

**Butchering Statutes:  
The Postville Raid and the Misinterpretation of Federal Criminal Law<sup>\*</sup>**

**BY PETER R. MOYERS<sup>†</sup>**

ABSTRACT

On Monday, May 12, 2008, the Bureau of Immigration and Customs Enforcement led an immigration raid at the Agriprocessors, Inc. meatpacking plant in Postville, Iowa. The local U.S. Attorney's Office pursued criminal complaints against approximately 300 migrant workers. The raid at Postville remains the nation's largest criminal immigration raid. I aim to provide a detailed and accurate account of the investigation of Agriprocessors, the raid, the criminal prosecutions, the sentencings and the aftermath. In so doing, I argue that a confluence of factors explain the number of individuals arrested and the accelerated criminal proceedings.

I describe how the investigation of Agriprocessors led to the raid and criminal prosecutions. I show that the defendants, though not technically coerced, were the victims of systemic coercion. Such systemic coercion produced prompt resolutions of their cases, which propelled the guilty pleas and sentencings.

I then argue that the accelerated process was premised upon two flawed interpretations of federal law, without which the guilty pleas and removal orders could not have been achieved. First, the USAO employed § 1028A(a)(1) of Title 18, aggravated identity theft, which imposes a two-year mandatory, consecutive sentence to any defendant convicted under it, to leverage expedited plea agreements. The interpretation is erroneous, because the statute was intended to cover only true identity thieves, not those who did not know whether the means of identification they used belonged to another actual person.

Second, I address § 1228(c)(5) of Title 8, judicial removal, which permits a federal district court to enter an order of removal against a criminal defendant as part of a plea agreement with the government. I argue that the district court improperly applied the statute, because the statute only applies to defendants who are lawfully admitted to the United States. The Agriprocessors employees were never lawfully admitted to the United States. Such orders of removal were invalid on their own terms.

I argue that these mistaken applications of federal law are prone to repetition, because the relevant players cannot be relied upon to insist on the proper application of the operative statutes. Finally, I argue rectifications of these misinterpretations are likely to diminish the feasibility of future raids followed by imprisonment.

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<sup>†</sup> Staff Attorney, Iowa Legal Aid. A.B., Princeton University; J.D., Harvard Law School. I served as a judicial clerk in the Northern District of Iowa during the criminal process in Waterloo, Iowa, following the raid at Agriprocessors in Postville. However, what follows is entirely based on publicly available court filings, newspaper articles, congressional hearing testimony and interviews. I extend my warmest gratitude to Stephen Legomsky for his invaluable comments on an earlier draft. Raquel Aldana, Bret Asbury, Randall Bezanson, Andrea Gittleman, John Haarlow, Sara Johnson, Nancy Morawetz, Michael Redmond, Mark Schantz, Theodore Schroeder and Juliet Stumpf provided very useful criticisms and advice. Daniel Kanstroom was of great assistance in my initial research. Special thanks to my wife, Christine, for her extensive comments on early drafts and tireless support.

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## I. Introduction

On Monday, May 12, 2008, at approximately 10:00 a.m., the Bureau of Immigration and Customs Enforcement (“ICE”), a division of the Department of Homeland Security (“Homeland Security”), led an immigration raid at the Agriprocessors, Inc., meatpacking plant in Postville, Iowa, executing 697 criminal arrest warrants.<sup>1</sup> Nearly 400 employees were arrested on suspected immigration violations and taken into custody.<sup>2</sup> Those arrested were transported to a temporary detention facility at the National Cattle Congress fairgrounds (“Cattle Congress”), a 60-acre facility leased by the federal government for the raid, in Waterloo, Iowa,<sup>3</sup> about 75 miles southeast of Postville. Over a period of 12 days, the U.S. Attorney’s Office for the Northern District of Iowa (“USAO”) pursued criminal complaints against approximately 300 migrant workers, and the federal district court sentenced them to federal prison terms to be immediately followed by removal to their countries of origin.<sup>4</sup> The raid at Postville remains the nation’s largest criminal immigration raid.<sup>5</sup>

I aim to provide a detailed and accurate account of the investigation of Agriprocessors, the raid, the criminal prosecutions, the sentencings and the aftermath. In so doing, I argue that a confluence of factors explain the defining features of the raid, *viz.*, the number of individuals arrested and the accelerated criminal proceedings that followed.

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<sup>1</sup> Alicia Ebaugh, *Raid Biggest in U.S. History – Majority of 390 Arrested from Guatemala, Mexico*, CEDAR RAPIDS GAZETTE, May 14, 2008, Section A, at 1.

<sup>2</sup> *Id.*

<sup>3</sup> Susan Saulny, *Hundreds Are Arrested in U.S. Sweep of Meat Plant*, N.Y. TIMES, May 13, 2008, Section A, at 13 (hereinafter *Saulny*).

<sup>4</sup> Julia Preston, *Immigrants’ Speedy Trials After Raid Become Issue*, N.Y. TIMES, August 9, 2008, A12 (hereinafter *Preston I*).

<sup>5</sup> Antonio Olivo, *Immigration raid roils Iowa melting pot*, CHICAGO TRIBUNE, May 19, 2008, Section C, at 1. Although the subsequent August raid at Howard Industries became the largest single-site immigration raid, the criminal feature of the raid was minimal; only 8 individuals were criminally charged. Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid*, N.Y. TIMES, Aug. 27, 2008, Section A, at 16.

In Part II, I begin with an account of Agriprocessors's prior legal troubles, which explains how it became such a politically attractive target; it was a not sympathetic local employer. Next, I describe how the investigation of Agriprocessors led to a raid seeking to execute nearly 700 criminal arrest warrants. In Part III, I describe the causes of the accelerated criminal process that resulted in nearly 300 guilty pleas and sentencings in the space of 12 days.

In Part IV, I argue that the accelerated process was premised upon two flawed interpretations of federal law, without which the guilty pleas and removal orders could not have been so quickly achieved, if achieved at all. The USAO employed § 1028A(a)(1) of Title 18, aggravated identity theft, which imposes a two-year mandatory, consecutive sentence to any defendant convicted under it, to leverage expedited plea agreements. However, I argue that the interpretation advanced by the USAO, although it prevails in the federal circuit that includes Postville, is erroneous.

Second, I address § 1228(c)(5) of Title 8, judicial removal, which permits a federal district court to enter an order of removal against a criminal defendant as part of a plea agreement with the government. I argue that the district court improperly applied the statute to the Agriprocessors employees, because the statute only applies to defendants who are lawfully admitted to the United States and subsequently are convicted of aggravated felonies.

In Part V, I argue that these mistaken applications of federal law are prone to repetition. In Part VI, I argue rectifications of these misinterpretations are likely to diminish the feasibility of future raids followed by imprisonment.

## II. The Size of the Raid

### a. Prologue

A convergence of factors, several of which are not immediately apparent, led to the raid and criminal prosecutions. Funding for ICE has increased as has its appetite for criminal enforcement. In its first year of operations, fiscal year 2003, ICE enjoyed a budget of approximately \$3.62 billion.<sup>6</sup> By February of 2008, ICE requested from Congress an increase in its budget to nearly \$5.7 billion.<sup>7</sup> Today it boasts over 16,500 employees.<sup>8</sup> It “is the largest investigative arm of [Homeland Security] with a mission to protect America and uphold public safety.”<sup>9</sup> Consistent with this mission, in 2007, it

enacted a multi-year strategy of improving immigration enforcement through more efficient management, focused enforcement efforts that target the most dangerous illegal aliens, worksite enforcement initiatives that target employers who defy immigration law and reducing the pull of the “jobs magnet” that draws illegal workers across the border in search of employment.<sup>10</sup>

In the strategy’s first year, ICE made 863 criminal arrests in worksite enforcement operations;<sup>11</sup> by comparison, the Agriprocessors raid alone, during the strategy’s second year, resulted in more than 300 criminal arrests. Just a month before the raid, Homeland Security Secretary Michael Chertoff, on behalf of ICE, affirmed ICE’s commitment to criminal worksite enforcement actions, arguing that “[t]hese are the kinds of cases that have a high impact on those

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<sup>6</sup> DEPT. OF HOMELAND SEC., BUDGET IN BRIEF FISCAL YEAR 2005 13 (2004).

<sup>7</sup> BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET FISCAL YEAR 2009 1 (February 1, 2008).

<sup>8</sup> 2007 ICE ANN. REP. 1.

<sup>9</sup> *Id.*

<sup>10</sup> 2007 ICE ANN. REP. iii.

<sup>11</sup> *Id.* at iv.

who would hire and employ undocumented and illegal aliens often facilitated through identity theft and document fraud.”<sup>12</sup>

The Agriprocessors raid was, in part, a consequence of the funding increases and the worksite enforcement strategy. An ICE spokesman stated, with regard to the raid, “ICE is committed to enforcing the nation’s immigration law in the workplace to maintain the integrity of the immigration system . . . .”<sup>13</sup> The size and scope of the raid was profound, requiring months of planning and the participation of at least 17 other federal agencies.<sup>14</sup>

Agriprocessors’s prior history with government regulators and its own employees is also relevant to understanding the raid. Agriprocessors had run afoul of government regulators in the past for a variety of alleged violations. In 2004, the Environmental Protection Agency sued Agriprocessors in the federal district court for Northern District of Iowa (“district court”), alleging that the meatpacker exceeded federal limits on pollutants that it discharged into Postville’s waste-water treatment system.<sup>15</sup> Agriprocessors settled the suit nearly two years later, agreeing to pay nearly \$600,000.<sup>16</sup> In 2004, the Department of Agriculture (“USDA”) began an investigation into allegations of animal cruelty at the Postville plant; the USDA responded to allegations that Agriprocessors was slaughtering cattle in an unnecessarily painful manner.<sup>17</sup>

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<sup>12</sup> *Time Change – Oversight of the Department of Homeland Security Before the Sen. Comm. on the Judiciary*, 109th Cong. 7 (2008) (statement of Michael Chertoff, Secretary, United States Department of Homeland Security).

<sup>13</sup> Press Release, Immigration and Customs Enforcement, ICE and DOJ joint enforcement action at Iowa meatpacking plant, May 12, 2008, available at <http://www.ice.gov/pi/news/newsreleases/articles/080512cedarrapids.htm> (hereinafter “ICE Press Release”).

<sup>14</sup> *Id.*

<sup>15</sup> Orlan Love, *EPA sues Postville packing plant*, CEDAR RAPIDS GAZETTE, Dec. 2, 2004, Section B, at 2.

<sup>16</sup> Dorothy DeSouza-Guedes, *Meat processor to pay \$600,000 in settlement*, CEDAR RAPIDS GAZETTE, Sept. 2, 2006, Section B, at 2.

<sup>17</sup> *Meatpacker investigated – USDA to look into all aspects of Postville Plant*, DUBUQUE TELEGRAPH HERALD, Dec. 3, 2004, Section C, at 17.

The resulting report by the USDA confirmed that Agriprocessors had violated federal animal cruelty laws, but the USAO declined to pursue a criminal action against the plant.<sup>18</sup>

The State of Iowa also became involved; in early 2008, it cited Agriprocessors for 39 occupational health and safety violations, proposing fines of \$182,000.<sup>19</sup> Days after these citations, the USDA also cited Agriprocessors for elevated levels of salmonella in its poultry products.<sup>20</sup>

These confrontations with federal and state regulators were joined by complaints from the company's employees. In March of 2007, current and former employees of Agriprocessors filed a class action lawsuit in the district court, alleging that the company failed to pay wages for employee-time spent on work-related tasks but away from the production line.<sup>21</sup> In August of that year, the United Food & Commercial Workers, a union organizing Agriprocessors's employees, released a report describing the company's labor and safety abuses.<sup>22</sup> According to the report, in a period of just 13 months, the company had two recalls of its products and received more than 250 noncompliance records from the USDA's Food Safety and Inspection Service.<sup>23</sup> The report also expressed concerns about Agriprocessors's monitoring procedures for mad cow disease.<sup>24</sup>

In summary, Agriprocessors had been criticized by both government regulators and its own employees, though the actions prompted by these criticisms did not interrupt Agriprocessors's operations. Coupled with the regulatory and legal troubles, the alleged immigration violations

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<sup>18</sup> Donald G. McNeil, Jr., *Inquiry Finds Federal Inspections at Kosher Meat Plant*, N.Y. TIMES, March 10, 2006, Section A, at 16.

<sup>19</sup> Orlan Love, *Postville meatpacker hit with 39 safety violations*, CEDAR RAPIDS GAZETTE, March 21, 2008, Section B, at 2.

<sup>20</sup> Orlan Love, *Tests find salmonella in poultry*, CEDAR RAPIDS GAZETTE, April 5, 2008, Section B, at 1.

<sup>21</sup> David DeWitte, *Lawsuit faces crucial test*, CEDAR RAPIDS GAZETTE, Oct. 20, 2007, Section B, at 1.

<sup>22</sup> David DeWitte, *Meat plant's record alarms union*, CEDAR RAPIDS GAZETTE, Aug. 10, 2007, Section B, at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

made the company an attractive target. It had made enemies at both the federal and state levels, and its employees were hardly satisfied with its treatment of them. ICE, the USAO and the DOJ could expect little resistance to their joint operation, because the company's prior behavior had made it so unsympathetic.

b. Investigation

i. Confidential Informants

ICE obtained evidence from confidential informants that revealed that Agriprocessors was routinely and intentionally hiring undocumented migrant workers, many of whom it mistreated. Although ICE had information as early as 2006 that foreign nationals with fraudulent or stolen identification documents were employed at Agriprocessors,<sup>25</sup> the formal ICE investigation began in earnest only eight months prior to the raid. According to the search warrant affidavit authorizing the raid, signed by ICE Senior Special Agent David M. Hoagland ("Affidavit"), the investigation of Agriprocessors began with information provided by confidential informants.<sup>26</sup> At the end of August of 2007, the Iowa Department of Public Safety requested the assistance of ICE in "identifying individuals who were involved in an altercation that had occurred in Postville...."<sup>27</sup> As a result of the investigation, ICE arrested at least five foreign nationals for possession of fraudulent permanent resident alien cards.<sup>28</sup> Each of the five foreign nationals claimed to have been employed by Agriprocessors and to have used fraudulent identification documents to procure that employment; at ICE's request, Agriprocessors provided a Form I-9 for

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<sup>25</sup> *In re John Doe et al.*, case no. 08-MJ-110-JSS, docket no. 1-3 (N.D. Iowa May 9, 2008) (hereinafter "Affidavit"), at ¶¶ 62-69 (describing information from Agriprocessors employees, Sources #8, 9 and 10, interviewed by ICE on May 4, 2006).

<sup>26</sup> *Id.* at ¶ 20.

<sup>27</sup> *Id.* at ¶ 20.

<sup>28</sup> *Id.* at ¶¶ 20-34.



four of the five foreign nationals.<sup>29</sup> Each Form I-9 confirmed that the foreign national had used a fraudulent permanent resident alien card as part of the employment process at Agriprocessors.<sup>30</sup>

Other confidential informants provided ICE information. In early November of 2007, “Source #1,” a former supervisor at Agriprocessors,<sup>31</sup> and “Source #7,” a confidential source who subsequently agreed to seek employment undercover at Agriprocessors,<sup>32</sup> began to assist in the investigation. Source #1 told ICE agents that Source #1 had worked as a supervisor at Agriprocessors from 2005 to 2006, where the Source supervised employees from “Mexico, Guatemala, and Eastern Europe....”<sup>33</sup> The Affidavit noted that Source #1 described a conversation between the Source and Agriprocessors’s human resources manager; the Source alerted the manager to the fact that three of the employees under Source #1’s supervision were using the same social security number. The Source stated that, in response, the manager simply laughed.<sup>34</sup>

In addition to the allegations of document fraud, Source #1 told ICE agents that the Source “discovered an active drug (methamphetamine) production in the plant. This led to a physical confrontation [between Source #1 and] Source #1’s immediate supervisor. Source #1 believes the incident led to Source #1’s termination.”<sup>35</sup> Source #1 also alleged, based on conversations with the human resources manager and the Source’s son, who also worked at Agriprocessors, that the manager may have been deducting payroll taxes from the paychecks of undocumented

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at ¶¶ 22, 25, 29, 32.

<sup>31</sup> *Id.* at ¶¶ 15-19.

<sup>32</sup> *Id.* at ¶¶ 37-61.

<sup>33</sup> *Id.* at ¶ 15-16.

<sup>34</sup> *Id.* at ¶ 18.

<sup>35</sup> *Id.* at ¶16.

workers and depositing the sums “in bank accounts belonging to an unknown person or persons.”<sup>36</sup>

ICE’s direction of Source #7 reveal its commitment to uncovering incriminating evidence against Agriprocessors. Source #7 had previously assisted ICE on investigations that resulted in the conviction of two individuals for identification document fraud.<sup>37</sup> The Source, acting undercover, applied for employment at Agriprocessors three times in two months, in each instance with no or different identity documentation. On November 8, 2007, at the direction of ICE agents, Source #7, wired with an electronic audio monitoring device, attempted to obtain employment at Agriprocessors without identification documents of any kind. Initially, an employee of the human resources department told Source #7 that the Source would need a social security number to work at the plant.<sup>38</sup> When Source #7 left the plant, the Source approached an Agriprocessors employee across the street and inquired about employment at the plant; the employee told the Source that the supervisor of the turkey processing area of the plant employed workers without social security numbers. The employee gave Source #7 the phone number for the supervisor, “C.”<sup>39</sup> C later met with Source #7, who was wired with an electronic audio monitoring device. During the meeting, C told Source #7 that the Source should “fix” the Source’s social security number, presumably implying fraud, if the Source desired to work at Agriprocessors without identification documents.<sup>40</sup> C promised to call the plant’s human resources manager to inquire about employment on Source #7’s behalf.<sup>41</sup>

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<sup>36</sup> *Id.* at ¶ 19.

<sup>37</sup> *Id.* at ¶ 35.

<sup>38</sup> *Id.* at ¶ 36.

<sup>39</sup> *Id.* at ¶ 37.

<sup>40</sup> *Id.* at ¶ 39.

<sup>41</sup> *Id.*

In December of 2007, Source #7, wired with an electronic audio monitoring device, again attempted to obtain employment at the plant. Source #7 used a counterfeit social security card and permanent resident alien card, each of which contained a fictitious name and unassigned numbers; an employee of the plant's human resources department rejected the Source's application, noting that the name and social security numbers provided by Source #7 did not match.<sup>42</sup> Less than one month later, in January of 2008, Source #7 returned to the plant to obtain employment; for this occasion, ICE had provided the Source with a social security card containing a valid number, but replaced the name with the name Source #7 had used in the prior application from December.<sup>43</sup> Source #7's third application with the company was successful.<sup>44</sup> The company, at least in this instance, appeared to be accommodating potential employees: other applicants were having difficulties though, and Source #7 described how an employee, in Spanish, told the approximately 30 other applicants how to fill out Form I-9 so as to appear to be lawful permanent resident aliens.<sup>45</sup>

In addition to the hiring and employment practices of Agriprocessors, Source #7 alleged that there were hazardous working conditions at the plant and that the supervisors practiced intimidation. A rabbi employed by the plant allegedly "call[ed] employees derogatory names and thr[ew] meat at employees."<sup>46</sup> In another incident a floor supervisor allegedly "duct-taped the eyes of an employee that Source #7 believed to be an undocumented Guatemalan. The floor supervisor then took one of the meat hooks and hit the Guatemalan with it . . . ."<sup>47</sup>

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<sup>42</sup> *Id.* at ¶ 43.

<sup>43</sup> *Id.* at ¶ 45.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at ¶ 49.

<sup>47</sup> *Id.* at ¶ 52.

ii. “No-Match” Letters

Cooperation between ICE and the Social Security Administration (“SSA”) proved crucial to the investigation. As valuable as the various confidential informants were to ICE agents, Agriprocessors’s receipt of “No-Match” letters explain how the size of the raid became so large. As a matter of policy, the SSA sends a “No-Match” letter to an employer when, according to the records of the SSA, the name and social security number provided by an employee on the employee’s Form W-2 do not match.<sup>48</sup> Although the SSA admits that its records and databases of those who are eligible to work in the United States contain serious omissions and errors,<sup>49</sup> Homeland Security and ICE continue to rely on them in law enforcement actions.

The No-Match letters gave ICE its first sense of the extent of the unlawful employment at Agriprocessors. According to the Affidavit, Agriprocessors, since 2002, had received thousands of No-Match letters.<sup>50</sup> The Affidavit alleged that, based on a search of the SSA’s databases, as of the fourth quarter of 2007, 737 Agriprocessors employees were “using a social security number not lawfully issued to that person.”<sup>51</sup> Of the 737, the Affidavit alleged that 147 of those employees were using social security numbers that were never lawfully issued to anyone and that

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<sup>48</sup> 20 C.F.R. § 422.120(a) (2008) (If an employer or employee provides a mismatched name and social security number to the SSA, “SSA will write to the employee at the address shown on the wage report and request the missing or corrected information. If the wage report does not show the employee’s address or shows an incomplete address, SSA will write to the employer and request the missing or corrected employee information.”). For a summary of the policy, see the SSA memo, “Overview of Social Security Employer No-Match Letters Process”, available at <http://www.ssa.gov/legislation/nomatch2.htm>. However, the function of the No-Match Letter as a law enforcement tool is in flux. Normally, the SSA cannot lawfully share the information about mismatched names and social security numbers from Forms W-2 with other federal agencies, such as Homeland Security or ICE, unless such agency has independent evidence of employer or employee misconduct. See 26 U.S.C. § 6103 (2008).

<sup>49</sup> Office of the Inspector Gen., Soc. Sec. Admin, Congressional Response Report: Accuracy of the Social Security Administration’s Numident File, at ii (2006), available at <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf> (estimating that 17.8 million of the SSA’s 435 million records evidence “discrepancies in the name, date of birth or citizenship status of the numberholder . . .”); see also Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, U.C. DAVIS L. REV. 1081, 1097 (2008) (describing how reliance on inaccurate SSA databases creates implementation difficulties for workplace enforcement of immigration laws).

<sup>50</sup> Affidavit, *supra* note 25, at ¶ 77(a)-(1).

<sup>51</sup> *Id.* at ¶ 89.

590 were “using valid social security numbers, however the numbers did not match the name of the employee reported by Agriprocessors as having used that number during employment.”<sup>52</sup>

The allegation that about 590 employees were using valid social security numbers under different names was potentially the most incriminating of the Affidavit; the DOJ later defended the raid, at least in part, on the grounds that the employees were not engaging in a victimless crime, but rather, they were stealing the identities of innocent third-parties.<sup>53</sup> According to the Affidavit, only one “person who was assigned one of the social security numbers being used by an employee of Agriprocessors has reported his/her identity stolen.”<sup>54</sup> In other words, the DOJ could only identify one victim of identity theft, despite the thousands of No-Match letters.

### c. The Criminal Complaints

The criminal investigation was based primarily on state and federal cooperation. Parallel to the ICE investigation of Agriprocessors described above, the DOJ was conducting an investigation of its own. The DOJ’s efforts explain how the criminal dimension of the raid came to include hundreds of suspected undocumented workers.

Some time in the early months of 2008, the USAO reviewed Iowa Workforce Development (“Workforce Development”) records of Agriprocessors’s reported employees.<sup>55</sup> For the months of October, November and December of 2007, Agriprocessors reported to Workforce Development that it had employed 968 persons.<sup>56</sup> The Affidavit stated that Workforce Development records for the first quarter of 2008 were not available because Agriprocessors had

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<sup>52</sup> *Id.*

<sup>53</sup> *Immigration Raids: Postville and Beyond Before the House Comm. on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law*, 109th Cong. 7 (2008) [hereinafter *Hearings*] (statement of Deborah J. Rhodes, Senior Associate Deputy Attorney General, United States Department of Justice).

<sup>54</sup> Affidavit, *supra* note 25, at ¶ 86.

<sup>55</sup> *Id.* at ¶ 110. “[Workforce Development] is a State of Iowa government agency that works in conjunction with the Iowa Department of Labor and is a repository of [sic] documents for employees working in the state [sic] of Iowa.” *Id.* at ¶ 110.

<sup>56</sup> *Id.* at ¶ 88.

not filed them at the time of the filing of the Affidavit.<sup>57</sup> Of those 968 employees, ICE determined that the records of 737 employees evidenced discrepancies between their names and the social security numbers they provided.<sup>58</sup> Based on these discrepancies, on April 16, 2008, the USAO filed criminal complaints against, and sought criminal arrest warrants for, 697 of Agriprocessors's reported employees "under their alias names, charging them with unlawfully using social security numbers in relation to their employment in violation of" 42 U.S.C. § 407(a) (unlawful use of a social security number for the purposes of employment), 18 U.S.C. § 1028A(a)(1) (aggravated identity theft) and/or 18 U.S.C. § 1546 (possession or use of a fraudulent identification document for the purposes of employment).<sup>59</sup>

Section 1028A(a)(1) propelled the criminal prosecutions. The statute reads, in part,

In general. Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.<sup>60</sup>

Among the felonies enumerated in subsection (c) are violations of § 1546(a)<sup>61</sup> and § 408(a)<sup>62</sup>. The Eighth Circuit Court of Appeals has made plain that another's name or social security number constitutes a means of identification under § 1028A(a)(1).<sup>63</sup> Furthermore, except in cases of multiple, contemporaneous violations of § 1028A(a)(1), a defendant must serve the two-year term of imprisonment consecutively to any sentence imposed for the underlying felony

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<sup>57</sup> *Id.* at ¶ 110.

<sup>58</sup> *Id.* at ¶ 88.

<sup>59</sup> *Id.* at ¶ 110.

<sup>60</sup> 18 U.S.C. § 1028A(a) (2006).

<sup>61</sup> 18 U.S.C. § 1028A(c)(7). Subsection (c)(7) states that any violation of "provision contained in chapter 75" of title 18 triggers the two-year sentence of § 1028A(a). Section 1546(a) is in chapter 75 of title 18.

<sup>62</sup> 18 U.S.C. § 1028A(c)(11). Subsection (c)(11) states that any violation of section 208 of the Social Security Act triggers the two-year sentence of § 1028A(a). Section 208 of the Social Security Act is codified at 42 U.S.C. § 408.

<sup>63</sup> *U.S. v. Mendoza-Gonzalez*, 520 F.3d 912, 916 (8th Cir. 2008).

violation.<sup>64</sup> In other words, if convicted, a defendant charged under § 408(a) or § 1546(a), in addition to § 1028A(a)(1), must serve at least two years in prison.<sup>65</sup>

The application of 1028A(a)(1) was proper, however, because in the Eighth Circuit, the government need not prove that a defendant knew the means of identification that the defendant transferred, used or possessed belonged to another actual person.<sup>66</sup> The absence of such a requirement significantly diminishes the government's burden. First, by definition, the subtraction of an element of proof for the charge enlarges the pool of violators. Second, in the employment context, the content of the requirement itself poses evidentiary difficulties for the government. A jury could infer from circumstantial evidence that a defendant knew that a social security card was not lawfully issued to him, because he obtained it in exchange for cash from a known forger rather than from the local Social Security Administration office. Circumstantial evidence is unlikely to be as effective in showing that the defendant knew that the social security card belonged to another actual person. The narrow interests of the defendant in the employment context defeat any necessary inference that he must know that a means of identification belonged to another. For example, a migrant worker could use the social security card to obtain employment at a meatpacking plant without the creation of any inference that he knew it belonged to another. From the migrant worker's point of view, all that matters is that the means of identification that he obtains satisfies the supervisor of the potential employer; whether the name, number or document itself belongs to another actual person is unnecessary for the defendant's limited purposes of meeting an employer's standards. Furthermore, such a defendant almost certainly has no knowledge of the No-Match letter procedure, which might

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<sup>64</sup> 18 U.S.C. § 1028A(b)(2)-(4).

<sup>65</sup> Although there are serious concerns about the interpretation and use of § 1028A(a)(1) described above, and I address them below in Part IV, for present purposes it is sufficient to note that the statute provided the USAO with powerful leverage in its dealings with the defendants.

<sup>66</sup> See *Mendoza-Gonzalez*, 520 F. 3d at 916.

otherwise compel the defendant to seek out only identification documents of actual persons who are lawfully authorized to work in the United States. The employment context does not give rise to an inference of actual identity theft that other contexts might. Given the absence of inference in this context, the government avoids a serious evidentiary burden under an interpretation of §1028A(a)(1) that does not require it to prove that the defendant knew the means of identification belonged to another person.

d. Scope of the Search Warrant

The confidential informants, No-Match letters and Workforce Development records combined to present ICE and the DOJ with an attractive target, because of the sheer size of a raid's impact. The primary benefit of a workplace raid is that it allows federal authorities to arrest a large group of suspected undocumented workers in a single operation, rather than through piecemeal enforcement. The more suspected violators that work at a particular site, the more enforcement federal authorities can produce from their efforts. The combined evidence revealed a kind of law enforcement "jackpot" that could result in nearly 700 arrests.

Given the extensive evidence that suggested violations of federal law, the broad scope of the warrant is unsurprising. The Affidavit requested a "criminal search warrant[.]" as well as a civil immigration, or *Blackie's*,<sup>67</sup> warrant<sup>68</sup>. However, the only search warrant to ever appear on the docket was a criminal search warrant,<sup>69</sup> and ICE, in its press release the day of the raid, referred only to the execution of a "criminal search warrant" at Agriprocessors.<sup>70</sup> The Affidavit reasoned that "for the vast majority of subjects, the government does not possess photo identification

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<sup>67</sup> A *Blackie's* warrant is an administrative search warrant that empowers ICE (formerly the Immigration and Naturalization Service) agents to search commercial establishments suspected of harboring unlawful aliens based only upon a reasonable suspicion rather than a particularized description of each suspected unlawful alien alleged to be present therein. *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1213 (D.C. Cir. 1981).

<sup>68</sup> Affidavit, *supra* note 25, at ¶ 110.

<sup>69</sup> *In re John Doe et al.*, case no. 08-MJ-110-JSS, docket no. 3 (N.D. Iowa May 21, 2008) (hereinafter, "Warrant").

<sup>70</sup> ICE Press Release, *supra* note 13.



using the alias name on the criminal complaint and [arrest] warrant. It will be necessary to attempt to identify, among those present at the facility during the search, those individuals for whom there are currently arrest warrants.”<sup>71</sup> The Affidavit concluded by requesting authorization to search the Agriprocessors plant and “identify any of those 697 employees for whom the [USAO] obtained a criminal complaint.”<sup>72</sup> It argued, based on the Workforce Development records from the fourth quarter of 2007, that “[t]here is probable cause to believe that one or more of those subjects are present at Agriprocessors during regular working hours.”<sup>73</sup> Therefore, the Affidavit submitted, “[t]he agents intend to engage in consensual conversations with employees concerning their identification, and to request voluntary production of identification documents.”<sup>74</sup>

As a means of sorting the allegedly lawful Agriprocessors employees from the allegedly unlawful Agriprocessors employees, the Affidavit requested authorization to search and seize “from each person believed to be an employee of Agriprocessors any and all Agriprocessors-issued identification cards, Agriprocessors-issued entry or proximity cards, drivers’ licenses, or other means of identification from any person within the Agriprocessors facility.”<sup>75</sup>

The Affidavit also requested authorization to search and seize Agriprocessors’s computers and digital employment records,<sup>76</sup> as well as obtain biometric information from each employee present during the search, specifically information provided by hand-print identification scanners used by Agriprocessors to identify employees and their hours of work in the plant.<sup>77</sup> The

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<sup>71</sup> Affidavit, *supra* note 25, at ¶ 110.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at ¶ 111.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at ¶¶ 114-120.

<sup>77</sup> *Id.* at ¶ 112.

Affidavit argued that the government should, as part of its search, be allowed to use these scanners to assist in its identification of both lawful and unlawful employees.<sup>78</sup>

e. The Raid

Given the size that the investigation had taken, secrecy was critical to ensure that concerned workers would not flee prior to the day of the raid. On May 3, 2008, Doug Miller, general manager of the Cattle Congress in Waterloo, announced that the federal government had “leased out virtually the entire facility for a training exercise.”<sup>79</sup> Although neither the Cattle Congress management nor the federal government would comment further on the nature of the lease, one individual present at the Cattle Congress told a reporter that he worked for ICE.<sup>80</sup> Suspicion grew during the weekend as federal contractors installed generators to the various buildings at the Cattle Congress and the windows of the buildings were covered, obscuring any view inside them.<sup>81</sup> Miller stated that access to the Cattle Congress would be restricted for the length of the lease, except for Cedar Falls High School’s prom the following weekend.<sup>82</sup>

The announcement, and explanation of a “training exercise,” did little to quell local curiosity. In response to press inquiries about a possible immigration raid, Tim Counts, a spokesman for ICE, stated at the time, “ICE never talks about our investigative activity or possible future enforcement actions . . . . Regarding the exercise in Waterloo, there is currently no publicly releasable information about that, so we aren’t releasing any.”<sup>83</sup> Counts concluded that there would be a news blackout at the Cattle Congress, but he would not “speculate at what point that

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<sup>78</sup> *Id.*

<sup>79</sup> Pat Kinney, *Feds take over NCC fairgrounds for May training exercise*, WATERLOO-CEDAR FALLS COURIER, May 3, 2008, available at <http://www.wcfcourier.com/articles/2008/05/04/news/metro/10318480.txt>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> William Petroski, *U.S. lease of Waterloo fairgrounds raises questions*, DES MOINES REGISTER, May 6, 2008, Section B, at 1.

might be.”<sup>84</sup> Local concern was especially strong, because, in 2006, a similarly billed training exercise had resulted in an ICE raid at the Swift & Co. meatpacking plant in Marshalltown, Iowa; ICE used the military barracks at Camp Dodge in Johnston, Iowa, as detention facilities.<sup>85</sup>

By the end of the following week, suspicions became so strong that local immigration rights activists held a meeting at a Waterloo church to answer questions about a possible immigration raid.<sup>86</sup> The *Waterloo-Cedar Falls Courier* noted in its coverage leading up to the raid that Tyson Foods Inc. operates a meatpacking facility in Waterloo,<sup>87</sup> and there is little doubt that locals suspected the raid to occur there, rather than in Postville, where few workers had fled. Nevertheless, at 10:00 a.m. on May 12, ICE officials executed its criminal search warrant and arrest warrants at the Agriprocessors plant.<sup>88</sup>

### III. The Accelerated Criminal Process

#### a. Meeting of Defense Attorneys

Part of the accelerated process can be attributed to the planning of the district court. For the purposes of this article, I interviewed defense attorneys Christopher Clausen, Stephen Swift, Alfred Willett and Michael Lahammer in the weeks and months after the raid. Each had received a phone call from the court some time in April, asking if the attorney could clear his schedule for two weeks in May to assist the court in an operation; the court provided no further details about the operation or the details of the work and asked that the attorney keep the request completely confidential until the briefing on May 12.<sup>89</sup> Only on the day of the raid did any

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Activists worried about immigration raid in Waterloo*, WATERLOO-CEDAR FALLS COURIER, May 12, 2008, available at [http://www.wfcourier.com/articles/2008/05/11/news/breaking\\_news/doc48278699f2e7a234748700.txt](http://www.wfcourier.com/articles/2008/05/11/news/breaking_news/doc48278699f2e7a234748700.txt).

<sup>87</sup> *Id.*

<sup>88</sup> ICE Press Release, *supra* note 13; *see also* Saulny, *supra* note 3, at 13.

<sup>89</sup> Interview with Stephen Swift, CJA Panel Defense Attorney, Northern District of Iowa, in Cedar Rapids, Iowa (July 2, 2008) (hereinafter *Swift Interview*) (recording on file with author); Interview with Alfred Willett, CJA Panel Defense Attorney, Northern District of Iowa, in Cedar Rapids, Iowa (July 9, 2008) (hereinafter *Willett Interview*)

defense attorneys learn about the nature of the raid and their role in the subsequent criminal prosecutions. At approximately the same time as the commencement of the raid, the defense attorneys, selected by the district court from its Criminal Justice Act panel, congregated in the third-floor courtroom of the federal courthouse in Cedar Rapids, Iowa.<sup>90</sup> Approximately 20 defense attorneys were present in the courtroom the day of the raid, two assistant federal public defenders among them.<sup>91</sup> Also present were various judges, and court and chambers staff.<sup>92</sup>

Assistant United States Attorney for the Northern District of Iowa Richard Murphy, the chief of the criminal division, and Assistant United States Attorney Stephanie Rose announced the nature of the operation. ICE, along with other federal agencies, raided the Agriprocessors plant, seeking to execute nearly 700 criminal arrest warrants.<sup>93</sup> Attorney Clausen explained that, upon receiving information, he immediately began to divide 700 by the number of colleagues he counted in the court gallery, leading to a rough calculation of 35 defendants per attorney.<sup>94</sup>

The district court had attempted to ameliorate the necessary lack of preparation among the defense attorneys by presenting them with a manual (“Manual”), a “117-page compendium of scripts, laying out step by step the hearings that would come after the raid . . . .”<sup>95</sup> The Manual contained 15 sections,<sup>96</sup> which included: model scripts for the presiding judges for initial appearances, guilty pleas and sentencings; relevant statutes and provisions of the United States Sentencing Guidelines (“Sentencing Guidelines”); a model waiver of indictment; a model

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(recording on file with author); Interview with Christopher Clausen, CJA Panel Defense Attorney, Northern District of Iowa, in Cedar Rapids, Iowa (July 18, 2008) (hereinafter *Clausen Interview*) (recording on file with author); Interview with Michael Lahammer, CJA Panel Defense Attorney, Northern District of Iowa, in Cedar Rapids, Iowa (August 21, 2008) (hereinafter *Lahammer Interview*, and, collectively with the *Swift Interview*, *Willett Interview* and *Clausen Interview*, *Defense Attorney Interviews*) (recording on file with author).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Clausen Interview*, *supra* note 89.

<sup>95</sup> *Preston I*, *supra* note 4.

<sup>96</sup> USAO Manual for Defense Attorneys (May 12, 2008) (on file with author), also available at <http://www.aclu.org/immigrants/workplace/36215res20080731.html> (hereinafter “Manual”).

consent to plead guilty before a magistrate judge; a model report and recommendation regarding a defendant's guilty plea; a model waiver of time to object to the report and recommendation regarding the defendant's guilty plea and consent to acceptance of a guilty plea by a district judge; a model order accepting the magistrate judge's report and recommendation regarding defendant's guilty plea; and a model stipulated request for judicial removal and removal order.<sup>97</sup> According to the *New York Times*, the Manual "was compiled before the raid by court officials . . . with input from the office of the United States Attorney Matt M. Dummermuth."<sup>98</sup> Although once the nature of the operation was revealed most of the assembled defense attorneys agreed to participate, at least one defense attorney refused.<sup>99</sup>

Criticisms following the raid focused on the Manual as evidence of improper cooperation between the USAO and the district court.<sup>100</sup> The defense attorneys I interviewed did not perceive the Manual as coercive, or as evidence of improper cooperation, but took it as a valuable resource for organizing their representations of their clients.<sup>101</sup> Moreover, these criticisms of the Manual do not grapple with the real issues; the Manual does not so much evidence improper cooperation but a lack of attention to the relevant law.<sup>102</sup> I will discuss in Part IV the improper applications of two statutes critical to the accelerated criminal proceedings, Section 1028A(a)(1) and 8 U.S.C. § 1228(c)(5) (judicial removal).

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<sup>97</sup> *Id.*

<sup>98</sup> *Preston I*, *supra* note 4.

<sup>99</sup> *Id.*

<sup>100</sup> *Preston I*, *supra* note 4; *Hearings*, *supra* note 53, at 5-6 (statement of Professor Robert R. Rigg, Associate Professor of Law and Director of the Criminal Defense Program at Drake University Law School).

<sup>101</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>102</sup> The Manual is rife with errors. It would be petty to list all of the errors here, but a typical example suffices to support the inference that thorough legal research and drafting did not undergird the model documents. In the model order accepting the magistrate judge's report and recommendation regarding the defendant's guilty plea, there is a reference to the standard of review set forth at Federal Rule of *Civil* Procedure 72(b). However, a district judge reviews a report and recommendation of a magistrate judge for a guilty plea in a criminal matter under Federal Rule of *Criminal* Procedure 59(b)(3).

b. Detention and Sorting of the Defendants at the Cattle Congress

The period between the inception of the raid and the initial appearances presents a gap in the information known either by the public or the assigned defense attorneys.<sup>103</sup> The ICE Press Release amounts to the only public record of what occurred at the Agriprocessors plant. According to the ICE Press Release, ICE agents determined through interviews of the employees who among them were in the United States illegally; ICE then administratively arrested its suspects and transported them either to Estel Hall, a temporary detention facility constructed by ICE on the Cattle Congress, or to local county jails.<sup>104</sup>

Local press, to a limited extent, confirmed the ICE account, *viz.*, that “[t]he questioning of plant workers continued throughout the day inside the plant. Workers were then put on white [Homeland Security] buses for transport to Waterloo, where the federal government ha[d] leased Estel Hall. . . . Windows of the buses were covered with white paper.”<sup>105</sup> ICE further explained that “[a]ll of those taken into custody . . . [were] interviewed by . . . Public Health Services officers to determine if they [had] health, caregiver, or other humanitarian concerns.”<sup>106</sup> ICE claimed to have released more than 40 detainees in response to concerns raised by such detainees during their interviews with the Public Health Services officers.<sup>107</sup> At Estel Hall, the detainees were provided “cots and a recreation space. The detainees had access to phones. Hot meals were served by a local caterer.”<sup>108</sup>

The defense attorneys I interviewed described what their clients had told them about the raid and detentions; these descriptions largely comport with the ICE and local press accounts.

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<sup>103</sup> The USAO declined my repeated requests for an interview.

<sup>104</sup> ICE Press Release, *supra* note 13, at 1; Alicia Ebaugh, *300 workers held – Identity theft, fraud among charges*, CEDAR RAPIDS GAZETTE, May 13, 2008, Section A, at 1 (hereinafter *Ebaugh*).

<sup>105</sup> *Ebaugh*, *supra* note 104, at 1.

<sup>106</sup> ICE Press Release, *supra* note 13, at 1.

<sup>107</sup> *Id.*

<sup>108</sup> *Hearings*, *supra* note 53, at 6 (statement of Deborah J. Rhodes, Senior Associate Deputy Attorney General, United States Department of Justice).

According to these defense attorneys, ICE agents sought *Miranda* waivers from, and interviewed, each of the workers at the Agriprocessors plant about his or her immigration status.<sup>109</sup> Attorney Willett stated that at least one of his clients refused to sign a *Miranda* waiver or otherwise speak with ICE agents.<sup>110</sup> He reported that ICE agents applied at least some pressure to the client during the interview by stating to the client that if the client did not wish to cooperate, the client had the option of seeking a lengthy trial.<sup>111</sup>

Through these on-site interviews, and subsequent interviews at the Cattle Congress, federal prosecutors, both from the USAO as well as the DOJ, were able to match detained workers with false identification documents and false employment documents the lawyers already possessed.<sup>112</sup> The discovery file for a typical defendant contained: a copy of the criminal complaint; an allegedly fraudulent visa or social security card discovered on the defendant's person or in the defendant's on-site locker; a *Miranda* waiver and summary of the defendant's statement to ICE agents; and an employment document, normally a Form I-9, allegedly containing false identification information and the defendant's signature.<sup>113</sup> Accompanying each discovery file was a proposed plea agreement, which, among other things, required the defendant to waive indictment and cooperate with the government's on-going investigation.<sup>114</sup> By its

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<sup>109</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>110</sup> *Willett Interview*, *supra* note 89.

<sup>111</sup> *Id.*

<sup>112</sup> *Defense Attorney Interviews*, *supra* note 89 (stating that discovery files provided by federal prosecutors evidenced matching particular detained individuals with allegedly fraudulent employment documents signed by such individuals).

<sup>113</sup> *Willett Interview*, *supra* note 89; *Lahammer Interview*, *supra* note 89. A transcript of the interview and client statement was also available to defense counsel upon request.

<sup>114</sup> *Defense Attorney Interviews*, *supra* note 89; *see also United States of America v. Lastor-Gomez*, case no. 08-CR-1141-LRR, docket no. 5-2, ¶¶ 2, 6 (N.D. Iowa May 19, 2008) (containing typical plea provisions for the waiver of indictment and the obligation of the defendant to cooperate).

terms, the proposed plea agreement remained an open offer to the defendant for a period of seven days after the defendant's initial appearance.<sup>115</sup>

c. The Criminal Process

i. The Initial Appearances

The initial appearance is a brief hearing before the court, at which the defendant learns of the charges brought against him by the government, either by way indictment from a grand jury or by criminal complaint. Prompt filing of the criminal complaints was crucial to the criminal prosecutions. To avoid *habeas* problems, the USAO was required to charge a defendant within 72 hours of arrest at the raid.<sup>116</sup> However, the defense attorneys were not assigned clients until late the next day, Tuesday, or Wednesday, May 14,<sup>117</sup> because technology problems interfered with the progress of the operation<sup>118</sup>. Specifically, the software employed by ICE to match detainees with the criminal complaints filed by the USAO, and to organize detainees by substantive criminal charge into groups of 10, failed to operate as anticipated.<sup>119</sup> As a result, by the end of day after the raid, only one group of 10 defendants had made an initial appearance before a federal magistrate judge.<sup>120</sup>

The delay resulted in very little time for the defense attorneys to meet with their clients prior to the initial appearances on the criminal complaints. After receipt of the discovery files and

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<sup>115</sup> See, e.g., *United States of America v. Lastor-Gomez*, case no. 08-CR-1141-LRR, docket no. 5-2, ¶ 11 (N.D. Iowa May 19, 2008) (“A signed copy of this agreement must be delivered to a representative of the United States Attorney’s Office **by 5:00 p.m. seven calendar days from the date of defendant’s initial appearance in court** or this offer will be withdrawn.” (Emphasis in original)).

<sup>116</sup> *Hearings*, *supra* note 53, at 9 (statement of Dr. Erik Camayd-Freixas, Federally Certified Interpreter).

<sup>117</sup> *Swift Interview*, *supra* note 89; *Willett Interview*, *supra* note 89; *Clausen Interview*, *supra* note 89; *Lahammer Interview*, *supra* note 89.

<sup>118</sup> Jeff Raasch, *Technology problem shuts down immigration hearings*, CEDAR RAPIDS GAZETTE ONLINE, May 13, 2008, available at <http://gazetteonline.com/apps/pbcs.dll/article?AID=/20080513/NEWS/373506579&SearchID=73326154284434> (hereinafter *Raasch*).

<sup>119</sup> *Willett Interview*, *supra* note 89; *Lahammer Interview*, *supra* note 89; see also *Hearings*, *supra* note 53, at 7 (statement of Dr. Erik Camayd-Freixas, Federally Certified Interpreter) (describing the failure of the “barcode booking system” employed by ICE to promptly transmit information regarding the detainees to the USAO).

<sup>120</sup> *Raasch*, *supra* note 118.



proposed plea agreements from the USAO, the defense attorneys met with their clients either prior to their initial appearances, or shortly thereafter, to discuss the criminal charges.<sup>121</sup> Two of the defense attorneys described these initial meetings with their clients as somewhat cumbersome, because the meetings took place inside Estel Hall, in areas partitioned from the cots and recreation area by temporary walls, and other groups and their lawyers were waiting nearby for use of these meeting spaces.<sup>122</sup> Attorney Willett said that the meeting room provided by ICE at Estel Hall did not provide for meaningful attorney-client privilege.<sup>123</sup> It was not unusual for defense attorneys to wait as much as two hours to meet with their clients at Estel Hall.<sup>124</sup> During the initial meetings, the defense attorneys discussed the charges both with the group as a whole as well as with each of their clients individually.<sup>125</sup> They explained that they were appointed by the court to represent the defendants' interests in the defendants' criminal cases for the use of false identification documents.<sup>126</sup>

The initial appearances themselves were brief, although somewhat prolonged by the necessity of simultaneous interpretations between English and Spanish, as well as by the number of defendants. A United States Magistrate Judge read the charges against the defendants; if an individual defendant was charged with a crime distinct from the others in his or her group, the judge read the charge separately to the individual defendant.<sup>127</sup> The judge ensured that each defendant had a copy of his or her criminal complaint<sup>128</sup> and then scheduled a status conference

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<sup>121</sup> *Defense Attorney Interviews*, *supra* note 89; *see also Lahammer Interview*, *supra* note 89 (stating that he was only able to meet briefly with his clients before their initial appearances).

<sup>122</sup> *Swift Interview*, *supra* note 89; *Willett Interview*, *supra* note 89.

<sup>123</sup> *Willett Interview*, *supra* note 89.

<sup>124</sup> *Willett Interview*, *supra* note 89 (describing his own wait of approximately 45 minutes as remarkable given that another defense attorney waited two hours); *Clausen Interview*, *supra* note 89 (describing another defense attorney's two-hour wait to meet with his clients in Estel Hall).

<sup>125</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>126</sup> *Id.*

<sup>127</sup> *Swift Interview*, *supra* note 89; *Willett Interview*, *supra* note 89.

<sup>128</sup> *Willett Interview*, *supra* note 89.

for the following week, typically six to seven days from the date of the initial appearance, after the defendants had a chance to consider the plea agreements from the USAO.<sup>129</sup> Nearly all of the defendants were detained pending trial<sup>130</sup> and remanded to the custody of the United States Marshals Service (“USM”)<sup>131</sup>.

Whatever difficulties the initial client meetings had encountered were offset by the depth of subsequent meetings. Later during the day of a group’s initial appearance, the USM transported the defendants to jails throughout the state.<sup>132</sup> The meeting facilities at the local jails proved much more amenable to attorney-client discussion. In addition to the increased privacy, the jails, and their schedules, provided for extensive meetings between attorneys and each of the defendants; for example, Attorney Lahammer, along with an interpreter, was able to meet with his 10 clients for more than nine hours on the day after the initial appearance, at the Bremer County jail in nearby Waverly, Iowa.<sup>133</sup> There were, however, initially some access problems for the interpreters, which Attorneys Swift and Willett stated caused simply minor delays.<sup>134</sup>

#### ii. Section 1028A(a)(1) and the Plea Offer

For the vast majority of defendants, Section 1028A(a)(1) drove the entire plea process. The section’s relationship to particular features of federal criminal law and the Sentencing Guidelines explain the accelerated trajectory of the plea negotiations.

The USAO offered to resolve the charges against the defendants through plea agreements. Generally, defendants who were charged with using merely invalid social security numbers in pursuit of employment at Agriprocessors were offered probation in exchange for a stipulation to

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<sup>129</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>130</sup> *Id.*

<sup>131</sup> *Largest Ever Criminal Worksite Enforcement Operation Stretches Court*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Vol. 40, No. 6, June, 2008, at 1 (hereinafter *THIRD BRANCH*).

<sup>132</sup> *Id.*

<sup>133</sup> *Lahammer Interview*, *supra* note 89.

<sup>134</sup> *Swift Interview*, *supra* note 89; *Willett Interview*, *supra* note 89.

immediate judicial removal, also known as deportation, to the defendant's home country; defendants who were charged with using the social security numbers of actual persons were offered prison terms of five months in exchange for cooperation with the on-going investigation of Agriprocessors, as well as stipulations to judicial removal.<sup>135</sup>

Although the terms of the plea offers varied widely,<sup>136</sup> the vast majority of defendants were offered five-months imprisonment.<sup>137</sup> 230 of the 305 defendants agreed to five-month prison sentences for use of a false identification document of another person to obtain employment; an additional 30 agreed to the same prison term for using the Social Security number or card of another person for employment purposes.<sup>138</sup>

The five-month term in the plea offer was not an arbitrary figure; it was based on reasoning under applicable federal law. Nearly all defendants were charged with either the unlawful use of a social security number, under 42 U.S.C. § 408(a), or possession or use of a fraudulent identification document for the purposes of employment, under 18 U.S.C. § 1546(a). The statutory maximum under § 408(a) is five years imprisonment,<sup>139</sup> and the statutory maximum under § 1546(a), if the violation does not involve terrorism or narcotics, is 10 years imprisonment<sup>140</sup>.

The Sentencing Guidelines are only advisory, but a sentence within a properly calculated Sentencing Guidelines range is considered presumptively reasonable on appeal.<sup>141</sup> If convicted

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<sup>135</sup> Grant Schulte, *Agriprocessors identity theft puts data of 230-plus at risk*. DES MOINES REGISTER, August 22, 2008, Section B, at 1 (hereinafter *Schulte*).

<sup>136</sup> For example, a client of Attorney Swift's was offered a prison term of one year and one day, because he had previously been removed from the United States for unlawful entry. *Swift Interview*, *supra* note 89.

<sup>137</sup> Julia Preston, *270 Sent to Prison in Federal Push*. N.Y. TIMES, May 24, 2008, Section A, at 1 (hereinafter *Preston II*).

<sup>138</sup> Nigel Duara and Grant Schulte, *Family faces uphill battle to stay together after raid*, DES MOINES REGISTER, May 24, 2008, Section A, at 1.

<sup>139</sup> 42 U.S.C. § 408(a) (2006).

<sup>140</sup> 18 U.S.C. § 1546(a) (2006).

<sup>141</sup> *See, e.g., U.S. v. Braggs*, 511 F.3d 808, 812 (8th Cir. 2008) (describing Eighth Circuit sentencing law).

of either charge, under the Sentencing Guidelines defendants with no criminal history, or prior removal or deportation, would merit a sentence between zero and six months. The Sentencing Guidelines provide that a violation of 42 U.S.C. § 408(a) is governed by USSG § 2B1.1 and that a violation of 18 U.S.C. § 1546(a) is governed by USSG § 2L2.2.<sup>142</sup> The base offense level under USSG § 2B1.1 for a violation of § 408(a) is six.<sup>143</sup> There was general agreement among the defense attorneys and the USAO that the specific offense characteristics that increased the offense level<sup>144</sup> did not apply to the defendants arrested in the raid<sup>145</sup>. The base offense level under USSG § 2L2.1 for a violation of § 1546(a), if not made for profit, is eight.<sup>146</sup> Similarly, the defense attorneys and the USAO generally agreed that the specific offense characteristics that increased the offense level, under USSG § 2L2.1(b)(2), did not apply. Therefore, under the Sentencing Guidelines, a defendant with no criminal history, who scores an offense level of either a six or an eight, merits between zero and six months imprisonment.<sup>147</sup>

However, those defendants who used the valid social security numbers of other persons in obtaining employment at Agriprocessors were also charged with aggravated identity theft, under

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<sup>142</sup> U.S. SENTENCING GUIDELINES appx. A (2007).

<sup>143</sup> USSG § 2B1.1.

<sup>144</sup> See USSG § 2B1.1(b).

<sup>145</sup> *Clausen Interview*, *supra* note 89.

<sup>146</sup> USSG § 2L2.1(a)-(b).

<sup>147</sup> USSG ch. 5, pt. A. Of course, it is far from settled that the specific offense characteristics for USSG §§ 2B1.1 and 2L2.1 would not apply. For example, in using a fraudulent social security number to obtain employment, a defendant may have received the number as a result of a theft from another person, which would merit a two-level increase. See USSG § 2B1.1(b)(3). Or such use of a social security number may constitute the use of an “authentication feature,” which would merit an increase, at least, to an offense level of 12. USSG § 2B1.1(b)(9). It is more certain that the specific offense characteristics under § 2L2.1 would not apply, because such characteristics relate to the use and type of multiple fraudulent documents, the use of such documents to commit distinct, non-immigration, felonies, and the existence of a prior immigration felony. USSG § 2L2.1(b)(2)-(5). At least facially, there is no indication that those Agriprocessors defendants that were charged under § 1546(a) with the use of a fraudulent identification document fit any of these specific offense characteristics, as part of the alleged violations. Furthermore, the chapter 3 enhancements under the Sentencing Guidelines might also apply in certain cases, thereby further increasing a defendant’s offense level, but the reductions in that chapter could similarly apply. The point is that the calculated Sentencing Guidelines range of zero to six months imprisonment amounts to a rough estimate, perhaps even a low estimate.

§ 1028A(a)(1),<sup>148</sup> in addition to any charges under § 408(a) or § 1546(a). Those who allegedly had not used the social security numbers of other actual persons were offered probation and immediate removal to their countries of origin; they were not charged under § 1028A(a)(1).<sup>149</sup>

The plea offers of five months, therefore, were premised upon a credible threat of prosecution under § 1028A(a)(1), which would entail a two-year mandatory minimum. The threat was a credible one, because in the Eighth Circuit, the government need not prove that a defendant knew the means of identification that the defendant transferred, used or possessed belonged to another actual person.<sup>150</sup>

### iii. Plea Negotiations

Professor Camayd-Freixas,<sup>151</sup> a federally-certified interpreter who assisted both attorney-client communications and the court proceedings after the raid, has argued that the plea agreements were coerced<sup>152</sup>. Professor Rigg leveled similar criticisms of the procedures following the raid, *viz.*, group representation of defendants and the compression of the process undermined their due process rights.<sup>153</sup> Circumstances counsel that I avoid the issue of whether the plea agreements were knowing, intelligent and voluntary for purposes of the Sixth Amendment. I did not speak to the defendants, and I have only the Defense Attorney Interviews upon which to rely.

Therefore, my aim in this subsection is merely descriptive. Based on the evidence available to me, the plea agreements were the product of a subtle systemic coercion, *viz.*, the threat of a consecutive, mandatory two-year sentence of imprisonment did not present the defendants with a

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<sup>148</sup> *Schulte, supra* note 135.

<sup>149</sup> *Id.*

<sup>150</sup> *See Mendoza-Gonzalez*, 520 F. 3d at 916.

<sup>151</sup> Erik Camayd-Freixas is a professor in the Modern Languages department at Florida International University and director of its Translation and Interpretation program. He is not an attorney nor does he hold a juris doctorate.

<sup>152</sup> *Hearings, supra* note 53, at 4 (statement of Dr. Erik Camayd-Freixas, Federally Certified Interpreter).

<sup>153</sup> *Hearings, supra* note 53, at 5-6 (statement of Professor Robert R. Rigg, Associate Professor of Law and Director of the Criminal Defense Program at Drake University Law School).

live option. Regardless of their actual guilt, the risk involved in challenging the USAO's evidence made acceptance of the plea offer the only rational choice. The pleas agreements were not coerced in a strict sense; the terms were negotiable and the plea agreements were entered into voluntarily. But the presence of a negotiable and voluntary agreement for each defendant did not create a meaningfully free choice.

The absence of strict coercion does not imply that the defendants became experts in federal criminal law and procedure. The defense attorneys I interviewed were unanimous in their explanations that a detailed description of federal criminal procedure and the Sentencing Guidelines would be of little use to their clients.<sup>154</sup> For example, Attorney Lahammer had difficulty explaining to his clients the federal grand jury procedures and a waiver of the right to indictment,<sup>155</sup> and Attorney Swift stated that the Sentencing Guidelines were simply too complex to describe in any detail<sup>156</sup>.

The defendants were not, as a group, particularly sophisticated. A typical client was a young male with little formal education; Attorney Willett noted that his clients ranged from illiterate to possessing as much as a seventh-grade education.<sup>157</sup> The language barrier impeded the progress of attorney-client discussions.<sup>158</sup> However, Attorney Clausen noted, by example, that a PhD can have difficulty understanding how a court may order an administrative revocation of her driver's license for driving under the influence even though she was never convicted of a criminal drunk driving offense.<sup>159</sup> It is unreasonably optimistic to expect each and every client, *i.e.*, a less

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<sup>154</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>155</sup> *Lahammer Interview*, *supra* note 89.

<sup>156</sup> *Swift Interview*, *supra* note 89.

<sup>157</sup> *Willett Interview*, *supra* note 89.

<sup>158</sup> *Clausen Interview*, *supra* note 89; *Lahammer Interview*, *supra* note 89.

<sup>159</sup> *Clausen Interview*, *supra* note 89.

educated, non-English-speaker, to grasp the nuances of an unfamiliar criminal justice system, as well as its interaction with prevailing immigration law.<sup>160</sup>

The defendants' appetite for prompt resolutions of the charges explains much of the speed of the plea negotiations process. The defense attorneys I interviewed described largely similar exchanges with their clients regarding the plea offers. Typically, the defense attorney described the charges and what the government had to prove in order to make its case; the attorney then explained that if convicted by a jury after a trial, the client would spend a minimum of two years in federal prison, before being removed to the client's country of origin.<sup>161</sup> The defense attorneys explained that the government's evidence under the charges, both the § 1028A(a)(1) charge and its predicate charge, was very strong: nearly all of their clients had signed *Miranda* waivers acknowledging their use of false social security numbers or I-9s, and the USAO had copies of the false documents their clients used, as well as signed W-2s in some cases.<sup>162</sup> However, if the client were willing to waive indictment and stipulate to removal, the USAO would dismiss the § 1028A(a)(1) charge and recommend the client serve only five months imprisonment.<sup>163</sup> As Attorney Clausen explained, the choice presented by the plea offer did not present comprehension problems; each client could grasp the exchange involved, *viz.*, if the client permitted the government to forgo the time and cost of indictment and trial, the USAO would not seek to enforce a two-year minimum sentence, and the client would only have to serve five months before being removed.<sup>164</sup> He also explained to his clients that an appeal to the

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<sup>160</sup> *Id.*

<sup>161</sup> *Defense Attorney Interviews, supra* note 89.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* The USAO engaged in charge bargaining here under the DOJ's fast-track program, which allows federal prosecutors, in limited circumstances, to develop procedures for the expedited disposition of criminal cases and "to charge less than the most serious, readily provable offense." John Ashcroft, Attorney General, Memo Regarding Policy On Charging of Criminal Defendants to All Federal Prosecutors (Sept. 22, 2003) (on file with author), available at [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm).

<sup>164</sup> *Defense Attorney Interviews, supra* note 89.

Eighth Circuit Court of Appeals of any conviction under § 1028A(a)(1), would take at least year, if not more.<sup>165</sup> Attorney Willett stated that eight of his 10 clients wanted to accept their plea offers immediately.<sup>166</sup>

The eagerness of the defendants to sign their agreements, coupled with the eventual assent of each defendant to whom an offer was extended, do not suggest that the plea offers were favorable and freely accepted. Rather, these features reveal how little control and choice the defendants had over the dispositions of their cases. The coercion involved flowed from the law itself, *i.e.*, the improper application of § 1028A(a)(1); it did not flow from an absence of knowledge or choice. Indeed, the defendants understood their limited choices all too well: put the government to its proof and exercise one's rights, and risk at least two years imprisonment, or take the deal and spend no more than five months out of work.

The defense attorneys also emphasized the importance of certainty for their clients, who were anxious about when they could return home to their families.<sup>167</sup> After the defense attorneys explained the contours of the plea offer, the prospect of a minimum two-year prison term made the offer of five months exceedingly attractive.<sup>168</sup> The plea offers were extended pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which allows the government and the defendant to stipulate to a sentence, from which the court may not deviate, if the court decides to accept the plea agreement.<sup>169</sup> In other words, the court could not accept the plea agreement in part and then modify the stipulated sentence; the court could only reject the plea agreement in total. A

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<sup>165</sup> *Clausen Attorney Interview, supra* note 89.

<sup>166</sup> *Willett Interview, supra* note 89.

<sup>167</sup> *Defense Attorney Interviews, supra* note 89.

<sup>168</sup> *Id.*

<sup>169</sup> The relevant language states that “If the defendant pleads guilty . . . to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will: (C) agree that a specific sentence . . . does or does not apply (*such a recommendation or request binds the court once the court accepts the plea agreement*).” FED. R. CRIM. P. 11(c)(1)(C) (emphasis added). The Rule also provides that, for Rule 11(c)(1)(C) plea agreements, “the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.” FED. R. CRIM. P. 11(c)(3)(A).



rejection by the court would require a renegotiation of the terms, which would involve the client's consent. The defense attorneys reported that the plea agreements provided certainty to their clients, who craved resolution; even if the client sought a trial on his charges, a period of at least two to three months would elapse between indictment and a final jury verdict, followed by an additional nine to 12 months for an appeal of any adverse judgment.<sup>170</sup> Moreover, if the client were to prevail on all charges at trial, ICE's subsequent administrative removal proceedings, according to Attorney Clausen, who had acted as immigration counsel for numerous clients in the Swift Raid in 2006, normally require two to six weeks for resolution before the foreign national is returned to his country of origin.<sup>171</sup> Therefore, the costs, in terms of detention time, of challenging the government's evidence were only marginally preferable to a five-month sentence but, in addition, carried the risk of a two-year sentence. The defense attorneys noted that nearly all of their clients were anxious to accept the plea offers once the various options and consequences were explained to them in some detail.<sup>172</sup> The clients' interests in a swift, certain resolution were necessary elements of the accelerated plea process;<sup>173</sup> Attorney Willett reported that he denied a few clients' requests to sign their plea agreements at their first meeting, telling them that there was no reason to hurry and that the clients should "sleep on it" until he returned the next day for further discussions<sup>174</sup>.

Professor Camayd-Freixas also wrongly states that the plea offers were not negotiated;<sup>175</sup> the plea offers were marginally, but not meaningfully, negotiable. For example, two of Attorney Willett's clients pleaded to aiding and abetting charges of document identification fraud, because

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<sup>170</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>171</sup> *Clausen Interview*, *supra* note 89.

<sup>172</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>173</sup> *Swift Interview*, *supra* note 89.

<sup>174</sup> *Willett Interview*, *supra* note 89.

<sup>175</sup> *Hearings*, *supra* note 53, at 20 (statement of Dr. Erik Camayd-Freixas, Federally Certified Interpreter) (stating that the plea offers were non-negotiable).

the clients did not obtain the documents themselves.<sup>176</sup> He explained that, despite the clients' desires to sign the plea agreements as offered, there was an insufficient factual basis for either plea, because the two clients had told him that employees of Agriprocessors had taken their pictures and provided them the false identification documents with their photographs.<sup>177</sup> Therefore, he could not ethically allow his clients to sign the plea agreements as offered.

When Attorney Willett raised the matter with the USAO, it immediately rejected the possibility of an *Alford*<sup>178</sup> plea, and the USAO responded that it would seek trials if the defendants did not accept their plea offers.<sup>179</sup> After days of negotiations, the USAO eventually agreed to modify the plea offers to include only charges of aiding and abetting the substantive charge; although the five-month sentence and judicial removal stipulation remained, the substantive crime in the plea offers were modified in response to negotiations between the parties.<sup>180</sup>

Similarly, Attorney Lahammer reported that the USAO agreed to the omission of any stipulation to judicial removal for his clients who had children born in the United States; of course, the government retained the right to proceed administratively for removal upon the conclusion of the clients' criminal prison sentences, but it was a concession nonetheless.<sup>181</sup> Attorney Clausen stated that the USAO even considered reducing its plea offer of five-months imprisonment to probation upon learning that one of his clients had acquired his allegedly fraudulent identification documents within 24 hours prior to the raid; the USAO did not

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<sup>176</sup> *Willett Interview, supra* note 89.

<sup>177</sup> *Id.*

<sup>178</sup> *See North Carolina v. Alford*, 400 U.S. 25 (1970). The holding in *Alford* permits a defendant in criminal court to plead guilty to a criminal charge, while asserting her innocence and denying the underlying criminal conduct.

<sup>179</sup> *Willett Interview, supra* note 89.

<sup>180</sup> *Id.*

<sup>181</sup> *Lahammer Interview, supra* note 89.

subsequently agree to the reduction.<sup>182</sup> The plain fact is that the parties in some instances did engage in bargaining and modification, however meager.

The accelerated plea process was also a result of the uniform sense of guilt among the defendants; the defense attorneys noted, to a man, that each of their defendants had at least a generalized sense that their possession and use of fraudulent identification documents or means of identification were unlawful.<sup>183</sup> Similarly, none of their clients claimed to be lawfully present within the United States. In order to be convicted under § 1028A(a)(1), the government must prove, *inter alia*, that the defendant knowingly used, without lawful authority, the means of identification of another person.<sup>184</sup> Attorney Clausen, for example, described discussions he had with at least two clients, who posited that they did not actually know that the means of identification they acquired and used did not lawfully belong to them but to others.<sup>185</sup> They asked, coyly, how were they to know the means of identification were not properly issued to them?<sup>186</sup> The clients abandoned their inquiries after Attorney Clausen explored their accounts of how they acquired the means of identification, *e.g.*, one client acknowledged that one does not obtain a valid, government-issued identification document in Guatemala, as the client admitted he did in the United States, by having a private citizen fashion it in the citizen's basement in exchange for a large sum of cash.<sup>187</sup>

This uniform sense of guilt, though, should not be taken to mean that the defendants understood themselves to be guilty of aggravated identity theft under § 1028A(a)(1). There are degrees of guilt, and the sense among the defendants was merely generalized. The defendants

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<sup>182</sup> *Clausen Interview, supra* note 89.

<sup>183</sup> *Defense Attorney Interviews, supra* note 89.

<sup>184</sup> *See Mendoza-Gonzalez*, 520 F.3d at 916. Whether the knowledge element of the statute also applies to the statutory requirement that the means of identification belong to another actual, rather than fictional, person, will be addressed below.

<sup>185</sup> *Clausen Interview, supra* note 89.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

had little interest in parsing the various grades of false identification document charges against them. The option of parsing the charges, *i.e.*, to put the USAO to its evidentiary burden at trial, was not a live one, because the sentence for a conviction under § 1028A(a)(1) was too severe to risk, in light of the plea offer of five months imprisonment.

The sophistication of the defendants did not interfere with the pace of the plea negotiations. Professor Camayd-Freixas’s argument that the defendants, in general, lacked the capacity for “abstract” or “conceptual” thinking may very well be valid,<sup>188</sup> nevertheless, the conclusion does not imply that the defendants could not understand that they were in possession of, and used, the means of identification of persons not themselves for the purposes of employment. It suffices here to note that any prevailing cognitive limits did not necessarily correlate with a prevailing sense of innocence. As Attorney Swift noted, his clients were aware of the risks involved in seeking work in the U.S. with false identification documents; any encounter with law enforcement, they believed, would most likely result in removal to their countries of origin.<sup>189</sup>

As prevalent as the sense of guilt was among those arrested, the incredulity regarding the criminal sanctions was even more prevalent, although it did not appear to slow the accelerated plea process. For example, a client of Attorney Willett’s asked why ICE did not simply remove him back to Guatemala; Attorney Willett responded that the USAO wanted to “kick [him]” or “punish [him]” before any removal.<sup>190</sup> Put differently, Attorney Clausen explained that the USAO hoped that those convicted, upon their return to their countries of origin, would tell their

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<sup>188</sup> *Hearings, supra* note 53, at 4 (statement of Dr. Erik Camayd-Freixas, Federally Certified Interpreter) (stating that the plea offers were non-negotiable) (emphasis omitted).

<sup>189</sup> *Swift Interview, supra* note 89. I address the merits of the knowledge and intent elements of § 1028A(a)(1) as applied to these defendants below in Part IV.

<sup>190</sup> *Willett Interview, supra* note 89.

stories and thereby discourage others from seeking unlawful entry and employment in the Northern District of Iowa.<sup>191</sup>

The defense attorneys, if anything, slowed the accelerated plea process. Instinctively, criminal defense attorneys react with hostility to prosecutorial aggression. The defense attorneys, by and large, had to resist these instincts, because their clients felt a generalized sense of guilt and merely wanted to be returned to their countries of origin as promptly as possible.<sup>192</sup> It became apparent that the goals of the clients, *viz.*, swift disposition of their cases, were at odds with the typical goal of a criminal defense attorney, *viz.*, aggressively fighting the criminal charges.<sup>193</sup> Indeed, the defense attorneys among themselves discussed the possibility of collectively rejecting the plea offers and requesting trials for each of the 305 clients criminally charged after the raid.<sup>194</sup> The district court, and the other local players in the federal criminal system, could not accommodate such a collective effort: the USM could not find enough capacity in local county jails to house the defendants pending trial; the USAO lacks the capacity to individually try 305 cases; and the district court has only two active Article III judges, far too few to conduct 305 trials within the time limits mandated by the Speedy Trial Act.<sup>195</sup> This possibility, though, was deeply inimical to their clients' wishes, in light of the threat posed by a conviction under § 1028A(a)(1). The stated interests of their clients, in no small measure, aligned with those of the USAO; both sides wanted to minimize any delay in the resolution of

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<sup>191</sup> *Clausen Interview, supra* note 89.

<sup>192</sup> A client of Attorney Swift's stated flatly at their first meeting, "I know I'm guilty. When can I go home?" *Swift Interview, supra* note 89.

<sup>193</sup> Attorney Swift explained that, because of his clients' unambiguous wishes, he switched his focus from challenging the USAO's evidence to negotiating the best deals for his clients that he could manage. *Swift Interview, supra* note 89.

<sup>194</sup> *Swift Interview, supra* note 89; *Willett Interview, supra* note 89; *Lahammer Interview, supra* note 89.

<sup>195</sup> *Willett Interview, supra* note 89; *Clausen Interview, supra* note 89; *see also* 18 U.S.C. § 3161(c)(1) (mandating that a defendant's trial commence no later than 70 days after the filing of an indictment or information, whichever is later).

the criminal cases.<sup>196</sup> Although, as Attorney Willett discovered, the USAO expressed a willingness to bring to trial any case that could not be resolved through a plea agreement, the explicit goal of the USAO was to obtain as many pleas as possible during the life of the lease at the Cattle Congress.<sup>197</sup>

The favorability of the plea agreements relative to those normally propounded by the USAO also ensured a faster plea process. Attorney Clausen summarized the thoughts of his colleagues in the federal criminal defense bar. Had the USAO approached each of the defendants from the raid individually, the plea offers would have been much less advantageous to the defendants.<sup>198</sup> Attorney Clausen praised the USAO for its professionalism, but, he added, it is an aggressive office that does not normally permit pleas to lesser charges and typically pursues sentences at the upper-end of the Sentencing Guidelines range.<sup>199</sup> Outside of the raid context, the USAO would not have agreed to dismiss the § 1028A(a)(1) charge, and its two-year mandatory minimum.<sup>200</sup> Attorney Lahammer remarked, “It was a great plea offer. I wish I could get that in a lot of my other cases, where a client is looking at three or four years and gets five months.”<sup>201</sup>

#### iv. Plea Hearings and Sentencing Hearings

The district court was efficient in its dispositions after the plea agreements had been signed. Of the defense attorneys I interviewed, each reported that each of his clients accepted the plea offer and was sentenced the week of May 19, 2008.<sup>202</sup> Defendants appeared in groups of 10 to plead guilty before a magistrate judge in the Electric Park Ballroom at the Cattle Congress.<sup>203</sup>

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<sup>196</sup> Attorney Swift noted the congruence of interests between his clients on the one hand and the USAO in particular. *Swift Interview, supra* note 89.

<sup>197</sup> *Willett Interview, supra* note 89.

<sup>198</sup> *Clausen Interview, supra* note 89.

<sup>199</sup> *Id.*

<sup>200</sup> *Defense Attorney Interviews, supra* note 89.

<sup>201</sup> *Lahammer Interview, supra* note 89.

<sup>202</sup> *Defense Attorney Interviews, supra* note 89.

<sup>203</sup> *Id.*

The magistrate judge engaged in a single plea colloquy for each group of defendants; however, the magistrate judge asked each defendant individually at the conclusion of each distinct section if he or she understood the magistrate judge’s description of the rights and waivers in the section and consented to it.<sup>204</sup> The magistrate judge then recommended that the district court enter orders accepting the pleas of guilty.<sup>205</sup>

During the plea negotiations period, the United States Probation Office for the district court (“USPO”) “ran criminal histories, checked identification records, and then provided oral reports to the court” for “every one of the hundreds of cases . . . .”<sup>206</sup> The district judges were thus armed with a bare bones presentence investigation report for each defendant (“PSR”) at the time of sentencing. The usefulness of the PSRs in this context is unclear. Typically, the USPO has several weeks, if not months, between conviction and sentencing to prepare a PSR for a defendant, primarily as an aid to the district court in determining an appropriate sentence. The PSR, drafts of which are available to a defendant for review with his or her lawyer, also assist in shaping the issues to be litigated during sentencing. The accelerated process precluded any meaningful development of the record and investigation of defenses or mitigating facts. In other words, the price of the five-month prison sentence included forfeiture of an evidentiary process that may result in benefits for a defendant, *e.g.*, a lesser sentence. Of course, a PSR also may reveal additional facts that could increase a defendant’s sentence, so one cannot necessarily conclude that the absence of the typical PSR process for the defendants led to greater sentences than would otherwise have been imposed. Furthermore, it could be argued that the PSRs had no substantive impact here: the plea agreements were offered pursuant to Rule 11(c)(1)(C); the

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<sup>204</sup> Manual, *supra* note 96, at § 4.

<sup>205</sup> *Id.*

<sup>206</sup> *THIRD BRANCH*, *supra* note 131, at 1.

district judge could not alter the sentence, regardless of any information produced in the PSR or legal argument presented by defense counsel.<sup>207</sup>

Immediately following the plea hearing, the group of 10 was escorted to a nearby trailer for sentencing by a district judge;<sup>208</sup> defendants were sentenced in groups of three to five.<sup>209</sup> The defense attorneys stated that the district judges did not reject any of their clients' plea agreements, offered under Rule 11(c)(1)(C),<sup>210</sup> and a review of the district court docket and the press accounts implies that no plea agreement was rejected by the court. Similarly, a review of the district court docket, along with information provided by the defense attorneys I interviewed,<sup>211</sup> reveal that no employee opted for a trial.

d. Aftermath

As short as the criminal proceedings were, their effects persist. The raid itself was a mixed success for the USAO. According to a *Des Moines Register* analysis of the 697 criminal complaints, the raid managed only to detain about 30% of the named defendants.<sup>212</sup>

The raid snagged 220 of the 697 individuals believed to be illegal immigrants, or about 32 percent, who were identified in pre-raid criminal complaints as John or Jane Doe. The other 85 immigrants arrested during the operation were discovered as a result of the raid. The remaining 477 immigrants named in the warrants have so far escaped prosecution.<sup>213</sup>

Those sentenced to five-month prison terms largely remained in local county jails in Iowa,<sup>214</sup> and they may in all likelihood serve the entirety of their federal prison terms in such jails before

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<sup>207</sup> FED. R. CRIM. P. 11(c)(1)(C).

<sup>208</sup> *Preston II*, *supra* note 137.

<sup>209</sup> *Willett Interview*, *supra* note 89.

<sup>210</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>211</sup> *Id.*

<sup>212</sup> *Schulte*, *supra* note 135.

<sup>213</sup> *Id.*

<sup>214</sup> *Clausen Interview*, *supra* note 89; *Lahammer Interview*, *supra* note 89. For example, Attorney Lahammer reported that his clients remain in the Bremer County jail in Waverly. *Lahammer Interview*, *supra* note 89.



they are removed to their countries of origin. The defense attorneys I interviewed noted that a few of their clients remained in local county jails as a matter of convenience for the USAO; they have been called to testify before a federal grand jury in Mason City, Iowa, ostensibly to assist the USAO in its investigation of supervisors and managers at Agriprocessors.<sup>215</sup>

The large-scale criminal prosecutions of the employees eventually resulted, however, months later, in criminal action against the ownership and management. In July, the USAO charged two low-level supervisors with aiding and abetting the possession of a false resident alien card,<sup>216</sup> and in September, the USAO charged one supervisor with aiding and abetting document fraud and aiding and abetting aggravated identity theft, and one with harboring and aiding and abetting the harboring of undocumented aliens.<sup>217</sup> The two supervisors charged in July ultimately pleaded guilty to the charge.<sup>218</sup> As for the two charged in September, the district court ordered that at least 18 defendants remain in the United States as material witnesses for the case, while wearing GPS monitoring devices to track their movements.<sup>219</sup> The witnesses faced deportation when their testimony was no longer required.<sup>220</sup>

On September 10, 2008, the Iowa attorney general filed criminal charges against Agriprocessors, its owner and four executives, alleging 9,311 child labor violations.<sup>221</sup> The criminal complaint alleged violations related to 32 workers under the age of 18, seven of whom

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Attorney Willett, however, reported that many of his clients served their terms in a federal facility in Oakdale, Louisiana. *Willett Interview*, *supra* note 89.

<sup>215</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>216</sup> Trish Mehaffey, *Agriprocessors supervisors plead not guilty to charges*, CEDAR RAPIDS GAZETTE, July 18, 2008, Section B, at 2.

<sup>217</sup> *2 Postville plant employees indicted*, CEDAR RAPIDS GAZETTE, September 19, 2008, Section B, at 3.

<sup>218</sup> The first supervisor to plead guilty also agreed to plead guilty to an additional charge of conspiracy. Grant Schulte, *Meat plant official faces prison term*, DES MOINES REGISTER, August 21, 2008, Section B, at 3. The second supervisor pled only to an aiding and abetting charge. *Iowa: Guilty Plea in Immigration Case*, N.Y. TIMES, August 28, 2008, Section A, at 20.

<sup>219</sup> Grant Schulte and Tony Leys, *Illegal workers brought back to Postville by U.S.*, DES MOINES REGISTER, Oct. 17, 2008, Section A, at 1.

<sup>220</sup> *Id.*

<sup>221</sup> Tony Leys and Jennifer Jacobs, *Agriprocessors owner, 4 executives charged*, DES MOINES REGISTER, Sept. 10, 2008, Section A, at 1.

were under the age of 16.<sup>222</sup> Each count is punishable by 30 days in jail and a fine of \$625. It is a misdemeanor in Iowa to employ anyone under the age of 18 in a slaughterhouse.<sup>223</sup> The company's wage problems continued; on October 29, 2008, Workforce Development levied fines nearing \$10 million upon the company for improperly deducting the costs of protective clothing and uniforms from its employees' paychecks.<sup>224</sup>

The former CEO encountered a variety of criminal charges. On October 30, 2008, the USAO executed a criminal complaint against Agriprocessors's Sholom Rubashkin, charging him with conspiracy to harbor illegal aliens and abetting aggravated identity theft; if convicted, the former CEO could serve 22 years in prison.<sup>225</sup> The USAO's criminal complaint suggests that Rubashkin oversaw the preparation of dozens of fraudulent permanent resident alien cards during the afternoon and evening of Sunday, May 11, 2008, the night before the raid.<sup>226</sup>

On November 14, 2008, Rubashkin was charged by criminal complaint in a separate matter with bank fraud; Rubashkin allegedly inflated the value of accounts receivable to a lender for whom such accounts were collateral for a line of credit.<sup>227</sup> The same day he was indicted in a third criminal case with aiding an abetting the harboring of illegal aliens, document fraud and aggravated identity theft.<sup>228</sup> He became a co-defendant with Karina Freund, who was one of the supervisors charged in September.<sup>229</sup> Rubashkin has been detained by the USM pending trial.<sup>230</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> *State of Iowa v. Agriprocessors, Inc., et al.*, SMC009340-9345, docket no. 1, at 1 (Iowa Dist. Sept. 9, 2008) (citing IOWA CODE § 92.8(9) (2007)).

<sup>224</sup> Julia Preston, *Meatpacker Is Fined Nearly \$10 Million*, N.Y. TIMES, Oct. 30, 2008, Section A, at 22.

<sup>225</sup> *U.S. v. Rubashkin*, case no. 08-MJ-00363, docket no. 1 (N.D. Iowa Oct. 30, 2008); Julia Preston, *After Raid, Federal Charges for Ex-C.E.O. at Meatpacker*, N.Y. TIMES, Oct. 31, 2008, Section A, at 14.

<sup>226</sup> *Rubashkin*, case no. 08-MJ-00363, docket no. 1, at ¶ 22.

<sup>227</sup> *U.S. v. Rubashkin*, case no. 08-MJ-381-JSS, docket no. 1, at 1 (N.D. Iowa Nov. 14, 2008).

<sup>228</sup> *U.S. v. Rubashkin*, case no. 08-CR-1324-LRR, docket no. 80 (N.D. Iowa Nov. 14, 2008).

<sup>229</sup> *Id.*

<sup>230</sup> Tony Leys, *Agriprocessors' Rubashkin to stay in jail*, DES MOINES REGISTER, Nov. 21, 2008, Section B, at 1.

The company's various legal woes culminated in its filing for bankruptcy under Chapter 11 on November 5, 2008, in the bankruptcy court for the Eastern District of New York; the company's headquarters are in Brooklyn.<sup>231</sup>

The raid also wrought hardships upon the released employees, the families of the those detained and the community. The 45 detainees that ICE released for humanitarian reasons hardly fared any better; those released wore electronic ankle bracelets to track their movements, and they were not allowed to leave the state until their cases had been resolved, or until the USAO decided they were unnecessary as material witnesses in other prosecutions.<sup>232</sup> Unable to seek other lawful employment, they were particularly vulnerable, dependent upon the St. Bridget Roman Catholic Church ("Church") for support; the Church reported that it cost about \$10,000 to \$15,000 per week to support the 45 immigrants and their families.<sup>233</sup>

After the raid, as many as 400 Guatemalans and Mexicans in Postville had sought refuge in the Church, because their spouses and parents had been arrested in the raid.<sup>234</sup> The Church provided shelter and food for immigrants and their families who no longer felt safe in their homes.<sup>235</sup> The local food pantry began rationing its donations; accustomed to feeding 30-40 families per week, it struggled to serve the hundreds of hungry people seeking its services.<sup>236</sup> In one week in June alone it served a unit, "about a week's worth of groceries[,]'" to each of the approximately 600 persons who requested assistance.<sup>237</sup>

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<sup>231</sup> Julia Preston, *Large Iowa Meatpacker in Illegal Immigrant Raid Files for Bankruptcy*, N.Y. TIMES, Nov. 6, 2008, Section A, at 21.

<sup>232</sup> Nigel Duara, *Dozens in Postville face indefinite wait*, DES MOINES REGISTER, July 16, 2008, Section A, at 1.

<sup>233</sup> *Id.*

<sup>234</sup> Sally Morrow, *Families still in limbo after raid in Postville*, DES MOINES REGISTER, June 13, 2008, Section A, at 1.

<sup>235</sup> Tony Leys, *For Postville immigrants, St. Bridget's is safe haven*. DES MOINES REGISTER, May 17, 2008, Section A, at 8 (hereinafter *Leys*).

<sup>236</sup> Nigel Duara, *New hires bring new problems*, DES MOINES REGISTER, July 28, 2008, Section A, at 1 (hereinafter *Duara*).

<sup>237</sup> *Id.*

The town of 2,600 residents immediately felt the effects of the nearly 400 arrests.<sup>238</sup> After only three months, the town lost a quarter of its population.<sup>239</sup> Agriprocessors, with more than a third of its workforce arrested, sought replacement workers from throughout the world. Company recruiters brought in workers from as far away as Palau, a Pacific island nation and U.S. protectorate 8,000 miles from Postville, whose citizens may lawfully work in the United States.<sup>240</sup> Many Somali immigrants, lawfully in the United States as refugees from their home country's civil war, arrived as replacement workers.<sup>241</sup>

The bulk of the replacement workers were from the continental United States. Most were single, young men from outside of Iowa, rather than people with families with the intent to permanently remain; 50 homeless men from a shelter in Amarillo, Texas, took jobs shortly after the raid.<sup>242</sup> The influx of men not otherwise connected to the town correlated with a sharp increase in crime; a night in June resulted in so many calls to the Postville police station that the police asked the local bar to close early.<sup>243</sup> Over the summer, the police also reported that “[e]ach suspect in an incident of assault, disorderly conduct or public intoxication [was]” a new resident of Postville.<sup>244</sup> In light of the increase in reports of violent crime, especially drunken brawls near the town center, women have been warned to walk in groups at night.<sup>245</sup>

Members of Congress responded critically. Rep. Donald Payne of New Jersey asked ICE at a hearing the week of the sentencings why none of the ownership or management of

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<sup>238</sup> *Leys, supra* note 235.

<sup>239</sup> *A small town struggles after immigration raid*, BISMARCK TRIBUNE, August 17, 2008, Section A, at 3.

<sup>240</sup> Tony Leys, *Plant staff sought 8,000 miles away*, DES MOINES REGISTER, August 20, 2008, Section A, at 1.

<sup>241</sup> Tony Leys, *Postville job experiences vex Somali immigrants*, DES MOINES REGISTER, July 29, 2008, Section A, at 1.

<sup>242</sup> *Duara, supra* note 236.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

Agriprocessors had been charged.<sup>246</sup> ““The ones that are encouraging people to break the law walk away . . . .””<sup>247</sup> Three members of the Congressional Hispanic Caucus toured Postville in July and listened to complaints from locals before echoing those criticisms themselves, claiming that the workers were not treated fairly by the government.<sup>248</sup>

Iowa congressman Bruce Braley wrote a letter to ICE Assistant Secretary Julie Myers, requesting an accounting for the raid.<sup>249</sup> ““It is important that my constituents in Iowa and all U.S. taxpayers know how their tax dollars are being spent . . . .””<sup>250</sup> He did not receive an accounting from ICE until nearly five months had elapsed; ICE reported its costs alone for the raid were, as of August 21, 2008, \$5,211,092.<sup>251</sup>

The raid also disrupted an on-going investigation by the Department of Labor (“DOL”) into allegations of worker exploitation at Agriprocessors.<sup>252</sup> Congressman Braley expressed dismay at the Hearings that the DOL and ICE provided conflicting accounts of the extent of their cooperation prior to the raid; ICE, in a letter to the congressman, reported that it ““fully coordinated its activities”” leading up to the raid with the DOL.<sup>253</sup> However, the DOL, also in a letter to the congressman, reported that the DOL, nor any of its agencies, received any ““advance notice”” about the raid.<sup>254</sup>

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<sup>246</sup> Jane Norman, *Advocates ask why owners aren't facing any charges*, DES MOINES REGISTER, May 21, 2008, Metro Iowa, 4B.

<sup>247</sup> *Id.*

<sup>248</sup> Janell Bradley, *Postville workers plead for reform*, CEDAR RAPIDS GAZETTE, July 27, 2008, Section B, at 2.

<sup>249</sup> William Petroski, *Braley wants to know how much raids cost*, DES MOINES REGISTER, May 21, 2008, Section B, at 1.

<sup>250</sup> *Id.*

<sup>251</sup> William Petroski, *Taxpayers' costs top \$5 million for raid at Postville*, DES MOINES REGISTER, Oct. 14, 2008, Section A, at 1.

<sup>252</sup> William Petroski, *Union: Raid likely ruins exploitation probes*, DES MOINES REGISTER, May 17, 2008, Main News, 8A.

<sup>253</sup> *Hearings, supra* note 53, at 3 (statement of Congressman Bruce Braley).

<sup>254</sup> *Id.*

#### IV. The Misinterpretation of Criminal and Immigration Law

The criticisms of the criminal and removal process following the raid were as impassioned as they were diverse: commentators variously criticized ICE, the DOJ, the district court, the USM, the USAO and even the defense attorneys. The criticisms of Professors Rigg<sup>255</sup> and Camayd-Freixas,<sup>256</sup> offered at the Hearings, are well-taken. Specifically, Professor Rigg described six areas of concern: lack of input by the defense bar; transparency of the process; group representation by attorneys; compression of the criminal process; access to immigration attorneys for defense attorneys and clients; and individual attention by judges.<sup>257</sup> Professor Camayd-Freixas, a non-lawyer, propounded criticisms as well: a general lack of understanding among the detained employees as to the nature of the charges against them and their rights under prevailing law; improper cooperation among the district court, ICE and the USAO. However, these criticisms miss the truly disconcerting features of the raid.

The convergence of immigration and criminal law is well-documented in legal scholarship.<sup>258</sup> The incorporation of criminal justice norms into immigration law has been called the criminalization of immigration law, or “cimmigration.”<sup>259</sup> The misinterpretations of

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<sup>255</sup> *Hearings, supra* note 53, at 5-6 (statement of Professor Robert R. Rigg, Associate Professor of Law and Director of the Criminal Defense Program at Drake University Law School).

<sup>256</sup> *Hearings, supra* note 53, at 4 *et seq.* (statement of Dr. Erik Camayd-Freixas, Federally Certified Interpreter).

<sup>257</sup> *Hearings, supra* note 53, at 4-7 (statement of Professor Robert R. Rigg, Associate Professor of Law and Director of the Criminal Defense Program at Drake University Law School).

<sup>258</sup> The most recent literature describes, and largely decries, an approaching merger between the two areas of law. Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81 (2005); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639 (2004); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism*, 51 EMORY L.J. 1059 (2002); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws*, 113 HARV. L. REV. 1889 (2000); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

<sup>259</sup> See Stumpf, *supra* note 258, at 386 *et seq.*

§ 1028A(a)(1) and § 1228(c)(5) I describe in this section evidence the inverse of crimmigration, *viz.*, the “immigrationization” of criminal law.<sup>260</sup> This inverse amounts to a use of the criminal justice system to effect goals of immigration law.

Yet, the cooperation among ICE, the DOJ and the USAO in Postville evidences a novel instance of even greater intimacy between immigration and criminal law. In this section, I argue that despite this unprecedented convergence, the criminal prosecutions and judicial removals were premised upon faulty interpretations of criminal and immigration law. First, the criminal prosecutions were based upon an erroneous interpretation of § 1028A(a)(1). Second, judicial orders approving of the defendants’ stipulations to dismissal were based upon a careless reading of the provisions regarding judicial removal, under 8 U.S.C. § 1228(c)(5). Simply put, the interpretations of two statutes necessary for the accelerated criminal prosecutions were in error, further casualties of the immigrationization of criminal law.

a. Section 1028A(a)(1)

i. The Statute in the Eighth Circuit Context

Section 1028A(a)(1) was the cornerstone of the criminal component of the raid. Recall that the section reads, “[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.”<sup>261</sup>

There is disagreement, though, among the federal courts as to whether § 1028A(a)(1) requires that the government prove that the defendant knew the means of identification belonged to another actual person. In *United States v. Hines*, the Eighth Circuit Court of Appeals

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<sup>260</sup> Legomsky, *supra* note 258, at 482; Stumpf, *supra* note 258, at 376, n.35; Miller, *supra* note 258, at 618.

<sup>261</sup> 18 U.S.C. § 1028A(a).

described the elements of the offense, to wit, “the government must prove that the defendant (1) knowingly used (2) the ‘means of identification’ of another person (3) without lawful authority (4) during and in relation to a violation of” the enumerated statutes.<sup>262</sup> Approximately seven weeks prior to the raid, in *Mendoza-Gonzalez*, the court held that § 1028A(a)(1) “does not require the Government to prove that the defendant knew that the means of identity belonged to another actual person.”<sup>263</sup> It reasoned that the text of the statute was unambiguous for two reasons. First, the text employs the word “knowingly,” which “is an adverb, and ‘[g]ood usage requires that the limiting modifier, the adverb ‘knowingly,’ be as close as possible to the words which it modifies.”<sup>264</sup> In § 1028A(a)(1), the limiting modifier, *viz.* the adverb “knowingly,” appears before the verbs “transfers, uses or possesses”, and adverbs typically modify verbs.<sup>265</sup> Second, “the last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote.”<sup>266</sup> Therefore, this reading concludes, the statute does not require the government to prove that a defendant knew the means of identification belonged to another person.

ii. *Villanueva-Sotelo*

Two other circuit courts of appeals share this interpretation; I will call it the “Expansive View.”<sup>267</sup> But the First, Ninth and D.C. circuit courts do not; I will call it, for reasons that will become apparent, the “Theft View.” In *United States v. Villanueva-Sotelo*, the D.C. Circuit found the statutory language ambiguous, and thus turned to the legislative history, which

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<sup>262</sup> *U.S. v. Hines*, 427 F.3d 1038, 1039 (8th Cir. 2007).

<sup>263</sup> *Mendoza-Gonzalez*, 520 F.3d at 917.

<sup>264</sup> *Id.* at 916 (quoting *U.S. v. Montejo*, 442 F.3d 213, 215 (4th Cir. 2006)).

<sup>265</sup> *Id.* at 916.

<sup>266</sup> *Id.*

<sup>267</sup> *Montejo*, 442 F.3d at 215; *U.S. v. Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007).



compelled it to conclude that Congress intended to punish only identity thieves, *i.e.*, only those who knew the means of identification belonged to another actual person.<sup>268</sup>

I argue that the Theft View offers a more comprehensive, and convincing, analysis. A statute is ambiguous if it is “reasonably susceptible to more than one meaning[.]”<sup>269</sup> As a matter of statutory interpretation, the court must determine “how far § 1028A(a)(1)’s mens rea requirement-‘knowingly’-reaches in the statute.”<sup>270</sup> However, the text of the statute itself does not define the extent of the reach; no feature of the text “demand[s] that the statute’s mens rea requirement halt after ‘of identification’ rather than proceed to ‘of another person.’” Indeed, the Model Penal Code adopts as a general principle of construction a rule under which, absent evidence to the contrary, the mens rea requirement encompasses all material elements of an offense.”<sup>271</sup>

Two other factors underscore the inherent ambiguity in the statutory text. First, to interpret the “knowingly” requirement as encompassing only certain features of a § 1028A(a)(1) offense conflicts with the government’s interpretation of the subsection immediately following it, § 1028A(a)(2). That subsection, which covers terrorism offenses, reads “[w]hoever, during and in relation to any [enumerated terrorism felony], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person *or a false identification document* shall” serve five years imprisonment in addition to any punishment for the underlying felony.<sup>272</sup> The court argued, and the government conceded, that the “knowingly” requirement in

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<sup>268</sup> *U.S. v. Godin*, 534 F.3d 51 (1st Cir. 2008); *U.S. v. Miranda-Lopez*, 532 F.3d 1034 (9th Cir. 2008); *U.S. v. Villanueva-Sotelo*, 515 F.3d 1234, 1246 (D.C. Cir. 2008).

<sup>269</sup> *Villanueva-Sotelo*, 515 F.3d at 1239 (quotations and citation omitted).

<sup>270</sup> *Id.* at 1239.

<sup>271</sup> *Id.* (citation omitted).

<sup>272</sup> 18 U.S.C. § 1028A(a)(2) (emphasis added).

§ 1028A(a)(2) must extend to the “false identification document” element of § 1028A(a)(2). But such an interpretation results in puzzling conclusions.

[A]s a matter of pure textual distance, the mens rea requirement travels farther in subsection (a)(2) than the government claims possible in subsection (a)(1). Indeed, under the government’s interpretation, “knowingly” must skip over the contested phrase “of another person” and then, suddenly resuming its influence, apply to “false identification document.” Moreover, if Congress had intended section 1028A(a)(2)’s mens rea requirement to reach beyond “identification document” to embrace the fact of its falsity, it seems equally likely that Congress intended a parallel application regarding the phrase “means of identification of another person”—precisely the same language at issue in section 1028A(a)(1). As the Supreme Court has observed, “it is difficult to conclude that the word ‘knowingly’ modifies one of the elements in [a] subsection[ ] ... but not the other.” [*U.S. v. X-Citement Video*, 513 U.S. 64, 77-78 (1994)]. And if “knowingly transfers, possesses, or uses” acts upon the direct object and its modifiers in subsection (a)(2), [it is] quite reasonable to conclude that it could do the same in subsection (a)(1).<sup>273</sup>

In other words, the government’s claim that the statutory language of § 1028A(a)(1) is unambiguous compels the use of different interpretive approaches between two subsections within the same section; such a result though creates ambiguity in § 1028A as a whole.

Yet, the most compelling factor relates to the court’s review of similarly constructed statutes; it had previously held in several cases that the adverb “knowingly,” when placed at the beginning of a phrase, necessarily engenders ambiguity as to the extent of its modification of the remainder of the phrase.<sup>274</sup> It cited the Supreme Court case *Liparota v. United States*, which involved the identical issue of the reach of the adverb “knowingly;”<sup>275</sup> the Supreme Court was asked to interpret the statutory language that read, in part, “[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by

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<sup>273</sup> *Villanueva-Sotelo*, 515 F.3d at 1239-40.

<sup>274</sup> *Id.* at 1240.

<sup>275</sup> *Liparota v. U.S.*, 471 U.S. 419, 424 (1985)

[law] is subject to a fine and imprisonment<sup>276</sup>.” The reach of the required mental state, *i.e.*, whether the government was required to prove that the defendant knew that his use of any coupons or card was not authorized by law to satisfy the charge, the Supreme Court held, was not immediately ascertainable from the text itself; rather,

Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word “knowingly” to require *some* mental state with respect to *some* element of the crime defined in [the statute], the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. *Either interpretation would accord with ordinary usage.*<sup>277</sup>

Finding that the text of the statute is ambiguous, the court turned to the second part of its analysis, reviewing the structure, history and purpose of § 1028A. The court found compelling evidence that Congress intended the “knowingly” requirement to extend to each element of § 1028(a)(1). First, the title of the statute is “[a]ggravated identity theft,” which evidences an intent to punish identity thieves.<sup>278</sup> The court observes a dictionary definition of theft as “the felonious taking and removing of personal property *with intent to deprive the rightful owner of it.*”<sup>279</sup> The focus on the intent to deprive implies that a defendant must know that the means of identification belonged to another person. Were it otherwise, “a defendant could pick a series of numbers out of the air and win two extra years in prison if those numbers happened to coincide with an assigned identification number, yet escape punishment under [§] 1028A(a)(1) had he picked a slightly different string of random numbers. . . . That’s not theft.”<sup>280</sup>

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<sup>276</sup> *Villanueva-Sotelo*, 515 F.3d at 1240 (quotations omitted).

<sup>277</sup> *Id.* (quoting *Liparota*, 471 U.S. at 424 (emphasis added)).

<sup>278</sup> *Id.* at 1243 (quoting 18 U.S.C. § 1028A) (alterations in original).

<sup>279</sup> *Id.* (quotations and citations omitted) (emphasis in original).

<sup>280</sup> *Id.* at 1243.

Second, the legislative history reveals congressional intent to punish those who knew that the means of identification they were using belonged to other persons.<sup>281</sup> The House report accompanying the legislation (“House Report”) lends compelling support to a reading of the statute as applying only to theft in the traditional sense described above.<sup>282</sup> Section 1028A(a)(1) was enacted as part of the Identity Theft Penalty Enhancement Act.<sup>283</sup> Moreover, the focus in the House Report on identity theft and identity thieves is unmistakable. “The House [Report] accompanying the Act repeatedly emphasizes Congress’s intent to target and punish ‘identity thieves’ who ‘steal identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes.’”<sup>284</sup> The House Report “describes identity theft in detail[,]”<sup>285</sup> noting that identity thieves

obtain[]individuals’ personal information for misuse not only through “dumpster diving,” but also through accessing information that was originally collected for an authorized purpose. The information is accessed either by employees of the company or of a third party that is authorized to access the accounts in the normal course of business, or by outside individuals who hack into computers or steal paperwork likely to contain personal information<sup>[286]</sup>.

The House Report continues by summarizing various prior cases, which, under the new statute, would have merited greater punishment; each of the cases involved a defendant who knew that he or she was stealing the identity of another actual person or persons.<sup>287</sup>

Floor debates and hearing testimony focused on those who had sought out and stolen the identities of others but had only received light prison sentences. Most persuasively, “[a]t no

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<sup>281</sup> *Id.* at 1244.

<sup>282</sup> H. Rep. No. 108-528 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779.

<sup>283</sup> Identity Theft Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831.

<sup>284</sup> *Villanueva-Sotelo*, 515 F.3d at 1244 (emphasis in original) (quoting H. Rep. No. 108-528, at 3, 2004 U.S.C.C.A.N. at 780).

<sup>285</sup> *Villanueva-Sotelo*, 515 F.3d at 1244.

<sup>286</sup> Rep. No. 108-528, at 4-5, 2004 U.S.C.C.A.N. at 780-81.

<sup>287</sup> Rep. No. 108-528, at 5-6, 2004 U.S.C.C.A.N. at 781-82.

point in the legislative record did anyone so much as allude to a situation in which a defendant ‘wrongfully obtain[ed]’ another person’s personal information unknowingly, unwittingly, and without intent.’<sup>288</sup>

The court concluded by noting that even if the structure, history and purpose of the statute did not so clearly favor extending the “knowingly” requirement to the phrase “of another person,” the rule of lenity would compel the same result. Although the rule should not be employed whenever ambiguity exists in a criminal statute, the court held that the rule applied, because “even if the legislative history failed to resolve the statute’s ambiguity, the rule of lenity would forbid us from interpret[ing] a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.”<sup>289</sup>

### iii. Responses to *Villanueva-Sotelo*

There are three principal objections to the Theft View. The first argues that the text of the statute itself is not ambiguous. The second argues that even if the statutory text is ambiguous, the legislative history and structure of the statute make plain that Congress did not intend to the extend the mens rea requirement to the “of another person” element. The third argues that any reliance on Supreme Court precedent for similarly worded statutes is inappropriate here, because there is no concern that a broader reading of § 1028A(a)(1) will result in criminalizing innocent conduct: only those already guilty of federal felonies are eligible for penalty under the statute.

The first objection states that the meaning of § 1028A(a)(1) is not ambiguous because of the last antecedent rule. “The last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that

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<sup>288</sup> *Villanueva-Sotelo*, 515 F.3d at 1245 (alterations in original).

<sup>289</sup> *Id.* at 1246 (quotations and citation omitted) (alterations in original).

are more remote.”<sup>290</sup> Adverbs normally modify verbs.<sup>291</sup> The adverb “knowingly” therefore, as a matter of usage, should be read as modifying the verbs that follow it, *e.g.*, transfers, uses or possesses, but not the more distant portions of the statute.<sup>292</sup>

The first objection fails on its own terms; courts that rely on the last antecedent rule as support for the Expansive View both misinterpret the rule and confuse the consequences of its application. As an initial matter, reliance on the last antecedent rule proves too much. Strictly speaking the rule counsels that the adverb “knowingly” should only apply to “transfers” and not to “possesses” or “uses.” Congress clearly did not intend this reading. Application of the rule thus reveals that the central interpretative question posed by the statute is one of degree: how far does the modifier “knowingly” extend?

If the adverb “knowingly” applied only to the verbs that followed it, then it would not apply to the direct object “means” or the prepositional phrase “of identification.” Were that so, the government would not be required to prove that a defendant knew that the object he transferred, used or possessed was a means of identification. For example,

[i]f during a bank fraud conspiracy, I hand a defendant a sealed envelope asking her to transfer it and its contents to another and she knowingly does so, she has knowingly transferred the envelope and its contents. But if she believes my statement that the envelope contains only a birthday card when in fact it contains a forged social security card, the government surely would not contend that she should receive the enhanced penalty.<sup>293</sup>

Application of the last antecedent rule thus becomes untenable as a tool of construction, because it decouples the mens rea requirement from the object the statute seeks to protect: the means of identification. Put differently, such a decoupling drastically increases the range of culpable

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<sup>290</sup> *Mendoza-Gonzalez*, 520 F.3d at 915 (citing 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:33 (7th ed.2007)).

<sup>291</sup> *U.S. v. Jones*, 471 F.3d 535, 539 (4th Cir.2006).

<sup>292</sup> *Hurtado*, 508 F.3d at 609.

<sup>293</sup> *U.S. v. Godin*, 476 F. Supp. 2d 1, 2 (D. Me. 2007).

conduct, which does not comport with the statutory conception of the crime as “aggravated identity theft;” a crime is not normally aggravated, nor a penalty enhanced, by unwitting or unintentional conduct related to the object the law seeks to protect.

The failure of this objection reveals that the statutory text itself is ambiguous, *i.e.*, the meaning of the statute cannot be resolved by its own terms. The mens rea requirement, at a minimum, must extend to the phrase “means of identification,” as the government conceded in *Villanueva-Sotelo*. If it extends only to the verbs that follow it, as counseled by the last antecedent rule, the statute punishes conduct the government conceded that the statute should not.<sup>294</sup> If it extends to “means,” but no further, the result is “gibberish: ‘knowingly possessing a means’ means nothing.”<sup>295</sup>

The second objection has more force; unlike the first objection, it at least does not collapse under its own weight. A court must not make a determination regarding the mens rea of a federal criminal offense by resorting, in the first instance, to common law definitions; rather, such a determination begins with the text of the statute, followed by the statutory structure and legislative history.<sup>296</sup> With regard to § 1028A(a)(1), Congress meant to expand the definition of identity theft more broadly than it may be understood under the common law. The House Report notes that “the terms ‘identity theft’ and ‘identity fraud’ refer to *all types of crimes* in which someone *wrongfully obtains* and uses another person’s personal data *in some way that involves fraud or deception*, typically for economic or other gain, including immigration benefits.”<sup>297</sup>

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<sup>294</sup> *Villanueva-Sotelo*, 515 F.3d at 1238.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 1252-53 (LeCraft Henderson, J., dissenting). Circuit Judge LeCraft Henderson also advances an *in pari materia* interpretation, arguing that § 1028A(a)(1) is properly compared with 18 U.S.C. § 1546(a). *Id.* at 1256. However, such argument is inapposite, because the elements of such an argument are not met with regard to § 1028A(a)(1). *Id.* at 1248. Furthermore, the most useful statutory analog is § 1028A(a)(2), an analysis of which militates in favor of the Theft View.

<sup>297</sup> *Id.* at 1253 (quoting Rep. No. 108-528, at 4, 2004 U.S.C.C.A.N. at 780 (emphasis added)) (quotations omitted).

Despite the contention of the *Villanueva-Sotelo* court, the examples of lightly-punished conduct in the House Report did not all involve theft in the common law sense.<sup>298</sup>

In one case, a woman used her husband's social security number to collect disability benefits, and, in a similar case, a man used his brother-in-law's name and social security number to receive social security benefits. . . . Neither of these cases describes a crime in which the defendant stole a means of identification from another; the only victim was the government. In another example, . . . a woman received social security benefits using her social security number but used another's social security number to procure employment. . . . It is not clear whether or not the woman knew that the false number belonged to someone else.<sup>299</sup>

Congress, the objection argues, clearly meant to broaden the covered conduct beyond common law theft to other wrongful or deceitful activity that dispossesses a person of identification information or defrauds the government.

Furthermore, the House Report's focus on past offenders with egregious conduct and the need for stiffer sentences ought to be read as expanding the definition of the covered conduct. "A primary purpose of the statute was to increase the punishment for a defendant who 'wrongfully obtains and uses *another person's* personal data,' H.R. Rep. No 108-528 at 4, 2004 U.S.C.C.A.N. at 780 (emphasis added), so that the punishment more closely fits the harm the crime causes its victim."<sup>300</sup> The seriousness of the harm to potential victims provides insight into Congress's intent with regard to the evidentiary burden the government must bear.

It is preposterous to think the same Congress that so plainly and firmly intended to increase the penalty—"a mandatory consecutive penalty enhancement of 2 years"—if the defendant possesses another's means of identification "in order to commit a serious federal predicate offense," *id.* at 10, 2004 U.S.C.C.A.N. at 785, would then so limit its imposition as to require the Government to

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<sup>298</sup> *Godin*, 534 F.3d at 60.

<sup>299</sup> *Id.* (citations omitted).

<sup>300</sup> *Villanueva-Sotelo*, 515 F.3d at 1254 (LeCraft Henderson, J., dissenting).



prove that the defendant *knows* he wrongfully possesses the identity “of another person.”<sup>301</sup>

It seems odd, at least, that Congress intended the more burdensome reading of the statute propounded by the Theft View. “Except for the forger himself, proving beyond a reasonable doubt that each of the thousands, if not millions, of holders of false green cards knows that the false means of identification he possesses is that ‘of another person’ would ‘place[] on the prosecution [an] often impossible burden.’”<sup>302</sup>

To the extent the objection is convincing, and I maintain it is not, its impact is weak. At the very most, the objection proves that the House Report serves as a basis for either interpretation of the mens rea requirement’s reach in § 1028A(a)(1). The fact that portions of the House Report support a contrary reading to the Theft View merely creates further ambiguity. These portions of the House Report do not overwhelm the Theft View’s reliance on the other (and more numerous) passages in the House Report, the floor debates and the statutory title (“Aggravated identity theft”). At best, the objection shows that the legislative history is of no help in resolving the textual ambiguity.

A failure to resolve textual ambiguity through the legislative history though, does not support the Expansive View. Such a failure properly triggers the rule of lenity, because the statute imposes a mandatory penalty of two years imprisonment. A criminal defendant should not bear the burden of Congress’s failure to make its intentions clear. Similarly, a court should not engage in guess-work when one of its options involves a greater criminal sanction and another does not.

In any case, the legislative history as a whole, coupled with the statutory structure, defeats the few references in the House Report supporting the Expansive View. The House Report

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* (quoting *U.S. v. Chin*, 981 F.2d 1275, 1280 (D.C.Cir.1992)).

gestures at defining identity theft to include identity fraud and related crimes; and its examples of lightly-punished conduct include a few descriptions of behavior more closely resembling fraud than theft. But this amounts to very meager support. Under this interpretation, a court would be compelled to conclude that Congress intended to radically re-define a common law definition for purposes of the statute, yet it declined to specifically detail the re-definition in either the statutory text or the accompanying House Report. Such a conclusion defies common sense and “common sense tells us that a defendant ought not receive two additional years of incarceration for picking one random number rather than another—unless, of course, Congress has made clear that he should. Put another way, it’s only common sense to conclude that conviction under an identity theft statute requires actual theft.”<sup>303</sup>

The second objection’s deepest flaw, though, is its unsettling suggestion that one can infer an intent to expand the range of culpable conduct from a penalty enhancement. As a matter of logic, it begs the question to insist that Congress intended to punish identity thieves more harshly, because the initial inquiry seeks to define identity theft.<sup>304</sup> Courts cannot give effect to congressional intent to impose harsher punishments for certain behavior without a clear sense of what constitutes the behavior. Nor should they. The intention to punish certain conduct more harshly does not necessarily imply an intention to broaden the kinds of culpable conduct. Such an implication would invite serious unfairness; individual judges may take very different views of what kinds of conduct are sufficiently similar to “identity theft” to qualify as criminal under the statute. Moreover, it places the burden of ambiguous drafting upon the criminal defendant, who is poorly positioned to effect any improvement upon the wording of the statute. The burden

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<sup>303</sup> *Id.* at 1249.

<sup>304</sup> *Id.* at 1245.

properly sits with Congress, which is capable of amending the statute if it disagrees with the interpretations made by the federal courts.

This response sheds light on the strongest part of the second objection, *viz.*, that it is unreasonable to conclude that Congress, in response to the growing problem of identity theft, would draft a penalty enhancement statute, but do so with an exacting mens rea burden. The response in *Villanueva-Sotelo* has some force: the dissent “wonders if Congress really could have intended to punish those individuals who knew they had stolen a real person’s number more severely than those who did not. The short answer to that question is yes.”<sup>305</sup> Furthermore, the evidentiary burden implied by the Theft View is not nearly as exacting as the objection argues. Culpability would not be limited only to the forger as the Expansive View suggests. The government must always rely on objective conduct to prove subjective intent; it can rarely be shown by other means. The intent required by the Theft View is no different; the features of the identity theft scheme can suffice as proof. Whether the means of identification belongs to another actual person matters to certain subsets of those who misuse means of identification. For example, those who use the means of identification of another person to impersonate the other for purposes of obtaining government benefits rely on the fact that such person exists and is entitled to government benefits. Likewise, an identity thief may purposely seek out the means of identification of those with strong credit histories to obtain credit cards with higher balance limits.

The final objection states that reliance on the Supreme Court’s holdings in *Liparota* and *X-Citement Video*, is misplaced, because, although the statutes in those holdings have the same grammatical structure as § 1028A(a)(1), the Supreme Court declined to limit the mens rea

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<sup>305</sup> *Id.* at 1249.

elements in those cases based on the concern of criminalizing otherwise innocent conduct.<sup>306</sup> However, in the case of § 1028A(a)(1), the concern is not present, because the imposition of criminal liability under the statute assumes a conviction under a predicate federal felony. Reading the statute to require additional proof, as a means for protecting innocents from federal criminal liability, is unnecessary because the covered class is not at all innocent.

The objection misreads *Liparota* and *X-Citement Video*. Generally, it may be appropriate to extend the mens rea requirement for statutes structured like § 1028A(a)(1) if the absence of such a requirement would punish otherwise innocent conduct. But this holding does not imply its converse, *viz.*, if extension would not punish otherwise innocent conduct, the statute must be read to extend the mens rea requirement. The holdings should be read as providing a tool for distinguishing innocent from culpable conduct; this interpretive tool suggests that “courts *may* extend a mens rea requirement when ordinary tools of statutory interpretation—text, structure, purpose, and legislative history—compel that result.”<sup>307</sup> Put differently, the presumption favors extension of the mens rea requirement for statutes structured like § 1028A(a)(1), and the holdings in *Liparota* and *X-Citement Video* provide a basis to support the presumption, but the absence of such basis does not otherwise defeat the presumption, especially in cases where the text, statutory structure and legislative history counsel otherwise.

For these reasons, the Theft View is the superior interpretation. More remarkably though, this analysis reveals that the Expansive View is exceedingly weak. The circuit split alone should convince us that the text of the statute is ambiguous. Moreover, the Supreme Court has held that statutes with similar grammatical structures are *per se* ambiguous. And only a few passages in

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<sup>306</sup> *Id.* at 1259.

<sup>307</sup> *Villanueva-Sotelo*, 520 F.3d at 1249.

the legislative history are consistent with a congressional intent to limit the reach of the mens rea requirement for aggravated identity theft.

b. Section 1228(c)

i. Statutory Analysis

The stipulated orders of dismissal also were based on a mistaken reading of federal law.<sup>308</sup> Unlike the § 1028A(a)(1) context, in which courts have disagreed, there is no such disagreement here. Section 1228 is entitled “Expedited removal of aliens convicted of committing aggravated felonies.”<sup>309</sup> Normally, for expedited removal under § 1228, “the United States Attorney, with the concurrence of the Commissioner, [must] file at least 30 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1227(a)(2)(A) of this title.”<sup>310</sup> However, the defendant may waive this notice period and stipulate to the entry of the removal order, pursuant to 8 U.S.C. § 1228(c)(5), which reads:

The United States Attorney, with the concurrence of the [ICE] Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is *deportable under this chapter, to waive the right to notice and a hearing under this section*, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation and shall have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.<sup>311</sup>

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<sup>308</sup> David Wolfe Leopold, vice-president of the American Immigration Lawyers Association, provided a brief sketch of this argument at the Hearings. *Hearings, supra* note 53, at 7-8 (statement of David Wolfe Leopold, on behalf of the American Immigration Lawyers Association).

<sup>309</sup> 8 U.S.C. § 1228. I note that this use of “expedited removal” may be confusing, because there is a provision for expedited removal of a different sort for aliens detained at the border at 8 U.S.C. § 1225(b). I do not discuss that type of expedited removal here.

<sup>310</sup> *Id.* at § 1228(c)(2).

<sup>311</sup> *Id.* at § 1228(c)(5) (emphasis added).

In other words, an alien deportable for a conviction of an aggravated felony, as part of a plea agreement, may stipulate to his or her removal by a judicial order from a United States district court.

Section 1227, “Deportable aliens,”<sup>312</sup> defines the class of aliens deportable under Chapter 12 of Title 8 of the United States Code. Section § 1227(a)(2)(A) defines the class of aliens deportable for aggravated felonies as “[a]ny alien who is convicted of an aggravated felony at any time after *admission* . . . .”<sup>313</sup> However, Congress has codified the definition of admission: “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”<sup>314</sup>

The defendants here stipulated that, and the district court entered orders of removal stating, “Defendant entered the United States unlawfully and has never had lawful immigration status in the United States[,]” and “Defendant is currently removable from the United States pursuant to 8 U.S.C. § 1182(a)(6)(A) relating to aliens present in the United States without admission or parole.”<sup>315</sup> Therefore, the defendants, who were never lawfully admitted to the United States, were *not* eligible for deportation under § 1228(c)(5), because although such defendants committed aggravated felonies after entry into the United States, they did not commit such aggravated felonies after admission to the United States.

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<sup>312</sup> In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which, in part, substituted statutory references to “deportation,” “deport” and “deportable” with “removal,” “remove” and “removable.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pl. 104-208, § 308, 110 Stat. 3009-614 *et seq.* (1996). To avoid confusion, I use “deport” and its derivatives as does § 1228(c)(5).

<sup>313</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added).

<sup>314</sup> 8 U.S.C. § 1101(a)(13)(A).

<sup>315</sup> *See, e.g., United States of America v. Lastor-Gomez*, case no. 08-CR-1141-LRR, docket no. 11, ¶¶ 5(c), (e) (N.D. Iowa May 19, 2008) (stipulation); *United States of America v. Lastor-Gomez*, case no. 08-CR-1141-LRR, docket no. 12, ¶ 2(c), (e) (N.D. Iowa May 19, 2008) (removal order).

ii. Response

There is arguably an ambiguity in the statutory text that undercuts this analysis. Section 1228(c)(5), by its own terms, refers to “aliens deportable under this chapter[.]”<sup>316</sup> Judicial removal, therefore, should be available for any defendant deportable under any provision of chapter 12’s deportability categories, as described in § 1227, regardless of whether such defendant has been previously admitted and subsequently convicted of an aggravated felony. For example, a defendant arrested during the raid who was not charged with a crime may still be deportable under another category in § 1227, because the defendant, as an unlawful entrant into the United States, was inadmissible at the time of his entry and therefore deportable under § 1227(a)(1)(A).<sup>317</sup> This reading comports with common sense, because there seems to be no reason why Congress would permit expedited removal for lawfully admitted aliens who commit aggravated felonies but not for those not lawfully admitted. Congress surely could not have intended to afford greater legal process to unlawful entrants than to those lawfully admitted. Therefore, the argument concludes, the judicial removal procedures employed by the district court were not procedurally improper.

The response is unconvincing for several reasons. First, it does not address the existing error in the judicial removal orders, which state that the defendant is deportable “from the United States pursuant to 8 U.S.C. § 1182(a)(6)(A)[.]”<sup>318</sup> Section 1182 governs admissibility, not deportability. Although prior unlawful entry may serve as a basis for deportability, § 1182 is not the statutory mechanism for deportation.<sup>319</sup>

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<sup>316</sup> 8 U.S.C. § 1228(c)(5).

<sup>317</sup> 8 U.S.C. § 1227(a)(1)(A) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).

<sup>318</sup> See, e.g., *United States of America v. Lastor-Gomez*, case no. 08-CR-1141-LRR, docket no. 12, ¶ 2(c), (e) (N.D. Iowa May 19, 2008) (removal order).

<sup>319</sup> See 8 U.S.C. § 1227(a)(1)(A).

Second, such a reading does not comport with the remainder of the subsection, the section as a whole and the title of the section. The phrase “deportable under this chapter,” cannot be read in isolation, because it is immediately followed by “*to waive the right to notice and a hearing under this section*, and stipulate to the entry of a judicial order of removal[.]”<sup>320</sup> The references to those who have a right to notice and a hearing under § 1228 limits the broader group of aliens deportable under chapter 12, *i.e.*, only those who are both deportable, and entitled to notice and a hearing under § 1228, are eligible for judicial removal under § 1228(c)(5). Simply put, only aliens previously admitted and subsequently convicted of aggravated felonies have a right to notice and a hearing under the section. If the subsection were read to include all deportable aliens, the phrase “to waive the right to notice and a hearing under this section” becomes meaningless, or at the very least unnecessary, because not all deportable aliens are entitled to notice and a hearing under § 1228. Under this reading, if all deportable aliens were eligible for, and sought, judicial removal under § 1228(c)(5), then those aliens deportable for reasons other than aggravated felony convictions would be waiving the rights to notice and hearings that § 1228 never conferred upon them in the first instance.

This interpretation also conflicts with other provisions of the section. The rights to notice and a hearing are described in subsection (c)(2)(B), which provides that the government must file, 30 days before sentencing, a charge containing the factual allegations underlying its claim that the defendant is an alien and “identifying the crime or crimes which make the defendant deportable under § 1227(a)(2)(A)[.]”<sup>321</sup> Again, an alien deportable under § 1227(a)(2)(A) is deportable for the conviction of an aggravated felony after prior admission. If § 1228(c)(5) were meant to include all deportable aliens, then those aliens deportable for reasons other than

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<sup>320</sup> 8 U.S.C. § 1228(c)(5) (emphasis added).

<sup>321</sup> *Id.* at § 1228(c)(2)(B).



aggravated felony convictions after prior admission would seemingly be entitled to a charge, on 30 days' notice, of the grounds for their deportations under a statutory provision inapplicable to them. This reading also seems odd in light of subsection (a)(1), which directs the attorney general to establish special removal proceedings only for those deportable for aggravated felonies.<sup>322</sup> The subsection does not otherwise direct the attorney general to establish special removal proceedings for any other basis of deportability.

Finally, the title of the statute should extinguish any doubt that Congress meant the judicial removal procedure to apply only to aliens deportable for aggravated felonies, *viz.*, “Expedited removal of aliens convicted of aggravated felonies.”<sup>323</sup> It strains credulity that Congress would append a judicial removal procedure, applicable to all deportable aliens, to a subsection of a statute that otherwise only applies to aliens deportable under § 1227(a)(2)(A).

#### V. The Likelihood of Persistence

I argue in this section that there are several factors, external to the texts of the statutes themselves, that indicate that these misinterpretations of law will persist.

The first factor involves the various interests of the migrant worker. The undocumented migrant worker is especially vulnerable to § 1028A(a)(1), because the two-year mandatory, consecutive sentence it imposes is exceedingly more severe than what a first-time offender might expect for the underlying felony under the Sentencing Guidelines; for example, under the Sentencing Guidelines, a first-time offender, if convicted, might expect a sentence in the range of zero to six months for the use of a false social security number to obtain employment.<sup>324</sup> As noted above, the defense attorneys made plain that their clients' express interests were to return

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<sup>322</sup> *Id.* at § 1228(a)(1).

<sup>323</sup> *Id.* at § 1228.

<sup>324</sup> *See* Section 3(c)(ii), *supra*.

promptly to their countries of origin.<sup>325</sup> The pressure to plead, and avoid a § 1028A(a)(1) charge, regardless of the merits of the underlying case against the defendant, is profound, because the value of a trial for the defendant is relatively small. For example, the evidence supporting charges under § 1546(a) and § 1028A(a)(1) against a migrant worker might be scant, but the risk of serving a two-year mandatory, consecutive sentence under the latter after an adverse jury verdict defeats any desire to test the government's case. In other words, the incentive to challenge an AUSA's interpretation of § 1028A(a)(1) is small, if the charge can be avoided by pleading guilty only to the underlying felony.

This absence of an incentive to challenge the interpretation is compounded by what Professors Segal and Stein have called “ambiguity aversion.”<sup>326</sup> The heart of the argument is as follows:

A typical criminal defendant is ambiguity averse. He fears the ambiguity of his probability of conviction, over which he exercises no control. This ambiguity makes the defendant pessimistic about his chances of acquittal. In estimating his individual probability of conviction, the defendant adjusts the general probability of conviction upwards to reflect that pessimism. This upward adjustment generates the asymmetry detrimental to the criminal justice system. The defendant believes that his chances of being convicted by the jury are high, relative to what the prosecutor believes them to be. Aware of the defendant's ambiguity aversion, the prosecutor might exploit it in order to boost his or her performance and career. The prosecutor will offer the defendant a harsh plea bargain that the defendant will have to accept. This plea bargain will impose on the defendant a criminal sanction (conviction and penalty) that exceeds the average. The prosecutor can exercise the same strategy against other defendants. The result will be a conviction of some innocent defendants, as well as imposition of excessive punishments upon others. This overcriminalization is both unfair and inefficient.<sup>327</sup>

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<sup>325</sup> *Defense Attorney Interviews*, *supra* note 89.

<sup>326</sup> Uzi Segal and Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495 (2006).

<sup>327</sup> *Id.* at 1497 (footnotes omitted).

The statistical analysis supporting their description of the phenomenon is compelling,<sup>328</sup> and it informs an understanding of the migrant worker's interests. The migrant worker, by definition, exists within an unfamiliar legal system, seeking wages for himself, and very often, his family. As Attorney Swift noted, the certainty of a plea agreement was exceedingly attractive to his clients;<sup>329</sup> it removed the ambiguity regarding the extent of the defendant's punishment and the date of his release to his country of origin. A defendant's signature on a plea agreement locked in a specific date when he would be freed from government custody and could begin to work again. The economic component here cannot be over-emphasized: each of the defense attorneys I interviewed noted how important it was to each of their defendants that he receive his paycheck, and cash in his possession, upon release.<sup>330</sup> Moreover, it is instructive that none of the defendants arrested during the raid sought to challenge the evidence at trial. Finally, the circuit split between the Expansive View and Theft View does not do much to create certainty; only six circuit courts of appeals have had occasion to interpret the mens rea requirements of § 1028A(a)(1). Therefore, the possibility of severe punishment under § 1028A(a)(1), combined with ambiguity aversion, make it exceedingly unlikely that a migrant worker will challenge the government's interpretation of the statute.

The migrant worker also has little interest in challenging the interpretation of § 1228(c)(5). As an initial matter, the provision only triggers with a criminal defendant's consent, so it will not apply without his agreement. Furthermore, an undocumented migrant worker's chief interest is likely to be a prompt disposition of his case, followed by a return to his country of origin. There is not much incentive to appeal the application of judicial removal, if such an appeal merely serves to prolong the worker's stay in federal custody, especially given that the government may

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<sup>328</sup> *Id.* at 1534 *et seq.*

<sup>329</sup> *Attorney Swift Interview, supra* note 89.

<sup>330</sup> *Defense Attorney Interviews, supra* note 89.

always seek traditional removal through administrative proceedings before an immigration judge.

The interests of migrant workers are not the only interests ensuring that the statutes will continue to be misapplied. The DOJ has little reason to support an interpretation of a criminal statute that imposes a greater evidentiary burden on the prosecution. Section 1028A(a)(1) is also a bargaining tool. The AUSA enjoys the converse of acute ambiguity aversion in the migrant worker context: she can seek expedited, mass guilty pleas after raids with little fear that the offers will be rejected and she will be required to present evidence at trials. Similarly, the DOJ and ICE have no incentive to interpret § 1228(c)(5) appropriately, because its misinterpretation allows for efficient disposition of criminal and immigration matters in a single proceeding. Under the correct reading of § 1228(c)(5), only previously admitted aliens convicted of aggravated felonies are eligible for stipulated judicial removal; the DOJ and ICE decrease their respective workloads if the statute can apply to aliens, regardless of the type of entry or conviction.

Congress also has little reason to correct these misinterpretations of its statutes. There is essentially no political benefit in limiting the application of criminal liability.<sup>331</sup> The interrelation of migrant workers, § 1028A(a)(1) § 1228(c)(5) nearly assures a lack of congressional action. Foreign nationals cannot vote, and the DOJ and ICE are likely to exert strong pressure on Congress not to interfere with their interpretations of the statutes.

The federal courts cannot be relied upon to ensure that these misinterpretations of federal law are avoided after future raids. The federal courts can only interpret laws they have been asked to interpret; as explained above, the litigants cannot be relied upon to challenge the Expansive

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<sup>331</sup> For an illuminating discussion of the incentives of legislators with regard to criminal liability, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001).

View. Furthermore, federal courts take no role in the plea negotiations process. The role is especially limited in the case of a Rule 11(c)(1)(C) plea agreement: the district judge must accept or reject the plea agreement, and the agreed upon sentence, in total.<sup>332</sup> The district judge cannot ensure that the AUSA leverages each plea agreement under the correct interpretation of § 1028A(a)(1).

A federal court, however, clearly is in a position to correctly apply § 1228(c)(5). But the pressure to approve a stipulation to judicial removal is especially acute in the immigration raid context: there may be hundreds of defendants to process and a denial of the stipulation undermines a negotiated agreement between the parties. Put simply, a denial creates additional work for an especially burdened court and thwarts the preferences of both the government and the defendant. Moreover, as noted above, an erroneous interpretation of § 1228(c)(5) is essentially appeal-proof, because the only party with an interest and right to appeal either waives it in the plea agreement or may not legally re-enter the United States.

Areas of law commonly intersect in ways that lead to confusion and misinterpretation. The difficulty in the immigration raid context, though, is that the victims of improperly applied law, as well as the DOJ, ICE, Congress and the federal courts are unlikely to pursue remedies to it. The process pursued by the DOJ, ICE and the USAO against the employees, therefore, can be repeated elsewhere without serious risk, regardless of the deficiencies in the application of § 1028A(a)(1) and § 1228(c)(5), because each of the participants has little or no interest in challenging these interpretations.

## VI. Impacts on Enforcement

Under the Expansive View, the USAO was able to leverage advantageous plea agreements, which included expedited judicial removal, based on a faulty interpretation of § 1028A(a)(1). As

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<sup>332</sup> FED. R. CRIM. P. 11(c)(3).

noted above, were the Theft View the prevailing law in the Eighth Circuit, the USAO would not have been able to credibly threaten the defendants with a mandatory two-year prison term. Absent such a threat, it is very likely that many of the defendants would have challenged the USAO's evidence at trial rather than agree to five months imprisonment and judicial removal.

The Supreme Court has the opportunity to rectify the misinterpretation of § 1028A(a)(1), which would severely impact the use of the statute as a threat following future raids. On October 20, 2008, it granted certiorari in *Flores-Figueroa v. United States*, a case originating in the Southern District of Iowa.<sup>333</sup> The petitioner challenges the Eighth Circuit Court of Appeals's application of the Expansive View in upholding his conviction under § 1028A(a)(1).<sup>334</sup> If the high court adopts the Theft View, the effect on the DOJ's enforcement strategies could be profound. Without the blanket threat of a mandatory, consecutive two-year sentence, the cost-benefit analysis of mass criminal prosecutions following workplace enforcement actions may not favor government action. The DOJ, at least in the migrant worker context, could not credibly threaten application of § 1028A(a)(1), because, as noted above, it will have difficulty showing that a defendant knew, or even had an interest in knowing, that the means of identification he used belonged to another actual person. Absent such a credible threat, future defendants may elect to test the government's evidence at trial on the related lesser charges under § 408(a) or § 1546(a), because a Sentencing Guidelines sentence for first-time offenders is unlikely to exceed the time served in anticipation of trial and any subsequent appeal.

A proper interpretation of § 1228(c)(5) necessarily limits the range of circumstances in which the DOJ and ICE could enjoy the advantages and efficiencies of dispositions of criminal and immigration matters in a single proceeding. If, as I have argued, the accelerated removal

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<sup>333</sup> See Adam Belz, *Supreme Court to hear ID theft appeal, implications for Postville*, CEDAR RAPIDS GAZETTE, Oct. 21, 2008, Section A, at 1.

<sup>334</sup> See *U.S. v. Flores-Figueroa*, 274 F' Appx. 501 (8th Cir. 2008).

proceedings properly were only applicable to those who, after lawful admission, commit aggravated felonies, the DOJ and ICE would incur costs for the additional litigation required to obtain traditional removal for defendant for whom the statute does not apply through the immigration courts. The raid here suggests that the costs would be extensive: as I noted above, each of the plea agreements stated that the defendant had never been lawfully admitted, *i.e.*, the statute did allow for accelerated removal for any of them. Under the proper interpretation, ICE would have been required to seek removal, under a different statutory provision, in immigration court only after a defendant served his prison sentence. In place of the model order employed by the USAO in the criminal proceedings after the raid, ICE would have to task its own lawyers to prepare for, and litigate, the removal case for each of the defendants before different immigration judges as each defendant completed his or her prison sentence in different Bureau of Prisons facilities throughout the country. Put differently, the difference between the interpretation employed following the raid and the proper interpretation is the difference between the burden of litigating one case and the burden of litigating 305 cases.

## VII. Conclusion

I have offered a description and an explanation for the size of the raid and the accelerated criminal prosecutions that followed. I argued that two statutes necessary to the accelerated outcomes were incorrectly applied. Finally, I argued that these misinterpretations are likely to persist, given the various interests of migrant workers, ICE, the DOJ and Congress.

The events as I have described them reveal a serious cost of the immigrationization of criminal law, *viz.*, the unfettered perversion of federal criminal statutes to address the widespread presence of undocumented foreign nationals within the United States. It is estimated that there

are 12 million “illegal” immigrants in the United States today;<sup>335</sup> the ubiquity of their presence cannot be denied. But criminal law is not designed to combat broad social trends; rather, its design and purpose are to deter and punish behavior that deviates from the norm. It is meant to apply to the abnormal. Given that its punishments result in a deprivation of liberty, it involves extensive procedures and safeguards to protect the criminal defendant.

However, the presence of undocumented foreign nationals, especially migrant workers, in the United States is hardly abnormal. Indeed, the number of undocumented migrant workers in the United States exceeds the prison population by a factor of seven.<sup>336</sup> The mass criminal prosecutions following the Agriprocessors raid amounted to an attempt to increase the scale of criminal law to meet the size of the undocumented migrant worker population. However, the increase in scale could only be efficiently accomplished by misinterpreting applicable federal law. In this case, the mistakes resulted in the improper imprisonment and removal of 305 undocumented migrant workers, broken families and a decimated community. We have every reason to believe that future raids will result in improper criminal prosecutions that will produce similarly severe results.

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<sup>335</sup> Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S. Estimates Based on the 2005 Annual Population Survey*, PEW HISPANIC CENTER, March 7, 2006. The report estimates that as of March of 2006, there were between 11.5 and 12 million unauthorized persons within the United States.

<sup>336</sup> UNITED STATES DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2006 (December 2007). At the end of 2006, there were 1,570,861 prisoners under the jurisdiction of state and federal correctional authorities.