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Disciplining Criminal Justice: The Peril amid the Promise of Numbers

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INTRODUCTION

When it comes to the opaque domain of criminal justice's inner workings, statistics have a penetrating potential that scholars and officials have deployed in governing discretion, achieving accountability, and revealing systemic faults.¹ The growth of sophisticated scholarship and ideas adapting quantitative technology to unveil the hidden,² spur debate,³ and police bad

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1. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 265-66 (2005) (relying on statistical evidence to find invidious intent behind the exclusion of all black jurors in a capital case); *McClesky v. Kemp*, 481 U.S. 279, 321-22 (1987) (Brennan, J., dissenting) (recognizing, based on a statistical analysis of Georgia death penalty cases, that "there was a significant chance that race would play a prominent role in determining if [a defendant] lived or died"); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 915-16, 955-59 (2006) (arguing that a gulf between "insiders"—judges, police, and prosecutors—and "outsiders"—crime victims and the general public—undercuts the instrumental, moral, and expressive efficacy of criminal law, and arguing that better statistical information, particularly at the local level, could help bridge this gulf); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1119-22 (1997) (emphasizing the importance of statistical information in providing a "rough check" against selective prosecution and urging Congress to mandate the assembly of records reflecting patterns in the exercise of prosecutorial discretion); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600-604, 613-14 (2005) (emphasizing the importance of numerical performance measures in holding local prosecutors publicly accountable and noting the lack of "meaningful performance measures" and correspondingly less accountability on the federal side); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1006-12, 1015-25 (2001) (assessing, with the aid of statistics, the damage done to black communities and families by the high rate of black incarceration).
 2. See, e.g., Richard S. Frase, *The Decision To File Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 247 (1980) (using quantitative methods to analyze the decision whether or not to prosecute, which is "one of the least visible stages of criminal justice"); Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004) (using quantitative methods to analyze the decision to decline prosecution, "one of the great enigmas of the criminal justice system").
 3. See, e.g., John Donahue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (assessing the statistical evidence regarding the deterrent effect of the death penalty); Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347 (2005) (suggesting that widespread

behavior⁴ is an important movement. Yet this Article sounds a note of caution against the primacy of numbers in disciplining criminal justice practices.

This Article does not take aim at numbers deployed to correct, monitor, and reveal as an adjunct to serving public values. Rather, the Article's concern is about numbers becoming an end or target in criminal justice, *becoming the value* rather than serving as a technology toward higher aims and principles.⁵ The concern is about how statistics of people prosecuted and cases won, divorced from qualitative details and isolated from context, are officially deployed as a proxy for performance in criminal justice, in place of substantive aims that have proved difficult to attain or denominate in determinate ways.⁶

aversion to the death penalty in black communities may explain why black defendant–black victim murder cases receive the lowest rate of death sentences); Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 351 (2006) (concluding, based on statistical models, that there is a “measurable and significantly prejudicial effect” from joining multiple counts in a single trial, and calling for a re-examination of the criminal law doctrine of joinder and severance in light of these findings).

4. See, e.g., David C. Baldus & George Woodworth, *Race Discrimination and the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003) (reviewing multiple post-1990 statistical studies and reporting widespread race-of-victim disparities “reflecting more punitive treatment of white-victim cases among similarly aggravated cases”); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 83 (2001) (using statistical analysis to analyze peremptory challenges in death penalty cases and discerning evidence “of systematic discrimination . . . at the individual case level”); Poulin, *supra* note 1, at 1119–22; cf. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995) (advocating financial incentives to constrain charging behavior so that the offenses of conviction are very similar or identical to the offenses charged).
5. Cf. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992) (describing the turn to a systemic objective of “primacy given to the efficient control of internal system processes in place of the traditional objectives of rehabilitation and crime control” and the attenuation of “any external social referent” for goals like reducing recidivism, rehabilitation and crime control).
6. Cf. AMERICAN PROSECUTORS RESEARCH INSTITUTE, PROSECUTION IN THE 21ST CENTURY: GOALS, OBJECTIVES, AND PERFORMANCE MEASURES, at v, 1–3 (2004), available at http://www.ndaa.org/pdf/prosecution_21st_century.pdf

The Article analyzes how substituting numbers of prosecuted people for the values and goals of criminal law administration, like security or justice, is a mode of coping with pervasive doubt about the efficacy of the nation-state's governance and control. In place of hard-to-achieve, complex, and squishy public values, the production of numbers—with their comforting solidity and relatively easier attainability—is substituted as the goal and standard of performance. When used in this way, statistics obscure rather than illuminate and short-circuit self-scrutiny rather than spur it.⁷ This numbers-as-aims discourse effaces values, even as it claims to make performance more visible, and it borrows legitimacy from the bright hopes of reform projects that use numbers as a method rather than an end. The discourse gives official sanction to the flattening of the goals of criminal justice and legitimizes a focus on collecting favorable win statistics rather than considering whether the prosecutor's actions substantively address the public interest in context.

This Article argues that there are two tendencies that lead to the substitution of numbers for substantive values. The first is a tendency to address public doubt in government by making performance visible through “objective” quantified targets and measures and avoiding “soft” measures attentive to qualitative detail. Yet, when it comes to public values like “doing justice” or “protecting the environment,” where there is no discrete bottom line, such as private-sector profits or widgets made, qualitative description is particularly necessary. The struggle to conform public values to an ill-fitting idiom where rigidity is taken for rigor may lead to qualitatively impoverished proxies for substantive values.

The second motivation for turning to prosecution numbers is “denial and acting out” over policy failure.⁸ David Garland, in his influential study, has shown how policy actors wrestling with a pervasive sense of inefficacy have responded with “denial and acting out” through displays of punitive power “however poorly these gestures are adapted to dealing with the un-

(reporting that numerical indicators like conviction rates do not capture the role of the modern prosecutor, who works toward crime prevention by addressing the underlying factors and problems that contribute to crime).

7. See Marilyn Strathern, *The Tyranny of Transparency*, 26 BRIT. EDUC. RES. J. 309, 310, 313, 318 (2000) (arguing that making performance visible through measurement conceals and effaces the unmeasurable real quality of performance); cf. MICHEL FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE 78, 105 (Colin Gordon ed., 1980) (arguing “a system of right” may be “superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques”).

8. DAVID GARLAND, *THE CULTURE OF CONTROL* 131 (2001).

derlying problem.”⁹ This Article contends that when we retreat from the tough task of addressing problems, statistics about numbers of people prosecuted, stripped of qualitative consideration of impact or context, are particularly susceptible to being used *in place of* an intractable and hard-to-reach value or goal, rather than a tool wielded constructively *toward* public aims and values.

The analysis proceeds through two case studies.¹⁰ Part I examines how the Government Performance and Results Act responded to widespread public criticism of federal government performance by making numerical targets the standard of performance and qualitative depiction a deviation that bore the burden of justification. The case study examines how the Department of Justice tried to resist the denomination of the duty of “doing justice” in terms of output targets, repeatedly explaining the potential for perverse consequences and that justice is ill-served by reduction to numerical outputs like quantity of people prosecuted. Part I then assesses the recent reversal of commitment to this principle and the turn to officially denominating performance in terms of numbers of people prosecuted and win rates.

Part II examines how substituting numbers of people prosecuted for intractable goals is used to expressively exorcise frustration over policy failure in the context of immigration control and prosecution. This Part begins by examining the apparent failure of the paradigm of “prevention through deterrence” in border control, despite muscular and expensive policy and legislative measures that heighten the “pain” of unauthorized entry and ramp up the rate of prosecution.¹¹ The case study examines how frustration is expelled and unattained goals redefined by using numbers of immigration prosecutions as a proxy for “border security” and control, effacing the courage and vision to search for more effective strategies and to better serve substantive values. A decrease in immigration prosecution “deliverables” was

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9. *Id.* at 134. *See generally id.* at 110-20, 131-35 (analyzing how policy actors cope with the apparent limitations of the sovereign state’s ability to govern social life and offer crime control through strategies including shows of punitive force).
 10. *See generally* Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, in *QUALITATIVE RESEARCH PRACTICE* 420, 422 (Clive Seale et al. eds., 2004) (emphasizing the importance of case studies for “the development of a nuanced view of reality”).
 11. *Cf.* JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 169-70, 172-73 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1780) (writing that the “pain” of punishment must offset the “pleasure” of the profit of an offense and that want of certainty and proximity in punishment “must be made up in magnitude”). *See discussion infra* Part II.A.

the officially proffered reason for the recent dismissal of a U.S. Attorney by the administration that appointed her—when she tried to pursue the public interest by aiming higher, at the more culpable and powerful orchestrators of crime, rather than pursue self-interest by directing limited resources at collecting the quickest and easiest statistics without regard to context or efficacy.

Part III presents this Article's prescription for the problems of numbers that replace—and efface—higher values rather than work toward achieving them. I call for more receptivity in policy and legislation to qualitative methods and worldviews, so that numbers and values can be situated in context. Qualitative approaches are context-sensitive, holistic ways of addressing the world's complexities and indeterminacies.¹² Qualitative and quantitative ways of seeing need not be opposed. As the "mixed methods" turn in the social sciences shows, the two approaches deployed together can approach problems pragmatically and in complementary fashion, permitting smarter use of numbers and mooring quantitative technology to context and values in qualitative perspective.¹³

Before we proceed, a note on theoretical commitments: this Article's analysis of statistical improvement as a form of knowledge and a strategy of power that molds behavior is informed by the indispensable Michel Foucault, but parts ways with Foucault's gloomy conception of the modes and methods—what he termed the technologies, tactics, strategies, and disciplines—of post-Enlightenment power and control.¹⁴ Foucault illuminated how juridical power has become allied with corpuses of knowledge and technical discourses, or "régime[s] of truth" that produce the effect of truth, in disciplines like psychiatry and economics.¹⁵ Formerly brute, repressive power has been supplanted by gentler, more pervasive, meticulous, and minute strategies of discipline, like monitoring, measuring, assessing, diag-

12. See sources cited *infra* note 285.

13. See source cited *infra* note 286.

14. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Penguin Books 1977).

15. *Id.*; see also FOUCAULT, *Truth and Power*, in *POWER/KNOWLEDGE*, *supra* note 7, at 131 (explaining "régimes of truth" and "'general politics' of truth" that accept certain types of discourses as true as effects of power); I, PIERRE RIVIÈRE, *HAVING SLAUGHTERED MY MOTHER, MY SISTER AND MY BROTHER . . . : A CASE OF PARRICIDE IN THE 19TH CENTURY* x-xi (Michel Foucault ed., Penguin Books 1975) (explaining how assemblage of documents from a murder cases reveals how competing discourses of doctors, judges, prosecutors intervene); cf. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 79-80 (A.M. Sheridan Smith trans., Tavistock Publications 1972) (theorizing discursive formations).

nosing, and curing through the empirical sciences.¹⁶ Post-Enlightenment power is subtle and productive rather than repressive; it generates information and comes in the form of correction.¹⁷ Foucault contended that the principles of Panopticism—of creating a sense of “constant and permanent visibility” so that the subject self-monitors and internally inscribes the surveillant gaze—is the pervasive modern mode of discipline that governs throughout society, from the “schoolboy” to the figures of authority.¹⁸

Foucault’s later turn to theorizing government and governmentality is also informative. In Foucault’s usage, government refers to the art of shaping, guiding, and correcting how individuals conduct themselves.¹⁹ Foucault described a shift in the eighteenth century from sovereign imposition of the law to government, which is not about *imposing* law but using *tactics*—of which law is just one—to arrange things to achieve ends like managing the population.²⁰ Foucault used the neologism “governmentality” to refer to the increasing ascendancy of this managerial government as the method of power.²¹ Among scholars of Foucault, governmentality has come to refer to the combining of government with the mentality that everything can and should be managed, administered, and regulated, and the profusion of mechanisms to steer behavior.²²

While Foucault is an indispensable theorist of modern forms of power, he is murky on the normative propriety of particular techniques of power.²³ He seems to suspend the important question of what counts as legitimate or even laudable uses of power to concentrate on analyzing how power operates.²⁴ Despite his ostensible bracketing of the question of legitimacy, his writings tend to depict modern techniques of power as sinister modes of

16. FOUCAULT, *supra* note 14, at 104-09, 139, 225-27.

17. *Id.* at 194, 217-18, 226-28.

18. *Id.* at 202-04.

19. See Graham Burchell, *Liberal Government and Techniques of the Self*, in FOUCAULT AND POLITICAL REASON 20 (Andrew Barry, Thomas Osborne, & Nikolas Rose eds., 1996).

20. Michel Foucault, *Governmentality*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 100-02 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991).

21. *Id.* at 95, 102-03.

22. Barry Allan, *Foucault and Modern Political Philosophy*, in THE LATER FOUCAULT 179-80 (Jeremy Moss ed., 1998).

23. NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY 17, 31 (1989).

24. *Id.* at 18-19.

subjection that subtly and pervasively subjugate.²⁵ His work is informed by concern with “uncovering the dark side of modernity,”²⁶ and his rhetoric can be read as seeming to “endorse a one-sided, wholesale rejection of modernity . . . without any conception of what is to replace it.”²⁷

But modern techniques of power are not necessarily something to be deplored; they can be put to excellent ends. Technologies, like statistics, that surveil and mold conduct can help us police ourselves and hold us accountable to our ideals. For example, statistics are an important tool in identifying invidious decisions to exclude jurors on prohibited grounds like race.²⁸ We may not be able to peer into people’s minds to find invidious intent, but a claim can be proved circumstantially, by showing patterns of exclusion.²⁹

25. See, e.g., FOUCAULT, *supra* note 14, at 26, 30, 89-90, 138-39 (describing “subjection” of the body and manufacture of the soul as prison through “subtle” means of extending and entrenching pervasive “domination”, small “acts of cunning” that while seemingly innocent were “profoundly suspicious” and “attentive ‘malevolence’”); *id.* at 222 (arguing that the same juridical form that supported a system of egalitarian rights in principle also undergirded “non-egalitarian and asymmetrical” disciplinary mechanisms that “constituted the other, dark side”); Michel Foucault, *The Subject and Power*, in HERBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT BEYOND STRUCTURALISM AND HERMENEUTICS 211-13 (1982) (defining subjection as subjugation). Foucault had a less bleak view of discourses, which may transmit and produce power, but also help thwart it. MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION 101 (Robert Hurley trans. & ed., 1990). As an example, he compared the series of nineteenth-century discourses in psychiatry, jurisprudence and literature on homosexuality as “psychic hermaphroditism”, and how to control “perversity” that made possible the rise of a “‘reverse’ discourse: homosexuality began to speak on its own behalf, to demand that its legitimacy and or ‘naturalness’ be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.” *Id.*

26. LOIS MCNAY, FOUCAULT: A CRITICAL INTRODUCTION 2 (1994).

27. FRASER, *supra* note 23, at 33.

28. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 265-66 (2005) (relying on statistical evidence to find invidious intent behind the exclusion of black jurors in a capital case); *Batson v. Kentucky*, 476 U.S. 79, 102-103 (1986) (Marshall, J., concurring) (describing statistics, which were of limited availability at the time, as instructive regarding misuse of peremptory challenges to exclude black jurors). *But see* *United States v. Grandison*, 885 F.2d 143, 148 (4th Cir. 1989) (noting that while several courts use statistical analysis as a factor in assessing whether a *prima facie* *Batson* claim is established, “[a] battle of the numbers on appeal is no substitute for the district court’s assessment of the government’s conduct at trial”).

29. *Batson*, 476 U.S. at 93, 97; see THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 76 (1995)

Statistics may also reveal problems that are otherwise submerged, like the continuing prevalence and tolerance of violence against women. The legislative history of the Violence Against Women Act, for example, used statistics to depict the low rate of prosecution of crimes against women despite the pervasiveness of such crimes.³⁰ Statistics help uncover and police against behavior that contravenes our evolving vision of social ideals.³¹

Similarly, a pragmatic legal scholar would consider techniques that produce a safe and productive society without resort to brute compulsion, like architecture as crime control, or reducing penalties for violations of contested norms to encourage enforcement and spread of the norm, as elegant good design in governance.³² What Foucault calls tactics and technologies of

(“[C]ourts cannot very easily second-guess every employment and salary decision by a corporate office, university department, or law firm, but they can assemble numbers to establish a prima facie case for discriminatory practices by this or that unit.”).

30. S. REP. NO. 103-138, at 41-42 (1993); see also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118-19, 2150-73 (1996) (analyzing how the concepts of the privacy of the family and “domestic harmony” shielded and submerged violence against women even after the Anglo-American doctrine permitting physical “chastisement” was abolished and citing statistics that reveal the continuing pervasiveness of violence against women).
31. See, e.g., Baldus et al., *supra* note 4, at 83-84 (positing that the infrequency of claims of invidious strikes despite statistical evidence of “systematic discrimination,” is likely due to both sides tolerating “one another’s discriminatory use of peremptories to reduce the risk that a retaliatory claim will be brought by the other side”). If the Baldus hypothesis is correct, statistics helped discern invidious exclusion beneath tacit mutual silence. At a minimum, statistics raised the question. The prohibition against exclusionary jury practices goes beyond the interests of the parties in the proceeding and springs from a vision of justice that does not countenance the assumption “that justice in a court of law may turn upon on the pigmentation of skin, the accident of birth, or the choice of religion.” *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (Rehnquist, C.J., concurring) (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)). Invidious exclusion is not just a potential harm to the defendant; “minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish ‘state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.’” *Miller-El*, 545 U.S. at 237-38 (quoting *J.E.B. v. Alaska ex rel. T.B.*, 511 U.S. 127, 128 (1994)).
32. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607-09, 614-20 (2000) (proposing that where norms are “sticky” in the sense that they are contested, shifting norms can be better accomplished by refraining from prescribing hard penalties for violations, which stir resistance to applying the penalty, and choosing lighter penalties more apt to be applied, which spurs wider application and norm

power may be used for good or ill and have salutary or sinister effects. The normative assessment should therefore not be of the tool, but of the context where the tool is deployed, toward what goal, and with what effects. The concern of this Article is the inversion of the bright potential of quantitative technology to obscure and efface rather than illuminate.

I. GOVERNING GOVERNANCE AND THE MANUFACTURE OF "OBJECTIVE" VISIBILITY

The difficulty in denominating public values in ways that can be qualitatively measured creates a presumption against qualitative description and can lead to the substitution of inapt numerical targets in place of substantive values.³³ Trying to assuage public perceptions of federal government waste and inefficacy,³⁴ policy actors have increasingly turned to private-sector techniques to supply proof that taxpayer dollars are being spent efficiently.³⁵ A prominent feature of the private-sector turn is regimes of audit, a method of checking up and giving an account of actions originating in the financial field that has entered diverse other domains, such as the public sector and higher education, prompting scholars to write of an "audit culture" or "audit society."³⁶

Audit is allied with the venerable idea of accountability, but it is also about a dominance of certain forms and ways of seeing that powerfully determine resource allocation, institutional credibility, and proper aspirations.³⁷ Audit is about evaluating performance and giving an account of

shifting); Neil Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1041-44, 1071, 1089 (2002) (proposing deploying architecture and shaping social norms as crime control, instead of a single-minded focus on police and prosecutors).

33. See GARLAND, *supra* note 8, at 150 (describing erosion of trust and welfare state since the 1970s); William V. Roth, Jr., *The "Malmanagement" Problem: Finding the Roots of Government Waste, Fraud, and Abuse*, 58 NOTRE DAME L. REV. 961 (1983) (describing deepening public alienation from government and perception of government inefficacy and waste from vantage as senator).
34. See GARLAND, *supra* note 8; see also S. REP. NO. 103-58, at 2-32 (1993), reprinted in 1993 U.S.C.C.A.N. 327, 328-29 (accompanying the Government Performance and Results Act of 1993 and describing public opinion polls showing particular dissatisfaction with the federal government).
35. PORTER, *supra* note 29, at 198-99; MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* 43-44 (1997).
36. POWER, *supra* note 35, at 4-6; Marilyn Strathern, *New Accountabilities: Anthropological Studies in Audit, Ethics and the Academy*, in *AUDIT CULTURES: ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS AND THE ACADEMY* 27 (Marilyn Strathern ed., 2000).
37. Strathern, *supra* note 36, at 1.

one's performance.³⁸ But in the actuarial idiom of audit, only certain forms convince and only certain operations count.³⁹ What counts is the quantifiable. The central technique of audit is performance statistics.⁴⁰

Performance statistics manufacture the effect of an objective gaze detached and distinct from subjective descriptions and perceptions.⁴¹ As Theodore Porter puts it: "[q]uantification is a way of making decisions without seeming to decide."⁴² The numerical indicators take on a seemingly detached impersonal autonomy—even though they are framed and chosen by policy actors. The appearance of objectivity "lends authority to officials who have very little of their own,"⁴³ which is particularly important to a strategy of coping with pervasive public doubt about policies and policy professionals.⁴⁴

While statistics are often couched as an information-gathering tool, and indeed are of great utility in the compilation of information, statistics are also a technique of disciplining behavior to conform to statistical classifications.⁴⁵ As Marilyn Strathern writes in the context of performance statistics permeating the British academy: "What is being tested would seem to be the performance and productivity of academics but 'everyone knows' that what

38. POWER, *supra* note 35, at 4.

39. See Strathern, *supra* note 36, at 1 ("Recognizable in the most diverse places, these practices also drive very local concerns. They determine the allocation of resources and can seem crucial to the credibility of enterprises; people become devoted to their implementation; they evoke a common language of aspiration.").

40. *Id.* at 7.

41. See PORTER, *supra* note 29, at 8 ("A decision made by the numbers (or by explicit rules of some other sort) has at least the appearance of being fair and impersonal.").

42. *Id.*

43. *Id.*

44. See *id.* at 200 (explaining "how strategies of quantification work in an economy of personal and public knowledge, of trust and suspicion" and the current political context "of overwhelming distrust, or at least distrust of personal judgment").

45. See Foucault, *Governmentality*, *supra* note 20, at 99-100 (portraying statistics as an important technology of governmentality, a *savoir* of government that gathers information from a population in order to manage it); Ian Hacking, *How Should We Do the History of Statistics?*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY*, *supra* note 20, at 95, 181 ("The bureaucracy of statistics imposes not just by creating administrative rulings but by determining classifications within which people must think of themselves and of the actions open to them.").

is being tested is how amenable to auditing their activities are or how their performance matches up to performance indicators.”⁴⁶

Performance statistics map well to disciplining private-sector goals such as efficiently maximizing output and profit, but public values are not always akin to private-sector goals. Leading scholars of government and management have agreed with Wallace Sayre’s quip that “public and private management are fundamentally alike in all unimportant respects.”⁴⁷ As for the important aspects, government agencies and private companies differ. As John J. DiIulio, Jr. writes:

Unlike most private corporations, most government agencies have no market-test of output. The managers of a smokestack company are out to turn a profit; the managers of the Environmental Protection Agency are out to ‘protect the environment.’ The executives of television networks contrive to generate dividends for shareholders; the heads of the Federal Communications Commission contrive to regulate airwaves in ‘the public interest.’⁴⁸

Justice Sutherland similarly described the performance metric of a federal prosecutor in a unanimous Supreme Court opinion: the United States Attorney’s interest “is not that [the United States] shall win a case, but that justice shall be done.”⁴⁹

46. Strathern, *supra* note 7, at 309-10.

47. See John J. DiIulio, Jr., *Measuring Performance When There Is No Bottom Line*, in BUREAU OF JUSTICE STATISTICS, PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 143, 143 (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pmcjs.pdf> (citing as examples Graham T. Allison and James Q. Wilson).

48. *Id.*

49. *Berger v. United States*, 295 U.S. 78, 88 (1935). The enunciation of duty “has become ubiquitous on publications produced by and about U.S. Attorneys.” H.W. Perry, *United States Attorneys: Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 130 (1998). This standard is stated in a plethora of opinions. *E.g.*, *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting the duty-to-justice passage in the context of considering a case concerning prosecutorial disclosure of *Brady* material and the prosecutor’s duty to truth); *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (explaining the departure from the “pure adversary model” posed by the *Brady* requirement that the prosecution help make the defense case); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384 & n.12 (1979) (holding that members of the public and press do not have a Sixth Amendment right to attend criminal trials and explaining that “our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation” and pointing to the prosecutor’s duty to justice).

How can such aspirational public values be cast in the idiom of emphasis on discrete measurable targets—a method of assessing progress and outputs in the *private* interest rather than a *social* interest? At most, DiIulio writes, outputs can serve as proxies for the duties that public managers serve.⁵⁰ But the proxies are not always well aligned with public values and goals. Generally, public managers have non-operational goals—“an image of a desired future state of affairs that cannot be compared unambiguously to an actual or existing state of affairs”—while private managers have operational goals that can be expressed in target terms.⁵¹ While a corporate manager can set a target number of widgets to produce at a target cost, for example, duties such as doing justice or heightening a sense of security are not as amenable to such quantification.

James Q. Wilson’s observation about performance measures for public policing is instructive: “There are no ‘real’ measures of overall success; what is measurable about the level of public order, safety, and amenity in a given large city can only partially, if at all, be affected” by law enforcement behavior.⁵² Wilson’s solution involves qualitative evaluation—he would look to the qualities that the public desires and specify “the features of a given neighborhood that are strategic and must be improved if the quality of life is to be improved,” examining context-specific factors like a business that permits loitering or bars that are frequently the scene of brawling.⁵³

The lesson is the need to adapt modes of evaluating performance based on context. Transplanting a performance-measurement tool across different contexts without sufficient adaptation presents a danger that the real goals of public administration will be “set aside so that officials can be judged against standards that miss the point.”⁵⁴ Accumulating numbers efficiently becomes an imperfect proxy for effectiveness, leaving out details that, while hard to denominate in outputs or targets, may be crucial for effective stewardship of public power and resources given in trust.⁵⁵ As we will examine,

50. DiIulio, *supra* note 47, at 144.

51. *Id.* at 145-46.

52. James Q. Wilson, *The Problem of Defining Agency Success*, in *PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM* 157, 159-160 (Bureau of Justice Statistics ed., 1993), available at http://ojp.usdoj.gov/BJA/evaluation/guide/documents/problem_of_defining_agency_succe.htm.

53. *Id.* at 157-162.

54. PORTER, *supra* note 29, at 216.

55. See Rosita S. Chen, *Social and Financial Stewardship*, 50 *ACCOUNTING REV.* 533, 533-36 (1975) (describing effective use of resources as a higher form of accounting and detailing genesis of idea of stewardship as duty to administer common resources for the good of society); Keith Hoskin, *The ‘Awful Idea of Accountability’: Inscribing People into the Measurement of Objects*, in *AC-*

there also exists the potential for bending the bounds of what is officially sanctioned and altering the meaning of public values.

A. The Law of Making Performance Visible

The Government Performance and Results Act of 1993⁵⁶ marks the inroads of audit culture in the law of governing those who govern. The Act aimed at assuaging public perception of waste and inefficacy.⁵⁷ Advocating for the Act, General Accounting Office Comptroller General Charles A. Bowsher testified about the import of having performance measures “just like you have in the private sector.”⁵⁸ Unlike the private sector, however, which accords “tremendous weight” to “soft” qualitative performance indicators,⁵⁹ the Act inscribed a presumption against qualitatively denominated performance goals.

The Act deployed strategies of agency self-monitoring and internalization of a regime in which quantification and measurability are central to denominating performance, and where qualitative description is a deviation that must be justified to the Office of Management and Budget (OMB). Under the Act, federal agencies are required to submit annually a performance plan setting performance goals “in an objective, quantifiable, and measurable form.”⁶⁰ If an agency, in consultation with the OMB, finds it infeasible to denominate a performance goal in measurable, quantifiable form, then it must seek the OMB’s permission to express the performance goal with an alternative descriptive statement that permits comparison of actual performance against the description given as a goal.⁶¹

The privileging of the quantifiable and quantified is reflected in the Act’s design and language. A performance goal is defined as “a target level of performance expressed as a tangible, measurable objective, against which actual achievement can be compared, including a goal expressed as a quan-

COUNTABILITY: POWER, ETHOS AND THE TECHNOLOGIES OF MANAGING 265 (Rolland Munro & Jan Mouritsen eds., 1995) (describing the ancient idea of stewardship as a proper conservation of resources).

56. Pub. L. No. 103-62, 107 Stat. 285 (1993).

57. See Pub. L. No. 103-62, § 4(b), 107 Stat. 285, 287 (1993) (codified as amended at 31 U.S.C. § 1115(a) (2000)) (requiring quantification of performance); S. REP. NO. 103-58, *supra* note 34, at 328-29 (claiming Act is a response to the widespread public perception of federal government waste and inefficacy).

58. S. REP. NO. 103-58, *supra* note 34, at 330.

59. John DiIulio, Jr., *Rethinking the Criminal Justice System: Toward a New Paradigm*, in PERFORMANCE MEASURES, *supra* note 47, at 145.

60. Pub. L. No. 103-62, § 4(b), 107 Stat. 285, 287 (1993) (codified as amended at 31 U.S.C. § 1115(a)(2) (2000)).

61. *Id.* (codified as amended at 31 U.S.C. § 1115(b))

titative standard, value, or rate.”⁶² The Act also mandates that the agency inscribe performance indicators “to be used in measuring or assessing the relevant output, service levels, and outcomes of each program activity” and “describe the means to be used to verify and validate measured values.”⁶³

What we have, in short, is a mandate to internalize target vision.⁶⁴

The Act set a deadline of March 31, 2000 for agencies to begin delivering annual program performance reports comparing actual performance to the preset targets.⁶⁵ If a target is unmet, the report must explain why and provide “plans and schedules for achieving the established performance goal” or explain why the goal set by the agency was impractical or infeasible.⁶⁶ The Act mimics private sector incentives by affecting funding.⁶⁷ Agencies therefore have a financial stake in delivery of the typically numerically denominated targets.

An intelligently crafted regime, the Act had a design feature aimed against mere numerical spit-outs unmoored to a vision of how to achieve long-range duties wisely. The Act set a deadline of September 30, 1997 for agencies to submit to the OMB a “strategic plan” with a mission statement and agency goals and objectives.⁶⁸ The annual performance plan had to be

62. *Id.* (codified as amended at 31 U.S.C. § 1115(f)).

63. *Id.* (codified as amended at 31 U.S.C. § 1115(a)(4), (6)).

64. *Cf.* Keith Hoskin, *The Viewing Self and the World We View: Beyond the Perspectival Illusion*, 21 ORGANIZATION 141, 143 (1995) (analyzing the “Perspectival Self, whose all-seeing unseen eye keeps under surveillance the multiple selves arrayed around it”). Compare Foucault’s famous analysis of Jeremy Bentham’s Panopticon as epitomizing modern systems of control whereby power is more pervasive yet less physically repressive. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 14, at 200-03. The Panopticon inverts the idea of the dungeon. *Id.* at 200. Instead of being plunged in darkness, the prisoner is backlit by a window and visible to a central watch tower. *Id.* at 200-01. The subject experiences “a state of constant and permanent visibility” and self-monitors behavior, “inscrib[ing] in himself the power relation” and becoming the instrument of his own subjection, thereby rendering unnecessary the actual exercise of power. *Id.* at 201-03. Foucault argued that the principles of Panopticism have pervaded society, reaching at once the schoolboy and the watchtower inspector. *Id.* at 202-04.

65. Government Performance and Results Act of 1993, Pub. L. No. 103-62, § 4(b), 107 Stat. 285, 288 (codified as amended at 31 U.S.C. § 1116(a), (b) (2000)).

66. *Id.* (codified as amended at 31 U.S.C. § 1116(d)(3)).

67. Sidney A. Shapiro & Rena I. Steinzor, *The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 LAW & CONTEMP. PROBS. 99, 109 (2006).

68. Government Performance and Results Act of 1993, Pub. L. No. 103-62, § 3, 107 Stat. 285, 286 (codified as amended at 5 U.S.C. § 306 (2000)).

consistent with achieving the goals of the strategic plan.⁶⁹ The requirement links the quantified goals and related annual rites of assessing actual performance against targets to the agency's broader mission.

The Act was, after all, about achieving results, not just inducing annual displays of output. The Senate Report explicating the Act stated the legislation was intended to focus on delineating results and outcomes rather than output.⁷⁰ Results, in a shallow sense, can mean simple output. In a deep sense, when linked to long-term goals, results mean having an impact toward accomplishing goals. By trying to link results to long-term plans, the Act's good intention was to better achieve results in the deep sense of long-term goals. As the case study in the next section analyzes, however, when self-scrutiny is denominated as meeting quantified targets, the unintended consequence may be mistaking output for quality performance.

B. Difficulties Defining Criminal Justice in the Idiom of Targets

The case we will examine is how the Department of Justice came to officially sanction denominating performance in criminal justice in terms of numbers of people prosecuted and win rates—in contravention of prior commitments and repeated concerns about the potential for perverse consequences and denigration of what doing justice means. The account proceeds by analyzing what I term *sub-law*. Sub-law encompasses the internal law of administration—policy documents, manuals, letters, and memo-

69. *Id.* (codified as amended at 5 U.S.C. § 306(c)).

70. See S. REP. NO. 103-58, *supra* note 34, at 329 (“A key step in changing government behavior is to create a focus on results.”); *id.* at 341 (“A common weakness in program performance plans is an over-reliance on output measures, to the neglect of outcomes. . . . It is very important that annual performance plans include goals, not just for the quantity of effort, but also for the quality of that effort. These goals should be as specific as possible, they should drive much of the daily operations of the agency, and they should aim at achieving the long-term general goals of the agency’s strategic plan.”); *id.* at 355 (“While the Committee believes that a range of measures are important for program management, and should be included in agency performance plans, it also believes that measures of program outcomes, not outputs, are the key set of measures that should be reported to OMB and Congress.”); General Accounting Office, Reports on the Government Performance and Results Act (2007), <http://www.gao.gov/new.items/gpra/gpra.htm> (“The Government Performance and Results Act of 1993 seeks to shift the focus of government decision-making and accountability away from a preoccupation with the activities that are undertaken—such as grants dispensed or inspections made—to a focus on the results of those activities, such as real gains in employability, safety, responsiveness, or program quality.”).

randa - that guides administrators.⁷¹ Sub-law also embraces a broader field of imperatives beyond the internal law of administration, such as inter-agency communications and outside pressures and demands that affect interests like funding, legitimacy, and institutional relations.⁷²

The documents of sub-law, such as government performance reports and internal memoranda, are important artifacts⁷³ for analyzing the imperatives that steer the daily details of criminal justice administration and shifts in the governing principles. Government reports take a standard form and often retain similar wording and structure over the years. By tracing shifts in the format, wording, and focus of documents, we can trace shifts in the organizing logic of what performance means. Memoranda and letters made publicly available can flesh out the behind-the-scenes struggles that occasioned the shifts. Such sub-law artifacts are important items for analysis because they do not just reflect shifts in the organizing logic; they are also the instruments for exerting such shifts.

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71. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 15 (1983) (directing attention to how the internal law of administration can be a tool in better achieving administrative justice); Jerry L. Mashaw, *Republican Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 *YALE L.J.* 1636, 1686 (2007) (excavating early examples of the internal law of administration). Curiously, despite the import of the internal law of administration in managing the daily details of the law and producing law's lived effects, scholars of administrative law steered by the case method have hardly studied it, with works by Mashaw largely pioneering sustained scrutiny of the area.
 72. See, e.g., M. ELAINE NUGENT-BORAKOVE & LISA M. BUDZILOWICZ, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *DO LOWER CONVICTION RATES MEAN PROSECUTORS' OFFICES ARE PERFORMING POORLY?* 1-2 (2007), available at http://www.ndaa.org/pdf/do_lower_conviction_rates_07.pdf (explaining how phone calls expressing concern prompted by focus on conviction rates and plea bargain rates can be pressures on local prosecutors); *Hearing on U.S. Attorney Firings Before the S. Comm. on the Judiciary*, 110th Cong. (2007), 2007 WL 927187 [hereinafter *U.S. Attorney Hearings, Part III*] (testimony of D. Kyle Sampson, former Chief of Staff to the Att'y Gen. of the United States) (testifying that a U.S. Attorney's job was put in jeopardy because her immigration statistics were criticized as not reflecting "what was going on politically").
 73. For work analyzing the import of documents as artifacts to be analyzed, see ANNELISE RILES, *THE NETWORK INSIDE OUT* 8-15, 70-91 (2000); Annelise Riles, *Introduction: In Response*, in *DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE* 1, 2 (Annelise Riles ed., 2006). For example, Riles relates how participants in international conferences hope that the language of their non-binding conference agreements and resolutions "is quoted and repeated from one conference document to the next and as states begin to conform their practices, or at least their discourse, to the norms expressed therein, some of what is agreed upon at global conferences gradually will become rules of 'customary international law.'" RILES, *supra* at 89.

Since 1966, the Attorney General has been required by statute to deliver a yearly report to Congress about Department of Justice business and anything else he or she deems proper.⁷⁴ The report must include: (1) a statement of the appropriations controlled by the Department of Justice and the amount appropriated; (2) federal crime statistics; and (3) the number of pending cases involving the United States.⁷⁵ Though the 1966 statute states the report must include crime statistics and a statement of the number of pending cases, such figures are not designated the central standards of performance. Indeed, as recently as the period between 1994 and 1999, quantified measures did not drive the depiction of how the Department of Justice carried out its duties.⁷⁶ The 1994 Attorney General's Annual Report, for example, is driven by qualitative description, with statistics situated in context.⁷⁷ Performance is not denominated in numerical "targets" to be hit or missed.

In June 1997, about four months before the deadline for the Department of Justice to submit its strategic plan under the Performance and Results Act, the General Accounting Office⁷⁸ reviewed the strategic plans of major agencies, including the Department of Justice.⁷⁹ The Accounting Office had a strong interest in seeing quantified measures—the agency had pushed for two decades for quantified measures before passage of the Performance and

74. 28 U.S.C. § 522 (2000). The core of the statutory provision was added by Pub. L. No. 89-554, § 4(c), 80 Stat. 615 (1966).

75. 28 U.S.C. § 522(1)-(3) (2000).

76. The reports for 1997 and 1998 had an additional appendix of statistics regarding prosecution of intellectual property offenses, in compliance with a provision in the Anticounterfeiting Consumer Protection Act of 1996, which mandated that, beginning in 1997, the Attorney General must include in her report "an accounting, on a district by district basis" of enforcement actions against infringement of intellectual property rights. Pub. L. 104-153, § 5, 110 Stat. 1387, *codified at* 18 U.S.C. § 2320(e) (Supp. V 1996), *recodified at* 18 U.S.C. § 2320(f) (2000), *recodified at* 18 U.S.C. § 2320(f)(1) (Supp. IV 2006); OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, 1997 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES, 85-121 (1997), *available at* <http://www.usdoj.gov/ag/annualreports/ar97/index.html>; OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, FISCAL YEAR 1998 ANNUAL ACCOUNTABILITY REPORT, B-1 (1998), *available at* <http://www.usdoj.gov/ag/annualreports/ar98/ar98.pdf>.

77. *See generally* OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, 1994 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1997), *available at* <http://www.usdoj.gov/ag/annualreports/ar94/finalag.txt>.

78. Hereinafter referred to as "Accounting Office."

79. Letter from Gen. Accounting Office to Richard K. Arme y, John Kasich, Dan Burton, and Bob Livingstone, Congressmen (July 11, 1997), *available at* <http://www.gao.gov/archive/1997/gg97153r.pdf> [hereinafter 1997 GAO Letter].

Results Act.⁸⁰ The agency's campaign included more than seventy reports on performance measures.⁸¹ One of the reports urged: "Assessing government accomplishments requires measuring employee and program performance."⁸² The Accounting Office argued that nearly two-thirds of government employees could have their work measured through "formal productivity measurement systems" and for the remaining third, "substantial time and effort" could still yield measures of performance, with qualitative measure a last resort if quantitative measures proved infeasible.⁸³

During deliberation over the Performance and Results Act, Comptroller General Charles A. Bowsher testified about the import of having performance measures, "just like you have in the private sector" and how it would immensely aid the Accounting Office.⁸⁴ Bowsher explained the Accounting Office's interest: "We waste half our time in doing our program evaluation work and our financial audit work even in trying to figure out what is the goal that was trying to be achieved and where is the information. We are always over there trying to gather the data. It should be brought together in an organized fashion by the agencies themselves."⁸⁵ The Assistant Comptroller General for Accounting and Financial Management also expressed his "fond hope" for "measurable goals."⁸⁶

After reviewing an early version of the Department of Justice's first strategic plan, the Accounting Office sent a letter to Congress reporting that the stated goals and objectives "are not consistently results oriented or expressed in as measurable a form as they could be" and "the performance indicators are not always as outcome related as they could be."⁸⁷ In February 1998, the Department of Justice submitted its first performance plan to Congress. The performance plan listed performance measurements for the seven core functions identified in the Department of Justice's strategic plan.⁸⁸ The first core function was the investigation and prosecution of

80. S. REP. NO. 103-58, *supra* note 34, at 4330.

81. *Id.*

82. *Id.* at 5331 (internal citation omitted).

83. *Id.*

84. *Id.* at 4330.

85. *Id.*

86. *Id.*

87. 1997 GAO Letter, *supra* note 79.

88. OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, FY 1999 SUMMARY PERFORMANCE PLAN 1 (1998), *available at* <http://www.usdoj.gov/ag/annualreports/summary1999/>.

criminal offenses, which reflected the Attorney General's priorities for FY 1999.⁸⁹

Performance measures were a mix of output-oriented and results-oriented data and qualitative and quantitative criteria. For example, under the goal of reducing illegal drugs, the Department listed its Southwest Border Initiative to disrupt or dismantle drug trafficking organizations.⁹⁰ Measures included: (1) "arrests, indictments and convictions obtained in cases involving these organizations"; (2) "kingpins indicted and prosecuted"; and (3) "number and/or qualitative assessment of cases that have lead to the disruption, dismantlement or collapse" of organized drug traffickers.⁹¹

In May 1998, the Accounting Office assessed the performance plan the Department of Justice had submitted.⁹² Reporting to Congress again by letter, the Accounting Office wanted more quantification and "specific targets," such as quantifying the extent of reduction in violent crime and drug use and availability that the Justice Department planned to achieve—though the Justice Department explained there was no "credible basis upon which to predict with any degree of certainty" such specific levels of reduction.⁹³ The assessment letter noted that the Justice Department had refused to set numerical targets for certain outputs, such as indictments and convictions, because of concern that setting numerical goals would risk the perception of bounty-hunting, compromise ethics, and exert other unintended consequences.⁹⁴

A February 1999 internal memorandum from Attorney General Janet Reno to her department heads reveals the behind-the-scenes conflict. The

89. *Id.* These priorities included reducing violent crime, "including organized crime, drug and gang-related violence," "[r]educing the availability and abuse of illegal drugs," combating terrorism, reducing white-collar crime, and coordinating and integrating Justice Department law enforcement activities with that of other agencies. *Id.* at 1-2, 5.

90. *Id.* at 7.

91. *Id.*

92. Letter from Gen. Accounting Office to Henry J. Hyde, Chairman of the H. Comm. on the Judiciary & John Conyers, Jr., Ranking Minority Member of the H. Comm. on the Judiciary (May 29, 1998), available at <http://www.gao.gov/new.items/gpra/gg98134r.pdf>.

93. *Id.* at 5-6; see also DiIulio, *supra* note 47, at 1 ("[M]ost criminal court judges, prosecutors, public defenders, and other justice practitioners know from experience that the prevalence and severity of crime depend mainly on factors affecting individuals long before most are taken into custody.").

94. Letter from Gen. Accounting Office, *supra* note 92, at 5.

memorandum's subject was "Using Statistics to Assess Performance."⁹⁵ Reno wrote that while she strongly supported improved program management and believed objectives should be expressed in measurable forms when possible, she was concerned over "the potential for abuse if certain statistical indicators are inappropriately used for measuring either program or employee performance."⁹⁶ The concern would come into play, Reno wrote, "if we are pressed to set a target regarding a future level of law enforcement activity—such as making numeric projections for indicators such as arrests, indictments, convictions, or asset seizures—without sufficient consideration to the quality or impact of those actions."⁹⁷ Reno explained:

Serving justice is our ultimate standard of success. It does not necessarily correspond to the number of arrests made, indictments brought, cases settled, or convictions won. In fact, if circumstances warrant, the Government's decision not to take certain enforcement actions may be more indicative of the successful pursuit of justice.

In addition, I am particularly concerned that the individual employee performance is not evaluated based on these types of unqualified indicators. I am deeply concerned that the judgment and actions of our personnel never be perceived as being influenced by striving to reach a targeted goal, or quota, for its own sake, without regard to the activity's larger purpose.⁹⁸

Based on these principles and concerns, Reno directed that "arrest, indictment, conviction, and asset seizure data should not be used out of context or without appropriate qualification when assessing program or employee performance."⁹⁹

For FY 1999, the Attorney General's annual report was revamped and released as the Department's first statement of performance in compliance with the Performance and Results Act.¹⁰⁰ This self-assessment of performance was organized around the core functions, goals, and measures of the strategic plan and performance plan. Where numerical targets were set, for

95. Janet Reno, Attorney Gen., Memorandum for Heads of Department of Justice Components, Using Statistics to Assess Performance (Feb. 8, 1999), *available at* <http://www.usdoj.gov/ag/readingroom/usestat.htm> [hereinafter Memorandum on Using Statistics to Assess Performance].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Foreword to OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, FISCAL YEAR 1999 ANNUAL ACCOUNTABILITY REPORT (2000), *available at* <http://www.usdoj.gov/ag/annualreports/ar99/fullrep.pdf>.

example, for the percent decline in members of the violent organized crime group La Cosa Nostra, the report stated whether the targets were met and if they were not, why.¹⁰¹ Where the Attorney General had refused to set targets, for example, for the number or rate of convictions, the measures section stated the actual number of prosecutions, convictions, or indictments obtained that year compared to previous years.¹⁰²

On June 30, 2000, the Accounting Office reviewed the performance report.¹⁰³ The Accounting Office reported to senators that progress could not be readily determined because “the agency has yet to develop performance goals and measures that can objectively capture and describe performance results.”¹⁰⁴ The Accounting Office thought the performance measures were flawed, in part because they had no stated performance targets and were more output than outcome oriented.¹⁰⁵ “In relation to setting targets,” the Accounting Office wrote, “it is important to note that the Attorney General has ‘emphatically cautioned against establishing certain crime enforcement targets.’ Her concern is that law enforcement may be perceived by the public as engaging in ‘bounty hunting’ or pursuing arbitrary targets for the sake of meeting the goal.”¹⁰⁶

Again assessing Justice Department performance reports in June 2001, the Accounting Office noted difficulty in certain areas because some performance measures did not have targets against which to compare actual performance and thus “measure success.”¹⁰⁷ The Accounting Office reported that “Justice believes that it is unfair for us to report that its performance was not considered sufficient to assess progress merely because there was no performance target against which to measure.”¹⁰⁸ The assess-

101. *Id.* at 1-2.

102. *Id.* at 1-12.

103. Letter from U.S. Gen. Accounting Office to Fred Thompson, Chairman, S. Comm. on Governmental Affairs & Joseph I. Lieberman, Ranking Minority Member, S. Comm. on Governmental Affairs 1 (June 30, 2000), <http://www.gao.gov/new.items/gg00155r.pdf>.

104. *Id.* at 1-2.

105. *Id.* at 2.

106. *Id.*

107. GEN. ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE, DEPARTMENT OF JUSTICE, STATUS OF ACHIEVING KEY OUTCOMES AND ADDRESSING MAJOR MANAGEMENT ISSUES, GAO-01-729, at 2, 7 (2001), available at <http://www.gao.gov/new.items/do1729.pdf> [hereinafter GAO REPORT TO RANKING MINORITY MEMBER].

108. *Id.* at 26-27.

ment report noted that the Justice Department had described the difficulty in measuring law enforcement performance because it is not possible to isolate the effect of agency efforts from other factors over which the agency had little control.¹⁰⁹ Yet again, the Justice Department had expressed concern that certain performance targets would contribute to the perception that law enforcement officers were bounty hunting or pursuing arbitrary targets.¹¹⁰

Justice Department officials were apparently troubled enough by the pressures and problematic tension to include in the Department's 2000 Performance Report a section entitled "Measuring Law Enforcement" that began:

First, "success" for the Department of Justice is when justice is served fairly and impartially. It cannot be reduced to simplistic numerical counts of activities such as arrests, cases, or convictions. Therefore, although the Department provides retrospective data on these activities, it does not target levels of performance. The Department is concerned that doing so would lead to unintended and potentially adverse consequences.¹¹¹

Searching for some way to denominate performance in conformity with the privileging of quantified targets, the Justice Department established alternatives that operated similarly to targets but did not have the noxious, obvious odor of a quota. One change in response to pressure for targets was to offer trend data for nearly every performance measure.¹¹² Though conviction or indictment quotas were not explicitly set, the trends of year-to-year actual numbers delivered could be monitored and performance judged from the trends. In a 2001 letter to the Accounting Office, the Justice Department expressed frustration that such trend information, short of a target, still did not suffice.¹¹³

109. *Id.* at 27.

110. *Id.* at 2.

111. JUSTICE MANAGEMENT DIVISION, U.S. DEP'T OF JUSTICE, FISCAL YEAR 2000 PERFORMANCE REPORT AND FISCAL YEAR 2002 PERFORMANCE PLAN (April 2001), <http://www.usdoj.gov/ag/annualreports/pr2000/Introduction.htm> [hereinafter FISCAL YEAR 2000 PERFORMANCE REPORT AND FISCAL YEAR 2002 PERFORMANCE PLAN].

112. Letter from Janis A. Sposato, Acting Assistant Attorney General for Administration, to Paul Jones, Director, Justice Issues, General Accounting Office (June 19, 2001), in GAO REPORT TO RANKING MINORITY MEMBER, *supra* note 107, at 46.

113. *Id.*

C. Bending the Bounds of the Officially Sanctioned

Despite the history of concern over possible perverse consequences, target outputs of people prosecuted and case win rates are now the officially sanctioned proxies for performance in the duty of doing justice. For fiscal years 2006, 2007, and 2008, the Department of Justice adopted pre-set target conviction numbers and win rates.¹¹⁴ In its budget submission to Congress for FY 2008, the Justice Department explained: “In the criminal area, there are two primary performance measures for the USAs [U.S. Attorneys], including 1) terrorism convictions, and 2) criminal cases favorably resolved.”¹¹⁵ For FY 2007, the target number for non-terrorism convictions is 68,180 and the target win rate is ninety-two percent.¹¹⁶ For FY 2008, the target number of people convicted will increase to 70,907.¹¹⁷

A simple chart entitled “Performance Measure Table” in the Justice Department’s ’2008 budget submission to Congress marks the shift in what is officially sanctioned as legitimate.¹¹⁸ Covering fiscal years 2000 to 2008, the table sets forth as “performance measures” the numbers of defendants found guilty and percentage of cases favorably resolved. From fiscal years 2000 to 2005, there are no targets because of the concerns repeatedly expressed in the documents we examined. The table retrospectively reports the actual numbers obtained. Starting with FY 2006, however, the table compares target conviction numbers and win rates with actual figures. We are far from the ideal, expressed in *Berger*, that the interest of a United States Attorney is not in winning—and the distance between that value and reality is now official and officially sanctioned.¹¹⁹

This transformation of the bounds of what is formally approved is striking because the Performance and Results Act aimed to focus on outcomes and results rather than output and had a design feature seeking to connect quantified performance measures with long-term strategic goals. As we examined in the preceding sections, however, when it comes to criminal justice administration, linking the ultimate goal of crime prevention to measurable targets is difficult because crime levels are such a multi-variable,

114. U.S. DEP’T OF JUSTICE, CONGRESSIONAL SUBMISSION: FY 2008 PERFORMANCE BUDGET UNITED STATES ATTORNEYS 16-18, 21 (2007), http://www.usdoj.gov/jmd/2008justification/pdf/22_usa.pdf [hereinafter USDOJ, FY 2008 BUDGET SUBMISSION].

115. *Id.* at 16.

116. *Id.* at 21.

117. *Id.* at 18, 21.

118. *Id.* at 21.

119. *Berger v. United States*, 295 U.S. 78, 88 (1935).

macro-scale phenomenon, and improvement a non-operational value that calls for qualitative depiction.¹²⁰ Numerical outputs became the imperfect proxy during the struggle to conform public values and goals to a mode of measurement that privileges targets and creates a presumption against qualitative description.

The result is an irony: There are more protections for the character and meaning of law enforcement performance in administering traffic law in several states than for the federal system, where law enforcement officials wield heavier artillery.¹²¹ A host of states bar the use of targets or quotas for citations and arrests in traffic enforcement and general law enforcement.¹²² In contrast, the federal system now has official targets for numbers of convictions.

We should take seriously the protections we enact in the more everyday places where we are more likely to see ourselves ending up—and for the

120. See Letter from Norman J. Rabkin, Director, Admin. of Justice Issues, to Henry J. Hyde, Chairman of the House Comm. on the Judiciary & John Conyers, Jr., Ranking Minority Member of the House Comm. on the Judiciary (May 29, 1998), *available at* <http://archive.gao.gov/paprpdf2/160549.pdf> (reporting the difficulties in determining whether Justice Department efforts have deterred or prevented crime and the department's refusal to set targets for the amount of crime reduction it attended to achieve because there was no "credible basis" on which to make such predictions).

121. Compare, e.g., CAL. VEH. CODE § 41603 (West 2007) (providing that law enforcement may not "use the number of arrests or citations issued by a peace officer or parking enforcement employees as the sole criterion for promotion, demotion, dismissal, or the earning of any benefit provided by the agency"), with U.S. Attorney Hearings, Part III, *supra* note 72 (testimony of D. Kyle Sampson, former Chief of Staff to the Att'y Gen. of the United States) (testifying that a U.S. Attorney was dismissed in the wake of concerns about her number of "immigration deliverables," which were below target), and USDOJ, FY 2008 BUDGET SUBMISSION, *supra* note 114, at 16-18, 21 (measuring performance in terms of meeting target numbers of convictions and win rates).

122. E.g., ARK. CODE ANN. §§ 12-6-301 to -303 (West 2007) (arrest and citation quotas); CAL. VEH. CODE §§ 41600-41603 (West 2007) (citation and arrest quotas); CONN. GEN. STAT. ANN. §§ 7-282d, 29-2b (West 2007) (traffic ticket quotas); FLA. STAT. ANN. § 316.640(1)(a)(2) (West 2007) (traffic citation quotas); MINN. STAT. ANN. §§ 169.985, 299D.08 (West 2007) (traffic citation quota); MD. CODE ANN., PUB. SAFETY, § 3-504(b)(1) (2007) (arrest and citation quotas); MONT. CODE ANN. § 46-6-420 (2007) (arrest and citation quotas); NEB. REV. STAT. § 48-235 (2007) (traffic citation quotas); N.C. GEN. STAT. § 20-187.3(a) (2007) (traffic citations or ticket quotas); N.J. STAT. ANN. §§ 40A:14-181.1, 40A:14-181.2a (West 2007); TEX. TRANSP. CODE § 720.002 (Vernon 2007) (traffic citations).

average voter that is traffic court, not federal criminal court. While we are not ignorant as to our place in society and do not craft rules under the Rawlsian veil of ignorance, it is nevertheless an important heuristic in conceptualizing what justice would require. To paraphrase broadly, the veil of ignorance is a heuristic for deriving the justice we would want for ourselves if we did not know how we would end up, if we did not know our social place, status or class, or fortune in the distribution of assets and abilities.¹²³ The brilliance of the idea of the veil of ignorance is that it blends what is intuitive to us—the Golden Rule of doing unto others as you would do unto yourself—while correcting for the distortions of self-interest based on knowledge of one's own place in the world. The justice we want for ourselves should be the justice we would endorse generally for our society and its institutions.

The perverse consequences of using numerical targets and output as a proxy for performance in law enforcement are illustrated by the experience of officers in Falls Church, Virginia. The Falls Church police department is unusual in imposing numerical performance targets when most police commanders since the 1980s have rejected such measures as an inaccurate way of gauging performance and a perverse incentive distracting officers from doing important, time-consuming work.¹²⁴ Falls Church police officers are required to write an average of three tickets, or make three arrests for every twelve-hour shift and net 400 tickets and arrests a year.¹²⁵ If these targets are not met, the officer is put on a 90-day probation and faces possible demotion or dismissal if ticket and arrest numbers do not immediately increase to the numbers demanded.¹²⁶ Police union officials say the policy discourages officers from doing the time-consuming work critical to public safety like following a weaving and seemingly drunk driver, since an arrest for driving under the influence would take four hours to process, when they can just net a quick ticket for broken headlights in ten minutes.¹²⁷ Writing a ticket for a broken headlight has the same value in fulfilling the quota as a time-consuming arrest for armed robbery.¹²⁸

123. JOHN RAWLS, A THEORY OF JUSTICE 118, 122 (rev. ed. 1999).

124. Tom Jackman, *Falls Church Police Must Meet Quota for Tickets*, WASH. POST, Aug. 8, 2004, at C01.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* I use this example because it involves a choice between people whom could legitimately be given tickets. The question is which person the officer chooses to pursue, with consequences for public safety in the incentive to net the fastest statistic.

In the field of federal prosecution, there is a similar danger of collapse of qualitative difference and incentivizing undesirable behavior because of statistical pressure. For example, time- and labor-intensive cases that dismantle criminal schemes or organizations, like bringing down a smuggling ring's leader or prosecuting corrupt Border Patrol agents paid off by smuggling organizations, net the same statistical point as swift prosecution of an immigration defendant who enters the United States without official permission or an expendable low-level courier who drives straight up to agents at a port of entry with evidence in the car.¹²⁹ Going after the criminal organizations or corrupt officials means fewer statistical points because resources are focused on larger crime problems rather than rapidly racking up conviction and case filing numbers through small cases.¹³⁰ Focusing solely on output without consideration of contextual factors penalizes rather than recognizes the courage and integrity to go after the hard case that actually impacts crime. This effacement of qualitative detail exacted by the discipline of numerical targets in place of values is what the discourse of making performance visible has the potential to conceal.¹³¹

II. EXPRESSIVE, EXPIATORY "DELIVERABLES"

The effacement of values by the substitution of numbers of people prosecuted as a proxy may also result from denial and acting out when expressively exorcising frustration over policy failure. David Garland has analyzed how sharp crime rate increases in the 1970s and 1980s fractured faith in the ability of the sovereign state to do its job and deliver control and order within its territory, leading to a populist politics of "tough-on-crime" poli-

129. See Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235, 256 (1997) (writing, from his perspective as a judge, about the futility of focusing on an inexhaustible supply of the poor conscripted into service as mules rather than the more culpable); Carol Lam's Responses to Questions from Subcommittee Chair Linda Sanchez (Apr. 23, 2007), <http://judiciary.house.gov/Media/PDFS/Chair-Lamo70430.pdf> [hereinafter Responses to Questions from Subcommittee Chair] (explaining that cases bringing down criminal organizations and conspiracies could not be pursued if resources were devoted to prosecuting low-level offenders but low-level offenders net more statistics); cf. *United States v. Pineda-Torres*, 287 F.3d 860, 862-63 (9th Cir. 2002) (reporting a typical courier case in which evidence is driven right up to agents at port of entry by a nervous person with limited involvement in the criminal enterprise).

130. Responses to Questions from Subcommittee Chair, *supra* note 129, at 3.

131. Cf. Strathern, *supra* note 7, at 310 ("[W]hat does visibility conceal?"); FOUCAULT, *supra* note 7, at 102, 105 (writing about how "a system of right" may be "superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques").

cies.¹³² Faith in the state and its professionals was eroded by a sense that nothing worked and high crime was becoming a fact of life.¹³³ Though crime rates have decreased since the end of the 1990s, the fear of pervasive crime and insecurity persists.¹³⁴ As policy professionals have realized that it is more feasible to address the effects of crime, such as fear and outrage, rather than crime itself, policy has become about risk and resource management and expressive penal measures.¹³⁵

At the same time, the political machinery has engaged in denial of the limits of the sovereign state's control and, instead of adapting, policies have been about "acting out" and staging shows of asserting control through displays of punitive force.¹³⁶ The result is policy that "downplays the complexities and long-term character of *effective* crime control in favor of the immediate gratifications of a more expressive alternative," rendering law into "retaliatory gestures intended to reassure a worried public . . . however poorly these gestures are adapted to dealing with the underlying problem."¹³⁷ In short, the system slides into staging impressive displays of power rather than doing the hard job of aiming for effective strategy.

Immigration control is another front on which faith in sovereign control is fracturing and policy has turned to expressive, dramatic displays. Immigration is an issue fraught with anxiety and contention. Theorists write of "debordering" by transborder phenomena sweeping across state lines,

132. GARLAND, *supra* note 8, at 12-14, 106-09, 115-16.

133. *Id.* at 20, 61-63.

134. *Id.* at 106-07.

135. *Id.* at 109. Fittingly, an important strand of contemporary criminal law scholarship has turned attention to the expressive and communicative aspects of law. *E.g.*, George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1633-35 (1993) (theorizing how the decision to punish or not carries social meaning and how the state's decision to punish condemns the crime and shows solidarity with the victim); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350-51, 362-65 (1997) (theorizing the import of social influence—how individuals perceive one another's values, beliefs and behaviors—in shaping criminal behavior and the ability of criminal law to regulate these perceptions through its expressive power); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996) (addressing expressive aspect of laws generally and defending "laws that attempt to alter norms, rather than laws that merely 'speak'").

136. GARLAND, *supra* note 8, at 131-33.

137. *Id.* at 134.

shrinking the domain of state control and function.¹³⁸ Legal scholars, sociologists, and political economists have examined how human migration has undermined notions of state sovereignty and territorial control.¹³⁹ Control over national ingress and egress within territorial limits has become a fiercely held standard of sovereignty. Laws on migration are tightly linked with the idea of sovereignty and its central feature of territorial control. As Catherine Dauvergne puts it, migration control is associated “with the essence of being a nation, across the range of understandings of what that might be: people, borders, mythology, and a monopoly over coercive power.”¹⁴⁰ In a time when national control seems eroded by advanced and fast-flowing cultural, economic, and human flows, nations “seek to assert themselves as nations through migration laws and policies which assert their ‘nation-ness’ and exemplify their sovereign control and capacity.”¹⁴¹

Migration control has proved elusive, however, despite millions of dollars poured into a strategy premised on the notion that heightening what Bentham called the “pain”¹⁴² and what we euphemistically call the “costs” of undocumented entry—the dangers, difficulties, and punitive consequences—and their probability, would deter.¹⁴³ Pursuing the paradigm of “prevention through deterrence,” law and policy have dramatically ramped

138. E.g., Mathias Albert & Lothar Brock, *Debordering the World of States: New Spaces in International Relations*, in *CIVILIZING WORLD POLITICS: SOCIETY AND COMMUNITY BEYOND THE STATE* 19 (Mathias Albert et al., eds., 2000).

139. For a summary of the diverse currents in thought see, for example, GALLYA LAHAV, *IMMIGRATION AND POLITICS IN THE NEW EUROPE: REINVENTING BORDERS* 7 (2004); and Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times*, 67 *MOD. L. REV.* 588, 593-94 (2004).

140. Dauvergne, *supra* note 139, at 592.

141. *Id.* at 595.

142. Cf. BENTHAM, *supra* note 11, at 169-70 (writing of how the “pain” of punishment must offset the “pleasure” of profit in offending).

143. See DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 9-11, 108-14 (2002) (explaining how the cost-raising paradigm, which assumes that the decision to migrate involves a simple weighing of costs and benefits and that raising costs would deter migration, is wrong); OFFICE OF THE INSPECTOR GEN., *OPERATION GATEKEEPER: AN INVESTIGATION INTO ALLEGATIONS OF FRAUD AND MISCONDUCT* § I.C (July 1998), available at <http://www.usdoj.gov/oig/special/9807/index.htm> (describing how in 1993, “the traditional strategy of allowing aliens to enter and then apprehending them was abandoned in favor of a strategy that emphasized deterrence”); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 *POP’N & DEV’T REV.* 661, 662 (2001) (explaining paradigm and its costs).

up barriers, border policing, and immigration prosecutions, and routed migrants to the most dangerous parts of the desert where death rates have soared.¹⁴⁴ The next Sections examine the apparent failure of the muscular and costly paradigm to accomplish the aim of preventing undocumented migration and how policy and politics wrestling with policy failure use numbers of people prosecuted as proxies for intractable, contention-fraught goals.

A. At the Point of Policy Failure

Douglas Massey and colleagues have detailed how immigration issues came to be equated with national security and antiterrorism during the 1980s Cold War era and related turmoil in Central and South America.¹⁴⁵ The rhetorical and political linkage “created a climate in which elected representatives came under increasing pressure to ‘do something’” about undocumented migration, leading to the landmark Immigration Reform and Control Act of 1986,¹⁴⁶ which packaged Border Patrol build-up,¹⁴⁷ presidential “immigration emergency” certification and funding powers,¹⁴⁸ and employer sanctions for hiring undocumented workers,¹⁴⁹ with amnesty¹⁵⁰ for unauthorized migrants already in the United States.¹⁵¹

The 1986 Act apparently failed in slowing undocumented migration, however, and by 1990, apprehensions of border crossers, a widely used albeit highly imperfect proxy for migration volume,¹⁵² were on the rise.¹⁵³ Congress responded by passing the Immigration Act of 1990,¹⁵⁴ which increased

144. See *infra* notes 180-184 & Appendix, tables 1-8, at notes 323-331. For death data, see GEN. ACCOUNTING OFFICE, ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995: BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED 6-9, 15-16 (2006) [hereinafter GAO, BORDER-CROSSING DEATHS]; and GEN. ACCOUNTING OFFICE, INS' SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 5-6 (2001) [hereinafter GAO, INS' SOUTHWEST BORDER STRATEGY].

145. MASSEY ET AL., *supra* note 143, at 86-87, 89.

146. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

147. *Id.* at tit. I, pt. B, §§ 111-115.

148. *Id.* at tit. I, pt. B, § 113.

149. *Id.* at tit. I, pt. A, §§ 101, 102.

150. *Id.* at tit. II, § 201.

151. MASSEY ET AL., *supra* note 143, at 89-90.

152. Cornelius, *supra* note 143, at 667.

153. MASSEY ET AL., *supra* note 143, at 91.

154. Pub. L. 101-649, 104 Stat. 4978 (1994).

penalties for immigration violations and authorized funding for an additional thousand Border Patrol agents.¹⁵⁵ In early 1993, the federal government also commissioned a study of new methods of border control from Sandia National Laboratories, a military research facility.¹⁵⁶ The Sandia study recommended a strategy of “prevention-through-deterrence” by increasing the difficulties of illegal entry.¹⁵⁷

Around that time, temperate California had by far the greatest amount of undocumented migration. By the mid-1990s, nearly two-thirds of undocumented traffic came through California.¹⁵⁸ The popular crossing area was along a 14fourteen-mile stretch from ocean-front Imperial Beach to the base of the Otay Mountain, near the bustling city of San Diego.¹⁵⁹ The area had “easy terrain and gentle climbs, where the crossing lasts only 10 or 15 minutes to a pick up point.”¹⁶⁰

By 1994, the end of the Cold War and resulting diminished defense spending had mired California in a deep recession.¹⁶¹ The governor was running for re-election and one of his campaign points was that the state’s woes were because the federal government had failed at border control.¹⁶² Both California gubernatorial candidates urged federal authorities to institute a version of the El Paso Border Patrol Sector’s Operation Blockade,¹⁶³ a maneuver devised and launched by the sector’s then-supervisor, Silvestre Reyes, that involved stationing hundreds of agents and dozens of patrol vehicles and helicopters to create a highly visible deterrent on the twenty miles of border between El Paso and Ciudad Juárez.¹⁶⁴ The strategy resulted in a dramatic diminishment of migrant traffic through El Paso—though, as an Office of the Investigator General (OIG) report explained, smugglers and

155. *Id.* §§ 541, 543, 104 at 4978, 5057-59; MASSEY ET AL., *supra* note 143, at 91.

156. Cornelius, *supra* note 143, at 662.

157. *Id.*

158. MASSEY ET AL., *supra* note 143, at 107.

159. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 126 (2001).

160. *Id.*

161. MASSEY ET AL., *supra* note 143, at 88.

162. *Id.* at 88-89.

163. Operation Blockade was later renamed Operation Hold-the-Line after Mexican government protests. Cornelius, *supra* note 143, at 663.

164. PABLO VILA, *CROSSING BORDERS, REINFORCING BORDERS: SOCIAL CATEGORIES, METAPHORS, AND NARRATIVE IDENTITIES ON THE U.S.-MEXICO FRONTIER* 167-68 (2000).

migrants with destinations other than El Paso simply shifted to other areas.¹⁶⁵

Under pressure, federal authorities launched Operation Gatekeeper on October 1, 1994 as the first phase of the Southwest Border Strategy.¹⁶⁶ The strategy poured resources into fortifying popular border-crossing points, adding more border-watching agents and physical barriers, and increasing immigration prosecutions.¹⁶⁷ The strategy marked the abandonment of “the traditional strategy of allowing aliens to enter, then apprehending them” and the turn to the paradigm of “prevention through deterrence.”¹⁶⁸

Millions of dollars were poured into diverting unauthorized migrant traffic to more remote, harsher deserts and mountains—called “more hostile terrain” in the Border Patrol’s Strategic Plan—by heavily fortifying and policing the customary crossing places in more temperate environs closer to urban centers, now designated as security priority areas.¹⁶⁹ Government strategists assumed that “natural barriers including rivers, such as the Rio Grande in Texas, the mountains east of San Diego, and the desert in Arizona would act as deterrents to illegal entry.”¹⁷⁰

The border strategy funneled massive amounts of money and manpower to border policing. Between 1993 and 1997, the Immigration and Naturalization Service (INS) budget for the southwest border doubled from \$400 million to \$800 million.¹⁷¹ The overall INS budget more than tripled between fiscal years 1993 and 1998, from \$1.5 billion to \$4 billion.¹⁷² By 1998, the INS had more gun-carrying officers with arrest authority than any other federal law enforcement agency.¹⁷³

165. OFFICE OF THE INSPECTOR GEN., *supra* note 143, at § I.C.

166. GENERAL ACCOUNTING OFFICE, REPORT TO THE COMM. ON THE JUDICIARY, U.S. SENATE, AND THE COMM. ON THE JUDICIARY, U.S. HOUSE, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGIES RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED 13 (Dec. 1997), available at <http://www.gao.gov/archive/1998/gg98021.pdf> [hereinafter 1997 GAO REPORT ON SOUTHWEST BORDER STRATEGIES].

167. *Id.* at 12-13.

168. OFFICE OF THE INSPECTOR GEN., *supra* note 143, at § I.C.

169. JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 4 (2002).

170. GAO, BORDER-CROSSING DEATHS, *supra* note 144, at 6.

171. Hing, *supra* note 159, at 129.

172. Peter Andreas, *The Transformation of Migrant Smuggling Across the U.S.-Mexico Border*, in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 113 (David Kyle & Rey Koslowski eds., 2001).

173. *Id.*

The policy of prevention through deterrence proved to be law on the make. Though Operation Gatekeeper was chartered in agency policy documents and pronouncements rather than formal legislation, by 1996, Congress had enacted legislation reinforcing the prevention through deterrence paradigm.¹⁷⁴ The Illegal Immigration and Immigrant Responsibility Act¹⁷⁵ heightened penalties for immigration-related offenses like illegal entry,¹⁷⁶ funded an additional thousand Border Patrol agents to raise the force to ten thousand,¹⁷⁷ and provided for two more layers of fencing in the San Diego area and military technology like remote sensor units and aircraft.¹⁷⁸ The Act also provided for at least twenty-five more assistant U.S. attorneys to prosecute crimes “involving illegal aliens.”¹⁷⁹

For all the expense and heavy artillery, soaring death rates and migrant traffic trends show that people were—and are¹⁸⁰—paying up to the ultimate price rather than being deterred.¹⁸¹ Migrants were crossing the scorching Arizona deserts and formidable arid, cold mountains that policy strategists thought would deter them.¹⁸² Deaths from extreme heat and cold climbed.¹⁸³ Though the number of border-crossing deaths was on the decline between 1990 and 1994, after the launch of the strategy’s first phase, dubbed Operation Gatekeeper, the annual number of deaths more than doubled between 1994 and 2005, reaching 472 deaths in just 2005 alone.¹⁸⁴

For all the costs to human life and the public fisc, “the primary discernible effect” of the strategy was to shift traffic of undocumented mi-

174. Peter Andreas, *The Escalation of U.S. Immigration Control Post-NAFTA*, 113 POL. SCI. Q. 591, 595 (1998-1999).

175. Pub. L. No. 104-208, Division C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

176. E.g., IIRIRA §§ 211, 334, 110 Stat. 3009-569, 3009-635.

177. IIRIRA §§ 101(a), 110 Stat. 3009-553; MASSEY ET AL., *supra* note 143, at 95.

178. IIRIRA §§ 102(b)(1), 103, 110 Stat. 3009-554, 3009-555.

179. IIRIRA § 204.

180. See Randal C. Archibold, *At the U.S. Border, the Desert Takes a Rising Toll*, N.Y. TIMES, Sept. 15, 2007, at A1 (detailing how migrant deaths continue to soar).

181. See MASSEY ET AL., *supra* note 143, at 108-115 (analyzing rates of death and apprehension and finding no evidence of deterrence).

182. GAO, BORDER-CROSSING DEATHS, *supra* note 144, at 9.

183. *Id.* at 9, 15-16.

184. *Id.* at 6-9, 15-16; GAO, INS’ SOUTHWEST BORDER STRATEGY, *supra* note 144, at 5-6.

grants¹⁸⁵—in short, diversion, not deterrence. By 1998, the San Diego region went from being the site of nearly half of all apprehensions of undocumented migrants, to a decreased share of sixteen percent¹⁸⁶—but non-California crossings jumped from thirty percent to fifty-eight percent between just 1996 and 1998.¹⁸⁷ The sudden appearance of rerouted traffic appeared like an “invasion,” as Massey and colleagues explain, to sparsely populated communities in the zones of diversion.¹⁸⁸

Additional regions were given their versions of Operation Gatekeeper, which channeled migrants to even more remote places instead of deterring border crossings in the first place.¹⁸⁹ Border Patrol Union President T.J. Bonner asked us to “[i]magine the border as a big, long, skinny balloon. When you squeeze in one part, it comes out in another. It doesn’t disappear.”¹⁹⁰ Rather, as Massey and colleagues explain, traffic flows to less inhabited, more remote crossing points less likely to be patrolled—and where border crossers are less likely to be apprehended.¹⁹¹

The policy of diversion rather than deterrence proved to be a big business boost to organized smuggling rings because tougher crossing routes created reliance on guides to navigate the border gauntlet.¹⁹² As smuggling prices soared from demand, narcotics-trafficking organizations muscled into the now-lucrative people-smuggling trade.¹⁹³ Because crossings have become so costly in terms of smuggling fees and safety, migrants who used

185. GAO, INS’ SOUTHWEST BORDER STRATEGY, *supra* note 144, at 1-2, 28; *see also* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, MEXICO-U.S. MIGRATION: A SHARED RESPONSIBILITY 5 (2001), *available at* <http://www.carnegieendowment.org/pdf/files/M%20exicoReport2001.pdf> (describing how the border strategy has not produced deterrence).

186. Joseph Nevins, *The Remaking of the California-Mexico Boundary in the Age of NAFTA*, in *THE WALL AROUND THE WEST: STATE BORDERS AND IMMIGRATION CONTROLS IN NORTH AMERICA AND EUROPE* 104 (Peter Andreas & Timothy Snyder eds., 2000).

187. MASSEY ET AL., *supra* note 143, at 108.

188. *Id.* at 106-09.

189. *Id.* at 94-95, 106-09.

190. Brady McCombs, *Barriers Have Failed Before*, ARIZ. DAILY STAR, Sept. 25, 2006, at A4.

191. MASSEY ET AL., *supra* note 143, at 109.

192. *See* Andreas, *supra* note 172, at 116; Cornelius, *supra* note 143, at 666, 668.

193. Marc Cooper, *On the Border of Hypocrisy: The Unintended Consequences of Getting Tough on Immigration*, L.A. WEEKLY, Dec. 5-11, 2003, *available at* <http://www.laweekly.com/general/features/on-the-border-of-hypocrisy/2157/#Comments>; Cornelius, *supra* note 143, at 668.

to work seasonally in the United States and return cyclically to their home communities have remained in the United States. Many of those who now stay have sent for their loved ones, typically wives, to cross the border too, leading to a “feminization” of migration.¹⁹⁴ There may be a feminization of border-crossing deaths as well, though migration has typically involved men. (In Arizona’s Tucson sector, where many migrants were diverted, for example, the number of deaths of women migrants rose from twenty-two in 1998 to ninety in 2005.¹⁹⁵) In short, policy has not only fallen far from achieving its aim of immigration control, it has backfired with an array of unintended consequences.

The apparent failure of what the *New York Times* has dubbed the “Misery Strategy”¹⁹⁶ has seemed to fuel fiercer attachment. Ramping up toughness has become a stand-in for the goals of security, safety, and control, even if the values of safety and control have not been well-served by a decade of get-tough strategy. The attachment has taken a propitiatory cast, past the point of deconstruction of the original idea of utility.¹⁹⁷ The muscular persistence of the paradigm is evident in such dramatic penalty-ratcheting legislation as the controversial 2005 bill passed by the House of Representatives that would have made illegal presence in the United States a felony crime instead of a civil violation and imposed mandatory minimum sentences for offenses involving illegal entry or re-entry after deportation.¹⁹⁸ The turn to dramatic expressive measures is also evident in the Secure Fence Act of 2006,¹⁹⁹ which aimed to build a 700-mile, double-layer border fence that many say is an expensive gesture that will not address underlying problems²⁰⁰—but which was hard to oppose for fear of appearing weak on border security.²⁰¹

194. MASSEY ET AL., *supra* note 143, at 133, 136.

195. GAO, BORDER-CROSSING DEATHS, *supra* note 144, at 24.

196. Editorial, *The Misery Strategy*, N.Y. TIMES, Aug. 9, 2007, at A18.

197. For an ethnographic exploration of what sustains the policy paradigm past the point of deconstruction among the public, which reinforces and sustains the projects of government, see Mary D. Fan, Symptoms of Border Control Law: Fetish, Fantasy and Cynicism in a Zone of Diversion (on file with YALE L. & POL’Y REV.) (based on fieldwork in a southeastern Arizona region where migrant traffic was rerouted by Operation Gatekeeper and is now the site of border build-up efforts under Operation Safeguard, the Secure Fence Act of 2006 and the “Minutemen Fence Project”).

198. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. §§ 203-204 (2005).

199. Pub. L. No. 109-367, 120 Stat. 2638 (2006) [hereinafter Secure Fence Act].

200. See, e.g., Tom Brune, *Senate OKs U.S.-Mexico Border Fence*, NEWSDAY (N.Y.), Sept. 30, 2006, at A8 (noting critics have dismissed the fence as “expensive

B. Numbers that Do Not Attain Aims

After the launch of Operation Gatekeeper in 1994, the number of immigration prosecutions also surged, but similarly did not prove to approximate deterrence or control. As depicted in Table 1 of the Appendix,²⁰² the number of immigration prosecutions in district court rose dramatically between 1994 and 2003, and the annual total number of immigration prosecutions increased substantially. According to the Syracuse-affiliated Transactions Records Access Clearinghouse (TRAC), by fiscal year 2004, immigration cases came to be the “single largest group of all federal prosecutions, about one third (32%) of the total,” outpacing narcotics and drugs, which had long been the prioritized and largest category of federal prosecutions.²⁰³

Many immigration cases are in-and-out affairs, quickly dispatched in a day or less in magistrate court with “time-served” sentences—“usually the few days it takes between being picked up by the [Border Patrol] and being tried and sentenced before a judge in a U.S. Magistrate Court.”²⁰⁴ Magistrate

and impractical”); Nicole Gaouette, *Border Barrier Approved*, L.A. TIMES, Sept. 30, 2006, at A1 (reporting critiques by opponents that the fence is a “costly political gimmick that would have little effect on stopping illegal immigration”); Peter Hecht, *Border Fence Support Falls in California*, SACRAMENTO BEE (Cal.), Apr. 10, 2007, at A1 (reporting that increasing numbers of California voters think a border fence is a bad idea and that the fence construction plan “has since drawn criticism as too expensive or as an ineffective remedy to illegal immigration”).

201. See Charles Hurt, *Senate Set To Consider Fence Bill*, WASH. TIMES, Sept. 19, 2006, at A1 (reporting critiques by Congressional opponents that the Act was an “election-year ‘gimmick’ intended to portray them as weak on security measures”). In the words of National Public Radio reporter Ted Robbins:

Even the president has said he doesn’t think a 700 mile fence is a good idea, but he signed the bill, which leads to the possible conclusion that the Secure Border Fence Act is all about election year politics Whether the fence actually gets built may be less important right now than whether the tough stance on border security translates into short term political security.

All Things Considered: Bush Signs Act Requiring Huge Fence at Border (National Public Radio broadcast Oct. 26, 2006), available at 2006 WLNR 22841595.

202. See *infra*, appendix, at notes 323-324.
203. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NEW FINDINGS: PROSECUTION OF IMMIGRATION CASES SURGE IN U.S., SENTENCES SLUMP, MASSIVE JUMP FOUND IN ONE JUDICIAL DISTRICT, <http://trac.syr.edu/tracins/latest/131> (last visited Nov. 3, 2007).
204. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION REPORT: CONTROLLING THE BORDERS2006, <http://trac.syr.edu/immigration/reports/141>

courts are limited to disposing of misdemeanor cases.²⁰⁵ Figures and trends for district court immigration prosecution are examined here to delineate cases that are more likely to involve a post-conviction prison sentence rather than relatively rapid return across the border.

Immigration prosecutions in district court rose 552 percent between 1994 and 2003, from 2,453 cases to 15,997 cases.²⁰⁶ In contrast, the aggregate increase in prosecutions in district court for all categories of cases during the period was forty-eight percent.²⁰⁷ The number of people convicted of immigration offenses in district court rose 560 percent from 2,152 people to 14,199 people.²⁰⁸ In contrast, the aggregate increase in the quantum of people convicted for all offenses during the same period was fifty percent.²⁰⁹

(last visited November 3, 2007); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION REPORT: PROSECUTION TIME FOR DHS-IMMIGRATION CASES, http://trac.syr.edu/tracins/highlights/vo4/crtgrp2_processime.html (reporting that the median time for processing a case from referral by investigators to resolution in magistrate court in 2004 was zero days—half of all cases were completed on the same day they were filed—whereas in district court, the median processing time is 145 days) (last visited Dec. 7, 2007).

205. See 18 U.S.C. § 3401(a) (2000) (conferring jurisdiction over misdemeanor cases when the district court specially designates the magistrate judge); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 228-29 (2006) [hereinafter COMPENDIUM], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjso4.pdf> ("Cases concluded by U.S. magistrates are, by statute, misdemeanors.").
206. See *infra*, appendix, table 2 & note 325. All years referenced are fiscal years, which run from October 1 through September 30 of the year stated. For example, fiscal year 2003 runs from October 1, 2002 to September 30, 2003. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS, 2003: FEDERAL JUSTICE STATISTICS PROGRAM 43 (Aug. 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjto3.pdf>. Before 2001, weapons offenses were classed with immigration offenses in the category of "public order offenses." *Id.* at tbl.A7. But weapons prosecutions rose much less than immigration prosecutions during the ten-year period—a 180 percent increase for weapons offenses compared to a 552 percent increase for immigration offenses. See *infra*, appendix, table 2 & note 325. In aggregate, in 2003, there were 9,961 weapons convictions compared to 15,997 immigration offense convictions. *Id.*
207. See *infra*, Appendix, table 2 & note 325.
208. See *infra*, Appendix, tbl. 3 & note 326. For this category of data as well, weapons offenses were classed with immigration offenses in the category of "public order offenses" before 2001. But weapons offenses convictions rose much less than immigration offense convictions during the ten-year period—116 percent compared to a 560 percent increase for immigration offenses. *Id.*

The ramp-up in immigration prosecutions made the five Southwestern border districts—the Southern District of California, the District of Arizona, the District of New Mexico, and the Southern and Western Districts of Texas—the main engines for churning out prosecution statistics.²¹⁰ The five southwestern border districts were the top-grossing districts in terms of criminal cases filed and number of cases concluded by conviction.²¹¹ There are 94 federal districts and 93 U.S. Attorneys.²¹² But just the five southwestern border districts accounted for 45 percent—close to half—of all cases concluded by guilty conviction in district court in fiscal year 2006.²¹³ The five border districts also produced a disproportionate share of convicted defendants—40 percent of all convicted defendants in fiscal year 2006.²¹⁴ In 2001, one of the five southwestern border districts, the Southern District of California, had more sentencings than the entire First Circuit, Second Circuit, Third Circuit, Seventh Circuit, Eighth Circuit, Tenth Circuit, or D.C. Circuit, according to testimony by Marilyn Huff, the district's Chief Judge at the time.²¹⁵

In aggregate, in 2003, there were 6,970 weapons convictions compared to 14,199 immigration offense convictions. *Id.*

209. See *id.* (raw data and calculations).
210. Nearly all border-related apprehensions—98.5 percent—occur along the southern border between the United States and Mexico. AMY WU, DEP'T OF HOMELAND SEC., FACT SHEET: BORDER APPREHENSIONS: 2005, at 12 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2004.pdf.
211. MOTIVANS, *supra* note 206, at 2 (noting that four southwestern border districts “comprised 54 percent of the growth in arrests and bookings between 1994 and 2004”); U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2006, at tbls.1-2A (2007), available at http://www.usdoj.gov/usao/reading_room/reports/asr2006/06statrpt.pdf [hereinafter UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT] (listing numbers by district). The five southwestern border districts received 63 percent of immigration matters referred to United States Attorneys' offices. MOTIVANS, *supra* note 206, at 8.
212. UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, *supra* note 211, at 1. That figure was then compared to the sum of cases concluded by guilty verdict in magistrate and district courts for all 94 districts.
213. See *infra*, Appendix, table 7, at note 330.
214. See *infra*, Appendix, table 6, at note 329.
215. Testimony of Marilyn Huff, Chief Judge, Southern District of California, to the U.S. Sentencing Commission 1 (Sept. 23, 2003), available at http://www.ussc.gov/hearings/9_23_03/Huff.pdf.

The likelihood of being imprisoned for an immigration offense also substantially increased, climbing from an incarceration rate of 57 percent in 1985 to a rate of 91 percent in 2001.²¹⁶ Between 1985 and 2000, the number of people imprisoned for immigration offenses multiplied nearly nine-fold, from 1,593 to 13,676 people.²¹⁷ Between 1995 and 2003, the number of people in federal prison for immigration offenses ballooned by 394 percent.²¹⁸ The increase in immigration-related incarceration accounted for 14 percent of the federal prison population growth between 1985 and 2000.²¹⁹

The incarceration rate may even have impacted the demographics of the federally imprisoned. Because 90 percent of people sentenced for immigration offenses are Hispanic²²⁰ and more than half of immigration defendants referred for prosecution are Mexican citizens,²²¹ Table 8 of the Appendix examines trends in the proportion of Mexican citizens and Hispanic people in federal prison. As Table 8 shows, between 1994 and 2005, an increasing proportion of people incarcerated in federal prison were Mexican citizens. The proportion of people classified as Hispanic in federal prison also generally increased between 1994 and 2005, although at a slower rate. As of June 23, 2007, nearly one-third of people in federal prisons were Hispanic, though Hispanic people make up only one-seventh of the U.S. population, according to the most recent census data.²²² The proportion of Mexican

216. JOHN SCALIA & MARIKA F. X. LITRAS, BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 2, 5 (2002), *available at* <http://www.ojp.gov/bjs/pub/pdf/iofcjs00.pdf>. The adoption of the U.S. Sentencing Guidelines was a substantial factor in the increasing likelihood of incarceration, *id.*, though in recent years, judges have given immigration defendants the most downward departures from Sentencing Guidelines ranges and immigration defendants have the lowest median sentence for all offense categories. *See* MOTIVANS, *supra* note 206, at 21 tbl.16, 23, tbl.18.

217. SCALIA & LITRAS, *supra* note 216, at 2.

218. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS IN 2005, at 10 (Nov. 2006, rev'd Jan. 18, 2007), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/po5.pdf>.

219. SCALIA & LITRAS, *supra* note 216, at 2.

220. U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl. 4 (2006), *available at* <http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm>.

221. SCALIA & LITRAS, *supra* note 216, at 2 (reporting that more than half of people referred for immigration prosecution in 2000 were Mexican nationals); Wu, *supra* note 210, at 2 (stating that more than half 86.1 percent of people apprehended for illegal entry in 2005 are from Mexico).

citizens in federal prison has nearly doubled from 8.9 percent in December 1994 to 17 percent of the current prison population.²²³

The surges in prosecutions and increase in likelihood of imprisonment have apparently not dampened migration volume, however. Analysts explain that more than anything else, flows tend to follow the ups and downs of the U.S. and Mexican economies and social trends.²²⁴ Migration tends to increase when economic times are good and jobs are plentiful in the United States and ebb when the economy weakens and job availability slackens.²²⁵ Recent significant influences include the Mexican economic crisis and collapse of the peso in December 1994, the U.S. economic boom in the latter part of the 1990s, and the 2001 U.S. recession.²²⁶

Table 1 of the Appendix²²⁷ compares the increases in prosecution and estimated average annual undocumented migration by the Pew Hispanic Center based on data from the Current Population Survey, American Community Survey, and Census 2000 data. Changes in undocumented migration volume generally track the economic factors highlighted by the analysts. Estimated migration volume increased by 12 percent between 1994

222. See BUREAU OF PRISONS, QUICK FACTS ABOUT THE BUREAU OF PRISONS (2007), available at <http://www.bop.gov/news/quick.jsp> [hereinafter BUREAU OF PRISONS, QUICK FACTS] (inmate population 31.2 percent Hispanic, aggregating 62,151 people); Associated Press, *Hispanics Now One-Seventh of U.S. Population*, MSNBC NEWS, June 10, 2005, available at <http://www.msnbc.msn.com/id/8147476>.

223. Compare BUREAU OF PRISONS, QUICK FACTS, *supra* note 222 (demographics as of June 23, 2007), with U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1994 at 66 (1994) (data as of Dec. 31, 1994).

224. See MASSEY ET AL., *supra* note 143, at 111 (Mexican economy); PEW HISPANIC CENTER, RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992-2004, at 2, 10 (2005), available at <http://pewhispanic.org/files/reports/53.pdf> (U.S. economy); cf. Frank D. Bean & Robert G. Cushing, The Relationship Between the Mexican Economic Crisis and Illegal Immigration to the United States (1992-2000), <http://www1.lanl.utexas.edu/cswht/paper5.html> (last visited September 18, 2007) (explaining that "the size and persistence of the [migration] flows has a great deal to do with economic and demographic conditions on both sides of the border" including "economic changes in Mexico; population growth in Mexico; inadequate job creation in Mexico; fluctuations in U.S. border enforcement; changes in U.S. immigration policies; and labor market developments in the United States").

225. See PEW HISPANIC CENTER, *supra* note 224, at 2, 10.

226. See MASSEY ET AL., *supra* note 143, at 111 (peso devaluation and economic crash); PEW HISPANIC CENTER, *supra* note 224, at 2, 10 (U.S. economic trends).

227. See *infra*, Appendix, at notes 323-324.

and 1995, as the shock of the peso devaluation hit.²²⁸ In 1996 and 1997, however, came slight decreases from the 1994 level.²²⁹ It is possible that the 1996 and 1997 decreases might have been influenced by the much-publicized October 1994 launch of Operation Gatekeeper and the get-tough strategy of barrier-building and heightened policing—a sort of novelty and wait-and-see effect—but if so, the influence soon wore off. Prosecutions surged between 1997 and 2001—and so did migration volume between 1998 and 2000, peaking in 2000 at 29 percent greater volume than in 1994. Migration volume then started ebbing as the U.S. economic recession hit in 2001.²³⁰ The 2001 migration volume was still 6 percent greater than in 1994, but in 2002 and 2003, as the effects of the 2001 recession filtered in, migration volume dropped to a 13 percent lower volume than in 1994. As the U.S. economy started recovering, however, the level of migration increased in 2004 to eight percent over the 1994 level.²³¹ In short, there is no apparent inverse relationship between ramp-ups in prosecutions and migration; rather, structural factors appear much more significant.

Though a cornerstone of “prevention through deterrence” was the premise that increasing the probability of detection and apprehension would deter,²³³ empirical studies have found that there is similarly no apparent deterrent relationship. Based on empirical analysis of a range of data sets, Thomas J. Espenshade has reported that “the perceived probability of being located and arrested at the Mexico-US border by immigration authorities has relatively little to do with variations in unauthorized migrant flows.”²³⁴ Espenshade’s finding has been confirmed in a later study by Douglas Massey and Kristin Espinosa based on research among migrant sending communities that found that raising apprehension probabilities and

228. *Id.*

229. *Id.*

230. See PEW HISPANIC CENTER, *supra* note 224, at 2, 10 (attributing decrease to the 2001 recession).

231. See *id.* at 2, 11 (attributing increase to the start of economic recovery from the recession).

233. See 1997 GAO REPORT ON SOUTHWEST BORDER STRATEGIES, *supra* note 166, at 11-12.

234. Thomas J. Espenshade, *Unauthorized Immigration to the United States*, 21 ANN. REV. OF SOCIOLOGY 195, 206 (1995) [hereinafter Espenshade, *Unauthorized Immigration to the United States*]; see also Thomas J. Espenshade, *Does the Threat of Border Apprehension Deter Undocumented Migration?*, 20 POP’N & DEV’T REV. 871, 873 (1994) (setting forth study design and results).

introducing employer sanctions have nearly zero net deterrent effect.²³⁵ In short, amassing high statistics are a poor proxy for the substantive policy aims of dampening undocumented migration—there are more complicated questions and issues at play.

C. What Expiation by Numerical Proxy Effaces

Despite—or perhaps because of—the gap between amassing numbers and achieving aims, there is currently a fierce propitiatory attachment to high immigration prosecutions statistics as a proxy for the aims of “border security” and immigration control. In this section, we consider a case of how the focus on numbers of immigration prosecution “deliverables” came to crowd out the courage, vision, and integrity to pursue the substantive aims of criminal justice, inscribing the poor-fitting statistical proxy as the end and aim instead.

1. *Aiming Beyond the Baseline*

The standard of justice is more than the accumulation of the most convictions and case filings.²³⁶ Doing justice²³⁷ also has a qualitative component based on good judgment in considering the context, complexity, and impact of cases²³⁸ and effectively using limited resources to build public trust and

235. Douglas S. Massey & Kristin E. Espinosa, *What's Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. SOCIOLOGY 939, 990 (1997).

236. See, e.g., Elizabeth Glazer, *Crime Busting and Crime Prevention: A Dual Role for Prosecutors*, 15 A.B.A. J. CRIM. JUST. 10, 10 (2001) (“The focus on arrests and convictions diminishes the role prosecutors can play as problem solvers.”); NUGENT-BORAKOVE & BUDZILOWICZ, NAT’L DIST. ATTORNEYS ASS’N, *supra* note 72, at 6 (explaining that attempts to measure prosecutor performance relying mostly on number of cases filed, conviction rates, and crime rates “fall short in taking into consideration the quality of justice for victims, the leadership role of the prosecutor, or the non-case processing activities of the prosecutor”).

237. Prosecutors have “heightened ethical duties to do justice.” *United States v. Bendolph*, 409 F.3d 155, 166 n.16 (3d Cir. 2005) (en banc); accord *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (en banc). This heightened duty comes from the fact that the prosecutor “is ‘the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” See *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

238. See, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2, 5 (1971) (stating that prosecutorial discretion provides for “flexibility and sensitivity” in the criminal justice system by per-

address crime problems.²³⁹ How prosecutorial discretion is wielded can impact the quality and nature of justice.

An important body of literature has called attention to how prosecutorial discretion can be wielded to covertly dampen the standard of justice, for example by targeting people for impermissible reasons or, conversely, wielding the power to be lenient based on arbitrary, idiosyncratic, impermissible or self-interested considerations extraneous to justice.²⁴⁰ Scholars have also revealed how prosecutors may wield discretion to serve self-interest rather than the public interest, for example, by leveraging charging and plea bargaining power to induce defendants to relinquish rights and enter guilty pleas to increase their conviction statistics at the sacrifice of sentence severity and to avoid the ardors and possible damage to win-loss statistics posed by trial.²⁴¹ Police and prosecutors may also avoid bringing cases that take

mitting a prosecutor “to consider special facts and circumstances” when dealing with individual cases and emphasizing that a system without discretion would be “rigid and mechanistic” and “clearly undesirable” because it sacrifices the “subtleties that are a requisite feature of the decision-making of any decent quality”).

239. See, e.g., NAT'L DIST. ATT'YS ASS'N, PROSECUTION IN THE 21ST CENTURY: GOALS, OBJECTIVES, AND PERFORMANCE MEASURES, at v, 1-3 (2004), available at http://www.ndaa.org/pdf/prosecution_21st_century.pdf (reporting that numerical indicators like conviction rates do not capture the role of the modern prosecutor in working toward crime prevention and addressing the underlying factors and problems that contribute to crime); U.S. DEP'T OF JUSTICE, STEWARDS OF THE AMERICAN DREAM: THE DEPARTMENT OF JUSTICE STRATEGIC PLAN FY2007-12, at i, 13-14 (2007) [hereinafter DOJ, STEWARDS] (depicting the Department of Justice as stewards entrusted with managing resources intelligently and effectively to carry out its mission and listing strategic goals in terms of outcomes like crime prevention); Glazer, *supra* note 236, at 1 (advocating that prosecutors be problem solvers in addressing crime concerns).
240. E.g., KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 169-172 (1969) (theorizing the strong potential for injustice in one of the most inscrutable and standardless areas of prosecutorial discretion—the discretion to be lenient to some, which entails a discretion not to be lenient to others); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 411-14 (2001) (arguing that many forms of prosecutorial misconduct, such as inappropriate or unethical charging decisions and selective and vindictive prosecutions, occur behind closed doors); Note, *Judging the Prosecution: Why Abolishing Preemptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2123-25 (2006) (discussing the dangers of prosecutorial discretion with regard to three primary areas of discretion: investigating, charging, and plea bargaining).
241. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (arguing that a prosecutor's sentencing decisions in the

more effort and are more difficult to win—not because there is less of a likelihood that a crime was committed, but because the case is simply harder because of the nature of the perpetrator, victim or case. Harder cases may involve, for example, intimidated and frightened witnesses, such as battered women²⁴² or leaders of criminal organizations who are able to insulate themselves, putting lower-level players on the front lines.

context of plea bargaining may be “made on non-penological grounds for tactical as well as administrative reasons” and that so long “as prosecutors believe that their interest lies in securing as many convictions as possible, this characteristic would seem inherent in the guilty plea system”); Bibas, *supra* note 1, at 921-22 (2006) (arguing that prosecutors have “self interests” in disposing of cases and emphasizing that plea bargains guarantee “certainty of conviction” and that “risk averse prosecutors sacrifice [sentence] severity to avoid possible acquittals that could embarrass them and hurt their career prospects”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471-72 (2004) (emphasizing that “prosecutors want to ensure convictions” and that the “statistic of conviction . . . matters much more than the sentence” with the result that “prosecutors may prefer the certainty of plea bargains even if the resulting sentence is much lighter than it would have been after trial”); Meares, *supra* note 4, at 869-70 (1995) (analyzing the problem of prosecutorial overcharging, “due in part to an abhorrence of losing that is central to prosecutorial culture” and the coercion of defendants to relinquish rights and enter guilty pleas); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 623-24 (2005) (arguing that pretextual prosecution is a particular problem in the federal system because “[f]or decades, federal prosecutors have worked in a system that offered a host of strategic charging options little clear responsibility and no external performance measures,” and that prosecutors’ incentives under this system have been to “pursue whatever charges would maximize the odds of conviction”).

242. See, e.g., Bibas, *supra* note 1, at 934 & n.30 (“Police avoid making arrests and prosecutors avoid bringing (and pursuing) charges in cases that are troublesome and not easy to win, such as domestic abuse cases.”). Reluctance to bring domestic violence cases is also tinged with a history of condoning violence against women, which jurisdictions have begun to remedy through “no drop” policies that mandate arrest, prosecution and reporting. See Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 466 (2003) (explaining how the battered women’s movement helped significantly improve the criminal justice system’s response to domestic violence cases previously ignored and how “no-drop” policies for domestic violence cases is a sign of the success); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1853-55, 1857-60 (1996) (offering history of no-drop policies and perspective of a former state’s attorney in an urban domes-

There is also a positive potential to prosecutorial discretion, however, to internally improve the aims and quality of justice beyond the baseline of minimum standards and the expedient. An important component of the project of safeguarding the nature and quality of justice is to foster uses of prosecutorial discretion that improve the integrity of the system—to reward good behavior that aims higher than the floor of baseline requisites.²⁴³ The standard of justice is raised when procedures are internally improved²⁴⁴ or when law enforcement officials aim higher, at the more culpable, rather than exhausting resources on collecting low-level players used as interchangeable and disposable resources by harder-to-get higher-ups who enjoy impunity.²⁴⁵

As Kenneth Culp Davis observed, fairness and justice questions are implicated when prosecutors pursue “X . . . when known offences of other parties who are not prosecuted are greater.”²⁴⁶ The fairness concern is acute in the federal criminal justice system, which tends to involve complex problems with a hierarchical structure of actors with varying degrees of culpability. More than half of federal prosecutions involve either immigration or drugs, primarily drug trafficking,²⁴⁷ which are the kinds of crimes that in-

tic violence prosecutions unit); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 557-69 (1999) (setting forth history of mandatory policies and analyzing consequences); Siegel, *supra* note 30, at 2118-19, 2150-73 (analyzing the history of condoning of violence against women and explaining the English common law “rule of thumb” under which a wife could be beaten so long as the rod was not thicker than the man’s thumb).

243. See Meares, *supra* note 4, *passim* (proposing financial incentives to reward good prosecutorial behavior and encourage prosecutors to engage in conduct that exceeds constitutional minimums and aim higher than constitutional floors).
244. See MASHAW, *supra* note 71, at 15-16, 192-94 (explaining the import of internal improvements to the quality of administrative justice).
245. See Glazer, *supra* note 236, at 10 (advocating that federal prosecutors go beyond merely measuring success by number of arrests or convictions and use their broad array of powers to become problem solvers and develop strategies that have long-term impact on crime problems).
246. DAVIS, *supra* note 240, at 24; see also *id.* at 25 (writing: “One may dream of a system in which X cannot be prosecuted if known offenses of others who are not prosecuted are greater” and observing that until we achieve a system with that feature of fairness and other safeguards “discretionary justice will often be decided on the basis of considerations other than justice”).
247. See U.S. SENTENCING COMMISSION, *supra* note 248, fig. A, available at <http://www.ussc.gov/ANNRPT/2006/FigA.pdf>; MOTIVANS, *supra* note 206, at

volve powerful and elusive figures and scores of the bottom-rung poor who are used as disposable couriers or exploitable resources.²⁴⁸ A host of writers, including federal appellate judge Juan Torruella, have deplored the frequency at which prosecutions and severe penalties are aimed at a seemingly inexhaustible supply of the poor, who are conscripted by powerful organizations, rather than the most culpable who control the criminal enterprises.²⁴⁹

The potential of prosecutorial discretion to improve the quality of justice is powerfully manifest at the level of case-intake guidelines that systematize criteria governing which cases to take based on principles like fairness and efficacy. Federal prosecutors must be particularly selective about which cases to pursue because of scarce resources and the structure of criminal justice enforcement, which counts on the states to handle most criminal prosecutions and allocates the majority of federal resources to investigatory agencies rather than to prosecutors.²⁵⁰ Because the allocation “between federal investigatory and federal prosecutory resources is quite skewed in favor

tbl.A.2 (showing that majority of federal drug prosecutions were for drug trafficking).

248. See, e.g., *United States v. Beltran-Rios*, 878 F.2d 1208, 1210 (9th Cir. 1989) (summarizing expert testimony by deputy sheriff that the typical courier or “mule” is generally poor, sympathetic-looking and took a courier job “because it [was] the only way for such individuals to make money quickly”); Torruella, *supra* note 129, at 256; cf. *United States v. Valdez-Gonzalez*, 957 F.2d 643, 645-46, 650 (9th Cir. 1992) (explaining that typically impoverished “mules” along the Mexican border “are uniquely situated in terms of their role in the drug trade, being even less involved in the overall drug business and with less to gain from the success of the drug enterprise than ordinary underlings” and detailing the circumstances of two defendants who take a job driving marijuana across the border); Robert J. Caldwell, *Cartel Secrets*, SAN DIEGO UNION-TRIB., July 1, 2007, at G1 (detailing the years of painstaking investigation required to bring down leadership of the notoriously violent Arellano-Félix Organization (AFO) drug trafficking cartel).
249. See Andreas, *supra* note 172, at 117 (explaining how many of the people arrested for migrant smuggling “are the lowest-level and most expendable members of migrant smuggling organizations—the border guides and drivers who are the ‘foot soldiers’ of the business”); Torruella, *supra* note 129, at 256 (based on experience as a judge, deploring the perversity of a system that futilely sweeps up an inexhaustible supply of the poor conscripted into service as mules and fails to adequately address the most culpable); *Letter from Federal Defenders to the U.S. Sentencing Commission About Federal Sentencing Since United States v. Booker*, 18 FED. SENT. REP. 106 (2005) (explaining that low-level couriers are easily replaced and their incarceration thus has little impact on crime).
250. Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 225 (2003).

of the investigating agencies,”²⁵¹ the number of case referrals to U.S. Attorney’s Offices dwarfs the availability of prosecutors.²⁵²

Intelligent decisions must be made as to which cases to take. “‘Perfect’ enforcement”—going after every case referral—is impossible.²⁵³ The United States Attorney’s Manual acknowledges this reality, stating: “Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists.”²⁵⁴

Actions affecting the standard of justice include deciding where the cuts are made and which cases are taken under systemized, principled case-intake guidelines so that limited resources can be put to good use on more culpable defendants or cases with better evidence. The criteria that prosecutors set for case intake can influence law enforcement behavior for the better, encouraging practices and procedures to reach beyond baseline requirements.

An example that recently came to public attention of discretion wielded to improve the quality of justice is a case-intake guideline by former U.S.

251. *Id.* at 224-25 & n.14.

252. *Id.* at 225.

253. *Id.* at 231; *see also* *Morrison v. Olson*, 487 U.S. 654, 727-728 (1988) (Scalia, J., dissenting) (quoting Robert Jackson, Address Delivered at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940)) (“One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 151 (1970) (“Full enforcement of the criminal law in the sense that every violator of every statute should be apprehended, charged, convicted, and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable idea.”).

254. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.230.B.1 (Jan. 2007), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm. There is a logic to the allocation of the vast share of federal resources to investigation: prosecutors confronted with more cases than they can handle must examine the context and circumstances of each case and choose where to bring the heavy artillery of prosecution to bear. The structure of funding thus contemplates qualitative prosecution and selection of cases based on the nature and circumstances of each case.

Attorney Paul Charlton requiring, with a few exceptions, that suspect interviews be taped as a condition for accepting a case for prosecution.²⁵⁵ Federal law does not require that suspect interviews be recorded.²⁵⁶ Confessions may be easier to elicit without taping because the investigator is free to use tactics that are legal but unpalatable to juries.²⁵⁷ But videotaping is important to maintain public trust in law enforcement and to offer better proof regarding whether a defendant's statements were voluntarily made.²⁵⁸

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255. Eric Lipton & Jennifer Steinhauer, *Battle over F.B.I. Policy Against Taping of Suspects Comes to Light in Firing Inquiry*, N.Y. TIMES, Apr. 2, 2007, at A16 (describing how former U.S. Attorney Paul Charlton instituted a videotaping policy for all federal law-enforcement agencies in his jurisdiction); Letter from Paul K. Charlton, U.S. Attorney, Dist. of Ariz., to Timothy Landrum, Special Agent in Charge, Drug Enforcement Agency (Feb. 9, 2005), *available at* http://www.nytimes.com/packages/pdf/national/20070402_Paul_Charlton_letter.pdf [hereinafter Letter from Paul K. Charlton].
256. *See, e.g.*, United States v. Williams, 429 F.3d 767, 772 (8th Cir. 2005) (declining to fashion a federal requirement that suspect interviews be taped, finding no indication that there is such a requirement in federal law, though noting that several states have legislatively mandated taping); United States v. Short, 947 F.2d 1445, 1451 (10th Cir. 1991) (noting that circuit courts have held that in federal criminal cases, incriminating statements are not rendered inadmissible by police failure to record or take notes and collecting cases). In contrast, eight states, through legislation or court action, require that suspect interviews be videotaped for serious felony cases, and more than 450 local law-enforcement agencies have required the taping of interviews. Lipton & Steinhauer, *supra* note 255.
257. *See* Lipton & Steinhauer, *supra* note 255 (describing resistance to videotaping because lawful interrogation tactics, such as psychological tricks like misleading or lying to a suspect, may appear unpalatable to a jury).
258. *See, e.g.*, Soffar v. Cockrell, 300 F.3d 588, 604-605 n.8 (5th Cir. 2002) (en banc) (DeMoss, J., dissenting, joined by Parker and Dennis, JJ.) (writing that use of videotaping during interrogation would have averted "troubling" questions of voluntariness); United States v. Plummer, 118 F. Supp. 2d 945, 949 (N.D. Iowa 2000) (advocating videotaping of interrogations and expressing the opinion that law enforcement agency's explanation for not videotaping interrogations "is totally pretextual"); Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1130 (2005) (finding that videotaping interrogation increases public confidence in police practices "because recordings demonstrate that officers conducting closed custodial interviews have nothing to hide from public review"); Letter from Paul K. Charlton, *supra* note 255 (explaining rationale for recording policy). In an era of avidly watched and ubiquitous television crime shows, where technologically provided proof seems effortless, costless and necessary, and the confession moment is beamed onto the television screen, jurors may find cause for mistrust when a suspect interview is not taped and they cannot hear

2. *Effacing Higher Aims*

We focus on a second example of discretion used to improve the character of justice and its denouement. In the Southern District of California, former U.S. Attorney Carol Lam decided to do more than simply pursue statistics and undertook cases with greater impact on crime concerns. This selective approach is resource conservative and in the public interest. It does not exhaust resources on amassing statistics by focusing on convicting impoverished low-level people who are used as disposable couriers. Rather, Lam's approach focuses on organizational higher-ups and investigates larger criminal organizations, unscrupulous businesses, and the more powerful causes of crime concerns.²⁵⁹ The strategy means devoting more effort to investigations, going to trial more often rather than plea bargaining cases,

or see it. See, e.g., Michael Mann, *The "CSI Effect": Better Jurors Through Television and Science?*, 24 BUFF. PUB. INT. L.J. 211, 213-14 (2005-2006) (discussing the "CSI effect" and the perception that prosecutors increasingly must meet a "'Hollywood' standard" of proof); Letter from Paul K. Charlton, *supra* note 255 ("Jurors today are inundated with technology. They get much of their information from television and the internet. They know that electronic devices can be tiny, effective and cheap. Much of the evidence they now see in court has been digitized and presented to them on flat screen monitors in the jury box. As a result, they question why they are asked to take the word of an agent that a defendant admitted criminal responsibility, when a defendant's statement could have been recorded using a low-tech tape recorder."); cf. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1053-60 (2006) (arguing the media was too quick to jump to the conclusion that the "CSI effect" is increasing the acquittal rate and disputing that CSI exposure causes jurors to heighten the standards for conviction, but finding the claim "initially plausible and consistent with the findings of empirical research in legal psychology").

259. Responses to Questions from Subcommittee Chair, *supra* 129, at 4-5; cf. Torruella, *supra* note 129, at 256 (writing from experience as a judge about how all too often it is the expendable low-level mules who are prosecuted under drug laws meant for higher-level drug traffickers). Compare the experience of Bolivia under a law ostensibly aimed at punishing narcotraffickers: the people prosecuted in masses to fuel the "constant need to demonstrate high arrest statistics" are the "transport mules" and poor farmers, who are "'readily replaceable commodities subject to manipulation by the real narcos' and are indeed easily replaced by more victims of poverty." Solimar Santos, Comment, *Unintended Consequences of United States' Foreign Drug Policy in Bolivia*, 33 U. MIAMI INTER-AM. L. REV. 127, 137-38 (2002) (quoting David E. Dubberly, *Commentary on the Ley del Regimen de la Coca y Sustancias Controladas*, 6 A.B.A.: INTER-AM. LEGAL MATERIALS 278 (1995)).

and accepting that statistics would not ramp up as quickly—the converse of the prosecutor focused on self-interest and favorable statistics.²⁶⁰

The most expedient route to accumulating statistics may not be the efficacious route to addressing the public interest and larger causes of concern. Organizational higher-ups are harder to investigate and arrest because they have more power to insulate themselves and to prolong the cost and time required for investigation and prosecution.²⁶¹ But if these harder-to-reach causes are not addressed, then flows of couriers and undocumented people continue and prosecution becomes simply about diverting parts of the flow into prisons, only to be replaced by more.²⁶² Rising prosecution statistics net more funding and feed demands for proof that something is being done—even if what is done does not address the *causes* of concern.²⁶³

260. Greg Moran & Onell R. Soto, *Lam's Legacy*, SAN DIEGO UNION-TRIB., Jan. 21, 2007, at A1 (subheadline reads: "U.S. Attorney Went for Quality Prosecutions Over Quantity—It May Have Cost Her the Job"); Teri Figueroa & William Finn Bennett, *Legal Community Stunned by Lam Report*, N. COUNTY TIMES (San Diego), Jan. 12, 2007, at A1, available at http://www.nctimes.com/articles/2007/01/13/news/top_stories/21_44_311_12_07.txt; Responses to Questions from Subcommittee Chair, *supra* note 129.

261. According to law-enforcement testimony, the couriers or "mules" are "generally poor, sympathetic-looking individuals, who went into the drug courier trade because it is the only way for such individuals to make money quickly." *United States v. Beltran-Rios*, 878 F.2d 1208, 1210 (9th Cir. 1989); see also *United States v. Valdez-Gonzalez*, 957 F.2d 643, 645-46, 650 (9th Cir. 1992) (explaining that typically impoverished "'mules' along the Mexican border are uniquely situated in terms of their role in the drug trade, being even less involved in the overall drug business and with less to gain from the success of the drug enterprise than ordinary underlings" and detailing the circumstances of two defendants who take a job driving marijuana across the border); cf. Caldwell, *supra* note 248.

262. See, e.g., Andreas, *Transformation of Migrant Smuggling*, *supra* note 172, at 117 (explaining how many of the people arrested for migrant smuggling "are the lowest-level and most expendable members of migrant smuggling organizations — the border guides and drivers who are the 'foot soldiers' of the business"); Torruella, *supra* note 129, at 256 (deploring the perversity of a system that futilely sweeps up an inexhaustible supply of the poor conscripted into service as mules and fails to adequately address the most culpable, as learned from author's experience as a judge); *Letter from Federal Defenders to U.S. Sentencing Commission about Federal Sentencing since United States v. Booker*, 18 FED. SENT. REP. 106, 111 (2005) (explaining that low-level couriers are easily replaced and their incarceration thus has little impact on crime).

263. See, e.g., GARLAND, *supra* note 8, at 134 (describing the increasing tendency in criminal law toward staging expressive gestures to reassure the public, even if the gestures do not address the underlying problem); *United States v. Clary*, 846 F.Supp. 768, 790-91 (E.D.Mo. 1994), *rev'd* 34 F.3d 709 (8th Cir. 1994) (de-

Under Lam's leadership, prosecutors investigated and prosecuted the heads of organizations that smuggle undocumented people, rather than sweeping up the numerous interchangeable couriers and coyotes²⁶⁴ used by the leaders.²⁶⁵ Her district also investigated and prosecuted corrupt Border Patrol and Customs and Border Protection Officers who took bribes to facilitate smuggling of people into the United States by organized groups.²⁶⁶ The consequences of such corruption are dramatically illustrated by the case of two supervisory Border Patrol agents who released undocumented people in Border Patrol custody back into the grips of a smuggling organization.²⁶⁷

Lam's office also pursued one of the very few prosecutions against an employer of undocumented workers—one of California's largest fence companies that, ironically, participated in putting up the southwestern bor-

ploring focus of prosecution on low-level actors that are "perhaps designed to give the impression of great victories" but has instead incarcerated many first-time offenders and failed to reduce the problem).

264. Coyote is the colloquial term for a foot guide in navigating a border crossing.
265. See, e.g., Superseding Indictment, United States v. Sanchez-Perfino et al., 06CR2268 (S.D. Cal. Feb. 28, 2007); Indictment, United States v. Sanchez-Perfino et al., 06CR2268 (S.D. Cal. Oct. 18, 2006); Judgment of Conviction, United States v. Rangel-Rodriguez et al., 02CR3220 (S.D. Cal. Aug. 29, 2006); Indictment, United States v. Rangel-Rodriguez et al., 02CR3220 (S.D. Cal. Dec. 5, 2002); Onell R. Soto, *Illegal Immigrant Smuggling Ring's Leaders Arrested by Authorities*, SAN DIEGO UNION-TRIBUNE, Oct. 26, 2006, at A1 (detailing arrest of Javier Sanchez-Perfino, the alleged leader of a smuggling organization that used routes through an active minefield); George Gale, *Human Smuggling Ring Leader Sentenced to 15 Years*, KXO RADIO (San Diego), Aug. 29, 2006, available at <http://kxoradio.com/regional/human-smuggling-ring-leader-sentenced-to-15-years.html> (detailing conviction of Armando Rangel-Rodriguez).
266. E.g., Indictment, United States v. Samuel McClaren, Crim. Case No. 06CR0466 (S.D. Cal. Mar. 7, 2006); Amended Judgment of Conviction, United States v. Samuel McClaren, Crim. Case No. 06CR0466 (S.D. Cal. Nov. 28, 2006); Indictment, United States v. Mario Alvarez, Crim. Case No. 06CR0466 (S.D. Cal. Mar. 7, 2006); Amended Judgment of Conviction, United States v. Mario Alvarez, Crim. Case No. 06CR0466 (S.D. Cal. Nov. 22, 2006); Indictment, United States v. Richard Elizada et al., Crim. Case No. 06CR1195 (S.D. Cal. filed 2, 2006); Judgment of Conviction, United States v. Richard Elizada, Crim. Case No. 06CR1195-LAB (S.D. Cal. Mar. 29, 2007); Indictment, United States v. Michael Anthony Gilliland, Crim. Case No. 06CR1336 (S.D. Cal. June 16, 2007); Amended Judgment of Conviction, United States v. Michael Anthony Gilliland, Crim. Case No. 06CR1336 (S.D. Cal. Mar. 15, 2007).
267. Onell R. Soto, *Ex-Border Patrol Agents Sentenced for Accepting Bribes*, SAN DIEGO UNION-TRIB., Oct. 31, 2006, at A1.

der fence.²⁶⁸ While undocumented people are imprisoned by the tens of thousands, “[i]t is exceptionally rare” for those who draw undocumented workers with the lure of employment “to face any kind of prosecution, let alone jail time”²⁶⁹—even though executive branch officials have recognized that a major cause of immigration control concerns is unscrupulous employers and have promised to address the pull-side of the issue.²⁷⁰

Local defense attorney Mark Chambers, a veteran of the district’s federal courts, saw a change: “There were major increases in large conspiracy cases that involved a great deal of resources to prosecute and investigate. She went after the big fish,” Chambers said in a news report.²⁷¹ Chambers explained that, historically, the people prosecuted were at “the extreme low end of the totem pole, and some prosecutorial discretion should have been applied. Since she took over the office I haven’t felt that. The people who were getting prosecuted were clearly high profile, high culpability.”²⁷²

There is a surprise ending to this story of trying to improve the character and quality of justice and redressing the systemic problems that scholars have noted. Lam was among several U.S. Attorneys dismissed by the administration that had appointed them.²⁷³ Congress is investigating whether

268. Scott Horsely, *Border Fence Firm Snared for Hiring Illegal Workers*, NAT’L PUB. RADIO (Dec. 14, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6626823>; see also Judgment of Conviction, United States v. Fenceworks, Inc., Crim. Case No. 06CR2604 (S.D. Cal. Mar. 29, 2007); 062605142006 Judgment of Conviction, United States v. Michael McLaughlin, Crim. Case No. 06CR2605 (S.D. Cal. Mar. 29, 2007); Judgment of Conviction, United States v. Melvin Kay, Crim. Case No. 06CR2606 (S.D. Cal. Mar. 29, 2007); Sentencing Memorandum by the United States, United States v. Fenceworks, Inc., Crim. Case No. 06CR2604 (S.D. Cal. Mar. 27, 2007); Information, United States v. Melvin Kay, Crim. Case No. 06CR2606 (S.D. Cal. Dec. 14, 2006); Information, United States v. Michael McLaughlin, Crim. Case No. 06CR2605 (S.D. Cal. Dec. 14, 2006); Information, United States v. Fenceworks, Inc., Crim. Case No. 06CR2604 (S.D. Cal. Dec. 14, 2006).

269. Horsely, *supra* note 268.

270. See, e.g., Transcript of Press Conference with Michael Chertoff, Secretary of Homeland Security, Julie Myers, Assistant Secretary for Immigration and Customs Enforcement, Glen Suddaby, United States Attorney, Northern District of New York (Apr. 20, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0892.shtm.

271. Figueroa & Bennett, *supra* note 260, at A1; see also *U.S. Attorney Hearings, Part III*, *supra* note 121 (statement of Sen. Feinstein) (describing Lam as handling some of the “biggest cases in the United States”).

272. Figueroa & Bennett, *supra* note 260, at A1.

273. *U.S. Attorney Hearings, Part III*, *supra* note 72 (pages unnumbered) (testimony of D. Kyle Sampson, former Chief of Staff to the Att’y Gen.) (“I believe

the dismissals were because seven of the eight U.S. Attorneys pursued political corruption investigations impartially, without letting partisanship influence their duty—a concern raised by senators investigating Lam’s case because her office had convicted Republican Representative Randy “Duke” Cunningham for corruption and had issued subpoenas in a related political corruption investigation.²⁷⁴ This Article does not express an opinion in ad-

that each replaced U.S. attorney was selected for legitimate reasons falling well within the president’s broad discretion and relating to his or her performance in office, at least as performance is properly understood in the context of Senate-confirmed political appointees.”); *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007), 2007 WL 417171 (statement of Paul McNulty, Deputy Attorney General) (“[T]he phone calls that were made back in December [terminating various U.S. Attorneys] were performance related”); Dan Eggen, *U.S. Attorney Firings Set Stage for Congressional Battle*, WASH. POST, Feb. 4, 2007, at A7 (“Justice Department officials also defend Gonzales’s right to fire U.S. attorneys at will and have suggested that each of the recently dismissed prosecutors had performance problems.”).

274. See, for example, the statement of Sen. Cardin:

Now you know that of the seven U.S. attorneys who were removed on the same day, five had controversial political investigations in their jurisdiction; including in New Mexico, where there’s a probe of state Democrats and the Republicans were unhappy; that in Nevada, there was a probe of a Republican governor; in Arizona, there were probes of two Republican congressmen; in Arkansas, there was a probe of a Republican governor, in Missouri; South California, Representative Cunningham’s investigation which was being expanded; in Washington, a decline to intervene in a disputed gubernatorial election that angered local Republicans. You now know all that. This was a unique process that was being used. Hasn’t been used before to remove this many attorneys for this type of a reason. Don’t you see that this might have been interpreted as trying to send a message to U.S. attorneys around the country to stay away from sensitive political corruption cases?

Hearing on Oversight of the Department of Justice Before the S. Judiciary Comm., 110th Cong. (2007), 2007 WL 1157338; statement of Sen. Specter:

It is admitted that the president has the authority to replace U.S. attorneys for no reason, but I think there’s a consensus that the president does not have a right to ask for resignations for a bad reason; that is, whether U.S. Attorney Carol Lam in San Diego was asked to resign because she was hot on the trail of confederates of Duke Cunningham.

Hearing on the Dismissal of U.S. Attorneys Before the S. Judiciary Comm., 110th Cong. 1st Sess., Mar. 6, 2007, 2007 WL 690974 ; statement of Sen. Schumer:

vance of the findings. Rather, the Article examines the officially proffered reason for Lam's dismissal during the hearings because it reveals how the focus on immigration numbers has become the official proxy for performance, effacing consideration of substantive, qualitative aims, ends, and values.

Kyle Sampson, the former Chief of Staff to former Attorney General Alberto Gonzales, testified that Lam was targeted for dismissal because she did

Four weeks ago this committee had its first hearing to investigate the unprecedented firing of more than half a dozen presidentially appointed United States attorneys. At that time, I said I was deeply concerned about the politicization of the Justice Department and about allegations that our top prosecutors were victims of a political purge. . . . Here are the questions that we are concerned with, among others. Was any U.S. attorney removed because he or she was bringing too much heat on Republican elected officials, as in the case of Carol Lam?

Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III, 110th Cong. (2007), 2007 WL 927187; statement of Rep. Sanchez:

We also need to determine if the administration is making a systematic effort to curtail ongoing political corruption investigations. Former San Diego U.S. Attorney Carol Lam led the investigation of former California Representative Randy "Duke" Cunningham and his coconspirators, discovered pervasive and widespread political corruption and secured a guilty plea from Mr. Cunningham. Despite announcements of two related indictments just days before her departure, she was replaced

Hearing on the Dismissal of U.S. Attorneys Before the Subcomm. on Commercial and Administrative Law of the H. Judiciary Comm., 110th Cong. (2007), 2007 WL 689769.

See also Editorial, *A Scandal That Keeps Growing*, N.Y. TIMES, May 6, 2006 ("There is, to start, the very strong appearance that United States attorneys were fired because they were investigating powerful Republicans or refused to bring baseless charges against Democrats. There is reason to believe that Carol Lam of San Diego, who put Randy Cunningham, the former Republican congressman, in jail, and Paul Charlton of Arizona, who was investigating Representative Rick Renzi, among others, were fired simply for their nonpartisan pursuit of justice."); Richard A. Serrano, *Alarm Rises over Firing of U.S. Atty in San Diego*, L.A. TIMES, Mar. 19, 2007, at A1 ("Senate Democrats signaled Sunday that of the eight federal prosecutors abruptly ousted by the Bush administration, the case in San Diego is emerging as the most troubling because of new allegations that U.S. Atty. Carol C. Lam was fired in an attempt to shut down investigations into Republican politicians in Southern California.").

not generate enough immigration prosecution “deliverables.”²⁷⁵ The following testimony by Sampson reveals how immigration prosecution “deliverables” were used as a political proxy for the aim of “securing the border.”²⁷⁶

SAMPSON: What I remember was going on at that time was there was a robust debate going on in the Congress about comprehensive immigration reform, and a robust debate going on within the Administration about how the Administration could show that we were doing everything we could with regard to securing the border.

[Sen. Sheldon] WHITEHOUSE: So the problem was not so much a change in her conduct, as with outside atmospheric factors that affected your view of the importance of the immigration issue?

SAMPSON: I remember the Attorney General felt some exposure because the Department was being criticized soundly for not doing enough to enforce the border. And there was a debate going on in the Administration about how to show that the Administration was doing more to enforce the border. And at that very time there was discussion between the Department and the White House about the notion of militarizing the border. And in fact, on May 15 the president announced that he was going to send National Guard troops to the border.

I remember also that—I believe at around that time, I think even on May 11 there was a meeting that had been scheduled to meet with House Republicans who had expressed concern about border enforcement, with either the Attorney General or the Deputy Attorney General.

SAMPSON: I don’t know that that meeting ever happened. But I remember, at the time, there was real discussion, in the senior man-

275. See *U.S. Attorney Hearings, Part III*, *supra* note 72 (testimony of D. Kyle Sampson, former Chief of Staff to the Att’y Gen.) (discussion about the Department’s need for “immigration deliverables” to “show that we were doing everything we could with regard to securing the border.”) The discussion included the following exchange:

Senator FEINSTEIN: But the next day you wrote the e-mail which says, ‘The real problem we have right now—right now—with Carol Lam that leads me to conclude we should have someone ready to be nominated on 11/18, the day after her four-year term expires,’ relates to her immigration record.

SAMPSON: The real problem that I was referring to in that e-mail was her office’s failure to [bring] sufficient immigration cases. *Id.*

276. *U.S. Attorney Hearings, Part III*, *supra* note 72 (testimony of D. Kyle Sampson, former Chief of Staff to the Att’y Gen.)

agement offices of the Department of Justice, about how we could fix that problem, how we could get some immigration deliverables.²⁷⁷

The deployment of numbers in this case illustrates the danger that numbers can be used to obscure rather than illuminate. Not racking up statistics rapidly enough to fill some unspecified target for immigration “deliverables” became the primary reason proffered for dismissal. The issue reduced to what case processing statistics were amassed—short-circuiting important substantive questions like whether Lam’s prosecution strategy was effective, and whether ramping up numbers of immigration “deliverables” is a valid proxy for border security. These important questions dropped out of consideration and debate. Ultimately, the overriding concern for numbers crowded out qualitative considerations of how to use resources wisely by pursuing strategies intended to have impact rather than just amassing statistics without regard to effect.

Scholars roundly critique prosecutors for pursuing self-interest and favorable statistics at the expense of the public interest.²⁷⁸ The denouement we have examined shows the institutional pressures inducing such suboptimal behavior and effacing the integrity to pursue the public interest.²⁷⁹ There is no official watchman designated to cull out prosecutors who collect conviction statistics as trophies and who, in the words of one prosecutor turned defense attorney, cited by Albert Alschuler, “believe that the scalps on their belt enter their souls.”²⁸⁰ The system we have now incentivizes such a mindset. As Stephanos Bibas, a former prosecutor, writes: “Favorable win-loss statistics boost prosecutors’ egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.”²⁸¹ The countercurrent aimed at keeping prosecutors from succumbing to self-interested over-reaching is the inculcation of ideals, norms and practices of serving qualitative justice and the public interest. Key techniques for cultivating critical norms and dispositions involve leading by example and expectation and rewarding good behavior. The denouement in Lam’s case is a blow to the critical and delicate task of embedding a norm of vindicating the public interest, rather than the interest in amassing favorable statistics.

277. *U.S. Attorney Hearings, Part III*, *supra* note 72 (testimony of D. Kyle Sampson, former Chief of Staff to the Att’y Gen.).

278. *See supra* notes 241-242.

279. *Cf. Meares, supra* note 4, at 861 (“Prosecutors have the capacity to attain what I describe as desired behavior, but the current culture in which prosecutors operate simply does not place a premium on this behavior.”).

280. Alschuler, *supra* note 41, at 106 & n.138.

281. Bibas, *supra* note 241, at 2471.

III. TOWARD A POLICY EMBRACE OF VALUES AND NUMBERS IN QUALITATIVE CONTEXT

Donald B. Ayer has observed that in the domain of criminal justice, it is painfully apparent that “every few years we have multiplied our expenditures in enforcement and litigation dollars with little noticeable positive effect on the state of public order.”²⁸² Times have changed since Ayer wrote in 1993, as has the context of crime concerns, but the worry over spiraling costs without solutions is still salient. Substituting high numbers of people prosecuted for the substantive aims of criminal justice and strategies aimed at addressing concerns is a sure way to perpetuate the problem. What we need is a greater embrace by law and policy of the value of qualitative perspective and protections for qualitative evaluation.

A. Qualitative Perspective

I use qualitative in two senses. One sense plays on the wise adage of the virtues of quality over quantity, which has particular resonance when it comes to cost-effective stewardship of public power and resources given in trust.²⁸³ The main sense of qualitative perspective comes from the social

282. Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150, 2160 (1993).

283. See Rosita S. Chen, *Social and Financial Stewardship*, 50 ACCOUNTING REV. 533, 533-36 (1975) (describing effective use of resources as higher form of accounting and detailing genesis of idea of stewardship as duty to administer common resources for good of society); Keith Hoskin, *The ‘Awful Idea of Accountability’: Inscribing People into the Measurement of Objects*, in ACCOUNTABILITY: POWER, ETHOS AND THE TECHNOLOGIES OF MANAGING 265 (Rolland Munro & Jan Mouritsen eds 1995). Officials warn against the danger of focusing on quantity at the expense of quality in a wide array of governmental contexts. See, e.g., *Army Recruiting and Retention: Hearing Before the Subcomm. on Military Personnel of the H. Armed Services Comm.*, 110th Cong. 1 (2007), 2007 WL 2220804 (testimony of Gen. Rochelle that the Army cannot “trade quality for quantity” in encouraging enlistment); *Hearing on Health and Human Services Before the Subcomm. on Labor, Health, and Human Services of the S. Comm. on Appropriations*, 109th Cong. 1-16 (2005), 2005 WL 629795 (testimony of Michael Leavitt, Sec’y, Dept. Health and Human services) (criticizing the Medicare program for focusing on the “quantity of care, not the quality of care”); *Veterans Affairs Benefits Development: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veteran’s Affairs*, 109th Cong. 1-3 (2005), 2005 WL 2902534 (statement of Rep. Evans) (criticizing the perception among V.A. employees that “quantity, not quality, is recognized and rewarded”); *Credit Rating Agency Duopoly: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 109th Cong. 1-29 (2005), 2005 WL 1541511 (statement of Rep. Kanjorski) (characterizing the debate regarding financial rating agencies as one of “quantity-versus-quality” and ar-

sciences. Theodore Porter has explained how the rise of quantitative methods in governance in the 1960s and 1970s reflected the strong success and influence of quantification in disciplines like the social sciences.²⁸⁴ The later turn of social sciences to a widening embrace of qualitativity and “mixed methods” can be similarly instructive for governance.

The social sciences have increasingly deployed qualitative methods as a context-sensitive, nuanced way of getting to know the world through experience.²⁸⁵ While the quantitative worldview is described as “postpositivism” and “reductionism,” focusing on a few variables,²⁸⁶ qualitative approaches take a holistic approach to examining the complexities and indeterminacies of the world. In the social sciences, the quantitative-qualitative

guing that the focus must be on the quality of the ratings, not the quantity of the raters); Speaker of the House of Representatives Holds News Conference on Federal Education Programs (July 16, 1998) (transcript available at 1998 WL 396503) (statement of Rep. Goodling, Chairman, H. Educ. Comm.) (saying the Committee will fund “quality not quantity” and “excellence, not excess”).

284. PORTER, *supra* note 29, at 198-99 (“The massive effort to introduce quantitative criteria for public decisions in the 1960s and 1970s was not simply an unmediated response to a new political climate. It reflected also the overwhelming success of quantification in the social, behavioral, and medical sciences during the postwar period. . . . [T]his was not a chance confluence of independent lines of cultural and intellectual development, but in some way a single phenomenon. It is no accident that the move toward the almost universal quantification of social and applied disciplines was led by the United States, and succeeded most fully there. The push for rigor in the disciplines derived in part from the same distrust of unarticulated expert knowledge and the same suspicion of arbitrariness and discretion that shaped political culture so profoundly in the same period.”)
285. See Norman K. Denzin & Yvonna S. Lincoln, *Preface* to HANDBOOK OF QUALITATIVE RESEARCH, at ix (Norman K. Denzin & Yvonna S. Lincoln eds., 1994) (arguing that during the 1970s and 1980s, a “qualitative revolution” overtook the social sciences and related professional fields); Norman K. Denzin & Yvonna S. Lincoln, *Introduction: Entering the Field of Qualitative Research*, in HANDBOOK OF QUALITATIVE RESEARCH, *supra*, at 4-6 (emphasizing the ability of qualitative research to provide a more detailed, individualistic, and nuanced perception of the social world); Egon G. Guba & Yvonna S. Lincoln, *Competing Paradigms in Qualitative Research*, in HANDBOOK OF QUALITATIVE RESEARCH, *supra*, at 106 (emphasizing the ability of qualitative approaches to balance quantitative methods by providing contextual information, insight into human behavior, and an insider’s view of groups, societies and cultures).
286. JOHN W. CRESWELL & VICKI L. PLANO CLARK, *DESIGNING AND CONDUCTING MIXED METHODS RESEARCH* 21-23 (2007).

opposition has become dated as, increasingly, scholars realize that a melding of the two and “mixed methods” offer a better picture of the world.²⁸⁷ The resulting worldview is generally described as pragmatic, attentive to the consequences of action, centered on problems and “real-world practice oriented.”²⁸⁸

Mooring numbers to context can lead to more sensitive use and understanding of output statistics. Expanding on our examples from Section I.C., if we look at qualitative details we will be able to distinguish a bank robbery arrest from a ticket for a broken headlight, or the complex investigation and crippling of a criminal organization by convicting its leader from the quick statistic scored by taking the guilty plea of a low-level courier or border crosser. The contextual factors can even be translated into more sensitive ways of quantitative scoring that differentiate based on important factors like case impact. Examining context permits us to give credit to—or at least, to avoid easily disregarding and penalizing—strategies that achieve greater impact at tackling crime problems, even if output goes down. Most importantly, looking at context commits us to considering the problem at hand rather than retreating and substituting poor-fitting proxies as the goals and ends of policy.

B. How Law and Policy Can Be Conducive to Qualitative Evaluation

Law and policy can be more conducive to qualitative evaluation and protect against the misuse of numbers stripped of context in myriad ways. I take two concrete examples, based on our two case studies. In Part I, we examined the presumption against qualitative description of performance in the Government Performance and Results Act and the difficulties in denominating public values in terms of measurable numerical outputs. The

287. See H. RUSSELL BERNARD, *RESEARCH METHODS IN ANTHROPOLOGY: QUALITATIVE AND QUANTITATIVE APPROACHES* 452 (2006) (emphasizing that both qualitative and quantitative approaches are useful); CRESSWELL & PLANO CLARK, *supra* note 286, at 33 (explaining how the combination of qualitative and quantitative approaches can offer a more complete picture); Abbas Tashakkori & Charles Teddlie, *Preface* to *HANDBOOK OF MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH*, at ix-x (Abbas Tashakkori & Charles Teddlie eds., 2003) (describing the rise of the “mixed-method” approach in social science research and predicting mixed methods designs will be the “dominant methodological tools in the social and behavioral sciences during the 21st century”); cf. Abbas Tashakkori & Charles Teddlie, *Major Issues and Controversies in the Use of Mixed Methods in the Social and Behavioral Sciences*, in *HANDBOOK OF MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH*, *supra*, at 4-8 (offering an historical description of the “paradigm wars” between quantitatively- and qualitatively-oriented social science research methodologies).

288. CRESSWELL & PLANO CLARK, *supra* note 286, at 22, 26-27.

cure in this case is simple—making qualitative description more accepted. Rather than requiring special permission from the Office of Management and Budget to express a performance goal with a descriptive statement,²⁸⁹ the Act can permit descriptive statements of goals where, in the agency's assessment, quantified targets and measures are infeasible, ill-advised, or qualitative description is better suited to capture the performance goal. Agencies could be required to set forth concisely the reasons why qualitative description is better-suited so that the agency's concerns and rationale are made public—rather than submerged in inter-agency communications and internal memoranda of protest. The modification takes a middle path that still expresses a preference for quantification, which, as General Accounting Office officials explained, has the virtue of making performance easier to assess, but eases some of the presumption and burden against qualitative description where qualitative perspective needs to be preserved.

We have also examined the problems with using numbers of convictions, isolated from context, as a primary criterion for assessing the performance of U.S. Attorneys—and the primary proffered reason for dismissal. In redressing the problems posed, we can learn from states that have prohibited the use of numbers of arrests or citations as the sole or primary criterion for promotion, demotion and dismissal. Maryland, for example, provides that a law enforcement agency “may not: (1) establish a formal or informal quota for the law enforcement agency or law enforcement officers of the agency; or (2) use the number of arrests made or citations issued by a law enforcement officer as the sole or primary criterion for promotion, demotion, dismissal, or transfer of the officer.”²⁹⁰ California law similarly provides that law enforcement may not “use the number of arrests or citations issued by a peace officer or parking enforcement employees as the sole criterion for promotion, demotion, dismissal, or the earning of any benefit provided by the agency.”²⁹¹

Such protections do not prevent using quantitative data as part of the evaluation process. Maryland, for example, provides that its protections do not preclude:

1. using quantitative data for arrests, citations, and other law enforcement activities as management tools or in evaluating performance;
2. collecting, analyzing, and applying information concerning the number of arrests and citations in order to ensure that a particular law enforcement officer or group of law enforcement officers does not violate an applicable legal obligation; or

289. Government Performance and Results Act, 31 U.S.C. § 1115(b) (2000).

290. MD. CODE ANN., PUB. SAFETY, § 3-504(b) (2006).

291. CAL. VEH. CODE § 41603 (2003).

3. assessing the proportion of the arrests made and citations issued by a law enforcement officer or group of law enforcement officers.²⁹²

California permits numbers of arrests or citations to “be considered in evaluating the overall performance of a peace officer.”²⁹³ Elaborating on the diversity of factors that define performance, the California code explains: “[A]n evaluation may include, but shall not be limited to, criteria such as attendance, punctuality, work safety, complaints by citizens, commendations, demeanor, formal training, and professional judgment.”²⁹⁴

Similar protections can be provided for federal criminal justice in a manner sensitive to the current structure of executive branch stewardship over United States Attorneys. Congress can deploy its art of inter-branch dialogue to elicit a public commitment from the Justice Department to enact internally similar safeguards encoded in a frequently used form of sub-law at the Department, a memorandum announcing binding policy.²⁹⁵

Whether the legislative branch can directly enact safeguards through formal legislation must be distinguished from the question of *ought*. On the question of the possible in congressional power, *Morrison v. Olson* held that

292. MD. CODE ANN., PUB. SAFETY § 3-504(c) (2006).

293. CAL. VEH. CODE § 41603 (2003).

294. *Id.*

295. See, e.g., Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors, Memo Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm; Policy Statement from Janet Reno, Attorney Gen., Concerning Law Enforcement Agency Witnesses (“Giglio” Policy) (Dec. 9, 1996), available at <http://www.usdoj.gov/ag/readingroom/agmemo.htm>. For example, the Department of Justice’s longstanding Petite Policy on whether to bring federal prosecution based on substantially the same acts adjudicated in a prior state or federal proceeding was first enunciated by memorandum in 1959. See *Watts v. United States*, 422 U.S. 1032, 1034-35 (1975) (Burger, C.J., dissenting) (noting the Petite Policy was first promulgated in a memorandum from the Attorney General to United States Attorneys in 1959). The Petite memorandum is now incorporated in the United States Attorney’s Manual, an important source of guidance for federal prosecutors. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-2.031 (Sept. 1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9/2mc-rm.htm#9-2.0311; see also *United States Senate Judiciary Committee Hearing on U.S. Attorney Firings*, 110th Cong., 1st Sess. (June 5, 2007), 2007 WL 1607122 (statements of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary and Sen. Sheldon Whitehouse, Member, S. Comm. on the Judiciary) (discussing the importance of the manual and deploring official’s failure to follow the manual’s provisions).

Congress could legislatively mandate good cause for presidential removal of independent prosecutors wielding the full force of prosecutorial powers.²⁹⁶ *Morrison* moved beyond parsing whether an official's function was "quasi-legislative," "quasi-judicial," or "purely executive" in deciding whether Congress could limit presidential removal power.²⁹⁷ The pertinent queries are instead (1) "whether removal restrictions . . . impede the president's ability to perform his constitutional duty" of executing the law,²⁹⁸ and (2) whether there is impermissible "aggrandizement of power by one branch at the expense of another."²⁹⁹ *Morrison* ruled that the provision that an independent prosecutor could not be removed absent good cause was neither an impermissible usurpation of power nor impediment to execution of the laws.³⁰⁰ The power to remove the independent prosecutor for good cause gave the executive "substantial ability to ensure that the laws are 'faithfully executed.'"³⁰¹

Whether the reasoning in *Morrison* supports similar legislation protecting United States Attorneys against removal based on number of convictions or case filings alone is unclear. As in *Morrison*, there would be no aggrandizement of power at the expense of another branch because the president still retains sole power to remove. But United States Attorneys play a central role in the execution of the federal criminal laws, making the presidential interest in control greater than in the case of the independent prosecutor. The independent counsel at issue in *Morrison* had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority."³⁰² United States Attorneys are also appointed for a fixed term,³⁰³ but they are the principal litigators for the United States, "construe and implement the policy of the Department of Justice;" manage a team of Assistant United States Attorneys, and "coordinate[] multiple agency investi-

296. *Morrison v. Olson*, 487 U.S. 654, 662, 691 (1988).

297. *Id.* at 689-90 & n28. *Morrison* thus clarified and moved beyond the analytic approach of cases like *Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935).

298. *Morrison*, 487 U.S. at 691.

299. *Morrison*, 487 U.S. at 693 (citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1926)).

300. *Id.* at 686, 696.

301. *Id.* at 696.

302. *Id.* at 691.

303. 28 U.S.C. § 541(b) (2000).

gations” in their district.³⁰⁴ Taken as a group, United States Attorneys are a major arm in the execution of federal criminal justice.

But United States Attorneys also pose a historical conundrum that has fuelled a lively historical debate.³⁰⁵ In contemporary light, federal prosecutors seem to be quintessentially executive officials under centralized control.³⁰⁶ In *Morrison*, there was not even “real dispute” that the independent prosecutor was an executive official.³⁰⁷ A host of scholars, however, have presented historical evidence that the original structure of control over

304. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, U.S. ATTORNEYS’ MANUAL §§ 3-2.100, 3-2.140 (Nov. 2006), available at http://www.usdoj.gov/usa/eousa/foia_reading_room/usam/title3/title3.htm.

305. Compare Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning, There Was Pragmatism*, 1989 DUKE L.J. 561, 566-81 (analyzing the office of the Attorney General at the founding as a creation of Congress and subject to both Congressional and Presidential directives), and Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 280-81 (1989) (arguing that the historical record “lends considerable support to the [*Morrison*] majority’s conclusion that Congress retains wide latitude in deciding the extent and manner of the Executive’s criminal law enforcement efforts”), and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-22 (1994) (arguing that neither constitutional text, in its original context, nor historical practice support the proposition that the president maintains a monopoly on prosecution power), and Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of ‘Seeing the Trees’*, 30 WM. & MARY L. REV. 375, 379-81 (1989) (“That the founding generation conceptualized criminal prosecution as an inherently executive function necessarily encompassed by the vesting clause of article II is extremely unlikely.”), and Stephanie A. J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers’ Intent*, 99 YALE L.J. 1069, 1070 (1990) (arguing that Constitutional text and historical practice around the time of the Framing suggest that prosecution is not a core executive function), with Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 545-47, 658-61 (1994) (arguing, contra Lessig and Sunstein, that pre-ratification and post-ratification history support the argument that the Constitution created a unitary executive with control over prosecution), and Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 526-28, 552-67 (2005) (arguing against “most of the existing scholarship examining original practices” and excavating evidence that the president did have the power to direct prosecution).

306. *Morrison*, 487 U.S. at 697, 706 (Scalia, J., dissenting) (expressing view that “[g]overnmental investigation and prosecution of crimes is a quintessentially executive function”).

307. *Morrison*, 487 U.S. at 691.

United States attorneys was much different than today.³⁰⁸ In the nation's early days, the president did not wield the kind of control taken for granted today and lacked statutory authority to remove either the Attorney General or the district attorneys, the precursors to the United States Attorneys.³⁰⁹

Setting these historical, branch-relationship questions aside, what is clear is that there is at least a century-long tradition of executive branch stewardship over federal prosecutors to better ensure coordination and accountability in the execution of laws.³¹⁰ By the Act of June 22, 1870, the Department of Justice, headed by the Attorney General, was entrusted with "supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts."³¹¹ Over the years, executive stewardship over federal prosecution has settled into our practices and history. The tension and doubt as to the limits of permissible legislative limitations because of separation of powers concerns, inflected in part by the accreting of historical practice,³¹² is part of the genius of a system that induces interbranch dialogue and softer approaches to ensuring safeguards for the protection of the public, such as the eliciting of commitments from executive-branch officials.

The commitment to preserving conditions for qualitative justice has fullest force if it is both a public one and a promise made to Congress. A

308. E.g., Bloch, *supra* note 305, at 566-58; Krent, *supra* note 305, at 280-90; Lessig & Sunstein, *supra* note 305, at 15-19; Dangel, *supra* note 305, at 1084-87.

309. Prakash, *supra* note 305, at 534; *see also* Lessig & Sunstein, *supra* note 305, at 15, 19-20 (analyzing the early lack of centralized control over the district attorneys and private citizens who also partook of the power of federal prosecution).

310. *See, e.g.*, Lessig & Sunstein, *supra* note 305, at 2 ("A strongly unitary executive can promote important values of accountability, coordination, and uniformity in the execution of the laws, and to whatever extent these were the framers' values, they are certainly now ours.").

311. Act to Establish the Department of Justice, ch. 150, § 16, 16 Stat. 162, 164 (1870).

312. *See Morrison*, 487 U.S. at 654, 691 (1988) ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.") (emphasis added). *See also id.* at 662. While Justice Scalia, in his sole, vigorous dissent, derided the qualifier as adding "nothing but atmosphere," *id.* at 697, 705-06, the qualifier adds much more than atmosphere—it considers the longstanding tradition of practice, which has changed since the founding. This leaves room for Cass Sunstein and Lawrence Lessig's conception that readings of the Constitution's text can be mediated by the structure and translation of changed circumstances. *See* Lessig & Sunstein, *supra* note 305, at 3, 85-91.

public commitment is akin to Ulysses binding himself to the mast to maintain fortitude and integrity even under intense pressure. The power of such a public promise is illustrated by the infamous “Saturday Night Massacre” involving President Richard Nixon’s attempts to order Justice Department officials to fire special prosecutor Archibald Cox, who was investigating the Watergate break-in during the 1972 presidential campaign.³¹³

Nixon ordered Attorney General Elliot L. Richardson to fire Cox after Cox subpoenaed tapes from Nixon’s bugged White House office.³¹⁴ Deeply torn between his public pledges to the Senate to ensure Cox’s independence and his sense of integrity on the one hand, and his loyalty and the fate of his political career on the other, Richardson made the momentous decision to resign rather than fire Cox.³¹⁵ Acting Attorney General William Ruckelshaus also chose resignation over firing Cox.³¹⁶ The third in line, Acting Attorney General Robert Bork, also considered resigning rather than firing Cox, or firing Cox and then resigning.³¹⁷ Richardson and Ruckelshaus talked Bork out of the “murder-suicide” of firing and then resigning, believing Bork to be in a different moral position, in part because he had not pledged to the Senate not to fire Cox.³¹⁸ The decisions of these Justice Department officials amid intense national and personal crises show the value of commitment to Congress and the import of the art of inter-branch dialogue in protecting public values.

The commitment that dismissals cannot be predicated solely on prosecution numbers would not preclude consideration of quantitative data. The commitment simply protects against a myopic focus on numbers of convictions or case filings in place of the substantive aims of criminal justice and public administration.

CONCLUSION

Integrity, writes Stephen Carter, requires hard work and deep reflection to discern what we believe and value.³¹⁹ Integrity also requires acting on

313. I thank Jerry Mashaw for this point. For an account, see KEN GORMLEY, *ARCHIBALD COX: CONSCIENCE OF A NATION* 354-371 (1997).

314. *Id.* at 342-56.

315. *Id.* at 345, 355-56.

316. *Id.* at 364-65.

317. *Id.* at 365-66.

318. *Id.* at 366. The second important distinction was that Bork did not share Richardson’s and Ruckelshaus’s view of the impropriety of the president’s actions. *Id.* After Cox was fired, a maelstrom of public anger and disillusionment followed. *Id.* at 367-371.

319. STEPHEN L. CARTER, *INTEGRITY* 10 (1996).

what we believe.³²⁰ We want our officials and our policies to have integrity in wielding and deploying the resources of power, legitimacy and money that we entrust.³²¹ The peril of using numbers of people prosecuted in place of the substantive aims of crime and control is the short-circuiting of the prerequisites of integrity, the tough task of reflection about what we value and how best to achieve those often hard-to-attain aims.

Crime and control involve complicated and tough-to-confront considerations of trade-offs, compromises, indeterminacies, and conflicts between what we want and what we value in society and security. Crime and control also present prospects of failure. Confronted with such difficulties, it is tempting to retreat into a determinate simple numerical proxy that offers the comfort of distance from the messy hard details.³²² Such a retreat, however, is no cure, and can be counterproductive to finding better solutions. Instead of disciplining better practices, what is disciplined is the flattening and effacement of the substantive aims of criminal justice and performance that seek to go beyond amassing statistics and searches for effective solutions. We need to foster the courage to address complexity, context, and indeterminacy by an embrace of qualitative ways of seeing in politics and policy, so that numbers can be situated in context and serve as a tool *toward* the substantive aims of governance, rather than a substituted aim that supplants public values.

320. *Id.*

321. See, e.g., U.S. DEP'T OF JUSTICE, STEWARDS, *supra* note 239, at 13 ("Our leadership role and the funds entrusted to use by the taxpaying public demand that we maintain the highest levels of integrity and trustworthiness. This affects not only the way we carry ourselves as representatives of the law, but the manner in which we manage the resources entrusted to use to carry out our mission."). See also *id.* at i, 14.

322. PORTER, *supra* note 29, at ix, 77, 196 (analyzing how numbers are a technology of distance).

APPENDIX

Table 1: 1993-2004: Immigration Prosecution Increases³²³ and Average Annual Undocumented Immigration Volume Estimates by Pew Hispanic Center³²⁴ Based on Data from Current Population Survey, American Community Survey, and Census 2000 data

	P (D.C.)	%Δ P (D.C.)	P (Total)	% Δ P (Total)	U	% Δ U
1994	2,453		13,068		519,000	
1995	3,866	58%	15,337	17%	581,000	12%
1996	5,390	120%	14,223	9%	503,000	-3%
1997	6,726	174%	17,807	36%	517,000	-0.4%
1998	9,254	277%	22,857	75%	668,000	29%
1999	10,550	330%	21,588	65%	656,000	26%
2000	12,036	391%	22,071	69%	667,000	29%
2001	11,504	369%	23,374	79%	549,000	6%
2002	13,101	434%	23,219	78%	450,000	-13%
2003	15,997	552%	24,153	85%	451,000	-13%
2004					562,000	8%

P (D.C.) = Prosecutions in District Court

P (Total) = Total Prosecutions

U = Undocumented Migrants

(Percentage changes measured from 1994)

323. Column 1 data for prosecution numbers in district court between 1994 and 2003 were obtained from MOTIVANS, *supra* note 206, at tbl.A.7. The box for 2004 is shaded because the data set does not extend to 2004. Column 3 data for total numbers of prosecutions between 1994 and 2004 were obtained from Sourcebook of Criminal Justice Statistics Online, Prosecutions for Violations of U.S. Immigration and Naturalization Laws, tbl.5.75.2004, <http://www.albany.edu/sourcebook/pdf/t5752004.pdf>. The data for 2004 total immigration prosecutions is not included and the box is shaded because beginning in 2004, Immigration and Customs Enforcement stopped reporting data whereas previously it had, *id.* at note c, which may lead to a smaller number because of the omission of data from an important agency in immigrations enforcement.

324. Data obtained from PEW HISPANIC CTR, *supra* note 224, at 15, 29 tbl.1a.

Table 2: Numbers of Prosecutions in District Court, By Offense Category,
1994-2003³²⁵

	1994	1997	2000	2003	% Change 1994-2003
All Offenses	62,327	69,351	83,251	92,085	48 %
Immigration Offenses	2,453	6,726	12,036	15,997	552%
Weapon Offenses	3,557	3,837	6,073	9,961	180%
Drug Offenses	20,275	24,693	29,455	30,668	51%
Fraud	10,301	11,371	12,659	13,142	28%
Public Order Offenses	4,679	4,273	5,136	4,829	3%
Violent Offenses	3,222	3,603	3,135	3,167	-2%
Other Property Offenses	2,854	2,519	2,578	2,590	-9%

325. Raw data on number of prosecutions in district court per category of offense were obtained from the most recently posted issue of *Federal Criminal Justice Trends*. See MOTIVANS, *supra* note 206, at 48 tbl.A.7.

Table 3: Change in Numbers of People Convicted in District Court,
By Offense Category, 1994-2003³²⁶

	1994	1997	2000	2003	% Change 1994-2003
All Offenses	50,701	56,570	68,156	75,805	50 %
Immigration Offenses	2,152	6,044	11,125	14,199	560%
Weapon Offenses	3,232	2,871	4,196	6,970	116%
Drug Offenses	16,400	19,115	24,206	25,582	56%
Fraud	8,671	9,919	10,396	11,323	31%
Public Order Offenses	4,023	3,962	4,585	4,331	8%
Violent Offenses	2,704	2,876	2,557	2,643	-2 %
Other Property Offenses	2,442	2,091	2,058	1,988	-19%

326. Raw data on conviction numbers in district court per category of offense were obtained from *id.* at 49 tbl.A.10.

Table 4: Change in Numbers of Suspects Referred to U.S. Attorneys for Prosecution, By Offense Category, 1994-2003³²⁷

	Referrals 1994	Referrals 1999	Referrals 2002	Referrals 2003	% Change 1994-2003
All Matters	99,251	117,994	124,335	130,078	31%
Immigration Offenses	5,526	15,539	16,699	20,341	268%
Weapon Offenses	5,996	6,982	11,200	14,022	134%
Drug Offenses	29,311	37,313	38,150	37,416	28%
Public Order Offenses	19,143	22,816	23,472	23,717	24%
Violent Offenses	5,570	5,768	6,392	5,688	2%
Fraud	28,491	24,200	24,019	24,261	-15%
Other Property Offenses	4,088	3,811	3,302	3,114	-24%

327. Numbers of referrals were obtained from *id.* at 7 tbl.6.

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Table 5: Fiscal Year 2006: Numbers of Case Filings and Defendants Filed Against in Five Border Districts Compared to the Eighty-Nine Other Districts³²⁸

	D.C. Filings	% Total Filings	D (D.C.)	D (M.C.)	D (D.C. + M.C.)	% Total D
Five Border Districts	18,920	32%	22,913	20,048	42,961	37%
89 Other Districts	39,782	68%	58,175	14,892	73,067	63%
Total Number	58,702	100%	81,088	34,940	116,028	100%

D.C. Filings = District Court Criminal Case Filings

% Total Filings = Percentage of Total Criminal Case Filings

D (D.C.) = Number of Defendants Filed Against – District Court

D (M.C.) = Number of Defendants Filed Against – Magistrate Court

D (D.C. + M.C.) = Number of Defendants Filed Against (District + Magistrate Courts)

% Total D = Percentage of Total Defendants (District + Magistrate Courts)

328. Raw data on the number of cases filed and numbers of defendants filed against were obtained from the latest posted issue of the *United States Attorneys' Annual Statistical Report*. UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, *supra* note 211, at tbl.1. The figures for criminal cases filed in district court in fiscal year 2006 by the southwestern border districts are: (1) District of Arizona = 3,448; (2) Southern District of California = 2,703; (3) District of New Mexico = 2,503; Southern District of Texas = 5,335; Western District of Texas = 4,931. *Id.* The figure for the 89 other districts was obtained by subtracting the total number of criminal case filings in the southwestern border districts from the number of total filings. The figures for the number of defendants filed against in the other 89 districts were similarly obtained by subtracting the southwestern border district aggregate from the total for all districts.

Table 6: Fiscal Year 2006: Number of Defendants Convicted
Five Border Districts Compared to the Eighty-Nine Other Districts³²⁹

	District Court	Magistrate Court	Magistrate + District Court	% of Total (Magistrate + District Court)
Total for Five Southwestern Border Districts	22,654	16,578	39,232	40%
Total for 89 Other Districts	52,996	6,508	59,504	60%
Grand Total	75,650	23,086	98,736	100%

329. Raw data on the number of defendants convicted in district court and magistrate court in each district were obtained from *id.* at tbls.2, 2A. The breakdown was: (1) District of Arizona—4,321 in district court, 7,337 in magistrate court; (2) Southern District of California—2,659 in district court, 8 in magistrate court; (3) District of New Mexico—3,265 in district court, 49 in magistrate court; (4) Southern District of Texas—6,422 in district court, 8,629 in magistrate court; (5) Western District of Texas—5,987 in district court, 555 in magistrate court.

Table 7: Fiscal Year 2006: Number of Cases Concluded by Finding of Guilt
Five Border Districts Compared to the Eighty-Nine Other Districts³³⁰

	District Court	Magistrate Court	Magistrate + District Court	% of Total (Magistrate + District Court)
Total for Five Southwestern Border Districts	19,064	16,296	35,360	45%
Total for 89 Other Districts	37,134	6,275	43,409	55%
Grand Total	56,198	22,571	78,769	100%

330. Raw data on the number of cases concluded by guilty verdict in district court and magistrate court in each district were obtained from *id.* The breakdown was: (1) District of Arizona—3,360 in district court, 7,195 in magistrate court; (2) Southern District of California—2,353 in district court, 8 in magistrate court; (3) District of New Mexico—2,923 in district court, 47 in magistrate court; (4) Southern District of Texas—5,601 in district court, 8,542 in magistrate court; (5) Western District of Texas—4,827 in district court, 504 in magistrate court.

Table 8: Federal Prison Inmate Demographics: 1994-2005³³¹

	1994	1995	1996	1997	1998	1999
Proportion Hispanics	26.7%	27.2%	28.2%	29.1%	29.9%	31.4%
Proportion Mexican Citizens	8.9%	9.8%	10.5%	11.6%	12.8%	14.6%
	2000	2001	2002	2003	2004	2005
Proportion Hispanics	32.3%	31.9%	31.8%	31.9%	32.1%	31.8%
Proportion Mexican Citizens	16.2%	16.2%	16.1%	16.5%	17%	17%

331. The data in the chart are compiled from the Bureau of Prisons' annual State of the Bureau reports. U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1994, at 66 (1994) (data as of December 31, 1994); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1995, at 36 (1995) (data as of September 30, 1995); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1996, at 44 (1996) (data for fiscal year 1996); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1997, at 48 (1997) (data for fiscal year 1997); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1998, at 49 (1998) (data for fiscal year 1998); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 1999, at 52 (1999) (data for fiscal year 1999); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 2000, at 52 (2000) (data for fiscal year 2000); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 2001, at 52 (2001) (data for fiscal year 2001); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 2002, at 56 (2002) (data for fiscal year 2002); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 2003, at 56 (2003) (data for fiscal year 2003); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 2004, at 58 (2004) (data for fiscal year 2004); U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, STATE OF THE BUREAU 2005, at 51 (2005) (data for fiscal year 2005). All are available at <http://www.bop.gov/news/publications.jsp>.