U.S. VS. THEM: A PERSPECTIVE ON U.S. IMMIGRATION LAW ARISING FROM *UNITED STATES V. ROSALES-GARCIA* AND THE COMBINATION OF IMPRISONMENT AND DEPORTATION

ABSTRACT

This Comment centers on immigration law, specifically, U.S. immigration law. *United States v. Rosales-Garcia*, a recently published case from the Tenth Circuit, was the original diving board for the thoughts that follow. In *Rosales-Garcia*, Raul Rosales-Garcia (Rosales), an undocumented immigrant, had been deported following a state drug conviction and was caught having illegally returned to the United States. He appealed the length of his sentence for a federal conviction of illegal reentry. The district court had enhanced (increased) his sentence based on the U.S. Sentencing Guidelines. Rosales appealed the level of enhancement. While the Tenth Circuit's decision ultimately helped to clarify how sentence enhancements for Rosales and similarly situated defendants are calculated, it did not answer a more fundamental question. Prior to his illegal reentry, Mr. Rosales had been convicted of a state drug-trafficking felony. He was sentenced to ninety days in jail and three years of probation. After serving the ninety days in jail, Mr. Rosales was deported. My question is, why, if we are going to deport an immigrant, are we first bothering to imprison him?

This Comment considers the importance of citizenship by looking at the roots of modern democratic civilization: ancient Greece and Rome. The Comment then looks at the birth of the United States, specifically the fact that from the beginning, this country was a nation of immigrants. Now, the original popular perception of America as a haven welcoming immigrants appears to have changed. America no longer seems so welcoming in light of the current popular perception that immigrants are dangerous. The idea of immigrants as criminals is reflected in the hostility present in current immigration law, which is set up to both punish and deport the criminally convicted immigrant. I suggest that deportation itself is more properly a punishment than a collateral consequence, and therefore the combination of deportation and imprisonment is excessive. The time has come for reform; immigration law needs to reevaluate the purposes it serves and ensure that the laws and regulations are set up to further those purposes rather than to pay tribute to hostile feelings towards the immigrants who continue to dare enter our land.

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INTRODUCTION

> Well I'm so glad I'm livin' in the U.S.A.
>
> Yes I'm so glad I'm livin' in the U.S.A.
>
> Anything you want we got right here in the U.S.A.
>
> —Chuck Berry, *Back in the U.S.A.*[1]

This Comment deals with double jeopardy[2]—a special kind of double jeopardy not recognized by the U.S. legal system.[3] In our current

1. CHUCK BERRY, *Back in the U.S.A., on* REELIN' & ROCKIN' (Chess Records 1959).

2. BLACK'S LAW DICTIONARY 564 (9th ed. 2009) (defining "double jeopardy" as "[t]he fact of being prosecuted or sentenced twice for substantially the same offense"); *see also* U.S. CONST. amend. V (providing that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb").

3. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 481 (2007) ("[B]ecause deportation has been held not to be punishment, the constitutional bar on double jeopardy does not preclude the government from bringing deportation proceedings once the person has completed his or her criminal sentence.").

system of immigration law, deportation is not considered punishment.[4] An undocumented immigrant convicted of a crime can therefore be both imprisoned and deported.[5] This was the experience of one such immigrant, Raul Rosales-Garcia (Rosales), who was convicted of a state felony, imprisoned, released on parole, and deported.[6] But Rosales' saga of crime and punishment did not end there. He was caught having returned to the United States.[7] His return was a double violation because it violated not only the terms of his probation but also the federal code.[8] Rosales was sent back to state prison to serve another sentence as punishment for violating probation.[9] After completing that sentence, he was released into federal custody to be tried for the crime of illegal reentry.[10] The Government sought not only to imprison Rosales for this charge but also to enhance[11] his base sentence.[12] It was the length of the enhancement that Rosales appealed before the Tenth Circuit.[13]

The Tenth Circuit's decision in *United States v. Rosales-Garcia*[14] provided an important clarification for the particular sort of sentence enhancement Rosales faced, that which is provided for undocumented immigrants who have been previously convicted of a serious crime.[15] A drug-trafficking felony, like the one for which Rosales was convicted, is enumerated as a serious crime for purposes of the U.S. Sentencing Guidelines.[16] The amount of enhancement depends upon the maximum length of the sentence imposed for the prior crime.[17] The question on appeal was how much longer Rosales's federal sentence could be: either a 12-level enhancement, based on the length of his original state sentence of ninety days followed by three years of probation, or a 16-level based on the maximum length of his probation-revocation sentence (fifteen years), imposed after deportation.[18] When *Rosales-Garcia* was decided,

4. *See, e.g.*, *id.* at 472 ("For more than a century, . . . the courts have uniformly insisted that deportation is not punishment.").

5. *See* United States v. Rosales-Garcia, 667 F.3d 1348, 1349 (10th Cir. 2012); Legomsky, *supra* note 3.

6. *See Rosales-Garcia*, 667 F.3d at 1349.

7. *See id.*

8. *See id.* (citing 8 U.S.C. § 1326 (2012)).

9. *Id.*

10. *Id.*

11. An enhanced sentence is one which is made longer for some reason. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 609 (defining "enhanced" as "[m]ade greater; increased").

12. *Rosales-Garcia*, 667 F.3d at 1349 (referring to the Presentence Report prepared by the United States Probation Office).

13. *Id.* at 1349–50.

14. 667 F.3d 1348 (10th Cir. 2012).

15. *See id.* at 1349 ("The sentencing scheme embodied in § 2L1.2 imposes, via enhancements to the defendant's base offense level, more severe punishment for defendants who have committed serious prior crimes.").

16. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012); *see also Rosales-Garcia*, 667 F.3d at 1349.

17. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)–(B).

18. The levels refer to the length of time by which a sentence can be increased (enhanced). If the 12-level enhancement were applied to Rosales, the range of sentencing would be twenty-four to

it was unclear whether the predicate sentence (the length of which determines the level of enhancement) must have been imposed before deportation and subsequent reentry.[19] The court in *Rosales-Garcia* held that the predicate sentence must precede deportation and reentry.[20] Only a sentence imposed prior to the defendant's deportation and illegal reentry may be used for enhancement of the federal sentence punishing illegal reentry.[21]

In his dissenting opinion, Judge Gorsuch lamented the ambiguity in the language of the U.S. Sentencing Guidelines, adding that whether his interpretation or the majority's was correct "may be ultimately less important than the fact we're unable to agree."[22] Not long after the decision in *Rosales-Garcia*, the commentary accompanying the Sentencing Guidelines was amended.[23] It would seem that the U.S. Sentencing Commission heard and complied with Judge Gorsuch's request for clarity.[24] With the official clarification provided by the amendment, the courts will no longer be split on this issue and, at least regarding this particular aspect, "similarly situated defendants [will] receive . . . consistent treatment" by the federal courts.[25]

Though the *Rosales-Garcia* decision was restricted to the narrow question of sentence enhancements of the criminal immigrant,[26] it served as the diving board for the broader consideration of U.S. immigration law that follows. It may be somewhat intuitive that the penalty inflicted upon the undocumented when caught within our borders is to eject them and send them back whence they came.[27] What is not intuitive, however, is why we feel the need to first imprison them within the very borders from which we plan to evict them. The paradoxical penalty is that to punish the undocumented for being here when we don't want him, we shall

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thirty months. When the U.S. Probation Office applied the 16-level enhancement, the result was a range of thirty-seven to forty-six months. The district court applied the 16-level enhancement and sentenced Rosales to a prison term of thirty-seven months. *Rosales-Garcia*, 667 F.3d at 1350.

19. *See id.* at 1354; United States v. Lopez, 634 F.3d 948, 952–53 (7th Cir. 2011); United States v. Bustillos-Pena, 612 F.3d 863, 868–69 (5th Cir. 2010); United States v. Compres-Paulino, 393 F.3d 116, 118–19 (2d Cir. 2004) (per curiam).

20. *Rosales-Garcia*, 667 F.3d at 1351 ("Because it is undisputed that the defendant's prior *conviction* must have occurred before deportation, we agree with Mr. Rosales that the most logical reading of § 2L1.2 is to refer to the date of deportation in evaluating whether the 'sentence imposed' for the prior felony exceeded 13 months.").

21. *Id.* ("In other words, we conclude that the temporal requirement contained in the text of § 2L1.2 with regard to the defendant's *conviction* also applies to the imposition of his *sentence* for that conviction.").

22. *Id.* at 1359 (Gorsuch, J., dissenting).

23. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) (2012).

24. *Rosales-Garcia*, 667 F.3d at 1359; *see also* United States v. Catalan, 701 F.3d 331, 333 (9th Cir. 2012) (per curiam) ("Recognizing this ambiguity, the Sentencing Commission recently clarified the interpretation in Amendment 764 to the Guidelines . . . and discussed *Bustillos-Pena*, *Lopez*, *Rosales-Garcia*, *Guzman-Bera*, and *Compres-Paulino*.").

25. *Rosales*-Garcia, 667 F.3d at 1359 (Gorsuch, J., dissenting).

26. *Id.* at 1349 (majority opinion).

27. *See, e.g.*, Legomsky, *supra* note 3, at 476 ("Violations of the immigration laws, naturally enough, have consequences. One of those consequences is removal from the United States . . . .").

first force him to stay. Though we cannot properly define this as double jeopardy,[28] we may classify it as a double sanction for the undocumented immigrant.

I suggest that a driving force behind this double sanction of incarceration and removal provided by our legal system is a brand of xenophobia which has directed the trend of U.S. immigration law over the course of the twentieth century.[29] A good number of the American public assumes that immigrants are here illegally.[30] In the case of Rosales, he was in the U.S. illegally and was convicted of a felony.[31] However, "the vast bulk of immigration to the United States occurs through legal channels."[32] Why should the popular perception be that immigrants are illegal?[33] The preoccupation in this country is with illegal immigration rather than with the many legal channels of immigration.[34] This reflects a shift occurring in the twentieth century from a land calling on the rest of the world to send us their "tired, . . . poor, . . . huddled masses yearning to breathe free"[35] to a nation edged with fences and border patrols.[36] Based on the continuing surge of immigration into the United States,[37] it would seem that the huddled masses are still eager to come to our shores and partake of the American way of life to which Chuck Berry jubilantly refers in *Back in the U.S.A.*[38] This Comment considers why there has been this shift in the American immigration paradigm. Why is it that the Statute of Liberty no longer has the loudest voice on the border? This Comment will suggest that the answer lies within a certain xenophobic paranoia that immigrants are dangerous.[39]

Part I of this Comment takes a brief look at the importance of citizenship in the ancient world and considers both the disdain of foreigners and the duty of hospitality to strangers. Part II turns specifically to the

28. *See id.* at 515 (citing Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (refusing to apply double jeopardy to a deportation proceeding)).

29. The fear being, in part, that immigrants are responsible for heightened crime in the United States. *See, e.g.*, Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 145 (2009) ("Surveys consistently show that the public associates immigrants—whether or not undocumented—with high rates of crime.").

30. *See* Legomsky, *supra* note 3, at 503–04.

31. *Rosales-Garcia*, 667 F.3d at 1349.

32. Legomsky, *supra* note 3, at 503–04.

33. *Id.*

34. *See id.* at 504–05.

35. Emma Lazarus, *The New Colossus*, *in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 2601 (Nina Baym et al. eds., 6th ed. 2003).

36. *See, e.g.*, Legomsky, *supra* note 3, at 509 (highlighting specifically increased border patrol in an effort to respond to perceived "security vulnerabilities in the immigration laws").

37. *See, e.g.*, Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 111 (2011) ("[The United States] annually accepts the largest intake of immigrants in the world."); STEVEN A. CAMAROTA, CTR. IMMIGR. STUD., PROJECTING IMMIGRATION'S IMPACT ON THE SIZE AND AGE STRUCTURE OF THE 21ST CENTURY AMERICAN POPULATION 16 (2012) ("The high standard of living in the United States means that it remains an attractive option for migration, particularly for people in less-developed countries.").

38. *See* BERRY, *supra* note 1.

39. *See, e.g.*, Legomsky, *supra* note 29.

United States and looks at the popular conception of America as the land of opportunity with a warm welcome mat at Lady Liberty's feet. Part III tracks the progression of immigration law in the twentieth and twenty-first centuries, looking specifically at the blending of civil immigration law with criminal law and the related popular perception that if one is an immigrant, then he is likely to be an undocumented one. Part IV turns to *United States v. Rosales-Garcia*, summarizing the case's facts, procedural history, and opinions. Part V analyzes the conclusions reached by the majority and the dissent and concludes by discussing the odd state of affairs presented by *Rosales-Garcia*: current immigration law is set up to punish the criminal immigrant within our own penal system and then remove the immigrant altogether. Part V also considers whether deportation truly is not punishment. The closing suggestion is that immigration law should consider the purpose of this practice of combining imprisonment and deportation and whether it is necessary or desired.

I. "XENOLOGY"

Allez, venez, Milord

Vous asseoir à ma table

Il fait si froid dehors

Ici c'est confortable.

Laissez-vous faire, Milord

Et prenez bien vos aises

Vos peines sur mon coeur

Et vos pieds sur une chaise.

—Édith Piaf, *Milord*[40]

A. Prized Possessions: The Value of Citizenship in the Classical World

The ancient Greeks greatly prized and protected citizenship.[41] The Greek *polis*[42] was a closely knit community, with a dynamic akin to that

40. ÉDITH PIAF, *Milord*, *on* MILORD (Columbia Records UK 1959) ("Come along, Milord, / Sit yourself at my table / It is so cold outside / Here it's comfortable. / Relax, Milord / And take your at ease / Put your troubles on my heart / And your feet on a chair.").

41. *See, e.g.*, SARAH B. POMEROY ET AL., ANCIENT GREECE: A POLITICAL, SOCIAL, AND CULTURAL HISTORY 451 (3d ed. 2012) ("Alexandria . . . was founded [by Alexander] as a Greek polis with citizenship limited to Greeks and Macedonians.").

42. H.D.F. KITTO, THE GREEKS 64 (2d ed. 1957) ("'Polis' is the Greek word which we translate 'city-state.'"); *see also* POMEROY ET AL., *supra* note 41, at 530 (defining polis as a "[c]ity [or] town"). "Beginning in the eighth century, *polis* came to designate a political community, composed of a principal city or town and its surrounding countryside, which together formed a self-governing entity, the city-state." *Id.*

of a family.[43] Inclusion within the citizenry of the *polis* was therefore strictly limited, and outsiders were rarely naturalized.[44] The *polis* that was perhaps the strictest in this regard was Sparta, who not only resisted naturalization of outsiders but was also known for removing them entirely from the community.[45] While Athens was far more hospitable to outsiders, citizenship and naturalization were severely limited.[46] Inclusion within the citizenry was an honor and much was expected of the citizens.[47] Pericles famously said, "We . . . regard a man who takes no interest in public affairs, not as a harmless, but as a useless character . . . ."[48] Citizenship thus was not merely nominal membership within the citizenry but literally a government ruled by the people.[49]

In Rome, a civilization that greatly admired and, to a certain extent, emulated the Greeks,[50] citizenship was also prized and protected.[51] Take, for example, the Social War, fought because the Romans denied citizenship to their Italian city-state allies.[52] In this instance, the Italian allies

43. *See, e.g.*, C.M. BOWRA, THE GREEK EXPERIENCE 65 (1969) ("[The Greeks] felt that the city-state was a natural development first of the family and then of the village . . . . [They did not] look beyond [the city-state, or *polis*,] to some more embracing unity. . . . Even when Athens and Sparta built empires in the fifth century, these were largely coalitions, in which the members maintained a considerable degree of local autonomy, and there was little sense of corporate identity."); KITTO, *supra* note 42, at 78 ("The polis was a living community, based on kinship, real or assumed—a kind of extended family, turning as much as possible of life into family life . . . .").

44. *See* KITTO, *supra* note 42, at 74.

45. *See e.g.*, *id.* (using Pericles's Funeral Speech as recorded by Thucydides).

46. *See, e.g.*, Simon Hornblow, *Greece: The History of the Classical Period*, *in* THE OXFORD HISTORY OF THE CLASSICAL WORLD 135 (John Boardman et al. eds., 1986) ("A law of the year 451 [B.C.] restricted citizenship and thus its benefits . . . to persons of citizen descent on both sides. . . . Athenian (and Spartan) stinginess with the citizenship was singled out by panegyrists of Rome as the chief cause of the brevity of their empires."); *see also* Oswyn Murray, *Life and Society in Classical Greece*, *supra*, at 210 ("[I]n the classical period the state intervened to establish increasingly stringent rules for citizenship and so for legitimacy: ultimately a citizen must be the offspring of a legally recognized marriage between two Athenian citizens, whose parents must also be citizens. . . . It became impossible for an Athenian to marry a foreigner or to obtain recognition for the children of any other type of liaison: the development is essentially democratic, the imposition of the social norms of the peasant majority on an aristocracy which had previously behaved very differently . . . .").

47. *See, e.g.*, THE OXFORD CLASSICAL DICTIONARY 333–34 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996) (defining "citizenship, Greek"); *id.* at 334–35 (defining "citizenship, Roman").

48. Thucydides, *The Funeral Oration of Pericles and the Plague*, *in* GREEK AND ROMAN CLASSICS IN TRANSLATION 410 (David McKay Co. ed., 1947).

49. *See* 4 THE OXFORD ENGLISH DICTIONARY 442–43 (2d ed. 1989) (defining "democracy" as "[g]overnment by the people" and explaining that the word is derived from the combination of the Greek words *demos* (the people) and *kratia* (rule)).

50. Perhaps the best example of Rome's admiration and emulation of the Greeks they conquered is Virgil's *Aenied*, hoped to be the Roman equivalent of Homer's *Iliad*. *See, e.g.*, VIRGIL, THE AENEID, Bk. VI, ll.847–53 (H. Rushton Fairclough trans., 1974) (19 B.C.) ("Others, I doubt not, shall beat out the breathing bronze with softer lines; shall from marble draw forth the features of life; shall plead their causes better; with the rod shall trace the paths of heaven and tell the rising of the stars: remember thou, O Roman, to rule the nations with thy sway—these shall be thine arts—to crown Peace with Law, to spare the humbled, and to tame in war the proud!" (footnotes omitted)).

51. THE OXFORD CLASSICAL DICTIONARY, *supra* note 47, at 334–35 (defining Roman citizenship).

52. Circa 91–88 B.C., Rome's Italian allies waged the Social War (also called the Marsic War or the Italic War) against Rome. WILLIAM E. DUNSTAN, ANCIENT ROME 149–50 (2011). Rome was

felt that having both served and paid tribute to Rome, they had a right to become full citizens of Rome.[53] The city-states had long desired the benefits of Roman citizenship, and this came to a head in the Social War.[54] At the conclusion of the war, the city-states won their citizenship and the associated privileges of Roman citizenship.[55] Subsequently, the Roman Empire continued this trend of granting the privilege of citizenship to her allies.[56] The benefits of Roman citizenship were conferred upon selected members of the outlying territories that Rome had conquered and incorporated into the Empire.[57]

B. Us vs. Them: The Notion of Barbarians

Fear of, dislike for, and distrust of foreigners has been a longstanding tradition of civilized society.[58] The ancient Greek term "οι βαρβαροι" (*hoi barbaroi*) was used to refer to anyone who was not Greek and thus foreign.[59] This term has been transported into modern English as "barbarians,"[60] which tends to carry with it the additional association of uncouth, uncivilized, and even savage.[61] At first, this more negative connotation of barbarian was not associated with the term as the Greeks used it.[62] As time passed, however, the connotations of foreigners as uncouth and inferior to the Greeks became incorporated into the usage of the term.[63]

C. Welcoming Them to the Table: The Role of Hospitality

In spite of the limits on naturalization and the view of non-Greeks as uncultivated and even savage, it was a moral requirement of the

victorious mainly because of her concession to the Italian allies to grant them citizenship, which united all of Italy south of the Po River by the common bond of Roman citizenship. *Id.*

53. *See, e.g.*, Michael Crawford, *Early Rome and Italy*, *in* THE OXFORD HISTORY OF THE CLASSICAL WORLD, *supra* note 46, at 413–16.

54. *See id.*

55. *See id.*

56. THE OXFORD CLASSICAL DICTIONARY, *supra* note 47, at 1330 (entry for "Rome (history)").

57. *Id.*

58. *See, e.g.*, HAROLD MACMILLAN, RIDING THE STORM: 1956–1959, at 49 (1971) ("This kind of isolationism or economic nationalism, amounting to xenophobia, seized all nations, great and small, from time to time.").

59. A LEXICON: ABRIDGED FROM LIDDELL AND SCOTT'S GREEK–ENGLISH LEXICON 126–27 (Oxford Univ. Press ed., 1997) (1891) [hereinafter A LEXICON] ("Plato divides mankind into Barbarians and Hellenes, as the Hebrews gave the name of Gentiles to all but themselves. [F]rom the Augustan age, the term was applied by the Romans to all nations except themselves and the Greeks: but the Greeks still affected to look upon the Romans as Barbarians.").

60. *See* 1 THE OXFORD ENGLISH DICTIONARY, *supra* note 49, at 945.

61. *Id.*

62. *See, e.g.*, BOWRA, *supra* note 43, at 14 ("[I]n its early days the Greek word [for barbarian] was not necessarily contemptuous or hostile, and meant little more than 'foreign.'").

63. *See, e.g.*, *id.* ("After the Persian Wars had revealed what hideous destruction could be wrought by barbarian invaders, the Greek attitude hardened, and the word *barbaros* began to assume some of its modern associations.").

Greeks to offer hospitality to the strangers who crossed the threshold.[64] Interestingly, the word "ξενος" (*xenos*) in ancient Greek originally connoted guest, host, and stranger.[65] It is from the Greek roots "*xenos*" and "*phobos*" (fear, terror, dismay)[66] that modern English derives the term "xenophobia."[67] And so, Athens was thrown open to the world and foreigners were given hospitality but not citizenship.[68]

II. TIRED, POOR, AND HUDDLED MASSES[69]

> Tell the folks back home this is the promised land callin'
>
> And the poor boy is on the line.
>
> —Chuck Berry, *Promised Land*[70]

The United States of America proclaims to be a nation rooted in the principle of "liberty and justice for all."[71] America was seen as the country where those suffering under the yoke of persecution could find asylum and, ultimately, a new life.[72] And certainly this promise of safe haven from persecution was at least partially true for the early colonization of American shores.[73] The Pilgrims, dissatisfied with their lives in Eng-

64. A LEXICON, *supra* note 59, at 471. Hospitality is also a recurring motif in classical mythology. *See e.g.*, Ovid, *Philemon and Baucis*, *in* METAMORPHOSES 192 (A.D. Melville trans., Oxford Univ. Press ed., 1986) (8 A.D.) ("This wicked neighbourhood shall pay / Just punishment [for refusing to admit the gods across the threshold]; but to you there shall be given / Exemption from this evil."); *see also* POMEROY ET AL., *supra* note 41, at 525. *Xenia* [guest friendship] is "[a] form of ritual friendship whereby a 'stranger' (*xenos*) entered into a relationship of mutual friendship with a man from another *demos*, each being obliged to offer hospitality and aid when visiting the other's community. . . . A prominent feature of Homeric society, *xenia* continued throughout antiquity . . . ." *Id.*

65. A LEXICON, *supra* note 59, at 471.

66. *Id.* at 764.

67. 20 THE OXFORD ENGLISH DICTIONARY, *supra* note 49, at 674 ("A deep antipathy to foreigners.").

68. *See, e.g.*, Thucydides, *supra* note 48 ("Our city is thrown open to the world, and we never expel a foreigner . . . .").

69. Lazarus, *supra* note 35.

70. CHUCK BERRY, *Promised Land*, *on* ST. LOUIS TO LIVERPOOL (Chess Records 1964).

71. 4 U.S.C. § 4 (2012).

72. *See, e.g.*, Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast,"* 33 VA. J. INT'L L. 433, 438 (1993) ("Wave upon wave of immigrants have come to [America] to escape ancient systems of caste, class and ownership, to be rid of bureaucracies and kings, to be left alone, free to make their fortunes by their own wit and hard work. It is the American dream, and it has bred a wild energy, a spirit of openness and innovation marveled at throughout the world." (citing ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 13 (1992) ("Those intrepid Europeans who had torn up their roots to brave the wild Atlantic *wanted* to forget a horrid past and to embrace a hopeful future. They *expected* to become Americans. Their goals were escape, deliverance, assimilation. They saw America as a transforming nation, banishing dismal memories and developing a unique national character based on common political ideals and shared experiences.")).

73. *See, e.g.*, *William Bradford*, *in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 121 (Nina Baym et. al. eds., 8th ed. 2012) [hereinafter NORTON ANTHOLOGY] ("For Bradford, as well as for the other members of this community [the first wave of Pilgrims], the decision to settle at Plymouth was the last step in a long march of exile from England, and the hardships they suffered . . .

land and in Holland, chose to immigrate to America.[74] As the colonization continued, many more people from England, France, Holland, Spain, Portugal, and elsewhere settled in America.[75] At the completion of the American Revolution, the newborn United States reaffirmed their[76] values of liberty, justice, and freedom for (almost) all.[77] As further confirmation of America's warm welcome to all those who shared the treasured value of liberty, the Statue of Liberty took her post at Ellis Island.[78] In 1903, the following words of welcome were etched in a plaque at her base: "Give me your tired, your poor, / Your huddled masses yearning to breathe free."[79] Certainly, America was popularly associated with free and welcome immigration.[80]

As time passed, America, peopled by a varied and multifaceted mixture of backgrounds, continued to be perceived as welcoming immi-

were tempered with the knowledge that they were in a place they had chosen for themselves, safe at last from persecution.").

74. *See, e.g.*, *Introduction: Pilgrim and Puritan*, *in* NORTON ANTHOLOGY, *supra* note 73, at 13 ("In 1608, . . . the Scrooby congregation [Pilgrims] left England and settled in the Netherlands. . . . Eventually, fearing that they might lose their religious identity as their children were swallowed up in Dutch culture, they petitioned for the right to settle in the vast American territories of England's Virginia Company.").

75. *See generally* 1 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 84–86 (Meridian 3d ed. 1994) (1965).

76. Prior to the American Civil War, the United States were referred to in the plural form; ever since the war, the United States has been referred to in the singular form. This syntactical shift exhibits the reunited states' desire to be, once and for all, a single union rather than a league of individual states. *See* Shelby Foote, *The Civil War* (PBS television series Sept. 23–27, 1990).

77. *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."). I have noted this as "freedom and liberty for (almost) all" because, of course, not everyone in the newborn United States was free, at least not until slavery was repealed. *See, e.g.*, *American Literature 1700–1820: Pursuing Happiness*, *in* NORTON ANTHOLOGY, *supra* note 73, at 374 ("Of course, in 1820, many Americans were still not free. Some of the Founding Fathers, including George Washington and Thomas Jefferson, were themselves slave owners . . . . Men could not vote unless they owned property; women could not vote at all.").

78. *Statue of Liberty*, NAT'L PARK SERVICE, http:www.nps.gov/stli/index.htm (last updated Mar. 21, 2013) ("The Statue of Liberty Enlightening the World was a gift of friendship from the people of France to the people of the United States and is a universal symbol of freedom and democracy. The Statue of Liberty was dedicated on October 28, 1886, designated as a National Monument in 1924 and restored for her centennial on July 4, 1986.").

79. Lazarus, *supra* note 35 ("Not like the brazen giant of Greek fame, / With conquering limbs astride from land to land; / Here at our sea-washed, sunset gates shall stand / A mighty woman with a torch, whose flame / Is the imprisoned lightning, and her name / Mother of Exiles. From her beacon-hand / Glows world-wide welcome; her mild eyes command / The air-bridged harbor that twin cities frame. / 'Keep, ancient lands, your storied pomp!' cries she / With silent lips. 'Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tossed to me, / I lift my lamp beside the golden door!'" (footnotes omitted)).

80. The reference to "(almost) all" in note 77 is applicable here too, as there were concerns regarding certain specific immigrants right from the birth of the nation. *See, e.g.*, Chinese Exclusion Act of May 6, 1892, ch. 60, 22 Stat. 58 (repealed 1943).

grants with open arms.[81] As Fievel Mousekewitz was told in the animated film *An American Tail*, "[Y]ou are in luck, my little immigrant. This is America."[82] In the picture of America painted by Lady Liberty's iconic lines, the United States was truly a land of the free where "the more the merrier" held true.[83] Was this utopian vision true? Perhaps. Did it hold? Judging by the morass of complex immigration laws and criminal penalties for undocumented immigrants, and coupled with tightened border patrols and fences, it would seem that the American lens of immigration is no longer quite so rosy-hued.[84] What happened to "[g]ive me your tired, your poor"?[85] One possible answer is that "[n]ow it reads 'NO VACANCIES.'"[86]

III. CRIMINALIZING IMMIGRATION

I just spent 60 days in the jailhouse

For the crime of having no dough, no no

Now here I am back out on the streets

For the crime of having nowhere to go!

—The Band, *The Shape I'm In*[87]

A. The View of Immigrants as Criminals

There is no reason to assume that the term "immigrant" refers specifically to illegal immigrants[88]; however, that is the trend in our society

81. *See, e.g.*, Stark, *supra* note 72, at 438–40 (describing the American "rhetoric of opportunity," which held "that there was plenty for everyone willing to work hard and take a chance in America" and continued through various waves of immigration from the colonial period to the Great Depression).

82. AN AMERICAN TAIL (Amblin Entertainment 1986).

83. Lazarus, *supra* note 35.

84. *See, e.g.*, Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 3 (2010); Samuel Bettwy, *Assisting Soldiers in Immigration Matters*, 1992 ARMY LAW. 3, 3 ("Many attorneys consider immigration law to be the most complicated area of American jurisprudence, rivaled in its complexity only by tax law."); Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS. U. PUB. L. REV. 415, 417 (2010); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1637 (2009) ("The U.S. immigration laws have long been incredibly complex. By many accounts, only the much-maligned Internal Revenue Code rivals the intricate, lengthy, and frequently obtuse Immigration and Nationality Act of 1952, which is the centerpiece of modern American immigration law."); Legomsky, *supra* note 3, at 509 (highlighting specifically increased border patrol in an effort to respond to perceived "security vulnerabilities in the immigration laws"); Diana R. Podgorny, Comment, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 298 (2009).

85. Lazarus, *supra* note 35.

86. LETHAL WEAPON 4 (Warner Bros. 1998). The response to this line in the film was "I guess your parents were Native Americans . . . ." *Id.*

87. THE BAND, *The Shape I'm In*, *on* STAGE FRIGHT (Capital Records 1970).

today.[89] My own mother is an English emigrant legally working and residing here in the United States, so I know of legal channels of immigration from personal experience. And yet, I hear the term "immigrant" and my mind, like that of so many others, conjures an image of someone crawling under a barbed-wire fence on the Texas–Mexico border.[90] It is clear that a certain hostility towards immigrants is present in America today.[91] Again, that "NO VACANCIES" slapped across the Statue of Liberty's slogan crops up. Famous, or in some circles infamous, examples of this hostility appear in state and local immigration initiatives, such as Arizona Senate Bill 1070 and California Proposition 187.[92] One has only to look at the statements by Barbara Coe, Proposition 187's drafter, to see evidence of this hostility:

> You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact. . . . You're not dealing with a lot of shiny face, little kiddies. . . . You're dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread drugs around in our school system.[93]

While Proposition 187 was never passed, Arizona's new immigration law is in full legal effect.[94] There is certainly a lot that can be, and has been, said about Arizona's controversial immigration law.[95] The fact that the title of the law is "Support Our Law Enforcement and Safe

88. *See* Legomsky, *supra* note 3, at 503–04 ("Although the vast bulk of immigration to the United States occurs through legal channels, the public thinks the opposite is true.").

89. *See id.* at 471–72 ("Public perception of criminals and foreigners have become ever more intertwined."); *see also* Campbell, *supra* note 84.

90. *See, e.g.*, Legomsky, *supra* note 3, at 502–04.

91. *See, e.g.*, Campbell, *supra* note 84, at 416, 418–19.

92. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)); Proposition 187, 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994); *see also* Johnson, *supra* note 84, at 1606 ("[T]he state and local immigration ordinances have been motivated in no small part by racism and nativism.").

93. *See* Podgorny, *supra* note 84, at 299 n.90 (quoting Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1841 (2007)) (internal quotation marks omitted).

94. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)).

95. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492 *passim* (2012); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 352 (2011) ("Numerous lawsuits have been filed challenging the constitutionality of S.B. 1070."); Scott Nakama, *Senate Bill 1070: The Implication of Arizona's Immigration Law upon MLB*, 8 DEPAUL J. SPORTS L. CONTEMP. PROBS. 23, 23 (2011) (describing Arizona's Senate Bill 1070 as "one of the most controversial pieces of immigration legislation in recent history"); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 MODERN AM. 42, 43 (2011); David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 523–24 (2011) ("S.B. 1070 is fascinating on many levels for many reasons. It has focused a national and international spotlight on Arizona. It has broadened and intensified the national debate regarding immigration policies and enforcement. It has tested the constitutionality of state and local enforcement of immigration laws. . . . S.B. 1070 is so controversial in part because of strong feelings and deep divisions about racial profiling.").

Neighborhoods Act"[96] strongly suggests that perception of immigrants as criminals was a driving force behind the law. Initiatives like Proposition 187 and Senate Bill 1070 are specifically designed to target immigrants.[97]

Let's take another example, this time from the turn of the twentieth century: the passing of laws prohibiting marijuana.[98] When these federal marijuana laws were enacted, right around the time that Prohibition ended, the Mexican-American population was the main consumer of marijuana.[99] So, the addition of marijuana to the list of banned substances effectively created a new crime for the Mexican-American immigrant population.[100]

This new crime was at least partly a response to the growing population of Mexican immigrants. While twenty-two states had prohibited marijuana between 1910 and 1931, marijuana was not targeted on the federal level until 1932.[101] That year, marijuana was added to the catalog of banned drugs listed in the Uniform Narcotic Drug Act.[102] The following year, Prohibition was repealed.[103] Four years later, Henry J. Anslinger, Director of the new Federal Bureau of Narcotics, successfully passed the Marijuana Tax Act of 1937 after just three days of truncated hearings unsupported by empirical findings or research.[104] The early twentieth century saw a significant increase in the number of Mexicans immigrating into the western United States.[105] From the turn of the twentieth century through the 1930s, there was very little in the way of general public concern regarding the use of marijuana.[106] It was generally thought that Mexican immigrants were the main users of marijuana and thus the ones bringing the "narcotic" into the country.[107] Not coincidentally, the first states to restrict marijuana were the southwestern states.[108] When Texas passed the McMillan Senate Bill, which included marijuana restrictions, the *Austin Texas Statesman* noted, "[Marijuana is] a Mexican herb . . .

96. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)).

97. *Id.*; Proposition 187, 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994).

98. *See* Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (repealed 1970).

99. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970).

100. *See id.* at 1012.

101. *Id.* at 1010.

102. *Id.*

103. U.S. CONST. amend. XXI.

104. Bonnie & Whitebread, *supra* note 99, at 1054.

105. *Id.* at 1012.

106. *Id.* at 1011.

107. *Id.* at 1012.

108. Pete Guither, *Why Is Marijuana Illegal?*, DRUGWARRANT.COM, http://www.drugwarrant.com/articles/why-is-marijuana-illegal/ (last visited Feb. 17, 2013) (referring, in chronological order, to California, Wyoming, Texas, Iowa, Nevada, Oregon, Washington, Arkansas, Nebraska, and Montana).

said to be sold on the Texas–Mexican border."[109] Accordingly, the early days of marijuana illegalization appeared targeted toward the Mexican immigrants, the drug's primary user group, and arguably reflected the American West's negative view of immigrants and immigration.[110]

What does this brief overview of our nation's marijuana war have to do with the criminalization of immigration laws? Marijuana was feared as subversive.[111] Mexican immigrants (along with other minority groups in the East) were the main users during this period.[112] For this reason, the law banning marijuana can reasonably be viewed as a prophylactic measure designed, at least in part, to protect citizens from the Mexican immigrants who used the drug.[113] As Professors Bonnie and Whitebread put it, "We conclude that the legislative action and judicial approval [of marijuana restrictions] were essentially kneejerk responses uninformed by scientific study or public debate and colored instead by racial bias and sensational myths."[114]

This perception of immigrants as criminals bringing drugs to our country has not abated.[115] Kevin Johnson points to an "all-too-common . . . headline: 'Illegal Alien Indicted for Possession With Intent to Distribute Marijuana.'"[116] According to Johnson, "[t]he reference to 'illegal alien,' . . . serves to inflame passions and tilt the debate toward favoring more immigration enforcement (especially at the expense of 'criminal aliens') and more restrictive immigration laws."[117] Furthermore, the Anti-Drug Abuse Act of 1988 described its policy goal as providing a "drug-free America" by "reducing the number of drug users and decreasing the availability of illegal drugs."[118] One available inference is that by keeping out immigrants (specifically, Mexican and South American immigrants), the United States can curb the availability and use of illegal drugs within her borders.

109. *See* Bonnie & Whitebread, *supra* note 99, at 1014 (quoting the June 19, 1923 *Austin Texas Statesman*) (internal quotation mark omitted).

110. *See id.* at 1012, 1015 (pointing out "that public perception of marijuana's ethnic origins and crime-producing tendencies often went hand in hand, especially in the more volatile areas of the western states," and although there was not much public awareness of the drug, newspapers in the 1930s would include the occasional "vociferous allusion to the criminal conduct inevitably generated when Mexicans ate 'the killer weed'").

111. *See, e.g.*, REEFER MADNESS (Motion Picture Ventures 1936).

112. Bonnie & Whitebread, *supra* note 99, at 1012.

113. *See id.* at 1012–16.

114. *Id.* at 1010.

115. *See* Johnson, *supra* note 84, at 1633.

116. *Id.* (quoting *Illegal Alien Indicted for Possession with Intent to Distribute Marijuana*, STATES NEWS SERV., Dec. 10, 2009) (internal quotation marks omitted).

117. *Id.* (quoting Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181) (internal quotation marks omitted).

118. Podgorny, *supra* note 84, at 292.

Another modern example of how the perception of immigrants as dangerous has served to shape immigration law is the USA PATRIOT Act, passed in the aftermath of September 11, 2001.[119]

Just as the War on Drugs had its effect on immigration, the War on Terror had a marked effect on the criminalization of immigration.[120] A fear of *all* immigrants based on the immigrant status of the terrorists led to heightened immigration measures premised on the need for national security.[121] Based on an "examination of the rhetoric behind the recent immigration laws," Diana Podgorny interprets three justifications for the increasingly strict criminal immigration laws: "[T]he perception that non-citizens are the reason for increasing criminality in the United States, a desire to protect . . . the economic interests of citizens, and a blurred line between crime control efforts related to non-citizens and protection of national security."[122]

B. The Blurred Line Between Civil and Criminal Law in the Immigration Context

A cognizable trend in modern American immigration law is that the criminal code has been imported and transmuted into the body of civil-based immigration law.[123] Although immigration law has always contained at least some aspects of the penal system,[124] the modern trend has been accused of unfairly taking "the enforcement components of criminal justice without the corresponding adjudication components."[125] An example of the "lacking adjudication" component is arguably the fact that deportation of immigrants subsequent to criminal proceedings does not fall within the category of double jeopardy as deportation is consid-

119. *See, e.g.*, Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 856 (2003) ("The USA PATRIOT Act expands the definition of 'terrorist activity' for purposes of the immigration laws in ways that may result in an additional removal ground for noncitizens convicted of assault and similar crimes. 'Terrorist activity' thus has gone the way of 'aggravated felony' for immigration purposes, expanded well beyond what one normally would consider to be truly 'terrorist' in nature. The USA PATRIOT Act further provides that a spouse or child of a 'terrorist' generally is inadmissible. A noncitizen also may be deemed inadmissible for being 'associated with a terrorist organization,' broad terms reminiscent of the principle of guilt by association, a discredited law enforcement technique popular during the dark days of the McCarthy era. Fears also have been expressed that the expanded definition of 'terrorist activity' in the USA PATRIOT Act will adversely affect bona fide asylum-seekers fleeing persecution in their native lands." (footnotes omitted)).

120. *See* Podgorny, *supra* note 84, at 298–300 ("[T]he primary motivation behind the 1996 Acts and the USA PATRIOT Act was a concern over national security."); *see also* Johnson, *supra* note 119.

121. *See, e.g.*, Legomsky, *supra* note 3, at 508–10.

122. Podgorny, *supra* note 84.

123. *See, e.g.*, Legomsky, *supra* note 3, at 469 ("Sometimes dubbed 'criminalization,' the trend has been to import criminal justice norms into a domain built upon a theory of civil regulation.").

124. Podgorny, *supra* note 84, at 289 ("Immigration law has always contained some elements of penal law in its attempt to preempt criminal aliens from seeking naturalization in the United States, but the lines between immigration and penal law have recently become increasingly blurred." (footnote omitted)).

125. Legomsky, *supra* note 3, at 473.

ered a collateral consequence rather than a direct, punitive consequence of an immigrant's criminal proceeding.[126]

Recent laws have added enhanced punishments for immigrants convicted of crimes as well as easier avenues of deportation.[127] The Anti-Drug Abuse Act of 1988 introduced the notion of an aggravated felony, which provided for harsher penalties of imprisonment, expedited removal, and longer bans on reentry for immigrants guilty of the crimes falling within the "aggravated felony" definition.[128] While this started as a very narrow definition, limited to murder and trafficking of weapons or drugs, it has since expanded so that "now an aggravated felony need no longer be either aggravated or a felony" for purposes of removing immigrants.[129] The increased ease of deportation based on these criminal statutes has greatly increased the number of such federal prosecutions. "Immigration cases are now the largest single category of federal prosecutions, accounting for 32% of the annual total"[130] and "surpassing even drug prosecutions."[131]

It is in this current context of criminalized immigration that we turn to *United States v. Rosales-Garcia*. Earlier this year, the Tenth Circuit decided this immigration case, which involved an illegal immigrant who was convicted and imprisoned on a drug charge. He was released on parole and deported, and was then caught having illegally reentered the United States, a violation of both his parole and federal law.[132] The question at issue in the case was whether the enhancement of the defendant's federal sentence could be based on the parole-revocation sentence following deportation or whether it had to be based on the original sentence prior to deportation.[133]

126. *See id.* at 481–82 ("[C]riminal prosecution is therefore an add-on, not a substitute, for deportation.").

127. *See* 8 U.S.C. § 1252 (2012).

128. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (codified throughout 8 U.S.C.); *see also* Legomsky, *supra* note 3, at 484 ("In its nascent form, the aggravated felony definition was defined narrowly, in keeping with the harsh consequences . . . . The term included only murder, weapons trafficking, and drug trafficking. [The aggravated felony definition] is now a colossus." (footnote omitted)); Podgorny, *supra* note 84, at 292.

129. Podgorny, *supra* note 84, at 289.

130. Legomsky, *supra* note 3, at 479–80 (referring to the increase in Department of Homeland Security's recommended immigration prosecutions).

131. Podgorny, *supra* note 84, at 308.

132. *See* 8 U.S.C. § 1326 (2012); United States v. Rosales-Garcia, 667 F.3d 1348, 1349 (10th Cir. 2012).

133. *Rosales-Garcia*, 667 F.3d at 1349.

IV. *UNITED STATES V. ROSALES-GARCIA*

"Oh help me in my weakness"

I heard the drifter say

As they carried him from the courtroom

And were taking him away.

—Bob Dylan, *Drifter's Escape*[134]

A. Facts and Procedural History

In 2008, a Utah state court convicted Raul Rosales-Garcia of a drug-trafficking felony and sentenced Rosales to ninety days in jail and three years' probation.[135] Upon being released on probation, Rosales was deported.[136] Following his removal, Rosales reentered the country in violation of 8 U.S.C. § 1326 and was soon arrested by federal agents.[137] The Utah state court imposed a probation-revocation sentence as a consequence for Rosales illegally reentering the country in violation of the terms of his probation.[138] While the original state drug-trafficking sentence was a term of ninety days, the probation-revocation sentence was a term of one to fifteen years.[139] Rosales served his time in state prison and was then released into federal custody to be prosecuted for his illegal reentry.[140]

Rosales chose to participate in the district of Utah's fast-track program by agreeing to plead guilty to the federal charge.[141] In its Presentence Report, the United States Probation Office recommended a 16-level enhancement of Rosales' sentence based on section 2L1.2(b)(1)(A) of the U.S. Sentencing Guidelines and Rosales's fifteen-year state probation-revocation sentence.[142] Not surprisingly, Rosales objected to the 16-level enhancement.[143] Unlike the drifter in Bob Dylan's song,[144] Rosales had no opportunity for escape, but he did have the opportunity for appealing the Presentence Report.[145] Specifically, Rosales challenged the "procedural reasonableness of his [federal] sentence" because his state

134. BOB DYLAN, *Drifter's Escape*, *on* JOHN WESLEY HARDING (Columbia Records 1967).
135. *Rosales-Garcia*, 667 F.3d at 1349.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* Note that, for purposes of section 2L1.2 of the U.S. Sentencing Guidelines, the maximum term of the previous sentence is used for purposes of calculating a sentencing enhancement. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) (2012).
143. *Rosales-Garcia*, 667 F.3d at 1349.
144. *See* DYLAN, *supra* note 134.
145. *Rosales-Garcia*, 667 F.3d at 1350.

sentence for the base offense of drug trafficking did not exceed thirteen months at the time of his illegal reentry and thus, argued Rosales, should not satisfy the 16-level enhancement requirements of section 2L1.2(b)(1)(A).[146] Rosales conceded that his original sentence made him eligible for a 12-level enhancement of his sentence but was not willing to concede his eligibility for the 16-level enhancement, which relied on the state probation-revocation sentence rather than on the sentence for his base drug-trafficking conviction.[147] Rosales properly reserved his issue for appeal, arguing that the statutory language only allows enhancements for the sentence imposed at the time of his illegal reentry.[148] The Tenth Circuit reviewed the case de novo.[149] If the court were to agree with Rosales, he would face a 12-level enhancement, providing a sentence range of twenty-four to thirty months' imprisonment for the federal charge.[150] If the court were to agree with the federal Government, Rosales would face a 16-level enhancement, providing a sentence range of thirty-seven months to forty-six months.[151]

B. The Majority Opinion

The appeal in this case was based solely on a question of law. The facts, as summarized above, were, according to the Tenth Circuit, straightforward, uncomplicated, and uncontested.[152] The narrow issue before the court was whether a sentence can be enhanced based on a prior sentence that did not exceed the minimum sentence length until *after* the deportation and subsequent illegal reentry.[153] The Sentencing Guidelines contained in section 2L1.2 allow for more severe punishments for illegal immigrants who have committed sufficiently serious prior crimes.[154] The relevant provision directs the government to increase the base offense level by sixteen levels "[i]f the defendant previously was deported . . . after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded 13 months."[155] Therefore, the question presented for the court was, when may a predicate sentence be imposed in order to be eligible for calculation of section 2L1.2 sentence enhancements.[156]

146. *Id.* at 1349–50.
147. *Id.* at 1355.
148. *Id.* at 1349–50.
149. *Id.* at 1350 (citing United States v. Ford, 613 F.3d 1263 (10th Cir. 2010)) ("We review *de novo* a district court's interpretation of the Sentencing Guidelines where the appellant's argument was properly preserved before the district court.").
150. *Id.*
151. *Id.*
152. *Id.* at 1349.
153. *Id.*
154. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) (2012).
155. *Id.*
156. *See Rosales-Garcia*, 667 F.3d at 1349.

Ultimately, the Tenth Circuit agreed with Rosales's interpretation of the Guidelines and remanded the case to the U.S. District Court for the District of Utah for resentencing.[157] Because the Tenth Circuit concluded that the predicate sentence must have been imposed *before* the defendant's deportation, the court remanded the case for resentencing based on the length of Rosales's original state jail sentence, eligible only for the 12-level enhancement.[158] The court reached its conclusion by focusing on the language of the statute,[159] the Sentencing Commission's accompanying application notes, and analogous precedent.[160]

C. The Dissenting Opinion

Whereas the majority concluded that Rosales's interpretation of the Sentencing Guidelines was correct,[161] the dissent concluded that the Government's interpretation was preferable.[162] In his opinion, Judge Gorsuch dissected the statutory language.[163] After pointing out the ambiguity in the construction of the statute, Judge Gorsuch turned to the accompanying commentary and concluded that it resolved the ambiguity by specifically stating that the predicate "sentence imposed" includes "any terms of imprisonment given upon revocation of probation, parole, or supervised release."[164] The dissent held that "any terms of imprisonment" would include even those given on revocation of parole following the defendant's deportation and illegal reentry.[165] This conclusion was in accord with the Second Circuit's decision in *United States v. Compres-Paulino*,[166] a case which presented the same issue of when a predicate sentence must have been imposed in order to apply for the higher 16-level sentence enhancement.[167]

Based on the dissent's interpretation of the Sentencing Guidelines and accompanying commentary, Rosales' state sentence imposed after his deportation and subsequent reentry would apply for purposes of the Guidelines.[168] Because his probation-revocation sentence of one to fifteen years exceeded thirteen months, Rosales would then be subject to

157. *Id.* at 1355.
158. *Id.*
159. "If the defendant previously was deported, or unlawfully remained in the United States after . . . a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]." U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A).
160. *Rosales-Garcia*, 667 F.3d at 1350–55.
161. *Id.* at 1355.
162. *See id.* at 1357 (Gorsuch, J., dissenting).
163. *See id.* at 1355–57.
164. *Id.* at 1357 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii)) (internal quotations marks omitted).
165. *Id.* at 1356–57 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii)) (internal quotations mark omitted).
166. 393 F.3d 116 (2d Cir. 2004) (per curiam).
167. *Id.* at 118.
168. *Rosales-Garcia*, 667 F.3d at 1357 (Gorsuch, J., dissenting).

the 16-level enhancement for his federal sentence.[169] Judge Gorsuch's dissenting opinion therefore held that the district court "got it right" and properly applied the 16-level enhancement.[170]

V. ANALYSIS

> I asked him for water, he poured me some wine
>
> We finished the bottle, then broke into mine.
>
> —Bob Weir, *The Greatest Story Ever Told*[171]

A. The Question Presented

The question on appeal was whether the district court had correctly applied the 16-level enhancement to Rosales's federal sentence.[172] As previously noted, the 16-level enhancement provided in the Sentencing Guidelines can only be applied when the preceding conviction carried a sentence longer than thirteen months.[173] Rosales's original state sentence (prior to his deportation and subsequent reentry) would not satisfy the 16-level enhancement requirements set out above because his original ninety-day sentence did not exceed thirteen months.[174] However, Rosales's one- to fifteen-year probation-revocation sentence, if used for the calculation of enhancing the federal illegal reentry sentence, certainly would qualify Rosales for the 16-level enhancement.[175] Even if Rosales were to only serve the minimum of that sentence (i.e., one year, which would not exceed thirteen months), it would not matter for the purpose of section 2L1.2 because the accompanying commentary clearly states that when the previous sentence is a range of time, the maximum length of that sentence is to be used for sentencing purposes.[176] In the event that Rosales's enhanced state drug-trafficking sentence could be used for sentencing, fifteen years would be the length of the sentence imposed, thereby clearly subjecting Rosales to the 16-level enhancement.

B. The "[S]entence [O]nly a [G]rammar [T]eacher [C]ould [L]ove"[177]

Both the dissenting opinion and the majority opinion point out that the phrasing of the statute allows for two separate interpretations.[178] The

169. *Id.*; *see also id.* at 1349 (majority opinion).
170. *Id.* at 1357 (Gorsuch, J., dissenting).
171. BOB WEIR, *The Greatest Story Ever Told*, *on* ACE (Warner Bros. Records 1972).
172. *Rosales-Garcia*, 667 F.3d at 1349 (majority opinion) ("The sole question presented before us on appeal is whether the 16-level enhancement in USSG § 2L1.2(b)(1)(A) applies to a defendant whose sentence for an earlier drug trafficking felony was made longer than 13 months *after* the defendant was deported and committed the base offense of illegal reentry.").
173. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).
174. *Id.* § 2L1.2 cmt. n.1(B)(vii); *see also Rosales-Garcia*, 667 F.3d at 1349 (majority opinion).
175. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A).
176. *Id.* § 2L1.2 cmt. n.1(B)(vii).
177. *Rosales-Garcia*, 667 F.3d at 1356 (Gorsuch, J., dissenting).

majority went with the interpretation of a temporal restriction on when a predicate sentence was imposed;[179] the dissent interpreted the statute to mean any predicate sentence, whether imposed before or after deportation and subsequent reentry.[180]

While certain phrases, such as "venial syntactical sins"[181] and the alliterative "prudent penological policy,"[182] seem unnecessarily overblown, Judge Gorsuch's dissenting opinion made it readily apparent that he agreed with the Government's interpretation of the Sentencing Guidelines.[183] To be fair, this interpretation was in accord with that of the Second Circuit.[184] Nonetheless, Rosales's interpretation, shared by the majority and the Fifth and Seventh Circuits, was plausible, not precluded by the language, and preferred in light of the policy behind the Sentencing Guidelines.[185] As the dissent's reasoning focused more on an analysis of the language, we shall look first to the dissent's analysis.

The dissent turned first to the relevant language of section 2L1.2(b)(1)(A), denouncing it as "a sentence only a grammar teacher could love."[186] The language of the statute is as follows: "If the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]."[187] The dissent pointed to the string of prepositional phrases,[188] the passive voice,[189] and the "scraggly expression of time"[190] as the "gnarled" grammar of the statute.[191]

The dissent observed that the use of the past tense is not particularly helpful in the statute. Judge Gorsuch reasoned that the past tense of "imposed" and "exceeded" could equally indicate a sentence given prior to deportation *or* any other sentence imposed before the current prosecution.[192] The majority agreed that this was a plausible interpretation but

178. *See id.* at 1351–52, 1356–58.
179. *See id.* at 1351 (majority opinion).
180. *Id.* at 1357 (Gorsuch, J., dissenting).
181. *Id.* at 1355.
182. *Id.* at 1358.
183. *Id.* at 1357.
184. United States v. Compres-Paulino, 393 F.3d 116, 118 (2d Cir. 2004) (per curiam).
185. *Rosales-Garcia*, 667 F.3d at 1351–52 (majority opinion).
186. *Id.* at 1356 (Gorsuch, J., dissenting).
187. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).
188. *Id.* ("If the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction *for a felony* that is . . . a drug trafficking offense *for which the sentence* imposed exceeded thirteen months[, add a sentence enhancement]." (emphasis added)).
189. *Id.* ("If the defendant previously *was* deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]." (emphasis added)).
190. *Id.* ("If the *defendant previously was deported*, or unlawfully remained in the United States, *after* . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]." (emphasis added)).
191. *Rosales-Garcia*, 667 F.3d at 1356.
192. *Id.*

declined to concede that it was the better interpretation based on the Sentencing Commission's commentary and the purpose behind the Sentencing Guidelines.[193] The dissent agreed that the first prepositional phrase made clear that the prior conviction must occur before deportation.[194] However, the dissent reasoned, "[W]e can have no similar confidence that the 'sentence imposed' must [come prior to deportation]" because the prepositional phrase modifying "sentence imposed" is placed "two modifying phrases away."[195]

Let us walk through the grammar ourselves. At its most basic, the sentence in section 2L1.2 is an if–then statement. If the court is dealing with a prior drug-trafficking conviction that imposed a sentence longer than thirteen months, then add a sentence enhancement. Based on the facts in this case, we may ignore the "or unlawfully remained in the United States" line because Rosales was deported and illegally reentered.[196] The string of prepositional phrases referenced by the dissent read, "[W]as deported . . . after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded 13 months."[197] Both the phrase "for which the sentence imposed exceeded 13 months" and "for a felony that is a drug trafficking offense" modify the term "conviction."[198] It does not matter that the "sentence imposed" phrase "comes at the caboose of the prepositional train."[199] What matters is that both phrases modify conviction, and the conviction must come after deportation. Therefore, the grammatical construction of the sentence, as the majority held, indicates that the conviction and its corresponding sentence must come before the deportation. Said in a slightly simpler fashion, if the defendant was deported after a drug-trafficking felony conviction for which the sentence imposed exceeded thirteen months, then apply the 16-level enhancement.

C. The Purpose Behind the Sentencing Guidelines

The majority's discussion of the overall purpose behind section 2L1.2 provides a helpful foundation for understanding the reasoning of the court.[200] As the majority pointed out, both parties in the case agreed that "the purpose of § 2L1.2(b)(1) is to punish illegal reentry more severely where the defendant has committed one or more of certain enumerated prior crimes," including the drug-trafficking felony at issue here.[201] The method for determining the seriousness of the prior crime is

193. *Id.* at 1351 n.2 (majority opinion).
194. *Id.* at 1356 (Gorsuch, J., dissenting).
195. *Id.*
196. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A).
197. *Id.*
198. *Id.*
199. *Rosales-Garcia*, 67 F.3d at 1356 (Gorsuch, J. dissenting).
200. *Id.* at 1353–54 (majority opinion).
201. *Id.* at 1353.

to look at the maximum sentence imposed on the defendant.[202] The court stated that using the sentence as a measure of the prior crime's magnitude may be rough, but it is nonetheless one that provides at least a modicum of consistency and "numerically prescribed" precision.[203] Simply put, the longer the sentence a defendant received in state court, the more serious the offense would appear in a situation like this.[204]

In spite of the fact that his probation-revocation sentence was "technically imposed as part of the punishment process for an earlier felony," the majority agreed with Rosales's interpretation of the Commission's intentions.[205] This interpretation was that "the Commission did not intend consideration of a sentence imposed as a result of post-deportation actions."[206] As the court adroitly pointed out, the increased sentence stemming from Rosales's failure to comply with his probation by reentering the country had nothing to do with the seriousness of the original drug-trafficking offense.[207] The court reasoned that this interpretation, which looks only to the sentence of the prior offense before the deportation, is consistent with the distinction between pre- and post-deportation and reentry drawn by section 2L1.2.[208]

The dissent expressed the concern that the majority, by accepting Rosales's interpretation and the distinction between pre- and post-deportation proceedings, altogether ignored probation-revocation sentences when calculating the seriousness of an offense.[209] The majority's response to this concern was that the categorization as original sentence or as probation-revocation sentence was not the determining aspect and cited *United States v. Moreno-Cisneros*,[210] where a probation-revocation sentence was taken into consideration during sentencing.[211] However, in *Moreno-Cisneros*, the revocation of probation occurred before deportation.[212] Thus, the *Rosales-Garcia* court held that the temporal placement of the sentence, whether it occurs before or after deportation, is definitive when applying the Sentencing Guidelines.[213]

This temporal focus is, according to the *Rosales-Garcia* court, supported by the language of both the statute and the accompanying notes supplied by the drafters.[214] In his argument, Rosales stressed the choice

202. *Id.* at 1353–54.
203. *Id.*
204. *Id.* at 1354.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 1358 (Gorsuch, J., dissenting).
210. 319 F.3d 456 (9th Cir. 2003).
211. *Id.* at 457.
212. *Id.* at 458.
213. *Rosales-Garcia*, 667 F.3d at 1355 (majority opinion).
214. *Id.* at 1350–53.

and placement of the word "after" in section 2L1.2(b)(1), along with the "repeated use of the past tense . . . in referring to the predicate drug trafficking felony sentence."[215] In the language of the statute, "[i]f the defendant previously was deported . . . after . . . a conviction for a felony,"[216] the conviction is read to precede the deportation.[217] The use of the past tense for the words "imposed" and "exceeded" was interpreted by Rosales and the majority to mean that that there must be some date of reference before which the predicate sentence was given.[218] The court reasoned that the date of reference is the same for both the prior conviction and the predicate sentence;[219] therefore, because there is no dispute that the prior conviction must take place before deportation, the predicate sentence must occur before deportation as well.[220]

In its argument, the Government countered that the Sentencing Commission's commentary to section 2L1.2(b)(1) indicates that any sentence prior to the federal sentence is eligible for the purposes of sentence enhancement.[221] The commentary defines "sentence imposed" as "any term of imprisonment given upon revocation of probation."[222] The majority accused the Government of "urg[ing] a simple truism: 'any' means 'any.'"[223] While the dissent was persuaded by this "simple truism," the majority was not.[224] Instead, the majority relied on the fact that the commentary did not mention the temporal aspect at issue here.[225] Because the commentary did not mention the temporal constraint at issue in *Rosales-Garcia* and similar cases, the majority concluded that the Government's interpretation was not consistent with the commentary.[226]

Furthermore, the court explained "any term of imprisonment" for sentences imposed by way of the "relation back" doctrine.[227] Rather than referencing any conviction as an indication that post-deportation convictions count, the *Rosales-Garcia* court understood the commentary to be instructing courts to consider all of the defendant's convictions prior to the illegal reentry, regardless of how far in the past those convictions occurred.[228]

The dissent proceeded to respond to the remaining points made in the majority opinion. Judge Gorsuch found that the commentary's silence

215. *Id.* at 1351.
216. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).
217. *Rosales-Garcia*, 667 F.3d at 1351.
218. *Id.*
219. *Id.* at 1351–52.
220. *Id.* at 1351.
221. *Id.* at 1352.
222. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii).
223. *Rosales-Garcia*, 667 F.3d at 1352.
224. *Id.*
225. *Id.*
226. *Id.* at 1353.
227. *Id.* at 1352.
228. *Id.*

on the temporal restraint, and the analogous silence regarding the issue in the four supporting cases cited by the Commission, did not indicate "limiting language" about the sentence imposed.[229] The dissent accused the majority of relying on mere guesswork about the commentary's silence and omission to amend in light of the circuit split.[230] The dissent also rejected the policy concern of arbitrary anomalous results based on "whether state or federal officials happen to collar the defendant first" because the federal courts have the discretion in sentencing to consider fairness concerns such as this.[231] Of course, this discretion suggests that federal courts can do exactly the same overreach of authority that the dissent accused the majority of doing: using discretion when applying the Sentencing Guidelines. In short, the dissent did not convincingly respond to the analysis of the majority.

D. Precedential Support and the Circuit Split

Throughout its opinion, the *Rosales-Garcia* majority included references to precedential support. For persuasive authority, the court cited four opinions from other circuits regarding the same issue: *United States v. Lopez*,[232] *United States v. Bustillos-Pena*,[233] *United States v. Jimenez*,[234] and *United States v. Guzman-Bera*.[235] In all these cases, the courts similarly concluded that a sentence enhancement under section 2L1.2 could only be based on a conviction prior to deportation.[236] Additionally, the Seventh Circuit agreed in *Lopez* that the Sentencing Commission's commentary did not support the Government's view that any conviction, including those after deportation, would apply for section 2L1.2.[237]

Additionally, the court offered the fact that none of the four cases[238] chosen by the Sentencing Commission to support the commentary's definition of "sentence imposed" implicated the temporal issue of post-deportation convictions.[239] In all of the four cases offered by the commentary, the previous sentence imposed occurred before deportation and subsequent illegal reentry.[240] The court pointed out that the commentary included these four cases but excluded *Guzman-Bera*, which implicates

229. *Id.* at 1357 (Gorsuch, J., dissenting).
230. *Id.* at 1358 n.1.
231. *Id.* at 1358–59.
232. 634 F.3d 948 (7th Cir. 2011).
233. 612 F.3d 863 (5th Cir. 2010).
234. 258 F.3d 1120 (9th Cir. 2001).
235. 216 F.3d 1019 (11th Cir. 2000).
236. *Lopez*, 634 F.3d at 950; *Bustillos-Pena*, 612 F.3d at 869; *Jimenez*, 258 F.3d at 1125–26; *Guzman-Bera*, 216 F.3d at 1021.
237. *Lopez*, 634 F.3d at 953.
238. United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir. 2003); United States v. Compian-Torres, 320 F.3d 514 (5th Cir. 2003); United States v. Hidalgo-Macias, 300 F.3d 281 (2d Cir. 2002) (per curiam); United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002).
239. United States v. Rosales-Garcia, 667 F.3d 1348, 1353 (10th Cir. 2012).
240. *See id.*

the temporal constraint.[241] And so, the court did not find an intention by the commentary to include post-deportation sentences within the meaning of a "sentence imposed" for purposes of section 2L1.2.[242] The court noted that this conclusion did not strip the commentary of all meaning; for any probation-revocation sentence imposed prior to deportation, the enhancement provisions set forth in section 2L1.2 would certainly apply based on the definition set forth in the commentary.[243]

The opinion also acknowledged the presence of a circuit split on the precise issue of the case.[244] The majority specifically referenced *United States v. Compres-Paulino*, a per curiam case that came to precisely the opposite conclusion as that of the *Rosales-Garcia* court.[245] In *Compres-Paulino*, the Second Circuit found that "any punishment assessed for a violation of probation is actually imposed for the underlying conviction."[246] The court in *Rosales-Garcia* chose to follow the Fifth and Seventh Circuits not only for the reasons outlined above but also because the *Rosales-Garcia* court was concerned with the "needless and nonsensical aberrant results" that would flow from the *Compres-Paulino* holding.[247] Specifically, the aberrant results with which the court was concerned were that a defendant like Rosales could be punished more or less severely based solely upon "the happenstance that his state probation was revoked before his federal prosecution commenced."[248] In other words, the *Rosales-Garcia* court disdained the consequence of different sentences based only upon the coincidence of sequencing.[249] Under the holding in *Compres-Paulino*, Rosales would have received only the 12-level enhancement had the State of Utah revoked his probation after the federal trial but the higher 16-level enhancement if Utah had revoked the probation before the federal sentence.[250] According to the majority, avoidance of this type of arbitrary difference in sentencing further bolsters the *Rosales-Garcia* conclusion.[251]

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 1354 ("We acknowledge that our decision is squarely in conflict with the Second Circuit's holding in *United States v. Compres-Paulino*.").
245. *Id.* at 118–19; *Rosales-Garcia*, 667 F.3d at 1354.
246. *Compres-Paulino*, 393 F.3d at 118 (quoting United States v. Huerta-Moran, 352 F.3d 766, 770 (2d Cir. 2003)) (internal quotation marks omitted).
247. *Rosales-Garcia*, 667 F.3d at 1354.
248. *Id.*
249. *Id.* ("One particular concern we have with [the *Compres-Paulino*] decision is the disparate treatment it gives to like offenders whose prosecutions have happened to differ sequentially. As Mr. Rosales points out, if we were to adopt the Second Circuit's rule, Mr. Rosales would face more substantially increased punishment solely because of the happenstance that his state probation was revoked before his federal prosecution commenced. . . . [This] bolster[s] our conclusion . . . by acknowledging that it avoids needless and nonsensical aberrant results.").
250. *See Compres-Paulino*, 393 F.3d at 118–19.
251. *Rosales-Garcia*, 667 F.3d at 1354.

The court also noted that the Sentencing Commission omitted amending its Guidelines contained in the commentary in spite of the holdings of the Fifth and Seventh Circuits in *Bustillos-Pena* and *Lopez*, respectively.[252] The decision in *Bustillos-Pena* presented the first circuit split on the temporal issue of pre- and post-deportation.[253] And yet, the Sentencing Commission did not amend its commentary.[254] The opinion in *Lopez*, which agreed with the Fifth Circuit, was issued a mere month before the Sentencing Commission submitted proposed amendments to the 2011 congressional session.[255] And still, the Commission failed to amend the definition of "sentence imposed."[256] While the court admitted that this failure to amend is far from dispositive, the court noted, "[T]he Commission's failure to address this [narrow] issue . . . offers at least a modicum of further support for the notion that the Fifth and Seventh Circuits' construction of the provision is not inconsistent with the Commission's intention."[257] In conclusion, the majority held that Rosales's interpretation of the U.S. Sentencing Guidelines was the better interpretation by way of an opinion that was thoughtful, well reasoned, well supported, and complete with rational responses to the reasoning contained in the dissent.[258]

E. Judge Gorsuch's Plea for Clarification

To his credit, Judge Gorsuch ended his dissent well. He closed with "a plea for syntactical assistance" from the Sentencing Commission.[259] He closed by calling upon the Commission to clear up the confusion once and for all.[260] Because, as he rightly pointed out, the current state of affairs means that "similarly situated defendants receive different sentences only because of the happenstance of the circuit in which they sit."[261] Although I agree with the reasoning and holding of the majority, I also agree that clarity on this issue, one way or the other, is to be desired.

It would appear that the Sentencing Commission heard Judge Gorsuch's plea.[262] Effective November 1, 2012, Amendment 764 to the Sentencing Guidelines confirmed that the majority's interpretation of a temporal restraint on when a "sentence imposed" may apply is correct[263]: A sentence following revocation of probation may still apply for purposes

252. *Id.*
253. *Id.* (discussing United States v. Bustillos-Pena, 612 F.3d 863 (5th Cir. 2010)).
254. *Id.*
255. *Id.* (discussing United States v. Lopez, 634 F.3d 948 (7th Cir. 2011)).
256. *Id.*
257. *Id.* at 1355.
258. *See generally id.* at 1349–55.
259. *Id.* at 1359 (Gorsuch, J., dissenting).
260. *Id.*
261. *Id.*
262. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) (2012); *see also* United States v. Catalan, 701 F.3d 331, 333 (9th Cir. 2012) (per curiam).
263. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii); United States v. Rosales-Garcia, 667 F.3d 1348, 1355 (10th Cir. 2012).

of section 2L.1 but only when the revocation occurred before deportation.[264] The Sentencing Commission indicated that the amendment responds to and resolves a "circuit conflict" and discussed the holding in *Rosales-Garcia*.[265] So, as it turns out, the majority got it right. And because Judge Gorsuch's plea for clarification by the Sentencing Commission was granted, defendants in Rosales's position will receive consistent treatment in all the federal circuits. Indeed, one such similarly situated defendant has already felt the effect of the amendment.[266] In *United States v. Catalan*, the amendment was applied retroactively to a defendant who had been given a higher level of sentence enhancement based on his post-deportation probation-revocation sentence.[267] As was Rosales's, Catalan's fate was remanded back to the district court for sentencing based on a 12-level, not a 16-level, enhancement.[268]

F. The Paradox of Punishing and Removing

What does this case teach us? For starters, the case illustrates the level of complexity now standard within immigration law.[269] The difference between the holding in *Rosales-Garcia* and the holding in the Second Circuit also illustrates the "inconsistent and unpredictable application" of immigration laws.[270] The *Rosales-Garcia* decision further serves as an example of the increasing "criminalization" of immigration law through the use of enhanced sentencing.[271] But the case also highlights a paradox—the fact that Rosales was both imprisoned in the United States and removed from the country. What sense does this make? When the law provides for removal of illegal immigrants, including those who, like Rosales, have committed crimes in this country, why do we feel the additional need to punish prior to deportation? As it currently stands, immigration law views deportation not as punishment but rather as a consequence divorced from the punishment of incarceration.[272] Therefore, un-

264. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) ("The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.").

265. *See Catalan*, 701 F.3d at 333 (quoting U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 26 (2012)).

266. *Id.*

267. *Id.* at 333 ("Pursuant to the amendment, which we apply retroactively, we hold that the district court erred in imposing a 16-level enhancement under section 2L1.2(b)(1)(A), rather than a 12-level enhancement under section 2L1.2(b)(1)(B).").

268. *Id.*

269. *See* Bettwy, *supra* note 84.

270. Podgorny, *supra* note 84, at 315.

271. *See* United States v. Rosales-Garcia, 667 F.3d 1348, 1349 (10th Cir. 2012); Legomsky, *supra* note 3, at 476.

272. *See, e.g.*, Legomsky, *supra* note 3 ("[B]ecause deportation has been held not to be punishment, the constitutional bar on double jeopardy does not preclude the government from bringing deportation proceedings once the person has completed his or her criminal sentence." (footnote omitted)).

documented immigrants like Rosales can be both imprisoned and removed.[273]

Can it really be argued that deportation is not punishment? The courts insist that "deportation is not punishment."[274] However, most people would see deportation—being sent into exile away from the place considered home and the people considered friends and family—as a punishment.[275] Historically, deportation was used as punishment (e.g., the practice of sending convicted criminals out of English prisons and into the American and Australian colonies).[276] The current argument that deportation is not punishment "is tautological: deportation is not punishment because we do not view it as punishment."[277]

In spite of the insistence that deportation is not punitive, it seems that the ends of deportation bear a striking resemblance to traditional theories of punishment, "particularly retribution, deterrence, and incapacitation." [278] The most obvious connection between deportation and traditional theories of punishment is the connection between incapacitation and deportation.[279] Incapacitation is "the isolation of the undesirable offender from society."[280] It does not require sophisticated scholarship to see that deportation serves the purpose of incapacitation even better than imprisonment; if the individual is removed from a country, then he is no longer able to cause trouble in that country. The deterrence theory of punishment provides that the individual offender (specific deterrence) as well as potential future offenders (general deterrence) will be discouraged from committing the offense through knowledge of the attendant consequences if caught.[281] This same general deterrence theory arguably holds true for deportation as well.[282] If immigrants are aware of the possible consequence of deportation, they are less likely to commit the offense that could carry a deportation consequence with it.[283] The retribution theory of punishment has perhaps the weakest connection with deportation.[284] However, "even retribution might well come into play when

273. *See id.*

274. *See id.* at 472.

275. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1895 (2000) ("[M]ost people undoubtedly do see deportation as punishment.").

276. *See, e.g.*, Legomsky, *supra* note 3, at 513 (citing Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 129 (1999)).

277. Kanstroom, *supra* note 275.

278. Legomsky, *supra* note 3, at 488.

279. *See, e.g.*, *id.* at 513–14.

280. *Id.* at 514.

281. *Id.*

282. *Id.*

283. *Id.* at 514–15 ("Congress might well feel that the threat of deportation, with all its long-term effects, deters unlawful entries or violations of the terms of one's admittance.").

284. *See id.* at 514 ("The retribution rationale for criminal punishment admittedly has less universal application to deportation . . . .").

deportation is predicated upon the commission of an independent wrong, rather than upon the remedying of an immigration status violation."[285]

I will not delve further into the connection between deportation and the traditional theories of punishment here. Let it be sufficient for the moment to note that having citizens pay for the jail time of the criminally convicted non-citizen and then having the immigrant deported upon release is overkill. Immigration law needs to consider what the larger purpose behind incarceration and deportation is and then make a rational decision regarding the fate of convicted non-citizens. Either we accept the criminal immigrant, punish him, and release him into our society after his rehabilitation,[286] or we "sentence" him to deportation. It seems to me that current immigration law does not have a sufficient reason for both imprisoning and then deporting.

CONCLUSION

Red and white, blue suede shoes

I'm Uncle Sam, how do you do?

Gimme five; I'm still alive! Ain't no luck; I learned to duck!

—The Grateful Dead, *U.S. Blues*[287]

What is the purpose of immigration law? Dean Johnson has noted that the United States has often been unclear about the goals of the immigration laws.[288] It is clear that we want to protect our citizens. Regardless of whether immigrants pose an actual threat, a perceived threat has resulted in a trend toward criminalizing immigration laws.[289] It is also clear that in order to be naturalized, immigrants coveting American citizenship must have "good moral character."[290] This desire to protect our citizens and to guard our citizenship from those lacking good morals is both natural and beneficial. However, where do we fall on the other end of the spectrum? Do we still retain any of that welcoming, hospitable sentiment that we posted on our Statue of Liberty?[291] In a nation built on

285. *Id.*

286. Of course, this option has its own problems; if such an option were put in place, then the easiest way to become naturalized would be conviction of a crime.

287. THE GRATEFUL DEAD, *U.S. Blues*, *on* FROM THE MARS HOTEL (Grateful Dead Records 1974).

288. Johnson, *supra* note 84, at 1638.

289. *See, e.g.*, Legomsky, *supra* note 3, at 469 ("Sometimes dubbed 'criminalization,' the trend has been to import criminal justice norms into a domain built upon a theory of civil regulation."); Podgorny, *supra* note 84, at 289 ("Immigration law has always contained some elements of penal law in its attempt to preempt criminal aliens from seeking naturalization in the United States, but the lines between immigration and penal law have recently become increasingly blurred." (footnote omitted)).

290. 8 U.S.C. § 1101(f) (2012).

291. Lazarus, *supra* note 35.

mass immigration,[292] is it fair that we have slapped a "NO VACANIES" sign over those words of unqualified welcome? It is time to address the issue of immigration within the context of our modern world and take a stand. If nothing else, consistency in the application of the law needs to be achieved. During his 2004 presidential campaign, President Obama declared:

> Now is the time. Now is the time not just for comprehensive immigration reform at the federal level, but for humane, meaningful immigration reform that respects the dignity of all persons and reflects both a knowledge and embrace of international human rights law . . . that fulfills the promise of our great nation as a haven for persons the world over regardless of race, color, ethnicity, or national origin.[293]

I am not presuming to be able to provide satisfactory answers to all these questions here, nor am I able to suggest a comprehensive reform of one of the most complex areas of U.S. law.[294] I do, however, hope to have illustrated through this Comment that immigration laws, specifically the combination of enhanced punishment by imprisonment and removal that Mr. Rosales encountered, are colored by hostility towards immigrants. In the process of writing, it was pointed out to me that even using the term "illegal immigrant" risks perpetuating the stigma of immigrants as criminals.[295] So, rather than providing the necessary reform, my goal was to expose one of the problems in immigration law and thereby show that reform is necessary.

This is not to say that there should not be laws affecting non-citizen immigrants. The simple fact of the matter is that undocumented persons residing in this country are here illegally. But in determining the conse-

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292. *See, e.g.*, Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 110 n.1 (2011) (noting that the literature supporting America as a "'nation of immigrants' is too vast to cite").

293. *See* Campbell, *supra* note 84, at 457–58.

294. Immigration law has been dubbed as one of the most complex areas of U.S. law. *See* Bettwy, *supra* note 84; Johnson *supra* note 84.

295. *See also* Chacón, *supra* note 93, at 1838–39 ("By the 1950s, the phrases 'illegal immigrant' and 'illegal alien' had become a staple of the popular lexicon. Today, the press, politicians and individuals and organizations promoting restrictionist immigration laws commonly use the phrases 'illegal alien' and 'illegal immigrant' when describing unauthorized migrants in the United States. Thus, in law and language, there is a clear link between irregular status and illegality. Care is not always used in how the 'illegal immigrant' label is applied. With their entry and their labor criminalized, certain groups of migrants—most commonly Mexicans—increasingly bear the label 'illegal aliens,' whether or not that label applies to them. In other words, the term 'illegal alien' (which has no clear legal meaning) is not only used to signify irregular migrants, but also often applied to those perceived as irregular migrants, regardless of actual immigration status. These perceptions of undocumented status are heavily influenced by racial stereotypes." (footnotes omitted)); Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 529–30 (2008) ("This author deems it inaccurate to refer to a group of people as 'illegal' simply because they have committed a criminal act by entering the United States without obtaining permission from the government. . . . [I]t is more accurate to describe them as undocumented immigrants.").

quences for those illegally present, the law should not be colored by xenophobia. If the purpose is simply to curtail the number of undocumented residents, then deportation is enough and punishment inhospitably gratuitous. Some laws are necessary, but as it stands currently, the additional punishment of imprisonment with the very real possibility of enhanced sentencing goes beyond necessity. This is intended to raise the provocative question of whether we are obliged to incarcerate non-citizens at all.

And so, in closing, I echo Judge Gorsuch's plea for clarification.[296] Instead of clarification of the specific ambiguity presented by section 2L.1, I call for clarification of the need for any level of sentence enhancement. Rather than debating or reforming the level of enhancement and when that enhancement may be imposed, let us question whether we require the sentence in the first place. Does this serve some purpose of criminal justice or does this instead satisfy a xenophobic urge to enhance the punishment of those who dare presume to trespass on our land? I propose that the latter is the better interpretation. At best, the combination of imprisonment and deportation reflects ambivalence in the law's consideration of the theory behind the practices.[297] This urge is not proper within the edicts of blind justice. Justice should be served on the undocumented immigrant either through deportation or jail time, not both. In short, the time for immigration reform has come.

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296. United States v. Rosales-Garcia, 667 F.3d 1348, 1359 (10th Cir. 2012) (Gorsuch, J., dissenting).

297. *See* Kanstroom, *supra* note 275, at 1934 ("In the field of immigration law in general, and deportation law in particular, the lack of a comprehensive theoretical approach has been . . . problematic. Classifying the proceedings as 'civil' has simply subjected questions of fairness and rights to decisions based on a muddle of models.").

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