense lawyers testified at the public hearing on the merits of the aggravated felony enhancement.[113] Numerous federal prosecutors and law enforcement agents wrote to the Commission urging it to increase the penalties for reentry, with many of them citing Chiles's law as a justification.[114] The Sentencing Commission also interviewed practitioners

106. *Id.* at 8.

107. *Id.*

108. Public Hearing, *supra* note 103, at 31–32. There were nine witnesses total at the hearing, but only Brown discussed the aggravated felony enhancement to § 2L1.2.

109. U.S. SENT'G COMM'N, Transcript of Public Hearing on Sentencing Guidelines for Organizational Defendants (Dec. 13, 1990).

110. *Id.*

111. *See* Keller, *supra* note 88, at 734–35; Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felony Re-Entry Cases*, 8 FED. SENT. REP. 275, 276 (1996); Russell, *supra* note 84, at 1185–86*; see also* Public Hearing Before the U.S. Sentencing Commission 30 (Mar. 13, 2008) (testimony of Maureen Franco) ("No empirical study or policy analysis was conducted to justify the 16-level enhancement.").

112. The staff wrote an internal memo looking at seventy-two prior illegal reentry cases in order to gauge the impact of an enhancement for a prior aggravated felony. Memorandum from Carl Ricca & Tracy Leeber, Re: Proposed Amendments to the Immigration Guidelines, at 4 (Mar. 18, 1991). Based on this memo, the senior Commission staff declined to endorse the enhancement due to a lack of good data. Memorandum from John Steer et al., Re: Senior Staff Review of Amendment No. 23 (Mar. 25, 1991) ("In reviewing the attached report of the Immigration Working Group, staff note that the Working Group found only one case involving an aggravated felony. Because of the paucity of case experience and the potentially wide variation in seriousness of prior, aggravated felony convictions, there is not a consensus among senior staff that the proposed amendments . . . are warranted at this time.").

113. Public Hearing, *supra* note 103 (containing testimony from three defense lawyers, none of whom discuss the aggravated felony enhancement).

114. *See, e.g.*, Wayne A. Budd, U.S. Att'y, Mass., Comments on the Sentencing Guidelines (Sept. 1990) (urging a higher base offense level for illegal entry and reentry); Paul Maloney, Deputy Assistant Att'y Gen., Letter to Sentencing Commission, at 5–6 (Sept. 14, 1990) ("[W]e urge that Congress' 10 year increase in the maximum sentence be recognized by a concomitant increase in the guidelines . . . by 20 levels for all prior 'aggravated felony' violations."); Bart Szafnicki, Senior Special Agent, U.S. Immigration &Naturalization Serv., Letter to Sentencing Commission (Feb. 6, 1991) (calling for a

in California and Texas, including INS agents, prosecutors, defense lawyers, and judges, who provided different perspectives on whether illegal reentry should be punished more harshly.[115] Ultimately, aside from referencing Mr. Brown's testimony, the Commission did not explain or justify the aggravated felony enhancement when it was adopted. The Commission enacted Mr. Brown's proposal, but with sixteen points rather than twenty.[116]

These enhancements made the federal justice system much harsher for undocumented immigrants. They caused the average time in prison for unlawful reentry to more than double from 1991 to 2000, going from fifteen months to over thirty.[117] The enhancements also helped the government bring many more reentry prosecutions. In 1991 only around 2,000 reentry cases were prosecuted in the federal courts, but by the year 2000 there were nearly 10,000 cases.[118] The prior conviction enhancements facilitated this increase by giving federal prosecutors much more punishment leverage to compel plea bargains. And the federal prosecutors who lobbied the Commission for higher reentry guidelines in 1991 were keenly aware that higher guidelines meant more and faster guilty pleas.[119] The increased reentry punishments empowered prosecutors to create a fast-paced plea system called "Fast Track."[120] Under the Fast Track program, reentry

"minimum 16 to 20 level increase" in offense level for aggravated felons based in part on Chiles's amendment); Letter from H. Allen Moye, Assistant U.S. Att'y, Ga. (Sept. 7, 1990) (advocating increased penalties for aggravated felons based on Congress's intent); Letter from Dexter Lehtinen, U.S. Att'y, S.D. Fla. (Dec. 3, 1990) (arguing for a 4-level increase for aggravated felons in order to combat Colombian, Haitian, and Jamaican drug traffickers); Letter from Katherine Armentrout, Assistant U.S. Att'y, Md. (Dec. 6, 1990) (advocating an increase so that drug dealing immigrants are punished more harshly).

115. In these interviews the prosecutors and agents advocated longer sentences, while the defense lawyers argued that longer sentences would be arbitrary and wouldn't deter defendants. *See* U. S. Sent'g Comm'n, Commissioner Outreach: Immigration Offenses Texas (1990) (on file with author) (interviews with prosecutors, defense lawyers, probation officers, and other practitioners in Texas); Memorandum from Carl Ricca & Tracy Leeber, Re: Proposed Amendments to the Immigration Guidelines, at 6–7 (Mar. 18, 1991) (on file with author) (summarizing comments of prosecutors, defense lawyers, agents, and judges in San Diego and Los Angeles).

116. U.S. SENT'G COMM'N, MINUTES OF THE APRIL 2, 1991, BUSINESS MEETING, at 2–3 (noting passage of the amendment and also incorporating a memorandum from Brown into the record); GUIDELINES MANUAL, *supra* note 11, at app. C at 200, amend. 375 (1991) (describing the new enhancement without providing any explanation for it).

117. FIFTEEN YEARS OF GUIDELINE SENTENCING, *supra* note 88, at 64–65.

118. *Id.* at 61.

119. *See, e.g.*, Letter from Peter N. Nunez, U.S. Att'y, S.D. Cal., to William Weld, Assistant Att'y Gen., Re: Application of Sentencing Guidelines to Immigration Prosecution (Nov. 3, 1987) (arguing that the DOJ should lobby for higher guidelines in immigrant smuggling cases, because higher guidelines would facilitate a fast-paced "flip flop" guilty plea program, while the incentive to plead guilty quickly would be "considerably weakened" if the guidelines sentences were low).

120. *See* Amy Kimpel, *Alienating Criminal Procedure*, 37 GEO. IMMIGR. L.J. 237, 253–59 (2023); Keller, *supra* note 52, at 107–10; Alan Bersin & Judith Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 300–03 (1997).

defendants who qualified for an enhancement were offered a deal for a charge with a two-year maximum sentence.[121] This deal required them to plead guilty at their first court appearance, waive the right to appeal, and agree to a specific sentence followed by immediate deportation.[122] The stipulated sentence was usually two years, but prosecutors sometimes required sentences of two-and-a-half or four years.[123] If a defendant rejected this deal and had a prior felony or aggravated felony, then they faced a higher sentence under the mandatory Guidelines.[124] Fast Track thus used punishment leverage provided by the prior conviction enhancements to create a hyper-efficient plea process. The program was started in San Diego, but it spread to other border districts and allowed the massive growth of reentry prosecutions throughout the 1990s.[125]

The Commission changed the reentry guideline in 2001 to create a more graduated system of prior conviction enhancements.[126] This change was motivated by concern over the proliferation of aggravated felonies. Congress repeatedly expanded the definition of "aggravated felony" over the course of the 1990s.[127] This caused a much larger number of crimes to trigger the sixteen-level enhancement. Initially, the enhancement had been narrowly focused on immigrants who committed murder, drug trafficking, and weapons trafficking.[128] But by 2001 the term "aggravated felony" applied to dozens of crimes, including fraud, forgery, burglary, immigrant smuggling,

121. Bersin & Feigin, *supra* note 120, at 300.

122. *Id.* ("The conditions for the reduced sentence were that the defendant (1) waive indictment; (2) forego motions; (3) waive a presentence report; (4) stipulate to a particular sentence (usually 24 months); (5) submit to immediate sentencing; (6) waive all sentencing appeals; (7) consent to the entry of an order, issued by an Immigration Judge or officer, removing defendant from the United States upon conclusion of his or her prison term; and (8) waive all appeals of the removal order.").

123. *Id.*; *see also* Jane McClellan & Jon Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 523 (2006).

124. *See* McWhirter & Sands, *supra* note 111, at 276–77.

125. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1321–25 (2010) (showing how fast track dramatically increased the number and rapidity of § 1326 prosecutions); Bersin & Feigin, *supra* note 120, at 302 ("In 1995, the office filed 1,334 criminal alien cases under section 1326 compared with only 240 the year before. In 1996, 1,297 felony re-entry matters were filed under section 1326 and 1,606 cases during 1997. The fast track system allowed this explosion in filings to be accomplished in this area of prosecutorial activity with limited staff increases and, for the most part, without diverting resources from other prosecutive priorities." (footnote omitted)).

126. *See* Keller, *supra* note 88, at 737–42; Russell, *supra* note 84, at 1185–86.

127. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 627–28 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (1996); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 1796, 2026–28 (1994); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320–22 (1994); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (Nov. 29, 1990); *see also* Keller, *supra* note 52, at 110.

128. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (codified at 8 U.S.C. § 1101(a)(43) (1988)).

failing to appear for a sentence, crimes designated as "crimes of violence," and many more.[129] The breadth of this list, combined with the severity of the sixteen-level enhancement, created some palpably unjust case outcomes. Defendants were regularly given much more severe sentences for reentry than they got for the original aggravated felony.[130] And a prior murder triggered the same sixteen-level enhancement as a prior forgery.

Federal judges and defense attorneys criticized the Guidelines for producing such harsh sentences.[131] Judges also departed downward in about forty percent of cases, which the Commission characterized as judges "addressing this problem on an ad hoc basis."[132] The Commission rewrote the reentry guideline in 2001 in order to address these criticisms, and also to reduce the number of downward departures.[133] It created a tiered system of enhancements based on conviction type. Under the new guideline, different types of convictions would trigger enhancements of sixteen, twelve, eight, or four levels.[134] For example, the sixteen-level enhancement was limited to

129. 8 U.S.C.A. § 1101(43) (West, effective Dec. 21, 2000 to Jan. 15, 2002). The list of aggravated felonies consists of twenty one lettered categories, many of which enumerate multiple subcategories.

130. *See* Keller, *supra* note 88, at 720–21, 762.

131. *See* Linda Drazga Maxfield, *Aggravated Felonies and § 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 530 (2003) ("[T]he wide range of offenses falling within the aggravated felony definition prompted general judicial dissatisfaction, particularly among the southwest border districts. Complaints about the '+16' enhancement were summarized by judges in the Fifth Circuit at a meeting with U.S.S.C. Commissioners and staff in November 2000. A core belief emanated from the meetings: The definition of a 'prior aggravated felony' was too broad and captured many relatively minor offenses within guideline § 2L1.2's '+16' level enhancement." (footnotes omitted)); Russell, *supra* note 84, at 1188 n. 272.

132. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 72 (2003); GUIDELINES MANUAL supp. to app. C. amend. 632, at 218–19 (U.S. SENT'G COMM'N 2001).

133. GUIDELINES MANUAL supp. to app. C., amend. 632, at 218–19 (U.S. SENT'G COMM'N 2001). ("This amendment responds to concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border between the United States and Mexico, that § 2L1.2 . . . sometimes results in disproportionate penalties because of the 16-level enhancement provided in the guideline for a prior conviction for an aggravated felony. The disproportionate penalties result because the breadth of the definition of 'aggravated felony' provided in 8 U.S.C. § 1101(a)(43), which is incorporated into the guideline by reference, means that a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault."); REPORT TO THE CONGRESS, *supra* note 132, at B-25 ("The amendment of section 2L1.2 arguably is an example of the system working as Congress intended: application of a guideline was resulting in an increased use of departures that, in turn, signaled to the Commission that a potential problem existed and prompted a response by the Commission.").

134. GUIDELINES MANUAL, § 2L1.2(b)(1) (U.S. SENT'G COMM'N 2001) ("Apply the Greatest: If the defendant previously was deported, or unlawfully remained in the United States, after—(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels; (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels; (C) a conviction for an aggravated felony, increase by 8 levels; (D) a conviction for any other felony, increase by 4 levels; or (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses,

firearms offenses, drug trafficking, crimes of violence, immigrant smuggling offenses, and a few other enumerated crimes.[135] Less serious drug trafficking convictions (those with a sentence of thirteen months or less) triggered a twelve-level enhancement.[136] The remaining aggravated felonies resulted in only an eight-level enhancement.[137] And other felonies still caused a four-level enhancement.[138] The Commission also deleted an application note that permitted downward departures if an enhancement was based on a less-serious aggravated felony.[139]

While the 2001 amendment made the reentry guideline somewhat less harsh, it still produced clear injustices. Relatively minor nonviolent crimes, like immigrant smuggling or low-level drug trafficking, triggered large twelve- or sixteen-point enhancements. And there were still no time limits, so crimes from several decades ago would count for the enhancements. The federal defense bar criticized these features of the guideline in letters and testimony before the Commission.[140] And in 2005, the Supreme Court declared in *United States v. Booker* that the Sentencing Guidelines were no longer mandatory.[141] Federal judges could thus sentence defendants outside of the Guidelines range, through what became known as *Booker* variances. Judges took advantage of this new power to vary downward in illegal reentry cases in which the Guidelines were especially harsh.[142] In one notable case, for example, the Ninth Circuit reversed a within-Guidelines fifty-two-month

increase by 4 levels.").

135. *Id.* § 2L1.2(b)(1)(A).

136. *Id.* § 2L1.2(b)(1)(B).

137. *Id.* § 2L1.2(b)(1)(C).

138. *Id.* § 2L1.2(b)(1)(D).

139. GUIDELINES MANUAL § 2L1.2 cmt, n. 5 (U.S. SENT'G COMM'N 2000) ("Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.").

140. *See, e.g.*, Public Hearing Before the U.S. Sent'g Comm'n, San Diego, Cal., at 86–91,94–96 (Mar. 6, 2006) (testimony of federal defenders Reuben Cahn and Jon Sands); Public Hearing Before the U.S. Sent'g Comm'n, Washington, D.C., at 30 (Mar. 13, 2008) (testimony of federal defender Maureen Franco); Letter from Jon M. Sands, Fed. Pub. Def., Dist. of Arizona et al., to the U.S. Sent'g Comm'n, Comments on Proposed Amendments to the Sentencing Guidelines (Mar. 6, 2008); Letter from Jon M. Sands, Fed. Pub. Def., Dist. of Arizona, et al., to the U.S. Sent'g Comm'n, Comments on Proposed Amendments to the Sentencing Guidelines (Mar. 21, 2008).

141. United States v. Booker, 543 U.S. 220, 245 (2005).

142. *See, e.g.*, United States v. Salazar-Hernandez, 431 F. Supp. 2d 931, 933–934 (E.D. Wis. 2006); United States v. Carballo-Arguelles, 446 F. Supp. 2d 742 (E.D. Mich. 2006); United States v. Santos-Nuez, No. 05 Cr. 1232 (RWS), 2006 U.S. Dist. LEXIS 32493, at *17 (S.D.N.Y. May 22, 2006); United States v. Santos, 406 F. Supp. 2d 320, 328 (S.D.N.Y. 2005); United States v. Zapata-Trevino, 378 F. Supp. 2d 1321, 1327 (D.N.M. 2005); United States v. Perez-Nunez, 368 F. Supp. 2d 1265, 1269–70 (D.N.M. 2005); United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 963–64 (E.D. Wis. 2005); Russell, *supra* note 85, at 1187 n.270 (collecting cases).

sentence because it was based on a prior conviction from twenty-five years ago.[143] From 2012 to 2016, about twenty-five percent of twelve-level and thirty-five percent of sixteen-level enhancement cases received below-Guideline sentences.[144] The Commission characterized this as an unusually high rate.[145]

Federal judges and the Department of Justice also criticized the post-2001 reentry guideline for requiring use of the "categorical approach."[146] Under that version of the guideline, the key question was whether a defendant's prior conviction matched one of the enumerated crime categories triggering an enhancement. These categories included "crime of violence," "firearms offense," "drug trafficking offense," "aggravated felony," and more.[147] The categorical approach requires lawyers and judges to look at the statutory elements of a conviction, compare them to the generic federal version of the enumerated crime category, and determine whether the two match.[148] Many judges dislike the categorical approach because it raises difficult legal questions, creates additional litigation, and produces non-uniform results across different states.[149] And federal prosecutors repeatedly complained about the categorical approach at public hearings before the Commission, arguing that it produces arbitrary results and unnecessary litigation.[150]

143. United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055–56 (9th Cir. 2009).

144. *See* THE IMPACT OF THE 2016 GUIDELINE AMENDMENT, *supra* note 5, at 10 (showing that +12 enhancement cases got a downward departure or variance 25.8% of the time, and +16 enhancement got a downward departure or variance 36.2% of the time (excluding fast track and substantial assistance departures)).

145. GUIDELINES MANUAL supp. to app. C., at 158 (U.S. SENT'G COMM'N 2016) ("The Commission's data shows an unusually high rate of downward variances and departures from the guideline for such defendants.").

146. *Id.* at 155 ("[T]he Commission has received significant comment over several years from courts and stakeholders that the 'categorical approach' used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty.").

147. GUIDELINES MANUAL § 2L1.2(b)(1) (U.S. SENT'G COMM'N 2001).

148. *See* Taylor v. United States, 495 U.S. 575, 602 (1990).

149. *See, e.g.*, Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1796–97 n. 167–73 (2020) (collecting judicial complaints about the categorical approach); Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1434 n. 287 (2021) (same).

150. *See* Diane J. Humetewa, U.S. Att'y, Dist. of Ariz., Testimony Before the U.S. Sent'g Comm'n (Mar. 13, 2008), at 21 ("Reported court decisions are replete with examples in which the categorical analysis has led to counter-intuitive, if not capricious results in some cases, allowing bad actors to avoid appropriate punishment on seemingly technical grounds."); Johnny K. Sutton, U.S. Att'y, W. Dist. of Tex., Before the U.S. Sent'g Comm'n (Mar. 6, 2006), at 70 ("In addition, the categorical analysis has sparked a seemingly endless wave of litigation in the trial and appellate courts. Eliminating the need for this analysis would greatly reduce the workload for the participants in the sentencing process and improve the efficiency and reliability of sentencing determinations.").

In 2016, the Commission rewrote the reentry guideline to address these criticisms.[151] It made four major changes. First, the Commission keyed enhancements to the sentence imposed for the prior crime rather than the category of crime. This cut out the categorical approach. Under the new system, defendants receive the largest of a ten-, eight-, six-, or four-level enhancement depending on the length of the sentence imposed for a prior felony.[152] In designing these enhancements, the Commission tried to approximate the enhancements previously imposed under the 2001 Guidelines for various kinds of prior convictions.[153] Second, the Commission added a new, second enhancement for a felony committed after the first deportation.[154] Prior versions of the guideline had only enhanced reentry sentences for felonies committed before the defendant was deported. This reflected Senator Chiles's amendment, which only increased the maximum sentence for defendants whose removal was "subsequent to" a felony (or aggravated felony) conviction.[155] The Commission reasoned that it was arbitrary to enhance a sentence for pre-deportation crimes but not post-deportation crimes, so it added a second enhancement covering the latter.[156] Third, the Commission introduced time limits for the criminal history enhancements.[157] These time limits are the same as those for the normal criminal history score calculation—sentences of thirteen months or less count until ten years after imposition, and sentences of over thirteen months count until fifteen years after release from custody.[158] Fourth, the Commission added a new four-level enhancement for having been previously convicted of illegal reentry.[159]

This new version of the reentry guideline mirrors the Sentencing Guidelines' general criminal history calculation,[160] adding up to two

151. GUIDELINES MANUAL supp. to app. C., at 155 (U.S. SENT'G COMM'N 2016) ("In considering this amendment, the Commission was informed by . . . extensive public testimony and public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.").

152. GUIDELINES MANUAL § 2L1.2(b)(2).

153. GUIDELINES MANUAL supp. to app. C., at 155 (U.S. SENT'G COMM'N 2016) ("The Commission's data analysis of offenders' prior felony convictions showed that the more serious types of offenses, such as drug-trafficking offenses, crimes of violence, and sex offenses, tended to receive sentences of imprisonment of two years or more, while the less serious felony offenses, such as felony theft or drug possession, tended to receive much shorter sentences. The sentence-length benchmarks in (b)(2) are based on this data."); *see also* Humetewa, *supra* note 150, at 12 ("[I]n fact the Commission's data indicates that under Option 3 overall sentences would remain about the same.").

154. GUIDELINES MANUAL § 2L1.2(b)(3).

155. 8 U.S.C. § 1326(b).

156. GUIDELINES MANUAL supp. to app. C. at 155–57 (U.S. SENT'G COMM'N 2016).

157. GUIDELINES MANUAL § 2L1.2 cmt. n.5 (U.S. SENT'G COMM'N 2016).

158. *Id.* § 4A1.2(c).

159. *Id.* § 2L1.2(b)(1)(A).

160. *See* GUIDELINES MANUAL supp. to app. C., at 156 (U.S. SENT'G COMM'N 2016) (The new

additional (often much larger) prior conviction enhancements on top of it.[161] This means reentry defendants now have their criminal history counted against them twice in two separate formulas, both based on prior sentence length. Other federal defendants are subjected to only one formula. The 2016 changes significantly lowered the amount of sentencing litigation in reentry cases, because they ended the use of the categorical approach.[162] They also somewhat lowered the average reentry sentence.[163] But some defendants—namely those with a felony both before and after their first deportation—receive much higher sentences under the new guideline.[164] These changes did not seem to affect judges' overall rate of downward variance, which has remained around eleven percent.[165] That is, notably, the lowest variance rate for all major categories of federal crime.[166]

In sum, the reentry guideline has transformed repeatedly over three decades. The 1991 amendment reflected Senator Chiles's (and Florida's) panic over a purported wave of Haitian drug traffickers. It added sixteen levels for defendants deported after murder, drug trafficking, or weapons trafficking convictions. As Congress expanded the definition of "aggravated felony" over the 1990s to include a long list of crimes, the sixteen-level enhancement became obviously unjust in many cases. But rather than pare the guideline down, the Commission expanded it in 2001 to create graduated enhancements for many types of prior crime. Judicial, prosecutorial, and defense bar dissatisfaction with that version of the guideline caused the Commission to amend it again in 2016. The new version focuses on the length of prior sentences and adds an additional enhancement for post-deportation convictions. The reentry guideline has thus, in a process of preservation through transformation, morphed into a general criminal history

enhancements are "similar to how Chapter Four of the *Guidelines Manual* determines a defendant's criminal history score based on his or her prior convictions").

161. For example, a five-year sentence would move a defendant up only one criminal history category. That usually means just a few additional months. However, under the new reentry guidelines, it will move a defendant up 10 offense levels. That means multiple additional years. *See id*.

162. *See* THE IMPACT OF THE 2016 GUIDELINE AMENDMENT, *supra* note 5, at 3 ("After Amendment 802, the number of opinions on § 2L1.2 appeals decreased by 90 percent, from 239 in fiscal year 2017 to 24 in fiscal year 2021.").

163. *Id.* at 16.

164. *See id.* at 11.

165. *Id.* at 9 (showing that the overall variance rate stayed between 9% and 12% from 2012 to 2021). This is distinct from the higher variance rate for the subset of defendants with large enhancements. *See id.* at 11; *supra* note 141 and accompanying text.

166. *See, e.g.*, U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at Table 31 (2023) (This table listing 30 categories of federal crime and shows the rate of sentencing variances in FY 2023. Immigration crimes, the vast majority of which are unlawful reentry, had the second lowest variance rate at 13%. The only lower rate was simple drug possession at 8.9%, but only 124 drug possession cases were brought that year. By contrast, drug trafficking cases had a variance rate of 41.1%, child pornography a rate of 59.6%, and money laundering a rate of 41.7%.).

enhancement that applies only to undocumented immigrants.[167] The Commission has yet to conduct any studies or publish any reports explaining why reentry defendants should be doubly punished for past crimes.[168]

### C. THE FIRST STEP ACT AND TRUMP-ERA IMMIGRATION POLITICS

Until 1984, federal prisoners were eligible for parole.[169] They could be released at the discretion of the United States Parole Board after serving at least one-third of their sentence. Under this system, the average federal prisoner served only forty-five percent of their sentence.[170] But Congress abolished federal parole in 1984, through the same law that created the Sentencing Commission.[171] Congress replaced parole with a much less generous system of "good time" credits. Under this system, prisoners can now earn up to fifty-four days off for each year in prison.[172] This means that, barring any other reductions, they must spend at least eighty-five percent of their sentences in prison.

The end of parole thus required federal prisoners to serve a much higher portion of their sentences. That did not change until 2018, when Congress enacted the First Step Act.[173] The First Step Act created a new system of "earned time" credits that further reduce a prisoner's time in custody. Under this system, federal inmates are evaluated by a prison official to determine what kinds of in-custody programs they should participate in.[174] Such programs include, for example, prison work assignments, substance abuse treatment, psychological treatment, job training, and formal schooling.[175] As

167. *Cf.* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENVER U. L. REV. 709, 763 (2015) (observing a similar dynamic in the civil immigration system's creation of liminal legal statuses); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (observing a similar dynamic, and coining the phrase "preservation through transformation," in the context of domestic violence assault law).

168. *See* Keller, *supra* note 88, at 749–51; McWhirter & Sands, *supra* note 111, at 276; Russell, *supra* note 84, at 1185–86; United States v. Osorto, 995 F.3d 801, 827–28 (11th Cir. 2021) (Martin, J., dissenting); United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005).

169. On the history of federal parole and the transition to a supervised release/good time credit system, see Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 593–607 (2020).

170. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 163 tbl 6–17 (1986) (showing that in 1970 a federal prisoner served on average 51% of their sentence at first release, in 1979 it was 48%, and in 1983 it was 45%).

171. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–3742).

172. 18 U.S.C. § 3624(b)(1).

173. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified at 18 U.S.C. § 3632).

174. 18 U.S.C. § 3632(a)–(b) (statutory mandate to develop a "risk and needs assessment" system); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT NO. 5400.01, FIRST STEP ACT NEEDS ASSESSMENT, (June 25, 2021) (outlining the risk and need assessment procedures).

175. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT NO. 5400.01, FIRST STEP ACT NEEDS ASSESSMENT, (June 25, 2021) at 3–4.

long as an eligible prisoner does not refuse to participate in these programs, they will receive ten days off of their prison sentence for every thirty days in custody.[176] Prisoners designated as "low" or "minimum" recidivism risks (fifty-five percent of federal prisoners) receive an additional five days off for every thirty days in custody.[177] "Low" and "minimum" risk prisoners also have their first year of earned time credit count toward early release from custody.[178] All other credit counts toward release into either home confinement or a halfway house.[179] Since halfway houses are designed for shorter stays to transition people out of prison, most of that time will go toward home confinement.[180] And prisoners can also receive the standard fifty-four days per year of good time credit on top of their earned time credit.[181] Someone who earns all these credits will spend only about fifty-six percent of their sentence in a federal prison.[182] The First Step Act has thus, at least for some, brought the federal system back to the old parole model where only about half of a sentence was served in prison.

But not all federal prisoners benefit from the First Step Act's earned time credit system. Unlawful reentry defendants with a prior felony conviction are explicitly excluded.[183] So are all immigrants with a prior order of deportation.[184] And if a deportable immigrant who has not yet been ordered deported seeks to collect earned time credit, the law requires that they be put into deportation proceedings "as early as practicable" during their incarceration.[185] Thus, previously deported defendants (including all unlawful reentry defendants) cannot collect earned time credit, and deportable immigrants who try to collect it will swiftly be ordered

176. *See* 18 U.S.C. § 3632(d)(4)(A)(i); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT NO. 5410.01, FIRST STEP ACT OF 2018 - TIME CREDITS: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. § 3632(d)(4), at 4–5, 16 (Nov. 18, 2022) (an inmate is "in earning status" so long as he or she "[h]as not opted out or refused to participate in any required program").

177. 18 U.S.C. § 3632(d)(4)(A)(ii); *see* DEP'T OF JUST., FIRST STEP ACT ANN. REP. 18 (2024) (showing 12.06% of inmates at "minimum" and 42.67% at "low" recidivism risk level as of January 31, 2024).

178. 18 U.S.C. § 3624(g); FSA Time Credits Final Rule, 87 Fed. Reg. 2705, 2712 (Jan. 19, 2022) (to be codified at 28 C.F.R. pts. 523, 541).

179. 18 U.S.C. § 3624(g)(2).

180. *See* Memorandum from Blake R. Davis, Assistant Dir., Corr. Programs Div., Fed. Bureau of Prisons to Reg'l Dirs., Wardens, and Residential Reentry Managers, Guidance for Home Confinement and Residential Reentry Center Placements, at 5–6 (May 24, 2013) (directing halfway house staff to conserve resources by placing eligible inmates in home confinement).

181. 18 U.S.C. § 3632(d)(6).

182. If a prisoner gets the full fifty-four days of good time credit per year, and fifteen days of earned time credit for each thirty days served, then for each year of the sentence they will serve only about 207 days in prison. So a ten year sentence would result in just over five and a half years in prison.

183. 18 U.S.C. § 3632(d)(4)(D)(lix).

184. 18 U.S.C. § 3632(d)(4)(E)(i).

185. 18 U.S.C. § 3632(d)(4)(E)(ii).

deported.[186] The First Step Act also contains a list of forty-seven other criminal charges that trigger exclusion from earned time credits.[187] These are mostly violent crimes, and all of them are much more serious crimes than unlawful reentry. They include, for example, convictions related to explosives, drive-by shootings, arson, child pornography production, terrorism, torture, weapons of mass destruction, sex trafficking, and being a drug kingpin.[188] Defendants convicted of these crimes, as well as undocumented immigrants, only have access to good time credits. They therefore must serve at least eighty-five percent of their sentences.[189]

The original version of the First Step Act allowed undocumented immigrants to collect earned time credit.[190] The bill passed by the House of Representatives in May 2018 did contain a list of conviction-based exclusions, including one for unlawful reentry with a prior felony, but not the broader immigration status exclusion.[191] That was added when the bill went to the Senate. Contemporaneous reporting indicates that a bipartisan group of senators agreed to an amended version of the First Step Act in November 2018.[192] This new version included the provision excluding all deportable immigrants from earned time credits.[193] The senators made that and other changes in negotiations with the White House, especially President Trump's son-in-law Jared Kushner who played a significant role pushing for the law.[194] The senators' goal with these changes was to persuade Senate Republicans to support the First Step Act, and ultimately to convince President Trump to sign it into law.[195] Including deportable immigrants was thus a nonstarter. Shon Hopwood, who worked directly with the Trump administration on the law, observed that "providing federal tax money to pay

186. Anyone convicted of unlawful reentry is necessarily subject to a deportation order because that is an element of the crime. 8 U.S.C. § 1326.

187. 18 U.S.C. § 3632(d)(4)(D)(i)-(lxviii).

188. *Id.*

189. 18 U.S.C. § 3624(b).

190. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, H.R. 5682, 115th Cong. (2018).

191. *Id.* at § 3632(d)(4)(D)(xliii).

192. *See* Nicholas Fandos & Maggie Haberman, *Bipartisan Sentencing Overhaul Moves Forward, but Rests on Trump*, N.Y. TIMES (Nov. 12, 2018), https://www.nytimes.com/2018/11/12/us/politics/prison-sentencing-criminal-justice-reform.html [https://archive.ph/5ylYw].

193. *Id.* (providing the text of the proposal); First Step Act of 2018, S. 3747, 115th Cong. § 3632(d)(4)(E) (2018).

194. *See* Fandos & Haberman, *supra* note 193 ("Jared Kushner, the president's son-in-law and the leading voice within the White House for the changes, is likely to brief Mr. Trump on the bill during a broader discussion of legislative priorities with top policy officials on Tuesday.").

195. *See id.*; Press Release, Brennan Center for Justice, New Compromise on Federal Criminal Justice Reform Should Be Priority for Congress (Nov. 13, 2018), https://www.brennancenter.org/our-work/analysis-opinion/new-compromise-federal-criminal-justice-reform-should-be-priority [https://perma.cc/SX7E-LYH3].

for rehabilitation programs and early release for those who will be deported had no chance of passing in the current Congress."[196]

These negotiations coincided with the first Trump Administration's most intense period of hostility to Latin American immigration. In April 2018, shortly before the House passed its version of the First Step Act, President Trump made a series of posts on Twitter warning about immigrant caravans from Latin America. He wrote in one post, for example, that "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."[197] Trump also gave a speech claiming that immigrants in these caravans were committing widespread rapes.[198] Shortly after Trump's posts, Attorney General Jeff Sessions announced a "zero tolerance" policy toward undocumented immigration.[199] This new policy caused an enormous increase in prosecutions for unlawful entry and unlawful reentry.[200] That increase continued through 2018 and 2019.[201] The Trump Administration also, as part of its 2018 "zero tolerance" policy, systematically separated children from their parents at the border so that the parents could be prosecuted.[202] This family separation policy sparked a nationwide protest movement against the administration's immigration policies.[203] And in November 2018, while the First Step Act compromise was being negotiated, President Trump issued an executive order categorically denying asylum to immigrants who entered unlawfully.[204] In

196. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, YALE L.J. F. 791, 814 n.105 (2019). Hopwood also observed: "[T]he earned-time provision will likely lead to more racial disparities because noncitizens who have been ordered deported, most of whom are Hispanic, were excluded from the ability to earn credits towards early release." *Id.*

197. Donald J. Trump (@realDonaldTrump), X, (formerly Twitter) (Apr. 2, 2018, 8:12 PM), https://twitter.com/realDonaldTrump/status/980961086546632705 [https://perma.cc/5GH6-89P5].

198. 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].

199. *See* Memorandum from Att'y Gen. Jeff Sessions to Fed. Prosecutors Along the Sw. Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018) (on file with author).

200. *See* AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 4–5 (2021); Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1905–1919 (2024).

201. AM. IMMIGR. COUNCIL, *supra* note 200.

202. *See* Caitlin Dickerson, *The Secret History of the U.S. Government's Family-Separation Policy*, THE ATLANTIC (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-admin istration-family-separation-policy-immigration/670604 [https://perma.cc/3WPA3PWD].

203. *See* Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES ( June 30, 2018), https://web.archive.org/web/20250911155 147/https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html.

204. *See* Michael D. Shear & Eileen Sullivan, *Trump Suspends Some Asylum Rights, Calling Illegal Immigration 'a Crisis,'* N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/us/politics/

signing the order Trump declared, "The continuing and threatened mass migration of aliens with no basis for admission into the United States through our southern border has precipitated a crisis and undermines the integrity of our borders."[205] This larger context of anti-immigrant policy and rhetoric explains why the Senate, in negotiations with the White House, excluded deportable immigrants from the new earned time credit system.

Immigrants' rights groups and some Democratic House members opposed the First Step Act's exclusion of undocumented immigrants. A coalition of activist groups including the NAACP, the ACLU, and the National Immigrant Justice Center raised concerns about the law in letters and press releases.[206] This coalition cited, among other problems, that the law "excludes from its reforms most undocumented immigrants," that it thereby "further criminalizes migration," and that these exclusions "could also have a disparate impact on racial minorities."[207] A coalition of immigration-related nonprofits expressed concern that the law "sets the precedent that immigrants are outside the scope of people who should benefit from criminal justice reform."[208] And in the House debates concerning the First Step Act, several Democratic Representatives highlighted its discriminatory impact on immigrants. Representative Pramila Jayapal noted that she was "very concerned about language in the bill that excludes immigrants from being eligible for time credits."[209] And Representative Jerrold Nadler observed that "the new incentive system for pre-release custody credits could exacerbate racial biases," because it "excludes large categories of inmates based on convictions for various offenses and on immigration status."[210]

The First Step Act enacted a generous new earned time credit system that, for those who qualify, can reduce a sentence by up to one-third. But the law also categorically excluded undocumented immigrants, keeping them trapped in a much more punitive system allowing only good time credits.

trump-asylum-seekers-executive-order.html [https://perma.cc/9DWN-JPW4 ].

205. *Id.*

206. *See* H.R. Rep No. 115-699, 115th Cong. 2d Sess., at 101–02 (2018); The Leadership Conference to Representative, Vote "No" on the First Step Act, Letter to Congress (May 21, 2018), https://civilrightsdocs.info/pdf/policy/letters/2018/Short_Oppose%20FIRST%20STEP%20Act_5.21.18_FINAL.pdf.

207. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, H.R. 5682, 115th Cong. (2018), at 102.

208. NAT'L IMMIGR. PROJECT, IMMIGRANT LEGAL RES. CTR., NAT'L IMMIGRANT JUST. CTR., IMMIGRANT DEF. PROJECT & IMMIGRANT JUST. NETWORK, CONCERNS OVER THE FIRST STEP ACT: IMMIGRATION ANALYSIS (2018), https://www.ilrc.org/sites/default/files/resources/concern_first_step_act-20181217.pdf.

209. 164 CONG. REC. H4314 (daily ed. May 22, 2018) (statement of Rep. Pramila Jayapal).

210. 164 CONG. REC. H4311 (daily ed. May 22, 2018) (statement of Rep. Nadler).

That exclusion was crafted during the first Trump Administration's most intense period of hostility toward Latin American immigration. And activists and legislators at the time pointed out its discriminatory consequences.

## II. THE DISCRIMINATION PROBLEM

These policies create two separate and unequal federal sentencing systems: one system for U.S. citizens and another system for deported immigrants. In the citizens' system, criminal history is counted once; in the immigrants' system, it is counted twice. In the citizens' system you can serve up to forty-five percent of your sentence out of prison, in the immigrants' system you can serve only fifteen percent. This separate system for immigrants is not small. Since 2010, about one-third of all federal cases have been unlawful reentry prosecutions.[211] And over ninety-nine percent of the defendants in those cases have been Latin American.[212] Federal sentencing law thus creates a caste structure in which undocumented immigrants from Latin America are relegated to a punishment underclass. This Part makes the straightforward observation that this is discriminatory. It does so by comparing these two sentencing systems in detail. It shows that federal sentencing law discriminates facially by immigration status, and in effect by race and ethnicity.[213] The more complicated issue of constitutionality is explored in Part IV.

### A. DOUBLE COUNTING CRIMINAL HISTORY

The unlawful reentry guideline stands alone in basing a defendant's offense level calculation entirely on their past crimes.[214] Other federal sentencing guidelines focus instead on the facts of the current crime. For

211. *Supra* note 2 and accompanying text.

212. U.S. SENT'G COMM'N, *supra* note 4.

213. Latin American immigrants in the U.S. come from a wide variety of ethnic, linguistic, and cultural backgrounds. The question of their treatment as a distinct ethnic/racial group in the United States has a complex history. *See, e.g.*, LAURA E. GÓMEZ, INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM 3 (2020). I have no intention of endorsing the ultimate validity of "race" as a concept here. My claim is that the federal sentencing regime effectively singles out a category of defendants, Latin American immigrants, who suffer identity-based discrimination in many other domains, and who the U.S. government formally treats as belonging to a distinct racial/ethnic group. *See, e.g.*, Notice of Decision: Revisions to OMB's Statistical Policy Directive No. 15, 89 FED. REG. 22182 (Mar. 29, 2024) (adding the "Hispanic" and "Latino" categories on the U.S. census into a general racial/ethnic identity question); *cf.* Hernandez v. Texas, 347 U.S. 475, 482 (1954) (holding that Mexican Americans are a protected class under the Equal Protection Clause); Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897 (2007).

214. GUIDELINES MANUAL § 2L1.2(b) (U.S. SENT'G COMM'N 2023). There are three enhancements in the reentry guideline, all focused on past convictions: one of up to ten points for a felony conviction before the first deportation, one of up to ten points for a felony conviction after the first deportation, and one of 4 points for a prior unlawful reentry conviction.

drug trafficking, what matters is the amount and type of drugs.[215] For fraud, it is the amount of money lost or stolen.[216] For child pornography distribution, it is the number of images and the ages of the victims, among other factors.[217] But for unlawful reentry, facts about the current crime are not factored in.[218] The only thing that matters is the defendant's criminal history. The reentry guideline enhances a defendant's sentence once along the "criminal history category" axis, and a second time along the "specific offense level" axis. Past crimes thus count against a reentry defendant twice in two separate formulas. For nearly all other federal defendants, they count only once.[219]

There are a few other places in the Guidelines where a past conviction triggers an increase in the offense level. A couple of guidelines have modest enhancements for defendants who committed the same kind of crime previously.[220] For example, the guidelines for immigrant smuggling, passport fraud, and immigration fraud all contain a two-level enhancement for having been previously convicted of a "felony immigration and nationalization offense."[221] The guideline for adulterating or misbranding food products contains a four-level enhancement for a prior conviction for the same offense.[222] And the guideline for domestic violence contains a two-level enhancement for a pattern of "stalking, threatening, harassing, assaulting the same victim," which includes prior convictions.[223] In addition, the guideline for being a felon in possession of a firearm ties the offense level to the nature and number of prior felony convictions.[224] And the drug

215. *Id.* § 2D1.1(c) (2023).

216. *Id.* § 2B1.1(b)(1) (2023).

217. *Id.* § 2G2.2(b) (2023).

218. A version of the reentry guideline more in line with the rest of the Sentencing Guidelines might, for example, focus on the manner of entry or the number of prior deportations. *See, e.g.*, GUIDELINES MANUAL § 2L1.2 (U.S. SENT'G COMM'N 1987) (original version of the reentry guideline, providing a two-point enhancement for a prior deportation).

219. *See* United States v. Osorto, 995 F.3d 801, 810 & n. 1 (11th Cir. 2021).

220. The reentry guideline also has an enhancement like this, on top of its general criminal history enhancements. GUIDELINES MANUAL § 2L1.2(b)(1) (U.S. SENT'G COMM'N 2023) (4-level increase for a prior felony § 1326 unlawful reentry conviction, and 2-level increase for two or more prior misdemeanor § 1325 unlawful entry convictions).

221. *Id.* §§ 2L1.1(b)(3), § 2L2.1(b)(4), § 2L2.2(b)(2) (U.S. SENT'G COMM'N 2023). Both enhancements go up to four levels if the defendant was convicted of two immigration and naturalization felonies in two separate previous prosecutions. They do not go higher than four levels.

222. *Id.* § 2N2.1(b)(1).

223. *Id.* § 2A6.2(b)(1)(E) & cmt. 3 ("Prior convictions taken into account under subsection (b)(1)(E) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).").

224. *Id.* § 2K2.1(a) (providing a base offense level of twenty-four if the felon-in-possession crime was committed after two felony convictions of either a "crime of violence" or "controlled substance offense," twenty for only one such prior conviction, and twelve otherwise); *id.* § 2K1.3(a) (providing the same criminal history enhancements for the felon-in-possession of explosive materials guideline).

trafficking guideline increases the offense level if both (1) the drugs caused death or serious bodily injury and (2) the defendant has a prior felony drug offense.[225]

These other criminal history enhancements are much narrower than the reentry enhancements.[226] They only apply to specific kinds of prior crimes, while the reentry enhancement applies to any prior felony. These other enhancements also have a much closer nexus to the defendant's current crime. Most of them involve having committed the same kind of crime previously. For the felon-in-possession enhancements, the prior felony is itself an element of the new crime.[227] And the drug trafficking criminal history enhancements only apply if the drugs caused death or serious bodily injury.[228] In these circumstances, the prior crimes are directly relevant to the defendant's conduct in the new case. By contrast, the enhancements in the unlawful reentry guideline apply to all criminal history in general, not just related crimes.

The reentry guideline's criminal history enhancements are also much larger than other comparable enhancements. A single prior felony will get a reentry defendant between four and ten additional offense level points, depending on the sentence length.[229] And this can happen up to twice, once

225. *Id.* § 2D1.1(a)(1)(B)(3) (increasing base offense for certain drug charges to forty-three or thirty, respectively, if both "death or serious bodily injury resulted from the use of the substance" and the defendant has "one or more prior convictions for a felony drug offense"); *id.* § 2D1.1(a)(1)(B) (increasing base offense for certain drug charges to forty-three if both "death or serious bodily injury resulted from the use of the substance" and the defendant has "one or more prior convictions for a serious drug felony or serious violent felony"); *see also* 21 U.S.C. §§ 841(b)(1)(A)-(B), 960(b)(1)-(2) (providing ten and fifteen-year mandatory minimum sentences for defendants with a prior "serious drug felony or serious violent felony").

226. There is also a standalone provision in the Sentencing Guidelines, called the "Career Offender" guideline, that applies to any defendant who is (1) convicted of a felony "crime of violence" or "controlled substance offense" and (2) has two prior convictions for a "crime of violence" or a "controlled substance offense." GUIDELINES MANUAL § 4B1.1(U.S. SENT'G COMM'N 2023). This guideline creates an entirely different (and much more severe) offense level calculation for any such defendant, and automatically puts them in criminal history category VI. *Id.* § 4B1.1(b)-(c). The Career Offender guideline applies to relatively few cases—only 1,351 defendants in 2023, or roughly 2% of federal defendants. U.S. SENT'G COMM'N, *supra* note 4. It is also mandated by a congressional statute. 28 U.S.C. § 994(h). Because the Career Offender guideline operates outside the normal Guidelines framework, I do not treat it as an analogue to the criminal history enhancements in § 2L1.2 of the Guidelines.

227. In contrast to unlawful reentry, the prior felony in a felon-in-possession case is an essential element that makes the conduct criminal. *Compare* Rehaif v. United States, 588 U.S. 225, 237 (2019) (holding that in a § 922(g) case defendant's knowledge of the status that makes possessing a firearm illegal, including being a felon, is an element of the crime), *with* Almendarez-Torres v. United States, 523 U.S. 224, 246–47 (1998) (concluding that a prior aggravated felony is not an element of § 1326 but merely a "sentencing factor"). *See also* Keller, *supra* note 88, at 735–36 (explaining that the felon-in-possession enhancement is much narrower than the unlawful reentry enhancement).

228. GUIDELINES MANUAL § 2D1.1(a) (U.S. SENT'G COMM'N 2023).

229. GUIDELINES MANUAL § 2L1.2(b)(2)-(3) (U.S. SENT'G COMM'N 2023).

for a felony before the first deportation and once for a felony after it.[230] Nowhere else in the Guidelines can a defendant get such a high increase for just a single prior conviction. It is thus actually something of an understatement to say that reentry defendants have their convictions counted twice, because the extra enhancement is potentially much more severe than the Guidelines' normal criminal history calculation. A prior conviction with a five-year sentence, for example, gives a reentry defendant both a one-level increase in their criminal history category and a ten-point increase in their offense level.[231] This takes a reentry defendant from a zero to six month range to a thirty to thirty-seven month range.[232] Other federal defendants starting from the same baseline would only see the one-level criminal history category increase, going from zero to six months to four to ten months.[233] Reentry defendants can thus receive multiple additional years in prison due to past crimes that would net other defendants only a few extra months.

These enhancements apply in a significant percentage of reentry cases. According to the U.S. Sentencing Commission's 2023 data, 43.6% of unlawful reentry defendants received a prior conviction enhancement.[234] The average sentence for unlawful reentry was twelve months in 2023, and since 2012 it has fluctuated between nineteen months and eight months.[235] But reentry defendants with prior convictions receive much longer sentences due to criminal history enhancements. According to the Commission, about 15% of reentry defendants since 2021 received sentences of at least two years, and 1% received sentences of at least five years.[236] At the top of this distribution, hundreds of reentry defendants have gotten more than five years, and some even more than a decade in prison.[237]

230. *Id.*

231. *Id.*; *id.* § 4A1.1 (2023).

232. *See infra* Appendix. This is assuming the defendant starts out with eight offense level points and zero criminal history points, which is the baseline for reentry cases.

233. United States Sentencing Guidelines Manual § 4A1.1 (2023). The most criminal history points you can receive for a prior conviction, no matter how long the sentence, is 3. And 3 points moves you up one criminal history category.

234. U.S. SENT'G COMM'N, *supra* note 4. Breaking it down further, 23% of reentry defendants received only a pre-first-deportation criminal history enhancement, 18.2% had only a post-first-deportation enhancement, and 2.3% got both enhancements.

235. *Id.*; U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2012–2022). These are the average sentence lengths since 2012: 2012: 19 months, 2013: 18 months, 2014: 17 months, 2015: 16 months, 2016: 14 months, 2017: 12 months, 2018: 10 months, 2019: 9 months, 2020: 8 months, 2021: 13 months, 2022: 13 months, and 2023: 12 months. There appears to be an inverse relationship between the number of prosecutions and the average sentence length. This may help explain why average sentences went down during the Trump Administration.

236. *Interactive Data Analyzer*, U.S. SENT'G COMM'N https://ida.ussc.gov/analytics/saw.dll?Dash board [https://archive.ph/qjcmT] ("Distribution of Sentence Length" for defendants sentenced under § 2L1.2 in 2021, 2021, and 2023).

237. *Id.* (one percent of the 36,416 reported cases for 2021–2023 is 364 cases); *see, e.g.*, United States v. Palomerez-Heredia, No. 23-2160, 2024 U.S. App. LEXIS 12281, at *1–2 (8th Cir. May 22,

The reentry guideline is also the only federal sentencing guideline that applies exclusively to noncitizens. It is used for four crimes: 8 U.S.C. § 1326 (unlawful reentry), 8 U.S.C. § 1325(a) (felony unlawful entry), 8 U.S.C. § 1253 (failure to depart after deportation order), and 8 U.S.C. § 1185(a)(1) (violating prescribed entry and departure regulations).[238] By their explicit terms, these four provisions only apply to noncitizens.[239] There are several other federal entry crimes that do apply to U.S. citizens, including passport fraud, entering the country without inspection, and entering the country through forgery or false statements.[240] But those crimes are not covered by the reentry guideline, and do not receive its extra criminal history enhancement.[241] So, for example, a U.S. citizen fugitive who tries to reenter the country with a fake passport will not receive a double enhancement. And arguably comparable crimes that punish illicit presence, such as escaping

2024) (158 month sentence, guideline range 84–105 months); United States v. Martinez, No. 23-50296, 2024 U.S. App. LEXIS 12226, at *1 (5th Cir. May 21, 2024) (54 month within guideline sentence); United States v. Sales, No. 23-12574, 2024 U.S. App. LEXIS 8697, at *6 (11th Cir. Apr. 11, 2024) (70 month within guideline sentence); Segura-Resendez v. United States, No. 3:18-CR-210-L(1), 2024 U.S. Dist. LEXIS 36051, at *3, *8 (N.D. Tex. Feb. 29, 2024) (77 month within guideline sentence); United States v. Molina-Mendoza, No. 22-40732, 2023 U.S. App. LEXIS 34527, at *1 (5th Cir. Dec. 28, 2023) (57 month within guideline sentence); Zuniga v. United States, No. 1:22-CR-825-1, 2023 U.S. Dist. LEXIS 229408, at *4 (S.D. Tex. Dec. 27, 2023) (62 month within guideline sentence); United States v. Alvarez-Espinal, No. 22-1145-CR, 2023 U.S. App. LEXIS 26599, at *1, *3 (2d Cir. Oct. 6, 2023) (64 month sentence, guideline range 70 to 87 months); United States v. Martinez-Rubio, No. 22-10109, 2023 U.S. App. LEXIS 8360, at *2 (5th Cir. Apr. 7, 2023) (120 month sentence, guideline range 84 to 105 months); Rosales-Diaz v. United States, 805 F. App'x 660, 662 (11th Cir. 2020) (120 month sentence, varying upward from guideline range of 77 to 96 months); United States v. Chica-Gutierrez, 833 F. App'x 592, 592 (5th Cir. 2021) (per curiam) (125 month within guideline sentence); United States v. Amaya Benitez, No. 21-5390, 2022 U.S. App. LEXIS 15383, at *6 (6th Cir. June 3, 2022) (68 month sentence, guideline range 100 to 125 months); United States v. Valdez-Cejas, No. 21-10659, 2022 App. LEXIS 21355, at *1, *2 (5th Cir. Aug. 2, 2022) (guidelines range 70–87 months, sentence of 87 months); Gutierrez v. United States, No. SA-20-CR-440-JKP-1, 2023 U.S. Dist. LEXIS 89598, at *3 (W.D. Tex. May 22, 2023) (77 month within guideline sentence); United States v. Cordova-Lopez, 34 F.4th 442, 443 (5th Cir. 2022) (51 month within guideline sentence); United States v. Salamanca, 821 F. App'x 584, 586 (6th Cir. 2020) (130 month sentence, guideline range of 130 to 162 months); United States v. Gomez-Gomez, 841 F. App'x 2, 2 (9th Cir. 2021) (99 month above guidelines sentence); United States v. Gomez-Colin, 823 F. App'x 368, 371 (6th Cir. 2020) (140 month sentence, guidelines range 130 to 162 months); Letter from Marjorie Meyers, Fed. Pub. Def., S. Dist. of Tex. Hon. Carlton W. Reeves, U.S. Dist. J., Chair, U.S. Sent'g Comm'n (July 9, 2024) (describing reentry case with a 130 to 162 month guidelines range in which the judge imposed 48 months).

238. GUIDELINES MANUAL app. A at 563 (2023). About 99% of sentences under Guidelines § 2L1.2 are for § 1326 convictions, the other three conviction types are relatively uncommon. FED. SENTENCING OF ILLEGAL REENTRY: THE IMPACT OF THE 2016 GUIDELINE AMENDMENT, *supra* note 5, at 4.

239. All four use the term "alien" to define defendants. 8 U.S.C. §§ 1326(a), 1325(a), 1253(a)(1), 1185(a)(1).

240. *See* 8 U.S.C. §§ 1541–44 (passport fraud); 19 U.S.C. § 1459(a) (failure to report arrival or submit to inspection); 8 U.S.C. § 1185(1)(2)–(7) (criminalizing various fraudulent means of entry to and departure from the U.S.). It is especially telling that the Guidelines include § 1185(a)(1) in the reentry guideline, but not § 1185(a)(2)–(7). Subsection (a)(1) only applies to noncitizens, while (a)(2) through (a)(7) also apply to U.S. citizens.

241. The deportation element of the § 2L1.2 enhancements also presumably excludes nearly all U.S. citizens, excepting those who naturalized after being deported.

from federal prison, failing to appear in court, failing to register as a sex offender, and trespassing on federal property, also receive no double enhancement.[242] Only counting criminal history twice in the reentry guideline thus constitutes explicit discrimination by immigration status. And because the reentry guideline is by far the most racially skewed, with over ninety-nine percent of defendants being of Latin American ancestry, doing so also effectively discriminates by race.[243]

The main rationale used to justify these criminal history enhancements is that they deter immigrants with prior convictions from reentering the United States. That was the rationale Senator Graham and Sentencing Commission witness Joe Brown invoked in 1991 when arguing for extra recidivist enhancements.[244] It is also the primary rationale that federal judges have cited in upholding the enhancements.[245] Though, notably, the Sentencing Commission itself has never announced an official justification for the enhancements.[246] The logic of a deterrence rationale is simple—by imposing higher sentences, the reentry enhancements give immigrants with past convictions a stronger disincentive to return. But the Commission has not conducted any study or other policy analysis to explain why the normal criminal history enhancement inadequately deters.[247] Rather, the story of the

242. *See* GUIDELINES MANUAL §§ 2A3.5, 2B2.3, 2J1.6, 2P1.1 (2023).

243. Declaration of Michael Light, Brief for Advoc. for Basic Legal Equal. et al. as Amici Curiae Supporting Petitioner at 41, United States v. Rodrigues-Barios, No. 21-50145 (9th Cir. Mar. 21, 2022) Dkt. No. 14 (analyzing the racial distribution of the ten most commonly used guidelines, and showing that §2L1.2 is by far the most disproportionate with 99% "Hispanic" defendants).

244. Statement of Joe B. Brown, *supra* note 105, at 8; 135 CONG. REC. S23608 (Oct. 5, 1989); *supra* note 71 and accompanying text.

245. *See, e.g.*, United States v. Adeleke, 968 F.2d 1159, 1161 (11th Cir. 1992); United States v. Ruiz-Chairez, 493 F.3d 1089, 1091 (9th Cir. 2007); United States v. Osorto, 995 F.3d 801, 816 (11th Cir. 2021). Some court opinions have included language suggesting that reentry after a criminal conviction could be a more serious crime under a retributivist theory. *See, e.g.*, United States v. Gonzalez, 112 F.3d 1325, 1330 (7th Cir. 1997). But it is difficult to see how the crime of entering the United States, the quintessential malum prohibitum regulatory offense, is made morally worse by previous unrelated crimes. *See* Keller, *supra* note 88, at 751–54; Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1296–97 (2014) ("It seems we are obligated to conclude that committing a crime of migration is not a wrong prior to and independent of law.").

246. *See* Keller, *supra* note 88, at 741, 747–49; Public Hearing Before the U.S. Sentencing Commission (2006), *supra* note 139, at 22 (testimony of Sentencing Commissioner Ruben Castillo) ("When we were out in Texas, the Federal Defenders gave some, I thought, compelling testimony that said, in the first instance, the Commission has never articulated a justification for the 16-level enhancement."); U.S. SENT'G GUIDELINES MANUAL SUPPLEMENT TO APPENDIX C at 155–59 (U.S. SENT'G COMM'N 2016) (explaining the 2016 revision but providing no ultimate justification for the double enhancements).

247. *See* Keller, *supra* note 88, at 742, 745–51; United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005) ("The Commission did no study to determine if such sentences were necessary- or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it.") (quoting Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases*, 8 FED. SENT. REP. 275, 276 (1996)).

reentry guideline is one of politics and path dependence. As discussed above, the initial criminal history enhancement was a response to Senator Chiles's 1988 statutory sentence increase.[248] And that increase was, in turn, motivated by Floridians' fear of Haitian drug dealers supposedly reentering the country to commit crimes.[249] The Commission set the original enhancement at sixteen points for no recorded reason, and then revised it in 2001 and 2016 to accommodate judges' and prosecutors' complaints.[250] But the size and nature of the reentry enhancements have never been connected to any empirical data about deterrence, or about reentry defendants committing additional crimes. Indeed, it is unlikely that first-time reentry defendants have any idea their Guidelines calculation will be enhanced so severely by their past criminal record.[251]

These double enhancements also impose a great deal of suffering on defendants and their families. Many reentry defendants have deep ties to the United States. According to Commission data from 2013, 53.1% of reentry defendants first entered the United States when they were minors,[252]and 49.5% of reentry defendants have children living in the United States.[253] And 74.5% had worked in the United States for more than a year before their arrest.[254] People with criminal history in the United States are also more likely to have lived in the United States for an extended period.[255] Thus, by focusing on prior convictions, the reentry guidelines direct more punishment at people with strong personal and family ties to this country. The prototypical target of the reentry enhancements is not a foreign drug dealer returning to commit more crimes. It is someone who grew up in the United States, has a family here, and wants to return to them. Many such immigrants spend large portions of their lives in federal prison because they repeatedly

248. *See supra* notes 93–105 and accompanying text.

249. *See supra* Section I.A.

250. *See supra* Section I.B.

251. In the author's experience as a defense lawyer in these cases, § 1326 defendants with a large recidivist enhancement nearly always express surprise that they are being punished so severely for their past conviction. One commonly used phrase is "but I already paid for that." This problem is compounded by the complexity of the Guidelines, discussed in Part III. *See also* Joanna Lydgate, Note, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481, 519 n. 240 (2010) (interviewing a federal public defender who notes, "[I]t's really hard to explain to someone who is not familiar with our system and our culture that if you have committed a crime and already paid the time for that crime, that that crime somehow advances you not only in your offense level but in your criminal history. Because, conceptually, it's hard for me to understand, too. For them, it's almost impossible.").

252. U.S. SENT'G COMM'N, ILLEGAL REENTRY OFFENSES 26 (2015).

253. *Id.* at 25–26.

254. *Id.* at 26.

255. *See* David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973, 977, 1013 (2022) ("[T]he limited evidence that exists suggests that prioritizing enforcement against people with criminal convictions means prioritizing enforcement against people with deeper attachments to the United States.").

try to return to their spouses, their children, and the country they grew up in.[256]

### B. DOING MORE AND HARDER TIME

The First Step Act also discriminates against undocumented immigrants. It creates two different classes of prisoner: a majority who can collect earned time credits, and a minority who cannot.[257] U.S. citizens are in the former category, excepting those who are in prison for a disqualifying crime like torture, child pornography production, or terrorism.[258] Deportable immigrants, including all reentry defendants, are in the latter category.[259] Prisoners who qualify for earned time credits can get up to fifteen days off their sentence for every thirty days served.[260] That means they can serve up to one-third of their sentence in a halfway house, home confinement, or released from custody altogether. Prisoners who do not qualify for earned time credits only get the standard fifty-four days of good time credit per year. And the exclusion of deportable immigrants is also racially discriminatory, since nearly all deportable immigrants in federal prison are Latin American.[261]

To defend this discrimination, one might argue that it makes sense to deny limited rehabilitation resources to prisoners who will be deported. Perhaps the federal government has an interest in limiting programs like drug

256. *See, e.g.*, HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS 44–61 (2013) (describing multiple stories of immigrants repeatedly prosecuted for returning to their families); *id.* at 47 (defense attorney noting "[t]here's a class of people doing life sentences on the installment plan," and sister of reentry defendant stating "[i]f we stay here, we're going to see my brother live his life in jail"); Damien Cave, *Crossing Over, and Over*, N.Y. TIMES (Oct. 2, 2011), https://www.nytimes.com/2011/10/03/world/americas/mexican-immigrants-repeatedly-brave-risks-to-resume-lives-in-united-states.html [https://perma.cc/MQR6-7ZBL]; United States v. Mendez-Bello, No. 18-cr-3676, 2018 U.S. Dist. LEXIS 213885 (S.D. Cal. Dec. 19, 2018) (defendant spent 19 of the last 20 years in prison on repeated reentry cases); United States v. Vasquez-Abarca, 946 F.3d 990 (7th Cir. 2020) (defendant came to the U.S. at five years old and served reentry sentences of 57 months, 24 months, and 72 months); United States v. Garcia-Jimenez, 630 F. App'x 764, 765 (10th Cir. 2015) (former permanent resident with children who first came as a teenager, and got 65 months for reentry); United States v. Iglesias-Cruz, 628 F. App'x 1000, 1002 (11th Cir. 2015) (defendant with wife and several children in the U.S., served two 40-month sentences for reentry); United States v. Duran, 733 F. App'x 495, 497 (11th Cir. 2018) (40 month reentry sentence for defendant who returned to care for two daughters while wife underwent cancer treatment, and who had prior 37 month reentry sentence); United States v. Morales-Sanchez, 752 F. App'x 814, 815 (11th Cir. 2018) (defendant with five children in the United States, sentenced to 42 months on his fourth reentry conviction).

257. *See* U.S. DEP'T OF JUST., FIRST STEP ACT ANN. REP. 19 (2024) (showing that 87,957 federal prisoners are eligible for earned time credits and 50,732 are ineligible).

258. 18 U.S.C. § 3632(d)(4)(D)(i)–(lxviii).

259. 18 U.S.C. § 3632(d)(4)(E)(i).

260. 18 U.S.C. § 3632(d)(4)(A)(i).

261. U.S. SENT'G COMM'N, QUICK FACTS: FEDERALLY SENTENCED NON-U.S. CITIZENS (2023) (88.4% of federally sentenced noncitizens were undocumented, and 93.2% of federally sentenced noncitizens were "Hispanic").

treatment and job training to U.S. citizens. But this argument ignores a key fact about the earned time credit system: a prisoner can collect custody credits even while they are not participating in anti-recidivism programs. As long as a prisoner does not refuse to participate in programs assigned to them, they remain in earning status.[262] And this happens even if programs are unavailable, or if the Bureau of Prisons decides the prisoner does not need programs. For example, prisoners assigned to programs that lack openings still earn time credits while waiting for a spot.[263] Prisoners also earn time credits for working jobs within the prison, like cleaning laundry or working in the kitchen.[264] Such work assignments are standard in federal prison, and all able-bodied inmates (including deportable immigrants) are required to perform them.[265] Many U.S. citizen prisoners receive earned time credit under the First Step Act for performing these prison jobs.[266] But deportable immigrants do not receive that credit. The federal government has thus created a system where two prisoners—one a U.S. citizen and the other an

262. FSA Time Credits Final Rule, *supra* note 177, at 2707.

263. *Id.* ("[T]emporary interruptions in participation that are unrelated to an inmate's refusal to participate or other violation of programming requirements, or that are authorized by the Bureau, such when a recommended program or activity is unavailable or at full enrollment, will not affect the inmate's ability to earn Time Credits."); Program Statement No. 5410.01, *supra* note 177, at 4 ("An inmate will remain in FTC earning status while on any waitlist for EBRR Programs or PAs recommended based on the inmate's needs assessment, not to exceed two assessment periods, as long as the inmate has not refused or declined to participate. Active participation in at least one EBRR Program or PA by the inmate supersedes this requirement. Exceptions to the two-assessment period time frame can be granted by the Regional Director upon request from the Warden.").

264. 18 U.S.C. § 3635(3)(C)(xi) (defining "evidence-based recidivism reduction program" to include "a prison job, including through a prison work program"); FSA Time Credits Final Rule, *supra* note 177, at 2714 ("Opting out of a program will not result in the forfeiture of credits, unless failure to complete the program itself constitutes an infraction (e.g. failing to accept a mandatory work assignment)."); Program Statement No. 5410.01, *supra* note 175, at 3 (defining "Productive Activity" to include "Institution work programs").

265. 28 C.F.R. § 545.23 (2024) ("Each sentenced inmate who is physically and mentally able is to be assigned to an institutional, industrial, or commissary work program."); 28 C.F.R. § 541.3 (2024) (defining refusal to accept a work assignment as "prohibited act" subjecting the inmate to punishment). *See also* Adam Davidson, *Administrative Enslavement*, 124 COLUMB. L. REV. 633, 682–84 (2024) (describing this and other mandatory prison work regimes as a form of enslavement and calling for their abolition).

266. First Step Act Annual Report, *supra* note 256 at 22 ("Moreover, while structured EBRR programs and PAs with a facilitator-led curriculum are listed in the FSA Approved Programs Guide, other activities, such as work assignments may also be recommended by staff to address individual needs as well as qualify for time credits for eligible individuals in custody."); FSA Time Credits Final Rule, *supra* note 177, at 2710 (discussing time credits for prison jobs); E-mail Correspondence with Jessie Agatstein, Fed. Pub. Def. (Aug. 27, 2024) (on file with author) ("[I]t is fairly common for someone to earn most of their credits by engaging in a 'productive activity,' meaning a prison job, rather than classes, mostly because there are always prison jobs available, but classes almost always have a waitlist or are short one-day or one-month things."). For federal prisoners serving sentences in jail facilities, a work assignment is commonly the only option available to provide earned time credits. *Id.*

immigrant—will work alongside each other at the same job in the same prison kitchen, with the citizen getting a one-third sentence reduction for their labor and the immigrant getting nothing.

The federal prison system discriminates against deportable immigrants in numerous other ways as well. In addition to First Step Act credits, a federal prisoner can spend ten percent of their sentence (up to six months) in home confinement.[267] Deportable immigrants, however, cannot get home confinement.[268] They are excluded from nearly all in-prison treatment and rehabilitation programs.[269] This includes the Residential Drug Abuse Program, a 500-hour treatment program that gives a one-year sentence reduction upon completion.[270] Deportable immigrants cannot receive a "minimum security" designation by the Bureau of Prisons, meaning that they cannot be housed in the least restrictive prison facilities.[271] Unlike other prisoners, they cannot serve part of their sentences in a halfway house.[272] While the Bureau of Prisons is required to try to house inmates within 500 miles of their families, it does not do so for deportable immigrants.[273] And the federal prison system houses most deportable immigrants in segregated facilities that have fewer amenities and less security than normal prisons, feature little in-custody programming, and are run by private corporations.[274] In conjunction with the earned time credit exclusion, these policies create a separate and unequal prison system for undocumented prisoners.

## III. THE ARBITRARINESS PROBLEM

The reentry guideline is also quite illogical in practice. It distributes prison time through a convoluted formula that is tangential to the severity of a defendant's criminal history. From the defendant's perspective, it feels like a twisted lottery—prison time is distributed at random based on what

267. 18 U.S.C. § 3624(c)(2).

268. BOP Program Statement no. 7310.04,

269. *See* Jacob Schuman, *Federal Prisons Don't Even Try to Rehabilitate the Undocumented*, THE MARSHALL PROJECT (Oct. 17, 2017, at 22:00 PT), https://www.themarshallproject.org/2017/10/17/federal-prisons-don-t-even-try-to-rehabilitate-the-undocumented [https://perma.cc/2SKQ-R26W]; Amy F. Kimpel, *Coordinating Community Reintegration Services for "Deportable Alien" Defendants: A Moral and Financial Imperative*, 70 FLA. L. REV. 1019, 1027–41 (2018); Eagly, *supra* note 125, at 1318–19.

270. 18 U.S.C. § 3621(e); 28 C.F.R. § 550.53(b) (2018); Bureau of Prisons, Program Statement: Psychology Treatment Programs, P5330.11, Mar. 16, 2009, at Ch. 2 p. 9.

271. U.S. Bureau of Prisons Program Statement 5100.08, Inmate Security Designation and Custody Classification, Ch. 5, at 9; Ch. 2, at 4 (Sept. 12, 2006).

272. U.S. Bureau of Prisons Program Statement 7310.04 at 10 (1998); 18 U.S.C. § 3621(b).

273. 18 U.S.C. § 3621(b); BOP Program Statement no. 5100.08 at Ch. 7, p. 4 (2006); Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1411 (2019) (finding that more than half of prisoners in federal facilities designated for immigrants are kept over 500 miles from their home).

274. *See id.* at 1408–18.

numbers turn up in what order. This Part explores several features of the guideline that cause it to treat defendants so arbitrarily. The basic problem is that up to two large (commonly multi-year) sentence enhancements are imposed based on superficial aspects of a defendant's record. First, the guideline places a puzzling emphasis on the order of convictions vis-à-vis the first deportation. If all convictions occurred either before or after the first deportation, then there is only one enhancement. But if two convictions straddle the first deportation, there are two enhancements. Thus, multiple years in prison often turn on the order of events. Second, the guideline only looks at nominal sentences, not actual time served. The enhancements are thus inflated by state sentencing policies, like indeterminate parole and automatic good time credit, that make the nominal sentence much longer than the real one. Third, violations of criminal supervision (e.g., probation) artificially inflate these past sentences and cause very old convictions to still trigger enhancements. This is a common problem for reentry cases because deportation itself often results in probation violations. Fourth, the difficulty of obtaining conviction and deportation records, combined with the fast pace of guilty pleas in these cases, leaves many defendants in the dark. They often plead guilty thinking their prison term will be brief, only to find out that it will be much longer. This Part explains these sources of arbitrariness, showing how they exacerbate the guideline's anti-immigrant discrimination. It also illustrates them with a real-world case example.

### A. THE CRIMINAL HISTORY LOTTERY

#### 1. Timing the Deportation

Before 2016, the reentry guideline only gave an enhancement for past convictions that were followed by a deportation.[275] This mirrored Chiles's amendment to § 1326, which increased the maximum punishment if a defendant was deported "subsequent to" a felony or aggravated felony.[276] Convictions occurring after a defendant's most recent deportation did not trigger an enhancement. The criminal history enhancement was thus a collateral consequence of being deported after a conviction, and not of a conviction alone. This reflected the Commission's apparent purpose of deterring immigrants deported after felony convictions from returning to the United States.[277]

When the Sentencing Commission rewrote the reentry guideline in 2016, it expressed concern that just focusing on pre-deportation convictions

275. *See* Guidelines Manual § 2L1.2 (1989–2015).
276. 8 U.S.C. § 1326(b).
277. *See* Brown, *supra* note 104, at 8; *supra* note 71 & accompanying text.

was arbitrary.[278] Take two defendants who committed the exact same prior crime, one before being deported and the other after being deported. Following the Commission's logic, it made little sense to give the former defendant multiple more years in prison than the latter.[279] But rather than simply removing the requirement that a conviction occur before a deportation, the Commission added a *second* enhancement.[280] Under the new version of the guideline, a defendant can get up to two enhancements of up to ten specific offense points. The first enhancement is for a conviction occurring before the defendant's first deportation, and the second is for a conviction occurring after their first deportation.[281] This solved the arbitrariness problem, by the Commission's reasoning, because it treated defendants with pre- and post-deportation felonies equally.

However, the 2016 amendment added a whole new dimension of arbitrariness. Under this new system, the order of convictions vis-à-vis the first deportation is enormously important. And that fact bears little relationship to the actual severity of someone's prior record. Consider the following four defendants, who suffer deportations and felony convictions in the following order:

- Defendant A: Felony, Deportation, Felony: two enhancements (one under Guidelines section 2L1.2(b)(2), another under (b)(3))
- Defendant B: Felony, Felony, Felony, Felony, Deportation: one enhancement (under (b)(2))
- Defendant C: Deportation, Felony, Felony, Felony, Felony: one enhancement (under (b)(3))
- Defendant D: Deportation, Felony, Deportation, Felony, Deportation, Felony, Deportation, Felony: one enhancement (under (b)(3))

Defendant A has the least serious criminal record, with just two felonies. But only Defendant A will receive two enhancements under the reentry guideline. Every other defendant gets just one enhancement, despite having more convictions than A and as many or more deportations than A. Why is Defendant A treated much more harshly? There is no logical explanation for distributing prison time this way. If the Commission's goal

278. GUIDELINES MANUAL supp. to app. C. at 157 (U.S. SENT'G COMM'N 2016); UNITED STATES SENT'G COMM'N, ILLEGAL REENTRY OFFENSES 6–7, 18–19 (U.S. SENT'G COMM'N 2015).
279. GUIDELINES MANUAL supp. to app. C. at 157 (U.S. SENT'G COMM'N 2016).
280. GUIDELINES MANUAL § 2L1.2(b)(3) (2016).
281. *Id.* at § 2L1.2(b)(2)-(3).

is to punish people more severely for returning to the United States and committing additional crimes, it should not focus just on the first deportation. For example, Defendant D above receives no second enhancement despite being convicted of crimes both before and after their deportations. According to a study by the Sentencing Commission, in 2013 the median number of prior deportations for reentry defendants was 2, and the mean was 3.2.[282] According to the same study, the median number of past criminal convictions was 3 and the mean was 4.4.[283] Conditioning sentence severity on the precise sequence of these events makes little sense.[284] And from the defendant's perspective, it seems quite random. Due to the size of these enhancements (between four and ten offense points), defendants who receive two of them are commonly looking at five to ten years in prison, sometimes even more.[285] For example, assuming that all the felonies in the above illustration carried two-year sentences, Defendant A would have a recommended sentence range of sixty-three to seventy-eight months.[286] Without the second enhancement, Defendant A's range would be only twenty-seven to thirty-three months.[287] And Defendants B, C, and D would face a range of forty-one to fifty-one months, despite having much more extensive felony records than A.[288]

Prosecutors can also exercise unilateral discretion over whether a post-deportation enhancement applies. In situations where a previously deported person is charged with a state crime, the federal prosecutor has a choice of when to bring them to federal court on the reentry case.[289] If the prosecutor waits for the state case to end, and it results in a conviction and sentence, the defendant will then receive a sentencing enhancement in their federal reentry

282. U.S. SENT'G COMM'N, ILLEGAL REENTRY OFFENSES 14–15 (2015). The data also reflected that 34.8% of cases involved one prior deportation, and 4.6% of cases had ten or more prior deportations.

283. *Id.* at 16–17. This was from a sample of 1,746 cases, excluding 151 cases involving with no prior convictions. The average sentence imposed for these prior convictions was 14 months, with a median of 6 months. These numbers include misdemeanor convictions, which do not usually trigger the reentry enhancements. According to data from 2023, 43.6% of reentry defendants qualify for one or both enhancements. U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2023).

284. People with less significant criminal and deportation histories tend to get charged with misdemeanor unlawful entry, 8 U.S.C. § 1325.

285. *See* cases cited, *supra* note 237 (examples of long sentences under the post-2016 reentry guideline). According to the Commission's data, 2.3% of reentry defendants in 2023 received both enhancements. U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2023).

286. *See infra* Appendix A. Defendant A would be in criminal history category 3, with 8 base offense points, and a +16 enhancement for the two prior convictions. If they pled guilty they could get a 3-point reduction, bringing their range to 46 to 57 months. GUIDELINES MANUAL § 3E1.1 (2023).

287. *See infra* Appendix A. With a 3-point reduction for pleading guilty, this would be 18 to 24 months.

288. *See infra* Appendix A. These defendants are all in criminal history category 5, but only get a single +8 enhancement. With a 3-point reduction for pleading guilty, the range goes down to 30 to 37 months.

289. *See* Meyers, *supra* note 237.

case.[290] But if the prosecutor instead brings the reentry case first, there is no extra enhancement. The reentry guideline thus empowers prosecutors to manipulate a defendant's sentence. And given the potential size of the enhancement, this sometimes means doubling or tripling a defendant's prison term.[291] Different prosecutors' offices have different policies on this question, with some prosecuting the reentry case right away and others waiting.[292] That adds yet another dimension of randomness to reentry sentencing.[293]

2. Misinterpreting State Sentences

Before 2016, the reentry guidelines' prior conviction enhancements were keyed to substantive crime categories. These included "crime of violence," "drug trafficking offense," "aggravated felony," and more.[294] This caused much litigation using the categorical approach, with lawyers arguing over which state crimes did or did not qualify for which enhancements.[295] Responding to judges' and prosecutors' complaints about this litigation, the Commission changed the guideline in 2016 to focus instead on past sentences. Under this new version of the guideline, the length of a sentence is treated as a proxy for the seriousness of the underlying crime.[296] If the "sentence imposed" for a prior crime was five years or more, it is worth ten points; if it was at least two years and less than five, it is worth eight points; if it was more than thirteen months and less than two years, it is worth six points; and all other felonies are worth four points.[297] This new system has reduced litigation over reentry sentences.[298] But it interprets state sentences in an incredibly unsophisticated way. In doing so, it creates arbitrary

290. *See* GUIDELINES MANUAL § 2L1.2(b)(3) (U.S. SENT'G COMM'N 2023) (post-deportation enhancement applies where "defendant engaged in criminal conduct that, at any time, resulted in . . ." a qualifying conviction and sentence).

291. *See* Meyers, *supra* note 237, at 2–3 (providing examples, including one of a defendant with a 130–162 month guideline range due to prosecutors' decision to delay).

292. *Id.* at 2 (noting that three federal prosecutors' offices in the Southern District of Texas charge the reentry case right away, but that the Houston office instead elects to wait until the state case is over).

293. A defense attorney can also sometimes change the Guidelines calculation by negotiating with the prosecutor to stipulate that the first order of deportation is invalid because it was "fundamentally unfair." *Cf.* United States v. Mendoza-Lopez, 481 U.S. 828 (1987) (providing for collateral attack of deportation orders in § 1326 prosecutions on that basis); Immigration and Nationality Act § 276(d), 8 U.S.C. § 1326(d) (enumerating limitations on such collateral attacks). This is sometimes called "moving" the deportation. If the defendant's history goes: (1) felony, (2) deportation, (3) felony, (4) deportation, then stipulating that the first deportation is invalid will save the defendant a sentencing enhancement. The author negotiated several such deals in § 1326 cases as a defense lawyer.

294. *See, e.g.*, GUIDELINES MANUAL 2L1.2(b)(1) (U.S. SENT'G COMM'N 2015).

295. *See supra* notes 142–47 and accompanying text.

296. *See* Fish, *supra* note 149, at 1393–416 (discussing the use of such heuristics in recidivist enhancements).

297. GUIDELINES MANUAL § 2L1.2(b)(2)-(3) (U.S. SENT'G COMM'N 2023).

298. *See* KACHNOWSKI & RUSSELL, *supra* note 5, at 3.

differences in punishment, and artificially inflates many enhancements, based on variations in state sentencing procedures.

The current guideline looks at the nominal sentence imposed by a court, not at the amount of time a defendant served in custody.[299] But the relationship between those two numbers varies widely between (and within) state systems. Some states require a defendant to serve all or nearly all of their sentence. Others set the sticker price of a sentence much higher than the time actually served. Consider some examples. In California, by default defendants serve only half of the announced prison sentence (and, under the recent "realignment" system, some defendants serve much less than that).[300] Arizona and Florida, by contrast, are truth-in-sentencing states, and require all defendants to serve at least eighty-five percent of the announced sentence.[301] In Minnesota, felony defendants are released on supervision after serving two-thirds of their sentences.[302] And discretionary parole systems (which most states have) introduce further complications.[303] In Utah, third-degree felonies are sentenced to an indeterminate term of zero to five years, and second-degree felonies get one to fifteen years.[304] In Texas, defendants are eligible for parole after serving twenty-five percent of their sentence.[305] But for all of these different state sentencing systems, the reentry guideline treats the maximum possible sentence as the "real" sentence. It does not matter if everyone in the courtroom—the judge, the lawyers, the defendant—understood that only a fraction of that time would be spent in prison. It does not matter if the sentence was an indeterminate term of zero to five years, and the defendant was paroled after just two months. The reentry guideline is deliberately ignorant of these facts. The sticker price *is* the sentence.

The 2016 amendment thus replaced one form of arbitrariness with another. Under the categorical approach regime, seemingly irrelevant differences in the elements of state crimes determined whether a prior

299. GUIDELINES MANUAL § 2L1.2 cmt. n.2 (U.S. SENT'G COMM'N 2023); *id.* § 4A1.2 cmt. n.2 (U.S. SENT'G COMM'N 2023) ("[T]he length of a sentence of imprisonment is the stated maximum . . . [C]riminal history points are based on the sentence pronounced, not the length of time actually served.").

300. CAL. PENAL CODE § 4019(f) ("[A] term of four days will be deemed to have been served for every two days spent in actual custody."); See CAL. PENAL CODE § 1170(h) (West 2020) (realignment sentencing); J. RICHARD COUZENS & TRICIA A. BIGELOW, FELONY SENTENCING AFTER REALIGNMENT (2017), [https://perma.cc/8RUK-UL6J].

301. ARIZ. REV. STAT. ANN. § 41-1604.07 (2019); FLA. STAT. ANN. § 944.275 (West 2023).

302. MINN. STAT. ANN. § 244.101 (West 2023).

303. *See* EDWARD E. RHINE, KELLY LYN MITCHELL & KEVIN R. REITZ, ROBINA INSTITUTE, LEVERS OF CHANGE IN PAROLE RELEASE AND REVOCATION 4 (2018) (34 states have discretionary parole systems).

304. UTAH CODE ANN. § 76-3-203 (West 2003), *id.* § 77-18-111 (West 2024).

305. TEX. GOV'T CODE ANN. § 508.145(f) (West 2025).

conviction counted for an enhancement.[306] Under the nominal sentence length regime, seemingly irrelevant differences in state sentencing procedures determine an enhancement's size.[307] The new system eases the burden of litigation on judges and prosecutors, but it maintains the burden of arbitrary treatment on defendants. One problem is that people with substantively similar prior sentences will get very different enhancements due to differences in state procedures. Another, related problem is that the nominal sentence often significantly overstates the seriousness of the underlying crime.[308] For example, in Utah's discretionary parole system you can serve just a few days in custody on a sentence that the Guidelines will count as five years long.[309] But "five years" is a terrible proxy for the severity of the actual crime in such a case. And it seems seriously unjust to get a ten-point enhancement for conduct that only merited a short stay in jail. A system based on time actually served would be far more rational. Such an approach has precedent in the federal system: federal drug crimes use a time-served model for determining recidivist sentence enhancements.[310] But, for the sake of administrative convenience, the Sentencing Commission rejected that approach when it amended the reentry guidelines.[311]

306. *See supra* notes 144–46 and accompanying text.

307. This criticism also applies to the Guidelines' normal criminal history score calculation, since it counts prior sentences the same way. GUIDELINES MANUAL § 4A1.2 cmt. n.2 (U.S. SENT'G COMM'N 2023). But the reentry guideline's arbitrariness is significantly worse, because a single prior sentence can create a much larger enhancement than it can with the general criminal history score. *See infra* Appendix (compare a 3-point increase in criminal history points with an 8- or 10-point increase in offense level).

308. Another similar problem arises when prior crimes get inflated sentences due to defendants' immigration status. Some state judges, and some prosecutors' offices, increase criminal sentences if the defendant is undocumented. *See, e.g.*, Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1430–33 (2011) (showing that some state courts impose enhanced sentences for a prior unlawful entry, and some states make undocumented immigrants ineligible for probation); Kay Levine, Ronald Wright, and Marc Miller, *Discriminatory Policy Pinned on Wall Should Shock All Prosecutors*, BLOOMBERG L., (May 4, 2023) https://news.bloomberglaw.com/us-law-week/discriminatory-policy-pinned-on-wall-should-shock-all-prosecutors [https://perma.cc/69XG-TUS8] (describing a Florida prosecutor's office with a formal policy of giving harsher plea deals to "Hispanic" undocumented defendants). This then triggers additional punishment in a later reentry prosecution, with the reentry guideline mistaking the higher sentence as evidence of more severe conduct rather than just the defendant's immigration status.

309. *See, e.g.*, United States v. Dozier, 555 F.3d 1136, 1138 n.2 (10th Cir. 2009) ("[A]n indeterminate 0 to 5 year sentence is considered a 5–year sentence.").

310. *See* 21 U.S.C. § 802(57)–(58) (defining "serious violent felony" and "serious drug felony" as convictions "for which the offender served a term of imprisonment of more than 12 months").

311. *See* GUIDELINES MANUAL supp. app. C, amend. 802, at 158 (U.S. SENT'G COMM'N 2016) ("The Commission considered public comment suggesting that the term of imprisonment a defendant actually served for a prior conviction was a superior means of assessing the seriousness of the prior offense. The Commission determined that such an approach would be administratively impractical due to difficulties in obtaining accurate documentation.").

3. Supervision Complications

Criminal supervision introduces further problems. Supervision sentences are very common in the United States: about 3.7 million people are currently on some form of probation or parole.[312] When someone is sentenced to supervision, they can be put in custody for violating certain rules. This can happen if they do things like refuse to meet with a probation officer, fail a drug test, or commit a new crime.[313] Under the Guidelines, any sentence for a violation of criminal supervision gets added to the sentence for the original crime.[314] So if a person is initially sentenced to zero days in prison plus probation, and then gets a 219-day sentence for violating probation conditions, the Guidelines treat that as a 219-day sentence for the original crime.[315] In the context of the reentry guideline, this means supervision violations enlarge the prior conviction enhancements by adding to the measured lengths of past sentences.[316]

Reentry defendants are especially susceptible to supervision violations, because deportation itself often causes them.[317] One standard supervision condition is that the supervisee must report in person to a probation or parole office.[318] But when someone is deported after release from jail, they cannot go meet their probation officer. This can trigger a violation report and an arrest warrant.[319] In addition, many state courts impose immigration-related conditions on undocumented supervisees, such as prohibitions on returning

312. *SEE* LEAH WANG, PRISON POL'Y INITIATIVE, PUNISHMENT BEYOND PRISONS 2023: INCARCERATION AND SUPERVISION BY STATE (2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html [https://perma.cc/KP4W-YNPK].

313. *See* Eric S. Fish, *The Constitutional Limits of Criminal Supervision*, 108 CORNELL L. REV. 1375, 1396–1401 (2023).

314. GUIDELINES MANUAL § 4A1.2(k) (U.S. SENT'G COMM'N 2023); *id.* § 2L1.2 cmt. n.2.

315. *See, e.g.*, United States v. Coast, 602 F.3d 1222 (11th Cir. 2010).

316. GUIDELINES MANUAL § 2L1.2 Application Note 2 (U.S. SENT'G COMM'N 2023).

317. Reentry defendants are also commonly given supervised release in the federal system and receive supervised release violations if they return unlawfully. When that happens, they get two cases—one for the reentry and one for the supervision violation. That means additional time in prison and often requires moving defendants around to different states for separate cases stemming from one arrest (i.e. when their supervision case is in one state, but the new reentry case is in another). *See* Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1868–83 (2022) (documenting the large number of supervised release violation sentences in federal immigration cases, which comprise one-third of annual revocations in the federal system); United States v. Ceballos-Santa Cruz, 756 F.3d 635 (8th Cir. 2014) (involving a new § 1326 prosecution in Arizona and related revocation hearing in Nebraska).

318. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 316–17 (2016).

319. *See, e.g.*, Rivera v. State, No. 07-00-0120, 2000 Tex. App. LEXIS 6073 (Tex. App. Aug. 31, 2000) (affirming probation violation for failing to report to probation office after deportation); State v. Contreras-Villegas, No. 112,091, 2015 Kan. App. Unpub. LEXIS 595 (Kan. Ct. App. July 24, 2015) (same); Chavez v. State, No. 49A02-1110-CR-899, 2012 Ind. App. Unpub. LEXIS 607 (Ind. Ct. App. May 21, 2012) (same); People v. Calderon, No. B226768, 2011 Cal. App. Unpub. LEXIS 5664, at *2–5 (Cal. Ct. App. July 29, 2011) (involving a violation for failure to apprise probation department of whereabouts after deportation).

to the United States without legal permission or requirements to report to a probation officer upon return.[320] When defendants are punished for violating immigration-based conditions, it also inflates their sentence enhancement in any later reentry case. This creates yet more double punishment—the state gives you a probation violation for returning to the United States, then the federal system treats that violation as evidence of separate bad conduct meriting an increased sentence for returning to the United States.[321]

The Guidelines' treatment of supervision violations also reproduces the problems discussed in the above Sections. Consider a person sentenced to probation and then deported for the first time. If that person returns to the United States and is prosecuted for a new crime, they will also get a probation violation.[322] If the sentence for that probation violation runs concurrent to the sentence on the new crime, then a single term in prison will count for two separate enhancements.[323] Further, a supervision violation can

320. *See, e.g.*, *Conditions of Supervised Probation*, YUMA CNTY., ARIZ., https://www.yumacountyaz.gov/government/courts/adult-probation/probation-services/standard-probation/conditions-of-supervised-probation (last visited Oct. 19, 2025) [https://archive.ph/FW3at ] ("If deported or processed through voluntary departure, I will not return to the United States without legal authorization during the term of my probation."); *Probation Information*, CALDWELL, COMAL, AND HAYS CNTYS., TEX,: CMTY. SUPERVISION & CORR. DEP'T, http://www.caldwellcscd.org/index_files/Page342.htm (last visited Oct. 19, 2025) [https://perma.cc/7BNM-EUE5] ("REPORTING REQUIREMENTS FOR DEPORTED PROBATIONER. If deported, do not return to the United States illegally. Report by mail every month and provide verification of income. If you return to the United States, you must report to the Community Supervision and Corrections Department within 10 days of re-entry."); *Standard and Special Conditions of Parole*, UTAH BD. OF PARDONS AND PAROLE, https://bop.utah.gov/wp-content/uploads/Standard-Special-Parole-Conditions_Downloaded-8-15-2022.pdf (last visited Oct. 19, 2025) [https://perma.cc/S5FC-ELWU] ("If Deported by ICE authorities: Do not remain in, or return to, Utah or the United States of America, without lawful permission of the government of the United States."); Barrientos v. State, No. 05-98-01966, 1999 Tex. App. LEXIS 8173, at *1–3 (Tex. App. Nov. 2, 1999) (outlining state supervision conditions requiring compliance with immigration authorities and reporting to probation upon return to the United States); State v. Vivas Buezo, A22-0917, 2023 Minn. App. Unpub. LEXIS 74, at *1–3 (Minn. Ct. App. Jan. 30, 2023) (showing state probation violations for unlawfully reentering the U.S. and failing to report to probation upon return); People v. Ochoa, No. B244844, 2014 Cal. App. Unpub. LEXIS 4703, at *1–2 (Cal. Ct. App. July 2, 2014) (regarding conditions to not enter the United States illegally and report to probation within 48 hours of return); State v. Grave-Perez, No. 98,169, 2008 Kan. App. Unpub. LEXIS 341 (Kan. Ct. App. May 2, 2008) ( regarding probation violation for failing to report upon return to the United States after deportation); *see also Sample Special Condition Language (Probation and Supervised Release Conditions)*, U.S. CTS., https://www.uscourts.gov/services-forms/sample-special-condition-language-probation-supervised-release-conditions (last visited Oct. 1, 2024) [https://web.archive.org/web/20241010053007/https://www.uscourts.gov/services-forms/sample-special-condition-language-probation-supervised-release-conditions] ("If you are ordered deported from the United States, you must remain outside the United States, unless legally authorized to re-enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return.").

321. *See, e.g.*, United States v. Rivera-Berrios, 902 F.3d 20, 24 (1st Cir. 2018) (affirming Guidelines criminal history enhancement based on revocation for the same conduct underlying the new federal conviction).

322. *See* Schuman, *supra* note 317, at 1821–22.

323. *See* GUIDELINES MANUAL § 2L1.2 cmt. n.2 (U.S. SENT'G COMM'N 2023) ("The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred."); U. S. SENT'G COMM'N, GUIDELINES

also result in a nominal sentence that is higher than the real sentence. For example, in California the half-time rule applies to probation violations, and in Utah a violation sentence can include an indeterminate prison term with parole.[324] In such cases the violation is counted as the maximum possible custody time rather than the actual time spent in prison.[325] Consider the case of *United States v. Gomez-Colin*.[326] The defendant was initially sentenced to probation on a Georgia felony conviction and then deported.[327] He later returned to the United States and received a state probation violation for reentering the country unlawfully.[328] This resulted in a five-year sentence that was set aside by the state court (meaning he did not serve it).[329] But the federal court treated it as a full five-year sentence under the reentry guideline, giving him a ten-point enhancement.[330] The guideline's treatment of violation sentences thus compounds with its treatment of indeterminate sentences to inflate the reentry enhancements even further.

Lastly, supervision violations also cause very old cases to trigger sentencing enhancements. For any sentence of over thirteen months, the reentry guideline only imposes an enhancement if the defendant was in custody within fifteen years of their arrest for reentry.[331] So if someone served a two-year sentence but was released from custody more than fifteen years ago, that prior sentence does not count. However, supervision violations extend this timeline forward.[332] Thus, if someone served a two-year prison sentence and was released on parole thirty years ago, but they served time on a later parole violation within the last fifteen years, the entire conviction still counts under the reentry guideline.[333] This is a common

AMENDMENT 809 (2018) (amending the reentry guideline so that revocation sentences after the first deportation are still added to underlying convictions before the first deportation); GUIDELINES MANUAL § 4A1.2(a)(2) ("Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest"); discussion *infra* Section III.B.

324. CAL. PENAL CODE § 4019 (West 2024); United States v. Dozier, 555 F.3d 1136, 1138 n.2 (10th Cir. 2009).

325. GUIDELINES MANUAL § 2L1.2 cmt. n.2 (U.S. SENT'G COMM'N 2023); *id.* §§ 4A1.2(b) cmt. n.2. (2023).

326. United States v. Gomez-Colin, 823 F. App'x 368 (6th Cir. 2020).

327. *Id.* at 370–71.

328. *Id.* at 370; Brief of Appellant at 2, United States v. Gomez-Colin, 823 F. App'x 368 (6th Cir. 2020) (No. 19-5616).

329. *Gomez-Colin*, 823 F. App'x at 370.

330. *Id.* at 371 (showing how the defendant got both a pre-deportation and a post-deportation enhancement and was sentenced to 144 months with a Guidelines range of 130–162 months).

331. GUIDELINES MANUAL § 4A1.2(e)(1) (2023). All shorter sentences only count if the initial sentence was imposed within ten years of the current crime. *Id.* § 4A1.2(e)(2)-(3). Supervision violations thus only affect the time window for prior sentence over thirteen months.

332. GUIDELINES MANUAL § 4A1.2(k)(2) (2023).

333. *See, e.g.*, Brief of Appellant at 6–7, United States v. Salamanca, 821 F. App'x 584 (6th Cir. 2020) (No. 19-5746) (Defendant in a 2019 reentry case received an enhancement for a conviction from 1999, due to an intervening probation violation sentence that was imposed in absentia).

problem for reentry defendants, because deportation itself triggers supervision warrants.[334] If a supervisee fails to report because they were deported, the court can issue a probation warrant that indefinitely pauses the clock on the term of probation.[335] Then, if the supervisee is arrested and jailed many years later on the warrant, the supervision violation causes the underlying crime to count for a Guidelines enhancement. This is true regardless of how long ago the underlying conviction occurred.[336] Reentry defendants are thus punished anew for decades-old crimes.

4. Slow Court Records, Fast Guilty Pleas

Given all these complications, it is often quite difficult to figure out a reentry defendant's Guidelines range. First you need to get their conviction records, their supervision revocation records, and their deportation records. This commonly means requesting documents from multiple state and federal government bodies. Ordering these records is often a complicated matter.[337] Many county courthouses only use paper documents, and many require records requests to be made in person or by mail.[338] And the federal government takes months to provide immigrants with their deportation records.[339] Indeed, a large portion of federal immigration files are kept in a defunct limestone mine in Missouri, and requested documents must be physically located there before they are provided.[340] Once you have all of these documents, you must piece together the defendant's deportation and criminal history, and put it in chronological order to figure out the recommended sentence. For the defendant, this exercise is a high-stakes logic game. It produces a longer or shorter sentence based on the specific features (and sequence) of their prior record.

334. *See supra* notes 318–21 and accompanying text.

335. *See* Lee R. Russ, Annotation, *Power of Court, After Expiration of Probation Term, to Revoke or Modify Probation for Violations Committed During the Probation Term,* 13 A.L.R.4th 1240 (2024, originally published in 1982) (observing the "general rule" that issuing a warrant and initiating revocation proceedings tolls the supervision clock indefinitely).

336. GUIDELINES MANUAL § 4A1.2(k)(2) (U.S. SENT'G COMM'N 2023).

337. *See* Fish, *supra* note 149, at 1396–97; Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 31, 70–71 (2005).

338. *See* Kat Albrecht & Kaitlyn Filip, *Public Records Aren't Public: Systemic Barriers to Measuring Court Functioning & Equity*, 113 J. CRIM. L. & CRIMINOLOGY 1, 28–30 (2023); Jonathan Abel, *Going Federal, Staying Stateside: Felons, Firearms, and the 'Federalization' of Crime*, 73 AM. U. L. REV. 585, 669 (2024).

339. *See, e.g.*, Complaint at 2, Sanchez Mora v. U.S. Customs and Border Protection, No. 24-cv-2430, 2024 U.S. Dist. LEXIS 239251 (N.D. Cal. Apr. 24, 2024) ("CBP generally takes over six months, and sometimes longer than one year, from receipt to make a determination on a FOIA request for individual records and, as illustrated by Plaintiffs Sanchez Mora and García's requests, many requests linger—unprocessed—for well over one year.").

340. *See* Ingrid Eagly, *Access to Public Records in Immigration Law: Reviewing Margaret B. Kwoka's Saving the Freedom of Information Act*, YALE J. REG. NOTICE & COMMENT (2022).

Unfortunately, this logic game has a short time limit. Unlawful reentry prosecutions proceed very quickly. Over ninety-seven percent of them end in guilty pleas.[341] About one-quarter of those pleas are obtained through a prosecutor-controlled program called "Fast Track."[342] The Fast Track program provides the defendant with a somewhat lower Guidelines range (usually a two- or four-point reduction) in exchange for (1) not filing any motions or appeals, and (2) pleading guilty within thirty days of their arrest.[343] Reentry cases in the Fast Track program thus resolve very quickly.[344] Even outside the Fast Track program, reentry cases tend to end in much faster guilty pleas than other federal crimes.[345] Most reentry prosecutions are brought in high-volume border districts, where they comprise the majority of cases.[346] Judges, defense lawyers, and prosecutors in those districts expect reentry cases to be routine guilty pleas and process them accordingly.[347]

This means defendants are pressured to plead guilty without having access to their full deportation and conviction records. The prosecutor usually provides a RAP sheet with basic prior conviction information from the FBI's criminal records database, but such RAP sheets are incomplete. They often lack information about the dates of past convictions, the sentences, and any probation or parole violations.[348] That information must be obtained from state agencies, which is a burdensome process. And while complete deportation records should theoretically be provided in discovery,

341. MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2022 at 11 (2024).

342. Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Justice, to all U.S. Att'ys Regarding Department Policy on Early Disposition or "Fast-Track" Programs 2 (Jan. 31, 2012), [https://perma.cc/ 63LM-CXGA]; *see* Kimpel, *supra* note 120, at 253–59. The Fast Track program is also applied to other kinds of federal cases, such as drug cases, but it is mostly used in the reentry context. *Id.* at 255; U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2023) (25.7% of reentry cases got a Fast Track reduction in 2023).

343. Cole Memorandum, *supra* note 342, at 3–4; Kimpel, *supra* note 120, at 259.

344. *See* Kimpel, *supra* note 120, at 254.

345. *See* U. S. CTS, FEDERAL COURT MANAGEMENT STATISTICS—PROFILES (June 30, 2024), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2024.pdf [https://perma.cc/L7JE-YYPZ] (the median duration of felony cases [from filing to final judgment/sentencing] in the five U.S./Mexico border districts are: 5.1 months (S.D. Tex.), 6.7 months (W.D. Tex.), 5.0 months (D. Ariz.), 6.1 months (S.D. Cal.), and 3.9 months (D. NM), compared with 11.3 months nationwide).

346. *See* Kimpel, *supra* note 120, at 246 (83% of reentry prosecutions are in the five border districts); U.S. SENT'G COMM'N, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2023) (reentry cases were 56% of all cases in the District of Arizona, 51.8% in the Western District of Texas, 51.4% in the Eastern District of Texas, and 50.5% in the District of New Mexico).

347. *Cf.* Fish, *supra* note 200, at 1897–1905 (describing routinized mass processing of immigration misdemeanors in federal courts along the border).

348. *See* Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. 1771, 1775–78 (discussing the problem of missing case dispositions in RAP sheets, which ranges from 22% of case entries in Iowa to 98% in Massachusetts, with a national average of 69%).

reentry defendants who plead guilty have no right to pre-plea disclosure of those records.[349] The defendant's full deportation and criminal history is thus often unknown until a court-appointed probation officer obtains the records while writing a presentence report. Presentence reports are prepared after the conviction and take several months to complete.[350] When provided to the defendant before sentencing, they often contain unpleasant surprises. If the probation officer finds a deportation order or supervision violation that the defense lawyer missed, multiple years can be added to the expected sentence.[351] Defendants thus often plead guilty thinking their prison term will be relatively short, only to find out right before the sentencing hearing that it will be much longer. The rapidity of guilty pleas in these cases, combined with the difficulty of obtaining records quickly, keeps defendants in the dark.

### B. THE CASE OF MR. R

The reentry guideline's criminal history enhancements thus create numerous problems. They produce arbitrary and illogical punishments, inaccurately measure prior sentence lengths, and make it difficult to ascertain a defendant's sentencing range before the guilty plea. It is helpful to illustrate these problems with a concrete case. To that end, here is the story of Mr. R, a reentry defendant who was sentenced to ninety-six months in prison in 2014.[352] The sentencing in his case illustrates several of the reentry guideline's absurdities.

Mr. R was born in a Latin American country. He moved to the United States with his father at the age of eight. In his late teens and early twenties, he collected a series of criminal convictions in California. In June 1995, when Mr. R was eighteen years old, he was convicted of stealing a car.[353] He was sentenced to 365 days in jail and three years of probation. Shortly after his release, in September 1995, he was convicted of possessing cocaine with intent to sell.[354] He was sentenced to three years in prison for the drug conviction and given a probation violation on the auto theft case with a

349. *See* Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1 (2017).

350. *See* FED. R. CRIM. P. 32(e)–(g).

351. It is especially common for expedited removals to be overlooked in the early stages of a reentry case. Such removals occur at the border and are never reviewed in an immigration court. Consequently, they generate a less extensive paper trail than formal deportations. Nonetheless, expedited removals count as deportations for § 1326 purposes. *See* AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL (2023).

352. This is a real case, and all the information provided here comes from publicly filed court documents. However, I am using a pseudonym to avoid publicizing the defendant's identity.

353. CAL. VEH. CODE § 10851(a) (West 2024).

354. CAL. HEALTH & SAFETY CODE § 11351.5 (West 2024)

concurrent three-year sentence. After his release from custody, he was deported from the United States for the first time in November 1997. He also received two separate three-year terms of parole in California, one for each of the 1995 convictions.[355]

Mr. R then reentered the United States and returned to California. He was convicted of robbery in 1998.[356] For that conviction he received a state sentence of fifteen years in prison. He also received two concurrent parole violations in each of the 1995 cases. He remained in prison in California on this sentence until 2012, when he was released from custody and deported again. He then reentered the United States and was prosecuted federally for unlawful reentry. Under the pre-2016 Guidelines, he received a sentence of fifty-seven months in prison because of his prior robbery conviction.[357]

Fast forward to 2018. Mr. R is arrested again for entering the United States and charged with unlawful reentry. He is now in his early forties, and his most recent state conviction is from 1998. Mr. R's court-appointed defense lawyer knows that the 1998 robbery conviction will trigger a ten-point enhancement, because Mr. R was released from custody within the last fifteen years.[358] But the lawyer does not think either of the 1995 convictions will count, because they are too old. This means Mr. R will receive just one prior conviction enhancement (for a post-first-deportation felony).[359] The lawyer tells Mr. R that he is looking at a Guidelines range of forty-six to fifty-seven months, and Mr. R pleads guilty less than two months after his arrest.[360]

Between the guilty plea and sentencing, a court-appointed probation officer orders Mr. R's criminal case records from California to prepare a presentence report. These records reveal that the two 1995 convictions produced parole violations that ran concurrent with the 1998 robbery sentence. The probation officer concludes that those 1995 convictions should therefore be counted in Mr. R's 2018 Guidelines calculation, because he was in custody within the relevant timeframe. This has two consequences for the sentence. First, it gives Mr. R six more criminal history points, putting him in the Guidelines' highest criminal history category. Second, it gives Mr. R a large new pre-first-deportation enhancement under the reentry guideline.

355. In most California felony cases parole is added to the end of a defendant's prison sentence (and therefore does not shorten the prison sentence). CAL. PENAL CODE § 3000 (West 2024).

356. CAL. PENAL CODE § 211 (West 2024).

357. The pre-2016 guidelines provided a 16-point enhancement for any prior "crime of violence." *See* GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).

358. GUIDELINES MANUAL § 4A1.2(e)(1) (U.S. SENT'G COMM'N 2018).

359. GUIDELINES MANUAL § 2L1.2(b)(3) (U.S. SENT'G COMM'N 2018).

360. Mr. R did not receive a Fast Track plea offer, so this rapid guilty plea did not produce a sentencing benefit.

The 1995 convictions occurred before Mr. R's first deportation, so they trigger a separate enhancement from the 1998 sentence. And even though the parole violation ran concurrent with the new robbery sentence, it is added to the 1995 sentence and thus the pre-deportation sentence enhancement.[361] Based on this calculation, the probation officer concludes that Mr. R's Guidelines range is 130 to 162 months.

The defense lawyer makes no objections to the probation officer's conclusions. At the sentencing hearing, the defense lawyer argues that these convictions are quite old and the product of Mr. R's troubled youth, while today Mr. R is a deeply religious man who works as a Christian pastor. Mr. R complains to the judge that his defense lawyer has not communicated with him about the surprise increase in his sentence. The judge proceeds with sentencing anyway and gives Mr. R ninety-six months in prison.

Subsequent litigation revealed that this Guidelines range was in fact wrong. The 1995 convictions should not have counted for the 2018 Guidelines calculation, because Mr. R's parole violation sentences were discharged in September 2000. California law provides that a person cannot be kept in custody longer than four years on a parole violation for a noncapital felony.[362] This means Mr. R was not in custody on those cases within fifteen years of 2018. But his discharge from parole could only be discovered by looking at prison administrative records kept by the California Department of Corrections. Mr. R's discharge was noted in pencil on a paper log in his prison file, which could only be obtained through a written request.[363] Because of this error, Mr. R should have been in a lower criminal history category, and he should not have received a pre-deportation felony enhancement. Mr. R's actual Guidelines range should have been forty-six to fifty-seven months.

This case illustrates several absurdities about unlawful reentry sentencing. First is the strange focus on the timing of the first deportation. Mr. R was deported from the United States multiple times, but his recommended sentence was dramatically increased because his first deportation happened to occur between two felony convictions. Had his first deportation happened before 1995 or after 1998, his Guidelines range would have been at least five years lower.[364] Second is the importance of

361. *See supra* note 324 and accompanying text.

362. CAL. PENAL CODE § 3000(b)(6)(A) (West 2024). The probation officer and the defense lawyer apparently did not realize this.

363. *See* SAN DIEGO CTY. DIST. ATTY, AUTHORIZATION FOR RELEASE OF OFFENDER CENTRAL FILE (2019), https://www.sdcda.org/Content/prosecuting/Central%20File%20Authorization%20Wavier.pdf [https://perma.cc/J4YG-T4RX].

364. Removing 8 points brings the range from 130–162 months down to 63–79 months.

supervision violations. Because they extend the clock on very old convictions, large swings in sentence length can turn on precisely when a probation or parole violation occurred. And because the Guidelines count violations as part of the original conviction, two completely concurrent sentences (one for a new crime and one for a supervision violation) are treated as separate sentences of the same length. Third is how crucial the Guidelines make difficult-to-find state records. Mr. R's defense lawyer did not know about the parole violations that, according to the probation officer, made the 1995 convictions count against Mr. R in 2018. And neither the lawyer nor the probation officer found the document in Mr. R's prison file that proved the convictions were, in fact, too old. When large sentence swings turn on the precise details of state cases, defendants are at the mercy of state agencies' variable recordkeeping practices.

Mr. R's case is exceptional in some respects, including that his sentence was unusually long for a reentry case.[365] But the problems it illustrates are endemic to the reentry guideline. They emerge in one form or another in thousands of cases every year. And his case also follows a familiar pattern for reentry prosecutions. Mr. R spent nearly his entire life in the United States. It is where his family lives and it is the only country he considers home. But he also accumulated a serious criminal record in his late teens and early twenties. Now, as a man in his forties whose entire life is in the United States, he keeps trying to return.[366] And, because of the reentry guidelines' double enhancements, those convictions from his youth keep triggering lengthy sentences every time he comes back.

## IV. SENTENCING CONSTITUTIONALISM

This Article has shown that the federal sentencing system discriminates against undocumented immigrants. So what can be done about it? Naturally, Congress could amend the First Step Act so that immigrants receive earned time credit. The Sentencing Commission could also rewrite the reentry guideline to remove its extra criminal history enhancements. Such legislative fixes would be straightforward. This Part will thus focus instead on what can be done by federal judges and the lawyers who appear before them.[367] A constitutional Equal Protection challenge seems like an intuitive strategy.[368]

365. *Supra* notes 231–34 and accompanying text.

366. There is significant empirical literature documenting that people age out of crime after their twenties. *See* RACHEL BARKOW, PRISONERS OF POLITICS 80–81 (2019).

367. It is worth noting that the last two major changes to the reentry guideline were motivated, in significant part, by widespread judicial variances. *See* 8 U.S.C.A. § 1101(43); *see supra* note 128, 139–42 and accompanying text. *See also* Eric Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 549 (2015).

368. Since we are discussing the federal government, technically, the Due Process Clause is the

But that approach faces significant obstacles under current case law. The Supreme Court has disallowed racial disparate impact claims, and it grants the federal government substantial leeway to discriminate by immigration status.[369] Such doctrinal hurdles may be surmountable, but advocates challenging these sentencing policies have yet to overcome them.

This Part proposes another approach, herein labeled "sentencing constitutionalism." The basic idea is that sentencing decisions are less constrained than other judicial decisions. In the sentencing context, judges exercise normative discretion over the size of the punishment and the reasons that justify it. And judges can include amongst those reasons a desire to advance underenforced constitutional norms.[370] Because so much deference is built into modern Equal Protection doctrine, many instances of clear discrimination go unremedied in formal constitutional review. Recognizing this, several scholars have developed a theory of "administrative constitutionalism."[371] These scholars have observed that executive branch agencies use their policymaking discretion to combat forms of discrimination, such as racial disparate impact, that cannot be remedied in court. Judges should do the same in the immigrant sentencing context. Specifically, judges should counteract the racial and immigration-status-based discrimination built into federal sentencing law by (1) refusing to apply the reentry guideline's recidivist enhancements, and (2) discounting immigrants' sentences to account for the fact that they cannot earn First Step Act credits.[372] Many federal judges have already embraced this kind of approach in the crack cocaine sentencing context. The crack/powder disparity in federal sentencing law is racially discriminatory, and Equal Protection challenges have entirely failed to remedy it. However, federal judges have somewhat counteracted this discrimination in their sentencing decisions. Numerous judges have explicitly rejected the higher crack

vehicle for constitutional Equal Protection norms. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); United States v. Windsor, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws").

369. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 280 (1987); Mathews v. Diaz, 426 U.S. 67, 68 (1976).

370. *See* Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

371. *See supra* note 24.

372. Some federal judges have done this. *See, e.g.*, United States v. Zapata-Trevino, 378 F. Supp. 2d 1321, 1327–28 (D.N.M. 2005) (granting a substantial downward variance in a reentry case, and citing as reasons both the unfairness of the Guidelines double counting criminal history and the fact that the defendant will be ineligible for early release or BOP programming); United States v. Navarro-Diaz, 420 F.3d 581, 588–89 (6th Cir. 2005) (remanding for post-*Booker* resentencing where sentencing judge indicated defendant's ineligibility for halfway house would have merited a lower sentence); United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 964 (E.D. Wis. 2005); United States v. Santos, 406 F. Supp. 2d 320, 324 (S.D.N.Y. 2005).

guideline as a matter of policy. And overall, federal judges vary downward from the Guidelines range in most crack cocaine cases. This systematic judicial rejection of the crack guideline is motivated by constitutional equality concerns. Judges should do the same with reentry sentences.

### A. A TWO-TRACK MODEL OF EQUAL PROTECTION AT SENTENCING

Immigrant defendants can challenge the sentencing discrimination described above as violating Equal Protection. This argument can be made as a constitutional challenge to the validity of the laws themselves. It can also be made as a quasi-constitutional appeal to judges' discretionary sentencing power. The former strategy runs into major obstacles in the form of deference principles established by the Supreme Court. The latter strategy lacks the compulsory force of law, but avoids the limitations of contemporary Equal Protection doctrine. Here both strategies will be explored in turn.

Both the First Step Act and the reentry guideline explicitly discriminate against defendants based on their immigration status.[373] Numerous defendants have argued that these laws are therefore unconstitutional.[374] To date, such arguments have not found success. Defendants have been unable to overcome the Supreme Court's deference to the federal government when it comes to immigration policy. Under the plenary power doctrine, the Court gives Congress and the President broad leeway to enact policies that discriminate by immigration status.[375] The Court has directed greater scrutiny at state laws that harm immigrants, but that is not helpful in the

373. The operative First Step Act provision only applies to noncitizens with a deportation order. 18 U.S.C. § 3632(d)(4)(E). And the reentry guideline is exclusively used for crimes with non-citizenship as an element, excluding numerous entry crimes applicable to citizens. *See supra* notes 235–38 and accompanying text.

374. For the reentry guideline *see, e.g.*, United States v. Valdez-Cejas, No. 21-10659, 2022 U.S. App. LEXIS 21355, at *1 (5th Cir. Aug. 2, 2022); United States v. Osorto, 995 F.3d 801, 807–08 (11th Cir. 2021); United States v. Alejo-Pena, 474 F. App'x 137, 137–38 (4th Cir. 2012); United States v. Ruiz-Chairez, 493 F.3d 1089, 1090 (9th Cir. 2007); United States v. Mendoza-Hinojosa, No. 99-50327, 2000 U.S. App. LEXIS 8068 at *5–7 (9th Cir. Apr. 20, 2000); United States v. Cardenas-Alvarez, 987 F.2d 1129, 1133–34 (5th Cir. 1993); United States v. Adeleke, 968 F.2d 1159, 1160–61 (11th Cir. 1992); United States v. Ceron-Sanchez, 222 F.3d 1169, 1173 (9th Cir. 2000); . For the First Step Act *see, e.g.*, Lomeli v. Birkholz, No. CV 23-9461-MRA (JPR), 2024 U.S. Dist. LEXIS 131885, at *3 (C.D. Cal. June 18, 2024); Cheng v. United States, 725 F. Supp. 3d 432, 437–38 (S.D.N.Y. Mar. 26, 2024); Murillo-Cabezas v. F.C.I. Otisville Warden, No. 23-CV-11329, 2024 U.S. Dist. LEXIS 139640, at *2 (S.D.N.Y. Aug. 2, 2024); .United States v. Arellano-Felix, No. 97-CR-2520-LAB-1, 2023 U.S. Dist. LEXIS 20796, at *3 (S.D. Cal. Jan. 31, 2023).

375. *See* Mathews v. Diaz, 426 U.S. 67, 81–82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 499 n. 31 (2001).

federal sentencing context.[376] Perhaps more usefully, the Court in *Hampton v. Wong* did apply heightened scrutiny to federal agency regulations that discriminate against immigrants.[377] *Wong* involved a Civil Service Commission regulation excluding all noncitizens from federal employment.[378] The Court applied heightened scrutiny to this regulation, reasoning that the plenary power doctrine does not protect agency rules unless they are mandated by Congress or the President.[379] The Court held that when an agency discriminates by immigration status, it must demonstrate both an "overriding national interest" and evidence that the policy was "actually intended to serve" that interest.[380] Because the Guidelines are written by an independent agency (the Sentencing Commission), *Wong* may support a constitutional challenge to the reentry guideline.[381] The post-deportation enhancement seems especially vulnerable, since it (1) is not connected to Congress's statutory maximum increase, which applies only to pre-deportation felonies, and (2) does not meaningfully deter reentry because it punishes only post-reentry conduct. Nonetheless, *Wong*-based challenges to the reentry guideline have yet to find success in court.[382]

Defendants could also argue that the reentry guideline and the First Step Act discriminate by race and ethnicity. Nearly every person harmed by these rules is of Latin American ancestry.[383] And policies that discriminate by race are subjected to strict scrutiny.[384] The problem, however, is that these rules are facially neutral as to race, and the Supreme Court has foreclosed Equal Protection challenges based on disparate impact claims.[385] A law could thus apply against only one race ninety-nine percent of the time and still be upheld in court because it is facially neutral. The Court has carved out one important

376. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971) (applying strict scrutiny to strike down an Arizona law requiring fifteen years of residency for noncitizens before they could receive welfare benefits); Plyler v. Doe, 457 U.S. 202, 230 (1982) (applying rational-basis-with-bite scrutiny to strike down a Texas law excluding undocumented immigrant children from public schools). *See also* Diaz, 426 U.S. at 85 (distinguishing between the high scrutiny applied to state governments when they discriminate by immigration status and the low scrutiny applied to the federal government).

377. Hampton v. Wong, 426 U.S. 88, 116 (1976).

378. *Id.* at 90–99.

379. *Id.* at 103.

380. *Id.*

381. By contrast, the discriminatory First Step Act provisions were passed by Congress.

382. So far, such challenges have only been brought in the Eleventh Circuit. *See generally* United States v. Osorto, 995 F.3d 801 (11th Cir. 2021); United States v. Huerta-Carranza, No. 20-12038, 2022 U.S. App. LEXIS 13953 (11th Cir. May 24, 2022); *but see* Osorto, 995 F.3d at 824 (Martin, J., concurring) (finding GUIDELINES MANUAL § 2L1.2(b)(3) unconstitutional under *Wong*).

383. *Supra* note 4 and accompanying text.

384. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995).

385. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996); McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Washington v. Davis, 426 U.S. 229, 230 (1976).

exception to this rule: under the *Arlington Heights* test, a formally race-neutral law violates Equal Protection if it was enacted with racist purposes and has a racially disparate impact.[386] A defendant could try to bring such a challenge to the First Step Act or the reentry guideline. In the guideline context, this would likely mean emphasizing the racist panic in Florida that gave rise to the double criminal history enhancements. In the First Step Act context, it would mean focusing on the Trump Administration's 2018 nativism. However, *Arlington Heights* challenges face two significant hurdles. First is the problem of proving intent—federal courts adopt a strong presumption that government action is not racially motivated.[387] Second is the problem of reenactment—if a rule is enacted for discriminatory reasons at Time One, and then reenacted for different reasons at Time Two, courts often treat Time Two as decisive. For example, many defendants have argued that the unlawful reentry statute is itself unconstitutional due to its racist history.[388] While federal courts have largely conceded that the law's original enactment was racist, they have unanimously upheld the law because it was later reenacted.[389]

Modern Equal Protection doctrine thus erects significant barriers to immigrants' antidiscrimination claims. While these barriers may be surmountable in some cases, they significantly limit the potential of constitutional challenges against the First Step Act and the reentry guideline. Another option would be to appeal to district judges' sentencing discretion. After *Booker*, sentencing judges do not have to follow the Guidelines.[390] They can sentence a defendant anywhere within the statutory range, subject only to deferential appellate review for reasonableness.[391] Because the judge is the key decisionmaker at sentencing, rather than Congress or the executive, the deference doctrines discussed above lack purchase. A judge can use their discretion to counteract race-based and immigration-status-based discrimination built into the federal sentencing rules. And judges should do so to vindicate a constitutional equality norm that, because of those deference doctrines, goes widely underenforced.[392] Constitutional norms can

386. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977).

387. *See, e.g.*, Abbott v. Perez, 585 U.S. 579, 603 (2018).

388. *See, e.g.*, United States v. Carrillo-Lopez, 68 F.4th 1133, 1138 (9th Cir. 2023); United States v. Gonzalez-Nane, No. 23-1418, 2024 U.S. App. LEXIS 17614 at *1 (3d Cir. July 17, 2024); United States v. Sanchez-Garcia, 98 F.4th 90 (4th Cir. 2024); United States v. Amador-Bonilla, 102 F.4th 1110, 1113 (10th Cir. 2024); United States v. Viveros-Chavez, 114 F.4th 618, 618–19 (7th Cir. 2024).

389. *See Adarand Constructors,* 515 U.S. at 237..

390. United States v. Booker, 543 U.S. 220 (2005).

391. *Id.* at 260–65.

392. *See* Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1215–19 (1978) (observing that constitutional norms often go underenforced by federal courts because of institutional deference concerns, and arguing that such norms are enforceable by other actors).

thereby have wider play in the discretionary sentencing context than they do in the judicial review context. This idea will here be called "sentencing constitutionalism."

Administrative constitutionalism is a close analogue to sentencing constitutionalism. In numerous contexts, scholars have observed administrative agencies using their policymaking discretion to advance constitutional norms beyond the level required by courts. For example, in the 1960s both the Federal Communications Commission and the Federal Power Commission interpreted the Equal Protection Clause as requiring regulated companies to achieve racial equality in employment.[393] In the 1940s and 1950s, the Federal Social Security Board enforced an Equal Protection norm safeguarding the welfare rights of the poor.[394] During the Obama Administration, the Department of Housing and Urban Development adopted rules requiring recipients of federal funding to affirmatively reduce racial housing disparities.[395] And, in the criminal justice context, contemporary federal (and some state) prosecutors have adopted a wide array of self-limiting rules that protect defendants' constitutional rights beyond what courts require.[396] In these examples and others, agencies go above the floor set by judicial doctrine and implement a more robust vision of constitutional rights. They do so through their own discretionary rulemaking authority. Judges, when they sentence defendants, operate in a similar context. Deference doctrines like plenary power over immigration, the prohibition on disparate impact claims, and others lack purchase because judges are themselves determining sentences. So long as they do not violate the law, judges can go above the constitutional floor just as agencies have.[397] Policymaking discretion thus lets them implement constitutional antidiscrimination norms to a greater degree than formal doctrine requires.

Sentencing constitutionalism is also similar to the concept of an imperfect defense.[398] In criminal trials, defenses are binary. The judge either will or will not let the defendant argue a defense, and the jury either will or

393. *See* Lee, *supra* note 24.

394. *See* Tani, *Administrative Equal Protection*, *supra* note 24.

395. *See* Emerson, *supra* note 24.

396. *See* Fish, *supra* note 24.

397. Some of the examples of administrative constitutionalism, especially those involving employment-based affirmative action, might be challenged as unlawful under the Supreme Court's recent affirmative action decisions. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2148 (2023). However, sentencing constitutionalism, at least as described in this Article, is not vulnerable to such a challenge because it does not involve classification by race.

398. In the homicide context, the term "imperfect self-defense" sometimes refers to a defense that defeats a murder charge but not a manslaughter charge. *See, e.g.*, Judicial Council of Cal., Criminal Jury Instructions (CALCRIM) No. 571 (2024) (Voluntary Manslaughter: Imperfect Self-Defense or Defense of Another). Here I focus instead on the use of an imperfect defense to justify a lower sentence.

will not acquit based on a defense. Because a successful defense exonerates completely, the formal elements of defenses are often written quite narrowly. The federal duress defense, for example, only applies where the defendant faces an "immediate threat of death or serious bodily injury."[399] The most common version of the insanity defense is limited to situations where the defendant either (1) did not know what they were doing or (2) was incapable of understanding that their action was wrongful.[400] And California's entrapment defense only applies where the police conduct would cause a "normally law-abiding person" to commit the crime.[401] Because these and other defenses are defined narrowly, they fail to exonerate the defendant in many cases where it seems like they should apply. Take, for example, someone who committed a crime on the orders of their abusive partner, but was not in immediate peril at the time of the crime. That person will not satisfy the elements of a duress defense, even though the moral purpose underlying the defense clearly applies.[402] In cases like these, many U.S. jurisdictions lower the defendant's sentence to account for the "imperfect" defense.[403] The Federal Sentencing Guidelines, for example, enumerate imperfect duress as a reason for downward departure.[404] Several federal circuits have also recognized imperfect entrapment as a legitimate basis for downward departure.[405] And numerous states' sentencing statutes specifically list imperfect defenses as mitigating factors.[406] Such imperfect defenses are structurally similar to sentencing constitutionalism. Both involve situations where a defendant's legal argument has strong moral force (e.g., a duress defense or discrimination claim). However, the argument fails in court for technical reasons (e.g. the defense is too narrowly defined, or the discrimination claim is denied out of deference and administrability concerns). In such circumstances, judges can use their sentencing discretion

399. Debra Oakes, Annotation, *Availability of Defense of Duress or Coercion in Prosecution for Violation of Federal Narcotics Laws*, 71 A.L.R. Fed. 2d 481 (2013).

400. *See* Clark v. Arizona, 548 U.S. 735, 747 (2006).

401. CALCRIM No. 3408 (2024).

402. *See, e.g.*, United States v. Willis, 38 F.3d 170, 176 (5th Cir. 1994).

403. *See* Hessick & Berman, *supra* note 28, at 188–91.

404. GUIDELINES MANUAL § 5K2.12 (U.S. SENT'G COMM'N 2023).

405. *See, e.g.*, United States v. Bala, 236 F.3d 87, 92 (2d Cir. 2000); United States v. Garza–Juarez, 992 F.2d 896, 912 (9th Cir. 1993); United States v. Osborne, 935 F.2d 32, 35 n. 3 (4th Cir. 1991); United States v. Barth, 990 F.2d 422, 424–25 (8th Cir. 1993); United States v. McKeever, 824 F.3d 1113 (D.C. Cir. 2016).

406. *See, e.g.*, CAL. R. OF COURT 4.423(a)(4) (2022); HAW. REV. STAT. ANN. § 706-621(2)(c) (West 2025); IDAHO CODE ANN. § 19-2521(2)(d) (West 2020); 730 ILL. COMP. STAT. ANN. 5/5-5-3.1 (2022); IND. CODE ANN. § 35-38-1-7.1(b)(4) (West 2025); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(25) (2010); N.J. STAT. ANN. § 2C:44-1(b)(4) (2023); OHIO REV. CODE ANN. § 2929.12 (West) (2014); TENN. CODE ANN. § 40-35-113(2)-(3) (West 2022); ALASKA STAT. § 12.55.155(d)(20) (2014); Hessick & Berman, *supra* note 28 at 188 n. 108–13 (listing state statutes).

to compensate for the narrowness of formal law. They can lower a defendant's sentence to account for the injustice that otherwise goes unremedied.[407]

Sentencing constitutionalism also finds conceptual support in Justice Anthony Kennedy's concurrence in *Beckles v. United States*.[408] In *Beckles*, the Supreme Court held that defendants cannot bring constitutional vagueness challenges to the Sentencing Guidelines.[409] The majority reasoned that because the Guidelines are purely advisory post-*Booker*, they do not raise the same due process concerns as a vague criminal statute.[410] Justice Kennedy wrote separately to note that constitutional vagueness challenges should still have a place in discretionary sentencing decisions. However, he posited that "the realm of judicial discretion in sentencing" required "some other explication of the constitutional limitations."[411] He thus suggested that the Constitution should be operationalized differently at sentencing. That is also the intuition behind sentencing constitutionalism. Indeed, Kennedy's reasoning could cover a variety of criminal procedure rights that do not normally apply at sentencing.[412] The right to confront witnesses, the prohibition on double jeopardy, the right not to be punished for acquitted conduct, the privilege against self-incrimination, and other constitutional principles can be incorporated into the discretionary sentencing context (perhaps in a modified form with more judicial flexibility).[413] This would particularly make sense in the federal system, where trials have all but disappeared and there is far more litigation at sentencing than at the guilt-or-innocence phase.[414] Thus sentencing

407. Legal scholars have called for similar sentencing-based remedies in the context of Fourth Amendment suppression motions and prosecutorial misconduct. *See* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 70–74 (1994); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509 (2009).

408. Beckles v. United States, 580 U.S. 256, 270–71 (2017) (Kennedy, J., concurring).

409. *Id.* at 270.

410. *Id.* at 264–67.

411. *Id.* at 271.

412. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 56–73 (2011) (listing sentencing factors that would violate ordinary constitutional rights if such rights applied in the sentencing context).

413. *See id.*; Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257 (2014) (arguing that confrontation rights should apply at sentencing); Carissa Byrne Hessick & Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45 (2011) (arguing that double jeopardy should apply at sentencing to limit recidivist enhancements); *see, e.g.*, United States v. Jordan, 256 F.3d 922, 929 (9th Cir. 2001) (imposing a "clear and convincing" standard of proof for unusually large sentencing enhancements, as opposed to the normal "preponderance" standard).

414. Nearly all federal convictions are the product of guilty pleas, meaning little or no litigation normally occurs prior to the conviction. *See* John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in* 2022, PEW RSCH. CTR. (June 14, 2023), https://www.pewresearch.org/

constitutionalism, in addition to providing an alternative remedy for Equal Protection claims, might also bring some of the Constitution's criminal procedure architecture into the sentencing process.

### B. SENTENCING CONSTITUTIONALISM AND THE CRACK/POWDER DISPARITY

The history of federal crack cocaine sentencing provides a real-world case study of sentencing constitutionalism. The story begins in 1986, with the tragic death of a basketball player named Len Bias. Bias died after using cocaine on the night he was drafted into the NBA.[415] The public reaction to his death launched a nationwide media-driven moral panic over crack cocaine.[416] This panic had a clear racial dimension, as crack cocaine abuse was widely perceived to be an epidemic amongst African-American individuals.[417] Politicians and the wider public feared that crack use was spreading from the inner cities to suburbia.[418] For example, Senator Lawton Chiles inserted a Florida newspaper article into the Congressional Record that reported: "Less than a block from where unsuspecting White retirees play tennis, bands of young Black men push their rocks on passing motorists, interested or not."[419]

Responding to this panic, Congress enacted the Anti-Drug Abuse Act of 1986.[420] Senator Chiles was one of the "prime movers" behind the law.[421] It created new mandatory minimum penalties for federal drug trafficking

short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022 [https://perma.cc/N994-ZPP2]. But due to the guidelines system and the norm of judicial discretion over sentencing, there is often vigorous litigation over sentencing issues.

415. *See* Adam M. Acosta, *Len Bias' Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences Under 18 U.S.C. § 3582*, 53 HOW. L.J. 825, 826–27 (2010). Ironically, Bias died after using powder cocaine.

416. *See* Sklansky, *supra* note 34, at 1293–97; DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 105–06 (2007) ("In July, the three networks offered seventy-four evening news segments on drugs, half about crack. In the three months before the 1986 election, there were one thousand stories discussing crack. Fifteen million viewers watched a CBS documentary on crack in the fall of 1986, the highest on record for a news documentary.").

417. *See* Theresa Runstedtler, *Racial Bias: The Black Athlete, Reagan's War on Drugs, and Big-Time Sports Reform*, 55 AM. STUD. 85, 89–94 (2016); Sklansky, *supra* note 34, at 1290–95; PROVINE, *supra* note 416, at 88–100.

418. *See* Sklansky, *supra* note 34, at 1293–94; PROVINE, *supra* note 416, at 98–99; Runstedtler, *supra* note 417 at 90–91.

419. 132 CONG. REC. 8292 (daily ed. 1986) (entering the article "It's Cheap, It's Available and It's Ravaging Society" by Paul Blythe of the Palm Beach Post into the Congressional Record). The article also connects crack sales to Chilton's theme of Haitian drug dealing. *Id.* ("Most of the dealers, as with past drug trends, are black or Hispanic, police said. Haitians also comprise a large number of those selling cocaine rocks, authorities said."). *See supra* notes 58–61 & accompanying text.

420. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801).

421. PROVINE, *supra* note 416 at 112.

crimes, which were triggered by a much lower quantity of crack than of powder cocaine. The law provided a ten-year mandatory minimum sentence for crimes involving five kilograms of powder cocaine, but just fifty grams of crack.[422] Similarly, it provided a five-year mandatory minimum for 500 grams of powder but just five grams of crack.[423] This 100-to-1 ratio was not the product of any systematic study of the drugs' relative effects—Congress's factfinding process was perfunctory.[424] Rather, legislators engaged in a one-way auction, ratcheting up the crack cocaine penalties in a competition to show which party could look tougher.[425]

The higher penalties for crack had a clear disparate impact on African American defendants. In 1993, 88.3% of federal crack cocaine defendants were Black and only 4.1% were White.[426] By comparison, powder cocaine defendants were 27.4% Black and 32% White.[427] The average federal drug sentence for a Black defendant went from 11% higher than that of a White defendant in 1986 to 49% higher four years later.[428] Black defendants sentenced under the new law brought Equal Protection challenges, arguing that this crack/powder disparity was racially discriminatory. Such Equal Protection claims succeeded, albeit temporarily, in only two cases. Judge Clyde Cahill of the Eastern District of Missouri struck down the crack/powder disparity on Equal Protection grounds, finding that the 1986 Congress was motivated by unconscious anti-Black racism.[429] Judge Cahill's ruling was then reversed by the Eighth Circuit.[430] The Minnesota Supreme Court also struck down a state statute creating higher penalties for crack than powder cocaine, concluding that it violated the state constitution.[431] The Minnesota legislature responded by increasing the penalties for powder cocaine to match those of crack.[432] Beyond those two outliers, such Equal Protection challenges failed. The federal courts of appeal unanimously

422. 21 U.S.C. § 841(b)(1)(A)(ii)-(iii).

423. 21 U.S.C. § 841(b)(1)(B)(ii)-(iii).

424. *See* Vagins & McCurdy, *supra* note 31, at 1–2 ("[T]here was no committee report to document Congress' intent in passing the Act or to analyze the legislation. Few hearings were held in the House on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio, which only lasted a few hours."); Barkow, *supra* note 366, at 74 ("We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it.").

425. *See* Sklansky, *supra* note 34, at 1296.

426. U.S. Sent'g Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy xi (1995) [1995 Report].

427. *Id.*

428. *See* Vagins & McCurdy, *supra* note 31, at 3.

429. United States v. Clary, 846 F. Supp. 768, 797 (E.D. Mo. 1994).

430. United States v. Clary, 34 F.3d 709, 714 (8th Cir. 1994).

431. State v. Russell, 477 N.W.2d 886 (Minn. 1991).

432. MINN. SENT'G GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON DRUG OFFENDER SENTENCING ISSUES 73 (2004).

upheld the disproportionate punishment of crack defendants.[433] As the Fourth Circuit explained: "[T]here is evidence that the line Congress and the Sentencing Commission have drawn has a disproportionate impact upon blacks. But this is not sufficient to make out an Equal Protection violation."[434]

When the Sentencing Commission published the first Guidelines Manual in 1988, it based drug trafficking sentences on the mandatory minimums set by Congress.[435] The centerpiece of the drug trafficking guideline is a "Drug Quantity Table" that specifies the defendant's base offense level.[436] This Table gives the defendant an offense level between six and thirty-six depending on the type and amount of drug involved in the crime. Following Congress, the Commission set the amount of crack cocaine corresponding to each level on the Table at 1/100th the amount of powder cocaine at that same level. So, for example, a defendant would have a base offense level of 28 for 2.0–2.9 grams of crack cocaine or 200–299 grams of powder cocaine.[437] This gave defendants with crack much higher sentences than defendants with an equivalent amount of powder. Appeals courts rejected defendants' Equal Protection challenges to the Guidelines, using the same reasoning that they applied to the underlying statute.[438] In 1995, the Sentencing Commission attempted to change the drug guideline in order to reduce the gap between crack and powder cocaine sentences.[439] Congress, however, exercised its veto power over Guidelines amendments to keep the disparity in place.[440]

433. *See, e.g.*, United States v. Frazier, 981 F.2d 92 (3d Cir. 1992); United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994); United States v. Galloway, 951 F.2d 64 (5th Cir. 1992); United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. Harding, 971 F.2d 410 (9th Cir. 1992); United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993); United States v. King, 972 F.2d 1259 (11th Cir. 1992); *see* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 279 n.90 (2009) (collecting cases); 1995 Report, *supra* note 427, at 118.

434. *D'Anjou*, 16 F.3d at 612.

435. *See* Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 29 (2013); Kimbrough v. United States, 552 U.S. 85, 96–97 (2007).

436. GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N 1988).

437. *Id*.

438. *See, e.g.*, United States v. Reece, 994 F.2d 277 (6th Cir.1993); United States v. Williams, 982 F.2d 1209 (8th Cir.1992); United States v. Turner, 928 F.2d 956 (10th Cir.); United States v. Stevens, 19 F.3d 93 (2d Cir. 1994).

439. *See* 1995 Report, *supra* note 426, at 198–200; Steiker, *supra* note 435, at 30–33.

440. *See id.* at 31. After the failed 1995 amendment, Congress retaliated against the Commission by refusing to confirm its members for several years until by 1998 there were none left. *See* William Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 319 (2011).

Then, in the 2005 case *United States v. Booker*, the Supreme Court made the Guidelines advisory.[441] This meant district judges could now choose to disregard the Guidelines and sentence defendants anywhere within the relevant statutory range. Federal judges soon took advantage of this new discretion to mitigate the crack/powder disparity. Citing racial discrimination concerns, numerous judges began to systematically sentence defendants below the Guidelines range in crack cocaine cases.[442] One such judge noted that "[t]his Court's conclusion that a non-Guideline sentence is called for is . . . supported by the vast majority of district courts that have evaluated the crack/powder cocaine sentencing disparity in the wake of *Booker*."[443] The Supreme Court then confirmed judges' power to categorically reject the crack cocaine guidelines in two decisions: *Kimbrough v. United States* and *Spears v. United States*.[444] The Court also singled out the crack guideline for criticism in *Kimbrough*, noting that it was based solely on the mandatory minimums in the 1986 law, not on any empirical study of drug crimes or drug sentencing.[445] Since then, judges have increasingly used their discretion to lower crack cocaine sentences. The Sentencing Commission's statistics show that the rate of below-Guideline sentences in crack cases has consistently been the highest of all major drug types.[446] The rate of downward variances has also steadily risen since *Booker*, and today more than half of all federal crack cocaine sentences are below the relevant Guidelines range.[447]

441. United States v. Booker, 543 U.S. 220 (2005). Appropriately, *Booker* was a crack cocaine possession case in which the defendant was sentenced to 30 years for having 658.5 grams of crack cocaine. *Id.* at 227.

442. *See, e.g.*, United States v. Perry, 389 F. Supp. 2d 278, 304 (D.R.I. 2005); United States v. Fisher, 451 F. Supp. 2d 553 (S.D.N.Y. 2005); United States v. Leroy, 373 F. Supp. 2d 887 (E.D. Wis. 2005); Simon v. United States, 361 F. Supp. 2d 35 (E.D.N.Y. 2005); United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005); United States v. Stukes, No. 12A04-0411-cr-605, 2005 WL 2560224 (S.D.N.Y. Oct. 12, 2005); United States v. Castillo, No. 03-cr-835, 2005 U.S. Dist. LEXIS 9780(S.D.N.Y. May 20, 2005); United States v. Beamon, 373 F.Supp.2d 878 (E.D.Wis.2005); United States v. Whigham, 754 F. Supp. 2d 239 (D. Mass. 2010); United States v. Gully, 619 F. Supp. 2d 633 (N.D. Iowa 2009); United States v. Lewis, 623 F. Supp. 2d 42 (D.D.C. 2009); *see* Steven L. Chanenson, *Booker on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POLICY 551, 572–73 (2006) (collecting cases).

443. *Perry*, 389 F. Supp. 2d at 304.

444. Kimbrough v. United States, 552 U.S. 85 (2007); Spears v. United States, 555 U.S. 261 (2009) (per curiam).

445. *Kimbrough*, 552 U.S. at 596.

446. *See* U.S. Sent'g Comm'n Interactive Data Analyzer, https://ida.ussc.gov/analytics/saw.dll?Dashboard [https://web.archive.org/web/20250417150512/https://ida.ussc.gov/analytics/saw.dll?Dashboard] (providing data since 2015); U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at D-14 (showing non-Guideline sentence rates for all the major drug types. Crack cocaine: 55.2%; Powder cocaine: 40.4%; Heroin: 40%; Marijuana: 33.9%; Methamphetamine: 40.8%; Fentanyl: 39.8%).

447. Interactive Data Analyzer, *supra* note 446 (showing that the rate of variance in crack cases has gradually increased from 31.6% in 2015 to 55.2% in 2023).

This history is a real-world example of sentencing constitutionalism. The crack/powder sentencing disparity is clearly racially discriminatory. It was produced during a racialized moral panic over Black drug use, and it disproportionately burdens Black defendants. Due to the hollowed-out nature of Equal Protection doctrine, defendants were unable to convince judges to declare the crack/powder disparity unconstitutional. However, some judges have exercised their sentencing discretion to lessen the constitutional harm.

Judges should do the same thing in unlawful reentry cases. Indeed, there are deep parallels between crack cocaine sentencing and unlawful reentry sentencing. Both involve formally neutral guideline provisions that produce overwhelming disparate impacts according to race and ethnicity. Neither guideline provision was the product of any systematic study by the Commission. Both were essentially copied from recently enacted statutes that increased the punishment ranges. In both cases, the underlying statute was enacted during a racialized moral panic in the 1980s. Both statutes were championed by the same Senator (Lawton Chiles), indeed both were even enacted through bills with the title "Anti-Drug Abuse Act." And constitutional Equal Protection challenges to both statutes have failed in the federal courts. The major difference is that judges have systematically used their discretion to mitigate sentencing discrimination in crack cocaine cases. They have not yet done so in unlawful reentry cases.

## CONCLUSION

This Article has shown that federal sentencing laws explicitly discriminate against undocumented immigrants. The Sentencing Guidelines give them duplicative recidivism enhancements that do not apply to U.S. citizens. The First Step Act denies them sentence reductions that U.S. citizens receive. This discrimination contributes to a racial and nationality-based hierarchy in the federal criminal justice system. Undocumented immigrants, nearly all of them Latin American, prosecuted for entering the United States, are treated as a legal underclass. They are punished more severely for past crimes and granted less mercy for current rehabilitation. Fortunately, federal district judges can help counteract this discrimination. Sentencing judges have the power to disregard the Guidelines' duplicative enhancements. They also have the power to correct for immigrants' exclusion from in-custody sentence reduction programs. For nearly twenty years, judges have mitigated a similar injustice in crack cocaine cases by systematically lowering sentences. They have done so out of recognition that

the sentences for crack cocaine are racially discriminatory, and that this discrimination has gone unremedied in ordinary litigation. Judges should do the same for undocumented immigrants.

# APPENDIX

## SENTENCING TABLE
### (in months of imprisonment)

| | Offense Level | Criminal History Category (Criminal History Points) I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
|---|---|---|---|---|---|---|---|
| | 1 | 0–6 | 0–6 | 0–6 | 0–6 | 0–6 | 0–6 |
| | 2 | 0–6 | 0–6 | 0–6 | 0–6 | 0–6 | 1–7 |
| | 3 | 0–6 | 0–6 | 0–6 | 0–6 | 2–8 | 3–9 |
| Zone A | 4 | 0–6 | 0–6 | 0–6 | 2–8 | 4–10 | 6–12 |
| Zone A | 5 | 0–6 | 0–6 | 1–7 | 4–10 | 6–12 | 9–15 |
| Zone A | 6 | 0–6 | 1–7 | 2–8 | 6–12 | 9–15 | 12–18 |
| Zone A | 7 | 0–6 | 2–8 | 4–10 | 8–14 | 12–18 | 15–21 |
| Zone A | 8 | 0–6 | 4–10 | 6–12 | 10–16 | 15–21 | 18–24 |
| Zone B | 9 | 4–10 | 6–12 | 8–14 | 12–18 | 18–24 | 21–27 |
| Zone B | 10 | 6–12 | 8–14 | 10–16 | 15–21 | 21–27 | 24–30 |
| Zone B | 11 | 8–14 | 10–16 | 12–18 | 18–24 | 24–30 | 27–33 |
| Zone C | 12 | 10–16 | 12–18 | 15–21 | 21–27 | 27–33 | 30–37 |
| Zone C | 13 | 12–18 | 15–21 | 18–24 | 24–30 | 30–37 | 33–41 |
| | 14 | 15–21 | 18–24 | 21–27 | 27–33 | 33–41 | 37–46 |
| | 15 | 18–24 | 21–27 | 24–30 | 30–37 | 37–46 | 41–51 |
| | 16 | 21–27 | 24–30 | 27–33 | 33–41 | 41–51 | 46–57 |
| | 17 | 24–30 | 27–33 | 30–37 | 37–46 | 46–57 | 51–63 |
| | 18 | 27–33 | 30–37 | 33–41 | 41–51 | 51–63 | 57–71 |
| | 19 | 30–37 | 33–41 | 37–46 | 46–57 | 57–71 | 63–78 |
| | 20 | 33–41 | 37–46 | 41–51 | 51–63 | 63–78 | 70–87 |
| | 21 | 37–46 | 41–51 | 46–57 | 57–71 | 70–87 | 77–96 |
| | 22 | 41–51 | 46–57 | 51–63 | 63–78 | 77–96 | 84–105 |
| | 23 | 46–57 | 51–63 | 57–71 | 70–87 | 84–105 | 92–115 |
| | 24 | 51–63 | 57–71 | 63–78 | 77–96 | 92–115 | 100–125 |
| | 25 | 57–71 | 63–78 | 70–87 | 84–105 | 100–125 | 110–137 |
| | 26 | 63–78 | 70–87 | 78–97 | 92–115 | 110–137 | 120–150 |
| | 27 | 70–87 | 78–97 | 87–108 | 100–125 | 120–150 | 130–162 |
| Zone D | 28 | 78–97 | 87–108 | 97–121 | 110–137 | 130–162 | 140–175 |
| Zone D | 29 | 87–108 | 97–121 | 108–135 | 121–151 | 140–175 | 151–188 |
| Zone D | 30 | 97–121 | 108–135 | 121–151 | 135–168 | 151–188 | 168–210 |
| Zone D | 31 | 108–135 | 121–151 | 135–168 | 151–188 | 168–210 | 188–235 |
| Zone D | 32 | 121–151 | 135–168 | 151–188 | 168–210 | 188–235 | 210–262 |
| Zone D | 33 | 135–168 | 151–188 | 168–210 | 188–235 | 210–262 | 235–293 |
| Zone D | 34 | 151–188 | 168–210 | 188–235 | 210–262 | 235–293 | 262–327 |
| Zone D | 35 | 168–210 | 188–235 | 210–262 | 235–293 | 262–327 | 292–365 |
| Zone D | 36 | 188–235 | 210–262 | 235–293 | 262–327 | 292–365 | 324–405 |
| Zone D | 37 | 210–262 | 235–293 | 262–327 | 292–365 | 324–405 | 360–life |
| Zone D | 38 | 235–293 | 262–327 | 292–365 | 324–405 | 360–life | 360–life |
| Zone D | 39 | 262–327 | 292–365 | 324–405 | 360–life | 360–life | 360–life |
| Zone D | 40 | 292–365 | 324–405 | 360–life | 360–life | 360–life | 360–life |
| Zone D | 41 | 324–405 | 360–life | 360–life | 360–life | 360–life | 360–life |
| Zone D | 42 | 360–life | 360–life | 360–life | 360–life | 360–life | 360–life |
| Zone D | 43 | life | life | life | life | life | life |