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With a Little Help from My Friends: The Federal Government's Reliance on Cooperation from the States in Enforcing Immigration Policy

Daniel G. Iles*

The operation of the United States government relies on the integration of disparate administrative compartments into a coherent regulatory scheme.¹ At a basic level, for example, a lawmaking body depends upon an executor to give its laws their desired normative or deterrent effect. After all, what purpose does capital punishment serve, if there is no executioner?

The compartmentalization of government functions is well-documented.² At the heart of separating functions within a republic is the dilution of centralized power.³ On a more pragmatic level, the

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1. On its official website, the United States government has hyperlinks to "Government Agencies," which include an "A-Z Agency Index"; "Federal Government"; "State Government"; "Local Government"; and "Tribal Government." Each of these leads to a page full of additional links, the most impressive in number being the list of agencies. However, each strain, no matter which is chosen, begins from the ordinate United States government and meanders seemingly without end. USA.gov: The U.S. Government's Official Web Portal, <http://www.usa.gov/> (last visited Feb. 22, 2008).

2. See, e.g., U.S. CONST. art. I-III.

3. David T. ButleRitchie, *The Confines of Modern Constitutionalism*, 3 PIERCE L. REV. 1, 13-14 (2004) ("It is Montesquieu who introduces the concept of further diluting the notion of sovereignty by separating the powers of government into different departments. This is a further compartmentalization and limitation of the structure and role of government" (citations omitted)). See also Craig S. Lerner, *Calling a Truce in the Culture Wars: From Enron to the CIA*, 17 STAN. L. & POL'Y REV. 277, 281 (2006) ("[S]egmentation of government agencies may guard against civil liberties violations, as well as provide additional spurs to action"). Cf. Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 699-700 (2004) ("The compartmentalization and the fractioning of power among government agencies can lead to

realities of organization, size, and geography require the delegation of functions among governmental agencies and systems.⁴

Unsurprisingly, then, the execution of United States immigration policy similarly is dependent on the cooperation of other governmental systems, particularly state law enforcement and correctional entities,⁵ because federal immigration officials are few and underfunded.⁶ With increased pressure added by a backdrop of exclusionary federal immigration policies dating back almost to the founding of the country,⁷ the prospect of achieving the goal of deporting every removable alien⁸ is bleak without the assistance of state and local governments.

disputes on ‘turf’ and this often results in a lack of implementation of binding obligations.” (citation omitted)).

4. Some delegation is inherently necessary to governmental organization. See *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (“As Chief Justice Taft expressed the point for the Court . . . the limits of delegation ‘must be fixed according to common sense and the *inherent necessities of the governmental co-ordination.*” (emphasis added) (citation omitted)). Some degree of delegation also owes to geographical and psychological concerns. Robert M. M. Shaffer, Comment, *Unfunded State Mandates and Local Governments*, 64 U. CIN. L. REV. 1057, 1085 (1996) (“A self-centered . . . perspective on a local level results in a compartmentalization and fragmentation of government in which the concerns of neighboring local communities and the region can often be lost to the immediate interests of one’s own community.” (citation omitted)).

5. After September 11, federal immigration officials enhanced their efforts with respect to “deterrence, detection, apprehension, detention, removal, and investigation of criminal organizations that violate the border.” Joseph Summerill, *Is Federal Immigration Detention Space Adequate?*, 54 FED. LAW. 38, 39 (2007). Moreover, “[the] initiative [was] intended to provide a mechanism to meet the challenges in each of these areas with . . . enhanced coordination on the federal, state, local, and international levels.” *Id.* (quoting Stewart Baker, Assistant Secretary for Policy, U.S. Department of Homeland Security, Testimony on the organizational structure of Homeland Security agencies (May 11, 2006)).

6. According to Summerill, the Bureau of Immigration and Customs Enforcement—the agency within the Department of Homeland Security charged with enforcing immigration laws—“receives funds to pay 261 immigration enforcement agents . . . to process approximately 78,300 criminal immigrants per year for removal by [Fiscal Year] 2008.” *Id.* at 42 (citation omitted). That is an average of 300 cases per agent per year. Moreover, the Bureau

maintains that it will need an additional 8,581 detention beds over the next two years and will ultimately need . . . 1,008 [immigration enforcement agents] to support [the Criminal Alien Program’s] long-term mission of removing all criminal immigrants *currently incarcerated* in local, state, and federal correctional institutions *who have been issued final orders of removal.*

Id. (emphasis added). That is a dramatic demand for manpower to remove a fraction of deportable immigrants.

7. See *infra* Part I.A.

8. Summerill, *supra* note 5, at 40. Adding to the tumult is the likelihood that “illegal

Public mistrust of immigrants and disfavor toward controlled substances have led Congress to allow removal of any noncitizen alien found guilty of a drug crime. To protect United States citizens from dangerous immigrants, Congress has required state and local, in addition to federal, corrections facilities to provide for in-house removal proceedings for criminal aliens. Yet when unregistered immigrant Nicholas Martinez pled guilty to possession of cocaine and child endangerment, the Kansas Court of Appeals held that a sentence to imprison him, departing upward from the sentencing guidelines on the basis of his lack of amenability to the prescribed probationary sentence, was inappropriate.⁹

Despite Congress's well-established power to dictate federal immigration policy and its pattern of excluding aliens, and despite the sentencing guidelines' flexibility in allowing for departure sentences, the court of appeals reversed Martinez's departure sentence. In so doing, the court created a loophole through which an unregistered alien can evade immigration officials upon entry, commit a crime with a probationary sentence, and be forced by the state to remain within the United States despite the federal government's goal to remove them. Had the court approached the issue more cooperatively with federal policies, it would have found that the district court had a substantial and compelling reason to depart.

Part I of this Note describes (A) the legislative developments of United States immigration policy from its roots; (B) the history of deportation laws; (C) deportation for controlled substance violations; (D) Kansas's modern criminal sentencing policy; and (E) the convergence of all of the above in *Martinez*. Part II distills (A) the trend toward exclusion in the history of immigration policy; (B) the policy considerations underlying sentencing guidelines; (C) the interplay between state and federal policymakers in immigration law; and (D) the problems with the Kansas Court of Appeals's decision in *Martinez*. Part III explores (A) the basis of the *Martinez* decision and the appellate court's misconception; (B) a hypothetical situation in which the court did not misconceive, yet made incorrect assumptions; and (C) a further hypothetical situation in which the court was correct

immigrants who are apprehended are released during the adjudication process." *Id.*

9. *State v. Martinez*, 165 P.3d 1048 (Kan. Ct. App. 2007).

in its assumptions, yet under any of the situations explored, its decision was inappropriate. Part IV summarizes the consequences of *Martinez* and the extent to which an alternative holding would promote teamwork between state and federal authorities and better execution of Congress's restrictive immigration policy.

I. IMMIGRATION, CRIME, AND PUNISHMENT THROUGH UNITED STATES HISTORY

A. Immigration Policy

The history of American immigration policy follows a steady course from openness to exclusiveness. With few hitches, Congress has amassed immigration restrictions, reflecting a waning need and tolerance for immigrants.

1. Development of the Nation Through Open-Door Policies (1776–1875)

To establish its credibility and economic footing, the young United States required a momentous population influx. Accordingly, Congress and state legislatures enacted few anti-immigration laws, and those that were enacted were poorly enforced.¹⁰ The nation's early growth is attributable largely to the contributions of immigrants and their descendants.¹¹

The Alien Act of 1798¹² stands out as an early federal statute restricting immigration. Under the Alien Act, the President could expel aliens he considered dangerous.¹³ At the same time, however, Congress enacted more legislation that encouraged or protected

10. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) (supporting this general proposal, yet refuting the “misinterpretation” of immigration in the nation's first century as being wholly unregulated and open).

11. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[1] (Matthew Bender & Co. 2008) (1959).

12. *Id.* (citing Act of June 25, 1798, ch. 58, 1 Stat. 570).

13. Congress allowed the Act to expire, though, because of popular backlash against the broad grant of expulsion power. *Id.*

immigration.¹⁴ These acts reflected the ongoing policy of welcoming immigrants.

Hard times led to opposition of the federal laissez-faire attitude toward immigration.¹⁵ States began to impose their own restrictions on immigration, and though the Supreme Court struck down such legislation on federalism grounds,¹⁶ Congress took note of the undercurrent of discontent.

2. Experiments with a Restrictive Approach to Immigration Policy (1875–1917)

The first reaction to the undercurrent of opposition to Congress's leniency on immigration was the Act of March 3, 1875,¹⁷ which barred immigration of criminals and prostitutes.¹⁸ In 1882¹⁹ Congress enacted its "first general immigration statute," which imposed a head tax and excluded whole classes of persons.²⁰ Later, Congress enacted the contract labor laws,²¹ which further restricted immigration.²² The popular perception that immigration was interfering with—not aiding—the developing United States finally led to Congress's

14. For example, in 1819, Congress improved conditions on ships carrying immigrants. Act of March 2, 1819, Ch. 41, 3 Stat. 488. And on July 4, 1864, Congress enacted a bill "To encourage Immigration." Act of July 4, 1864, Ch. 245, 13 Stat. 385, *repealed by* Act of March 30, 1868, Ch. 141, 15 Stat. 58. According to Gordon, this was the last federal "legislation designed to encourage immigration." GORDON ET AL., *supra* note 11, § 2.02[1]. Gordon also noted that "some of the states had active programs to promote immigration." *Id.*

15. *See supra* note 14.

16. GORDON ET AL., *supra* note 11.

17. *Id.* § 2.02[2] (citing Act of March 3, 1875, Ch. 141, 18 Stat. 477).

18. *Id.*

19. *Id.* (citing Act of Aug. 3, 1882, Ch. 376, 22 Stat. 214).

20. *Id.* In particular, this act excluded "idiots, lunatics, convicts, and persons likely to become a public charge." *Id.* *See also* Chinese Exclusion Act, Act of May 6, 1882, Ch. 126, 22 Stat. 58 (repealed 1943) (disallowing immigration by Chinese aliens).

21. GORDON ET AL., *supra* note 11 (citing Act of Feb. 26, 1885, Ch. 164, 23 Stat. 332; Act of Feb. 23, 1887, Ch. 220, 24 Stat. 414).

22. The contract labor laws limited the importation of "cheap foreign labor under labor contracts that depressed the [United States] labor market" and allowed the deportation of violating immigrants. *Id.* According to Gordon, this was the first deportation statute since the Alien Act of 1798. *Id.*

codification of its immigration law in 1891.²³ This new legislation represented the most restrictive enactment yet.²⁴

In the first decade of the twentieth century, federal immigration policy continued its trend toward general exclusion of aliens. In 1903, Congress excluded anarchists²⁵ and extended the statute of limitations for deportation of illegal entrants from one year to three.²⁶ A 1907 statute expanded the list of excluded classes.²⁷ The flood of immigrants from southern and eastern Europe spurred American jingoism and popular demand for further immigration restrictions.²⁸

3. Refinement of Restrictive Immigration Policy (1917–1952)

Congress began elaborating upon qualitative and quantitative restrictions on immigration in 1917, when it required immigrants to pass a literacy test²⁹ and created the Asiatic Barred Zone.³⁰ In the wake of World War I, facing a depression and general fear of a flood of European immigration, Congress imposed numerical restrictions

23. *Id.* (citing Act of March 3, 1891, 26 Stat. 1084).

24. *Id.* Under this Act, the federal government could inspect entering immigrants and deport any alien who entered illegally. More classes were excluded from entry, notably persons “previously convicted of a criminal offense involving moral turpitude.” Other excluded classes included “persons suffering from a loathsome or dangerous contagious disease, . . . paupers, and polygamists.” *Id.*

25. *Id.* (citing Act of March 3, 1903, 32 Stat. 1213). Inspired by panic in the wake of President McKinley’s assassination, this was the first political exclusion in United States immigration law. *Id.*

26. *Id.* (citing Act of March 3, 1903, 32 Stat. 1213).

27. *Id.* (citing Act of Feb. 20, 1907, 34 Stat. 898). The list grew to include:

the feeble-minded, children unaccompanied by their parents, persons suffering from physical or mental defects that might affect their ability to earn a living, persons afflicted with tuberculosis, persons who admitted the commission of a crime involving moral turpitude, and women coming to the United States for prostitution or other immoral purposes. *Id.*

28. *Id.* The fervor was augmented by a commissioned report recommending additional immigration restrictions. *See id.*

29. *Id.* § 2.02[3] (citing Act of Feb. 5, 1917, 39 Stat. 874). According to Gordon, President Wilson opposed and vetoed the literacy test requirement, but Congress overrode his veto. *Id.*

30. *Id.* The Asiatic Barred Zone prohibited immigration by non-Japanese Asians. Japanese immigration already was barred by a “Gentleman’s Agreement” between the United States and Japan. *Id.*

on immigration.³¹ Then, in the Alien Registration Act of 1940, Congress mandated the systemized registration and fingerprinting of immigrants.³²

Several enactments during the 1940s and 1950s contravened the restrictive trend. Immigration legislation of this era created particularized exceptions to the generally strict exclusion and deportation laws.³³ However, these merely were departures from a cemented policy of exclusion.

4. Immigration and Nationality Acts of 1952 and 1996

Congress overrode President Truman's veto of the Immigration and Nationality Act of 1952 ("1952 INA"),³⁴ a broad refinement and codification of immigration law. The 1952 INA prescribed detailed grounds for exclusion and deportation, as well as procedures for entry and deportation.³⁵ The grounds for and enforcement of exclusion continued to expand,³⁶ while deportation procedure ensured due process of law and allowed for appeals of adverse decisions.³⁷

The 1952 INA was amended in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA").³⁸ Among other things,³⁹ the IIRAIRA implemented procedures for the

31. *Id.* (citing Act of May 19, 1921, ch. 8, 42 Stat. 5). Immigrants from the Western Hemisphere were not subject to these quotas. *Id.*

32. *Id.* § 2.02[4], (citing Alien Registration Act of 1940, ch. 439, 54 Stat. 670).

33. For example, a provision of the Alien and Registration Act of 1940 allowed the suspension or deportation of resident aliens of good character. *Id.* The Displaced Persons Act allowed immigration of refugees. *Id.* (citing Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009). The War Brides Act of 1945, ch. 591, 59 Stat. 659, and the Fiancées Act of 1945, ch. 520, 60 Stat. 339, allowed the immigration of soldiers' wartime wives and fiancées. *Id.* And Congress enacted an exception to immigration restrictions for aliens who enlisted and served in the United States military. *Id.*

34. *Id.* § 2.03[1] (citing Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163). Although Truman objected to the bill's harshness, Congress did not amend it before its passage. *Id.*

35. *Id.* §§ 2.03[2][d]–2.03[2][h].

36. *Id.* § 2.03[2][d]. Grounds for deportation under the Act included illegal entry, narcotics violations, and violations of registration and reporting requirements. *Id.* § 2.03[2][f].

37. *Id.* § 2.03[2][h].

38. The purpose of the amendment was to incorporate new removal procedures into the 1952 INA. *See id.* § 64.03[1].

39. The IIRAIRA allowed for the alien's incarceration through her sentence before removal, as long as there was no additional detention at an Immigration and Naturalization

expedited removal of aliens convicted of crimes, including controlled substance violations,⁴⁰ and required the availability of removal proceedings at federal, state, and local correctional facilities.⁴¹ The 1952 INA and IIRAIRA served the government's interest in efficiently and effectively excluding and removing criminal aliens.

5. Civil Penalties for Unlawful Entry and Criminal Penalties for Unlawful Reentry

Currently, aliens are punished for entering the United States "at a time or place other than as designated by immigration officers."⁴² Moreover, the penalty for an alien who has been removed or denied entry and subsequently "enters, attempts to enter, or is at any time found in, the United States" is a fine, imprisonment up to two years, or both.⁴³ There are criminal penalties for any such alien who meets any of a number of statutorily defined criteria.⁴⁴ These penalties are consistent with the government's history of using exclusion of aliens to protect the safety and well-being of citizens and registered aliens.

Service ("INS") processing center. 8 U.S.C. §§ 1228(a)(1)–1228(a)(3)(B) (2006). Moreover, the IIRAIRA empowered judges to order removal of deportable aliens upon the request of a United States Attorney and the concurrence of the Commissioner of the INS. *Id.* § 1228(c)(1). And while it preserved the alien's right to counsel, the IIRAIRA did not create a right to expedited procedures. *Id.* §§ 1228(a)(1)–1228(a)(2).

In this last respect, the statute in effect codified a number of decisions in suits brought by criminal aliens who sought expedited removal proceedings. *See, e.g.,* Campos v. INS, 62 F.3d 311 (9th Cir. 1995); Giddings v. Chandler, 979 F.2d 1104 (5th Cir. 1992); Aguirre v. Meese, 930 F.2d 1292 (7th Cir. 1991); Prieto v. Gulch, 913 F.2d 1159 (6th Cir. 1990); Gonzalez v. INS, 867 F.2d 1108 (8th Cir. 1989). In general, these cases held that "there was no private right to action by a detained alien to an expedited deportation hearing." 5 GORDON ET AL., *supra* note 11, § 64.07.

40. 8 U.S.C. § 1228(a) (2006).

41. *Id.* § 1228(a)(1).

42. *Id.* § 1325(b). The penalty is a \$50–\$250 fine the first time an alien is caught entering or attempting to enter in violation of the statute, and twice that any time thereafter. *Id.* Moreover, "[c]ivil penalties under this subsection are in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed." *Id.*

43. *Id.* § 1326(a).

44. *Id.* § 1326(b). The criteria are: (1) having been removed after being convicted of multiple violent or drug-related crimes; (2) having been removed after being convicted of an aggravated felony; (3) having been excluded for being involved in terrorist activity; and (4) having been removed before completion of a sentence of imprisonment for commission of a nonviolent crime. *Id.* The criminal penalties range in maximum sentences from ten to twenty years. *Id.*

B. Federal Deportation Statutes

As previously noted, the Alien Act of 1798 was the first federal statute providing for the deportation of alien enemies and aliens “dangerous to the peace and safety of the United States.”⁴⁵ Thereafter, the grounds for deportation expanded with the restrictions on immigration. Early deportation laws were enforceable only within a statute of limitations.⁴⁶ The statute of limitations for deportation was increased from one to three years in 1907,⁴⁷ and to five in 1917.⁴⁸ Finally, the 1952 INA provided for the expulsion of illegal entrants without a time bar.⁴⁹

The exclusion theory of deportation justified the eradication of deportation statutes of limitations. Under this theory, an alien who would have been excluded had she attempted to enter legally should not be allowed to remain in the United States merely because she evaded detection.⁵⁰ Under the exclusion theory, “[b]arring the admission of undesirables and ejecting those who evaded the bar were regarded as different sides of the same coin.”⁵¹

In addition to expanding the time within which deportation statutes were enforceable, Congress steadily expanded the grounds for deportation. In 1910, Congress allowed the deportation of aliens linked to prostitution in the United States.⁵² Unlike previous grounds for expulsion, this statute did not depend upon unlawful entry, but

45. 6 GORDON ET AL., *supra* note 11, § 71.01[2][a] (citing Act of June 25, 1798, ch. 58, 1 Stat. 570). Enacted in a climate generally favoring immigration, the Alien Act was allowed to expire. *Id.*

46. The contract labor laws, for example, allowed deportation within one year of entry. *Id.* (citing Act of Oct. 19, 1888, 25 Stat. 566).

47. *Id.* § 71.01[2][b][iii] (citing Act of Feb. 20, 1907, ch. 1134, § 20, 34 Stat. 904).

48. *Id.* (citing Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889).

49. *Id.* (citing Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163). Thus, delay in deporting illegal entrants did not invalidate their eventual deportation. *Id.* (citing *Hamadeh v. INS*, 343 F.2d 530 (7th Cir. 1965); *Gestuvo v. Dist. Dir. Of U.S. INS*, 337 F. Supp. 1093 (C.D. Cal. 1971)). Moreover, the duration of noncitizen aliens’ residence in the United States did not exempt them from expulsion. *Id.* (citing *Oliver v. U.S. Dep’t of Justice*, 517 F.2d 426 (2d Cir. 1975)).

50. That is, “[i]f the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the five years after entry.” *Id.* at n.28 (citing S. Rep. No. 81-515, at 389 (1950)).

51. *Id.* § 71.01[2][a].

52. *Id.* (citing Act of March 26, 1910, 36 Stat. 263).

rather upon unlawful behavior after entry.⁵³ The 1910 Act reflected the punishment theory of deportation, under which “deportation was imposed as a form of punishment for . . . misconduct.”⁵⁴

The 1952 INA incorporated both the exclusion and punishment theories of deportation. It applied all grounds for deportation retroactively and without a statute of limitations.⁵⁵ Moreover, it expanded the grounds for deportation, including criminal convictions.⁵⁶ The Immigration Act of 1990 narrowed deportation to five classes of noncitizens, providing harsh mandates concerning aliens convicted of serious crimes, including those related to controlled substances.⁵⁷

Beyond the exclusion and punishment theories, two additional principles permeate the Act. First, federalism generally prevents state regulation of immigration. Courts have held that it is Congress’s province to dictate United States immigration policy⁵⁸ and to deport aliens.⁵⁹ Thus, state interference with congressional mandates violates the Constitution.⁶⁰ Second, deportation must be treated as a civil, not criminal, action.⁶¹

53. *Id.*

54. *Id.* (citing President’s Comm’n on Immigration and Naturalization, *Whom we Shall Welcome* 200 (1953)).

55. *Id.* §§ 71.01[2][b][i]–71.01[2][b][iii].

56. *Id.* § 2.03[2][f].

57. *Id.* § 71.01[2][c].

58. *Id.* § 71.02[1]. *See also* *McJunkin v. INS*, 579 F.2d 533, 536 (9th Cir. 1978) (stating that “Congress possesses plenary power over immigration.”).

59. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (stating that immigration “is a matter of permission and tolerance. The Government’s power to terminate its hospitality has been asserted by this Court since the question first arose.”).

60. *GORDON ET AL.*, *supra* note 11, § 71.02[1]. For example, the Supreme Court has “struck down . . . state statutes restricting the eligibility of aliens for welfare benefits, prohibiting children of undocumented aliens from free public education, and banning fishing licenses to any person not eligible for citizenship.” *Id.* (citations omitted). But the Supreme Court upheld a state statute penalizing knowing employers of illegal aliens. *Id.* (citing *De Canas v. Bica*, 424 U.S. 351 (1976)). Gordon noted the possible importance that “no federal employer sanctions for employing unauthorized aliens existed at the time.” *Id.*

61. *Id.* § 71.01[4][a] (citing *Bugajewitz v. Adams*, 228 U.S. 585 (1913)).

C. Deportation for Controlled Substances Violations and the Anti-Drug Abuse Act of 1986

As early as 1922, alien narcotics offenders were subject to expulsion.⁶² The INA of 1952 incorporated the deportation of aliens convicted of drug crimes,⁶³ and as the national drug problem consumed the government's criminal regulatory conscience through the second half of the twentieth century, immigration law kept pace.⁶⁴ Deportation under current law requires only a conviction of an applicable local, state, federal, or foreign controlled substance crime, regardless of sentencing, suspended sentencing, or probationary sentencing.⁶⁵

D. Kansas Sentencing Guidelines

The Kansas legislature adopted presumptive criminal sentencing guidelines in 1993.⁶⁶ These guidelines had several recognized purposes, including matching punishment to culpability and making sentencing more uniform.⁶⁷ Despite some changes to the statutory

62. *Id.* § 71.05[5][a][I] (citing Act of May 26, 1922, 42 Stat. 596).

63. *Id.* § 2.03[2][f].

64. For example, the Anti-Drug Abuse Act of 1986 expanded upon earlier statutes, including as grounds for deportation narcotics addiction and violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." Anti-Drug Abuse Act of 1986, 100 Stat. 3207. Later, in the Immigration Act of 1990, Congress included among grounds for deportation "narcotic drug abuse[]" and attempt to violate any drug law. 8 U.S.C. § 1227(a)(2)(B) (2006).

65. See 6 GORDON ET AL., *supra* note 11, § 71.05[5][b]. Unlike all other narcotics grounds for deportation, deportation of narcotic drug addicts and abusers does not require a conviction. *Hernaiz v. INS*, 244 F.3d 752 (9th Cir. 2001).

66. Kansas Sentencing Guidelines Act, 1992 Kan. Sess. Laws 479 (codified as amended at KAN. STAT. ANN. § 21-4701 *et seq.* (1995)). See Randall L. Hodgkinson, *A Blakely Primer: The Kansas Sentencing Guidelines*, CHAMPION, Aug. 28, 2004, at 20.

67. In particular, the goals were:

(1) Prison space should be reserved for serious/violent offenders; (2) the degree of sanctions imposed should be based on the harm inflicted; (3) sanctions should be uniform and not related to socioeconomic factors, race, or geographic location; (4) penalties should be clear so everyone can understand exactly what has occurred after they are imposed; (5) incarceration should be reserved for serious violent offenders who present a threat to public safety; (6) the State has an obligation to rehabilitate those incarcerated, but persons should not be sent to prison solely to gain education or job skills; and (7) the system should be rational to allow policymakers to allocate resources.

scheme, the guidelines remain the driving force behind Kansas's sentencing schedule.

The Kansas Sentencing Guidelines Act ("KSGA") allows for a judge to depart from the sentencing guidelines for "substantial and compelling reasons."⁶⁸ KSGA makes no distinction between dispositional—i.e., from probationary to imprisoning sentences or vice versa⁶⁹—and durational departure sentences.⁷⁰ Upward departure requires a jury's finding⁷¹ of one or more aggravating circumstances,⁷² which compel the judge "to leave the status quo."⁷³ Among the accepted extrastatutory factors is the defendant's lack of amenity to probation.⁷⁴

Currently KSGA has separate guidelines for drug and nondrug offenses.⁷⁵ This division reflects the legislature's attitude toward drug offenses as opposed to all other types of crimes.⁷⁶

State v. McKay, 26 P.3d 58, 62 (Kan. 2001) (citing State v. Favela, 911 P.2d 792, 805 (Kan. 1996)). See also Brief for Appellant at 4, State v. Martinez, 165 P.3d 1050 (Kan. Ct. App. 2007) (No. 06-96613-A) (attempting to summarize McKay's list of rationales).

68. Kansas Sentencing Guidelines Act § 21-4716(a).

69. *Id.* § 21-4703(g).

70. See *id.* § 21-4716; Brief for Appellant, *supra* note 67, at 2 (citing State v. Billington, 953 P.2d 1059 (Kan. Ct. App. 1998)).

71. The United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), affected the burden of proof required to grant a prosecutor's motion for an upward departure sentence. Hodgkinson, *supra* note 66, at 20. The Supreme Court of Kansas subsequently held KSGA's procedure for upward departure sentencing unconstitutional. State v. Gould, 23 P.3d 801 (Kan. 2001). The statutory scheme improperly allowed judges who found one or more aggravating factors to depart to twice the maximum prescribed sentence. *Id.* at 814. In accordance with the Kansas Supreme Court's ruling, the legislature amended KSGA's upward departure provision to require a jury's finding of the aggravating factors beyond a reasonable doubt. Hodgkinson, *supra* note 66, at 20.

72. Kansas Sentencing Guidelines Act § 21-4716(c)(2). The statute lists examples of aggravating factors, which "focus on a certain conduct involved in, or motivation behind, the offense, and a certain victim or victim relationship." Brief for Appellant, *supra* note 67, at 5. The statute's list is not exhaustive. Kansas Sentencing Guidelines Act § 21-4716(c)(2).

73. Brief for Appellant, *supra* note 67, at 4.

74. See *id.* at 5 (citing State v. Rodriguez, 8 P.3d 712 (2000)). Being a nonobjective writing, this appellate brief interprets the exception narrowly, only for cases in which a particular defendant has, through prior conduct, proven likely to violate the prescribed probationary sentence. *Id.*

75. Kansas Sentencing Guidelines Act §§ 21-4704 to 21-4705.

76. Cf. 8 U.S.C. § 1227(a)(2)(B)(i), amended by Immigration Act of 1990, 104 Stat. 4978, redesignated by IIRAIRA § 305(a)(2), 110 Stat. at 3009–597. Marking drug crime as a cause for removal, this statute is the analog in the immigrant removal system to the KSGA.

E. State v. Martinez: The Intersection of Immigration Policy and Statutory Sentencing Guidelines

The Kansas Court of Appeals encountered a novel issue of interpretation of federal immigration statutes and state sentencing guidelines in *State v. Martinez*,⁷⁷ where the two policies seemed to be in conflict.⁷⁸

1. Facts Established before Appeal

Nicholas Martinez sold cocaine to an undercover police officer on two occasions,⁷⁹ after which the police arrested him and obtained a warrant to search his home.⁸⁰ Martinez entered a guilty plea to an amended charge of possession of cocaine and child endangerment.⁸¹ Under the KSGA, possession of cocaine by a first-time offender carries a prescribed penalty of probation.⁸² Reacting to Martinez's admission of his alienage at his sentencing hearing,⁸³ the trial court determined that he was not amenable to probation due to conflicting federal and state laws, as his unregistered presence in the United States would constitute an ongoing violation of the term of his

77. 165 P.3d 1050 (Kan. Ct. App. 2007).

78. The court of appeals relied on two decisions from Oregon for the proposition that a defendant's "immigration status is not *per se* relevant" to sentencing, but that it may demonstrate an unwillingness to conform with legal requirements, which in turn is relevant. *Id.* at 1055–56 (citing *State v. Zavala-Ramos*, 840 P.2d 1314 (Or. Ct. App. (1992)); *State v. Morales-Aguilar*, 855 P.2d 646 (Or. Ct. App. (1993)).

79. On the first occasion, Martinez employed his minor son to transfer the cocaine; on the second, Martinez delivered the drugs himself. *Id.* at 1054.

80. The subsequent search turned up more cocaine, two stolen social security cards, and a fraudulent Immigration and Nationalization Service Resident Alien card, issued to one of the victims of the social security card theft but featuring a photograph of Martinez's wife. *Id.*

81. Originally, Martinez was charged with sale of cocaine, possession of cocaine with intent to distribute, endangering a child, theft, and unlawful possession of an identification card. *Id.*

82. Kansas Sentencing Guidelines Act § 21-4705(a); Brief for Appellant, *supra* note 67, at 6. As a term of the plea bargain, the prosecution recommended the presumptive probationary sentence.

83. At Martinez's plea hearing, regarding his eligibility for drug treatment, his counsel said, "I believe Mr. Martinez, because of his citizenship and status, may or may not be eligible . . . for the mandatory treatment. He may or may not be here. I think . . . that he risks the fate of his brother that [sic] I represented on similar charges [sic] who was deported, and Mr. Martinez—if the INS continues, . . . I expect that that's what's going to happen. We certainly have not guaranteed Mr. Martinez that's not going to happen." Martinez, 165 P.3d at 1054.

probation.⁸⁴ The court sentenced him to eleven months' imprisonment on the drug offense and a concurrent one-year sentence for endangering a child.

2. District Court's Sentencing and Rationale

Martinez's sentence was a dispositional upward departure from the prescribed probationary sentence, thus requiring a substantial and compelling rationale.⁸⁵ The district court's reason for departure was its identification of a conflict between federal immigration laws and the terms of the probation that the KSGA suggested.⁸⁶ This was the only clear reason the district judge offered for the departure sentence.⁸⁷

3. The Appeal

Martinez appealed the sentence, arguing that "his status as an illegal alien was not a substantial and compelling reason to deny him presumptive probation."⁸⁸ The State argued that Martinez's

84. KAN. STAT. ANN. § 21-4610(a) (2000).

85. See Kansas Sentencing Guidelines Act § 21-4705(a). See also Brief for Appellant, *supra* note 67, at 6 (noting that Martinez's criminal history qualified him for the minimum sentence for cocaine possession, a relatively minor drug offense).

86. According to the record of the sentencing hearing, the district judge said,

Okay, . . . the problem that arises for me is to follow these guidelines here because Mr. Martinez is illegally in the country and is in violation of the probation rules right from the start if I were to place him on probation. . . . [H]e . . . has to comply with all the conditions of the probation and he can't do that because he's in violation of the law not to violate any federal or state laws. And so for that reason, I am going to have a big problem following these guidelines.

Martinez, 165 P.3d at 1055.

87. *Id.* at 1056.

88. *Id.* In his appellate brief, Martinez argued against the sentence as a violation of his rights of due process and equal protection. See Brief for Appellant, *supra* note 67, at 7 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)). Martinez relied on *Plyler* for the propositions that illegal aliens are among the "persons' guaranteed due process of law by the Fifth and Fourteenth Amendments," and that the possibility of removal does not negate the application of "the full range of obligations imposed by the State's civil and criminal laws." *Plyler*, 457 U.S. at 205, 210, 215. Martinez accused the district court of unconstitutionally "singl[ing] him out for a departure sentence of imprisonment because he may have unlawfully entered this country," and of usurping the federal government's province to determine individuals' immigration status. Brief for Appellant, *supra* note 67, at 7.

immigration status was not the direct reason for the departure sentence.⁸⁹ The State further argued that Martinez's presence in the United States was in violation of federal law, rendering him unamenable to probation.⁹⁰ The court of appeals found that the district court had sentenced him directly because of his immigrant status.⁹¹

The court of appeals described the possible inconsistency between the presumed probationary sentence and the defendant's immigration status, noting that, "had Martinez previously been deported and reentered the country illegally, the district court's observations would be correct: Each day he served on probation would be a day on which he violated 8 U.S.C. § 1326."⁹² Moreover, state courts have no authority "with respect to the classification of aliens."⁹³

However, the court found no inconsistency in a probationary sentence for a defendant who had violated § 1325 but not § 1326.⁹⁴ It

89. Rather, the State argued that Martinez's immigration status resulted in the illegality of his continued unregistered presence in the United States, which in turn resulted in Martinez's non-amenable to probation, the direct cause of the departure sentence. Brief for Appellee at 6, *State v. Martinez*, 165 P.3d 1050 (Kan. Ct. App. 2007) (No. 06-96613-A).

90. *Id.* at 5. The State argued in passing that Martinez's failure to demonstrate a willingness to comply with the law was manifest in his failure, before or after pleading guilty, to attempt to change his resident status. *Id.* at 6.

91. According to the court of appeals, among the primary issues was "whether the fact that [Martinez] is an illegal alien justifies the denial of presumptive probation." *Martinez*, 165 P.3d at 1054. Moreover, the court of appeals claimed that "the district court concluded, and the State argue[d] on appeal, that Martinez'[s] immigration status alone made him ineligible for probation without further examination of his willingness or ability to conform his conduct to the law or to fulfill the terms of his proposed plan of probation." *Id.* at 1055. *But see* Brief for Appellee, *supra* note 89, at 6 ("The district court did not depart from the presumptive sentence . . . because of [Martinez's] resident status. The court departed because the defendant was in current and ongoing violation of federal law."). However, the court of appeals ruled finally against Martinez on this issue, and disposed of the case on other grounds. *Martinez*, 165 P.3d at 1058.

92. *Martinez*, 165 P.3d at 1057. Moreover, the court of appeals noted that the probation sentence would have included a travel restriction, requiring Martinez to remain within 100 miles of his residence, and inside Kansas borders, except with permission from his assigned court services officer. *Id.* The court concluded, "[t]hus, it is readily apparent that fulfillment of the statutorily mandated and additional recommended probation terms would have been inconsistent with Martinez continuing to reside in this country as an illegal alien throughout the term of his probation." *Id.* Such an inconsistency would lead to a dilemma by which court services officers may be encouraged to "look the other way" to avoid having to revoke the probationary sentence, an unacceptable result. *Id.*

93. *Id.* at 1058.

94. *Id.* at 1057.

distinguished between the prohibition against entry in § 1325 and the culpability under § 1326 of an alien “at any time found” in the United States.⁹⁵ The court found support in two federal decisions for the proposition that a violation of § 1325 does not make a “person’s ongoing presence in the United States in and of itself . . . a crime unless that person has been previously deported and regained illegal entry into this country.”⁹⁶

The court also relied on the distinction between the civil remedy of deportation and the underlying crime in a deportation action.⁹⁷ If Martinez entered in violation of § 1325, “his ongoing presence is not a crime though he is subject to deportation.”⁹⁸ Immigration law does not necessarily impute a crime wherever it contemplates an alien’s amenability to removal.

Limiting the breadth of its opinion, the court ruled against Martinez on several non-dispositive issues and expounded on the sentencing consequences of a defendant’s violation of § 1326.⁹⁹ The

95. 8 U.S.C. § 1326(a) (1996). Although the court did not parse § 1326 so explicitly, it is a fair assumption that this was the language it considered, since it then described the possible inconsistency between the presumed probationary sentence and the defendant’s immigration status.

96. *Martinez*, 165 P.3d at 1056 (citing *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1193–94 (9th Cir. 1979)). The Kansas Court of Appeals also noted that § 1325 and similar statutes “are not continuing [offenses], as ‘entry’ is limited to a particular locality and hardly suggests continuity.” *Id.* at 1056 (citing *United States v. Cores*, 356 U.S. 405, 408 n.6 (1958)).

Notably, a proposed amendment to § 1325 would add “or . . . is otherwise present in the United States in violation of the immigration laws or the regulations prescribed thereunder,” to the circumstances triggering the criminal penalties contained therein. H.R. 4065, 110th Cong. § 203(2)(C) (2007). Another proposed bill would make violation of § 1325 a felony. H.R. 4192, 110th Cong. § 312(b) (2007). Passage of these bills may alter the result in cases like *Martinez*.

97. *Id.* at 1056. See also 6 GORDON ET AL., *supra* note 11, § 71.01[4][a] (citing *Bugajewitz v. Adams*, 228 U.S. 585 (1913)). This was an important distinction because the defense apparently conceded Martinez’s deportability at the sentencing hearing. *Martinez*, 165 F.3d at 1054.

98. *Martinez*, 165 P.3d at 1057. The court interpreted the distinction between § 1325 and § 1326 as requiring a remand to the district court for determination whether Martinez had been denied entry or removed and reentered, in violation of § 1326. Martinez was unamenable to probation, and the departure sentence thus was justified, if and only if he had violated § 1326. *Id.*

99. First, Martinez argued that the district court improperly adjudicated his immigration status, but the court of appeals denied that his status was adjudicated at all in the lower court. *Id.* at 1057–58. See also 6 GORDON ET AL., *supra* note 11, § 71.02[1] (describing the many ways in which federal immigration policy binds states’ actions regarding aliens). Second, Martinez argued that the departure sentence violated his rights of due process and equal protection, but the court was not persuaded by his argument, and used his own sources against

court employed a *reductio ad absurdum* argument: if a violation of § 1326 did not render a defendant unamenable to probation, then a government official entrusted with enforcing the law would be made to supervise a probationary sentence known to be inconsistent with the very laws she must uphold.¹⁰⁰

The court claimed to be restricted to “interpreting and applying the law.”¹⁰¹In so professing, the court again stressed the district court’s authority over dispositional sentencing departures where a defendant is unamenable to probation, and maintained that Martinez’s sentence therefore would be appropriate if he were found in violation of § 1326.¹⁰²

II. TRENDS IN IMMIGRATION, CRIME, AND PUNISHMENT AND THEIR MISAPPLICATION IN *MARTINEZ*

A. *The Evolution of Federal Immigration Law toward an Exclusive United States*

The history of United States immigration policy demonstrates that, at any given time, the law reflects the perceived social and economic needs of the nation, and that the justifications and

him. *Martinez*, 165 P.3d at 1058 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (“[T]he Constitution does not require things which are different in fact or opinion to be treated as though they were the same.”)). See also Brief for Appellant, *supra* note 67, at 7. Finally, Martinez argued that it was inconsistent for the district court to deny probation and grant an appeal bond, but the court of appeals summarily held that “[t]he appropriateness of an appeal bond is not determinative of whether a substantial and compelling reason supports his departure sentence.” *Martinez*, 165 P.3d at 1058.

100. *Martinez*, 165 P.3d at 1057. The court quoted Justice Brandeis: “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

101. The court said as follows:

We do not presume to breach the line between interpreting and applying the law on one hand and establishing public policy on the other. We leave the latter task to our legislative branch. But our legislature . . . has mandated a provision in every probation plan that the defendant, during the term of probation, not violate the laws [of] the United States. So long as this remains the law of our state, we must refrain from any activity that undermines its clear and unequivocal intent.

Id. at 1058–59.

102. *Id.* at 1059.

procedures for removal fluctuate in severity with the grounds for exclusion. Thus, Congress's allowance for removal based on convictions for controlled substance violations reflects a modern alertness and disfavor toward drug trafficking and abuse by unregistered aliens.

The early years of the United States' development were marked by open-door policies encouraging immigration and the corresponding influx of social and economic capital. The few restrictive laws were poorly enforced.¹⁰³ These policies reflected the general expectation that immigration as often as not benefitted both the individual immigrant and the United States.¹⁰⁴ When it became apparent that not all immigration was helpful to the nation's social and economic growth, Congress began to react.

The Alien Act, which allowed the president to deport persons who would hinder, rather than benefit, the United States, was an early embodiment of the principle that immigration generally, but not always, is mutually beneficial.¹⁰⁵ After failed experiments with openness, Congress altered its position and began to experiment with a restrictive immigration policy.¹⁰⁶ Congress's consistent adherence to restrictive immigration policies in the intervening decades, with very few exceptions,¹⁰⁷ indicates that exclusion was favorable to the legislators' constituencies.

103. See *supra* Part I.A.1.

104. See *Smith v. Turner*, 48 U.S. 283, 440 (1849) ("Keeping in view of the spirit of the Declaration of Independence with respect to the importance of augmenting the population of the United States, and the early laws of naturalization, Congress, at divers [*sic*] subsequent periods, passed laws to facilitate and encourage more and more the immigration of Europeans into the United States for the purposes of settlement and residence."); see also Anna Byrne, Note, *Special Project: Current Issues In Immigration*, 60 VAND. L. REV. 1809, 1810 (2007) ("While fear of foreigners always existed, the United States had a liberal and inviting immigration policy in its early years. The country needed immigrants to help develop its vast territories.") (citation omitted).

105. See *supra* text accompanying notes 12–14. The young United States needed to encourage immigration, however, so the legislature began enacting initiatives incentivizing movement to the United States. See *supra* notes 15–16 and accompanying text. These early congressional policies favoring immigration were unsuccessful, to the extent that the results did not inspire the confidence of the American people, who already were adopting a level of jingoism. See *supra* notes 17–18 and accompanying text.

106. See *supra* Part I.A.2.

107. Since it began restricting immigration broadly, the United States has relaxed its policy only in very limited circumstances—especially in the wake of World War II, when the United

The first grounds for exclusion—prostitution and mental and physical illnesses¹⁰⁸—were proxies for the perceived likelihood that immigrants would do more harm than good for national growth. The contract labor laws exemplified Congress's goal of preventing the corruption of the nation's economic well-being.¹⁰⁹ Congress's short-sighted purpose was to prevent an influx of cheap labor, which it considered a threat to the employment and compensation prospects of United States citizens. Finally, when the people sensed that immigration threatened national security, especially at its peak during the industrial revolution, they turned to Congress to enact even more restrictive laws.¹¹⁰

The evolution of immigration law provides a window into the ever-changing attitudes toward immigration, particularly the costly and beneficial effects it is perceived to have on the state of the nation.¹¹¹ The current United States policy of general exclusion demonstrates a level of contentedness with the current composition of its populace and an expectation that immigration generally does more harm than good to its safety, society, and economy.

The exclusion theory of deportation teaches that grounds and procedures for removal ought to reflect the exclusionary regime. Under that theory, deportation fulfills the need to expunge the nation of aliens who would have been excluded but for their evasion of immigration officers.¹¹² The more strictly anti-immigration the policy is, the more extensive are its grounds for removal.¹¹³ As the perceived

States was reemerging on a global scale as a stable refuge for victims of persecution, and when its returning soldiers relied on the government to allow immigration of their families. *See supra* note 33.

108. *See supra* note 18 and accompanying text.

109. *See supra* note 21 and accompanying text.

110. Threatened by a potential wave of immigration after World War I, Congress began imposing quotas on immigration. *See supra* note 31 and accompanying text.

111. For example, Congress enacted such short-sighted, reflexive legislation as the exclusion of anarchists and subversives in the wake of the McKinley assassination. *See supra* note 37.

112. *See supra* text accompanying notes 77–78. In brief, removal must be coextensive with exclusion.

113. As Congress expanded its exclusion laws, it also extended the time period reaching from the time of the alien's unlawful conduct to the initiation of deportation proceedings. By 1952, there was no time limitation; this element of deportation procedure reflected the attitude favoring exclusion, by refusing to distinguish between exclusion at the time of attempted entry from later removal. *See supra* note 49 and accompanying text.

threats of immigrants worsened, deportation procedures became less lenient toward aliens and more convenient for government officials, allowing eventually for expedited proceedings at correctional facilities and retroactive application of grounds for deportation.¹¹⁴

The breadth of the Anti-Drug Abuse Act of 1986, which reaches to nearly all offenses related to controlled substances,¹¹⁵ reflects popular intolerance of drug offenders. The Act's strict retroactivity further reveals the United States' impatience with alien drug offenders. The automatic triggering of removal proceedings by drug offenses conforms to the generally strict policy against immigration of persons perceived to pose a threat to the nation.

B. The Policy of Statutory Sentencing Guidelines

Just as the United States' immigration law expresses the attitudes of American citizens toward immigrants, a government's sentencing guidelines can determine, at least in part, whether a populace is "tough on crime" or "easy on crime".¹¹⁶ The Kansas legislature designed the KSGA to serve two basic functions,¹¹⁷ which it fulfills by prescribing temporal and dispositional boundaries while allowing judges to depart under compelling circumstances.

C. Federalism Concerns of Immigration Policymaking and Regulation

In an area of the law over which Congress exercises "plenary power," it is unconstitutional under the Supremacy Clause¹¹⁸ for a

114. See *supra* note 41 and accompanying text.

115. The only exception is for a conviction of less than thirty grams of marijuana intended for personal use. See 6 GORDON ET AL., *supra* note 11, § 71.05[5][c].

116. More specifically, the prescribed sentence for any particular class of crimes should reflect the values of the legislature, namely whether preventing instances of that crime is a high priority.

117. First, the guidelines exist to provide a framework within which the judiciary can mete out punishment systematically, predictably, and equitably among various classes of convicted criminals. Second, sentencing guidelines provide sentencing judges with flexibility, even as they dictate the factors that control sentencing.

118. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

state to interfere with federal policy.¹¹⁹ Where federal immigration law¹²⁰ intersects with state criminal law, it is therefore important for the state to enable, and not to interfere with, the effective operation of the United States' policies and enforcement schemes.¹²¹

D. *The Problem with Martinez*

The Kansas Court of Appeals's decision in *Martinez*, requiring adherence to the KSGA's prescriptive probationary sentence even for a criminal who is subject to removal by the federal government, obfuscates the purposes of immigration law and the sentencing guidelines themselves.¹²² To illustrate, consider two alternatives: (1) Martinez violated § 1326, having reentered the United States after being removed or excluded; or (2) Martinez did not violate § 1326 but violated § 1325 by evading immigration officials when he entered the United States.¹²³

The court treated these two situations differently. It correctly speculated that in the first circumstance, Martinez would be unamenable to probation, and an upward sentence requiring imprisonment therefore would be appropriate.¹²⁴

119. Thus, courts have invalidated state statutes on this ground, ruling that the federal government possesses plenary authority on issues of international affairs. *See, e.g.,* *McJunkin v. INS*, 579 F.2d 533, 536 (9th Cir. 1978); 6 GORDON ET AL., *supra* note 11, § 71.02[1]; *see also supra* text accompanying notes 67–69. The Constitution balances this presumptive federal supremacy against the Tenth Amendment, U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”), which protects states against intrusions by the federal government. On the balance of powers between the states and the federal government, *see generally* *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992).

120. The courts have established that Congress has plenary power to regulate immigration. *See supra* text accompanying notes 58–61.

121. This emphatically is the case, considering the immigration enforcement troubles of the United States government. *See supra* notes 5–8 and accompanying text.

122. In particular, the court did not consider the flexibility of the KSGA. *See supra* notes 68–74 and accompanying text (describing departure sentencing within the framework of the KSGA).

123. In either situation, Martinez is subject to removal. A violation of either section requires this result, because a person who is excludable also is removable. *See infra* note 124 and accompanying text. Moreover, he is removable for having been convicted of an offense related to illegal drugs. *See supra* Part I.C.

124. *See supra* note 100 and accompanying text. If Martinez were incarcerated, expedited removal proceedings could be undertaken at the correctional facility. *See supra* note 41 and

In the second situation, the court in *Martinez* ruled that Martinez would be amenable to probation. In reaching its decision, the court relied on cases ruling that a violation of § 1325 occurs at the discrete moment of unlawful entry.¹²⁵ By not imprisoning Martinez, the state would evade the in-house removal proceedings of the correctional facility, which had been established for the convenience of the undermanned and underfunded immigration officials.¹²⁶

The distinction the court drew between violations of §§ 1325 and 1326 is based on a mere technicality.¹²⁷ The result is unsettling. Instead of facing almost certain removal, which the law requires for similarly situated immigrants, Martinez likely escapes this civil penalty and paradoxically is required to remain in the United States.¹²⁸ His commission of a crime enabled his avoidance of removal; the court effectively incentivized violators of § 1325 to commit crimes for which the prescribed penalty is probation.

III. A PROPOSAL TO REVERSE THE COURT OF APPEALS'S VERDICT

The result of *Martinez* is anomalous. The court itself noted the dangers of a government's acquiescence to the abuse of its laws.¹²⁹ By refusing to treat a convict's prior § 1325 violation as an aggravating factor in sentencing to allow a dispositional upward departure, Kansas has interfered with the efficient enforcement of federal law¹³⁰ and fallen into Justice Brandeis's trap.¹³¹

accompanying text.

125. *See supra* notes 84–86 and accompanying text. Thus, even if Martinez entered illegally, his continued presence in Kansas, subject to probationary supervision, would be consistent with the term of probation, that he shall not break any state or federal laws during his probationary term.

126. *See supra* note 41 and accompanying text. The odds that Martinez would not face removal proceedings are much greater if he serves probation than if he faces jail time.

127. The difference in Martinez's behavior is not in the offense for which he was convicted, but in the circumstances of his illegal entry into the United States, which do not control his immigration status with respect to removability.

128. Martinez would have state-imposed limitations on his mobility. *See supra* note 92.

129. Recall Justice Brandeis's words: "Our government is the potent, the omnipresent teacher. . . . If the government becomes a lawbreaker, . . . it invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

130. Given the lack of resources dedicated to immigration enforcement, it may be fair to say that an interference with the efficiency of operations is itself an interference with effect. *See supra* note 6.

A. An Anomaly Built upon Misconception

The court erroneously considered its decision bound by federal case law interpreting § 1325(a).¹³² In examining the criminality of Martinez's continuing presence in the United States under § 1325(a), the court neglected the other half of the legal system—that imposing civil liability upon its violators.¹³³ The court inappropriately narrowed the scope of the statute by reading out the applicability of civil penalties, such as removal under § 1227.¹³⁴

The court should not have relied solely on federal cases discussing the ongoing criminality of an alien's entry, but rather should have looked to the noncriminal statutes that defense counsel and the court itself acknowledged Martinez was violating.¹³⁵ It should have considered the entire federal scheme of immigration law enforcement and immigrant registration. If it had, it likely would have concluded differently in *Martinez*, and its conclusion would have harmonized with the plain language of the general terms of probation and the federal exclusionary regime.

B. Supposing the Court did not Misconceive . . .

Given the language of the statutory conditions of probation,¹³⁶ the court of appeals erroneously disregarded federal civil penalties that negated Martinez's amenability to probation.¹³⁷ Suppose, however,

131. *See supra* note 129.

132. *See supra* notes 94–96 and accompanying text. This case law distinguished § 1326(a), an ongoing criminal offense, from § 1325(a), a one-time criminal violation. This distinction relies on the language in § 1326 that any alien who “is at any time found in[] the United States” is subject to punishment. 8 U.S.C. § 1326(a) (1996). Section 1325 lacks similar language. *Id.* § 1325(a).

133. The “standard conditions of probation” under Kansas law do not distinguish between civil and criminal laws in requiring that “the court shall condition any order granting probation . . . on the defendant’s obedience of the laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject.” *State v. Gary*, 144 P.3d 634, 639 (Kan. 2006) (citing KAN. STAT. ANN. § 21–4610(a) (2006)).

134. *Martinez*, 165 P.3d at 1056 (citing 8 U.S.C. § 1227 (2000)).

135. *E.g.*, 8 U.S.C. § 1227 (2000).

136. KAN. STAT. ANN. § 21–4610(a) (2000).

137. These penalties would have justified the district court’s departure sentence. *Martinez*, 165 P.3d at 1057 (“[O]ur courts have repeatedly recognized that [nonamenability to probation] is [a substantial and compelling reason to depart].”).

that the court was correct in focusing only on Martinez's criminal liability. Although it found the federal cases defining criminality under § 1325(a) compelling, the court was not bound to follow them. The KSGA was designed to preserve a measure of judicial flexibility in sentencing.¹³⁸ Although the parties' briefs in *Martinez* focused on Martinez's non-amenability to probation as a possible aggravating factor, since it had been recognized by earlier courts,¹³⁹ the district judge's decision needed support by "substantial and compelling reasons."¹⁴⁰

The appellate court ought to have considered cooperation with federal immigration law enforcement efforts a substantial and compelling reason to depart from the presumptive probationary sentence. Martinez's immigration status was not in dispute.¹⁴¹ The appellate court was somewhat bound by the trial record; the trial judge was required to state her substantial and compelling reasons for departure in the record.¹⁴² The court of appeals's decision relied heavily on the presumption that "[t]here is no question that Martinez'[s] status as an illegal alien was the fact which prompted the [sentencing] court to depart."¹⁴³

Yet the question lingers: What did the district court intend by "in violation of the probation rules"?¹⁴⁴ Given the basic division between

138. Thus, the KSGA allows a judge to depart from the statutory sentence upon a finding of one or more aggravating circumstances. *See supra* notes 98–101 and accompanying text. The statute provides a "nonexclusive list of aggravating factors." Kansas Sentencing Guidelines Act at § 21-4716(c)(2). *See also supra* note 99. The list's nonexclusivity is necessary to the statute's flexibility.

139. *See supra* note 101 and accompanying text.

140. Kansas Sentencing Guidelines Act § 21-4716(c)(2); *Martinez*, 165 P.3d at 1055. The existence of a "substantial and compelling reason" was reviewed *de novo* on appeal. *Id.*

141. Only Martinez's compliance with 8 U.S.C. § 1326 was in question. *Martinez*, 165 P.3d at 1056. It was conceded by his attorney that Martinez had not entered the United States legally and therefore was subject to removal. The court of appeals acknowledged the possibility of Martinez's deportation, but focused instead on the criminality of his presence in the United States. *Id.*

142. *Id.* at 1055 (citing Kansas Sentencing Guidelines Act at § 21-4716(a) and *State v. Murphy*, 19 P.3d 80, 82 (Kan. 2001)). On the record, the district judge stated, "Mr. Martinez is illegally in the country and is in violation of the probation rules right from the start if I were to place him on probation." *Id.* at 1057.

143. *Id.* at 1055.

144. It is clear that by "probation rules," the district judge was referring to § 21-4610(a) of the KSGA, prohibiting a probationer from violating any laws to which she is subject. It also may be inferred therefrom that being "in violation" of § 21-4610(a) means being in ongoing

the civil and criminal systems, it is arbitrary and inappropriate, when confronted with an ambiguity between them, to decide one way instead of the other.¹⁴⁵ The court's conjecture was unwarranted and inequitable.

C. Supposing the Court's Conjecture was Correct . . .

Now assume, contrary to the plain language of the district judge's statement of her substantial and compelling reason to depart,¹⁴⁶ that the judge specifically determined that Martinez was in ongoing violation of the United States criminal immigration laws¹⁴⁷ and not its civil laws. Assume that her statement, however, was ambiguous.¹⁴⁸ If the court of appeals wrote exactly the *Martinez* opinion, it would have been correct in its supposition that the district judge had meant that Martinez violated § 1325(a) or § 1326(a).

Yet should it have decided, as it did, to reject the upward dispositional departure sentence? If the court had considered the consequences of its decision,¹⁴⁹ the sensible conclusion would be affirmation of the sentence.

The immediate consequence of affirming would have been Martinez's imprisonment in a correctional facility required by law to be equipped for removal proceedings.¹⁵⁰ An affirmation would have had at least two other, more remote, consequences. First, it would employ the punishment theory of deportation for deterring unwanted

violation of the laws of the United States or Kansas. Yet the court assumed negligently that the district court meant that Martinez was violating criminal laws.

145. Indeed, the district court would have been correct if Martinez either was in violation of criminal laws or subject to civil penalties, and the court of appeals accordingly should have considered both possibilities.

146. *See supra* note 133.

147. *See* 8 U.S.C. §§ 1325–1326 (1996).

148. For example, suppose the district court had said, "Mr. Martinez is in violation of United States immigration laws, and thus unamenable to probation, so we are compelled to depart from the KSGA." In this statement, "United States immigration laws" could refer equally to either criminal or civil laws.

149. The court would have considered its role in (1) obstructing the execution of the law by federal officials, creating a loophole through which undetected aliens who commit crimes for which the prescribed sentence is probation, can find a legal home in the United States; and (2) making a general muck of the law in the face of a clear alternative. *See supra* Part III.

150. *See supra* note 41.

behavior.¹⁵¹ Whether removal proceedings actually were begun against Martinez, the state courts would have furthered the federal policy of discouraging, rather than rewarding, illegal entry and evasion of immigration officers.

Second, and more generally, an affirmation of the departure sentence, placing Martinez neatly in the hands of immigration officers, would help make immigration law enforcement a cooperative effort among federal and state governments.¹⁵² Without stepping too heavily on the federal government's toes, the Kansas courts had the ability to set an example of teamwork to other states. After all, where two systems of law intersect as in *Martinez*, the Supremacy Clause and Tenth Amendment encourage restraint by each government from advancing its own goals aggressively at the expense of the other.

IV. A BETTER RESULT

This Note has examined the Kansas Court of Appeals decision in *Martinez* from three real and hypothetical perspectives. Any of these perspectives, whichever most closely resembles the realities of that case—or those perceived by the appellate court—presents a conclusion in opposition to the court's opinion. The decision in *Martinez* created an anomaly; where an objective of the law is predictability, anomalies are the enemy of success. And while the staple of United States immigration law is exclusion and removal of aliens who would have been excluded, *Martinez* sets a precedent of state-sponsored inclusion. It forces a state judge to play pardoner, sparing a convicted criminal from the full force of the federal law.

The Kansas Court of Appeals in *Martinez* barricaded the federal government from its efficient administration of the United States immigration laws. A different result—allowing the sentencing judge to consider the advancement of federal civil enforcement and marked by cooperation between the state and federal systems in fulfilling

151. In this case, since the Kansas courts had no control over the immigration law consequences of Martinez's departure sentence, the sentence would use the traditional deterrent of imprisonment where the deterrent of deportation is uncertain.

152. This, after all, was the intended effect of requiring the availability of removal proceedings at federal, state, and local correctional facilities.

their different, overlapping obligations—would be reasonable, simple, and favorable to the uncontested authority of Congress to set immigration policies. It would provide a clearer example for future defendants in Martinez’s position. Most importantly for the federal system, it would be a deterrent and a rallying point for the states to join Congress’s long history of shutting the nation’s doors to immigrants.