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On August 18th, 2021, Chief U.S. District Judge Miranda Du found that 8 U.S.C. § 1326, which criminalizes undocumented reentry, was unconstitutional due to the racial animus that motivated its passage, making it a violation of the Equal Protection Clause of the Fifth Amendment.[1] Her opinion in *United States vs. Gustavo Carrillo-Lopez* marks an important moment in our nation's immigration history and an opportunity for the United States to finally reckon with a policy steeped in racism and eugenics. As an expert witness in the case, I regard Judge Du's decision as the correct one and believe that it compels Congress to revisit and reexamine criminalization through the lenses of history and policy.

Penalties for illegal entry (8 U.S.C. § 1325) or reentry (8 U.S.C. § 1326) have, since their initial passage in 1929 as part of the Undesirable Aliens Act,[2] been defended as a necessary deterrent to illegal entry.[3] Countless Democratic- and Republican-led

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1. See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021).

2. Undesirable Aliens Act, Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

3. For a more detailed discussion of both immigration during the period of the 1920s, as well as the Undesirable Aliens Act specifically *See*, MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1999); BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA (2018); KELLY LYTLE HERNÁNDEZ, CITY OF INMATES CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 (2017); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2014); S. DEBORAH KANG, THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954 (2017); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2010); DANIEL TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION POLICY IN AMERICA (2001); ERIC S. FISH, RACE, HISTORY, AND IMMIGRATION CRIMES, 107 IOWA L. REV. 1051 (2022)

administrations and Congresses have come and gone, yet these policies have never received any true scrutiny, which is merited for a number of reasons. First, their passage in 1929 was motivated by a desire to deter undocumented entry, but also sought to create a marginalized, removable workforce in the Southwest for agribusiness, who opposed quotas on immigration from Mexico.[4] While Mexican immigrants and anyone from "south of the Rio Grande" were viewed as racially inferior, they were also a valuable and necessary source of labor.[5] The initial act of criminalization in 1929 was not based solely on a desire to defend the sanctity of the southern border but also to protect the racial purity of the United States while preserving access to Mexican labor.

Second, Sections 1325 & 1326 have been part of U.S. policy since 1929, yet there has been little evidence to suggest they effectively deter undocumented entry or reentry.[6] While deterrence of undocumented entry can be difficult to measure, apprehension statistics maintained by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) offer a window into their effectiveness. An increase in prosecutions under § § 1325-1326 should lead to a decrease in apphensions or reapprehensions for undocumented entry if they fuction as deterrents. Yet an examination of Operation Streamline, which did increase these prosecutions, found this had little effect on the flow of illegal entrants.[7]

These policies rest on assumptions about the U.S. borderlands that conceptualize them much as they were when these laws were first passed: as vast expanses where crossing is both cheap and relatively

4. *See* LYTLE HERNÁNDEZ, *supra* note 3, at 138; For examples of agribusiness' opposition to quotas on immigration from Mexico, *See* 69 CONG. REC. S1153-57 (daily ed. Jan. 9, 1928) (resolutions from Colorado organizations opposing further restriction of Mexican farm labor).

5. *See* 65 CONG. REC. H6476-8 (daily ed. Apr. 16, 1924) (statement of Rep. Cole).

6. The deterrent effect of criminal penalties for entry/reentry has been assumed but evidence is at best mixed on their effectiveness, with the Secretary of Labor noting in 1930 that attachment of criminal penalties to illegal entry had seemed to have little effect on the flow of migrants from Mexico. *See* Secretary of Lab. Ann. Rep. 21 (1933).

7. *See* Michael Corradini et al., , *Operation Streamline: No Evidence that Criminal Prosecution Deters Migration,* VERA INST. OF JUST. (June 2018), https://www.vera.org/downloads/publications/operation_streamline-report.pdf.

easy. Neither of these are true today.[8] Undocumented entry is costly, with migrants often needing to pay a coyote[9] to navigate the land crossing, and to obtain documentation that allows them to work.[10] Additionally, with the increase in the number of physical structures and the continued growth of the Border Patrol, crossing is often dangerous, leading a number of migrants to lose their lives in trying to enter.[11] There are thus already significant deterrents in place for illegal entry outside of the punitive penalties associated with 8 U.S.C. §§ 1325-1326. As policies that are both costly to the American taxpayer and one of the engines of mass incarceration in this country, they merit greater scrutiny than they have received thus far.[12]

Any analysis of 8 U.S.C. § 1326 must begin with an examination of the legislative debate around the Undesirable Aliens Act of 1929, which codified what would become 8 U.S.C. §§ 1325-

8. Since the passage of 8 U.S.C. § 1325 and 8 U.S.C. § 1326 in 1929 various policies have been passed that have affected the likelihood of apprehension either at the border or in the interior. The Immigration Reform and Control Act of 1986 (IRCA) increased the size of the Border Patrol, as did the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The latter also increased the number of physical structures along the border, pushing undocumented entrants off into more dangerous entry points. The September 11th attacks led to replacement of Immigration and Naturalization Services with Immigration and Customs Enforcement and an increase in the number of 287(g) agreements, which deputized local law enforcement as immigration agents, as well as a push for greater cooperation and coordination between local, state, and federal governments in enforcement of immigration policy. *See* Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Illegal Immigration Reform and Immigrant Responsibility Act, Division C, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 81 B.C. THIRD WORLD L. J. (2015).

9. This term is used to describe the human smugglers who provide assistance to those looking to enter the U.S. illegally.

10. *See* Christina Gathmann, *Effects Of Enforcement on Illegal Markets: Evidence From Migrant Smuggling Along the Southwest Border*, 92 J. PUB. ECON. (2008).

11. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 increased the number of physical barriers to entry, pushing migrants off into areas where the risk of death was higher, leading to an increase in the number of known deaths along the Southwestern border from 87 in 1996 to 499 in 2000. *See* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control*, 27(4) POPULATION AND DEV. REV. (2001). The border wall constructed during the presidency of Donald Trump has also led to an increase in injuries and death of migrants attempting to scale it to gain entry. *See* Amy Liepert et al, *Association of 30-ft U.S.-Mexico Border Wall in San Diego with Increased Migrant Deaths, Trauma Center Admission, And Injury Severity*, JAMA SURGERY (2022).

12. *See* Kit Johnson, *A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes*, 92 DENVER U. L. R. 863, 874 (2015).

1326 for the first time. This debate makes it quite clear that these policies were driven by an explicit racial animus toward Mexican, and more broadly Latinx, immigrants.[13] The Undesirable Aliens Act of 1929 was the culmination of a push to restrict Mexican immigration that began in earnest after the passage of the Johnson-Reed Act[14] in 1924.[15] The period of the 1920s was the height of the eugenics movement in the United States, with immigration policy driven in large part by the desire to protect the "purity" of America's racial stock.[16] Harry Laughlin of the Eugenics Record Office was a fixture in Congressional hearings throughout the decade and was called on a number of times to testify before the House of Representatives' Committee on Immigration and Naturalization.[17] He was appointed the committee's "expert eugenics agent" on April 17th, 1920.[18] Laughlin's primary concern was in limiting "new" immigration from Southern and Eastern Europe, believed by eugenicists to be of a racially-inferior White ethnic stock. During testimony in 1922 he ranked Mexicans fourth overall in various hereditary inadequacies, including a predisposition to criminality, feeblemindedness, insanity, and a propensity for disease, illness, and physical disability.[19] During that same hearing, he would point out, "We in this country have been so imbued with the idea of democracy, or the equality of all men, that we have left out of consideration the matter of blood or natural inborn hereditary mental and moral differences. No man who breeds pedigreed plants and animals can afford to neglect this thing."[20] In

13. *See generally* BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA (2018), KELLY LYTLE HERNÁNDEZ, CITY OF INMATES CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965 (2017); *and* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2014).

14. *Id.*

15. Immigration Act of 1924, Pub. L. No. 68-139, 45 Stat. 153 (1924).

16. *See supra* note 12.

17. *See The Biological Aspects of Immigration: Hearings Before the Comm. on Immigr. & Nat.*, 66th Cong., April 16-17, 1920 (statement of Harry H. Laughlin 1921); *and see Analysis of America's Melting Pot: Hearings before the Comm. on Immigr. & Nat.*, 67th Cong. (Nov. 21 1922); *and see The Eugenical Aspects of Deportation: Hearings Before the Comm. on Immigr. & Nat*, 70th Cong. 3 (1928) (statement of Dr. Harry H. Laughlin).

18. *The Biological Aspects of Immigration: Hearings Before the Comm. on Immigr. & Nat.*, 66th Cong., April 16-17, 1920 (statement of Harry H. Laughlin 1921).

19. *Analysis of America's Melting Pot: Hearings before the Comm. on Immigr. & Nat.*, 67th Cong. (Nov. 21 1922)

20. *Id.*

1928, one year prior to the passage of the Undesirable Aliens Act, Laughlin stressed that, "deportation is the last line of defense against the contamination of American family stocks by alien hereditary degeneracy."[21] The Johnson-Reed Act and its national origins quota system was a massive victory for restrictionists and eugenicists like Laughlin, but the Western Hemisphere was excluded from the quota system, in part due to resistance on the part of agricultural interests who did not want to see their access to Mexican workers limited.[22]

Despite this, a concerted push for quotas on Mexican immigration would begin after the passage of Johnson-Reed.[23] Representative John Box of Texas, one of the most outspoken proponents of quotas for Mexican immigration and a member of the House's Immigration and Naturalization Committee, regularly drew on eugenicist language to justify quotas on Mexico.[24] He argued that the purpose of the nation's immigration laws was to prevent, "the lowering of the ideals and the average of our citizenship," and specifically singled out the "Mexican peon" as a threat to the racial purity and cohesion of the nation.[25] In 1928, Box proclaimed "The Mexican peon is a mixture of Mediterranean-blooded Spanish peasant with low-grade Indians who did not fight to extinction but submitted and multiplied as serfs. Into that was fused much negro slave blood [. . .]. The prevention of such mongrelization and the degradation it causes is one of the purposes of our laws which the admission of these people will tend to defeat."[26] Another member of the committee, Rep. Robert Green of Florida wanted the quotas to go beyond Mexico, stating, "Another reason why the quota should apply to any country south of the Rio Grande is because their population in the main is composed of a mixture of blood of White, Indian, and Negro. This makes this blood a very great penalty upon the society which assimilates it."[27] Yet business and agricultural interests continued to push back against Mexican quotas, threatening that, "if we are deprived of this source of labor we must immediately bring negroes

21. *The Eugenical Aspects of Deportation: Hearings Before the Comm. on Immigr. & Nat*, 70th Cong. 3 (1928) (statement of Dr. Harry H. Laughlin).

22. GONZALEZ O'BRIEN, *supra* note 3.

23. NGAI, *supra* note 3.

24. GONZALEZ O'BRIEN, *supra* note 3 at 46-50.

25. 69 CONG. REC. H9614-15, (May. 23, 1928).

26. CONG. REC. H2818 (Feb. 9, 1928) (Restriction of mexican immigration).

27. 69 CONG. REC. 2462 (1926).

from the southern states or Porto Rico."[28] Fred Bixby, a representative for the California Cattle Raiser's Association, as well as a sugar beet farmer, noted that Mexican immigrants represented one of the last sources of labor available to those in agriculture, proclaiming that, "If I do not get Mexicans [. . .] I am through with the beet business. We have no Chinamen; we have not the Japs. The Hindu is worthless; the Filipino is nothing, and the white man will not do the work."[29] This would eventually lead to a compromise in the form of the formal criminalization of undocumented entry and reentry, both of which were commonplace in the 1920s due to labor demands in the U.S. and a largely unsecured border.[30]

While agricultural interests resisted quotas on Mexico, criminalization of entry and reentry would allow them continued access to Mexican labor while also ensuring this labor force remained marginalized and the laborers themselves never became permanent residents or citizens.[31] The Undesirable Aliens Act was introduced in the Senate by South Carolina's Coleman Blease, a White supremacist who defended lynch mobs, wanted a constitutional amendment prohibiting miscegenation, and was a staunch immigration restrictionist.[32] During debate on a bill that would have applied quotas to Mexico, Blease asked if a Mexican was comparable to "a clean sort of a negro" and later stated that Mexicans knew they had to behave in the United States because otherwise, "we will kill them".[33] He would later state that if it was up to him, "I would not let any of them in. I believe in America for Americans."[34] Upon the bill's introduction in the House, John J. O'Connor of New York noted that, "There seems to be a spirit of bigotry and intolerance in America directed at the races

28. *Restriction of Western Hemisphere Immigration: Hearing before the S. Comm. on Immigr.*, 70th Cong. (1928).

29. *Id.* at 26.

30. The Border Patrol would not be formed until 1924. *See* NGAI, *supra* note 3; KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL (2010).

31. Much of the debate around Mexican immigration had to do with fears that those entering would become permanent residents of the United States. As long as laborers returned to Mexico, this was not seen as a problem. Agricultural interests defending their access to Mexican labor were, for example, asked if they had ever heard their Mexican employees express an interest in citizenship. *See supra* note 28, at 62, 142.

32. *See* LYTLE HERNÁNDEZ, *supra* note 3.

33. *See supra* note 28, at 23-25.

34. *Id.* at 68.

of the rest of the world that surely is un-American," suggesting that the animus underlying the Undesirable Aliens Act was known, even at the time.[35] The bill had been ushered through committee by men who were proud White supremacists and eugenicists.[36] In the Senate, Coleman Blease sat on the Immigration Committee, while in the House Albert Johnson of Washington served as the chair of the Immigration and Naturalization Committee, which also counted John Box of Texas and Robert Green of Florida as members.[37] Johnson was one of the chief architects of the Johnson-Reed Act of 1924, which had explicitly drawn on the "science" of eugenics, and the testimony of Harry Laughlin, to implement national origins quotas for immigration that were meant to protect the American racial stock from degradation.[38] In the Congressional debate over The Undesirable Aliens Act, both Box and Green drew on racist stereotypes to justify the legislation.[39] Box argued, "They are badly infected with tuberculosis and other diseases; there are many paupers among them; there are many criminals; they work for lower wages; they are as objectionable as immigrants when tried by the tests applied to other aliens."[40] Rep. Green, in what was a common trope for eugenicists, linked immigration to criminality, stating, "if you will examine the criminal records you will find that [. . .] the percentage of criminals is largely foreign."[41] Much of the debate over the Undesirable Aliens Act centered not on what it was supposed to prevent (undocumented entry) but instead on who it was meant to target: Mexican, and more broadly, Latinx immigrants.[42] Deterrence of illegal entry was rarely discussed in general terms, but more often in the specific context of Mexican immigration.[43] Despite its naked racism, it was passed with little opposition in either house of Congress and became law on March 4th, 1929, representing the first codification of what would become 8 USC §§ 1325 and 1326.[44]

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35. *See* 70 CONG. REC. H3526 (1929).
36. *See* LYTLE HERNÁNDEZ, *supra* note 3, at 137.
37. *Hearings Before The H. Comm. on Immigr. & Nat.*, 70th Cong., (Feb. 12, 1929).
38. *See* NGAI, *supra* note 3, at 21-55.
39. *See* GONZALEZ O'BRIEN, *supra* note 3, at 51-56.
40. *See* 70 CONG. REC., 3620.
41. *Id.*, 3547.
42. *See* GONZALEZ O'BRIEN, *supra* note 3, at 51-56.
43. *Id.*
44. *Id.*

In the 1940s and 1950s, the explicit eugenicist language of the 20s and 30s became less socially acceptable on the heels of World War II and the horrors of the Holocaust.[45] While this language was no longer present to the same extent, the same attributions used to characterize Mexican immigrants in earlier decades were now attached to the figure of the "wetback," a term today acknowledged as racially derogatory.[46] In its appeal of Judge Du's decision in *U.S. vs Carrillo-Lopez*, the government has argued that this was simply a widely-used descriptor for undocumented immigrants at the time and not racist in nature.[47] Yet an examination of how this word was used by researchers and members of Congress at the time refutes the claim that this was simply a colloquial term.[48] One study of the "wetback problem" divided undocumented entrants into two groups, the first a set of docile agricultural workers who accepted "good or bad treatment, starvation wages, diarrhea and other sickness for his children [. .] and unsanitary living conditions," while the second, the "pachucos", were criminals, drug dealers, smugglers, prostitutes, and homosexuals.[49] These attributions of criminality, illness, and deviant behavior were based on race, not legal status, with a 1951 study of Mexican immigration in Texas noting that "no careful distinctions are made between illegal aliens and local citizens of Mexican descent. They are lumped together as Mexicans and the characteristics that are observed among the wetbacks are by extension assigned to the local people."[50] In 1952, just three months before the passage of the McCarran-Walter Act, the racial animus toward Mexican immigrants was on full display with the introduction of Senate bill 1851, nicknamed the "Wetback Bill".[51] This anti-harboring legislation attached criminal penalties to the sheltering or transport of undocumented immigrants, but initially, the legislation

45. GEORGE M. FREDERICKSON, RACISM: A SHORT HISTORY (2002) at 128.

46. *See* LISA A. FLORES, DEPORTABLE AND DISPOSABLE: PUBLIC RHETORIC AND THE MAKING OF THE "ILLEGAL" IMMIGRANT 126-38 (2020).

47. *See* Opening Brief for the United States, United States v. Carrillo-Lopez, No. 21-10233, Dkt. No. 5 (Nov. 19, 2021); United States v. Carrillo-Lopez, 3:20-cr-00026-MMD-WGC (D. Nev. Aug. 18, 2021)

48. *See* FLORES, *supra* note 46, at 126-38.

49. ED IDAR AND ANDREW C. MCLELLAN, WHAT PRICE WETBACKS? (1953).

50. LYLE SAUNDERS AND OLEN LEONARD, THE WETBACK IN THE LOWER RIO GRANDE VALLEY OF TEXAS (1951).

51. *See* 98 CONG. REC., S791, Feb. 5 (1952).

was to only be applied to those harboring Mexican nationals.[52] Senator George Aiken of Vermont questioned whether Congress could "discriminate constitutionally against the aliens of one particular nation" before noting that while it should apply to all illegal entrants, he knew "of no instances of illegal employment of Canadians."[53] Ultimately, these questions of constitutionality in regard to specifically targeting Mexican nationals would lead to this being stripped from the law, making it applicable to the harboring of any undocumented individual, regardless of nationality.[54] During the debate over this legislation, Mexican nationals were singled out and also discussed in terms of inherent criminality, much as they had been during the debate over the Undesirable Aliens Act.[55] Senator Harley Kilgore of West Virginia used language to describe the "wetback" population that largely mirrored earlier eugenicist reflections on the criminality of Mexican immigrants.[56] He argued, "Practically every State in the Union has the wetback problem. Some of these people cannot meet the standards of immigration. They may be criminals."[57]

The passage of the McCarran-Walter Act on June 27, 1952, reenacted 8 USC § 1326, but what is often focused on is its elimination of racial restrictions on immigration and naturalization.[58] While it did remove race-based prohibitions, it preserved the national origins quota system, and the small regional quota for all of the Asia-Pacific region, both of which had been a product of eugenicist beliefs in the 1920s.[59] The debate itself featured liberal use of the racially-derogatory "wetback", as well as some language alluding to continued support for eugenics among some members of Congress.[60] Rep. John Wood of

52. An Act to assist in preventing aliens from entering or remaining in the United States illegally, Pub. L. No. 82-283, 66 Stat. (1952).

53. 98 CONG. REC S799 (1952).

54. *Id.*

55. *See* 98 CONG. REC., S791-800.

56. *Id.* at 793.

57. *Id.*

58. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

59. NGAI, *supra* note 3, at 238.

60. Pat McCarran, one of the authors of the Immigration and Nationality Act of 1952, aka the McCarran-Walter Act, was a known anti-Semite and racist who used the term "wetback" on numerous occasions in the debate over his legislation. *See* 98 CONG. REC. at 5320 , Shea Johnson Mark Akers, *Clark County backs McCarran name change to Harry Reid International Airport*, LAS VEGAS REV. J. (2021).

Idaho noted, "It seems to me the question of racial-origins, though I am not a follower of Hitler, there is something to it. We cannot tie a stone around its neck and drop it into the middle of the Atlantic just because it worked to the contrary in Germany. The fact still remains that the peoples of Western Europe have made good American citizens [. . .]. I believe that possibly statistics would show that the Western European races have made the best citizens in America."[61] President Truman would veto the legislation because of its discriminatory aspects, in his letter to Congress stating that while he approved of the removal of the racial restrictions for naturalization and immigration, "…now this most desirable provision comes before me embedded in a mass of legislation which would perpetuate injustices of long standing [. . .] and intensify the repressive and inhumane aspects of our immigration procedures."[62] There was scant attention paid to Mexican immigration during the debate, largely because undocumented entry had already been criminalized and Senate bill 1851, passed earlier that year, sought to address Mexican immigration through its anti-harboring provisions. These were incorporated in the McCarran-Walter Act's overhaul of the U.S. immigration system.[63] Yet the use of the slur "wetback" toward undocumented entrants from Mexico, as well as the echoes of eugenics present in the debate, demonstrate that 8 USC § 1326 was not cleansed by its reenactment.[64]

This is further reinforced by the fact that America's two borders were treated very differently during this period.[65] By the 1950s, some members of Congress reported that there was a growing problem on the northern border with undocumented entrants from Canada.[66] In 1951, Rep. Emanuel Cellar of New York pointed out that there was a "distressing" number of illegal immigrants entering through the northern border,[67] and in 1954, Senator Herbert Lehman

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https://www.reviewjournal.com/news/politics-and-government/clark-county/clark-county-backs-mccarran-name-change-to-harry-reid-international-airport-2281859/.

61. 98 CONG. REC. 4314 (1952).

62. Harry Truman,Veto of Bill to Revise the Laws Relating to Immigration, Nationalization, and Nationality. (June 25, 1952).

63. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

64. *See supra* note 60, note 61.

65. *See* NGAI *supra* note 3, at 84-9.

66. *See infra* notes 67-68.

67. 98 CONG. REC. S7155 (1951).

cited INS Commissioner Benjamin Habberton as stating there was little screening of European immigrants in Canada, and that "border-jumping" was on the upswing.[68] Despite this, no slur was used in describing this group of illegal entrants, there was no concerted push to expand enforcement on the northern border, and none of the same fear-mongering that was applied to Mexican immigrants was present.[69] Undocumented entrants from Canada were not spoken of in terms of essentialized traits like criminality or docility; instead, they were just people who illegally entered.[70] This isn't surprising considering most entrants from Canada were either European or of European descent and the historically different treatment of the two borders.[71]

Beginning in 1935 a loophole was created for illegal entrants in the form of a pre-examination program that allowed some to normalize their status.[72] Undocumented entrants could request "pre-examination" based on hardship and be cleared for legal entry while in the United States.[73] They then had to voluntarily depart the U.S. where they were issued a visa at the nearest American consul.[74] While this program initially applied to both borders, by the 1940s its scope had been narrowed to only cover deparature to Canada.[75] It was clear to members of Congress that this was in conflict with the criminalization of illegal entry or reentry, with Senator Robert Reynolds in 1940 characterizing it as "an inducement to aliens to enter illegally in the hope of availing themselves of this nullification pie," and members of Congress charging that many of those admitted under pre-examination had committed crimes that should have made them ineligible for entry.[76] The racial bias underlying this program was made clear in 1945 when Mexican immigrants were explicitly excluded from the program.[77] Between 1935 and 1959, approximately 58,000 pre-

68. 100 CONG. REC. S2562 (1954).
69. *See* NGAI *supra* note 3, 66-7.
70. *Id.* at 89.
71. NGAI, *supra* note 3 at 66-7, 82.
72. *Id.* at 84; 86 CONG. REC. S9275 (Jul. 8, 1940).
73. *Id.*
74. For a more in-depth discussion of this program, s*ee* NGAI *supra* note 3.
75. *ID.* at 87.
76. *See* 86 CONG. REC. S9275 (1940).
77. NGAI, *supra* note 3 at 87.

examination requests were made and most were granted,[78] with more than 4,000 immigrants allowed to normalize their status in both 1943 and 1944,[79] the years preceding the exclusion of Mexican nationals in 1945. The bulk of these approvals were for European immigrants.[80] On the other hand, between 1929 and 1939 approximately 44,000, largely Mexican, immigrants were charged under the Undesirable Aliens Act for illegal entry.[81]

The racially-neutral impetus behind the criminalization of undocumented entry and reentry is, according to the Department of Justice's appeal of *Carrillo-Lopez*, to preserve a deterrent, a claim often raised by defenders of these statutes.[82] Yet 8 USC §§ 1325 and 1326 have been a part of American immigration policy for over ninety three years with little evidence that rates of undocumented entry are affected by increases in the enforcement of either law.[83] In 1933, just four years after the passage of the Undesirable Aliens, the Annual Report of the Secretary of Labor would note: "The act of March 4, 1929, prescribing penalties for illegal entries of aliens does not seem to have the deterrent effect expected."[84] Over its long history, there has been no concrete evidence presented by § 1326's proponents that the policy does actually deter illegal reentry, though it does continue to provide the marginalized workforce that was part of its original intent.[85] The felony charges attached to § 1326 violations also eliminate the possibility that individuals can normalize their status if charged and found guilty.[86] This can leave those with lives and loved ones in the United States with few alternatives other than illegal reentry.

The only evidence to date on the deterrent effect of § 1326 is based on recidivism rates published by Immigration and Customs

78. *Id.*
79. *See* 91 CONG. REC., S2222 (Mar. 14, 1945).
80. NGAI *supra* note 3 at 88.
81. LYTLE HERNÁNDEZ *supra* note 3 at 138.
82. *See supra* note 47 for a summary of the federal government's defense of § 1326.
83. *See infra* notes 88, 96.
84. SEC'Y OF LAB. ANN. REP. 21 (1933).
85. NGAI *supra* note 3; LYTLE HERNÁNDEZ *supra* note 3; FLORES, *supra* note 46.
86. 8 U.S.C. § 1326(b)(2); 8 USC 1182: Inadmissible aliens.

Enforcement as part of the Consequence Delivery System (CDS).[87] These rates suggest that those convicted of an immigration crime are less likely to reenter, but this has its limitations since it does not account for other variables that could influence an immigrant's decision to attempt reentry.[88] Moreover, recidivism is only tracked over the fiscal year.[89] This means that an immigrant who returns to the United States after this period would not be included in those rates.[90] If an immigrant is incarcerated based on § 1326 charges, they must serve their sentence prior to deportation, making fiscal year recidivism rates a poor measure of the effectiveness of deterrents, something noted in a 2017 report by the Government Accountability Office.[91] The lower recidivism rates are also contradicted by evidence on the effectiveness of Operation Streamline, which increased §§ 1325 and 1326 prosecutions.[92] Utilizing a time-series model,[93] researchers at the University of New Haven examined monthly apprehension rates from 1992 to 2014 in border regions that had implemented Operation Streamline.[94] The program went into effect in 2005, so if it did serve as a deterrent, apprehension rates should have dropped after its implementation.[95] Instead, it was found to have little effect on apprehension rates, with fluctuations instead attributed to various push and pull factors that had nothing to do with increased enforcement of §§ 1325 and 1326.[96] Thus, one of the main arguments for the existence of §§ 1325 and 1326 does not seem to hold up to empirical scrutiny.

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87. *See infra* note 91.

88. LISA SEGHETTI, CONG. RSCH. SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY (2014).

89. *Id.*

90. *See infra* note 91.

91. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-66, BORDER PATROL: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF POST-APPREHENSION CONSEQUENCES (2017).

92. *See* Michael Corradini et al., *Operation Streamline: No Evidence that Criminal Prosecution Deters Migration*, VERA INST. OF JUST., (June 2018) https://www.vera.org/downloads/publications/operation_streamline-report.pdf.

93. These models allow long-term trends, short term volatility, and short-term drift in a dependent variable to be isolated, allowing the effectiveness of a time-based intervention to be assessed. *Id.*

94. *Id.*

95. *Id.*

96. Jeremy Slack et al., *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US- Mexico Border*, 3 J. OF MIGRATION & HUM. SEC. 109 (2015); Corradini, *supra* note 91.

This is not particularly surprising considering that a host of deterrents to undocumented entry exist independent of punitive penalties associated with §§ 1325 and 1326.[97] The Southern border has become increasingly militarized since the 1980s, with physical barriers and the size of the Border Patrol both increasing.[98] Currently, 734 miles of the border have some kind of physical barrier in place to deter illegal entry.[99] The Border Patrol has expanded from a poorly resourced force of 450 in 1925[100] to 19,536 in 2022, significantly increasing the likelihood of apprehension.[101] In 2021, between 557 (U.S. Border Patrol) and 650 (International Organization for Migration) immigrants died while trying to illegally enter the United States from Mexico, highlighting the dangerous nature of the crossing as physical barriers and the number of Border Patrol agents have increased, pushing undocumented immigrants into more remote and dangerous areas to attempt entry.[102] Because of this, a majority of those illegally entering the United States from Mexico use a smuggler, or coyote, as a guide.[103] Based on data from the Mexican Migration Project, approximately fifty eight percent of those illegally entering the United States for the first time reported using the services of a coyote.[104] For those reentering the United States, a majority also report that they relied on a human smuggler for entry.[105] The average cost

97. *See supra* notes 8, 10-11.

98. *Id.*

99. Christopher Giles, *Trump's wall: How much has been built during his term?*, BBC NEWS (Jan. 12, 2021), https://www.bbc.com/news/world-us-canada-46748492.

100. *Border Patrol History*., U.S. CUSTOMS & BORDER PROTECTION (Jul. 21, 2020), https://www.cbp.gov/border-security/along-us-borders/history.

101. *Snapshot: A Summary of CBP Facts and Figures*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Apr/cbp-snapshot-042022.pdf.

102. Geneva Sands, *Border Patrol tallies record 557 migrant deaths on US-Mexico border in 2021 fiscal year*, CNN (Oct. 29, 2022), https://www.cnn.com/2021/10/29/politics/border-patrol-record-border-deaths-fiscal-year-2021/index.html; Priscilla Alvarez, *At least 650 migrants died crossing the US-Mexico border, the most since 2014, international agency says*, CNN (Dec. 9, 2021), https://www.cnn.com/2021/12/09/politics/migrants-dying-crossing-us-mexico-border/index.html.

103. MEXICAN MIGRATION PROJ., https://mmp.opr.princeton.edu/home-en.aspx (last visited May 22, 2022).

104. *Id.*

105. *Id.*

was $657, which is far from a marginal cost for many immigrants seeking entry into the United States to work.[106]

Despite their ineffectiveness, §§ 1325 and 1326 roughly cost the government, and American taxpayers, $1,328,805,646 per year for incarceration of undocumented entrants.[107] These policies further fuel mass incarceration and the profits of private prisons, with little demonstrated benefit in terms of their effectiveness in reducing rates of undocumented entry.[108] While the evidence for §§ 1325 and 1326 as effective deterrents is weak at best, they have marginalized millions of Mexican and Latinx immigrants, many of whom now exist in a legal grey zone.[109] Today over ten million people live in the shadows of America's carceral state and deportation apparatus,[110] facing not only removal from the United States, but also criminal charges that make them ineligible to enter legally, as well as incarceration.[111] Considering the racial animus motivating the passage of §§ 1325 and 1326, which has never been addressed, it is well past time for Congress to reexamine these policies through the lens of their history, as well as their effectiveness and cost. Judge Du's decision has provided Congress, and the Biden administration, with the opportunity to do so.

106. *Id.*

107. Kit Johnson, *A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes*, 92 DENVER U. L. R. 863, 874 (2015).

108. *See generally Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, ACLU (Jun. 2014), https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf.

109. *See* NGAI; GONZALEZ O'BRIEN; LYTLE HERNÁNDEZ *supra* note 3; FLORES *supra* note 46.

110. *See* Mark Hugo Lopez et al, *Key Facts About The Changing U.S. Unauthorized Immigrant Population*, PEW RES. CTR. (Apr. 13, 2021), https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/.

111. *See* 8 U.S.C. § 1182: Inadmissible aliens.