

## BACKPACKING THE BORDER: THE INTERSECTION OF DRUG AND IMMIGRATION PROSECUTIONS IN A HIGH-VOLUME US COURT

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*Drawing from data obtained in a comparative study of US district courts' criminal justice practices, this paper examines adjudication processing responses at the intersection of immigration and drug offences in a Southwestern federal district court, where the logic of immigration enforcement subsumes more traditional federal drug law enforcement. I demonstrate how characteristics of 'drug cases' are constructed at this intersection in such a manner that they stand apart from the prototypical federal drug case, and more closely resemble criminal immigration cases. I argue that in this border jurisdiction, the prevailing adjudicatory logic is concerned with defendants' status as unauthorized outsiders such that these defendants are barely distinguishable from immigration defendants in how their sentences are calculated and rhetorically justified.*

Keywords: immigration enforcement, drug cases, criminal courts, sentencing

*Introduction*

Every day and every night, American border patrol agents comb the vast Southwestern desert that lays claim to the United States–Mexico border. They look for covert human activity, indications of border crossings by those not officially authorized to be on the US side of that line. And each day, they find what they are looking for. In one enforcement sector alone, covering 262 border miles, nearly 90,000 persons were apprehended in 2014. Just under 40,000 of those apprehended ended up being referred to the US Attorney's office in the Southern Division of Southwestern District<sup>1</sup> to be considered for criminal prosecution on charges related to their unauthorized crossing. While the majority of those prosecuted in this jurisdiction face charges of illegal entry or re-entry, the second-largest category of charges in this court are those related to illicit drugs. And most of those so charged are people picked up by US Border Patrol, caught in the stepped-up immigration enforcement of the border.

Specifically, the most common type of drug defendant here is a so-called 'backpacker', who is almost always an unauthorized immigrant, arrested in the desert after crossing into the United States with a backpack full of Mexican marijuana. Backpackers are typically apprehended in small groups, as are non-drug carrying border-crossers. Their backpacks are filled with anywhere from 21 to 28 kilograms of marijuana; often they have transported the drugs as part of their payment to a *coyote* for being guided across the increasingly difficult-to-cross border.

This paper examines the prosecution of these drug cases as situated within the immigration enforcement regime in this border region. Drawing on data obtained in a

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<sup>1</sup> This is a pseudonym for one of the high-volume federal districts that abuts the United States–Mexico border. Part of my confidentiality agreement with research participants who work in the districts under study included not revealing the actual locations.

comparative study of US district courts' criminal justice practices, I examine the adjudication processing responses at the intersection of immigration and drug offences in the Southern Division of Southwestern district, where the logic of immigration enforcement subsumes more traditional federal drug law enforcement. I demonstrate how characteristics of 'drug cases' are constructed at this intersection in such a manner that makes them stand apart from the prototypical federal drug case. In short, in this border jurisdiction, drug cases are immigration cases, and the prevailing adjudicatory logic is concerned with defendants' status as unauthorized outsiders to such an extent that these defendants are barely distinguishable from immigration defendants. In both sets of cases, how the case is adjudicated depends largely upon the past, primarily the defendant's prior documented history in the United States, and considers the future in devising strategies that foremost aim to keep the defendant out of the country.

In the next section, I review the theoretical and empirical literature on the emergence of 'cimmigration', the process by which criminal law has 'swallowed' immigration law so that 'the line between them has grown indistinct' (Stumpf 2006: 376). In doing so, I illustrate the rise in the use of immigration-related criminal law within the US federal criminal justice system. Following that, I delineate how the confluence of criminal and immigration law has created a hybrid juridical subject and postulate that immigration policy has become so criminalized that its logic now prevails in traditional criminal justice proceedings along the border. I then describe the present study, including the site, data and methods, followed by four thematic sets of findings that demonstrate how criminal justice rationales have been subsumed by the imperative of immigration enforcement on the border. I conclude by suggesting that the criminalization of immigration is so complete that immigration enforcement itself drives the adjudicatory strategies for prosecuting and sentencing drug defendants, at least in the site under study.

### *Crimmigration as a Sociopolitical Phenomenon*

The confluence of immigration law and policy and criminal law is now a global phenomenon, especially in Western Europe (Melossi 2000; 2003; Calavita 2003; 2005; Aas and Bosworth 2013), North America (Stumpf 2006; 2014; Chacón 2009) and Australia (Welch 2012; Weber 2013; Grewcock 2014), where jurisdictions seek to limit in-migration, especially of the global south's poor and disenfranchised, through the use of a broad array of civil and criminal legal tools (Stumpf 2014).

'Crimmigration', or the criminalization of migration (Bosworth and Turnbull 2014), captures several distinct phenomena. First, state officials have increasingly relied upon criminal statutes that define illegal entry and illegal re-entry as crimes, rather than on civil laws that regulate authorization to be present in a given jurisdiction, to manage those who are detained for unauthorized immigration (Guild and Minderhoud 2006; Chacón 2009). In the US context, as illustrated in Figure 1, the number of unauthorized detainees who are federally prosecuted, convicted and incarcerated before being deported has significantly increased over the last two decades.

Second, criminal convictions for other kinds of offences have been increasingly used to deny, rescind or foreclose the right to enter or reside in host jurisdictions. In the United States, this collateral consequence of criminal convictions has become a core area of criminal law practice, especially in the wake of the Supreme Court ruling in

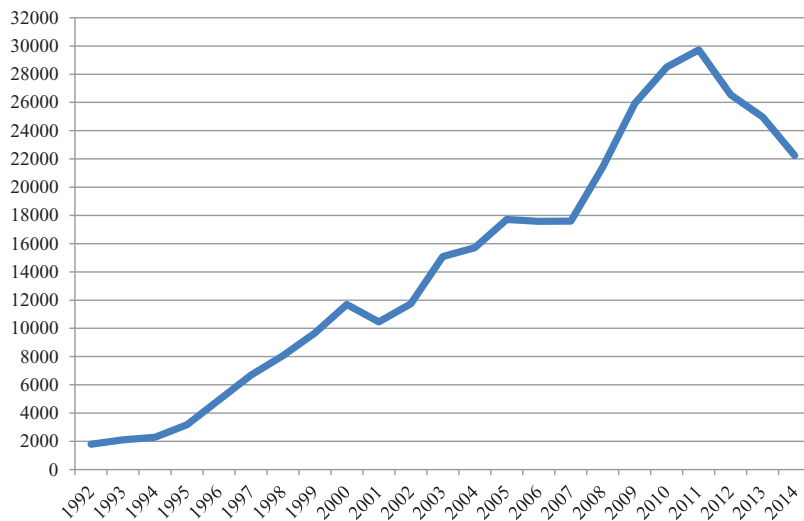


FIG. 1 US immigration convictions, 1992–2014.

Note: This figure does not include the petty offence convictions that likely total upwards of 60,000 annually since Operation Streamline became established in multiple sites.

*Padilla v. Kentucky* (2010), which requires defence attorneys to fully inform clients of deportation risks that attend certain criminal convictions. Specifically, over the past 25 years, the US Congress has greatly expanded its definition of ‘aggravated felony’ convictions that trigger a bar on legal entry, residency and citizenship (Yates *et al.* 2005). Therefore, criminal defence lawyers with non-citizen clients must know the immigration consequences of convictions and convey that knowledge to their clients when advising them on their cases.

Third, the practices of immigration enforcement increasingly resemble criminal law enforcement practices. Immigration enforcement officers function more and more like police officers, including the utilization of a full array of surveillance technology and weaponry that attend policing (Aas 2011; Weber 2013; Mutsaers 2014; Loftus 2015). Moreover, local law enforcement agencies have taken on more responsibility for (and sometimes even seek out) immigration enforcement duties (Eagly 2011; Weber 2013; Lynch 2015), incorporating immigration control into the broader mission of crime control. In some cases, subnational jurisdictions (most infamously, Arizona in the United States) have sought to directly pass criminal immigration statutes that allow local prosecutors to seek convictions under state or local laws (see Chacón 2009 and Eagly 2011 for detailed accounts in the US context).

Immigrant detention, too, looks like and is experienced more and more as criminal punishment (Welch 2002; Bosworth 2012; Aas and Bosworth 2013; García Hernández 2014) even if its formal legal status denies those material realities (Bosworth and Turnbull 2014). And in addition to the proliferation of prison-like detention facilities, state prisons and local jails hold a growing proportion of immigrants, who are either serving time for criminal convictions or being held there pending deportation proceedings (Bosworth and Kaufman 2011). In the United States, domestic penal

facilities have also been tasked with identifying and reporting non-citizens to immigration officials so that they may be deported after serving their time (Litwin 2011; Armenta 2012; Lynch 2015).

*Creating the ‘Crimmigrant’ and the Problem of Legal Subsumption*

The convergence of criminal law and immigration law has ultimately spawned a problem of subsumption of immigration law into the criminal justice field (Lynch 2015). In particular, as immigration regulatory duties are dispersed and devolved down to local criminal justice actors, immigration law is absorbed into the ‘preexisting logics, structures, and modes of action’ (Lynch 2015: 75) that characterize the host institutions. Thus, immigration enforcement becomes a new tool in the crime-fighting arsenal, and with it comes added powers to intervene in the lives of ‘suspect’ populations; expanded legal, social and spatial jurisdictions; and ultimately the reinforcement of ‘crimmigration’ ideology and practice. This is especially the case where local agencies have been delegated enforcement powers by the federal government (Lynch 2015).

A consequence of this process is that the ‘crimmigrant’ subject is constructed by the public, legal actors and even the subjects themselves as a hybrid legal being. Through an iterative process, unauthorized immigrants come to be viewed publicly and politically as criminal subjects who need to be managed through criminal justice means (Flores 2003; Provine and Doty 2011; Zatz and Smith 2012). Moreover, as immigrants come to be seen as criminals, support for using law enforcement resources for immigration control increases (Pickett 2015). Within criminal justice operations, immigrant criminal subjects are often viewed by system actors as posing additional risk—of being especially violent and/or gang affiliated; of posing an enhanced flight risk if released pending legal proceedings; and by virtue of their cultural otherness (Kreimer 2012; Zatz and Lerma 2015).

These constructions also get internalized, and sometimes contested, by those who are subject to immigration enforcement. Bosworth and Turnbull (2015), for instance, have documented how detainees in the United Kingdom experience their confinement as criminal punishment, punctuated by their status as soon-to-be exiled outsiders. Most pointedly in the United States, immigrants and advocates have used ‘we are not criminals’ as a rallying cry to protest the conflated identity imposed upon them (Cleaveland 2010; see Lal 2014 for an advocate’s critique of this strategy).

In short, the literature on the criminalization of immigration suggests a one-way process whereby immigration policy has been co-opted and transformed—even subsumed—by the logic of criminal justice. Yet, it may be that the co-optation and subsumption processes are bi-directional and that the logics and practices of immigration enforcement can subsume traditional criminal justice operations. As I explore in the coming pages, this appears to be the case in at least one high-volume federal criminal court along the southern US border. As such, it should best be viewed as a distinct variant of the ‘over-criminalization’ of immigration (Chacón 2012: 613). Chacón suggests that immigration is over-criminalized in the United States, referencing measures of quantity (the extremely high numbers of prosecutions) and ratios of proportionality (that criminal responses are disproportionate to the acts committed) as evidence. Here, I illustrate the ideological dimension of over-criminalization. It may be that

immigration policy has become *so* criminalized here that the immigrant status rather than criminal status of defendants in drug cases drives the adjudicatory logics and practices.

This stands in stark contrast to the traditional conceptualization of drug defendants worthy of federal prosecution. The legal and political construction of the prototypical drug dealer, especially one who is prosecuted in US federal courts, is as a ruthless, often violent and gun-toting thug who preys upon the weak and the addicted for profit (Brownstein 1991; Reinerman and Levine 1997; Provine 2008). Throughout the 20th century, drug panics episodically prompted federal intervention into the illicit drug trade (Musto 1999). These episodes almost always relied upon a racially stereotyped construction of the dangerous drug peddler (Provine 2008). Most infamously and consequentially, the US Congress enacted a series of very harsh drug laws in the 1980s, which were passed and have been sustained through invocations of the grave dangers posed by those engaged in drug sales (Provine 2008, see Grassley 2015 for a recent example, defending drug mandatory minimums).

### *The Study*

The findings presented here emerge from a comparative qualitative field research study situated in four distinct federal district court jurisdictions in the United States. I used direct observations and in-depth interviews, supplemented by analyses of social artefacts and secondary data sources, to look in-depth at variations in local legal contexts and their impact on how criminal cases, especially drug cases, are selected and adjudicated in this system. This project builds upon a long line of socio-legal scholarship that conceptualizes the law as something that is understood, interpreted, applied and experienced in multiple, contested and often competing ways. Thus, the study is designed to elucidate legal process rather than mere outcomes of criminal justice operations, and it examines how courtroom workgroup members in distinct locales appear to—individually and collectively—conceptualize and shape case outcomes.

I situated the study in districts that differ from each other on several key dimensions: overall size; size of criminal caseload; size of drug caseload; demonstrated rate and type of sentence outcome variations; and geographic location. The selected sites included one Northeastern district that is comprised of both urban and rural communities and typically sentences more leniently than average, one Southern district that metes out longer than average sentences, one rural district with a small and more variable (over time) criminal caseload and the Southwestern district that is situated along the United States–Mexico border. Southwestern is among the highest-volume federal districts, with a criminal caseload comprised substantially of immigration and drug cases. The data reported here come from the Southern Division of Southwestern district.

In the larger project, I take a comparative case analytic approach to examining the negotiations, conflicts, compromises and resolutions that occur in federal criminal cases. I use multiple data sources to flesh out how cases are adjudicated in each of my sites. These include field notes of my direct observations collected from late 2012 through summer 2014 in the districts; transcripts from in-depth interviews with defence attorneys, former and current federal prosecutors, and district court judges; case file materials including sentencing memos, plea agreements, transcripts and other relevant documents from sentenced cases in the districts, and the official data specific



to the districts from the US Marshal's office, the US Attorneys, the courts and the United States Sentencing Commission, much of which is available from 1992 to 2014.

Drug cases lived distinct lives in each of my districts; however, all three of the non-border districts had modes of adjudicating cases that bore resemblance to each other and that diverged considerably from Southwestern district. In the non-border districts, the prototypical drug dealer was viewed as worthy of prosecution and punishment because of the risk posed by his or her illicit drug activities. Dealing itself posed a problem in need of federal intervention—for the defendants themselves and for the communities in which sales occurred. Beyond that, illicit drug activity was rhetorically linked to corollary criminal threats, so drug crimes were characterized, especially by prosecutors and law enforcement, as intimately tied to gangs, guns and violence.

Indeed, in both Northeastern and Southern districts, a significant portion of the drug caseload was comprised of small, street-level distribution cases that were 'adopted' from state courts on just this kind of logic. In both cases, the practice of seeking out and prosecuting small drug-dealing cases grew out of 1990s' state and federal anti-violence initiatives. In both of these districts, those targeted for prosecution have primarily been young men of colour who come from select highly policed minority neighbourhoods. Even the rural district has had episodes of low-level drug law enforcement sweeps, headed up by multi-jurisdictional task forces.

In Northeastern district, a paternalistic logic undergirds drug prosecutions, especially in the small cases, where federal intervention is characterized as for the good of the defendants themselves and for their troubled communities more broadly. That is, the various punitive legal hammers used against drug defendants function as tools in the prosecutor's legal toolkit to save 'at-risk' defendants from themselves and their communities. As such, the targeted defendant is sort of a hybrid being—a troublemaker who is the cause of ruin in the neighbourhoods targeted for enforcement, but also vulnerable because of his lifetime exposure to the impoverished, degraded conditions in those same places. Here, especially, the illicit act of drug dealing is both cause and symptom of larger social problems that needed the 'treatment' of federal intervention.

In Rural district and especially Southern district, drug trafficking—whether big time or small time—was in itself constructed as a serious violation that deserved harsh punishment. The kind of 'helping with hammers' paternalism was not so much in evidence. Those worthy of prosecution were less likely to be constructed as broken or damaged, and more simply as dangerous people who had no respect for the law. Nonetheless, as in Northeastern, the illicit drug involvement itself was central to the adjudicative task.

Even in the case of immigrants prosecuted for drug offences in these non-border districts, prosecutors' arguments in support of harsh sentencing, and judge's pronouncements treated the immigration status of the defendant as an aggravator but not the core offence. For instance, on several occasions in both Southern and Northeastern districts, I witnessed judges condemn non-citizen defendants for coming into this country to 'spread poison (drugs)' and 'wreck the lives of our citizens' when pronouncing sentence. So while the immigration status did not go unnoticed, the real crime had to do with the drugs.

Thus, in the non-border districts, drug cases were drug cases, and the adjudicatory narratives were built around what the drug offence meant as an act, whether it signified individual weakness or inherent evil, the ravages of poverty, gang and gun involvement or social failures. These narratives were largely absent in the Southern Division of Southwestern district.

*Mass-processed or Individualized Adjudication? Sorting Logic in Southern Division*

Southwestern district was responsible for nearly 6,600 non-petty<sup>2</sup> criminal convictions in 2014, 87 per cent of which were immigration and drug offence convictions. About 80 per cent of the convicted defendants in this district are non-US citizens.<sup>3</sup> There has been astounding growth in the volume of both offence categories in this district, especially since 2008 (see Figure 2). The Southern Division handles more than 80 per cent of the entire district's criminal cases, and most of the recent growth has occurred in this division. This is largely the product of much more aggressive border patrol enforcement and the stepped-up use of criminal charges against those picked up in the enforcement efforts.

Among those arrested for either drug-related or immigration-related offences in the Southern Division, there are two potential routes to adjudication, either via a rapid-resolution, mass-processed mode or through an individualized mode. The mass-processing route includes two distinct sorting possibilities, one of which is 'flip-flop' court, which includes illegal entry/re-entry cases, drug cases and a smattering of illegal identity cases that typically involve a defendant accused of using fraudulent documents at the port of entry on the border.<sup>4</sup> Key to the mass-processing adjudication schemes is that the defendant is charged with a 'mixed complaint' that includes both a felony and a misdemeanour charge. The defendant is offered a misdemeanour conviction and a

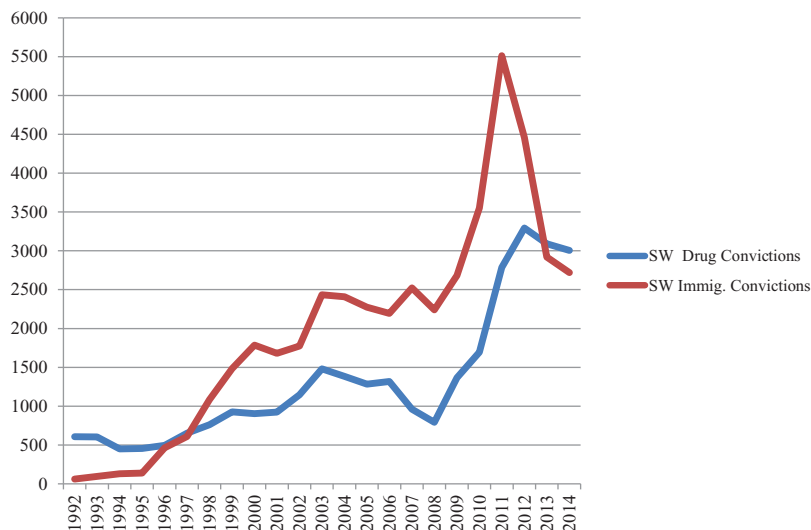


FIG. 2 Southwestern drug and immigration convictions, 1992–2014.

<sup>2</sup> In the federal system, petty offences include both infractions and misdemeanours that can result in no more than 6 months of incarceration. Record-keeping for petty offences convictions in federal court is sparse (Warner 2004) while more precise data are readily available for Class A misdemeanours and felonies.

<sup>3</sup> These figures exclude approximately 16,000–18,000 illegal entry convictions that were annually adjudicated as 'petty offences' in this district since 2008, the majority of which were adjudicated in 'Operation Streamline'. This is a mass-processing adjudication programme that was first put into operation in late 2006 in a small border court within the district. It was expanded to Southern Division in January 2008 and has since processed about 70–100 illegal entry criminal cases a day in the district.

<sup>4</sup> The other is Operation Streamline, limited to those accused of illegally entering or re-entering the United States, whereby 70 participating defendants per day begin and end their cases in a single day, including meeting an attorney, hearing charges against them, pleading guilty, waiving all rights and being sentenced to a maximum of 180 days incarceration.

particular sentence outcome, totalling less than 360 days of incarceration, in exchange for an immediate guilty plea prior to receiving discovery (the evidence in support of the prosecution), a waiver of all rights and a waiver of the full-blown sentencing procedure. Those defendants who decline the offers are routed to the individualized process and the opportunity to resolve the case with a misdemeanour plea generally disappears.

Not all immigration and drug defendants are offered a mass-processing option. Those who are not are funnelled directly into the individualized adjudication route. The primary determinant of who gets sorted where is the defendant's criminal history, including his<sup>5</sup> prior convictions in US courts. While the cut-offs appear to be somewhat malleable and can change over time, generally those with certain prior felony convictions are not eligible for misdemeanour offers, especially in the case of backpackers. Moreover, even though the schematic for these routing decisions is obscure, case pressure can and does move cut-offs for inclusion.

This is precisely how backpackers became eligible for the mass-processing, misdemeanour option in the first place. In 2012, US Attorneys in this division made marijuana backpackers eligible to participate in flip-flop court, limiting the opportunity to 30 defendants with no prior drug convictions per day. The new policy also provided an exception to that 30-defendant cap after long weekends or on Mondays if too many eligible 'backpacking' defendants were picked up. By 2013, the prosecutor's office in this division had set a cap of 40 per week on how many backpackers could be handled as *felonies*, thereby flipping the logic of exceptions for drug-trafficking offences. Thus, within a year of moving some cases that had exclusively been treated as felony trafficking cases to 'flip-flop' court, the felony label became the exception and the treatment of backpackers as misdemeanants became the norm. The weight cap for 'flip-flop' eligibility by this time was set at 100 kilograms of marijuana, so even those who transported larger amounts by car could qualify.

This turn in policy epitomizes how the logic of immigration enforcement has subsumed criminal enforcement of drug laws in this court. Prior to 2012, backpacker defendants with no records in this division were offered a sentence of 13 months and a day for pleading guilty to a felony trafficking charge, which ensured the conviction would qualify as an 'aggravated felony' under US immigration law. It would also kick in a significant sentencing enhancement for future immigration offenses.<sup>6</sup> Under this scheme, the adjudicated subject was indeed a hybrid legal being. The 13 months and a day had significant ramifications for the defendant's immigration status, in that it marked him as ineligible for legal status in the United States going forward. And in this system, the 13 months and a day sentence is not a standard sentence across the board; it has particular punitive value in the immigration context. Yet under this sentence, defendants are still ultimately defined by the underlying drug crime—that is what makes them aggravated felons, ineligible to legally be in the United States.

The relocating of the backpackers to the mass-processed misdemeanour calendar moves these defendants more fully to the category of unauthorized immigrant. Flip-flop convictions do not mark the defendant as a drug felon (the conviction is mere marijuana possession), nor do these convictions have the material impact that the 13 months and

<sup>5</sup> I use the generic male pronoun here because the overwhelming majority, well above 90 per cent, of drug and immigrant defendants prosecuted in this site are men.

<sup>6</sup> A drug-trafficking sentence of 12 months or more qualifies as an aggravated felony. Prior drug-trafficking sentences greater than 13 months increase the Guidelines 16 levels for those convicted of illegal re-entry.



a day sentence has on their future status in the United States. Rather, these defendants become part of a mass of unauthorized border-crossers who happened to be carrying backpacks of marijuana, and the imperative driving their criminal adjudication is swift and efficient resolution to get them out of the system and out of the country.

It is this move that also drove the huge, recent spike in drug convictions in this district. As illustrated in Figure 3, the bulk of the spike has been due to misdemeanour possession convictions, the outcome offered in flip-flop court. In 2014, misdemeanour possession convictions comprised two-thirds of Southwestern district's total drug convictions. This district's possession convictions, alone, accounted for 83 per cent of the nation's federal drug possession convictions.

#### *A Closer Look at Adjudication in Practice: A Morning in 'Flip-flop' Court*

Every business day, the Southern Division processes dozens of men and women arrested by border patrol officers. To begin with, US Border Patrol officers in the enforcement sector compile a list of 70 illegal re-entry arrestees of those being held as they were found on an Air Force base, who are recommended for adjudication through Operation Streamline in this court. Those cases will come and go in a single day. The remaining arrestees to be charged are generally processed into formal custody by the US Marshal Service and sent within 72 hours to a magistrate court for an initial appearance. By this point, a behind-the-scenes sorting into either a flip-flop offer or individualized treatment has happened, and the magistrate judge formalizes the sorting by announcing to each defendant his or her charges and next step in the adjudication process.

The subsequent hearing for those heading to flip-flop court will happen within a week, by which time the defendant will have spoken to an attorney and been informed of the offer in exchange for pleading guilty. The sentence to be agreed upon is determined solely by the US Attorney. It is put in writing in a plea offer that also requires the defendant to sign off on waiving his trial and appeal rights, and his right to a

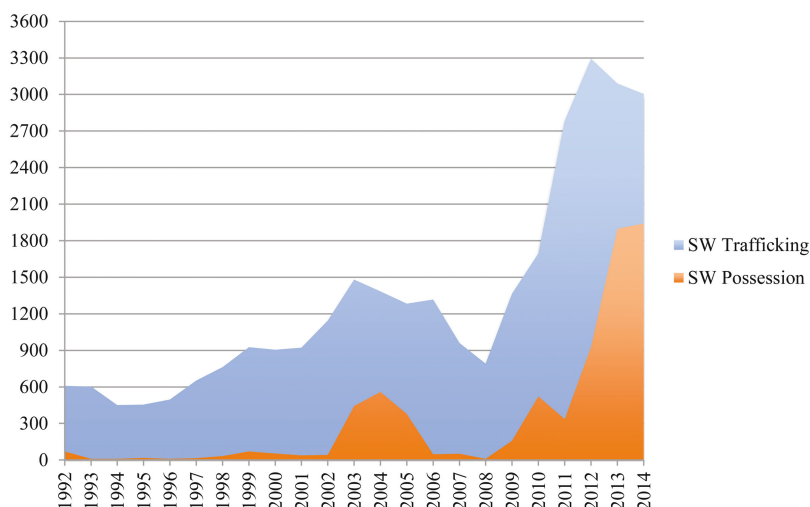


FIG. 3 Drug trafficking and possession convictions in Southwestern District, 1992–2014.

pre-sentence investigation and report, which is normally conducted by probation prior to sentencing.

I observed a number of flip-flop calendars in this court. The following describes a session in late October 2013. Twenty-eight defendants, 26 men and 2 women, were present for the 9:30 am calendar, filling the jury box and several rows of the spectator section of the courtroom. All wore jail-issued jumpsuits and all were shackled. All but three were Spanish speaking; they were each provided headphones to hear the interpreter seated in the witness box. 'Each of you is charged with a felony and a misdemeanour or petty offence. You are here to plead guilty to the lesser offence', the judge announced to open the session. She followed with a competency ceremony: 'Has any of you had drugs, alcohol or prescription medication that will affect your ability to understand? If so, please stand'. No one stood. 'Let the record reflect that no one is standing'. The judge moved on to confirm with the group that they understand the rights they are waiving by pleading guilty, including the right to remain silent, to confront and call witnesses, to force the government to prove its case beyond a reasonable doubt and to appeal the judgement. Again, no one stood when the judge asked those who do not understand to stand.

The stage is thus set for taking guilty pleas and imposing the predetermined sentences. The judge called up the defendants and their appointed attorneys in small groups, organized by offence type. The defendants lined up at a row of microphones in front of the judge's elevated bench, with their attorneys at their side. Most defence counsel in the room represent more than one defendant. Indeed, in the first group of 7, one attorney represented three of the defendants. This first group, six men and one woman, was pleading guilty to a petty offence of illegal entry in exchange for the dismissal of the felony illegal re-entry charge.

In each round of the small group processing, the attorneys were first asked to confirm that their clients were advised and seemed to understand the legal process they were undergoing. The attorneys in each round answered in unison, 'Yes, your honour'. Each defendant was then asked a series of yes or no questions to establish the factual basis of the guilty plea and to confirm that the plea was voluntary. Finally, they had to announce their guilt: 'How do you plead today?' *Culpable* was the correct response, or 'guilty' for those few who spoke English. All in the first group of illegal entry defendants received a sentence of 180 days. As is the routine, the group was then marched out of the courtroom into the US Marshal's holding pen; they each dropped their headphones in a portable cart on their way out.

A single defendant—the second of the two women—followed the illegal entry group. She pled guilty to the misdemeanour charge of possession of a false ID, for which she received 95 days. The remaining defendants, all men, were there to plead guilty to marijuana possession in exchange for dismissal of the possession with intent to distribute felony charge. They were called up in three groups of 5 and one group of 4. One of the men had been caught driving a car with 35 kilograms of marijuana; all the others were accused of carrying backpacks filled with 21–27 kilograms of marijuana. Despite the offences appearing nearly identical—many had been arrested with each other and all ostensibly had no prior drug convictions—the imposed sentences ranged from 60 to 240 days. Indeed, the defendant with the most weight, driving the car, was the sole defendant who received 60 days.

This day, there were two flies in the ointment in an otherwise rapid, routinized process. In the second-to-last group, a very old man, when asked if he pled guilty to carrying

TABLE 1 *Sentence outcomes as a function of offence type × adjudication route (field observations)*

	Flip-flop	Individualized
Illegal entry/re-entry	30–180 days	11–75 months
False ID/ID theft	30–95 days	Didn't observe
Marijuana backpacker	180–240 days	12–69 months
Marijuana poss./intent (other)	60–180 days	13–70 months

21 kilos of marijuana, insisted he did not carry anything but 'I signed that thing [the plea offer] so I can get going already' [translated by the court interpreter from Spanish to English]. The judge informed him, 'I can't take your guilty plea if you did not carry marijuana'. He was asked to step out of the group to talk further with his attorney. After the group guilty pleas were completed, he was brought up again. He still asked to be sentenced, but still insisted he did not carry any marijuana. For that, the misdemeanor offer was pulled by the US Attorney and the defendant was calendared to go the individual route—facing a sole felony count of possession with intent to distribute. The second complication was a lone defendant who remained uncalled and unclaimed by any defence attorney at the end of the process. It turned out he was brought to court with the group by mistake and was scheduled for a hearing a week later, so was taken back to lock-up.

This flip-flop calendar resembled the others I observed. In each, the formal charges nominally distinguished the defendants, but their treatment and the sentence outcomes were relatively indistinguishable across offence types. All those sentenced that day received similar sentences and would be then subject to similar proceedings for removal post-sentence. The modal backpacking sentence that I observed in flip-flop court was 180 days, which was also the modal sentence I observed in flip-flop court for illegal entry. To be clear, the 180 days represented the lowest sentence for flip-flop backpacker convictions, while it represented the highest sentence for flip-flop illegal entry convictions (see Table 1 below), but in general it served as the default sentence for both types of cases in my observations.

#### *The Individualized Sentencing of Backpackers and Illegal Re-entrants*

As is indicated by Table 1 above, the offence type is less determinative of how the defendant is punished than is the adjudication mode, which in turn was generally determined by criminal history rather than offence conduct. The sentence exposure—meaning the potential sentence possible—increases exponentially for defendants who are not routed through flip-flop court to a conviction. Actual sentences meted out via the individualized route are also significantly more punitive, and the convictions themselves more likely to have serious ramifications for defendants' immigration status. Indeed, it was in these cases where it was made clear that the logic of immigration enforcement played an overriding role in the adjudication of both drug cases and illegal re-entry cases. Below, I first describe the mechanics of the prototypical individualized process, then I illustrate how similar logics animate the adjudicative narratives in both illegal re-entry and drug case proceedings.

The individualized process in both kinds of cases comes with much more attention to particularized procedure, even though more than 99 per cent of both drug and immigration convictions in this district are the result of a guilty plea (as opposed to a trial). After the initial appearance, all proceedings are individualized.<sup>7</sup> The change-of-plea proceeding includes a full discussion of the elements of the negotiated plea agreement and the likely outcome at sentencing, in addition to a detailed discussion of the defendant's rights that will be waived by pleading guilty. The probation office will complete a pre-trial investigation and report, and the defendant is provided a full sentencing proceeding, in which both sides can file sentencing memos and present arguments to the judge.

In the Southern Division of Southwestern district, even those drug and immigration cases that get individualized are typically eligible for a 'fast-track' option that is not routinely available in non-border federal district courts. Specifically, both illegal re-entry and drug-trafficking defendants receive an additional four-level reduction from the recommended sentencing guidelines if they accept the plea offer by a date specified by the prosecutor (usually within a few weeks or a month of initial appearance) and forego pre-trial motions in addition to the standard rights-waivers that attend plea offers.

In October 2013, I saw two back-to-back sentencing proceedings in front of the same judge, both involving defendants who had accepted 'fast-track' plea offers. The first was of a man who had pled guilty to a felony charge of illegal re-entry, and the second was a man who had pled guilty to a felony charge of possession with the intent to distribute marijuana after being caught with a backpack of marijuana. In each of these sentencing proceedings, the judge began by reviewing the plea agreement to ensure that the defendant had provided a knowing, intelligent and voluntary rights waiver and plea. He then asked both sides whether there were any objections to the pre-sentencing report or the calculation of the sentencing guidelines, as contained in that report. There were no objections in either case.

The first session opened with the defence attorney asking the judge to follow the recommendation of the pre-sentence report for a term of 12 months, followed by a supervised release period of one year. He reported to the judge that the defendant was a 'very good person' who hoped to now return to Mexico to work there. The defendant was then given an opportunity to speak. He opened with an apology for being back in the United States, which was translated into English by the court interpreter seated in the jury box: 'Forgive me for having re-entered. I knew I was not supposed to and I took the risk'. He then assured the judge that he no longer desired to be in the United States. 'I just want to go back to Mexico to my mom, my children, and my grandchildren and support them. I ask you in the name of Jesus Christ to give me the minimum sentence so I can go back and support my family'.

When given the opportunity to speak to his position on sentencing, prosecutor did not dispute the 12-month prison recommendation but did ask the judge to place the defendant on three years of supervision instead of the recommended one year. He argued for this because the defendant had been caught in the country just one month prior to this arrest and was not prosecuted that time. Rather, he had been voluntarily returned to Mexico, then came right back. The supervised release sanction in cases

<sup>7</sup> Some co-defendant cases can and do undergo joint proceedings, but even within these each defendant is afforded an individualized treatment.

where the defendant will be deported after incarceration may seem illogical since the defendant won't actually be released or supervised in the United States. But the provision imposes a window of time in which, if the defendant is caught back in the country, his subsequent sentence will be considerably enhanced, both directly by triggering a sentence for violating the terms of release and indirectly by increasing the advisory guidelines sentence. Thus, in this case, the prosecutor sought that additional, future-sentencing hammer to loom for three years rather than just one, subsequent to the incarceration period.

The judge then had his turn. He recited back to the defendant how he had just been caught and given a break a month prior to this offence and how he, the defendant, blew it by turning around and coming right back. He asked the defendant, 'What made you think this was a good idea?' 'I just didn't think', was the response. With a shake of the head in apparent disgust or disappointment, the judge told the defendant his sentence, 'Twelve months this time, double of last sentence which was six months. Next time I'll double that'. As an added deterrent, he complied with the prosecutor's request and imposed a three-year supervised release term.

The next defendant on the calendar had the felony backpacking case. The judge opened the hearing by reviewing the plea agreement with the parties, which specified a 24- to 30-month prison sentence. He turned to the defendant to tell him, 'Normally you'd get six months for backpacking, but this option is not available to you since you've been in trouble before'. He then turned the floor over to the defence attorney. The attorney said little, referring the judge to a letter submitted by the defendant asking for forgiveness and mercy. The defendant then had an opportunity to speak, again translated by the interpreter: 'I apologize for my mistake. I will respect your decision, but I ask for the minimum'. The prosecutor followed, and simply let the judge know that the defendant had already done 21 months in custody and that he stands by the stipulated plea agreement.

The judge's sentencing pronouncement clearly reveals how this is not a case about drug dealing, but about illegal immigration. He began by telling the defendant, 'You have been removed six times already. You cannot come back'. He then posed a question for which there was clearly no correct answer: 'What makes you think that coming back this time with marijuana would work out?' The defendant tried to explain, 'The situation is so bad in Mexico, I thought I could make some money'. The judge then recited all of the time that the defendant had already spent in custody. 'How does that help your family? No matter how bad things are in Mexico, you make more there than when you are here in prison'. Formal sentencing then ensued. The judge imposed a sentence of 24 months in prison, followed by a 3-year period of supervision. He made clear to the defendant how this sentence would affect his future should he ever be caught in the United States again. 'You now have an aggravated felony, which means you will face 92–115 months at the least if you come back here for ANY reason'.

### *Creating a Record for the Future*

The judge in the previously described backpacking case paved the way for a future of hard prison time for that defendant if he is caught back in the country. The judge's threats in that regard are not idle. Prior convictions, especially certain categories of priors, dramatically increase the federal sentencing guideline calculations in complex

and overlapping ways. These complexities are enhanced for non-citizens, who have the added cost of ‘aggravated felonies’. The following two sentencing proceedings, one involving an illegal re-entry defendant who had spent the majority of his life in the United States, and the other a backpacking defendant whose priors exposed him to a lengthy ‘career offender’<sup>8</sup> sentence, reveal what happens when that paved future comes to be. These two examples from my observations illustrate the ironic effect of the sorting process in this system, in that for both sets of defendants—the drug couriers and the illegal re-entrants—the more rooted they had been in the United States portends a much more punitive response.

The first defendant, who I will call Mr. Gomez-Laredo, pled guilty to an enhanced illegal re-entry charge. His case pointedly illustrates how having an established history in the United States exposes unauthorized immigrants to especially harsh criminal penalties. Under the sentencing guidelines formulation, only US criminal records count against defendants, so those who are new immigrants typically have no applicable prior records. Mr. Gomez-Laredo, though, had arrived in the United States when he was 16 and lived with his mother here. He came of age, got married and had children in California where he lived up until the time he was first deported at the age of 34. He returned to California after that deportation to re-unite with his family, and he stayed under the radar for another 10 years. He came to the attention of immigration authorities after local police contact and was then criminally prosecuted for illegal re-entry. He was sentenced to 30 months in prison in that case and received a period of supervised release as an added hammer if he returned once more. He was deported after completing his prison sentence, but once again decided to return to the United States. He was caught about two months after his deportation, just two days after re-entering the United States, still in the midst of the desert trek north of the border within Southwestern district’s jurisdiction. By now, he was a middle-aged man.

I attended his sentencing for the new illegal re-entry conviction stemming from that crossing, which also incorporated the sentencing proceeding on the supervised release violation. The guidelines sentence range for the new conviction was 57–71 months, and the range for the supervised release violation was 8–14 months. The plea agreement stipulated a ‘fast-track’ sentence of 46–57 months on the new offence and 8–11 months on the violation. His sentence exposure was so high due to his prior criminal record. He had one ‘aggravated felony’ prior—possession of a gun by an ‘illegal alien’—as well as several lower-level misdemeanours, and the prior immigration conviction. The duelling sentencing memoranda filed by the defence and prosecution in this case reveal how Mr. Gomez-Laredo’s deep American roots function as a double-edged sword.

The prosecutor’s memo characterized the defendant’s assimilation as an aggravating factor’ that necessitates a harsh sentence. He recommended a total of 60 months be imposed, based on the following reasoning:

In the case at bar, it is clear that the defendant has failed to exhibit any respect for the law, as he once again chose to violate the law by illegally crossing into the United States, just less than two months after he had been previously deported. As such, he has not been deterred from breaking the law.

<sup>8</sup> The ‘career offender guidelines’ were devised by the US Sentencing Commission to dramatically increase sentences for certain convictions in federal court, for defendants with two or more drug or violence prior convictions. See *Baron-Evans et al.* (2010) for more details about this provision.



There should be no doubt that once the defendant was sentenced in California for illegal re-entry, he was told that he could not re-enter the country without the explicit permission from a lawful authority from the United States. Being that his family lives in California, he had a strong incentive to return. Despite this, the defendant does not deserve to have a sentence run concurrent.

In addition, this Court should consider assimilation as a factor during sentencing, however, the defendant's past is a prime example to suggest assimilation should be used as an aggravating factor. Probation correctly asserts that this defendant is a 'serious risk to public safety when he is illegally present in this country'.

Conversely, the defence asked for the lowest sentence allowable under the stipulated plea agreement, 42 months with an eight-month violation term to run concurrent. He supported this position on the theory that assimilation should mitigate the punishment. As he put it in his memo, 'Mr. [Gomez-Laredo] arrived in the United States in 1985, when he was about 16 years old. He speaks (limited) English. His reason for returning [this time] was to help support his mother and his children. [He] has clearly assimilated to life in the United States. Assimilation in this case is a mitigating factor'. He then quoted extensively from letters of support provided by the defendant's family and previous employers, who characterized him as a wonderful father and a hard worker. Finally, the memo acknowledges that despite his positive assimilation, Mr. Gomez-Laredo is resigned to the fact that he must never return to this country. That, too, was the theme of the sentencing proceeding.

In his oral presentation, the defence attorney quickly summarized the arguments presented in his sentencing memorandum, concluding by assuring the court that the whole family is now resigned to Mr. Gomez-Laredo no longer living with them, and that they know 'it is better to visit him in Mexico than in prison'. The defendant then reiterated the pledge to stay away, and apologized for returning. 'Thank you and I am sorry for returning. I did it for two reasons. My kids and my ailing mother'. After the defence presentation, the prosecutor made his pitch for a longer sentence, based on the defendant's past record and to deter him from returning. The judge compromised, although favouring the prosecution, by sentencing Mr. Gomez-Laredo to 54 months in total (46 for the new offence and 8 months consecutive for the violation) plus three years of supervised release. She justified the sentence as serving as a deterrent, for 'the protection of the public and to promote respect for the law', but left unresolved the place of assimilation in imposing punishment.

The second case, of the backpacking 'career offender', reveals not only the powerful role of previous criminal justice encounters but also how distant the federal drug offender persona is from the Southern Division backpacker. In this case, the defendant who I will call Mr. Torres-Ortiz had been arrested by Border Patrol just on the US side of the border, within Southern Division's jurisdiction. He was one of four from a group of eight marijuana backpackers apprehended; the other four escaped but left behind their backpacks. This was Mr. Torres-Ortiz's third conviction in 10 years for backpacking marijuana. Because his prior convictions had occurred prior to the flop-flop policy change, they served as predicate convictions under the federal sentencing commission's 'career offender guidelines'. Consequently, while Mr. Torres-Ortiz's co-defendants in the case went to flip-flop court where they likely received a six-month sentence, he faced 188–235 months if sentenced as a career offender. Even with fast-track, the Guidelines sentence range was still 130–162 months, so nearly 11 years in prison at the low end to be

served prior to his removal from the country. He also faced an additional 6–12 months for a supervision violation, since he came back while under supervision.

This sentencing exposure was distressing to all sides—the defence, the prosecutor, and the judge—at the sentencing proceeding. The defence attorney began his argument speaking on behalf of his client *and* the prosecutor to assert that in constructing the plea agreement, ‘we *collectively* felt that the career offender guidelines overstate culpability in this case’. He was brief in his comments, allowing the prosecutor to make the case for a sentence well below the guidelines range.

The prosecutor began by saying he ‘echoes’ the defence, and that he has never seen anything like this, which will lead to a ‘wildly disproportionate’ result if the defendant is sentenced under the career offender enhancement. He asserted, ‘this is not what the career offender guideline was made for’ and suggested to the judge that the sentencing guidelines should be calculating using straight criminal history rather than as enhanced criminal history. He explained that this is what the stipulated plea agreement set out to do and urged the judge to accept the terms. He then talked about the mechanics of how the judge could make this plea agreement look appropriate on the record—whether the calculus proposed should be labelled a ‘variance’ or whether it is a departure since the criminal history ‘over-represents’ culpability. Finally, he explained that since the defendant pled guilty to conspiracy to traffic marijuana, the drug weight attributable to him is the total found in the eight backpacks, so 226 kilograms.

The judge was in full agreement with the attorneys. She accepted the plea agreement on the record, and stated that she read the letters in support of the defendant from friends and family. She pointed out that due to the drug quantity, there is a 5-year mandatory minimum below which she could not sentence Mr. Torres-Ortiz. The hearing then proceeded in the manner of a more traditional sentencing. The defence requested a total of 63–66 months for the current offence and the supervision violation. The defendant then apologized to the court and explained that he came back to help his ailing mother, who is his last remaining parent: ‘I am very remorseful for what I did. I did it for my mother’.

The prosecutor asked that the supervised release violation sentence run consecutive to the sentence for the new conviction, but reiterated that for ‘justice’ the sentence should be below the calculated guidelines. It was then the judge’s turn to impose sentence. She admonished the defendant: ‘You really messed up coming back here. You can expect to spend your adult life in prison if you keep doing this. It hurts you and your family’. She pronounced a sentence of 63 months on the new conviction, and six months to be served consecutive for the violation, plus a new term of four years of supervised release to follow the incarceration. With that, the defendant’s past record in the United States set the stage for the present in the form of a sentence more than 11 times longer than his peer backpackers. And it once again paved a new future whereby any further official encounters in the United States would expose Mr. Torres-Ortiz to the potential of life in prison.

### *Conclusion*

The proceedings detailed here highlight how the immigration enforcement imperative undergirds adjudication practices in federal court at the United States–Mexico border. Indeed, it is so much so that it challenges the notion that the criminalization of

immigration is a one-way process. Here, it is clear that there has been more of an ‘immigrantization’ of criminal law that has intensified with the increased use of enforcement tactics at the border. There are several notable findings in that regard. First, in the vast majority of individualized criminal matters involving non-citizens, the in-court colloquies centred on the defendant’s status as an excludable outsider. As I illustrated, all parties focused in on the fact that the defendant had to stay out of the United States in order to be law abiding in the future, no matter what the underlying offence. The sentences meted out in both drug cases and illegal re-entry cases were justified as a deterrent to *returning* (rather than to transporting drugs), either this time around or in future encounters if the defendant came back.

The actual practices also reinforced the centrality of the defendant’s outsider status. For instance, judges added to the usual ceremony of rights-waivers, done prior to accepting guilty pleas, to assure that the defendants were advised in their native tongue and that they understood the consequences of their convictions for their immigration status. The construction of special sentence terms, like the 13 months and a day, which legally ensure sentenced defendants’ future expulsion, exclusion and enhanced punishment if they return, works toward maintaining and even fortifying their outsider status. And the creative use of supervised release terms for defendants who will never likely be released on US soil hammers home the system’s goal of deterring re-entry.

Even in flip-flop court, where there was little to no individualized colloquy and where the sentences do not serve as future deterrents, the practices marked the processed defendants as essentially of a single category of excludable subjects. Each was one of a flood of only nominally criminal border-crossers who had to be dealt as efficiently and expeditiously as possible so that they could do their assigned time in prison then be removed from the country. They were fodder for a legal machine that was erected as part of a larger crack-down on immigrants; the flip-flop backpackers merely carried illicit drugs but were otherwise indistinguishable from the other men and women picked up in the same desert. These defendants were nearly anonymous (even though identified by name in court) and only could garner individualized response when they went against the heavy pressure to plead and refused to take the deal. This, of course, exposed them to much more punishment, but this would at least afford them the chance of becoming known as more complex individuals—by their attorneys, by probation and even by the prosecutor and judge. It is clear from the individualized cases that this did not at all negate the master status of such defendants as ‘illegal’ immigrants, but it did give voice to the reasons for their unauthorized border crossings.

These findings also highlight the irony that those who actually have made a life in the United States, albeit with some legal bumps along the way, were the most likely to be criminalized in the traditional sense. Mr. Gomez-Laredo’s case makes that clear, in that he could be constructed much more fully as a dangerous threat precisely due to the history he has made here. To be sure, his status as ‘illegally present’ was the overriding force in his adjudication but his case opened up, and left unresolved, the paradox inherent in the criminal justice process in this jurisdiction. That is, that assimilation, which should mitigate treatment by the court, is indeed an aggravator. The very construction of the criminal law in play ensures that this is the case, and the narrative construction of the defendant as an embodied criminal subject reinforces that outcome.

Finally, while these cases, especially in flip-flop court, may have garnered what appear to be lenient sentences, at least relative to the sentences meted out for drug trafficking

in non-border districts, this does not mean that their treatment was somehow more just (or even too soft). Both the illegal entry and the drug cases I have described here represent a special case of over-criminalization, in that those thousands of immigrants arrested in this district each year are all too often themselves victims of a number of punishing forces that attended their migration: The economic catastrophes in their home countries that pushed them north in the first place; the increased cost to safely make it across the border, including the compelled carrying of drugs for coyotes and cartels; and the increasing incidence of families on both sides of the border being torn apart as by-products of the current American war on immigration.

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