PRESCRIBING DISPROPORTIONATE PUNISHMENT: THE FEDERAL SENTENCING GUIDELINES FOR ILLEGAL REENTRY

Zoey T. Jones[*]

TABLE OF CONTENTS

[*] Associate Editor, *Cardozo Law Review*. J.D. Candidate (June 2012), Benjamin N. Cardozo School of Law; B.A., *summa cum laude*, University of San Francisco, 2007. Thank you to Professor Alexander Reinert and the editors of the *Cardozo Law Review* for your insights and assistance.

INTRODUCTION

Illegal reentry is the crime of unlawfully entering, attempting to enter, or remaining in the United States after a deportation order is issued.[1] The Federal Sentencing Guidelines impose a series of sentencing enhancements on illegal reentrants with certain prior convictions.[2] The harshest of these provisions, referred to herein as the "sixteen-level enhancement," increases the offender's sentence anywhere from five to fourteen times,[3] and can result in a prison sentence as long as ten years.[4] The enhancement is automatically triggered by a single prior conviction for crimes as benign as "throwing a rock at an SUV,"[5] and often calls for a sentence far harsher than that imposed for the prior conviction,[6] and longer than the sentences suggested for other federal crimes including aggravated assault, reckless manslaughter, certain child sex offenses, and various crimes threatening national security.[7]

Nearly 20,000 individuals were prosecuted for illegal reentry in 2010, constituting nearly one third of all federal cases that year.[8] At an average annual cost of roughly $25,000 per inmate,[9] this means approximately $600 million in tax dollars were spent on punishing a nonviolent crime[10] and incarcerating offenders already subject to automatic

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1 8 U.S.C. § 1326 (2006).

2 U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2011).

3 *See* Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 589 (2009).

4 *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2011); *id*. at ch. 5, pt. A, at 402 (sentencing table).

5 *See United States Sentencing Commission Public Hearing* 37–38 (Mar. 6, 2006) [hereinafter *Public Hearing 2006*] (statement of Hon. Martha Vazquez, C.J., D.N.M.), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/hearings.cfm (referring to United States v. Perez-Nunez, 368 F. Supp. 2d 1265, 1265 (2005)).

6 *See* sources cited *infra* note 165.

7 *See* sources cited *infra* notes 184–87.

8 U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm [hereinafter SOURCEBOOK]. Illegal reentry is second only to drug prosecutions under section 2D1.1 (31.3% of 2010 prosecutions), and is prosecuted nearly three times more frequently than the next largest category, which is theft and embezzlement related crimes under section 2B1.1 (11.3% of 2010 prosecutions). *Id*.

9 Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 6161, 6161 (2011) (reporting annual cost of housing federal inmates for 2009).

10 *See* Linda Drazga Maxfield, *Aggravated Felonies and § 2L1.2 Immigration Unlawful Reentry Offenders: Simulating the Impacts of Proposed Guideline Amendments*, 11 GEO. MASON L. REV. 527, 530–31 (2003).

deportation.[11] These and many other aspects of the prosecution and sentencing of illegal reentrants inform the subject of this Note.

This Note builds upon arguments that the illegal reentry enhancement scheme results in unreasonably long sentences,[12] but recontextualizes these within the Supreme Court's Eighth Amendment jurisprudence. Although the Guideline's proposed sentences for illegal reentrants fall within statutory confines, this Note argues that the imposition of the harshest illegal reentry enhancement often results in sentences that violate the Eighth Amendment's proportionality principle.[13] This Note does not propose an ideal, proportionate sentence for illegal reentry, nor does it quantify the number of disproportionate sentences imposed pursuant to the sixteen-level enhancement. Rather, it highlights the inconsistencies and excesses of the sentencing guidelines for illegal reentry with the goal of encouraging more serious consideration of Eighth Amendment challenges to illegal reentry sentences than that currently given by federal courts.[14]

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[11] *See* 8 U.S.C. § 1231(a)(5) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.").

[12] *See* Adelman & Deitrich, *supra* note 3; Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Reentry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 732–33 (2010).

[13] This Note does not address the argument, maintained by Justices Scalia and Thomas, that the Eighth Amendment contains no proportionality limitation. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2044–47 (2010) (Scalia, J., dissenting).

[14] Proportionality challenges to illegal reentry sentences are often dismissed with a conclusory statement that the challenged sentence is not disproportionate, absent any degree of individualized analysis. *See, e.g.*, United States v. Rios-Nolasco, 421 F. App'x 463, 463 (5th Cir. 2011) (per curiam) ("A 57–month sentence for a first illegal reentry offense by a defendant with a prior felony conviction for transportation of illegal aliens is not grossly disproportionate to the crime."); United States v. Rivas, 377 F. App'x 360, 361 (5th Cir. 2010) (per curiam) ("Rivas has not established that his 57-month sentence, within the applicable guidelines range, was disproportionately harsh."); United States v. Martinez, 389 F. App'x 391, 391 (5th Cir. 2010) (per curiam) ("A six-year sentence for a second illegal reentry offense by a defendant with a prior felony conviction for manufacture/delivery of cocaine and several other convictions is not grossly disproportionate to the crime."); United States v. Garcia, 399 F. App'x 861, 861 (5th Cir. 2010) (per curiam) ("A 72-month sentence for a first illegal reentry offense by a defendant with a prior felony conviction for burglary of a habitation is not grossly disproportionate to the crime."); United States v. Castillo, 294 F. App'x 855, 856 (5th Cir. 2008) (per curiam) ("Castillo has not established that his 57-month sentence, within the applicable guideline range, was disproportionately harsh."); United States v. Gonzalez-Patino, 182 F. App'x 285, 288 (5th Cir. 2006) (per curiam) ("Gonzalez-Patino's fifty-seven months' sentence is not grossly disproportionate to his conduct. Therefore [his] constitutional arguments fail."). Federal judges often cite deference to legislative sentencing determinations as grounds for not engaging in proportionality analysis at all. *See, e.g.*, United States v. Cordova, 373 F. App'x 549, 552 (6th Cir. 2010) ("A sentence within the statutory maximum set by statute generally does not constitute cruel and unusual punishment." (internal quotation marks and citations omitted)); United States v. Aguilera-Meza, 329 F. App'x 825, 835 (10th Cir. 2009) ("Generally, a sentence within the limits imposed by statute is neither excessive

Part I examines the process by which the statutory maximum term of imprisonment for illegal reentry was raised from two to twenty years, and argues that Congress only intended the heightened maximum sentences to target serious felons reentering the United States after deportation with the purpose of reoffending. This Part also describes the structure of the Guidelines and the provisions applicable to illegal reentry, and explains that although compliance with Guidelines sentences is not mandatory, the Guidelines still carry immense influence over federal courts.

Part II discusses Supreme Court jurisprudence evaluating the proportionality of noncapital sentences under the Eighth Amendment. This jurisprudence outlines four principles that limit proportionality review of prison sentences. These principles require that courts conducting noncapital proportionality analysis respect the state-by-state diversity of the federal system, give sufficient deference to legislative sentencing decisions, respect the legitimacy of various justifications for punishment, and base proportionality determinations on objective factors. Part II also outlines the *Solem* test, a three-step analysis that guides noncapital proportionality review. Under the first prong of this test, courts should determine whether the challenged sentence is grossly disproportionate by comparing the gravity of the offense to the severity of the sentence. If the sentence is grossly disproportionate, the court should compare the challenged sentence to sentences imposed on other offenders within that same jurisdiction and to sentences imposed for comparable crimes in other jurisdictions. If these comparisons confirm the initial determination of gross disproportionality, the sentence violates the Eighth Amendment's proportionality principle.

Part III argues that proportionality review of sentences imposed upon illegal reentrants pursuant to the sixteen-level enhancement does not contravene the Supreme Court's four proportionality principles. In conducting such review, courts are only questioning federal sentences, and therefore do not interfere with the state-by-state diversity permitted the federalist system. This review does not threaten legislative primacy

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nor cruel and unusual under the Eighth Amendment." (internal quotation marks omitted)); United States v. Organek, 65 F.3d 60, 62–63 (6th Cir. 1995) ("[A] sentence within the statutory maximum set by statute generally does not constitute "cruel and unusual punishment."). This unquestioning deference to legislative sentencing ranges entirely vitiates the Eighth Amendment's proportionality requirement. *See* Donna Lee, *Resuscitating Proportionality in Noncapital Sentencing*, 40 ARIZ. ST. L.J. 527, 530 (2008) ("[T]he principle of legislative primacy has been too easily interpreted as absolute deference to legislatively imposed sentencing protocols. This results in an abdication of judicial responsibility to review noncapital criminal sentences and uphold Eighth Amendment proportionality standards."); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 311 (2005) ("[T]he concept of proportionality as a liberal principle independent of penal theory seems to have been eclipsed completely by judicial deference to legislative penology.").

in sentencing because the Guidelines are not written by the legislature, the sixteen-level enhancement itself is inconsistent with legislative intent in various ways, and the enhancement is not supported by empirical data. Likewise, proportionality review does not reject any of the penological purposes for the Guidelines, but rather shows that sentences resulting from the sixteen-level enhancement serve none of these purposes. Finally, determinations regarding the proportionality of illegal reentry sentences can be based on the objective factors outlined in the *Solem* test, which was expressly created to give concrete content to noncapital proportionality review.

Part III subsequently applies the *Solem* test to sentences imposed pursuant to the sixteen-level enhancement. This analysis argues that these sentences are often grossly disproportionate because illegal reentry in itself is not a serious enough offense to warrant the lengthy sentences called for by the sixteen-level enhancement, and the offender's predicate convictions are likewise generally insufficient to justify imposition of the enhancement. The intrajurisdictional comparison confirms that these sentences are grossly disproportionate because they are harsher than many Guidelines provisions for more serious offenses, and they are excessive when compared to jurisdictions where dramatically lower illegal reentry sentences are imposed merely because the offender agrees to facilitate a speedy conviction. The interjurisdictional comparison also reveals that these sentences are disproportionate as they are substantially longer than those imposed for comparable offenses in other countries with large immigrant populations.

Based on the fact that proportionality review of sentences imposed under the sixteen-level enhancement does not contravene the Supreme Court's four proportionality principles, and after concrete application of the *Solem* test to these sentences, this Note concludes that illegal reentrants are frequently subjected to sentences that violate the Eighth Amendment.

I. ILLEGAL REENTRY AND THE FEDERAL SENTENCING GUIDELINES

A. *Statutory Sentencing Range for Illegal Reentry*

The crime of illegal reentry was first established as a felony by the Immigration and Nationality Act of 1952, and was initially punishable by up to two years in prison.[15] Two statutes, however, dramatically increased the maximum sentences for illegal reentrants previously con-

[15] *See* 8 U.S.C. § 1326 (2006). The fines applicable to illegal reentry offenses are not discussed in this Note.

victed of certain felonies, ultimately authorizing as many as twenty years of imprisonment.[16]

The maximum sentence was first increased in 1988, when Congress enacted legislation subjecting illegal reentrants previously convicted of an aggravated felony to up to fifteen years in prison, and those previously convicted of any other felony to up to five years imprisonment.[17] The increase was proposed by Senator Lawton Chiles, who initially suggested that aggravated felons be subject to a *mandatory* term of fifteen years in prison.[18] Congress, however, ultimately determined that a mandatory minimum was not appropriate for illegal reentrants, and instead adopted the proposed fifteen year sentence as the maximum sentence for illegal reentrants previously convicted of an aggravated felony.[19] The sentence increases were proposed as a package of provisions intended to reduce the presence of criminal aliens in the United States and reduce the strain on "an already overburdened legal and penal system."[20]

Legislative history suggests that the sentence increases were intended to target undocumented immigrants returning to the United States after deportation to engage in serious criminal activity.[21] Aggravated felons, the offenders exposed to the highest of the new maximum sentences, were defined as individuals convicted of "murder, rape, kidnapping or attempts at such and any trafficking of illegal drugs as listed under the Controlled Substances Act."[22] To justify the dramatically longer sentences, Senator Chiles referenced a Colombian connected with "6 drug killings" and a Haitian "who has 18 active warrants against him for drug offenses," both of whom utilized various fake forms of identification to enter the United States.[23] Senator Chiles also emphasized the threat posed by the involvement of undocumented immigrants in international drug crime, referencing "the connection between illegal aliens and drug trafficking"[24] and "expansive drug syndicates established and managed by illegal aliens."[25]

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16 *Id*. § 1326(b)(2).

17 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(b)(1)–(2), 102 Stat. 4181 (codified as amended at 8 U.S.C. § 1326 (2006)).

18 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987).

19 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(b)(2), 102 Stat. 4181.

20 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987) (statement of Sen. Lawton Chiles).

21 *Id*. (introducing the proposed sentence increases for illegal reentry as "intended to strengthen immigration law by creating a greater deterrent to alien drug traffickers who are considering illegal entry into the United States"); *see also* Keller, *supra* note 12, at 731–33.

22 *See* 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987); *see also* 134 CONG. REC. 27,445 (1988) (statement of Sen. Alfonse D'Amato) (specifying that aggravated felons are individuals who have been convicted of "murder, kidnapping, rape, and drug and firearms trafficking.").

23 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987).

24 134 CONG. REC. 27,462 (1988).

25 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987).

In 1994, Congress again increased the maximum sentences for illegal reentry.[26] The increases were proposed by Senator Bill McCollum as part of legislation intended to minimize the cost of incarcerating criminal aliens, reduce prison overcrowding, and protect the public from the danger of repeat offenders.[27] The sentence ranges suggested by Senator McCollum, which remain unchanged, permit up to twenty years of imprisonment for an illegal reentrant previously convicted of an aggravated felony,[28] and up to ten years of imprisonment for one previously convicted for various other crimes.[29]

B. *Guidelines Provisions Applicable to Illegal Reentry*

The Federal Sentencing Guidelines give structure to the broad sentencing range authorized by Congress. Although compliance with the Guidelines is not mandatory,[30] federal judges are still required to calculate and consider the sentence range proposed by the Guidelines and overwhelmingly tend to comply with this range.[31] Absent a prosecutorial request for a lower sentence (i.e., a "government sponsored" sentence), eighty percent of cases in fiscal year 2010 were sentenced pursuant to the Guidelines.[32] Of the nearly 20,000 individuals sentenced for illegal reentry in fiscal year 2010, only 13.95% were given non-Guidelines, nongovernment sponsored sentences.[33] In other words, federal judges follow the Guidelines very closely when sentencing illegal reentrants.

The Guidelines are developed by the Federal Sentencing Commission, an ongoing agency situated in the judicial branch and composed of

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[26] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XIII, § 130001(b)(1)–(2), 108 Stat. 1796.

[27] 139 CONG. REC. E749-02 (daily ed. Mar. 24, 1993).

[28] 8 U.S.C. § 1326(b)(2) (2006).

[29] Illegal reentry after conviction for any felony or three or more misdemeanors involving drugs or crimes against the person is punishable by up to ten years in prison. *Id.* § 1326(b)(1). Illegal reentry by someone removed from the United States based on security related grounds or terrorist activities, or removed before completion of a sentence for a nonviolent offense, is punishable by up to ten years in prison. *Id.* § 1326(b)(3)–(4).

[30] Although the Guidelines were established as binding sentencing rules, the Supreme Court eventually excised the provision making the rules mandatory and the Guidelines now hold only advisory influence over federal sentencing determinations. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

[31] *See* Gall v. United States, 128 S. Ct. 586 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and initial benchmark [at sentencing]."); *Booker*, 543 U.S. at 245 (stating that courts are required to consider, although not bound by, Guidelines sentencing ranges).

[32] SOURCEBOOK, *supra* note 8, at tbl.N.

[33] *Id*. at tbl.28.

members appointed by the President and confirmed by the Senate.[34] The Guidelines assign a numerical value to the gravity of each federal offense (the base offense level)[35] and to the seriousness of the offender's criminal record (the criminal history category).[36] The criminal history categories constitute the horizontal line on the Guidelines' Sentencing Table and the offense levels form the vertical line.[37] To determine the sentence suggested by the Guidelines, a judge cross references the offense level with the appropriate criminal history category; the point at which the offense level and criminal history category intersect determines the applicable sentence range.[38]

The provisions applicable to illegal reentry are found at section 2L1.2, which assigns a base offense level of eight[39] and a sentencing range from zero to twenty-four months.[40] Under section 2L1.2, however, a broad range of prior convictions automatically enhance the base offense level, which in turn dramatically increases the applicable sentencing range.[41]

The harshest of these provisions increases the base offense level by sixteen—from level eight to level twenty-four[42]—and lengthens the applicable sentencing range to approximately four to ten years in prison.[43] The enhancement is triggered by a single prior conviction for: (1) a drug trafficking offense for which the sentence imposed exceeded thirteen months; (2) a crime of violence; (3) a firearms offense; (4) a child pornography offense; (5) a national security or terrorism offense; (6) a human trafficking offense; or (7) an alien smuggling offense.[44] Conse-

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[34] *See* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 3, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

[35] The base offense levels range from one to forty-three. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2011) (sentencing table). The sentencing judge can adjust the appropriate base offense level based on various factors outlined in the Guidelines, such as the nature of the victim and the offender's specific role in the offense. *Id*. §§ 3A1.1–3E1.1.

[36] The criminal history categories range from one to six. *Id*. at ch. 5, pt. A, 402 (sentencing table).

[37] *Id*.

[38] *Id*.

[39] *Id*. § 2L1.2(a).

[40] *Id*. at ch. 5, pt. A, 402 (sentencing table).

[41] *Id*. § 2L1.2(b).

[42] *Id*. § 2L1.2(b)(1)(A).

[43] *Id*. at ch. 5, pt. A, at 402 (sentencing table). The lesser enhancements increase the base offense level by twelve levels for a prior conviction for a felony drug trafficking offense for which the sentence imposed was thirteen months or less if the conviction receives criminal history points and by eight levels if it does not, by eight levels for a conviction for an aggravated felony, and by four levels for one conviction for any other felony, or three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses. *Id*. §§ 2L1.2(b)(1)(B)–(E).

[44] *Id*. § 2L1.2(b)(1)(A).

quently, there are an enormous range of offenses that can trigger the imposition of the sixteen-level enhancement.[45]

In the past, any conviction falling into one of the enumerated categories, regardless of how old, triggered the sixteen-level enhancement.[46] The fact that the sixteen-level enhancement is frequently triggered by alarmingly stale convictions is one of many factors contributing to the excessive nature of the resulting sentences.[47] The most recent amend-

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[45] *See, e.g.*, United States v. Martinez-Gonzalez, 286 F. App'x 672 (11th Cir. 2008) (affirming imposition of sixteen-level enhancement triggered by conviction for battery on a law enforcement officer for which the defendant served twenty-one days in jail); United States v. Lopez-Arrellano, 2010 WL 4363415 (E.D. Wis. Oct. 27, 2010) (imposing sixteen-level enhancement triggered by conviction for armed robbery in which offender was "armed" with a cologne bottle); United States v. Maroquin-Bran, No. 7:07-CR-107-FL, 2010 WL 686393 (E.D.N.C. Feb. 23, 2010) (affirming sixty-three month sentence pursuant to sixteen-level enhancement triggered by eighteen-year-old conviction for sale of marijuana); Barrera-Mendoza v. United States, No. 1:07-cv-107, 2009 WL 3429810 (W.D. Mich. Oct. 21, 2009) (affirming imposition of sentence of seventy months imprisonment and three years supervised release pursuant to sixteen-level enhancement triggered by nineteen-year-old conviction for delivery of a controlled substance); United States v. Perez-Nunez, 368 F. Supp. 2d 1265, 1269 (D.N.M. 2005) (declining to impose sixteen-level enhancement, although called for by Guidelines, where predicate conviction was for throwing a rock at an SUV after the driver had attempted to run him over four times); *see also United States Sentencing Commission, Public Hearing* 3 (Feb. 11, 2009) (testimony of Hon. Gregory Presness, J., M.D. Fla.), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Presnell_statement.PDF ("The [illegal reentry] enhancements from 4 to 16 points based upon arbitrary steps of prior criminal conducts often produce grossly unjust results."); *Public Hearing 2006*, *supra* note 5, at 35–36 (statement of Hon. Martha Vazquez, C.J., D.N.M.) ("Too often these prior convictions triggering the sixteen-level enhancement involve assault charges stemming from drunken bar fights . . . ."); *United States Sentencing Commission, Public Hearing* 116 (May 27, 2009) [hereinafter *Public Hearing May 2009*] (statement of Hon. B. Lynn Winmill, C.J, D. Idaho), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Transcript_20090527-28.pdf (expressing concern that the sixteen-level enhancement can be triggered by nonviolent crimes such as statutory rape).

[46] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2011) (no subsection or comment specifying time limitation on triggering convictions); *see also* United States v. Olmos-Esparza, 484 F.3d 1111 (9th Cir. 2007) (holding that section 4A1.2 of the Guidelines, which limits the age of convictions that may be considered for purposes of calculating a defendant's criminal history under the Guidelines, does not limit the age of a conviction that may be used to trigger an illegal reentry enhancement).

[47] *See, e.g.*, United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055–56 (9th Cir. 2009) (reversing imposition of sixteen-level enhancement in part because predicate conviction was twenty-five years old); United States v. Cedillo-Mercado, No. EP-10-CR-213-PRM, 2010 WL 1910302 (W.D. Tex. May 11, 2010) (imposing a sixteen-level enhancement triggered by a twenty-year-old assault II conviction); United States v. Maroquin-Bran, No. 7:07-CR-107-FL, 2010 WL 686393 (E.D.N.C., Feb. 23, 2010) (affirming sixty-three month sentence pursuant to sixteen-level enhancement triggered by eighteen-year-old conviction); Barrera-Mendoza v. U.S., No. 1:07-cv-107, 2009 WL 3429810 (W.D. Mich., Oct. 21, 2009) (affirming imposition of sentence of seventy months imprisonment and three years supervised release pursuant to sixteen-level enhancement triggered by nineteen-year-old conviction for delivery of a controlled substance); United States v. Romero-Sisquieros, No. 09-4008, 2009 WL 1024691 (D.S.D., Apr. 14, 2009) (affirming imposition of sixteen-level enhancement triggered by fifteen year-old conviction for burglary); *United States Sentencing Commission, Public Hearing* 170 (Nov. 19, 2009) [hereinafter *Public Hearing Nov. 2009*] (statement of Jason Hawkins, Supervisory Assistant Fed. Defender), *available at*

ment to section 2L1.2,[48] however, imposes a minimal staleness restriction on those convictions that can trigger the harshest of the illegal reentry enhancements. Pursuant to this amendment, a conviction triggers the sixteen-level enhancement only if it "receives criminal history points under Chapter Four."[49] Convictions that do not receive criminal history points trigger a lesser twelve-level enhancement.[50]

Under Chapter Four, convictions for which a sentence exceeding one year and one month was imposed receive criminal history points only if the sentence was imposed, or the defendant was incarcerated pursuant to the sentence, within fifteen years prior to commencement of the instant offense.[51] Convictions accompanied by any other sentence receive criminal history points if the sentence was imposed within ten years of commencement of the instant offense.[52] Accordingly, the oldest conviction that could trigger the sixteen-level enhancement is one that was accompanied by a sentence of at least one year and one month, and for which the defendant was sentenced, or incarcerated pursuant to that sentence, within fifteen years of violating 8 U.S.C. § 1326.[53] As discussed below, however, this amendment does little to ameliorate the excessive nature of the sentences resulting from imposition of the sixteen-level enhancement.[54]

II. SUPREME COURT PROPORTIONALITY REVIEW OF NONCAPITAL SENTENCES

The Supreme Court has found a noncapital sentence to violate the Eighth Amendment, based on its length, rather than its cruel or unusual nature, in only three cases: *Weems v. United States*,[55] *Solem v. Helm*[56]

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http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Agenda.htm (noting that even prior convictions too old to count towards the offender's criminal history score under the Guidelines can be used to trigger the enhancements); *Public Hearing 2006*, *supra* note 5, at 22–23 (statement of Hon. Irma Gonzalez, C.J., S.D. Cal) (stating that the sixteen-level enhancement is "somewhat draconian" because there is no time limitation on what convictions trigger the enhancement).

48 U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 75 (2011), *available at* http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20110428_RF_Amendments_Final.pdf.

49 U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2011).

50 *Id*.

51 *Id*. § 4A1.2(e)(1).

52 *Id*. § 4A1.2(e)(2).

53 *Id*. § 2L1.2(b)(1)(A).

54 *See infra* notes 143–48 and accompanying text.

55 217 U.S. 349 (1910).

56 463 U.S. 277 (1983) (overturning sentence of life in prison without parole for the crime of writing a fraudulent check).

and *Graham v. Florida*.[57] *Weems* overturned a law mandating fifteen years imprisonment at hard labor in chains for falsifying a public document.[58] Although *Weems* was decided based both on the length of the sentence and its unusual nature, the Court explicitly stated that the Eighth Amendment requires that punishments be "graduated and proportioned to offense."[59] Today, the Court maintains this interpretation of the Eighth Amendment.[60]

Jurisprudence evaluating the proportionality of sentences under the Eighth Amendment can be divided into two groups: (1) opinions discussing whether a punishment should be held *categorically* unconstitutional based on the nature of either the offender or the offense;[61] and (2) opinions evaluating whether a punishment is disproportionate based on the circumstances *of that particular case*.[62] The argument made by this Note is governed by the latter group of cases. These cases outline four principles that inform proportionality review of noncapital sentences, and establish a three-part test to guide adjudication of these Eighth Amendment challenges.[63]

The Supreme Court's four principles "give content to the uses and limits" of proportionality determinations.[64] These principles were first synthesized by Justice Kennedy in *Harmelin v. Michigan*[65] and were recently restated by Justice Roberts in *Graham v. Florida*.[66] The principles require: (1) respect for the state-by-state diversity of our federal system; (2) respect for various justifications for punishment; (3) judicial deference to legislative sentencing decisions; and (4) that proportionality determinations be based on objective factors.[67] These four principles

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[57] 130 S. Ct. 2011 (2010) (overturning imposition of a sentence of life in prison without parole on a juvenile offender for a nonhomicide offense).

[58] *Weems*, 217 U.S. at 363.

[59] *Id*. at 367.

[60] *See, e.g.*, *Graham*, 130 S. Ct. at 2021 ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'") (quoting *Weems*, 217 U.S. at 367).

[61] *Id*. (holding that imposition of life-without-parole sentences on juveniles who have committed nonhomicide crimes categorically violates the Eighth Amendment); Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that imposition of capital sentences for child rape categorically violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (holding that imposition of capital sentences on juvenile offenders categorically violates the Eighth Amendment).

[62] *Graham*, 130 S. Ct. at 2021.

[63] For a comparable discussion of this jurisprudence, see Lee, *supra* note 14, at 528–31.

[64] Harmelin v. Michigan, 501 U.S. 957, 998 (1993) (Kennedy, J., concurring in part and concurring in the judgment).

[65] *Id*. (stating that "close analysis of our decisions yields some common principles that give content to the uses and limits of proportionality review" and proceeding to outline principles); *see also* Ewing v. California, 538 U.S. 11, 23 (2003).

[66] 130 S. Ct. at 2037 (Roberts, J., concurring in the judgment).

[67] *Id*.

inform application of the Court's three-part test—initially articulated in *Solem v. Helm*,[68] further developed by *Harmelin v. Michigan*,[69] and recently reaffirmed in *Graham v. Florida*[70]—to guide adjudication of proportionality challenges to terms of imprisonment.

In *Solem*, the Supreme Court concluded that a sentence of life imprisonment without parole was disproportionate to the crime of writing a fraudulent check for $100 and therefore prohibited by the Eighth Amendment.[71] In so holding, the *Solem* majority created three steps courts should follow when evaluating the proportionality of a noncapital sentence: (1) compare the sentence to the gravity of the offense; (2) compare the sentence to those imposed on other criminals in the same jurisdiction (the intrajurisdictional comparison); and (3) compare the sentence to those imposed in other jurisdictions for the same crime (the interjurisdictional comparison).[72] The Court formulated this new analysis by synthesizing those factors considered in its past proportionality decisions.[73]

Eight years later, in *Harmelin v. Michigan*,[74] a Supreme Court plurality significantly developed the *Solem* proportionality analysis. Justice Kennedy's concurrence held that a court must first determine that a sentence is grossly disproportionate to the offense, *before* engaging in the interjurisdictional and intrajurisdictional comparisons.[75] Justice Kennedy wrote that the Court's four proportionality principles inform the threshold requirement of the *Solem* test: to violate the Eighth Amendment, a sentence may not be merely excessive, but must be *grossly* disproportionate to the offense for which it is imposed.[76] Only if the sentence is found to be grossly disproportionate to the crime, should the court conduct the interjurisdictional and intrajurisdictional comparisons outlined in *Solem*.[77]

Although the Supreme Court has failed to articulate a precise method for determining the first prong of the *Solem* test, it has explained that this analysis consists of comparing the gravity of the of-

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68 463 U.S. 277 (1983).

69 501 U.S. 957 (1991).

70 130 S. Ct. 2011 (2010).

71 *Solem*, 463 U.S. at 303.

72 *Id*. at 290–93.

73 *Id*. at 290–95. Specifically, the Court considered *Enmund v. Florida*, 458 U.S. 782 (1982), *Hutto v. Davis*, 454 U.S. 370 (1982), *Rummel v. Estelle*, 445 U.S. 263 (1980), *Coker v. Georgia*, 433 U.S. 584 (1977), *Trop v. Dulles*, 356 U.S. 86 (2008), and *Weems v. United States*, 217 U.S. 349 (1910).

74 501 U.S. 957 (1991) (rejecting a proportionality challenge to a sentence of life imprisonment without parole for the crime of possessing more than 650 grams of cocaine).

75 *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring in part and concurring in the judgment).

76 *Id*. at 997–1001.

77 *Id*. at 1004.

fense to the severity of the penalty.[78] Factors relevant to evaluating the gravity of the offense include whether the crime was violent or had the potential for triggering violence,[79] whether the offender poses a continuing threat to the public,[80] whether the offense was a crime against an individual,[81] the *mens rea* and motive of the offender,[82] and the gravity of past offenses if the offender was sentenced as a recidivist.[83] In evaluating the harshness of the penalty, courts have considered the availability of parole,[84] the possibility of clemency,[85] and accessory penalties.[86]

The Supreme Court recently affirmed the vitality of the *Solem* test in *Graham v. Florida*, its third opinion to overturn a noncapital sentence on Eighth Amendment grounds.[87] *Graham* fell into the categorical class of proportionality jurisprudence,[88] but both the majority and concurrence affirmed that the proper analysis when evaluating a noncapital sentence based on all of the circumstances of the case (rather than the categorical analysis used by the majority to reach its holding) is the *Solem* test.[89]

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78 *Id*. at 1001; Solem v. Helm, 463 U.S. 277, 291–92 (1983).

79 *See Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in judgment) (emphasizing that drug crimes have a high potential to cause crimes of violence); *see also Solem*, 463 U.S. at 280, 297 n.22.

80 *Solem*, 463 U.S. at 292.

81 *Id*. at 296–97.

82 Graham v. Florida, 130 S. Ct. 2011, 2037–38 (2010) (Roberts, J., concurring in the judgment); *Solem*, 463 U.S. at 293, 299.

83 Ewing v. California, 538 U.S. 11, 29 (2003) ("In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions."); *Solem*, 463 U.S. at 296–97 ("[The defendant] was not charged simply with uttering a 'no account' check, but also with being an habitual offender . . . . [His] status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person.").

84 Lockyer v. Andrade, 538 U.S 63, 74 (2003) (distinguishing *Solem* because in that case the challenged sentence was without the possibility of parole like the sentence challenged in *Lockyer*); *Solem*, 463 U.S. at 297, 302 (distinguishing *Rummel* because in that case the challenged sentence offered the possibility of parole after completion of twelve years imprisonment).

85 *Solem*, 463 U.S. at 302–03.

86 Weems v. United States, 217 U.S. 349, 364 (1910) (noting that the sentencing included "(1) civil interdiction; (2) perpetual absolute disqualification; [and] (3) subjection to surveillance during life").

87 Graham v. Florida, 130 S. Ct. 2011 (2010); *see also Lockyer*, 538 U.S. at 64 (2003) (holding that state court's refusal to overturn challenged sentence was not an unreasonable application of the "clearly established" gross disproportionality principle set forth by Kennedy's concurrence in *Harmelin*); *Ewing*, 538 U.S. at 28 (plurality opinion) (applying analysis outlined by Kennedy's concurrence in *Harmelin* to reject proportionality challenge).

88 *See* discussion *supra* notes 45–47 and accompanying text.

89 Graham v. Florida, 130 S. Ct. 2011, 2022 (2010); *id*. at 2037 (Roberts, J., concurring in the judgment).

III. ANALYSIS

When critically evaluated in light of the Supreme Court's noncapital proportionality jurisprudence, illegal reentry sentences imposed pursuant to the sixteen-level enhancement frequently violate the Eighth Amendment. The below analysis first argues that proportionality review of sentences imposed pursuant to the sixteen-level enhancement does not contravene legislative primacy in sentencing or the legitimacy of various penological justifications, and that such review can be based on the objective factors outlined by the *Solem* test.[90] This analysis then concludes that application of the *Solem* test demonstrates that these sentences are grossly disproportionate to the offense of illegal reentry, and are anomalous when compared to other Guidelines' provisions and to sentences for similar crimes in foreign jurisdictions.

A. *The Supreme Court's Proportionality Principles Applied to Illegal Reentry*

1. Legislative Primacy over Sentencing

The Supreme Court's reluctance to overturn prison sentences on proportionality grounds arises principally from its deference to legislative judgment regarding the severity of a crime and the appropriate penalty.[91] For various reasons, however, proportionality review of sentences imposed pursuant to the sixteen-level enhancement does not underundermine legislative primacy in sentencing. The most significant of these is the fact that the Federal Sentencing Commission is situated in the judiciary, not the legislature.[92] As the product of the judiciary, the Guidelines' sixteen-level enhancement is entitled to judicial deference

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[90] Because illegal reentry is a federal offense, the following analysis does not discuss the Supreme Court's third principle, which requires that proportionality review respect the penological diversity of the federalist system.

[91] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that . . . is 'properly within the province of legislatures, not courts.'") (citing Rummel v. Estelle, 445 U.S. 263, 275–76) (1980); Solem v. Helm, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."); *see also* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 61 (2009) ("In proportionality litigation, deference is considered essential to ceding to the legislature, as a majoritarian institution, the primary responsibility of judging the seriousness of particular crimes.").

[92] *See* discussion *supra* note 34 and accompanying text.

only to the extent that it embodies Congress's intent when lengthening the maximum sentences for illegal reentry.[93]

For various reasons, however, the sixteen-level enhancement is inconsistent with Congressional intent. First, the sixteen-level enhancement effectively imposes a minimum term of imprisonment on certain illegal reentrants, although Congress explicitly rejected the imposition of mandatory minimum sentences when it increased the penalties for illegal reentry.[94] Such an enhancement scheme better reflects federal sentencing laws like those applicable to firearms offenders with certain prior convictions.[95] Like the illegal reentry enhancements, these provisions impose a mandatory minimum sentence for certain firearms offenders previously convicted for three or more "violent felonies" or "serious drug offenses."[96] The Guidelines translate these provisions by requiring a base offense level assigning a sentencing range beginning just below the mandatory minimum.[97] Yet in the case of illegal reentrants, who are subject to no minimum term of imprisonment, the Guidelines impose a base offense level with a sentencing range that *begins* at over four years.[98] Why suggest a sentencing range beginning just below the statutory minimum for firearms offenders, yet recommend a range beginning substantially higher than the statutory minimum for illegal reentrants? The Commission has never justified this illogical and inconsistent interpretation of § 1326.[99]

Second, the sixteen-level enhancement imposes the highest sentences on many offenders who are not within the group targeted by Congress when it increased the illegal reentry sentencing range. As discussed earlier, Congressional statements indicate that Congress intended to target individuals reentering the United States after deportation with the intention of committing serious felonies when it increased the maximum sentences for illegal reentry.[100] Yet the sixteen-level enhancement applies to many defendants who do not fall within this category of criminals.[101]

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93 *Cf.* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 6, 39 (2010) (pointing out that not all penological policies are the product of "an equally democratic genesis" and proposing that the Court's level of deference be calibrated to reflect the policy's "democratic pedigree").

94 *See* discussion *supra* Part II.

95 *See* 21 U.S.C. § 851 (2006); 18 U.S.C. § 924(e)(1) (2006).

96 18 U.S.C. § 924(e)(1) (2006).

97 U.S. SENTENCING GUIDELINES MANUAL § 4B1.4 (2011) (assigning base offense level 33 which carries a sentencing range of 135 to 293 months).

98 *See* discussion *supra* Part I.

99 *See* discussion *infra* notes 110–11 and accompanying text.

100 *See* discussion *supra* Part II.

101 *See* sources cited *supra* note 45.

Third, not all felonies that can trigger the sixteen-level enhancement qualify as aggravated felonies such that they trigger the lesser eight-level enhancement.[102] This inconsistency has the counterintuitive result of making the sixteen-level enhancement triggerable by *less* serious crimes than those that trigger the eight-level enhancement. This seems to contravene Congress's intent that "aggravated felony" designate the most serious felonies.[103] The Commission has previously considered, although never implemented, various remedies to this inconsistency.[104]

Fourth, the Guidelines' broad application of the sixteen-level enhancement has resulted in massive incarceration of illegal reentrants.[105] This is inconsistent with congressional intent, given that one of the primary goals of both laws that increased the sentences for illegal reentry was to reduce the burden of criminal aliens on the American prison system.[106] The sixteen-level enhancement produces precisely the opposite, imposing lengthy sentences on tens of thousands of illegal reentrants each year at staggering cost to the American tax payer,[107] and placing enormous stress on already overburdened federal prisons.[108]

Additionally, the sixteen-level enhancement is not entitled to significant judicial deference because it was not based on the type of research and data which justify judicial reliance on the Guidelines. The Guidelines' post-*Booker* authority comes from the fact that its provisions are based on "empirical data and national experience,"[109] but the

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[102] This anomaly results from the fact that the sixteen-level enhancement can be triggered by any felony crime of violence, regardless of the sentence imposed, *see* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011), whereas the eight-level enhancement is only triggered by a crime of violence carrying a sentence of at least one year. *See id.* § 2L1.2 cmt. 3(a); 8 U.S.C. § 1101(a)(43)(F) (2006). For a case example, see United States v. Martinez Gonzalez, 286 F. App'x 672 (11th Cir. 2008).

[103] 8 U.S.C. § 1326(b) (2006) (assigning the greatest maximum sentence to those previously convicted for an aggravated felony, and applying a lesser maximum sentence to those convicted for any other felony); *see also* discussion *supra* Part II.

[104] U.S. SENTENCING COMM'N, INTERIM STAFF REPORT ON IMMIGRATION REFORM AND THE FEDERAL SENTENCING GUIDELINES 25 (2006), *available at* http://www.ussc.gov/Research/Working_Group_Reports/Immigration/20060120_Immigration_Report.pdf.

[105] *See* discussion *supra* Introduction.

[106] *See* discussion *supra* Part II.

[107] *See* discussion *supra* Introduction.

[108] *See United States Sentencing Commission, Public Hearing* 2–3 (Mar. 17, 2011) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Testimony_BOP_Lappin.pdf ("System-wide, the Bureau is operating at 35 percent over its rated capacity . . .); *see also United States Sentencing Commission, Public Hearing* 159–60 (May 27–28, 2009) (testimony of Marilyn Grisham, Chief Probation Officer, D. Idaho) ("[T]he sentences for immigration cases are just too high. They're costing the public too much money via the prison system.").

[109] Kimbrough v. United States, 552 U.S. 85, 108–09 (2007) ("[T]he Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical

section 2L1.2 enhancement scheme was not based on such considerations.[110] In fact, it is generally unclear what rationale or data motivated the Commission to subject illegal reentrants to such a dramatic and unusual enhancement scheme.[111]

In sentencing an illegal reentrant, therefore, federal judges owe only limited deference to the sixteen-level enhancement, and proportionality review of sentences imposed pursuant to the sixteen-level enhancement does not contravene legislative primacy in sentencing. Rather, such review ensures that the offenders that Congress intended to target with the higher range of illegal reentry sentences are the offenders receiving these sentences, and that federal incarceration resources are expended in a way consistent with Congressional goals.

2. Varied Penological Theories

The Supreme Court's second principle requires that courts respect legislative choices concerning the penological justifications behind sentencing schemes.[112] Proportionality review of sentences imposed under the sixteen-level enhancement does not limit or undermine any of the purposes that Congress intended the Guidelines to serve: deterrence, incapacitation, just punishment, and rehabilitation.[113] The Commission has never specified which, if any, of these punitive goals are served by

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data and national experience, guided by a professional staff with appropriate expertise.'" (citing United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

110 *See Public Hearing 2006*, *supra* note 5, at 93 (statement of Jon Sands, Federal Public Defender, D. Ariz.) (pointing out that the Commission has never stated a justification for the section 2L1.2 sixteen-level enhancement); Adelman & Deitrich, *supra* note 3, at 587 ("[T]he Commission has never explained in any detail why [section 2L1.2] places so much weight on prior drug-trafficking offenses and crimes of violence, and it clearly did not base its decision on research or expertise."); Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 FED. SENT'G REP. 275, 276 (1996) ("The Commission did no study to determine if [the sixteen-level enhancement sentences] were necessary—or desirable from any penal theory . . . . No Commission studies recommended such a high level, nor did any other known grounds warrant it."); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Conviction in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1184 (2010) ("The Commission adopted [the section 2L1.2] enhancements with little debate and without empirical support." (internal quotations and footnotes omitted)).

111 Doug Keller also notes that even the Commission's efforts to lessen the harsh impact of the section 2L1.2 enhancements in 2001 were intended only to change the distribution of the enhancements, not to justify the enhancements in the first place. Keller, *supra* note 12, at 746 n.168; Maxfield, *supra* note 10; *see also* U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II, amend. 632, at 213–14 (2011).

112 *See* discussion *supra* Part II.

113 U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 1 (2011).

the sixteen-level enhancement.[114] Indeed, the analysis below concludes, as others have, that the sixteen-level enhancement does not serve any of these four goals.[115] This failure is a compelling indication that sentences imposed pursuant to the sixteen-level enhancement violate the Eighth Amendment.[116]

a. Deterrence

Deterrence is the most likely justification for imposing lengthy prison sentences on illegal reentrants, particularly given Senator Chiles's explicit reference to deterrence when introducing the first sentence increases.[117] Deterrence-based sentencing seeks to reduce the likelihood of recidivism by demonstrating the unpleasant consequences of offending.[118] There are several factors, however, that make deterrence an inadequate justification for the sixteen-level enhancement.

To begin, the Commission has repeatedly stated that the base offense level is not intended to reflect an offender's likelihood of recidivism.[119] Likewise, the Commission has never cited any evidence that imposing lengthy prison sentences on illegal reentrants has any effect on deterring commission of the offense.[120] Consequently, it is doubtful that the sixteen-level enhancement's increase of the base offense level applicable to illegal reentry is intended to deter that particular offender from reoffending.

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114 *See id*. at app. C, vol. 1, at 241 (explaining the addition of the sixteen-level enhancement to section 2L1.2 by stating merely that "[t]he Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses"); *see also* Keller, *supra* note 12, at 747–48; McWhirter & Sands, *supra* note 110, at 276 ("The Commission did no study to determine if [the sixteen-level enhancement sentences] were necessary—or desirable from any penal theory.").

115 *See* Keller, *supra* note 12, at 747–56; *cf.* Russell, *supra* note 110, at 1157 (arguing that in many cases prior drug conviction enhancements in federal sentencing do not further the punitive goals of retribution, deterrence, and incapacitation).

116 Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

117 *See* 133 CONG. REC. S4992-01 (daily ed. Apr. 9, 1987) (statement of Sen. Lawton Chiles); *see also* James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation?*, 9 GEO. IMMIGR. L.J. 451, 476–77 (1995) ("[One] theory that lends support to the harsh [section 2L1.2] sanction is specific deterrence . . . . Several additional years of imprisonment send the illegal alien a clear message: If you return again, the United States will impose another substantial sentence merely for being found here.").

118 *See* Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 954–55 (2000); Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545, 546–47 (1986).

119 Keller, *supra* note 12, at 750.

120 *Id*. at 749–51.

Regardless, the sixteen-level enhancement likely has no significant deterrent effect. While it has been demonstrated that imposition of a prison sentence in general may discourage commission of the sanctioned offense,[121] studies have not consistently shown that there is a greater deterrent effect when the prison sentence is longer, separate from the incapacitation achieved by the sentence.[122] The sixteen-level enhancement is also an ineffective deterrent because illegal reentrants are either unaware of the high sentences imposed for the offense,[123] or unable to determine whether their past convictions would trigger the sixteen level enhancement.[124] If a potential offender cannot predict that an offense will result in a particularly lengthy sentence, then the potential sentence has no deterrent value.[125]

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121 *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 1–2 (1998).

122 *See, e.g.*, Michael K. Block, *Commentary: Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 FED. SENT'G REP. 451, 451 (1989) ("[D]eterrence research indicates that an increase in the certainty of punishment is a more powerful method of dissuading potential offenders than an equivalent increase in the magnitude of punishment."); Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 343–45 (1999) (noting that it is difficult to measure the deterrent effects of a sentence as separate from the incapacitation effect); Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 552 (2009) ("[E]mpirical evidence of a deterrent effect [of sentence enhancements] is mixed at best and must be weighed against the ability of other social programs to alter behavior."); Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (evaluating various studies on the deterrence of crime through sanctions and concluding that "there does seem to be a modest inverse relationship between the perceived certainty of punishment and crime, but no real evidence of a deterrent effect for severity, and no real knowledge base about the celerity of punishment"); Russell, *supra* note 110, at 1139 ("Empirical studies . . . suggest that longer prison terms do not significantly reduce recidivism and may even be counterproductive.").

123 Studies suggest that there is frequently a lack of knowledge regarding high sentences, which undermines the potential deterrent effect of such sentencing laws. *See, e.g.*, Gary Kleck et al., *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623 (2005) (arguing that increases in penalties do not have a general deterrent effect); *see also Public Hearing Nov. 2009*, *supra* note 47, at 280 (testimony of Hon. Kathleen Cardone, J., W.D. Tex.) (stating that many of the illegal reentrants who come before her returned to the United States unaware of the long sentences applicable to illegal reentry).

124 The analysis for determining whether a conviction triggers the sixteen-level enhancement is notoriously complex. *See, e.g.*, United States v. Yanez-Rodriguez, 555 F.3d 931, 944 (10th Cir. 2009) (outlining categorical approach for determining whether offense is a crime of violence for § 1326 purposes); United States v. Sanchez-Ruedas, 452 F.3d 409, 412 (5th Cir. 2006) (outlining the test for determining whether a conviction qualifies as one of the triggering convictions under § 1326). It seems highly unlikely that illegal reentrants, 82.3% of whom the Commission reports have less than a high school education, could conduct this analysis. SOURCEBOOK, *supra* note 8, at tbl.8.

125 *See* Nagin, *supra* note 121, at 17; Williams & Hawkins, *supra* note 118, at 545–50.

b. Just Punishment

Imposition of "just punishment" refers to the retributive theory that conduct be punished according to its inherent moral culpability.[126] Offenders with prior convictions, therefore, arguably deserve longer prison sentences given their past misconduct. For two reasons, however, the foundation for this justification is tenuous. First, prior convictions have limited bearing on the culpability of an offender for a present offense.[127] Second, illegal reentry is often motivated by what could be considered positive, or even altruistic, purposes, such as seeking to return to one's family and employment, seeking to be with a sick relative, or seeking to return to the country one was raised in from a young age.[128] Given that section 2L1.2 leaves no room for a court to evaluate the subjective moral culpability of illegal reentrants, it seems unlikely that its dramatic sentence enhancement serves the purpose of imposing just punishment.[129]

c. Incapacitation

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126 Huigens, *supra* note 118, at 952.

127 *See* Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) ("'[At] the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987))); Russell, *supra* note 110, at 1139 ("[F]rom a retributive standpoint, it is debatable whether a defendant's status as a recidivist is at all relevant to determining the just punishment for a subsequent offense.").

128 *See, e.g.*, United States v. Amezcua-Vasquez, 567 F.3d 1050, 1054 (2009) (noting that defendant had lived in the United States since age two); United States v. Murillo-Monzon, 240 F. App'x 43, 45 (6th Cir. 2007) (noting that defendant reentered the United States to be with his wife and three U.S. citizen children); United States v. Hernandez-Baide, 392 F.3d 1153, 1155 (10th Cir. 2004) (noting that defendant reentered the United States to settle a custody battle concerning her eleven-year-old daughter); United States v. Garcia-Lopez, 691 F. Supp. 2d 1099, 1101 (C.D. Cal. 2010) (noting that defendant was brought to the United States by her parents when she was nine months old); United States v. Lopez-Arellano, No. 10-CR-91, 2010 WL 4363415 (E.D. Wis. Oct. 27, 2010) (noting that defendant was brought to the United States by his family at age ten); United States v. Medina-Palomo, 2009 WL 3784398, at *2 (S.D. Tex. 2009) (noting that defendant reentered the United States because his father had died and because there was no one else to cross the border to receive the body and make funeral arrangements); United States v. Gonzalez-Tadeo, No. CR-03-275-E-BLW, at *4, *7 (D. Idaho 2006) (noting that defendant was brought to the United States by relatives at age four where he was gainfully employed for most of his life); *see also* sources cited *supra* note 117.

129 *See* Keller, *supra* note 12, at 751–52 ("[A] bit of reflection reveals the lack of conceptual fit between the seriousness of illegally re-entering this country and the nature of the defendant's criminal history . . . . [D]oes a defendant with certain prior convictions cause more harm or have a more culpable mental state than a defendant who illegally enters the country without the same background?").

The sixteen-level enhancement arguably reduces crime and protects the public by incapacitating offenders and preventing them from reoffending for the period of their imprisonment.[130] This is consistent with Senator Chiles's references to the public safety concerns posed by serious repeat offenders, such as felons involved in serious criminal activity like drug trafficking, weapon sales, and murder.[131] The Guidelines, however, do not ensure that the sixteen-level enhancement is imposed on those criminals who pose the greatest risk of recidivism.[132] As Justice Souter has noted, the more minor the prior offenses are, the further a court moves from legitimate incapacitation of dangerous offenders and the closer the court comes to repunishing the offender for past criminal conduct.[133]

Additionally, incapacitation is a legitimate penological justification for longer sentences only to the extent that the costs of the additional imprisonment are lesser than the cost to society of the offender's release.[134] The financial and social costs of imprisoning illegal reentrants for extensive periods of time are great, especially considering the frequency with which the offense is prosecuted.[135] The Commission, however, has not conducted any research to determine whether the benefit of incapacitating illegal reentrants outweighs these enormous costs.[136] Consequently, it is unlikely that sentences imposed pursuant to the sixteen-level enhancement serve the goal of incapacitation.

d. Rehabilitation

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130 *See* Fleissner & Shapiro, *supra* note 117, at 476 ("Locking up the alien for several additional years protects society for a significant period from the threat of that alien's 'aggravated' criminal behavior."); Russell, *supra* note 110, at 1154 ("Proponents of recidivist enhancements also argue that the societal benefits of incapacitation support enhanced sentences. By detaining someone, you prevent that person from committing a crime for a certain period.").

131 *See* discussion *supra* Part I.

132 *See* Keller, *supra* note 12, at 751–52 ("[T]he illegal re-entry prior conviction enhancements have not been tailored to ensure that defendants who are most likely to attempt to return illegally (or return illegally to commit more crimes) receive the highest offense level increase . . . .").

133 Lockyer v. Andrade, 538 U.S. 63, 81 n.2 (2003) (Souter, J., dissenting) ("Implicit in the distinction between future dangerousness and repunishment for prior crimes is the notion that the triggering offense must, within some degree, be substantial enough to bear the weight of the sentence it elicits. As triggering offenses become increasingly minor and recidivist sentences grow, the sentences advance toward double jeopardy violations . . . the triggering offense must reasonably support the weight of even the harshest possible sentences.").

134 *See* Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 ST. THOMAS L.J. 536, 542 (2006) ("Admittedly, longer incarceration brings with it a swollen prison population and its attendant collateral harms, but these costs may seem lower than those associated with identifying, investigating, and convicting a new set of criminals.").

135 *See* discussion *supra* Introduction.

136 Keller, *supra* note 12, at 742.

Rehabilitation is the least plausible justification behind the sixteen-level enhancement. Although it is cited as one of the Guidelines' purposes, it can be argued that the Sentencing Reform Act (SRA), through which the Federal Sentencing Commission was created, actually rejects the punitive goal of rehabilitation. This is because the SRA states that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[137] Moreover, the fact that illegal reentry offenders are automatically deported after serving their sentences makes rehabilitation an unlikely justification for the sixteen-level enhancement's long sentences.[138]

Because the sixteen-level enhancement does not serve any of the four punitive purposes for which the Guidelines were created, proportionality review of sentences calculated under this provision does not limit or reject the penological purposes behind the Guidelines.

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137 18 U.S.C. § 3582(a) (2006).

138 *See, e.g.*, Abby Pringle, *Enhancing Sentences for Past Crimes of Violence: The Unlikely Intersection of Illegal Reentry and Sex Crimes*, 99 J. CRIM. L. & CRIMINOLOGY 1195, 1221 (2009) ("When the state imprisons someone they intend to deport upon release, there is no motivation to rehabilitate that individual.").

3. Objective Factors

The Supreme Court has noted that absent foundation in objective factors, proportionality determinations will merely appear to reflect subjective line drawing.[139] The Court has also pointed out that courts commonly conduct such line drawing.[140] For example, courts conduct line drawing similar to that necessary for proportionality determinations when deciding when the Sixth Amendment right to a speedy trial has been violated and who is constitutionally entitled to a jury trial.[141] The *Solem* test was explicitly created to guide courts in determining which objective factors should be used in distinguishing proportional prison sentences from disproportional ones.[142] As the below application of the *Solem* test demonstrates, there are abundant objective factors indicating that sentences imposed under the sixteen-level enhancement are disproportionate to the offense of illegal reentry.

B. *The Solem Test as Applied to Illegal Reentry*

1. Gross Disproportionality: The Gravity of Illegal Reentry Compared to the Severity of the Sixteen-Level Enhancement

The threshold prong of the *Solem* test asks whether a sentence is grossly disproportionate to the offense for which it was imposed by weighing the gravity of the offense against the severity of the penalty.[143] When compared to the nature of the crime of illegal reentry, sentences imposed under the sixteen-level enhancement are grossly disproportionate to the offense for which they are imposed.

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139 *See* discussion *supra* Part II.

140 Solem v. Helm, 463 U.S. 277, 294 (1983) ("Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.").

141 *Id*. at 294–95; Ewing v. California, 538 U.S. 11, 33 (2003) (Stevens, J., dissenting) ("The absence of a black-letter rule does not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes. After all, judges are constantly called upon to draw . . . lines in a variety of contexts . . . ." (internal quotation marks omitted)).

142 *Solem*, 463 U.S. at 292 ("[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions . . . . Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale.").

143 *See* discussion *supra* Part II.

a. The Gravity of the Crime of Illegal Reentry

Many of the factors established by the *Solem* test for evaluating the gravity of an offense indicate that illegal reentry is not such a serious crime.[144] The act of illegally crossing a border is not a violent act or a crime against an individual.[145] Indeed, the offense itself generally causes no actual harm, and poses no threat to the public.[146] The crime is often committed with a benign motive, such as the intent to return to the country that one considers a home or where one's family lives.[147] Indeed, judges and advocates state that the majority of illegal reentrants have positive intentions when reentering the United States.[148] Given these factors, illegal reentry seems comparable to, or even more minor than, the principal offense in *Solem*: the crime of writing a bad check.[149]

Considering that the offense of illegal reentry itself is not serious enough to warrant the four- to ten-year sentences called for by the sixteen-level enhancement, the only potential justification for the enhancement is the offender's criminal history. Not only must this criminal history be serious enough to justify the dramatic sentence enhancement, but it must also warrant enhancement of the sentencing range in two or three different ways. This "multiple counting" results from the structure of the Guidelines. Because the applicable sentence

144 *See* discussion *supra* Part II.

145 *Cf.* ELSPETH GUILD, COUNCIL OF EUROPE, CRIMINALISATION OF MIGRATION IN EUROPE: HUMAN RIGHTS IMPLICATIONS 8 (2009), *available at* https://wcd.coe.int/wcd/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1674040&SecMode=1&DocId=1535524&Usage=2 [hereinafter COMMISSIONER FOR HUMAN RIGHTS] ("[A]n individual who irregularly crosses a border or stays on the territory of a state beyond his or her permitted period does not harm a specific individual.").

146 *See* Maxfield, *supra* note 10, at 532–33 (summarizing study conducted by the Commission in 2001, that found that 53.9% of illegal reentry offenders in a representative sample group of offenders whose illegal reentry convictions were enhanced under section 2L1.2 "did not have prior aggravated felonies which involved dangerous behavior" and that only 27.7% "had at least one conviction involving violence . . . .").

147 *See* sources cited *supra* note 128.

148 *Public Hearing Nov. 2009*, *supra* note 47, at 267–69 (statement of Hon. Micaela Alvarez, J., S.D. Tex.) (stating that many of the illegal reentrants who come before her were brought to the United States at a young age, grew up falsely believing they were American, do not speak the language of the country where they were born, and have spent little time in that country); *id.* at 279–80 (statement of Hon. Kathleen Cardone, J., W.D. Tex.) (making similar observations as Judge Alvarez); *Public Hearing May 2009*, *supra* note 45, at 61–64 (statement of Hon. Edward F. Shea, J., E.D. Wash.) (discussing illegal entrant who returned to the United States to care for his eight-year-old child); *Public Hearing 2006*, *supra* note 5, at 33 (statement of Hon. Martha Vazquez, C.J., D.N.M.) (observing that illegal reentrants are overwhelmingly "motivated by poverty to come to the United States to work . . . to support their families or to reunite with family members who are already in the United States"); *id.* at 95 (statement of Jon Sands, Federal Public Defender, D. Ariz.) ("The pull for most of the illegal reentries is economic and family.").

149 463 U.S. 277, 281 (2003).

range is increased the greater the extent of the offender's criminal history, *every* sentence calculated under the Guidelines necessarily takes into account the offender's past crimes.[150] When combined with the sixteen-level enhancement, this means an illegal reentrant's criminal history is twice used to increase the sentence: once in calculating the base offense level (increasing the base offense level from eight to twenty-four), and again when calculating the appropriate sentencing range (increasing the sentencing range the greater the extent of the offender's criminal history).[151] Other aspects of the Guidelines can even result in "triple counting" the offenders prior convictions.[152] Multiple counting is a strong indication of disproportionality, regardless of the nature of the illegal reentrant's past crimes, but the fact that the severity, staleness, and quantity of the predicate convictions are insufficiently tailored to the magnitude of the sixteen-level enhancement also indicates that most illegal reentrants should not be subjected to this provision.

While proportionality review of noncapital sentences should consider the offender's prior criminal history as well as the present offense,[153] the Supreme Court has also clearly stated that an offender's recidivist status "cannot be considered in the abstract."[154] For this reason, the Court in *Solem* engaged in a factual analysis of the content of the defendant's prior convictions.[155] The Court's determination that the offenses were minor and nonviolent was integral to its holding that Solem's sentence was disproportionate.[156] This inquiry, however, is dis-

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150 *See* discussion *supra* Part I.

151 *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2011); *id* at ch. 5, pt. A, at 402 (sentencing table); *see also Public Hearing Nov. 2009*, *supra* note 47, at 170 (statement of Jason Hawkins, Supervisory Assistant Federal Public Defender, N.D. Tex.) (stating that long prison sentences for illegal reentrants are driven by the fact that prior convictions count towards both the enhancement and the criminal history category); Adelman & Deitrich, *supra* note 3, at 589 ("[B]y placing such heavy emphasis on the defendant's prior record—which is also accounted for in the defendant's criminal history category—the guideline effectively punishes the defendant twice for the same misconduct.").

152 *See, e.g.*, *Public Hearing 2006*, *supra* note 5, at 38 (statement of Hon. Martha Vazquez, C.J., D.N.M.) (noting that the sentencing range for illegal reentry is also increased "if the defendant reentered the United States while still on probation or supervised release); *cf.* Pringle, *supra* note 138, at 1222 ("A crime of violence enhancement can double, triple, or quadruple a [Guidelines] sentence . . . .").

153 *See, e.g.*, Ewing v. California, 538 U.S. 11, 12 (2003) ("Recidivism has long been recognized as a legitimate basis for increased punishment and is a serious public safety concern . . . .").

154 Solem v. Helm, 463 U.S. 277, 296 (1983).

155 *Id.* at 279–81.

156 *Id.* at 296–97 ("[The defendant's] prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes . . . and the minimum amount covered by the grand larceny statute was fairly small. . . ."); *see also Ewing*, 38 U.S. at 30 ("Ewing has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior 'strikes' were serious felonies including robbery and three residential burglaries.").

couraged by the sixteen-level enhancement, which automatically increases the applicable sentencing range if the offender has just one predicate conviction. As judges have noted, some of the qualifying predicate convictions are simply not serious enough to justify imposition of the extreme enhancement.[157]

Even where the offender does have a serious prior conviction, it is often so stale that it is still insufficient to warrant the extreme sentence increase.[158] The staleness problem is purportedly addressed by the 2011 amendment to section 2L1.2, which requires that convictions that trigger the sixteen-level enhancement be recent enough to receive criminal history points under Chapter Four of the Guidelines.[159] But all prior convictions, regardless of staleness, still trigger a dramatic enhancement, and the sixteen-level enhancement itself can still be triggered by decades old convictions, regardless of whether these are probative of the defendant's likelihood of reoffending.

Finally, it is questionable whether even a recent conviction for an extremely serious crime is sufficient to justify the sixteen-level enhancement, recalling that the offender has already completed the sentence for the predicate conviction,[160] and that the conviction already counts towards the offender's sentencing range under the criminal history category and other Guidelines provisions.[161]

In light of the nonserious nature of the offense of illegal reentry, the Guidelines' repeated counting of prior convictions, and the fact that the sixteen-level enhancement can be triggered by a single, stale conviction for a wide variety of offenses, the overall gravity of most illegal reentrant's criminal conduct is insufficient to warrant imposition of the sixteen-level enhancement. Moreover, as the below discussion establishes, illegal reentrants are subject to not only inordinately long sentences, but an array of harsh accessory penalties, making sentences imposed under the sixteen-level enhancement particularly severe penalties.

b. The Severity of the Sixteen-Level Enhancement

Various factors used under the *Solem* test to weigh the severity of a sentence indicate that the sentences imposed pursuant to the sixteen-level enhancement are excessive, including accessory penalties attached

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157 *See* sources cited *supra* note 45.

158 *See* sources cited *supra* note 47.

159 *See* discussion *supra* Part I.

160 *Public Hearing 2006*, *supra* note 5 (statement of Hon. Martha Vazquez, C.J., D.N.M) (emphasizing that the illegal reentry enhancements are triggered by offenses "for which the defendant has already paid his debt to society").

161 *See* discussion *infra* notes 150–52 and accompanying text.

to sentences imposed under the sixteen-level enhancement, and the fact that illegal reentrants are necessarily subject to harsher conditions of confinement and longer periods of actual imprisonment by nature of being noncitizens.[162]

In *Weems*, the Supreme Court was particularly concerned by the severity of accessory penalties that permanently limited the offender's rights of parental authority, marital authority, property rights, and right to move freely about the country, noting that these amounted to a "perpetual limitation" on liberty.[163] An even greater limitation on liberty accompanies a conviction for illegal reentry. After serving their sentence, illegal reentrants are subject to automatic deportation without an immigration hearing.[164] The federal sentencing judge does not have the discretion to determine whether an illegal reentrant is deported,[165] and illegal reentrants are virtually ineligible to return to the United States, regardless of the extent of their ties to this country.[166] The Supreme Court recently and emphatically recognized the significance of deportation itself in sentencing: "[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[167] Deportation effectively results in penalties similar to those attached to the punishment in *Weems*—the loss of parental, marital and property rights where those rights are dependent upon residence in the United States—and given the bars on lawful reentry into the United States after deportation, similarly constitutes a "perpetual limitation" on one's liberty.

In addition to facing nearly inevitable deportation, illegal reentrants face harsher conditions of confinement than citizens convicted of federal offenses. To begin, noncitizens convicted of federal offenses are

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162 *See* discussion *infra* notes 176–97 and accompanying text.

163 Weems v. United States, 217 U.S. 349, 366 (1910).

164 8 U.S.C. § 1231(a)(5) (2006) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.").

165 Padilla v. Kentucky, 130 S. Ct. 1473, 1479–81 (2010) (outlining the process by which the ability of state and federal judges to determine whether a particular conviction constituted grounds for deportation was eliminated).

166 8 U.S.C.A § 1182(a)(9)(C)(i) (West 2011) ("Any alien who . . . (II) has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted is inadmissible.").

167 *Padilla*, 130 S. Ct. at 1480 (2010); s*ee also, e.g.*, Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (referring to deportation as "the equivalent of banishment or exile"); Bridges v. Wixon, 326 U.S. 135, 164 (1945) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence . . . .").

far more likely to be sentenced to prison time than are U.S. citizens.[168] Further, by nature of being noncitizens, illegal reentrants are automatically ineligible to serve their sentences in minimum security facilities.[169] Unlike citizen inmates, illegal reentrants are ineligible for early release programs for participation in drug treatment programs and other sentence reduction credits.[170] Because illegal reentrants are generally held in immigration detention immediately after completing their criminal sentences and prior to completion of their deportation proceedings, they end up serving even more time in federal immigration facilities.[171]

Other factors explicitly found to be relevant to determining the severity of a sentence likewise indicate the excessiveness of sentences imposed under the sixteen-level enhancement. For example, federal inmates whose crimes were committed subsequent to 1987 are not eligible for parole,[172] and the penological purposes of the sixteen-level enhancement are unclear.[173] Finally, the severity of the sixteen-level enhancement is also evidenced by the fact that its imposition frequently results in sentences dramatically longer than those imposed for the predicate offense.[174]

Accordingly, comparison of the gravity of the offense of illegal reentry to the severity of sentences imposed pursuant to the sixteen-level enhancement reveals that in many cases a finding of gross dispro-

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168 Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1317–18 (2010) ("[O]ver 60% of citizens in an eight-to-sixteen-month Guideline range are sentenced to prison alternatives, whereas over 90% of noncitizens in the same range are given prison time.").

169 FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. P5100.08, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION 9 (2006) (stating that all noncitizen inmates are classified as "deportable aliens" and that deportable aliens "shall be housed in at least a Low security level institution.").

170 Eagly, *supra* note 168, at 1318–19; Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 239–40 (2010).

171 Eagly, *supra* note 168, at 1319 ("Noncitizens are also frequently held in immigration custody both before and after their federal prison sentences. This additional period of detention results in a lengthened period of incarceration because, pursuant to Bureau of Prisons policy, noncitizens are unlikely to receive credit toward their sentence for time served in immigration custody.").

172 U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 2 (2011).

173 *See* discussion *supra* notes 126–61 and accompanying text.

174 *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224 (1998) (affirming imposition of eighty-five-month sentence under sixteen-level enhancement triggered by conviction for which the defendant served twelve months in prison); United States v. Martinez-Gonzalez, 286 F. App'x 672 (11th Cir. 2008) (affirming imposition of five year sentence under sixteen-level enhancement triggered by conviction for which the defendant served twenty-one days in jail); United States v. Perez-Nunez, 368 F. Supp. 2d 1265, 1269 (D.N.M. 2005) (declining to impose sixteen-level enhancement, although called for by Guidelines, where defendant served twenty-four days in jail for predicate conviction); *see also* Keller, *supra* note 12, at 762 (noting that the illegal reentry enhancement scheme "typically results in a defendant serving more time in federal prison because of the prior conviction than the defendant originally did for the prior offense").

portionality may be warranted. Under the *Solem* test, therefore, these sentences should be compared to sentences imposed within the same jurisdiction for illegal reentry, and sentences imposed in other jurisdictions for comparable offenses.

2. Intrajurisdictional Comparison of Penalties Imposed for Illegal Reentry

The intrajurisdictional analysis supports this finding of gross disproportionality in two ways. First, the sixteen-level enhancement results in sentences that are excessive when compared to Guidelines provisions applicable to other federal offenses. Second, intrajurisdictional disparity is evidenced by the fact that many jurisdictions choose to impose prison sentences substantially less than those called for by the sixteen-level enhancement, merely because the offender agrees to facilitate a speedy conviction.

There are various ways that sentences imposed pursuant to the sixteen-level enhancement—which assigns a base level of twenty-four and carries a sentence range of fifty-one to 125 months[175]—can be compared to the penalties imposed for other federal offenses. For example, the entire illegal reentry enhancement scheme can be compared to other Guidelines recidivist schemes, such as those imposed for firearms and explosives offenses. Alternately, illegal reentry can be conceptualized as a particular type of crime, such as a trespass offense or an immigration offense, and its sentences compared to those imposed for other crimes within this category. Finally, illegal reentry subject to the sixteen-level enhancement can be compared to other offenses assigned similar base offense level and punishable by a comparable sentencing range. Regardless of which intrajurisdictional analysis is used, this comparison demonstrates that the sixteen-level enhancement results in sentences that are excessive when compared to those imposed for other federal offenses, and confirms that these sentences are grossly disproportionate to the offense for the crime of illegal reentry.

a. Comparison to Other Guidelines Enhancement Schemes

Perhaps the most apt intrajurisdictional comparison is to the comparably structured prior conviction enhancement schemes applicable to

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[175] Base offense level of eight plus the sixteen-level enhancement. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a)–(b)(1)(A) (2011); *id*. at ch. 5, pt. A, 402 (sentencing table).

firearms and explosives offenders.[176] Just as they do for illegal reentrants, the Guidelines impose a heightened base offense level on explosives and firearms offenders previously convicted of certain crimes.[177] Comparing these enhancement schemes evaluates not the length of the sentences ultimately imposed, but rather the magnitude of the enhancement triggered by the prior conviction, as well as the number and severity of prior convictions required to trigger the enhancement. As others have noted, this comparison shows that section 2L1.2 is easily the harshest of the three schemes.[178]

Under section 2K2.1, the base offense level of a firearms offender should be increased by eight if the offender was previously convicted of a felony crime of violence or controlled substance offense,[179] by twelve if the offender has two such prior convictions,[180] and by fourteen if the offender has two such prior convictions and the present offense involved certain weapons.[181] Two factors make the illegal reentry scheme significantly harsher than the firearms enhancements: (1) the sixteen-level enhancement is triggerable by a far broader range of crimes, and (2) the magnitude of the enhancement for an illegal reentrant with one qualifying prior conviction is double that applicable to a firearms offender with one qualifying prior conviction.

Even someone subject to the harshest firearms enhancement—e.g., an individual convicted for conspiring to use anti-aircraft missiles with two prior convictions for violent felonies[182]—is subject to a lesser enhancement than someone convicted for failing to comply with a deportation order with only one prior felony conviction.

Similarly, explosives offenders are subject to lesser enhancements triggered by a narrower scope of prior convictions than those that trigger the sixteen-level enhancement.[183] The base offense level for explosives crimes is increased by eight if the offender was previously convicted of a crime of violence or a controlled substance offense,[184] and

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176 *See id*. § 2K1.3 ("Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials"); *id.* at § 2K2.1 ("Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition").

177 *Id*.

178 Keller, *supra* note 12, at 735–36.

179 U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(A) (2011) (increasing base offense level from twelve to twenty).

180 *Id*. § 2K2.1(a)(2) (increasing base offense level from twelve to twenty-four).

181 *Id*. § 2K2.1(a)(1) (increasing base offense level from twelve to twenty-six).

182 This offense is punishable under 18 U.S.C. § 2332g(a)(1) (2006) and is one of the provisions to which section 2K2.1 applies.

183 *See* U.S. SENTENCING GUIDELINES MANUAL § 2K1.3 (2011) ("Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials.").

184 *Id*. § 2K1.3(a)(3).

by twelve if the offender has two such prior convictions.[185] Again, seemingly more dangerous offenders are subject to lesser sentence enhancements for prior felony convictions.

b. Comparison to Sentences for Other Offenses of a Similar Nature

Viewed in the context of other immigration offenses, the sixteen-level enhancement creates disproportionate sentences. For example, trafficking one hundred or more documents "[r]elating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport" is subject to a base offense level of eighteen.[186] Consequently, an individual facilitating the unlawful entry of one hundred individuals into the United States is subject to a sentence nearly half that of an illegal reentrant sentenced pursuant to the sixteen-level enhancement.[187] Similarly, someone convicted of smuggling one hundred or more undocumented aliens into the United States is assigned a base offense level of nineteen,[188] which carries a sentencing range of twenty-four to sixty-three months.[189]

Likewise, when illegal reentry is conceived as a trespass crime,[190] sentences resulting from the sixteen-level enhancement are clearly excessive. Even trespass on an area crucial to national security, such as a secure government facility, nuclear energy facility, or a U.S. vessel or aircraft, is assigned only a base offense level of six.[191] If a dangerous weapon was possessed during the trespass, and the trespass involved invasion of a protected computer, the applicable base offense level is still only nine.[192]

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185 *Id*. § 2K1.3(a)(1).

186 See *id*. § 2L2.1(a) as enhanced by *id*. § 2L1.1.(2)(C).

187 *Id*. at ch. 5, pt. A, at 402 (sentencing table) (assigning base offense level eighteen a sentencing range of twenty-seven to seventy-one months, and base offense level twenty-four a sentencing range of fifty-one to 125 months).

188 See *id*. § 2L1.1(a)(3) as enhanced by *id*. § 2L1.1(b)(2).

189 *Id*. at ch. 5, pt. A, at 402 (sentencing table).

190 Fleissner & Shapiro, *supra* note 117, at 453 ("One may think of [illegal reentry] as a crime of trespass.").

191 U.S. SENTENCING GUIDELINES MANUAL § 2B2.3(b)(1) (2011). This base offense level is punishable by zero to eighteen months of imprisonment. *Id*. at ch. 5, pt. A, at 402 (sentencing table).

192 *Id*. § 2B2.3(b)(2)–(3). This base offense level is punishable by four to twenty-seven months of imprisonment. *Id*. at ch. 5, pt. A, at 402 (sentencing table).

c. Comparison to Offenses Subject to Similar Base Offense Levels

When compared to other federal offenses subject to a comparable sentencing range, illegal reentry appears unworthy of the long sentences imposed by the sixteen-level enhancement. Judges and scholars have noted that the sentences applied to illegal reentry seem alarmingly excessive when compared to those applicable to other federal offenses.[193] For example, other offenses assigned a base offense level equal to or lesser than twenty-four include certain recidivist child sex offenders,[194] reckless involuntary manslaughter,[195] and aggravated assault resulting in permanent life-threatening bodily injury.[196] These comparisons suggest that those who commit these offenses "ordinarily would be thought more deserving" of the applicable sentence, than an illegal reentrant.[197]

d. Comparison to "Fast-Track" Jurisdictions

Intrajurisdictional disparity is also created by varying charging practices for illegal reentrants. United States Attorneys in some districts with high immigration caseloads use "fast-track" programs, by which they recommend lower sentences for illegal reentrants in exchange for the offenders' prompt guilty plea and waiver of certain procedural rights.[198] Such programs are currently operable in sixteen of the ninety-

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193 *See Public Hearing 2006*, *supra* note 5, at 37–38 (statement of Hon. Martha Vazquez, C.J., D.N.M.) (noting that an antitrust defendant who commits an offense affecting $1.5 billion of commerce is given the same degree of an enhancement as an illegal reentrant previously convicted of throwing a rock at an SUV (referring to United States v. Perez-Nunez, 368 F. Supp. 2d 1265, 1265 (D.N.M. 2005))); Keller, *supra* note 12, at 761–62 (noting that the sixteen-level enhancement results in sentences comparable in length to those imposed for fraud causing loss of over one million dollars, threatening national security by using explosives to destroy an airport, transmitting national defense information, tampering with restricted data concerning atomic energy, sex trafficking of children, reckless manslaughter, involvement in slave trade, and inciting a prison riot with a substantial risk of death).

194 U.S. SENTENCING GUIDELINES MANUAL § 2A3.5(a)(1) & (b)(1)(C) (2011).

195 *Id*. § 2A1.4(a)(2)(A)–(B) (involuntary manslaughter carries a base offense level eighteen where the offense involved reckless conduct, and of twenty-two if the offense involved reckless operation of a means of transportation).

196 *Id*. § 2A2.2(b)(3)(C) (aggravated assault resulting in permanent or life-threatening bodily injury: base offense level twenty-one).

197 Solem v. Helm, 463 U.S. 277, 299 (1983).

198 *See* Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517 (2006). This practice was officially sanctioned by Congress in 2003.

four federal districts,[199] and the most recent statistics report that over seventy-nine percent of immigration offense sentences imposed under the Guidelines are prosecuted in districts with such programs.[200] However, not all jurisdictions, or even all jurisdictions with high immigration caseloads, implement fast-track programs. Significantly, non–fast-track jurisdictions with high immigration caseloads include all districts in Nevada, Utah, New York, and Florida, and certain divisions in the Southern District of Texas.[201] Consequently, an illegal reentrant sentenced in a fast-track jurisdiction may receive a sentence as little as half that which he would have received if sentenced in a non–fast-track district.[202]

This stark interdistrict disparity, as well as the intrajurisdictional disparity evidenced by the fact that so many serious federal offenses are subject to sentences equal to or lesser than those imposed upon illegal reentrants under the sixteen-level enhancement, supports the conclusion that this enhancement results in sentences that are grossly disproportionate to the offense of illegal reentry.

3. Interjurisdictional Comparison of Penalties Imposed for Illegal Reentry

The Supreme Court has never applied the *Solem* test to a sentence for a federal crime, thus it has not explicitly explained what the interjurisdictional comparison entails for a federal sentence. Perhaps the most relevant case for answering this question is *Trop v. Dulles*, in which the Supreme Court evaluated the proportionality of the punishment of denationalization for the federal offense of wartime desertion.[203] In determining that the punishment was cruel and unusual under the Eighth Amendment, the Court relied on an interjurisdictional analysis, in which it compared the punishment given for wartime desertion in the United States to that imposed for similar offenses in other coun-

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199 U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 141 (2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

200 *Id*.

201 McClellan & Sands, *supra* note 198, at 523.

202 *See* Sarah C. White, Note, *The Good, the Bad, and the Disparate: Analyzing Federal Sentencing in the Border Districts, 1996–2008*, 76 BROOK. L. REV. 867, 884–92 (2011) (concluding that disparate use of fast-track motions in border districts creates considerable sentencing disparity).

203 Trop v. Dulles, 356 U.S. 86, 87 (1958).

tries.[204] In *Weems*, the Court also engaged in an international jurisdictional comparison to determine whether the challenged sentence was cruel and unusual.[205] The Supreme Court has also considered international practices in many of its cases evaluating whether imposition of the death penalty and imprisonment for life without parole violate the Eighth Amendment.[206]

Application of the sixteen-level enhancement results in prison sentences far longer than those imposed for illegal reentry in other countries, even where the offender has previously been convicted of a crime.[207] The most relevant comparison is to those countries that also house large immigrant populations. Besides the United States, the nine countries with the greatest immigrant populations are Russia, Germany, Ukraine, France, Spain, Canada, India, the United Kingdom, and Saudi Arabia.[208] Comparison to the laws of these countries reveals that even those which seem to take a harsher stance on illegal immigration—demonstrated by the punishment of acts which are not criminalized in the United States, such as a single incidence of illegal entry or unlawful presence in the country—do not impose prison sentences nearly as long as those authorized by the sixteen-level enhancement. Moreover, none of these countries have a prior conviction enhancement scheme similar to that imposed by the Guidelines. In other words, while most of these countries punish illegal entry, and some punish acts similar to what this

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[204] *Id*. at 103 ("The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion."). Although the majority holding in *Trop* received only five votes, eight of the nine justices joined in opinions relying on the practices of international jurisdictions. *Id*. at 103, 126; *see also* James I. Pearce, Note, *International Materials and the Eighth Amendment: Some Thoughts on Method after* Graham v. Florida, 21 DUKE J. COMP. & INT'L L. 235, 242 (2010).

[205] Weems v. United States, 217 U.S. 349, 380–81 (1910) (comparing the challenged sentence, imposed by the Philippines, to the sentences imposed in the United States and Spain for comparable offenses).

[206] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2033 (2010); Roper v. Simmons, 543 U.S. 551, 575–78 (2005); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988); Enmund v. Florida, 458 U.S. 782, 796–97 & n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); *see also* Pearce, *supra* note 204 (arguing that the Supreme Court has developed a body of proportionality jurisprudence that considers international materials).

[207] This Note does not discuss the fines imposed by other countries for illegal entry or reentry.

[208] POPULATION DIVISION, DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, INTERNATIONAL MIGRATION 2006, *available at* http://www.un.org/esa/population/publications/2006Migration_Chart/Migration2006.pdf. The laws of Saudi Arabia are not examined here as crimes and punishments in that country are not codified, but rather determined case by case based on judges' interpretations of the Sharia (Islamic Law). *See* HUMAN RIGHTS WATCH, PRECARIOUS JUSTICE: ARBITRARY DETENTION AND UNFAIR TRIALS IN THE DEFICIENT CRIMINAL JUSTICE SYSTEM OF SAUDI ARABIA 17 (2008). An analysis of when and how illegal reentry is criminally sanctioned in Saudi Arabia is beyond the scope of this Note.

Note refers to as illegal reentry, none increase the sentences applicable to illegal reentry based on prior convictions.[209]

Of the countries listed above, Germany, Canada, the United Kingdom, and Italy criminalize acts similar to those defined by § 1326. In other words, these countries punish actions separate from a single illegal crossing of their borders, such as repeated illegal entry or illegal entry subsequent to deportation. In Germany, repeated illegal entry and unauthorized residence following a deportation order, conduct roughly equivalent to that prohibited by § 1326, are criminal offenses punishable by up to three years imprisonment.[210] Canada penalizes illegal entry subsequent to deportation by a maximum of two years imprisonment.[211] Italy is the only other nation to criminalize an offense similar to the conduct proscribed by § 1326. Although illegal entry into Italy is only sometimes a criminal offense and is never punishable by imprisonment,[212] failure to comply with an expulsion order is a crime punishable by six months to one year in prison.[213] An individual who fails to comply with an expulsion order who is later found on Italian territory is subject to imprisonment of one to four years.[214]

In India, Russia, France, and the United Kingdom, illegal reentry is not a separate offense from illegal entry, nor is repeated illegal entry subject to higher penalties. India imposes the harshest penalty for illegal entry: imprisonment for up to five years.[215] In Russia, illegal entry is punishable by up to two years imprisonment,[216] and in France the offense is punishable by imprisonment for up to one year.[217] Illegal entry into the United Kingdom is punishable by up to six months imprison-

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209 Because this Note does not challenge the proportionality of the Guidelines' general criminal history enhancements, which apply to all federal offenses, this Note does not discuss comparable laws of other countries.

210 Aufenthaltsgesetz [Residence Act] § 95(2); COMMISSIONER FOR HUMAN RIGHTS, *supra* note 145, at 11.

211 Immigration Act, R.S.C. 1952, s. 95(a) (Can.); R. v. Davis, [1994] B.C.W.L.D. 2072 (Can.) (stating that the maximum penalty for unlawfully entering Canada after deportation is two years imprisonment).

212 Matilde Ventrella McCreight, *Crimes of Assisting Illegal Immigration and Trafficking in Human Beings in Italian Law*, *in* IMMIGRATION AND CRIMINAL LAW IN THE EUROPEAN UNION: THE LEGAL MEASURES AND SOCIAL CONSEQUENCES OF CRIMINAL LAW IN MEMBER STATES ON TRAFFICKING AND SMUGGLING IN HUMAN BEINGS 152–55 (Elspeth Guild & Paul Minderhoud eds., 2006) [hereinafter IMMIGRATION AND CRIMINAL LAW IN THE EU]; GUILD, *supra* note 145, at 12.

213 McCreight, *supra* note 212, at 156.

214 *Id*.

215 The Foreigners Act, 1946, No. 31, Acts of Parliament, 1946 (India) §§ 3(2), 14.

216 UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code], ch. 32, art. 322.

217 Article 19, Ordinance No 45-2658 of 2.11.45 modified by the Act of 26.11.03.

ment.[218] Neither illegal entry nor reentry into Ukraine is punishable by imprisonment,[219] and the same can be said for Spain.[220]

This comparison reveals that at least some countries grappling with large amounts of undocumented immigrants agree with the American conclusion that repeated illegal entry, noncompliance with a deportation order, or illegal entry subsequent to deportation, are acts serious enough to be criminalized and punished by imprisonment. Nevertheless, the comparison also demonstrates that none of these countries view these acts as severe enough, or the offenders as dangerous enough, to warrant terms of imprisonment as long as those authorized by the sixteen-level enhancement. Even the highest penalty imposed for an offense similar to that defined by § 1326, the maximum of five years imprisonment assigned in India for illegal entry,[221] is still at the very bottom end of the range of sentences—from fifty-one to 125 months imprisonment—that can be imposed pursuant to the sixteen-level enhancement.[222]

The result of this interjurisdictional comparison is similar to those made in *Weems*, *Solem*, and *Trop*, in which the Supreme Court found that the disparity between the challenged sentence and the sentences imposed in foreign jurisdictions for comparable crimes evidenced "more than different exercises of legislative judgment."[223] Like in these cases, the interjurisdictional comparison here shows that the sixteen-level enhancement results in the imposition of sentences dramatically longer than those imposed in other countries for comparable offenses. Consequently, this comparison confirms that the sixteen-level enhancement results in sentences that are grossly disproportionate to the crime of illegal reentry.

CONCLUSION

The above analysis demonstrates that, due to a multitude of factors, closer Eighth Amendment scrutiny of sentences imposed upon illegal reentrants under the sixteen-level enhancement often reveals that the sentences are excessive and unconstitutional. Such scrutiny will not on-

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218 Immigration Act, 1971, c. 77, § 24 (U.K.); COMMISSIONER FOR HUMAN RIGHTS, *supra* note 145, at 11; Dora Kostakopoulou, *Trafficking and Smuggling in Human Beings: The British Perspective*, *in* IMMIGRATION AND CRIMINAL LAW IN THE EU, *supra* note 212, at 352.

219 Act on Stay of Aliens (Ukraine) § 76 (stating that unlawful entry is an administrative misdemeanor punishable by a fine).

220 Gortazzar Rotaeche et al., *Trafficking in and Smuggling of Human Beings: The Spanish Approach*, in IMMIGRATION AND CRIMINAL LAW IN THE EU, *supra* note 212, at 298–308.

221 *See supra* note 215.

222 *See* discussion *supra* Part I.

223 Solem v. Helm, 463 U.S. 277, 299 (1983); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

ly result in the imposition of more just sentences upon illegal reentrants, but will also ensure that such sentences reflect Congress's intent when it increased the maximum penalties for illegal reentry, to target and deter serious repeat felons from reentering the United States after deportation with the intention of reoffending. Eighth Amendment review of illegal reentry sentences will also serve Congress's goal of lessening the burden of criminal aliens on the federal criminal justice system. In essence, closer judicial scrutiny of illegal reentry sentences offers courts the opportunity to enforce both the constitutional rights of individuals and the intent of U.S. legislators.