

LONE STAR LESSONS

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ABSTRACT

This Article provides the first comprehensive empirical account of Operation Lone Star (OLS), Texas Governor Abbott's immigration enforcement initiative at the southern border. Though OLS consists of several components, including border wall construction and the busing of migrants to "blue" states, the machinery of OLS is primarily designed to apprehend recent migrants and prosecute them for violations of Texas state criminal law. The most common OLS prosecutions are for misdemeanor criminal trespass after migrants are arrested on private ranch lands near the border. As many criminal justice reforms aim to shrink the scale and scope of the criminal legal system, OLS is actively engaged in its expansion.

Drawing upon hours of court observation, qualitative interviews with judges, prosecutors, and defense attorneys, and review of court documents from thousands of cases, this Article describes the processing of OLS cases in detail to see what lessons can be learned from the rollout of this large-scale state immigration enforcement program. What emerges is how different case processing is in OLS cases from the "normal" processing of criminal cases in Texas state courts. OLS uses tools from both civil immigration proceedings and federal border-related criminal prosecution programs—like Operation Streamline and Fast-track—to create a hybrid system that shares efficiencies and dysfunctions with each of its constituent parts. As one lawyer explained, OLS has created a "separate and distinct criminal justice system." That separateness mitigates political and public resistance to this expansion of the carceral state and provides a roadmap for states looking for ways to scale up immigration enforcement and re-engage in the project of mass incarceration. The federal government has begun to use Texas's plan as a blueprint for criminal immigration enforcement. OLS is a laboratory for experimentation in ways to expand the apparatus of the criminal legal system and presents an

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extreme version of the future, where meaningful rights to trial or appellate review cease to exist for marginalized populations charged with crimes.

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INTRODUCTION

Kinney County, Texas sits on the Rio Grande abutting thirteen miles of the Mexican border. It is rural, with about 3,100 residents and a population density of roughly 2.3 people per square mile.¹ Over half of the residents identify as Hispanic or Latino, and roughly 10% were born outside of the United States.² From 2018-2020, there were only a couple dozen cases filed annually in the Kinney County Court, which handles misdemeanor offenses—most of which were traffic offenses.³ When Governor Greg Abbott announced Operation Lone Star (“OLS”), Texas’s border enforcement program, Kinney County became an early and aggressive adopter of OLS prosecutions. After OLS commenced in March of 2021, Kinney County Court filed 1553 cases in the remaining ten months of 2021, 1520 of which were for misdemeanor trespassing—the most common OLS charge.⁴ The vast majority of OLS prosecutions are for recent migrants charged with misdemeanor criminal trespass.⁵ The felonies tend to be human smuggling charges where most of the accused are U.S. citizens.⁶

OLS resources allowed this formerly sleepy county courthouse to handle a vastly larger number of cases. But to accommodate the exploding caseload, Kinney drastically modified the way it processed criminal cases. Magistration proceedings, where a judge advises the recently arrested of their charges and appoints counsel, were first conducted in parking lots and later in large tents rather than in the courtroom.⁷ In the early days, the migrants charged in OLS waited months before seeing the appointed attorneys to which they are entitled.⁸ As OLS evolved, appointment of counsel was achieved more rapidly, but because most of the attorneys lived in urban areas

1. U.S. CENSUS BUREAU, *2020 Census for Kinney County Texas*, <https://datausa.io/profile/geo/kinney-county-tx> [<https://perma.cc/L5NT-BL88>].

2. *Id.*

3. *See infra* I.c.

4. *See infra* I.c.

5. Interview #3 with prosecutor (July 22, 2022) (on file with author, at 1).

6. *Id.* at 4 (estimating 95% of felony defendants are U.S. citizens).

7. *See @Grassroots_News*, X (Aug. 19, 2021, 6:16 PM), https://x.com/Grassroots_News/status/1428526275308789764 [<https://perma.cc/A79J-VZCW>].

8. Jolie McCullough, *Migrants Arrested by Texas in Border Crackdown are Being Imprisoned for Weeks Without Legal Help or Formal Charges*, TEX. TRIB. (Sept. 17, 2021), <https://perma.cc/72GB-U5ZX>; Emily Hernandez, *What is Operation Lone Star? Gov. Greg Abbott’s Controversial Border Mission, Explained*, TEX. TRIB. (Mar. 30, 2022), <https://www.texastribune.org/2021/09/27/texas-border-migrants-jail/> [<https://perma.cc/8J8D-DWXE>].

in Texas or out of state,⁹ migrants met with counsel only by phone or Zoom. Many of those charged in OLS cases speak limited English, so interpretation is needed for defense counsel to communicate effectively.

In-person court proceedings are reserved for trial, and nearly all misdemeanor proceedings are conducted by videoconference.¹⁰ Though videoconferencing is common in immigration proceedings, video-conferenced criminal proceedings are rare outside of the Covid-19 pandemic.¹¹ In-person proceedings have recommenced in most Texas criminal cases, but videoconferencing persists in OLS misdemeanor cases.¹² The judges presiding over the Zoom court proceedings are typically senior visiting judges, rather than locally elected and accountable judges.¹³ The OLS-funded prosecutor positions are often held by attorneys from urban centers in Texas, rather than from the prosecuting counties.¹⁴ Nearly all those accused in misdemeanor

9. See Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster Permitting Out-of-State Lawyers to Practice in Texas Temporarily, Misc. Docket No. 23-9096 (Tex. Nov. 17, 2023), <https://www.txcourts.gov/media/1457547/239096.pdf> [<https://perma.cc/FGZ6-VKJ5>].

10. See *infra* II.d.2-5; see also First General Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020), <https://www.txcourts.gov/media/1447321/209042.pdf> [<https://perma.cc/6AYE-SZSB>]; Final General Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 23-9005 (Tex. Jan. 27, 2023), <https://www.txcourts.gov/media/1455664/239005.pdf> [<https://perma.cc/HC6J-F7DF>]; Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, Misc. Docket No. 23-9010 (Tex. Feb. 28, 2023), <https://www.txcourts.gov/media/1455939/239010.pdf> [<https://perma.cc/TG78-XLR2>]; Proclamation Renewing the Disaster Proclamation Concerning Border Security (Tex. June 28, 2024), <https://www.txcourts.gov/media/1458823/249036.pdf> [<https://perma.cc/9RAX-UT3Q>].

11. Ingrid Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 934–939 (2015), (hereinafter *Remote Adjudication*); see Pamela R. Metzger & Gregory J. Guggenmos, *COVID-19 and the Ruralization of U.S. Criminal Court Systems*, 2020 U. CHI. L. REV. ONLINE 70, *75 (2020), <https://lawreview.uchicago.edu/online-archive/covid-19-and-ruralization-us-criminal-court-systems> [<https://perma.cc/5AQE-MEM3>] (noting that video technology had been used in criminal proceedings by some rural jurisdictions before the pandemic, but that the pandemic “dramatically accelerated their adoption”); see also Andrew Guthrie Ferguson, *Courts without Court*, 75 VAND. L. REV. 1461, 1462–63 (2022) (describing how the pandemic caused a “radical disruption” and the emergence of a new video streaming system in the criminal legal system).

12. Jolie McCullough, *Texas Courts Cleared for In-Person Trials, and Local Officials Will Decide Whether to Require Face Masks*, TEX. TRIB. (Mar. 5, 2021), <https://www.texastribune.org/2021/03/05/texas-courts-in-person-trials-face-masks/> [<https://perma.cc/K2W5-T5PE>]; see Final General Emergency Order Regarding the COVID-19 State of Disaster, *supra* note 10 (ending the use of COVID-19-related remote hearings in March of 2023); see also Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, Misc. Docket No. 23-9010 (Tex. Feb. 28, 2023), <https://www.txcourts.gov/media/1459806/249103.pdf> [<https://perma.cc/TG78-XLR2>] (allowing Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster, Misc. Docket No. 24-9036 (Tex. June 28, 2024)).

13. See *Infra* II.d.2.

14. For example, Tony Hackebeil, who prosecuted the first OLS trial for Kinney County, is a “San Antonio-based prosecutor.” See Aaron Nelsen, *Some Texas Lawyers Think Greg Abbott’s Border Initiative Is Unconstitutional—But They’re Afraid to Challenge It*, TEX. MONTHLY (Oct. 14, 2022), <https://www.texasmonthly.com/news-politics/operation-lone-star-legal-challenge/> [<https://perma.cc/2DH5-B36F>].

cases were Latino non-U.S. citizen men, as women were exempted from prosecution in the early years of OLS.¹⁵

Typically, defendants in Texas are held in jail awaiting trial or are released on bond into the community. But because the local jail in Kinney County can house no more than thirty people, those charged in OLS proceedings are bused to state prisons, hours from the border.¹⁶ Prison is a place typically reserved for convicted felons, not individuals in pretrial custody, especially those facing misdemeanor charges.¹⁷ If they bail out of custody, migrants charged in OLS cases are usually transferred to Immigration and Customs Enforcement (ICE) custody and deported,¹⁸ meaning nearly all those charged in OLS misdemeanor cases are either in prison, in ICE custody, or in countries outside of the United States. Once migrants are released and deported, many lose touch with the court and attorneys, resulting in a finding that they failed to appear, which leads to the bond being forfeited. Kinney County has netted millions in the bond forfeiture in OLS.¹⁹

Migrants charged in misdemeanor trespassing cases are typically offered time served plea deals, which nearly all those in custody accept to get out of prison.²⁰ For those out of custody, judges can set trial dates, but unlike pretrial proceedings, which can be held remotely on Zoom, trials must be conducted in person unless both parties consent to remote adjudication.²¹ Most migrants who bond out are deported from the United States and then can't return to attend trial. Defense attorneys file writs to stay the proceedings, leading to hundreds of cases that are simply on hold and likely never to be resolved. Because of these logistical difficulties, the OLS conviction rate

15. That said, attorneys interviewed as part of this study indicated that U.S. citizens comprised the majority of those charged with felony smuggling offenses. See Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 11); see also ACLU TEXAS, *Data Report on Operation Lone Star: Misinformation and Discrimination in Texas Border Enforcement* 19 (May 22, 2024), <https://www.aclutx.org/publications/operation-lone-star-misinformation-and-discrimination-texas-border-enforcement/> [https://perma.cc/6HF6-UMWG] [hereinafter *ACLU OLS REPORT*].

16. McCullough, *supra* note 8.

17. Jolie McCullough, *Converted Texas prison gets first immigrant detainees as Gov. Greg Abbott's border security effort ramps up*, TEX. TRIB. (July 21, 2021), <https://www.texastribune.org/2021/07/21/texas-prison-immigrant-jail-briscoe/> [https://perma.cc/22XF-66QS] (describing efforts to get the facility to meet minimum standards for jails).

18. In the early days of OLS, there often weren't ICE detainers in place before defendants were ordered released on bond, but as OLS evolved, ICE detainers became commonplace. See Interview #10 with judge (May 31, 2023) (on file with author, at 40).

19. Jolie McCullough, *Cash Is Piling Up in Kinney County from Bonds Posted to Free Migrants Arrested Under Texas Border Crackdown*, TEX. TRIB. (May 13, 2022), <https://www.texastribune.org/2022/05/13/texas-border-migrants-cash-bonds/> [https://perma.cc/JF2S-Y76M]. The local economies of OLS counties have benefited economically from OLS in other ways as well—for example, hotels are full. See Interview #10 with judge (May 31, 2023) (on file with author, at 41) (“We see a lot of them at hotels [family members] were down at the border recently and they said ‘Oh my God! The entire place is full of uniforms’ and we’re like, ‘well, they’re OLS.’”).

20. See *infra* II.

21. See also, Final General Emergency Order Regarding the COVID-19 State of Disaster, *supra* note 10.

hovers around 50%.²² On the felony side, where most clients are U.S. citizens, deals for first-time offenders are often a four or five year deferred adjudication where the individual can avoid the stigma of a felony conviction and get a case dismissed if they comply with the conditions of court, which typically include community service, paying court costs and a fine, and staying out of further trouble.²³

As OLS matures, many intractable problems remain. OLS uses tools from both civil immigration proceedings and federal border-related criminal prosecution programs—like Operation Streamline and Fast-track—to create a hybrid system that shares efficiencies and dysfunctions with each of its constituent parts.²⁴ Operation Streamline and Fast-track are programs developed in federal border courts to efficiently and cost-effectively handle high volumes of immigration and border-related prosecutions—but both programs have been criticized as constituting “assembly-line justice,” which erodes procedural norms and due process protections for the accused.²⁵ The most substantial problem in OLS is the seeming impossibility of conducting jury trials.²⁶ In the tens of thousands of misdemeanor cases prosecuted as part of OLS in its first few years, there was only one trial.²⁷ Though trial rates have been diminishing for decades, a trial rate this low is an outlier and presents a window into the future if trial rates continue to decline to near-zero rates.²⁸ Even if trial rates this low remain cabined to immigration prosecutions, OLS warrants study.

It is not just the trial that is vanishing in OLS proceedings. Because most cases resolve pursuant to a plea agreement with an explicit appellate waiver, the ability to seek review of foundational legal questions in OLS prosecutions is stifled.²⁹ After OLS, defendants filed writs of habeas corpus asking the Appeals Court to consider whether common practices in OLS violate the Due Process Clause or the Sixth Amendment’s right to counsel clause, the Appeals Court determined that these issues were not cognizable as pretrial writs of

22. See Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1892 (2024) (noting jail rosters showed that only about half of defendants pled guilty before being deported); see also *infra* I.c.

23. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 20) (“they defer the finding of guilty, it’s not a felony conviction so long as they complete the terms of deferred—it’s usually 160 hours of community service . . .”).

24. For an in-depth description of Operation Streamline and Fast-track, see generally Amy F. Kimpel, *Alienating Criminal Procedure*, 37 GEO. IMMIGR. L. J. 237, 251–265 (2023).

25. *Id.* at 239, 252.

26. See *infra* III.c.

27. See *infra* II.a. There have been a couple of felony human smuggling trials more recently. See *Gutierrez v. State*, No. 13-24-00208-CR, 2024 WL 5118180 (Ct. App. Tx. 13th, Dec. 16, 2024) (opinion withdrawn). A second misdemeanor trial was held in December of 2025. See Lone Star Defenders Office (@lonestardefenders), Trial Update, INSTAGRAM (Dec. 23, 2025), https://www.instagram.com/p/DSn1ACtFGKd/?utm_source=ig_web_copy_link&igsh=MzRlODBiNWFiZA== [<https://perma.cc/A4LC-2XQU>].

28. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); see also Ronald Wright, *Trial Distortion and the End of Innocence*, 154 U. PA. L. REV. 79, 91 (2005).

29. See also Kimpel, *supra* note 24, at 258 (describing appellate waivers that began as part of fast-track plea agreements).

habeas corpus claims and would only be ripe for appellate review after a conviction.³⁰ More recently, the Texas Court of Criminal Appeals held that selective prosecution and enforcement claims based on the Equal Protection Clause were cognizable on a pretrial habeas application, but then set an almost impossibly high bar for establishing an Equal Protection Clause violation.³¹

Texas has spent over 11 billion dollars on OLS.³² Governor Abbott touts OLS as a major success. In July 2024, he issued a press release stating that OLS had “decrease[d] illegal crossings into Texas by 85%.”³³ The press release claimed that OLS has resulted in “516,600 illegal immigrant apprehensions and more than 45,500 criminal arrests, with more than 39,500 felony charges” and that 119,400 migrants had been transported to blue cities outside of Texas since April 2022.³⁴ But the press release, like all of Texas’s statistical claims about OLS, doesn’t cite to sources for its data or break it down.³⁵ Journalists, academics, and advocates have had difficulty getting accurate data from Texas and substantiating these claims.³⁶ It is likely Texas

30. See *Ex parte* Dominquez Ortiz, 668 S.W.3d 126, 140 (Tx. Ct. App. 2023).

31. *Ex parte* Aparicio, 707 S.W.3d 189, 205 (Tex. Crim. App. 2024), *cert. denied*, 145 S.Ct. 2852 (2025) (petitioner must demonstrate prosecutorial policy is motivated by an invidious discriminatory purpose).

32. See Alejandro Serrano, *Migrant Apprehensions Are Down at the Texas Border. Have State Policies Had an Impact?* TEX. TRIB. (Apr. 22, 2024), <https://www.texastribune.org/2024/04/22/texas-border-migrant-apprehensions-abbott-operation-lone-star/> [<https://perma.cc/JZ42-YYJW>]; see Sergio Martínez-Beltrán, *Texas Has Spent More Than \$148 Million Busing Migrants to Other Parts of the Country*, TEX. TRIB. (Feb. 21, 2024), <https://www.texastribune.org/2024/02/21/texas-migrants-busing-cost-greg-abbott/> [<https://perma.cc/FK4U-YFE9>]; see also Gov. Greg Abbott, Letter to Congress (Jan. 23, 2025), https://gov.texas.gov/uploads/files/press/Congressional_Leadership_and_Texas_Congressional_Members.pdf [<https://perma.cc/C5Q9-5BAG>]. The federal government is now poised to reimburse Texas for these expenses. See César García Hernández, *Texas Takes Feds’ Cash*, IMMIGR. L. UNHINGED (July 11, 2025), <https://ccgh.substack.com/p/texas-takes-feds-cash> [<https://perma.cc/9NPR-V69Z>].

33. Press Release, Office of the Tex. Governor, *Operation Lone Star Decreases Illegal Crossings into Texas by 85%* (July 26, 2024), <https://gov.texas.gov/news/post/operation-lone-star-decreases-illegal-crossings-into-texas-by-85> [<https://perma.cc/C3M2-2UAY>].

34. *Id.*

35. See Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2012–14 (2022).

36. See, e.g., Karim Doumar, *Here’s How We Analyzed the Data Underlying Texas Gov. Greg Abbott’s Claims About His Border Initiative*, PROPUBLICA (Apr. 20, 2022), <https://www.propublica.org/article/heres-how-we-analyzed-the-data-underlying-texas-gov-greg-abbotts-claims-about-his-border-initiative> [<https://perma.cc/6ZLX-8XW6>] (“There were two [data set] releases that came from three different departments with dissimilar ways of recording arrests and charges. In most cases, each row of the data represented one charge . . . but the way the charges were entered was not standardized or easy to understand. This made it nearly impossible to analyze.”); Lomi Kriel, Perla Trevizo, Andrew Rodriguez Calderón & Keri Blakinger, *Texas’ Governor Brags About His Border Initiative. The Data Doesn’t Back Him Up.*, PROPUBLICA (Mar. 21, 2022), <https://www.propublica.org/article/texas-governor-brags-about-his-border-initiative-the-data-doesnt-back-him-up> [<https://perma.cc/AGU8-6UCD>] (cases in OLS dataset received from Texas, included cases involving U.S. citizens that had nothing to do with the border—after journalists raised questions about cases like this, Texas removed roughly 2,000 of the 11,000 cases in the dataset. When it came to fentanyl seizures, “all but 12 of the 160 pounds” seized were from El Paso, a county that hadn’t yet joined OLS.); Fish, *supra* note 22, at 1931 n.257 (using OLS Detention Center rosters to document 8,288 misdemeanor trespassing defendants, about half of whom pleaded guilty while in custody but acknowledging that there is no way to confirm the number who pleaded guilty after being released because “those numbers have not been made available by the Texas courts”); ACLU OLS REPORT, *supra* note 15, at 8 (ACLU received data from DPS and the Office of Court Administration of the Texas Judicial System (OCA) and noted that “the figures we received from DPS and OCA showed alarming disparities despite both agencies tracking arrests made under OLS. Within these datasets, there were 38,030 arrests reported by DPS, but only 13,306 people appeared before a magistrate as reported by

is taking credit for arrests made in conjunction with federal officers, double-counting arrests when two Texas agencies are involved, and including arrests with no connection to the border in its statistics simply because the Texas Department of Public Safety (DPS) is the arresting agency.³⁷

Similarly, the Governor's press release suggests that the felony arrests are of "illegal immigrants," reinforcing negative associations between migrants and crime. But OLS data received by the ACLU from the Texas courts shows that U.S. citizens make up 85.8% of those "magistrated"³⁸ for drug offenses, 76.3% of those magistrated for smuggling people, and 90.1% of those magistrated for weapons offenses.³⁹ Interviews with those processing OLS felonies confirm these offenses overwhelmingly involve U.S. citizen defendants.⁴⁰ Abbott's statement suggests most of the arrests involve felonies—but the wording is misleading. In data provided to the ACLU of Texas by DPS, there were 38,030 OLS arrests in the relevant time period, but the data from Texas courts showed only 13,306 individuals had been arraigned before OLS magistrate judges, and nearly 70% of those arraignments involved only misdemeanor charges—most often a single charge for trespassing.⁴¹ This suggests a relatively small portion of arrests (likely of U.S. citizens) involve a large number of felony charges.⁴²

This Article aims to be a comprehensive look at a highly divisive and politicized program. OLS has been used as a political talking point by both the right and left, but there isn't much public information about how the cases and court proceedings operate that includes discussion of the nuance, inner workings, or logistical challenges. OLS has varied over time and place—even during its brief lifespan and constrained geography. This Article attempts to describe that diversity, beginning by exploring the many implementation challenges in the early months of OLS as the program scaled up. This Article's coverage ends in the fall of 2023, just before Texas passed legislation expanding its laws to directly criminalize illegal immigration.⁴³

OCA. Additionally, arrests for drug charges made up 40% of arrests, but only 3% of first appearances. Misdemeanors accounted for 40% of arrests and 70% of court appearances).

37. Kriel et al., *supra* note 36.

38. This is a Texan term to describe the process of bringing a recent arrestee before a magistrate for a first appearance. *See* Plattenburg v. State, 972 S.W.2d 913, 917 (Tex. App. 1998).

39. ACLU OLS REPORT, *supra* note 15, at 19.

40. *See infra*, Part II. *See, e.g.*, Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 11).

41. ACLU OLS REPORT, *supra* note 15, at 9, 13–14. Typically, rural jurisdictions prosecute misdemeanors more often than felonies as compared to urban jurisdictions. *See* Lisa R. Pruitt, Jennifer Sherman & Jennifer Schwartz, *Legal Deserts and Spatial Injustice: A Study of Criminal Legal Systems in Rural Washington*, 134 YALE L. J. F. 847, 854 (2025) (misdemeanor to felony charging ratio was 11:1 in rural counties in Washington state as opposed to 3:1 in urban counties).

42. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 17). One OLS defense attorney represented a US citizen man charged with felony weapons charges after he loaded up his car with weapons to bring down to the border to assist militia members in protecting the border from invading migrants. Because DPS executed the arrest and the case was tagged as an OLS prosecution, this case is included in the numbers Abbott uses to suggest migrants are responsible for felony crime at the border.

43. *See* Uriel J. García, *Gov. Greg Abbott Signs Bill Making Illegal Immigration a State Crime*, TEX. TRIB. (Dec. 18, 2023), <https://www.texastribune.org/2023/12/18/texas-governor-abbott-bills-border-wall-illegal-entry-crime-sb3-sb4/> [https://perma.cc/V5TS-63DJ].

OLS seems to be here to stay. Study of OLS is warranted both because it is an example of state and county-level criminal immigration enforcement and because, during a time when many criminal justice reforms are about reducing the size and scope of the criminal legal system, OLS is vastly expanding the criminal legal system along the southern border. Additionally, OLS is an experiment, and to assess the relative success of this costly experiment, we must know more about it than the soundbites coming from the left and right.

This Article proceeds in three parts. Part I describes the research methodology for the empirical piece of this study and the empirical findings. The empirical research consisted of three components: court observations, qualitative interviews with attorneys and judges, and review of court documents.⁴⁴ Part II tells the story of OLS's genesis and maturation. This includes discussion of the lone trial, the socio-political context in which OLS arose, and a catalogue of the implementation and legal challenges OLS faced in its first two and a half years.

Part III describes the lessons that can be learned from a close examination of OLS. OLS presents an example of how immigration-related prosecutions can be deployed to create separate and distinct legal systems with procedural features of both criminal and immigration case processing and can thus serve to erode criminal procedural norms.⁴⁵ Part of what makes the apparatus of OLS so distinct is its deployment of mass prosecution initiatives in rural jurisdictions where geographic sprawl and scarcity of personnel make traditional case processing schemes unsustainable.⁴⁶ This section also describes the impact of the impossibility of trial on OLS proceedings, and discusses how OLS is used to create criminal justice data that can be weaponized by political actors.⁴⁷

In 1932, Justice Brandeis noted that, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁸ Courage can be a catalyst for bold change or foolhardy recklessness. OLS is an experiment, and Texas has spent the last

44. One challenge studying in OLS is that state and local governments control the dissemination of data on prosecutions and often face a disincentive to be fully transparent, particularly when they use criminal prosecutions for political ends. See Okidegbe, *supra* note 35, at 2012–14.

45. See generally Ingrid Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281 (2010); Kimpel, *supra* note 24.

46. Metzger, *supra* note 11, at *71.

47. This Article is part of a larger research arc. One of the key lessons that can be learned about OLS is the role of “outsider prosecutions.” OLS prosecutions both mark the accused as outsiders and serve to facilitate the removal of migrants through physical expulsion from the United States. Additionally, the apparatus of OLS prosecutions employs many individuals who can be considered “outsiders” in the communities where migrants are prosecuted. State and federal, rather than local, law enforcement tends to initiate OLS arrests. Cases occur remotely on Zoom with judges, prosecutors, defense attorneys, and defendants appearing from locations other than the prosecuting counties. The phenomenon of “outsider prosecutions” will be explored in a separate article, using OLS as a primary case study. See Amy F. Kimpel, *Outsider Prosecutions* (forthcoming 2027).

48. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

four years serving as its laboratory. But as the second Trump administration looks to adopt components of Texas's strategy, OLS demands more scrutiny.⁴⁹ This Article provides the means to learn from OLS by hearing from those intimately engaged in its case processing. The primary Lone Star lesson is that when the State creates a criminal processing apparatus targeted primarily at outsiders like the migrants charged in OLS, there is a real danger of creating a separate and distinct legal system that undermines the rule of law and our communal commitments to justice.⁵⁰

I. EMPIRICAL RESEARCH METHODOLOGY

The empirical research grounding this Article consists of three components: (1) observations of court proceedings, (2) qualitative interviews with judges, prosecutors, and defense attorneys handling OLS cases, and (3) review of court documents from OLS proceedings.⁵¹ This section includes a brief explanation of the empirical research methodology.

During the period of this study, the Lubbock Private Defenders Office (LPDO) handled the appointment of indigent defense counsel for misdemeanor OLS cases in Kinney, Jim Hogg, Maverick, Val Verde, Webb, and Zapata counties.⁵² These counties are also among those that handle the highest volume of OLS cases.⁵³ Because the LPDO appointment signaled that a case was part of OLS, all the empirical research focused on LPDO-managed counties. Choosing to focus on LPDO-managed counties limits the data set and makes it less comprehensive because it does not describe how cases are handled in the other fifty-plus counties in the OLS “disaster zone.”⁵⁴

A. Court Observations

All court observations occurred in LPDO appointment counties.⁵⁵ Because OLS misdemeanor proceedings occur on Zoom, facilitating remote court observation, all court observations were conducted of misdemeanor cases. Felony proceedings occur in person and because the author is not located in

49. See Ana Campbell, *Texas is Trump's Biggest—and Most Enthusiastic—Partner on Immigration Overhaul*, NPR (Jan. 31, 2025), <https://www.npr.org/2025/01/31/nx-s1-5279486/texas-eagerness-to-help-with-trumps-illegal-immigration-crackdown-policies> [<https://perma.cc/A9KN-FK6U>].

50. *Infra* III.a.

51. The project was approved by the Institutional Review Board at the University of Alabama.

52. LPDO manages a panel of private defense attorneys and assigns cases to lawyers working with Neighborhood Defender Services of Texas and Texas Rio Grande Legal Aid. See *Operation Lone Star*, LONE STAR DEFS., <https://www.olsdefense.org/> [<https://perma.cc/R9AP-9VHS>] (last visited July 20, 2025); the team managing OLS defense has since parted ways with LPDO and rebranded as Lone Star Defenders Office (LSDO). Because the entity was called LPDO during the research period, this Article will refer to this entity as LPDO throughout.

53. Interview #11 with defense counsel (June 15, 2023) (on file with author); see also ACLU OLS Report, *supra* note 15, at 10-11.

54. Notably, according to a recent ACLU report, 18 “disaster zone” counties have never had an OLS arrest. ACLU OLS REPORT, *supra* note 15, at 10.

55. LPDO hosts a website with information about OLS Indigent Defense, see LONE STAR DEFS., *supra* note 52, which includes links to the YouTube channels for the county courts.

Texas, no in-person court proceedings were observed.⁵⁶ Court observations were conducted between May 2022⁵⁷ and June 2023 and included observation in five county courts and totaled over thirty hours.⁵⁸ Observation notes were taken on a form developed during the first few court sessions observed, and then notes were coded for inclusion in this Article.

Often, there is a risk in ethnographic observation that the research subjects will modify their behavior because they know they are being observed.⁵⁹ One benefit of remote court observations is that the participants in the proceedings had no way of knowing that they were being observed as part of a research study and therefore had no incentive to adapt their behavior. The court observations provided context and corroboration for the research interviews with attorneys and judges.

B. *Qualitative Interviews*

Interviews were solicited primarily by email,⁶⁰ using IRB-approved language.⁶¹ In all, thirteen participants were interviewed—two judges, two prosecutors, eight defense attorneys, and one defense paralegal. Because there are far more defense attorneys than prosecutors and judges handling OLS cases, this was a relatively representative sample. However, no court coordinators, clerks, prison staff, or law enforcement officials agreed to be interviewed, which means some perspectives on OLS were not included. In addition, defendants and complaining witnesses in OLS proceedings were not interviewed.⁶²

Of those who agreed to be interviewed, most (nine) were White, while three were Hispanic or Latinx and one was Black; eight were male, and five were female. Those interviewed had been involved in between 65 and

56. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 22) (noting that most felony hearings are in-person, but judges will allow Zoom appearances from time to time, for example, when an in-custody defendant isn't transported to court by Briscoe or Segovia prison staff).

57. Some preliminary court observations occurred before IRB approval. Because proceedings occur on YouTube and are accessible to the public, IRB approval was not needed to begin court observations.

58. Appendix B, Table of Court Observations. Though Val Verde County is an LPDO county, its misdemeanor case volume during the period of the research study was so low and court proceedings so infrequent that it was difficult to observe a proceeding.

59. MARIO LUIS SMALL & JESSICA MCCRORY CALARCO, *QUALITATIVE LITERACY: A GUIDE TO EVALUATING ETHNOGRAPHIC AND INTERVIEW RESEARCH* 120–21 (2022).

60. Email addresses were taken from court documents, the LPDO OLS website, LONE STAR DEFS., *supra* note 52 (a list received from LPDO with contact information for some state and county actors), County and other government websites, and the Texas State Bar website using the attorney search function, *Find a Lawyer*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm [<https://perma.cc/3BCX-G7Y2>] (last visited Oct. 15, 2025). In total, emails were sent to 156 separate email addresses—some representing unique individuals and some representing an office or entity (e.g., “county.attorney@co.maverick.tx.us”).

61. On file with author.

62. The IRB process for interviewing vulnerable populations like immigrants and prisoners is more onerous. There are also ethical issues involved with contacting defendants who are represented by counsel to discuss their experience with the court cases. Because the focus was on the procedural workings of OLS, a strategic decision was made to focus on interviewing government actors and criminal defense practitioners.

“thousands” of cases, with prosecutors and judges being involved in more cases than defense attorneys. Interview subjects were also asked about their political affiliation. Eight interview subjects described themselves as Democrats or to the left of the political spectrum. Three described themselves as either “conservative” or Republican, and two described themselves as “libertarians.”

All interview notes and transcripts were anonymized to protect the identities of the research subjects. Just as with the court observations, codes were developed during the data collection phase. After all interviews concluded, the notes or transcripts were coded, and quotations from the proceedings were isolated for inclusion in the Article.⁶³

C. *Review of Court Documents*

Review of court documents was accomplished using iDocket,⁶⁴ the case management system used by most of the counties along the Texas-Mexico border, including Kinney, Jim Hogg, and Webb counties.⁶⁵ Rather than being maintained by county clerks’ offices, iDocket is a separate web-based platform that relies on county clerks sending information to iDocket, which the platform then uploads to its system.⁶⁶ The public can then access court records online for a fee.⁶⁷ iDocket pricing makes searching court records in the covered counties relatively easy but expensive. Court records were reviewed to aid the court observation process and to obtain information on the number of misdemeanor cases processed in Kinney and Jim Hogg counties before and after OLS commenced. This data shows how OLS impacted the volume of cases in the respective counties, the type of cases charged, and the way cases were processed.



Figure 1.

63. See generally ANNETTE LAREAU, LISTENING TO PEOPLE: A PRACTICAL GUIDE TO INTERVIEWING, PARTICIPANT OBSERVATION, DATA ANALYSIS, AND WRITING IT ALL UP (U. Chicago Press 2022).

64. iDocket describes itself as a “Texas-based, Hispanic and Woman-Owned S-Corporation headquartered in Amarillo, Texas.” See About, IDOCKET, <https://online.idocket.com/Home/about> [<https://perma.cc/7PRK-HG6F>] (last visited Oct. 20, 2025).

65. County Court Map, IDOCKET, <https://idocket.com/countycourt.htm> [<https://perma.cc/4UVU-VLJJ>] (last visited Oct. 20, 2025).

66. Frequently Asked Questions, IDOCKET, <https://idocket.com/faq.htm> [<https://perma.cc/CE77-6DA4>] (last visited Oct. 20, 2025).

67. Subscription Plans, IDOCKET, <https://online.idocket.com/Subscriber> [<https://perma.cc/LM5L-G8UQ>] (last visited Oct. 20, 2025).

Before OLS was adopted in Kinney County in the spring of 2021, its case load was in the dozens and consisted primarily of traffic offenses. The case load exploded after the implementation of OLS, increasing by 7000%, almost entirely due to new trespassing prosecutions. This growth does not represent a 7000% increase in crime, though border crossings (and therefore trespassing into private land adjacent to the border) did increase significantly, by about 543% from 2020 to 2021 in the Del Rio Sector, for example.⁶⁸ What this tremendous growth in misdemeanor trespassing prosecutions represents is a reallocation of immigration law enforcement and prosecution from federal criminal and immigration courts to Texas state criminal courts.⁶⁹ Notably, the jump in Jim Hogg, which was experiencing the same elevated rates of border crossings as Kinney in 2021, doesn't have an increase in prosecutions until 2022, the year they adopted OLS.

KINNEY COUNTY COURT				
Time Period	Total Cases	Trespassing	Resisting or Evading Arrest	Traffic
1/1/18-12/31/18	52	0	0	23 (44.2%)
1/1/19-12/31/19	38	0	0	31 (81.6%)
1/1/20-12/31/20	21	0	0	20 (95.2%)
1/1/21-3/1/21	5	1 (20.0%)	0	4 (80.0%)
3/2/21-12/31/21	1553	1520 (97.9%)	14 (0.9%)	16 (1.0%)
1/1/22-12/31/22	2362	2131 (90.2%)	141 (6.0%)	13 (0.6%)
1/1/23-12/31/23	699	513 (73.4%)	143 (20.4%)	1 (0.1%)

Figure 2.

The case load in Jim Hogg's County Court prior to OLS was a bit different than the traffic-centered case load in Kinney County. The misdemeanors charged were comparatively more serious, consisting primarily of drug possession, theft-related offenses, DUIs, and charges relating to assaults, criminal threats, or violations of protective orders. Jim Hogg adopted OLS in January of 2022—a bit later than Kinney County—and, though its caseload increased significantly, the volume was only about a third of Kinney County's during its first year.

68. John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico Border in 7 Charts*, PEW RSCH. CTR. (Nov. 9, 2021), <https://www.pewresearch.org/short-reads/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/> [<https://perma.cc/P5ZV-X5HQ>].

69. AMERICAN IMMIGR. COUNCIL, *Prosecuting People for Coming to the United States* 5 (Aug. 23, 2021), <https://www.americanimmigrationcouncil.org/fact-sheet/immigration-prosecutions/> [<https://perma.cc/5B9S-J8ZF>] (showing federal prosecution rates for illegal border crossings from FY 2004 to 2020, including a drop from 106,312 in 2019 to 47,730 in 2020—the final year of the first Trump presidency).

JIM HOGG COUNTY COURT				
Time Period	Total Cases	Trespassing	Resisting or Evading Arrest	Traffic
1/1/18-12/31/18	59	0	8 (15.7%)	0
1/1/19-12/31/19	51	1 (2.0%)	6 (11.8%)	2 (3.9%)
1/1/20-12/31/20	21	2 (9.5%)	2 (9.5%)	1 (4.8%)
1/1/21-12/31/21	48	0	3 (6.3%)	1 (2.1%)
1/1/22-12/31/22	589	536 (91%)	17 (2.9%)	1 (0.2%)
1/1/23-12/31/23	153	112 (73.2%)	14 (9.2%)	3 (2%)

Figure 3.

Using this data, the research team calculated case disposition rates before and after the implementation of OLS.⁷⁰ Since the implementation of OLS, conviction rates have increased—particularly in Kinney County, which had no convictions in the three years pre-dating OLS. But despite the harsh rhetoric of OLS, the conviction rate has never risen above two-thirds of cases, and mostly it has hovered around 50%.

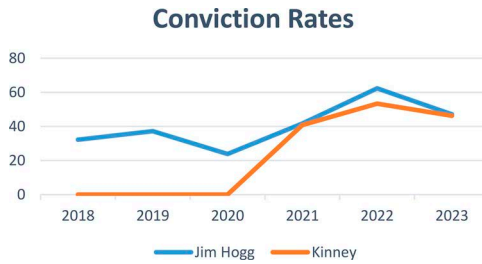


Figure 4.

Dismissal rates plummeted after the implementation of OLS. This is somewhat unsurprising because traditionally, misdemeanor dismissal rates are high because of diversion programs, which allow the accused to demonstrate good behavior or participate in rehabilitative programming to “earn” a dismissal.⁷¹ Because of diversionary programs, the conviction rate in Texas municipal and justice courts can be as low as 50%.⁷² Because the bulk of those charged in OLS cases are either in custody or deported outside of the United States, they would have difficulty participating in traditional diversion programs even if prosecutors were willing to offer them the opportunity.⁷³

70. Totals in these three charts do not equal 100% because Kinney County had some cases coded as “disposed” in 2018 and 2019, which weren’t clearly a dismissal or a conviction (seeming to involve post-appeal adjudication), and Jim Hogg had cases coded as “deferred adjudication,” which had no Kinney County equivalent.

71. See generally Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 450–55 (2022).

72. ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 270 n.6 (Princeton U. Press 2018) (cataloguing data and explaining the difficulties in differentiating dismissals and diversion-based dismissals in court data).

73. Notably, some OLS defendants were offered the opportunity to participate in diversionary programs in Jim Hogg County and earn a dismissal. See, e.g., *State v. Flores Ines Seraquive-Torres*, Cause No. 6040 (County Court of Jim Hogg County, Texas, 2023).

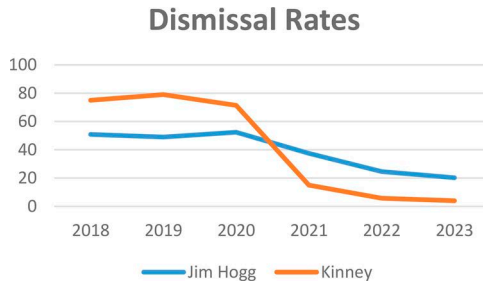


Figure 5.

Rather than dismissals, what prevents the conviction rate from rising much above 50% is the large portion of cases in the post-OLS years that fail to reach a disposition. As will be explained in more detail below, cases where migrants post bail and are removed to home countries are difficult to resolve.⁷⁴ Sometimes, the migrant fails to appear at a Zoom hearing, bond is forfeited, and a warrant is issued. Other times, the trial proceeding is stayed pending appeal of denials of pretrial writs. It is possible that some of the cases filed in 2023 have yet to be resolved because not enough time had passed when the data was compiled from iDocket in the spring of 2024. But it is telling that over 44% of Kinney County cases from 2021 had yet to be resolved by that point—suggesting that these cases may remain in limbo indefinitely.

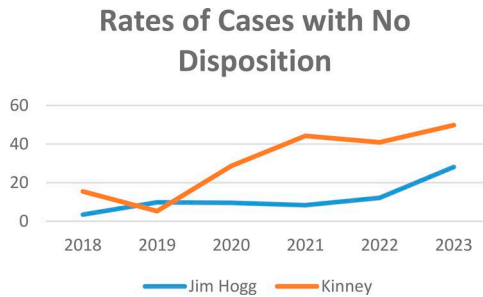


Figure 6.

Professor Eric Fish, whose recent article *Resisting Mass Immigrant Prosecutions* focuses on defense attorney resistance to both Operation Streamline in San Diego and OLS in Texas, points to the low conviction rate in OLS as evidence that the defense lawyering strategies are proving successful.⁷⁵ But Fish is comparing the OLS conviction rate to that of Operation Streamline, a federal court program, rather than to the state misdemeanor court conviction rate, which is typically much lower.⁷⁶ Undoubtedly, defense

74. See *infra* II.d.3, II.e.3.

75. Fish, *supra* note 22, at 1892, 1931.

76. *Id.* at 1893.

attorney resistance is making an impact. But Fish also presupposes that the government's goal is conviction.⁷⁷ It is just as likely that Texas's goal is expulsion from the United States and that it is equally satisfied with a criminal conviction or an outstanding warrant.⁷⁸

Through this review of all misdemeanor cases on iDocket in Kinney and Jim Hogg Counties from 2018-2023, the research team also identified three criminal trespass cases filed well before OLS began, and those provide a baseline to compare the case processing of OLS trespass cases and "normal" case processing in these rural border counties.

In 2019, one trespass case was filed in Jim Hogg County, Cause No. 5284. In that case, the alleged incident occurred on May 30, 2019, and the information was filed on June 20, 2019.⁷⁹ The bond was set as a \$2,000 surety bond, and upon a plea of guilty, the defendant was sentenced to twenty days in custody to run concurrent to any other sentence.⁸⁰ Notably, the sentence was to commence on the day judgment was rendered, suggesting that the accused was out of custody with respect to the trespassing offense at the time he pleaded guilty. Thus, he was arraigned on the information and sentenced on the same day without having to spend a day in pretrial custody on the offense.

In Jim Hogg County in 2020, there were two criminal trespass cases. The first was Cause No. 5314. The incident occurred on November 20, 2019, but the information wasn't filed until January 22, 2020.⁸¹ Bond was set at \$2,000 and was posted using a bail bondsman.⁸² A year later, on March 19, 2021, the prosecutor moved to dismiss the case, and the motion was granted.⁸³ The other trespass case was filed on September 11, 2020, with alleged conduct occurring in 2017.⁸⁴ At the time the information was filed, a bond had been posted in the form of a \$10,000 surety bond.⁸⁵ On April 11, 2022, the prosecutor filed a motion to dismiss the case, noting that the defendant had served 230 days in jail, and the case was dismissed the same day.⁸⁶ Around this same time, this individual was also facing misdemeanor charges alleging that he had made terroristic threats against a family member.⁸⁷ It appears these charges were resolved as part of the global disposition of a felony vandalism offense.⁸⁸ The presence of multiple, and more serious, charges likely explains

77. *Id.* at 1892, 1931.

78. *See infra* II.

79. *State v. Samuel Barrera*, No. 5284 (2019) (Information), available at iDocket.com.

80. *Id.* (Information, Judgment).

81. *State v. Carlos Soliz*, Cause No. 5314 (2020) (Information), available at iDocket.com.

82. *Id.*

83. *Id.* (Mot. to Dismiss, Order) (likely dismissing the case pursuant to an informal diversion agreement contingent on the defendant staying out of trouble for a year).

84. *State v. Kevin Byron Davis*, No. 5326 (2020) (Information), available at iDocket.com.

85. *Id.*

86. *Id.* (Mot. to Dismiss, Order).

87. *State v. Kevin Byron Davis*, No. 5327 (2020), available at iDocket.com.

88. LEXISNEXIS, Criminal Records Search, "Tex. Dept. of Corr.: Davis, Kevin Byron" (July 30, 2024) (on file with author) (showing vandalism charge from May 29, 2021, where sentence was imposed on April 7, 2022).

the relatively high bond amount and length of time in pretrial custody. Notably, most OLS misdemeanor trespassing cases are stand-alone charges, not filed with additional misdemeanor or felony offenses.⁸⁹

The growth in OLS trespassing prosecutions may also contribute to state-wide misdemeanor filing trends. Data from the Texas Courts shows that the category of “all other misdemeanors,”⁹⁰ which includes trespassing cases, has grown significantly as a share of new misdemeanor filings in the Texas courts. In FY 2019, they represented 31% of new filings, but in FY 2022, they comprised 39.31% of new filings, and in FY 2023, 39.25%.⁹¹

The review of court records demonstrates the exponential growth of the caseloads of the rural border counties involved in OLS. It also shows that the presence of the OLS docket is impacting case processing and provides a few examples of pre-OLS criminal trespassing case processing to use as points of comparison. As will be discussed below, the court observations and interviews provide more texture and nuance, describing in richer detail how OLS case processing differs from typical Texas court criminal case processing.⁹²

II. THE GENESIS AND MATURATION OF OLS

In 2021, Texas leveraged the twin “crises”⁹³ of the COVID-19 pandemic and increased migration at the Texas-Mexico border to launch OLS. The Governor declared the border a “disaster area,” which authorized him to deploy state troopers from the DPS and soldiers from the National Guard to apprehend migrants and police the border.⁹⁴ Texas also offered bed space in its prisons to counties unable to house OLS defendants.⁹⁵ Because emergency pandemic-related orders allowed for remote court processing, OLS cases

89. ACLU OLS REPORT, *supra* note 15, at 14.

90. “All other misdemeanors” is the category for misdemeanor cases that aren’t in the following categories: DWI 1st, DWI 2nd, theft, theft by check, drug offenses - marijuana, drug offenses - other, family violence - assault, assault-other, traffic, DWLS/DWLI. *See, e.g.*, TEX. STATE COURTS: COUNTY-LEVEL COURTS, MISDEMEANOR CASE ACTIVITY DETAIL, FISCAL YEAR 2019, https://www.txcourts.gov/media/1445371/misdemeanor_activity_detail-2019.pdf [<https://perma.cc/Z889-GPUS>] (last visited Oct. 13, 2025).

91. *See id.* (120,847 out of 389,818 new filings); TEX. STATE COURTS: COUNTY-LEVEL COURTS, MISDEMEANOR CASE ACTIVITY DETAIL, FISCAL YEAR 2022, https://www.txcourts.gov/media/1455720/misdemeanor_activity_detail-2022.pdf [<https://perma.cc/653N-M3TY>] (116,676 out of 296,813 new filings) (last visited Oct. 13, 2025); TEX. STATE COURTS: COUNTY-LEVEL COURTS, MISDEMEANOR CASE ACTIVITY DETAIL, FISCAL YEAR 2023, https://www.txcourts.gov/media/1459035/misdemeanor_activity_detail-2023.pdf [<https://perma.cc/XBC9-PU27>] (125,813 out of 320,523 new filings) (last visited Oct. 13, 2025).

92. *Infra* II.

93. Joel C. Sati, *On Trumpism and Illegality*, in TRUMPISM AND ITS DISCONTENTS (John A. Powell ed., 2020) at 117–120 (discussing how narratives about emergency are used to drum up fear of migrants).

94. Hernandez, *supra* note 8; *see also* Press Release, Office of the Tex. Governor, DPS Launch “Operation Lone Star” to Address Crisis at Southern Border (Mar. 6, 2021), <https://bit.ly/3Ow383L> [<https://perma.cc/9PWY-MN3V>]; *see also* Davis Winkie & James Barragán, *Deplorable Conditions, Unclear Mission: Texas National Guard Troops Call Abbott’s Rushed Border Operation a Disaster*, TEX. TRIB. (Feb. 1, 2022), <https://www.texastribune.org/2022/02/01/texas-national-guard-border-operation-lone-star-abbott/> [<https://perma.cc/5H77-938S>].

95. *See, e.g.*, Reese Oxner, *Texas Empties Prison to Prepare to Detain Immigrants Arrested During Ramped-Up Border Enforcement*, TEX. TRIB. (June 17, 2021), <https://www.texastribune.org/2021/06/17/immigration-prison-border-jail/> [<https://perma.cc/9KMC-ZV4V>].

could be heard remotely on Zoom without overburdening the infrastructure of rural jails and courthouses. In addition, penalties for many crimes, including misdemeanor criminal trespass, were enhanced in disaster areas. Suddenly, migrants in this “disaster zone” near the border were looking at increased law enforcement presence and increased criminal penalties, while counties were able to prosecute these cases without migrants ever having to set foot in a local jail or courthouse and without the counties having to foot the bill.

OLS has varied over time and from county to county. This Part begins with a description of the first and only misdemeanor trial case—somewhat of a case study.⁹⁶ This Part then describes the genesis and maturation of OLS. It goes on to describe the emergency proclamations and legal underpinnings of OLS, and then to describe a series of initial implementation challenges. This Part concludes by cataloguing the myriad legal challenges brought against OLS.

A. *The Lone Misdemeanor Trial*

On September 13, 2021, Lester Hidalgo Aguilar was arrested for trespassing on private ranch land in Kinney County, Texas.⁹⁷ Aguilar had just crossed the border from Mexico, seeking refuge in the United States after being threatened and tortured by members of drug cartels in Mexico and fleeing his native Honduras due to political persecution years earlier.⁹⁸ Aguilar had machete scars on his forehead and was missing the pinky finger on his left hand due to the abuse of the cartels.⁹⁹ Aguilar is typical of many OLS defendants in that he entered the United States due to fear of conditions in the countries he fled, but he may not have a demonstrable asylum claim.¹⁰⁰

96. According to Amrutha Jindal and Doug Keller of LSDO, there have been 10 felony human smuggling trials between the start of OLS in March 2021 and February 7, 2025. Only one of these occurred during the period covered by this research study—when 18-year-old U.S. citizen Brian Carrillo Ramirez was convicted at trial in October 2023. See Westin Womack, *Kinney County: 18-year-old Found Guilty of Human Smuggling, Gets 10 Year Sentence*, FOX 26 HOU. (Oct. 20, 2023), <https://www.fox26houston.com/news/kinney-county-18-year-old-found-guilty-of-human-smuggling-gets-10-year-sentence> [https://perma.cc/8S7G-ZRE5].

97. *Aguilar v. State*, No. 04-22-00438-CR, 2023 WL 3985259, at *1 (Tex. App. June 14, 2023); see also Jolie McCullough, *A Minor Trespassing Case Gives Gov. Greg Abbott’s Border Initiative its First Courtroom Win*, TEX. TRIB. (May 10, 2022), <https://www.texastribune.org/2022/05/10/texas-border-migrant-trespassing-trial/> [https://perma.cc/5GG8-2LWB] [hereinafter *First Win*] (discussing how, unlike many of those charged in OLS, Aguilar had previously lived in the U.S.—raised in Florida after being brought there as a child—and had a criminal history in the country before voluntarily leaving in his early twenties, following a choice between leaving or being subjected to extended probation in his criminal case).

98. *First Win*, *supra* note 97.

99. *Id.*; see also Transcript of Trial at 159, *Aguilar*, 2023 WL 3985259.

100. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 30) (stating many of their clients’ entry into the U.S. was because they were “genuinely afraid and running from something,” but the difference between those who are able to stay and litigate asylum claims and those who are sent back is dependent on the evidence they have to corroborate their claims) (on file with author).

A few months before Aguilar's arrest, Governor Abbott declared a "disaster" in counties along the Southern border—including Kinney—based on increased migration and the federal government's failure to address it.¹⁰¹ Usually, trespassing on private land has a maximum penalty of 180 days in jail.¹⁰² But Texas law provides for increased penalties for certain offenses, including trespassing, if committed in a "disaster area."¹⁰³ Now Aguilar faced a year in jail for simple trespassing.

DPS officers—deployed as part of OLS—along with U.S. Border Patrol arrested Aguilar.¹⁰⁴ Aguilar was arrested on Gabler Ranch, a parcel of 6,401 acres that three siblings had inherited from their father.¹⁰⁵ Typically, OLS arrests occur on ranch land where landowners have signed agreements allowing law enforcement to enter the property to look for trespassers, and this was likely the arrangement on Gabler Ranch.¹⁰⁶ Border Patrol spotted the group Aguilar was traveling with using an aerial drone, and then contacted DPS to assist with apprehensions and arrests.¹⁰⁷ When DPS arrived, eight agents from Border Patrol were on scene and had already apprehended some members of the group.¹⁰⁸

Because the small rural counties involved in OLS lack the infrastructure to process this volume of cases, two detention centers were built—first in Val Verde County and later in Jim Hogg—to process those like Aguilar who are arrested as part of OLS.¹⁰⁹ Those arrested are booked and magisterated in one of the two detention centers before being transferred to Briscoe or Segovia Unit—state prisons housing pretrial defendants charged under OLS.¹¹⁰

During Aguilar's magistration at the Val Verde Processing Center, his bail was set at \$1,500—an amount he was unable to pay.¹¹¹ He waited eight months locked up in prison before he was able to fight the misdemeanor

101. Proclamation by the Governor of the State of Tex., (May 31, 2021), https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf [<https://perma.cc/LN4V-Q9JQ>] [hereinafter *Proclamation*].

102. TEX. PENAL CODE ANN. § 12.22(2) (1994); *see also* TEX. PENAL CODE ANN. §§ 12.23, 30.05(d) (1994 & 2025) (providing that if the trespass occurs on agricultural land within 100 feet of the boundary of the land, it is a Class C misdemeanor punishable only by a \$500 fine; jail time is not permitted).

103. TEX. PENAL CODE ANN. §§ 12.50(b)(7), 30.02(a)(1) (2025).

104. *Aguilar v. State*, No. 04-22-00438-CR, 2023 WL 3985259, at *1 (Tex. App. June 14, 2023); *see also* Transcript of Trial at 91, *Aguilar*, 2023 WL 3985259. There is, of course, some irony in the fact that OLS relies on federal officers to arrest migrants when the program is premised on the Federal Government's purported inaction at the border.

105. *Aguilar*, 2023 WL 3985259 at *3.

106. *See* Melissa del Bosque, *Texas National Guard Filmed Trespassing During Border Operations*, THE INTERCEPT (Dec. 17, 2021), <https://theintercept.com/2021/12/17/texas-border-militarization-national-guard-operation-lone-star/> [<https://perma.cc/SN45-W6AW>].

107. Transcript of Testimony of DPS Sergeant Ryan Glenn at 101, *Aguilar*, 2023 WL 3985259.

108. *Id.* at 113.

109. Michael Gibson, *Migrant Processing Center in Jim Hogg County Now Officially Operational*, KIIITV.COM (Feb. 9, 2022), <https://www.kiiitv.com/article/news/local/migrant-processing-center/503-06915df3-73fe-4def-8f1f-bd6c3d3aaa53> [<https://perma.cc/5R22-GUTV>]; *see also* Press Release, Office of the Tex. Governor, Governor Abbott Opens Operation Lone Star Jail Booking Facility in Jim Hogg County (Feb. 8, 2022), <https://gov.texas.gov/news/post/governor-abbott-opens-operation-lone-star-jail-booking-facility-in-jim-hogg-county> [<https://perma.cc/2QPV-8ZT6>].

110. Press Release, Office of the Tex. Governor, *supra* note 109.

111. *First Win*, *supra* note 97.

trespassing charges at trial.¹¹² While awaiting trial, Aguilar was appointed counsel, a private attorney who was part of the LPDO-managed panel.¹¹³ Like all those charged with misdemeanors in OLS, Aguilar’s pretrial hearings were held remotely on Zoom, where he appeared from prison, and his attorney appeared from another location.

Of the thousands of misdemeanor cases in OLS, Aguilar’s was the first case to go to trial—and it remained the only misdemeanor trial case for the first four years of OLS.¹¹⁴ The court summoned a jury pool of seventy-five residents. To accommodate the crowds, jury selection was held in the local community center rather than the courtroom.¹¹⁵ During jury selection, locals expressed frustration with the increased migration in their county—some expressing “general dislike of ‘illegals.’”¹¹⁶ All six jurors ultimately selected to serve on the jury had Spanish surnames, reflecting the county’s majority Hispanic population. Three prosecutors presented the case for the State.¹¹⁷ In the closing argument, one prosecutor told the six jurors, “Send the message to not just your community that you agree this should not be allowed to happen. But send a message as loud as you can to all of those people who are continually doing this.”¹¹⁸ The jurors deliberated for just twenty minutes before finding Aguilar guilty.¹¹⁹ Next, it was the judge’s turn to send a message—he sentenced Aguilar to the maximum sentence allowed by law: one year in jail.¹²⁰ Before excusing them, the judge thanked the jury and told them their service was “what makes America great.”¹²¹

B. *The “Border Surge”*

In FY 2021, border apprehensions were at their highest levels ever, with over 1.6 million encounters with migrants who had crossed without authorization.¹²² Though many blamed the surge solely on Biden’s “softer” messaging on immigration,¹²³ the surge in migration—which began in the last months of Trump’s first term—was the result of several factors. First, according to the United Nations, there are more displaced people than ever before,

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The judge declined to impose the maximum fine.

121. Transcript of Trial at 155, *Aguilar v. State*, No. 04-22-00438-CR, 2023 WL 3985259 (Tex. App. June 14, 2023).

122. Gramlich, *supra* note 68.

123. See Stephen Collinson, *Southwest Border Crisis Leaves Biden Vulnerable on All Sides*, CNN (Mar. 16, 2021), <https://www.cnn.com/2021/03/16/politics/joe-biden-immigration-border/index.html> [<https://perma.cc/63HQ-RAQC>].

creating a greater supply of people seeking to cross into the United States.¹²⁴ This includes increasing numbers of migrants from countries other than Mexico arriving at the border; in 2000, 98% of those apprehended at the border were from Mexico, while in 2021, 40% were from Central American countries, with a growing number from South America, the Caribbean, and Africa.¹²⁵ Second, during the COVID-19 pandemic, President Trump began expulsions under Title 42, turning away 1.7 million migrants at the border in a process as short as fifteen minutes, even when migrants were otherwise eligible to apply for asylum.¹²⁶ The brevity of the Title 42 process has led to recidivism—DHS officials estimate that as many as 38% of those apprehended in 2021 were repeat crossers and that the 1.7 million apprehensions represented closer to 1.1 million unique individuals.¹²⁷ Title 42 also created a glut of potential repeat crossers because asylum seekers turned away at the ports were likely to return to the interior to request asylum. Finally, the high number of apprehensions is also a result of greater policing at the border—a greater share of people crossing the border illegally are apprehended than back in 2000 (the year that held the previous apprehension record).¹²⁸ The border surge continued until December 2023—the third year of the Biden presidency, at which point there was a sharp decline in migrant encounters.¹²⁹

Unlawful border crossings in 2021 were concentrated in Texas.¹³⁰ The Rio Grande Valley and the Del Rio/Eagle Pass regions were the busiest with respect to irregular migration.¹³¹ Landowners living in these border regions felt the impact of the surge. One property owner in Maverick County, Texas, described immigrant activity he has seen on his property over the two years

124. Eileen Sullivan, *Migrant Apprehensions Surpass a Fiscal Year Record*, N.Y. TIMES (Aug. 15, 2022), <https://www.nytimes.com/2022/08/15/us/politics/immigration-border.html> [<https://perma.cc/NE8F-R2LM>].

125. Joel Rose, *Border Patrol Apprehensions Hit a Record High. But That's Only Part of the Story*, NPR (Oct. 23, 2021), <https://www.npr.org/2021/10/23/1048522086/border-patrol-apprehensions-hit-a-record-high-but-thats-only-part-of-the-story> [<https://perma.cc/98VN-2T7L>].

126. Sullivan, *supra* note 124; *Title 42: An Indiscriminate Tool to Discriminate*, HARV. C. R.-C.L. L. REV. (Apr. 15, 2022), <https://journals.law.harvard.edu/crcl/title-42-an-indiscriminate-tool-to-discriminate/> [<https://perma.cc/XGR3-PSAS>].

127. Rose, *supra* note 125.

128. *Id.*

129. John Gramlich, *Migrant Encounters at U.S.-Mexico Border Have Fallen Sharply in 2024*, PEW RSCH. CTR. (Oct. 1, 2024), <https://www.pewresearch.org/short-reads/2024/10/01/migrant-encounters-at-u-s-mexico-border-have-fallen-sharply-in-2024/> [<https://perma.cc/YY6Y-RFHN>] (noting high of 249, 741 encounters in December 2023 and only 58,038 encounters in August 2024).

130. Increased fortification of the border in California and Arizona has pushed migration east toward Texas. See *US-Mexico Interactive Border Map*, USA TODAY, <https://www.usatoday.com/border-wall/us-mexico-interactive-border-map/> [<https://perma.cc/LF2V-6GPM>] (last visited Oct. 20, 2025).

131. Dianne Solis, *Border migration falls for 2nd month in a row, but annual total set to exceed 2 million*, DALLAS MORNING NEWS (Aug. 15, 2022), <https://www.dallasnews.com/news/immigration/2022/08/15/border-migration-falls-for-2nd-month-in-a-row-but-annual-total-will-exceed-2-million/> [<https://perma.cc/4NJP-YEKU>]; see also *A Close Look at the Geography of Border Patrol Arrests: How a Spike in Annual Arrests Along U.S.-Mexico Border Hides Remarkable Variation by Sector and Nationality*, TRAC IMMIGR, fig. 14 (Aug. 15, 2023), <https://trac.syr.edu/reports/726/> [<https://perma.cc/QYN4-XBN8>] (noting that the Del Rio sector experienced unprecedented migration from countries other than Mexico and the Northern Triangle countries in 2021 and 2022—seeing large numbers of apprehensions of people from Venezuela, Cuba, Nicaragua, and Colombia).

between 2020 and 2022 as “insane.”¹³² His main source of income was derived from hunting on his property, and he reported that hunts “have been disrupted by undocumented immigrants who he said have threatened his patrons.”¹³³ His fences have been broken, trash left on the ground, and illegal holes drilled into fresh water tanks throughout the property.¹³⁴ Another rancher near Del Rio also reported his fencing is “regularly cut, allowing his cattle to escape, sometimes into roadways, creating a danger.”¹³⁵

Aside from the crossing of undocumented migrants, the border is also the entry point for a good share of illegal drugs¹³⁶. Fentanyl is currently the most feared drug in the public discourse. In Texas, and elsewhere, government officials and political pundits laid the blame for the uptick in fentanyl deaths on Biden’s “open border policies.”¹³⁷ But though much of the fentanyl entering the US is coming from Mexico, “this flow has very little to do with the flow of migrants” because nearly all comes through ports of entry rather than rural unsecured sections of the border, and most of those arrested for smuggling are U.S. citizens.¹³⁸ Nevertheless, fear of fentanyl was central to the narrative calling for increased border security.

C. *Emergency Proclamations*

It was against this backdrop of the border surge that in March of 2021, Abbott announced OLS.¹³⁹ Two months later, on May 31, 2021, Governor Abbott issued a proclamation deeming the “ongoing surge of individuals unlawfully crossing the Texas-Mexico border” an “imminent threat” and “disaster.”¹⁴⁰ The initial disaster proclamation designated fifteen border

132. Ali Linan, *Texas Cops, Landowners Ask for More Help Along Border*, GAINESVILLE DAILY REGISTER (Aug. 16, 2022), https://www.gainesvilleregister.com/texas/news/texas-cops-landowners-ask-for-more-help-along-border/article_39206812-1c9e-11ed-a3c2-db56ffea1251.html [<https://perma.cc/ZB89-8SRU>].

133. *Id.*

134. *Id.*

135. *Id.*

136. David J. Bier, *US Citizens Were 80 Percent of Crossers with Fentanyl at Ports of Entry from 2019 to 2024*, CATO INST. (Aug. 8, 2024), <https://www.cato.org/blog/us-citizens-were-80-crossers-fentanyl-ports-entry-2019-2024> [<https://perma.cc/4GA3-Z7YB>].

137. Editorial, *Yes, Fentanyl Is Killing Texans. No, Abbott's Operation Lone Star Won't Save Them.*, HOUSTON CHRON. (Aug. 16, 2022), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Yes-fentanyl-is-killing-Texans-No-17375581.php> [<https://perma.cc/V6F4-6VET>].

138. *Id.*

139. Press Release, Office of the Tex. Governor, Governor Abbott Hosts Border Security Summit, Announces Comprehensive Border Security Plan to Crack Down on Unlawful Border Crossings (June 10, 2021), <https://gov.texas.gov/news/post/governor-abbott-hosts-border-security-summit-announces-comprehensive-border-security-plan-to-crack-down-on-unlawful-border-crossings> [<https://perma.cc/C2E8-3Q8V>].

140. Under Texas law, “disaster” is defined as “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, other public calamity requiring emergency action, or energy emergency.” TEX. GOV’T CODE ANN. § 418.004 (West 2025); see also *State v. El Paso Cnty.*, 618 S.W.3d

counties part of a disaster area.¹⁴¹ As mentioned above, Texas law provides for increased penalties for certain offenses, including trespassing, if committed in a disaster area.¹⁴² Under Texas law, the disaster declaration also allowed Abbott to unilaterally direct state resources and personnel toward border enforcement.¹⁴³ In May 2021, he deployed 500 Texas National Guard members to the border.¹⁴⁴ The following month, the force was expanded to 1,000 troops.¹⁴⁵

During a two-month period beginning in September 2021, the OLS troop deployment “ballooned from a lean 1,000-volunteer outfit to a mandatory mobilization of up to 10,000 members of the Texas Military Department.”¹⁴⁶ Also in September, the Texas Legislature passed House Bill 9, which authorized nearly \$2 billion in border security funding.¹⁴⁷ Abbott announced the availability of \$100 million in OLS grant funding for local government to enhance efforts to curb illegal immigration.¹⁴⁸ OLS was launched and resourced.

D. *Initial Implementation Challenges*

The scale and the scope of Abbott’s OLS project are best described by Abbott himself: “[w]hat we have done is we actually created additional jail cells and we created a court system down in South Texas.”¹⁴⁹ But creating a new court system presents myriad logistical and operational challenges. Who will manage the paperwork? Where will defendants be housed? Who will represent defendants—particularly in small rural communities described as

812, 818, 822-23 (Tex. App. 2020), *mandamus dismissed* Nov. 20, 2020) (Governor’s disaster order trumped that of localities in COVID-19 emergency). For another detailed description of the legal framework of the launch and development of OLS, see Bill Ong Hing, *The Dystopian World of Operation Lone Star and Its Challenge to Arizona v. United States*, 20 INTERCULTURAL HUMAN RTS. L. REV. 104–09 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5257646 [<https://perma.cc/WD3E-JH4A>].

141. Proclamation, *supra* note 101.

142. TEX. PENAL CODE ANN. § 12.50 (West). Criminal trespass is generally a Class B misdemeanor, but is elevated to a Class A if it occurs in certain designated areas, like on critical infrastructure, such as an electrical power generating facility or railroad yard. TEX. PENAL CODE ANN. § 30.05(a) (West). If the offense occurs in a disaster area, the Class B converts to a Class A, and the Class A converts to an offense with a minimum term of confinement of 180 days. TEX. PENAL CODE ANN. § 12.50(a)&(c) (West).

143. TEX. GOV’T CODE ANN. § 418.017(a)–(b) (West).

144. Proclamation *supra* note 101; see also Winkie & Barragán, *supra* note 94. Texas law places the responsibility for responding to disasters on the governor. TEX. GOV’T CODE ANN. § 418.011 (West).

145. Cassandra Pollock, *Texas Will Deploy 1,000 National Guard Troops to the Border Amid Migrant Surge*, TEX. TRIB. (June 21, 2019), <https://www.texastribune.org/2019/06/21/texas-greg-abbott-national-guard-border-security/> [<https://perma.cc/V3EA-H7VW>].

146. Winkie & Barragán, *supra* note 94.

147. Hernandez, *supra* note 8. Many felt the large-scale deployment was a response to then Fox News commentator Tucker Carlson calling out Governor Abbott’s lack of military response to the “border crisis.” See Tucker Carlson, *Tucker Carlson Show*, FOX NEWS (Sept. 22, 2021), <https://www.foxnews.com/transcript/tucker-biden-punishing-border-patrol-for-enforcing-the-law> [<https://perma.cc/3RN3-HYFG>] (calling out Abbott for not sending troops to border to address border crisis).

148. See Press Release, Office of the Tex. Governor, *Governor Abbott Announces Operation Lone Star Grant Program to Enhance Border Security Operations* (Sept. 20, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-operation-lone-star-grant-program-to-enhance-border-security-operations> [<https://perma.cc/C7BA-ZWSK>].

149. Greg Abbott (@GregAbbott_TX), X (Sept. 28, 2021, 10:51 AM CT), https://x.com/GregAbbott_TX/status/1442879549692338191 [<https://perma.cc/63WF-XPNN>] (sharing an interview in which he provides this statement at 1:04–1:10).

“legal deserts”?¹⁵⁰ On the law enforcement side, state troopers accustomed to handling traffic violations were suddenly responsible for hunting down migrants in brush land near the border. National guardsmen with military training and emergency relief training were enlisted to support immigration enforcement efforts. How would they be trained and resourced for these new roles?

As one interview subject explained, it’s hard to talk about OLS because it has evolved. OLS today doesn’t look “like OLS in 2021 when people were magisterated in parking lots.”¹⁵¹ According to research interviews, OLS has gotten a lot more “functional,” and no longer looks like the “shit show” it was in 2021 or even 2022.¹⁵² Even those sympathetic to the stated policy goals of OLS may find its implementation problematic; one attorney described it as “obscene.”¹⁵³ This section aims to catalogue and describe struggles encountered in the early days of OLS.

1. *Law Enforcement Challenges*

Despite the rhetoric surrounding OLS, which relies on a narrative of federal government inaction, cooperation from the federal government has been central to the implementation of OLS. As one attorney explained, “Border Patrol is actively involved in the arrest in most cases; federal cooperation is essential to [the] operation working. If [the] federal government refused to deport people after [they] bonded out or [were] convicted in OLS, it would completely undermine [the] program.”¹⁵⁴ An OLS judge explained, “In every single one of my cases, Border Patrol arrested them. . . to hand them over to DPS.”¹⁵⁵

The training and technical support of Border Patrol was essential, especially in the early days of OLS. A DPS sergeant testified:

“[I]n the beginning, we heavily relied on Border Patrol. A lot of work they do coincides with the work we do. And I’m not referring to immigration enforcement because we don’t enforce immigration laws, but tracking people, tracking people through properties in the rural areas. So, we leaned on the Border Patrol heavily to help teach us what to

150. Lisa Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway, & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15, 19–20 (2018) (explaining that the shortage of criminal defense counsel in rural areas contributes to the increase in rural jail populations); PAMELA R. METZGER, CLAIRE BUETOW, KRISTIN MEEKS, BLANE SKILES, & JIACHENG YU, GREENING CRIMINAL LEGAL DESERTS IN RURAL TEXAS (2022), <https://doi.org/10.25172/dc.10> [<https://perma.cc/F4TQ-PP84>].

151. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 2).

152. *Id.*

153. Interview #8 with defense counsel (Jan. 18, 2023) (on file with author, at 3).

154. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 6). One attorney reported Kinney County officials would drive migrants to the border patrol office after they were released to facilitate deportation—the sheriff even claimed he drove people to the border himself. *See* Interview #8 with defense counsel (Jan. 18, 2023) (on file with author, at 3).

155. Interview #10 with judge (May 31, 2023) (on file with author, at 30).

look for and how to track people down after they're trespassing on the properties."¹⁵⁶

Border Patrol helped address the logistical challenges of detecting trespassing on ranch lands and gaining entry to private lands to arrest migrant trespassers. When DPS first launched OLS, it "had very few resources, and as the time has gone on [it's] been able to increase the resources with the ability of the cameras and the ability of the drones."¹⁵⁷ Border Patrol had installed its own locks on the gates to many of the private properties near the border so that it could unlock the gates and access the properties—eventually DPS was also given access to these "Border Patrol locks."¹⁵⁸ DPS began using thermal drones and needed to get trained in their use.¹⁵⁹ DPS sought permission to install surveillance cameras on private property so it could detect trespassing activity.¹⁶⁰ Rumors circulated that landowners were being given incentives, like new fences or security cameras if they agreed to let DPS on their property to look for trespassers.¹⁶¹ And body camera footage showed law enforcement arresting people and moving them to locations where there were agreements with landowners to arrest.¹⁶²

Some challenges proved difficult to overcome, even with support from federal agencies and technological resources. Most DPS troopers deployed to the border aren't very experienced. They typically have less than three years on the job and need on-the-job training in report writing and testifying.¹⁶³ They also need training in policing. A prosecutor spoke about a case in which a trooper was at a checkpoint, and a Border Patrol agent walked up and said, "here are two illegals I caught at this ranch, they're your problem now." The prosecutor saw this in the arrest report and asked the trooper, "where were they caught?" The trooper couldn't answer, "so who would be able to testify at trial in the case" to establish the elements of the offense?¹⁶⁴ There were also some instances where body-worn camera footage showed DPS apprehending migrants on federal or public property and then leading them onto

156. Transcript of Testimony of DPS Sergeant Ryan Glenn at 99, *Aguilar v. State*, No. 04-22-00438-CR, 2023 WL 3985259 (Tex. App. June 14, 2023).

157. *Id.* at 98.

158. *Id.* at 118.

159. *Id.* at 81 (testimony of DPS Corporal Eric Ortiz).

160. *Id.* at 98 (testimony of DPS Sergeant Ryan Glenn); *see also* Interview #13 with defense counsel (June 27, 2023) (on file with author, at 11) (describing cameras on private lands that send surveillance to DPS, as well as "air assets like helicopters," drones, and heat vision to locate people).

161. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 11).

162. *Id.*

163. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 4).

164. *Id.*; *see also* Interview #10 with judge (May 31, 2023) (on file with author, at 27) (describing a similar circumstance where Border Patrol handed off custody to DPS, stating merely that the individuals were "arrested legally").

private property to make the arrest for criminal trespass—engaging in entrapment.¹⁶⁵ DPS was told not to break up family units for trespass prosecutions, but it became “challenging” to define what a family unit was, and sometimes DPS would arrest even if a group contained family members.¹⁶⁶

One defense attorney handling OLS felonies and federal alien smuggling cases observed that DPS used more force and was more “reckless” in the arrest process than federal officers.¹⁶⁷ Human Rights Watch released a report finding the rates of vehicle pursuits had increased dramatically since the implementation of OLS and that seventy-four people had been killed and another 189 injured in vehicle pursuits by DPS or local law enforcement in OLS counties between March 2021 and July 2023.¹⁶⁸ Another report by the ACLU contains data that suggests racial profiling in OLS.¹⁶⁹ In 2023, a whistleblower claimed that DPS had been instructed to push migrants back into the Rio Grande and deny them water during a heat wave.¹⁷⁰ One prosecutor suggested that rather than using state troopers from DPS, the state should fund local law enforcement who know the county better and can do the job more effectively and financially efficiently.¹⁷¹ This prosecutor intimated that if the state wants OLS, then they need to place more trust in the counties to operationalize it rather than creating overtime pay for state troopers.¹⁷²

The implementation challenges for the Texas National Guard deployment in OLS were even more dire. Troop deployment started in earnest in the fall of 2021, and by October 7, 5,000 troops had been assigned to OLS, many activated involuntarily.¹⁷³ Normally, National Guard troops are deployed on an emergency basis for short-term deployments, but are given plenty of notice for long-term deployments.¹⁷⁴ But the OLS deployments in the fall of 2021 were an exception—long-term deployments with little notice or planning. One member said he received only four days’ notice.¹⁷⁵

165. Interview #3 with prosecutor (July 22, 2022) (on file with author, at 2); Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 45).

166. Interview #3 with prosecutor (July 22, 2022) (on file with author, at 2). One county started rejecting prosecutions where this policy of not breaking up family units was defied.

167. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 17).

168. “SO MUCH BLOOD ON THE GROUND”: DANGEROUS AND DEADLY VEHICLE PURSUITS UNDER TEXAS’ OPERATION LONE STAR, HUM. RTS. WATCH (Nov. 2023), https://www.hrw.org/sites/default/files/media_2023/11/us_texas1123%20web_0.pdf [<https://perma.cc/H7UV-BB35>].

169. ACLU OLS Report, *supra* note 15, at 4. *But see* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (allowing consideration of race as a factor in determining reasonable suspicion for immigration crimes); Whren v. United States, 517 U.S. 806 (1996) (allowing for pretextual traffic stops).

170. Uriel J. García, *State Investigating Claim That DPS Troopers Were Told to Push Migrants Back into The Rio Grande and Deny Them Water*, TEX. TRIB. (July 18, 2023), <https://www.texastribune.org/2023/07/18/texas-troopers-department-public-safety-migrants-rio-grande-border/> [<https://perma.cc/7SXD-GRDD>].

171. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 6).

172. *Id.*

173. Mark Moore, ‘Suicides’ at Border National Guard Anguish, N.Y. POST (Dec. 25, 2021), <https://nypost.com/2021/12/24/four-texas-national-guard-commit-suicide-since-october/> [<https://perma.cc/PYL7-8VLK>].

174. Winkie & Barragán, *supra* note 94.

175. Moore, *supra* note 173.

Texas was not well-prepared to accommodate this large-scale deployment. There were issues with payroll, housing conditions, and a mission that seemed to many troops to be both politicized and pointless.¹⁷⁶ At least 1,330 of the first 10,000 OLS troops received incorrect pay in the first months of their deployment—forcing some to take out personal loans.¹⁷⁷ Troops arrived at the border to substandard living conditions—“communal trailers crammed with built-in bunk beds stacked three high” in camps that had not yet finished building kitchen facilities.¹⁷⁸ Most National Guard troops lacked the police training required to assist in migrant apprehensions, so they were left to man observation posts looking for migrants to report to Border Patrol.¹⁷⁹ Some described spending their days “sitting at a watch point for hours on end with their thumbs up their ass doing nothing.”¹⁸⁰ The conditions were so bleak that by December 2021, four National Guard members had died by suicide.¹⁸¹ The presence of military personnel turned border areas into war zones, complete with Humvees, tanks, and concertina wire—even in historically welcoming cities like El Paso.¹⁸² In January of 2023, an armed soldier shot a migrant at the border.¹⁸³ In August, another soldier shot a man who was still on the Mexican side of the border in Ciudad Juarez.¹⁸⁴

Overall, the deployment of state troopers and National Guard troops to the border for immigration enforcement in OLS presents a cautionary tale. Though DPS and the National Guard vastly expanded the law enforcement presence in border counties, there were myriad problems in their rapid deployment that negatively impacted migrants, the OLS counties, and the DPS and troops

176. Gus Bova, *The Guardian of the Guard*, TEX. OBSERVER (Mar. 1, 2022), 2022 WLNR 10397608 (Jason Featherstone, who retired after 25 years with the Texas Army National Guard shortly after the OLS deployments, explained, “We’re basically mall cops on the border.”)

177. *Deplorable Conditions*, *supra* note 174.

178. *Id.* This lack of preparedness was mirrored in the emergency deployment of nationalized National Guard Troops in Los Angeles in June of 2025 in response to immigration protests. See Mattias Gafni, *We Published Real Photos of Troops Sleeping on a Floor in L.A. Right-Wing Critics Called Them Fake*, S.F. CHRON. (June 10, 2025), <https://www.sfchronicle.com/california/article/national-guard-photos-20370678.php> [<https://perma.cc/756G-UF8N>].

179. Winkie & Barragán, *supra* note 94 (noting one unit of 25 troops who are police officers in their civilian lives).

180. *Id.* Other troops were dispatched to guard private ranchlands 80 miles from the border. James Barragán, *National Guard Troops Were Dispatched to Famous Texas Ranches with Private Security as Part of Border Mission*, TEX. TRIB. (Mar. 16, 2022), <https://www.texastribune.org/2022/03/16/texas-national-guard-king-ranch/> [<https://perma.cc/5552-CX7Y>].

181. Moore, *supra* note 173; Bova, *supra* note 176.

182. Lauren Villagran, *El Pasoans Troubled by National Guard Tactics*, EL PASO TIMES (Dec. 21, 2022), <https://www.elpasotimes.com/story/news/2022/12/21/el-paso-migrant-crisis-texas-national-guard-greg-abbott-immigration/69747476007/> [<https://perma.cc/H2TQ-VKFN>]; Rose L. Thayer, *Texas National Guard Parks Armored Vehicles at Border with Mexico to Ward off Migrants*, STARS & STRIPES (Dec. 3, 2022), <https://www.stripes.com/theaters/us/2022-12-02/texas-border-migrants-armored-vehicles-%C2%A0-8279595.html> [<https://perma.cc/AM5A-JL36>].

183. David Winkie & James Barragán, *Migrant Shot and Injured by National Guard Soldier Patrolling Border*, TEX. TRIB. (Jan. 20, 2023), <https://www.texastribune.org/2023/01/19/national-guard-migrant-shot-border/> [<https://perma.cc/W9WM-BU72>].

184. Rosa Flores & Sara Weisfeldt, *A Texas National Guard Member Shot a Man Across the Border in Mexico, Mexican Authorities Say*, CNN (Aug. 31, 2023), <https://www.cnn.com/2023/08/31/us/texas-national-guard-mexico-shooting/index.html> [<https://perma.cc/2RSR-5NXL>].

themselves. Many of these problems would have been avoidable if OLS had been scaled up more gradually, but others are more foundational.

2. Court Administration Challenges

The original counties with OLS cases were Val Verde, Kinney, and Jim Hogg, which OLS lawyers described as “small, dinky, rural counties.”¹⁸⁵ OLS resulted in as many arrests in a day or week as these counties had handled previously in an entire year.¹⁸⁶ The existing county court systems were overwhelmed. A separate infrastructure for OLS cases had to be built to accommodate the new volume.

Different judges handle OLS cases—typically visiting retired judges, many of whom are recruited from different administrative regions in Texas.¹⁸⁷ Some judges handle OLS dockets for multiple counties.¹⁸⁸ Three of the initial OLS judges had bail practices viewed as overly friendly to migrant defendants; they were fired and replaced with judges more politically aligned with the mission of OLS.¹⁸⁹ That early incident colors the perception of OLS judges to this day. One defense attorney described the judges as “hand-picked.”¹⁹⁰ Another defense attorney described it: “once there’s a judge friendly to us, they [. . .] kind of kick him out.”¹⁹¹ One OLS judge, Allen Amos, faced judicial disciplinary proceedings for using the racial slur “wet-backs” to describe Latino defendants in OLS proceedings—he was not sanctioned, though he no longer presides over OLS cases.¹⁹²

The work of an OLS judge is challenging. Even with additional judicial resources, one judge described OLS as “an exhausting amount of work” and likened it to the classic Lucy and Ethel chocolate factory scene from “I Love Lucy” where one is “constantly in the pressure of moving cases versus

185. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 4).

186. *Supra* I.c.

187. Interview #8 with defense counsel (Jan. 18, 2023) (on file with author, at 2); Interview #9 with judge (May 15, 2023) (on file with author, at 3-4) (“It settled out pretty quickly that all the OLS cases would be heard by an assigned judge sitting as the county judge for that county.”); Interview #9 with judge (May 15, 2023) (on file with author, at 2) (“The OLS cases were not in our region. And someone reached out to [the head judge of our administrative region] and he sought out volunteers.”); Interview #10 with judge (May 31, 2023) (on file with author, at 3) (indicating they were not located in the county where they presided over OLS cases but were instead just “Zooming in”).

188. *See, e.g.*, Interview #13 with defense counsel (June 27, 2023) (on file with author, at 8) (noting that Zapata County has a judge who presides in Maverick and a prosecutor who handles cases for Webb County).

189. Interview #8 with defense counsel (Jan. 18, 2023) (on file with author, at 2); J. David Goodman, *Cases Dismissed, Judges Replaced: Texas Struggles to Prosecute Migrants*, N.Y. Times (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/us/texas-migrants-operation-lone-star.html> [https://perma.cc/8YTM-ZCH3] (three retired judges—Vivian Torres, Kitty Schild, and Genie Wright—were replaced by others “handpicked” by a top county official).

190. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 4).

191. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 23) (describing judicial turnover in one county in a 1-year span).

192. Taylor Goldenstein, *No Discipline for Texas Judge Who Used Racial Slur to Describe Latino Defendants*, HOUSTON CHRON. (July 10, 2023), <https://www.houstonchronicle.com/politics/texas/article/no-censure-texas-judge-used-racial-slur-defendants-18187290.php> [https://perma.cc/M8YH-LBF5] (commission found the slur “not necessarily appropriate” but did not punish the judge for using it).

making sure everybody's rights are preserved.”¹⁹³ Another judge requested resources to hire law clerks to assist in researching the novel issues posed by OLS and expressed frustration that the Governor's Office had deleted several relevant orders from its website, which made legal research difficult.¹⁹⁴



Figure 7. Photograph of magistration hearing held in the parking lot of the Kinney County Sheriff's Office on Aug. 6, 2021, in the early days of OLS.¹⁹⁵

“Magistration” is the first step in the court processing of criminal cases in Texas. After an arrest, Texas law requires the person with custody of the arrestee to present them to the county magistrate within forty-eight hours.¹⁹⁶ The magistrate must inform the arrestee “of the accusation against him. . . of his right to retain counsel, of his right to remain silent. . . of the person's right to request the appointment of counsel if the person cannot afford counsel;” the magistrate also begins the administrative process for appointing counsel.¹⁹⁷ In the early days of OLS, magistration happened outside in parking

193. Interview #9 with judge (May 15, 2023) (on file with author, at 17).

194. Interview #10 with judge (May 31, 2023) (on file with author, at 13, 17).

195. Image posted by Kinney County Sheriff's Office (@KinneyCountySheriffsOffice), FACEBOOK, *This is Happening!* (Aug. 6, 2021) (posted with comment, “This is happening! 17 Illegals this morning. At the Kinney County Sheriff's Office. Judge Narci Villarreal magistrated each illegal alien. Thank you DPS for all your help.”), <https://www.facebook.com/KinneyCountySheriffsOffice/posts/pfbid02PAPkhHVPNz9SU7jDyD5R6knYJzRahKqXyZDFG7AmrryKDTwGY7dCBsJvGRU9ERvql> [<https://perma.cc/VL6T-QR8D>]. “Judge” Villarreal is not a judge, but rather a justice of the peace. In Texas, a justice of the peace does not need any prior legal education. See TEX. GOV'T CODE § 27.005.

196. TEX. CODE CRIM. PROC. ANN. art. 15.17 (West).

197. *Id.*; see also TEX. CODE CRIM. PROC. ANN. arts. 1.051, 26.04 (West).

lots.¹⁹⁸ Eventually, a “central magistration” system developed for most OLS counties—with two large tents serving as magistration centers, one in Jim Hogg and one in Val Verde County.¹⁹⁹ Migrants are magistrated and processed before being moved to Texas state prison facilities, Segovia and Briscoe units, hours from the border.²⁰⁰

For the misdemeanor cases, further hearings happen on Zoom. As one judge explained, “if we hadn’t had Zoom with OLS when it started, it would’ve been a nightmare. . . You’d be transporting prisoners constantly.”²⁰¹ Though most OLS cases are about trespassing on a particular plot of land in a particular county, the Zoom proceedings themselves are unmoored to any one place. Judges, attorneys, and defendants appear remotely. There is an eerie, detached feeling to the proceedings. Members of the public have access to watch the live stream. Because the interpreter speaks for the Spanish-speaking defendants and many pleas are taken in absentia, the voices of those prosecuted in OLS are largely silenced.²⁰² As one judge describes it:

The judges are in one place in one county. . . and the defendants are in some detention center out in the middle of nowhere. The prosecutors are in another county. And a lot of the prosecutors are using defense lawyers from other counties to assist them in the prosecutions. And [. . .] some of those prosecutors are, from my accounting, where they appear before me as defense lawyers, and then the actual defense lawyers are yet in another part of the State through different legal aid program[s]. So, everybody is all over the place.²⁰³

Attorneys and judges handling OLS cases don’t uniformly like Zoom court hearings but universally agree that the program is unworkable without them.

Everyone acknowledged that, particularly in the early days of OLS, delays in filing charging documents were routine.²⁰⁴ Defendants charged with misdemeanors are supposed to be charged formally within thirty days and within ninety days for felonies.²⁰⁵ If not, they are typically entitled to release with a personal recognizance bond or a release on a reduced bail under Article 17.151.²⁰⁶ However, due to the COVID-19 pandemic emergency,

198. Interview #8 with defense counsel (Jan. 18, 2023) (on file with author, at 2). Magistration hearings were handled by separate judges apart from those handling the later OLS hearings. Interview #10 with judge (May 31, 2023) (on file with author, at 3).

199. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 6); Karen Gleason, *Media Members Get Look Inside Migrant Processing “Tent,”* 830 TIMES (Oct. 27, 2021), <https://830times.com/news-media-members-get-look-inside-migrant-processing-tent/> [<https://perma.cc/4XZS-DMXB>]; Gibson, *supra* note 109.

200. *See infra* II.d.3.

201. Interview #9 with judge (May 15, 2023) (on file with author, at 19-20).

202. There is a separate channel for interpreters to translate to the Spanish-speaking participants in the Zoom proceedings, which facilitates simultaneous interpretation. *See* Interview #9 with Judge, at 20 (on file with author).

203. Interview #10 with judge (May 31, 2023) (on file with author, at 6-8).

204. *See, e.g.,* Interview #9 with judge (May 15, 2023) (on file with author, at 8).

205. TEX. CODE CRIM. PROC. ANN. art. 17.151 (West).

206. *Id.*; *see also* Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 2).

Governor Abbott suspended Article 17.151 “to the extent necessary to prevent any person’s automatic release on personal bond because the State is not ready for trial.”²⁰⁷ Without the teeth of automatic release for its violation, the timeframes in Article 17.151 were routinely ignored. For example, Moctezuma Rivera Castelan was arrested for trespass in Kinney County on October 6, 2021.²⁰⁸ He was magistrated promptly, and the magistrate determined he was entitled to appointed counsel, and he was then sent to Briscoe for pretrial detention.²⁰⁹ But “no one sent paperwork related to [his] appointment of counsel.”²¹⁰ Because LPDO was aware of cases falling through the cracks like this, it reached out to the court on December 16, 2021, which resulted in Mr. Castelan finally being appointed counsel on December 21, 2021—over seventy-six days after his arrest and forty-six days past the deadline by which Kinney County would normally be required to release him.²¹¹ Kinney County never formally charged Mr. Castelan, deciding to dismiss his case on June 14, 2022, 252 days into his detention.²¹² This was an outlier case, but similar delays in OLS are pervasive and troubling to those concerned with due process and the rule of law.

Some cases were delayed because the prosecutor was waiting for police reports from DPS to make a charging decision.²¹³ In others, it seems the cases may have just fallen through the cracks due to the counties’ lack of experience dealing with large caseloads. Ultimately, many of these cases were dismissed, but not until the individuals had been detained for several months.²¹⁴ On the felony side, the primary advocacy mechanism available pre-indictment is a pretrial writ, which causes additional hassles because it creates redundancies in court filings and judicial assignments.²¹⁵ The delays in indictment were significant—one attorney interviewed was working on a case where the arrest had happened nine months prior, and the client still had not been indicted.²¹⁶

There were also errors in the charging documents that were filed. In one case, defense counsel received assignment paperwork from Val Verde County, and the attorney hounded the Val Verde prosecution office for more information until it turned out that the paperwork they received was a mistake—really, the case was from Kinney County.²¹⁷ Another attorney reported getting a case from Kinney County where the arrest happened in Val

207. Exec. Order. No. GA-13 (Mar. 29, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-13_jails_and_bail_for_COVID-19_IMAGE_03-29-2020.pdf [<https://perma.cc/LEY9-KZA9>].

208. *Castelan v. Villarreal*, No. 5:23-CV-1394-JKP-RBF, 2025 WL 424538, at *1 (W.D. Tex. Feb. 6, 2025).

209. *Id.*

210. *Id.*

211. *Id.* at *2.

212. *Id.* at *2.

213. Interview #6 with defense paralegal (Dec. 29, 2022) (on file with author, at 30).

214. *Id.* at 30-31.

215. *Id.*

216. *Id.* at 26.

217. Interview #6 with defense paralegal (Dec. 29, 2022) (on file with author, at 37).

Verde.²¹⁸ Eventually, the cases were dismissed, but again, only after migrants spent months in jail.²¹⁹

Even though court clerks were “working diligently” after OLS launched, there were no systems in place to aid attorneys in filing paperwork. One attorney described it as “taking a year” to get functional filing systems in place, and said in that timeframe “everybody’s constitutional rights are being violated. . .unfortunately, nobody cares about criminals, right?”²²⁰ iDocket is the case management system used in Kinney and many of the other counties, but it’s a private company, and the information available on iDocket is often incomplete; for example, the bond paperwork is often not included.²²¹ This is particularly challenging given that most of the attorneys are not local, so asking them to check the file at the courthouse would require hours of travel at taxpayer expense.²²² Getting bond set or reduced was challenging because the judge overseeing the writ docket to reduce bonds was also “overwhelmed.”²²³ Sometimes it could take over two months for a hearing on a writ to be scheduled, despite writs being emergency proceedings, which should be set promptly.²²⁴

The process for setting court dates on OLS cases was opaque. As one defense attorney described: “I’m not certain, how the court actually decides who is set on what court date. . . There seems to be no organized rhyme or reason. Like, you know, if your charge was a certain date you’ll have your first court date, within ninety days, or sixty days, 120 days, some guys I’ve seen some of these cases, they’ve been arrested for maybe thirty days, forty days. Some guys have been in there for 120 days. It’s just, it’s like somebody just put them in a basket and just pull them out and fifty or so that’s your docket for that day.”²²⁵ Many of the accused wanted to accept plea deals, but “the sheer volume of cases meant people waiting weeks if not months for court appearances” needed to accept a guilty plea.²²⁶

Eventually, OLS overcame some of its initial growing pains. One prosecutor described their role in setting up the prosecution plan for one county based on grant money from the state; they sat down and created a staffing plan, and the Governor was in a “happy mood and wrote [them] a check.”²²⁷ The “staff” worked from within the county, but all of the prosecutors were working remotely, as were the judges and defense attorneys.²²⁸ Initially, there were some concerns about finding competent staff in a small rural area, but

218. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 8).

219. Interview #6 with defense paralegal (Dec. 29, 2022) (on file with author, at 37).

220. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 25).

221. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 16).

222. *Id.*

223. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 21).

224. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 27).

225. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 19).

226. Interview #4 with defense counsel (Aug. 5, 2022) (on file with author, at 2).

227. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 1).

228. *Id.*

most claimed to be successful in hiring “very good staff.”²²⁹ Once court processing stabilized, one prosecutor said most cases are resolved within seventy-five days from arrest to plea date and described the standard offer as time served (which was forty days on average), no fine, with court costs often being waived.²³⁰ But there is still instability—concerns about what will happen when the money runs out on the two-year grants, noting that after the election cycle, the Governor may not be as focused on the program, and there was no way to afford the additional staff needed to run the program absent funding from the state.²³¹

Moreover, these improvements do not remedy the initial damage done to those arrested in OLS in the early days. One defense attorney mused, “I don’t know whether that was an intentional part of the whole goal of screwing these little guys out here, you know, this is what you learn from illegally immigrating, or it’s just a matter of they’re overwhelmed down there.”²³²

3. *Pretrial Detention Challenges*

As mentioned above, OLS defendants are housed in state prison units rather than local jails, and that caused other difficulties. As pretrial facilities where those detained are presumed innocent, jails are subject to different legal requirements than prisons, which are considered punitive. Moreover, individuals in pretrial facilities need more frequent access to communication with counsel and transportation (or video conferencing access) to courts than do individuals serving a sentence after being convicted. Individuals also bail out of pretrial custody, and prisons are not used to facilitating the bail process. Unsurprisingly, the prison units that were converted to pretrial detention facilities as part of OLS took time to adjust.

Conditions can be brutal in prison units designated to house OLS defendants. Defense counsel complained of rat infestation, riots, lockdowns, moldy or uncooked food, and unnecessary strip searches.²³³ Defense counsel also expressed concern that their clients were getting lost in the system, completely incommunicado for weeks. “I can’t imagine being in Mexico or Honduras and knowing my family member [crossed] and not hearing from them for like six weeks and wondering what happened to them.”²³⁴ These dysfunctions have real impacts on individuals facing charges in OLS and on their mental health. As one defense paralegal explained, “I’ve seen a couple of inmates, they start out happy. The[y’re] very optimistic. [S]lowly but

229. *Id.*

230. *Id.* at 2.

231. *Id.* at 3.

232. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 11).

233. See Brant Bingamon, *TDCJ’s Bryan Collier Challenged at Public Meeting*, AUSTIN CHRON. (May 3, 2014), <https://www.austinchronicle.com/news/tdcjs-bryan-collier-challenged-at-public-meeting-12945812/> [https://perma.cc/PDJ9-ACKS]; see also Interview #13 with defense counsel (June 27, 2023) (on file with author, at 30) (describing riots and lockdowns at Briscoe Unit).

234. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 23).

surely [. . .] their mental state starts deteriorating drastically. They start going downhill very, very quickly.”²³⁵ When cases get “lost in the system,” it can also sow distrust between clients and their attorneys.²³⁶

There are also concerns about bail. For individuals fortunate enough to be able to afford release, there are barriers to bail recovery. A small percentage of defendants are out of custody in the United States awaiting immigration proceedings—one prosecutor estimated this fraction to be less than 10% of the total defendant population—but the rest are released to ICE and returned or removed to countries of origin.²³⁷ In the early days of OLS, when migrants did bond out, the bond paperwork was often incomplete and did not contain information that defense counsel could use to contact their client once appointed.²³⁸ Without assistance from counsel, migrants were confused about the court process and when and how to appear for court dates, causing non-appearance and bond forfeiture. Those who were compliant with the conditions of release still faced obstacles to bond recovery. One defense attorney described prosecutors as trying to set the fine at an amount that would require the entirety of the bond.²³⁹ In some circumstances, defense counsel perceived counties as stalling when it came to sending bond money back to defendants, “just sitting on it and hoping the [defendant] just gives up and goes away.”²⁴⁰ As mentioned above, Kinney County has netted millions in bond forfeiture as part of OLS.²⁴¹

4. *Challenges in Provision of Defense Counsel*

Initially, there were tremendous challenges in working out the assignment of indigent defense counsel in OLS cases.²⁴² Because most of the counties in which OLS are prosecuted are small rural counties with few attorneys, both the prosecution and defense have had to contract with attorneys far from the border. Defense and prosecution attorneys mainly hail from larger inland Texas metropolitan areas, such as Houston, Austin, and Dallas. But because hearings are remote, some attorneys “Zoom” in from elsewhere in the country—sometimes as far away as New England or New York.

As part of House Bill 9, passed in September 2021, funds were allocated for the provision of indigent defense in OLS cases. The Texas Indigent Defense Commission awarded a grant to LPDO to serve as “the Indigent Defense Hub” for OLS.²⁴³ LPDO manages appointed counsel for OLS cases arising out of Kinney, Maverick, Val Verde, Zapata, Webb, and Jim Hogg

235. Interview #6 with defense paralegal (Dec. 29, 2022) (on file with author, at 37).

236. *Id.* at 38.

237. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 2).

238. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 17).

239. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 4).

240. *Id.*

241. McCullough, *supra* note 19.

242. Interview #9 with judge (May 15, 2023) (on file with author, at 8).

243. LONE STAR DEFS., *supra* note 52.

Counties.²⁴⁴ The appointment list includes private attorneys as well as two public defender offices, Texas Rio Grande Legal Aid (TRLA), and Neighborhood Defender Services (NDS)—a public defender office that began in Harlem, New York, and has now expanded to several cities.²⁴⁵ In January 2022, to address the need for more defense counsel, the Supreme Court issued an order allowing out-of-state attorneys to handle misdemeanor OLS cases.²⁴⁶

Because of the distance involved, defense counsel almost never meet with their clients in person. Almost all communication takes place through videoconferencing, whether clients are locked up in Briscoe or Segovia prisons or deported to Mexico or Central America. Language barriers prove an additional barrier to communicating with counsel, as many defendants speak Spanish or indigenous languages and must rely on interpreters to communicate with English-speaking attorneys. Likewise, prosecutors rarely meet in person with the law enforcement officers involved in their cases, whether they be from local law enforcement, DHS, or DPS. Counsel on both sides rarely see the border areas where defendants are apprehended or the properties OLS prosecutions claim to protect.

One defense attorney mentioned a client who had been arrested at the end of August, the complaint was filed early September, he was in prison until December without ever talking to a lawyer; he then bonded out and was not assigned to her case load until June of the following year, about ten months after his arrest.²⁴⁷ Another of her clients was arrested nearly three weeks before she was appointed, and he was in prison the entire time.²⁴⁸ Her office had dealt with cases where clients had not been appointed attorneys for “five, six, eight months” after their arrests despite still being in custody.²⁴⁹ These delays were usually because court paperwork was not routed to LPDO to notify it to assign counsel.

Defense attorneys reported the emotional toll of the work. One described support staff quitting because it was “embarrassing to be part of a country that treats human beings this way.”²⁵⁰ One defense attorney research subject began wiping away tears during their interview as they explained how frustrating the work was because they were so often just pleading clients

244. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 2).

245. LONE STAR DEFS., *supra* note 52.

246. Emergency Order Regarding Indigent Defense and the Border Security State of Disaster Permitting Out-of-State Lawyers to Practice in Texas Temporarily at 1–2, Misc. Docket No. 22-9007 (Tex. Jan. 21, 2022), <https://www.txcourts.gov/media/1453498/229007.pdf> [<https://perma.cc/9GQ9-BMYZ>]; see also *Operation Lone Star Defense Panel Attorney*, LONE STAR DEFS., https://www.olsdefense.org/_files/ugd/3ccef_305a36902ff84fc18053f7e5b41d33d1.pdf [<https://perma.cc/R7LS-K8ND>] (last visited Oct. 17, 2025) (recruitment document for out-of-state attorneys to represent Operation Lone Star defendants).

247. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 5–6).

248. *Id.* at 6.

249. *Id.*

250. *Id.*

guilty.²⁵¹ Others described lots of “attrition” because of the workload and feelings of helplessness in the work.²⁵²

5. *Challenges Relating to Communication and Collaboration*

Communication in OLS would prove challenging given the many agencies and individuals involved. Normally, communication in criminal prosecutions is facilitated by proximity—a prosecutor can swing by the office of the arresting officer to clarify details in a sloppily written police report. The defense attorney may run into a prosecutor in court or at the local lunch counter and strike up a conversation about discovery or settlement. However, nearly all misdemeanor court appearances are on Zoom, and attorneys agree that Zoom court is less than ideal—“something is lost when you’re not there in person.”²⁵³

Client communication is difficult because you can’t whisper in a client’s ear or tap them on the shoulder.²⁵⁴ And there’s no ability to deal out a case in court through a face-to-face interaction with opposing counsel.²⁵⁵ Defense counsel described it as challenging to negotiate and communicate with prosecutors, given the remote hearings:

It’s very hard via Zoom to like kind of corner them and ‘okay, like give me this right now,’ you know? Like, ‘I need this right now, I’m not leaving this office until you give it to me, and now,’ I’m—it’s very frustrating.”²⁵⁶

Another defense attorney echoed these concerns, “It’s hard to get in touch with the prosecutors. Sometimes they just won’t answer emails. They won’t answer their phone if I call the office.”²⁵⁷

One prosecutor described the challenges of working remotely on OLS cases, explaining that he is normally used to sitting down in his office, reading the report, and if there is a gap in it, bringing the officer in and reviewing it—but that practice is impossible working remotely.²⁵⁸ His office contemplated hiring one prosecutor to work on site, but was told that no one would move to the small rural city for \$70,000 because there are no stores, sporting events, or law school.²⁵⁹

One attorney described the process of going over plea agreements with clients:

251. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 24).

252. *Id.* at 32.

253. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 4).

254. *Id.*

255. *Id.*

256. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 18).

257. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 35).

258. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 4).

259. *Id.* at 4-5.

“[O]n the Zoom I would share my screen and have the plea paperwork on the screen, and I would be reading the admonishments, because back then they wrote it in English and Spanish, so they would be able to follow along, and then I would read along, or I would read it to them as well.”²⁶⁰ Sometimes support staff with Spanish language ability would read plea paperwork and admonishments rather than attorneys.²⁶¹ Defense counsel described language as a barrier and described challenges in getting timely access to interpreters. One had resorted to paying out of pocket for interpreter services, voicing concerns about getting reimbursement because the interpreter they were using was not court certified.²⁶² Another used Google translate to translate texts on WhatsApp from Spanish to English to communicate with clients on bond.²⁶³ Another talked about the difficulties of explaining “complex topics” on WhatsApp “using Google translate as an intermediary.”²⁶⁴ Some migrants don’t speak English or Spanish, but instead speak indigenous languages and require special interpreters.²⁶⁵

6. *Challenges Relating to Discovery*

Another recurring theme in the interviews was complaints about delays in getting discovery. It’s challenging to get timely discovery from local police, DPS, and Border Patrol in the same case. Adding to the delays, the county attorney’s office is somewhat overwhelmed by its expanded case load.²⁶⁶ Arrests typically involve several officers, sometimes as many as eighteen, but discovery—reports and body-worn camera footage, for example—would be produced only from two of them.²⁶⁷ On the felony side, defendants are not entitled to discovery until after a case is indicted and given the delays in getting cases indicted, that creates additional hurdles for defense counsel to obtain discovery promptly.²⁶⁸ As one defense attorney explained, “We have to beg for discovery. . . We won’t have discovery by arraignment. Hardly ever. The State will drag [its] feet on it, or they will give us a partial production. . . So, we’re not getting quick discovery. We’re not getting thorough discovery. We’re not getting complete discovery. And it’s very frustrating.”²⁶⁹

260. Interview #6 with defense paralegal (Dec. 29, 2022) (on file with author, at 10).

261. *Id.*

262. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 42).

263. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 17).

264. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 36).

265. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 18).

266. Interview #1 with defense counsel (June 6, 2022) (on file with author, at 19-20).

267. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 14).

268. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 24) (citing to TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017)).

269. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 19-20).

Even prosecutors expressed frustration with discovery delays. DPS represented that discovery would be turned over from the agency to the prosecuting entity within ten days so charging decisions could be made timely, in accordance with Texas state law. But often prosecuting entities weren't getting discovery for two to six months.²⁷⁰ Prosecutors reported this as a problem to DPS and were told it would be addressed, but the problem wasn't remedied because of a "lack of urgency."²⁷¹ In addition, different law enforcement entities have different ways of documenting an encounter or arrest—which makes it challenging to even know what discovery exists. For example, Border Patrol does not have body-worn camera, so when the first to arrive on scene are Border Patrol Officers, there won't be footage of the initial encounter, whereas if DPS initiates the encounter, there will typically be footage.²⁷²

7. *Variability by County*

There is geographic variability as well in OLS. There are "systemic problems and features, but different counties look different."²⁷³ As one attorney explained, "each county is very different—each one has [its] own flavor depending on the judge."²⁷⁴ Some of the early adopter counties—like Kinney, Val Verde, and Jim Hogg—were also guinea pigs in that they had to build out OLS systems as they were addressing new logistical challenges without a working model to replicate. Counties later to the game, like Webb, had fewer glitches overall because the program was up and running by the time they joined OLS. Webb is also a more populous county, given the presence of Laredo (population approximately 250,000),²⁷⁵ and so they were better equipped to deal with a higher volume of cases than the rural border counties. That said, growing pains were experienced all along the border when OLS was adopted and that resulted in delaying things as fundamental as charging defendants, appointing them attorneys, providing discovery, and calendaring court hearings. Similarly, the early days of OLS caused mental pain and anguish for National Guard troops who were dislocated from their communities without warning and placed in substandard conditions without consistent pay, and for migrant defendants housed in punitive prisons and isolated from attorneys and families—sometimes held incommunicado without charges for months and lost in the system.

270. Interview #3 with prosecutor (July 22, 2022) (on file with author, at 3).

271. *Id.*

272. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 32).

273. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 2).

274. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 8-9) (describing one Maverick County judge as "a little bit snappy with everybody" and "hostile to defense").

275. *Laredo, TX: Census Place*, DATA USA, <https://datausa.io/profile/geo/laredo-tx/#:~:text=95.2%25%20of%20the%20people%20in,share%20of%20the%20total%20population> [https://perma.cc/83PX-43JD] (last visited Oct. 8, 2025).

The financial costs of prosecution are also significant. Abbott says Texas has spent \$77 million on OLS prosecutions.²⁷⁶ Though Abbott claims 50,000 criminal arrests, Texas court data suggests that far fewer people have been processed through the Texas state courts—probably closer to 15,000.²⁷⁷ That suggests a per prosecution cost of about \$5000, which is incredibly high given that most of the cases processed are misdemeanor trespassing cases.²⁷⁸ These massive expenditures did not prevent pervasive noncompliance with the procedural requirements of Texas law in the early days of OLS, nor did they prevent unwarranted human suffering by guard troops and migrants.

E. *Legal Challenges to OLS*

Because so much is novel about OLS, it provides fertile ground for legal challenges. The team at LPDO (now renamed the Lone Star Defenders Office), the entity tasked with providing counsel for those accused in OLS cases in the primary OLS counties, has been aggressively litigating cases at the trial, pretrial writ, and appellate level.²⁷⁹ Likewise, ACLU, its affiliates, and other non-profit organizations have engaged in civil legal strategies to stymie OLS, including both civil lawsuits and attempts to engage the United States Department of Justice in enforcement. These challenges have raised concerns about federal preemption, equal protection, due process, the Fourth Amendment, and violation of federal statutes among others. Each is now addressed in turn.

1. *Federal Preemption*

Federal law is the supreme law of the land.²⁸⁰ So even though police powers are historically reserved for the states, some state laws can be preempted by federal law. Federal preemption occurs only in three situations: (1) state law is preempted when a federal law expressly preempts state law, (2) States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance, and (3) state laws are preempted when they conflict with federal law including cases where “compliance with both federal and state

276. Letter from Governor Greg Abbott to U.S. House of Representatives Mike Johnson et al., *Governor Abbott Calls On U.S. Congress To Reimburse Texas For Historic Border Security Efforts* (Jan. 23, 2025), https://gov.texas.gov/uploads/files/press/Congressional_Leadership_and_Texas_Congressional_Members.pdf [<https://perma.cc/MYC6-RTT8>].

277. ACLU OLS REPORT, *supra* note 15 (the period for the ACLU data set was shorter than the entire lifespan of OLS, so, rather than 13,306, I am assuming roughly 15,000 people).

278. See Priscillia Hunt, James Anderson, & Jessica Saunders, *The Price of Justice: New National and State-Level Estimates of the Judicial and Legal Costs of Crime to Taxpayers*, 42 AM. J. CRIM. JUST. 231, 231, 234-35 (2016) (finding average cost of rape and sexual assault prosecution \$2000-\$5000, average cost of robbery prosecution \$600-\$1300, average motor vehicle theft prosecution \$200-\$400, etc.).

279. Fish, *supra* note 22, at 1892.

280. U.S. CONST. art. VI, cl. 2.

regulations is a physical impossibility.”²⁸¹ “The federal power to determine immigration policy is well settled” and is intertwined with national security and foreign policy interests.²⁸² Though the federal immigration code does not expressly preempt state law, attempts by states to regulate immigration have often been struck down under field preemption doctrine.²⁸³

However, trespassing is a state law charge that facially does not regulate immigration. Though many credibly argue that OLS trespassing prosecutions are pretextual attempts to regulate immigration, these prosecutions are unlikely to be deemed preempted by federal immigration law under existing doctrine.²⁸⁴ There is a stronger federal preemption argument for smuggling charges.²⁸⁵ The Texas human smuggling statute survived a facial challenge because it was, like trespassing, a “neutral” law that criminalizes smuggling of citizens and noncitizens alike, and could be applied constitutionally in a non-immigration-related situation, for example, to a person smuggling a robbery suspect lawfully present in the United States.²⁸⁶ Despite courts’ rejection of facial challenges, as-applied challenges have experienced limited success. In *Gutierrez v. State*, the defendant argued, first in a motion for a new trial, and then on appeal, that the Texas human smuggling law was preempted by federal immigration law as applied to individuals like herself who were smuggling people present in the United States in violation of federal immigration laws.²⁸⁷ Initially, a three-judge panel of the Court of Appeals of Texas agreed and reversed Gutierrez’s convictions, and the court denied rehearing en banc—but after a change to the composition of the court, the petition to rehear the case en banc was granted and the earlier opinion withdrawn; ultimately, the court rejected the federal preemption challenge and affirmed the conviction.²⁸⁸

In the fall of 2023, Texas called a special legislative session to address illegal immigration and passed S.B. 4, a bill that created two criminal offenses that directly regulate immigration by prohibiting noncitizens from illegally

281. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963)).

282. *Arizona*, 567 U.S. at 395; see also U.S. CONST. art. I, § 8, cl. 4.

283. See, e.g., *Arizona*, 567 U.S. 387; *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023–25 (9th Cir. 2013); *United States v. South Carolina*, 720 F.3d 518, 531 (4th Cir. 2013); *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1262–67 (11th Cir. 2012); *United States v. Alabama*, 691 F.3d 1269, 1285–88 (11th Cir. 2012); *Fuentes-Espinoza v. People*, 408 P.3d 445, 452 (Colo. 2017).

284. See *Arizona*, 567 U.S. at 399–415 (2012); see also *Whren v. United States*, 517 U.S. 806, 813 (1996) (rejecting claim relating to pretextual stop).

285. TEX. PENAL CODE ANN. § 20.05 (West 2024).

286. *State v. Flores*, 679 S.W.3d 232, 246–47 (Tx. App. 2023) (“While these arguments may be persuasive in the context of a preemption-as-applied challenge, we do not find them persuasive in a facial attack.”); see also *State v. Burciaga*, No. 08-23-00034-CR, 2024 WL 3917196, at *6–10 (Tx. App. Aug. 23, 2024) (not published) (rejecting facial challenge and concluding as-applied challenges were premature).

287. Amended Appellant’s Opening Brief at 1, *Anna Mercedes Gutierrez v. State*, No. 13-24-00208-CR (Tx. App. July 23, 2024); see also Hing, *supra* note 140, *47–48 (discussing *Gutierrez* in detail).

288. Order Before the Court En Banc, No. 13-24-00208-CR (Tx. App. Jan. 15, 2025); *Gutierrez v. State*, 721 S.W.3d 639, 648–57 (Tex. App. 2025) (en banc) (rejecting as-applied constitutional challenge).

entering or reentering the state and establishing removal procedures.²⁸⁹ Recently, the Fifth Circuit upheld a preliminary injunction preventing enforcement of S.B. 4 based on federal field preemption.²⁹⁰ Increasingly, it appears a goal of OLS is to tee up a challenge to *Arizona v. United States*, the Supreme Court case, which prevents state law enforcement of immigration crime.²⁹¹

2. Due Process Challenges

LPDO, NDS, and TRLA attorneys have filed countless challenges about the systematic violations of their clients' rights based on the State's complicity in the deportation of migrant defendants during the pendency of their cases, which prevents their clients from effectuating their trial rights, such as right to counsel, right to confront and cross-examine witnesses, and right to a speedy trial.²⁹² These claims are often litigated as pretrial writs of habeas corpus; if a claim can be litigated as a pretrial writ, under Texas law, it is immediately appealable if denied. But in *Ex Parte Dominguez Ortiz*, the Court of Criminal Appeals determined that pretrial writs of habeas corpus could not be used to litigate claims under the Due Process Clause of the Fifth and Fourteenth Amendments, nor to litigate speedy trial, right to confrontation, or right to counsel claims under the Sixth Amendment.²⁹³ The court found that these claims would be aided with further factual development at trial and also found that some of the claims were not yet ripe—for example, in the right to counsel violation context, the court noted, “If trial never commences, appellant will never suffer from an ill-prepared defense owing to pretrial deprivation of counsel.”²⁹⁴

The challenge in litigating the due process claim is both ripeness, as delineated by the *Dominguez Ortiz* court, and the difficulty in demonstrating state complicity in the deportation. In the federal context, the United States must decide whether to prioritize deportation or criminal prosecution and cannot hold defendants in immigration custody indefinitely to facilitate a criminal trial.²⁹⁵ Typically, if the federal government deports a defendant during the case, the case will be dismissed for violating due process.²⁹⁶

289. *United States v. Texas*, 144 F.4th 632, 640–41 (5th Cir. 2025), reh'g en banc granted, opinion vacated, 150 F.4th 656 (5th Cir. 2025); *see also* Hing, *supra* note 140, *30–39, 56–63 (discussing the Fifth Circuit's reasoning, the legality of S.B. 4 more generally, and the likely response from the current U.S. Supreme Court).

290. *Id.* at 671–77.

291. *Arizona v. United States*, 567 U.S. 387 (2012); *see also* Interview #3 with defense counsel (July 22, 2022) (on file with author, at 3).

292. *See, e.g.*, Appellant's Brief, *Ex Parte Jorge Favian Dominguez Ortiz*, No. 04-22-260-CR (Tx. Crim. App. July 6, 2022); *see also* Interview #10 with judge (May 31, 2023) (on file with author, at 34–36) (counties were holding migrants who had posted bail to enable ICE to pick them up for deportation).

293. *Ex parte Dominguez Ortiz*, 668 S.W.3d 126, 134–40 (Tex. App. 2023).

294. *Id.* at 138.

295. *United States v. Soriano Nunez*, 928 F.3d 240, 245 (3d Cir. 2019); *United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019).

296. *See, e.g.*, *United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128, 1138–40 (M.D. Fla. 2015); *United States v. Munoz-Garcia*, 455 F. Supp. 3d 915, 919–21 (D. Ariz. 2020).

But it's harder to get a dismissal when the state is the prosecuting entity and the federal government effectuates the removal. Defense attorneys point out that the state can ask the federal government to parole the defendant into the country, either allowing him to remain in the U.S. pending trial or allowing him to enter the U.S. only to attend trial; clearly, the federal government could "thumb [its] nose at the state authorities. But it may open an avenue for these defendants to go to trial."²⁹⁷

As one defense attorney explained:

[T]he State has the upper hand. When someone's deported, they can't come back into the country at all for any reason. And so, the State will, right before trial, they'll have an in-person hearing. Well, the person can't be there in person, so they forfeit their bond, which is a considerable amount of money for everyone involved.²⁹⁸

3. *Equal Protection Clause*

Defenders have also raised selective-enforcement claims alleging that OLS violates the Equal Protection Clause because it discriminates based on sex. For the first years of implementation, only men were prosecuted for trespassing—a practice the counties adopted because there were no pretrial detention beds for women.²⁹⁹ Some women were prosecuted for felonies, but they were not arrested; as one attorney explained, "they'll give them what [. . .] looks like a traffic ticket, but where they usually put 'speeding,' it says like smuggling five times."³⁰⁰ In 2023, perhaps to counter claims of sex discrimination, counties began to engage in prosecutions of women for trespassing after designating bed space for females.³⁰¹

There were some early wins based on the sex-selective prosecution challenges—including dismissals of cases.³⁰² Eventually, the selective prosecution issue wound up before the Court of Criminal Appeals on the appeal of the denial of a pretrial writ of habeas corpus. Though the court found the issue cognizable on a pretrial writ, it ultimately denied the claim on the merits.³⁰³ In analyzing the claim, the court addressed two prongs: (1) discriminatory effect,

297. Interview #9 with judge (May 15, 2023) (on file with author, at 27).

298. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 3-4).

299. *Ex parte Aparicio*, 707 S.W.3d 189, 195-97 (Tex. Crim. App. 2024) (noting that out of the 4,076 trespassing cases in the LPDO system, zero women had been arrested, though women had been arrested for felony offenses).

300. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 19).

301. Jolie McCullough, *Facing Sex Discrimination Claims, Texas Begins Jailing Migrant Women Under Border Crackdown*, TEX. TRIB (Jul. 26, 2023), <https://www.texastribune.org/2023/07/26/women-arrests-texas-border-operation-lone-star/> [<https://perma.cc/87Z4-CSNL>]. Women are now housed at the Lopez Unit in Edinburg, Texas, with a capacity of 200 women. See Bingamon, *supra* note 233.

302. See Gerald Harris, *Operation Lone Star: South Texas Judge Dismisses Case of 6 Migrants Accused of Trespassing*, KHOU-11 (Sept. 21, 2022), <https://www.khou.com/article/news/local/texas/south-texas-operation-lone-star-sex-based-discrimination/285-5dc99465-a8ce-4631-82a8-14af85f6d49c> [<https://perma.cc/ZY94-XKLA>].

303. *Aparicio*, 707 S.W.3d at 203.

and (2) discriminatory purpose, and ultimately held that the defense had failed to establish the “men only” policy was “motivated by a discriminatory purpose.”³⁰⁴ According to the court’s logic, the defense was required to show not simply differential treatment based on sex, but an invidious motive or hostility to men, “[o]therwise, penalizing men for knowingly trespassing in the women’s bathroom would be unconstitutional. So would having gender-specific prisons and state laws concerning statutory rape.”³⁰⁵ The court acknowledged that the standard it enunciated was “rigorous” and “demanding” but insisted that the defense demonstrate that the facially neutral trespassing law was being “administered in bad faith” to establish a selective prosecution claim.³⁰⁶ This exacting standard has all but snuffed out sex-selective prosecution claims in OLS and in Texas more generally.

4. *Jail Overstays and Fourth Amendment Challenges*

In August 2023, the ACLU filed a lawsuit against Kinney and Val Verde counties, alleging they had held migrants in custody for as long as six weeks after their cases were dismissed or they had served their sentences. The lawsuit alleged their over-detention violated the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment.³⁰⁷ The allegations in the complaint were consistent with the experience of defense counsel interviewed in this study, who reported having clients incarcerated for weeks after judges had signed orders releasing them.³⁰⁸ Even U.S. citizen defendants experienced over-detention.³⁰⁹ In the ACLU lawsuit, the District Court denied a motion to dismiss the case, and the county and state official defendants sought interlocutory review, which is now pending.³¹⁰

5. *Violation of Federal Law*

In the summer of 2023, Texas placed lines of buoys in the Rio Grande River and fortified its banks with concertina wire to prevent and deter migrants from crossing the river into the United States. Texas used language

304. *Id.* at 204–07.

305. *Id.* at 205.

306. *Id.* at 207–08.

307. Uriel J. Garcia, *Texas Imprisoned Migrants After They Should Have Been Released, Lawsuit Claims*, TEX. TRIB. (Aug. 21, 2023), <https://www.texastribune.org/2023/08/21/texas-migrants-lawsuit-aclu-operation-lone-star-detention/> [<https://perma.cc/J47R-EH7J>]; *see also* Complaint, Edgar Garces Robles et al. v. Maria Ramirez et al., 1:23-cv-00981 at 32–35 (W.D. Tex., Aug. 21, 2023), https://www.aclutx.org/app/uploads/2023/08/2023-08-21_complaint_comms.pdf [<https://perma.cc/UZ9Z-SX8L>].

308. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 28) (“Getting somebody released is also a headache. Even after the judge signs the order for them to be released, it’s taking them like a week or two to even get home.”)

309. *Id.* at 29 (noting that even US citizen clients were delayed in being released and opining that the delays may have to do with prison staffing issues).

310. Robles v. Martinez, No. 24-50595 (5th Cir. filed July 24, 2024) (oral argument was heard June 4, 2025).

of “invasion” to justify self-help actions and militarization of the border.³¹¹ Immigration advocates feared that the buoys would not deter migrants but instead would cause a hazard to those crossing and result in increased rates of drowning.³¹² Soon, reports of drownings started to pepper the news.³¹³ Biden’s Department of Justice quickly filed suit alleging the placement of the buoys without approval from the federal government violates federal law—the Rivers and Harbors Appropriation Act of 1899.³¹⁴ Likewise, Mexico intimated that the placement of the buoys violated international treaties.

Eventually, the Fifth Circuit determined Texas’s buoys could remain and vacated an earlier preliminary injunction because it was unlikely the section of the Rio Grande in question constituted “navigable waters” subjecting it to the Rivers and Harbors Appropriation Act.³¹⁵ After the election, the case was placed in abeyance to allow the new federal administration to assess and determine whether the case could be resolved without trial.³¹⁶ It is likely the Trump administration will drop the challenge.

6. *Other Potential Challenges*

There are myriad other potential challenges to OLS. For example, under current Equal Protection Clause jurisprudence, policies that distinguish citizens from noncitizens are subject to strict scrutiny if enacted by states, but only rational basis scrutiny if enacted by federal authorities.³¹⁷ One potential challenge to OLS is to argue that the remote case processing and separate OLS system and procedures violate equal protection. The federal appeals courts have blessed separate case processing for migrants in the challenges brought against Operation Streamline under rational basis review.³¹⁸ But it’s an open question whether differential treatment of non-citizens would withstand a stricter level of scrutiny as required when the state is the governmental

311. Daranesha Herron, *Gov. Greg Abbott Doubles Down on Declaring ‘Invasion’ at Texas-Mexico Border*, KVUE.COM (Sept. 20, 2023), <https://www.kvue.com/article/news/special-reports/at-the-border/greg-abbott-border-invasion/269-3315dfff-628e-4747-b195-e04ba8982795> [<https://perma.cc/CY7Q-4QEU>].

312. See, e.g., Edgar Sandoval, Jay Root & J. David Goodman, *Texas’ Harsh New Border Tactics Are Injuring Migrants*, NY TIMES (July 19, 2023), <https://www.nytimes.com/2023/07/19/us/texas-border-migrants-abbott.html> [<https://perma.cc/4D53-K3KH>]; see also Abel Rodriguez, *Lethal Immigration Enforcement*, 109 CORNELL L. REV. 465, 475–82 (2024).

313. See, e.g., Sandoval, *supra* note 313.

314. 33 U.S.C. § 403; see also J. David Goodman, *Justice Department Sues Texas Over Floating Barrier in Rio Grande*, NY TIMES (July 24, 2023), <https://www.nytimes.com/2023/07/24/us/texas-migrants-border-rio-grande-justice-department.html> [<https://perma.cc/E25N-SC94>]; see also Mark Joseph Stern, *Texas’ Latest Attack on the Biden Administration Is Coming Undone by a Technicality*, SLATE (July 26, 2023), <https://slate.com/news-and-politics/2023/07/biden-versus-texas-greg-abbott-fail.html> [<https://perma.cc/4AEH-BFRC>].

315. *United States v. Abbott*, 110 F.4th 700, 721 (5th Cir. 2024); see also Hing, *supra* note 140, at *39–46 (discussing the litigation about the razor wire in the Rio Grande in more detail).

316. See Joint Status Report, Doc. 276, Case No. 1:23-CV-853 at 1 (June 26, 2025); see also Joint Status Report, Doc. 284, Case No. 1:23-CV-853 at 1 (W.D. Tex. Dec. 23, 2025).

317. See generally Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1429 (2019) (compiling cases).

318. *United States v. Ayala-Bello*, 995 F.3d 710, 715 (9th Cir. 2021).

entity discriminating. Admittedly, Texas is likely to say it's being geographically selective rather than discriminating based on citizenship status—and it's true a few citizens have been prosecuted for trespassing as part of OLS when apprehended in the borderlands.

The ACLU urged the Department of Justice under President Biden to file a Title VII claim against OLS on the basis that it discriminates by both race and national origin.³¹⁹ Others have argued that there are potential international human rights law and treaty violations at play.³²⁰

There is also potential to consider organizing and education rather than litigation as strategies to address OLS. Binational litigation legal organizations like *Al Otro Lado* have engaged in efforts to educate migrants on the southern side of the border—both in person and online—so that migrants know their rights and are prepared for the challenges of the immigration asylum system, and this could be used as a model to address OLS.³²¹

III. LESSONS LEARNED

After providing this descriptive account, the next Part attempts to distill key lessons to be learned from the implementation and development of OLS. These lessons are that (1) OLS functions as a separate and distinct legal system, (2) rurality plays a central role in OLS, (3) the near impossibility of trial has a tremendous impact on OLS proceedings, and (4) OLS demonstrates the opacity and manipulability of criminal justice data. These lessons are intertwined. The separate nature of OLS is attributable to the role rurality plays in its operation. Likewise, the near-impossibility of trial is central to why OLS operates so distinctively. Moreover, a key purpose of OLS seems to be the creation of criminal justice data used to justify both its existence and expansion.

A. *Separate and Distinct Legal System*

OLS created a separate and distinct criminal legal system for processing recent migrants.³²² The empirical research demonstrates that OLS case processing differs dramatically from the typical processing of criminal cases in Texas state courts. In the name of “efficiency,” OLS borrows features from federal immigration prosecutions and civil immigration proceedings and incorporates them into the more traditional case processing to create a new way of processing cases in Texas state courts. This mirrors trends in federal

319. See E-mail from Kathryn Hudson, Staff Attorney of ACLU of Texas, et al., to Merrick Garland, Att’y Gen. of United States, et al. (Dec. 15, 2021), https://www.aclutx.org/app/uploads/2021/12/ols_trespass_arrest_title_vii_complaint.pdf [<https://perma.cc/LK52-LVEZ>].

320. See generally, Olivia Callan, *Human Rights in Texas: Analyzing Operation Lone Star Through a Human Rights Framework*, 34 DUKE J. COMP. & INT’L L. 265 (2024).

321. See *Binational Deportee Program*, AL OTRO LADO, <https://alotrolado.org/bd-program> [<https://perma.cc/N4EK-MBZR>] (last visited Oct. 15, 2025).

322. Interview #5 with defense counsel (Aug. 17, 2022) (on file with author) (describing OLS as a “separate and distinct criminal justice system” with a goal of preventing immigration).

court, where immigration prosecutions have been the catalyst for more “efficient” case-processing programs like Fast-track and Operation Streamline. Building on the work of Ingrid Eagly and others, my prior work details how those “migrant-only” prosecution programs can begin to produce system-wide erosion of procedural justice.³²³ OLS demonstrates an opportunity for this phenomenon to occur in state criminal proceedings.

One feature OLS shares with civil immigration case processing is the reliance on remote hearings. Though remote hearings are used more frequently in criminal cases since the COVID-19 pandemic,³²⁴ immigration courts have a much longer track record of their use.³²⁵ Another feature shared with immigration court is that, at least in misdemeanor OLS cases, defense counsel does not need to be admitted to the Texas State Bar, but just needs to be a member of any state bar in good standing.³²⁶

In response to the COVID-19 pandemic, the Texas Supreme Court permitted courts to “[m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order,” “subject only to constitutional limitations.”³²⁷ OLS relied on the suspension of deadlines and procedures in a way that slowed down case processing times. This meant that migrants sat for longer in custody awaiting hearings and trial, putting more pressure on migrants to forgo their trial rights and plead guilty. This makes OLS cases feel more like immigration proceedings where there is no statutory right to speedy trial, and individuals can languish in detention until they abandon their claims and consent to return to their countries of origin.

But the distinctness of the OLS system is more pervasive than any one feature. One attorney explained:

Well, there are very few appeals going through because people are taking these pleas. And so, the State’s just like, ‘no, we’re not going to give you evidence. No, we’re not going to behave properly with this. You have a good defense. [. . .] We’re just going to ignore that and push this through.’ And so this is a hundred times worse than anything, even the most frustrating criminal issue I’ve had. This is so much worse, so much worse.³²⁸

323. See generally Eagly, *supra* note 45; Kimpel, *supra* note 24.

324. See Andrew Guthrie Ferguson, *Courts without Court*, 75 VANDERBILT L. REV. 1461, 1463–1465 (2022); Jenia I. Turner, *The Emerging Constitutional Law of Remote Criminal Justice*, 59 WAKE FOREST L. REV. 753, 757–760 (2024).

325. *Remote Adjudication*, *supra* note 11 (discussing reliance of immigration court on videoconferencing technology and noting that immigration courts have used videoconferencing technology since the 1990s); see Ingrid Eagly & Steven Shafer, *Detained Immigration Courts*, 110 U. VA. L. REV. 691, 725–26 (discussing immigration adjudication centers, which began operating remotely over detained immigration dockets in 2004).

326. Emergency Order Regarding Indigent Defense and the Border Security State of Disaster Permitting Out-of-State Lawyers to Practice in Texas Temporarily, *supra* note 246 at 1–2; see also 8 C.F.R. §§ 1001.1(f), 1292.1(a)(1).

327. First General Emergency Order Regarding the COVID-19 State of Disaster, *supra* note 10.

328. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 23).

Another defense attorney complained, “Nothing at the border is normal. . . My impression of the border is that nothing works like any kind of standard rules there are in a big city. . . the whole point of this program [. . .] is basically [. . .] pick on illegal aliens.”³²⁹

Defense attorneys described OLS as very different from criminal case processing in big cities. For example, one explained:

[I]t’s not uncommon to keep somebody in custody in Operation Lone Star for over ninety days without an indictment. And that is extremely concerning because that is a rare occurrence in normal counties like Bexar County, Harris County, [. . .] Tarrant County, Travis County—all of those counties that is unheard of. You know, people’s heads would spin if you kept somebody in custody for over ninety days without indicting that case. And in this situation though, it’s commonplace.³³⁰

Another likened the quality of criminal justice to that of a foreign country, “I’ve compared the justice down there to some crap we would probably expect down in Guatemala. . . [S]omeone might get better due process in Guatemala, and that doesn’t say much for what’s happening down there. . .”³³¹

Even judges acknowledged that OLS differed from normal Texas criminal case processing.

Well, it was a whole distinct system. . . They weren’t detained in a county jail. They were in a state prison that had been revamped as essentially a huge county [jail] holding for OLS cases only. . . They were different in sheer magnitude of the numbers of cases. They were different in the key people in various roles, just having to scramble and figure out what to do with an overwhelming number of cases. . . And then the ones that bonded out. That’s very different. Because if they bonded out, they were, I’ll say, almost always [. . .] released to Border Patrol or ICE, or whatever. . . and [most] were sent back to another country.³³²

Another judge stated bluntly, “[it’s] an entirely new legal system that somebody created. . . a surreal Kafkaesque kind of environment.”³³³

Misdemeanor courts often “mark” and monitor defendants.³³⁴ Scholar Issa Kohler-Hausmann documents this practice in the New York City courts in her work. Kohler-Hausmann opines that prosecutors and courts mark defendants and then subject them to supervision and monitoring during pretrial

329. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 9).

330. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 34) (this attorney primarily handled felony cases with USC clients).

331. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 27).

332. Interview #9 with judge (May 15, 2023) (on file with author, at 5-6).

333. Interview #10 with judge (May 31, 2023) (on file with author, at 53).

334. *See generally*, ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

diversion programs to determine whether individual defendants are “governable” or whether they merit the more permanent mark of a criminal conviction.³³⁵ The marking and sorting, rather than the pursuit of a conviction, is the point.

Law Professor and former federal defender Eric Fish notes that due to zealous defense advocacy, when viewed through the lens of conviction rates, OLS is not very successful, given the conviction rate is less than half.³³⁶ But prosecutions are the point, not convictions. Like the system Kohler-Hausman observed in New York, OLS uses prosecution to mark defendants and subject them to monitoring and carceral control. What distinguishes OLS from the typical sorting of misdemeanor courts is that the monitoring and surveillance are not aimed at determining whether the defendant is “governable” and able to rejoin the community. Rather, OLS uses carceral control to ensure that the defendant is successfully expelled from Texas and that if they return, they bear the mark of “criminal” or “fugitive” and will not be assimilated into the community. For many migrants, OLS operates as a pretrial diversion program with a lifelong period of supervision.

B. *Role of Rurality*

The second lesson is the crucial role of rurality in OLS. As urban areas are decarcerating, incarceration in rural areas is rising—OLS follows that trend.³³⁷ OLS presents a large-scale model of how to work around the resource constraints typical of rural geographies—outsourcing government functions to deal with lack of personnel and material resources in rural border counties. But these “work around” practices can result in culture clashes between big city lawyers and rural agrarian communities.

Scholars Lisa Pruitt and Maybell Romero describe “spatial injustice” in the criminal legal system based on resource constraints in rural communities.³³⁸ They document many of the “distinctive” features of the rural criminal system, many of which are experienced by the migrants prosecuted in OLS. For example, rural jurisdictions tend to prosecute misdemeanor crime more frequently than their urban counterparts—explaining the prioritization of

335. *Id.* at 72–73.

336. Fish, *supra* note 22, at 1931 (less than half of the 8,288 migrants charged in OLS pled guilty while in custody).

337. See Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, VERA INST. OF JUST., at 7, 12 (June 2017), <https://vera-institute.files.svcdcdn.com/production/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf?dm=1568745551> [<https://perma.cc/3TYQ-EWQM>]; see generally Gregory Brazeal, *Rural Mass Incarceration and the Politics of Punitiveness*, U. MD. L. REV. 10–16 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4950389 [<https://perma.cc/63HU-LYK7>] (last visited Dec. 18, 2025).

338. Pruitt, *supra* note 41, at 911, 915; see Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 223 (2010); see also Maybell Romero, *Lowball Rural Defense*, 99 WASH. U. L. REV. 1081, 1092 (2021).

trespassing cases in OLS.³³⁹ Likewise, the longer detention times in OLS are typical of rural criminal processing due to judge and attorney scarcity.³⁴⁰ Rural Texas has longstanding challenges relating to getting counsel for criminal defendants—particularly in misdemeanor cases. The mean non-representation rate in Texas misdemeanor cases is 46%.³⁴¹ Rural Texas contains “legal deserts”—in urban counties, there is often one attorney for each hundred residents, but in 45% of Texas counties there are fewer than one attorney for every thousand residents.³⁴² As researchers studying gaps in representation in Texas explained: “There is something different about rural counties. Unlike any other factor [. . .], rurality is simultaneously associated with lower rates of both appointed and retained counsel. . . Rural places simply have a shortage of any kind of representation.”³⁴³ Rural attorney scarcity led OLS to rely on both Texan attorneys from urban areas and out-of-state counsel.

Having defense attorneys who aren’t part of rural communities cuts both ways. As newcomers, the attorneys aren’t beholden to small-town rules about civility, which may allow them to be more aggressive.³⁴⁴ Prosecutors expressed frustration that defense attorneys filed forty-page discovery motions in simple trespassing cases, and engaged in practices they deemed obstructionist, like refusing to waive arraignment.³⁴⁵ One attorney described the tactics of LPDO, NDS, and TRLA as “scorched earth litigation,” and described their own discomfort at one outsider attorney calling out a judge for being racist.³⁴⁶ But that same attorney did admit that these organizations had resources to file “elaborate” and “unique” motions—begrudgingly suggesting they may be litigating more aggressively.³⁴⁷

But the cultural context of the cases can be lost on urban practitioners—“some of these young lawyers have never been out to a ranch, born and raised in Houston or Dallas.”³⁴⁸ Local attorneys more familiar with rural landscapes may be better able to connect with witnesses and investigate the facts underlying cases. They may also be better at developing rapport with jurors in rural jurisdictions. Likewise, one prosecutor thought there would be benefits to

339. See Pruitt, *supra* note 41, at 854 (finding the misdemeanor to felony charging ratio was 11:1 in rural counties in Washington state as opposed to 3:1 in urban counties).

340. See *id.* at 906–07.

341. Andrew Davies, Shelby Sirivore, & Victoria M. Smeigocki, *If You Cannot Afford an Attorney, None Will be Appointed for You: Exploring Rate of Representation by Counsel in Texas Misdemeanor Courts*, 8 J. CRIM. JUST. & L. 25, 31 (2025) (based on an examination of data from Texas counties in 2019).

342. *Id.* at 29–30 (based on an examination of data from Texas counties in 2019).

343. *Id.* at 40 (based on an examination of data from Texas counties in 2019).

344. See Romero, *supra* note 339, at 1114; see also Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants’ Invocation of Adversary Procedures*, 122 YALE L. J. 2550, 2562–63 (2013).

345. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 3).

346. Interview #4 with defense counsel (Aug. 5, 2022) (on file with author, at 2). For a discussion on how to address racism in criminal litigation, see Daniel Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court’s Criminal Jurisprudence*, 110 CAL. L. REV. 681, 732–41 (2022).

347. Interview #4 with defense counsel (Aug. 5, 2022) (on file with author, at 2).

348. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 4).

having attorneys (including prosecutors) who lived in the community but admitted, “no one is going to move” to these rural areas.³⁴⁹

The rural geography of OLS, the migrant defendant population, and the use of non-local defense attorneys also kneecaps the possibility of employing participatory defense, a strategy that requires close connections between local communities and participatory defense practitioners. In describing De-Bug, a participatory defense organization in San Jose, law professor Jocelyn Simonson explains: “In all that they do, De-bug’s participatory defense practice is aimed to stay close to its roots as a community organizing strategy, a pooling of experiences and resources in an effort to build knowledge and power.”³⁵⁰

Rurality also blunts community backlash. Community members can’t see the arrests because they happen on private lands; there are no cell phone videos of police misconduct.³⁵¹ Simonson documents how ordinary community members can make positive impacts on the criminal system by court-watching—where they observe and then “share their observations and analysis with the larger public.”³⁵² “[I]t was regular visits to observe state actors in their local criminal courthouse—the “machinery of criminal justice” at work—that drove home for them the way these forces were interacting in their own [communities].”³⁵³ Research suggests that the court-watchers “are changing the proceedings just by sitting there. In social science, this is known as the observer effect. . . most basically, people change their behavior when they know they’re being watching. . .the act of watching can be a form of wielding power. . .”³⁵⁴ There have been some successful court-watching efforts with respect to Zoom court, but they are few and far between.³⁵⁵ Organizing a geographically dispersed community is extremely challenging, and court-watching has not been engaged successfully in the context of OLS.

Admittedly, the lack of community backlash may be based on popular support for OLS.³⁵⁶ But one attorney noted that even though local communities view illegal immigration as a real problem, they don’t find Lone Star particularly effective and likely don’t appreciate “DPS and the Government walking all over their property. . .”³⁵⁷ One major setback to OLS occurred when the Mayor of Eagle Pass deemed a public park private land to be able to prosecute migrants when they “trespassed” on it.³⁵⁸ In response, the community

349. *Id.*

350. JOCELYN SIMONSON, *RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION* 106 (New Press, 2023).

351. *Cf.* Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 393, 400–428 (2016) (describing the phenomenon of organized copwatching in urban areas and its power to generate police accountability).

352. SIMONSON, *supra* note 351 at 57.

353. *Id.*

354. *Id.* at 65.

355. *See, e.g., id.* at 154–58.

356. *Supra* II.a.

357. Interview #6 with defense paralegal (Dec. 29, 2022) (on file with author, at 18).

358. Amanda Henderson & Yama Virgin, *Eagle Pass Council Reclaims Shelby Park: Mayor’s Private Property Claim Rescinded Amidst Public Outcry*, FOXSANANTONIO.COM (Aug. 1, 2023),

organized, and with the aid of the City Council, the park was quickly given back to the public, and prosecutions in that area ceased.³⁵⁹ But that's the rare example of pushback on OLS, in large part because the rural spread and distance act as barriers to community organizing.

C. *Impact of the Impossibility of Trial*

*"If this whole thing is about prosecuting the crimes, we need to try cases. If the whole thing's about getting them out of the country, maybe we don't need trials."*³⁶⁰

The third lesson from OLS is that it teaches us what the criminal legal system looks like as trial rates decline further. The separate and distinct legal system described by those involved in OLS derives in large part from the impossibility of trial. There have been thousands of OLS cases, but only one misdemeanor trial in the first four years.³⁶¹ Defendants in custody choose to plead to time served rather than wait months in prison for trial, and those who get out are removed and can't return to the United States to effectuate their trial rights. As described by Stephanos Bibas, Ronald Wright, and other scholars, trial rates in both state and federal courts have been declining for decades, and that threatens the integrity of the criminal legal system.³⁶² OLS presents a dystopian future landscape where trial rates decline to almost zero.³⁶³

The first misdemeanor trial ended with a one-year sentence—the maximum—and that simple fact discourages other migrants from going to trial.³⁶⁴ As Wright explains, "the trial penalty—that is, the differential between the sentence after the plea and sentence after trial—convinced more defendants to abandon worthwhile defenses."³⁶⁵ In OLS, the post-trial penalty provides a disincentive to going to trial as compared to the time-served deal offered to most migrants in trespassing cases. As Bibas explains, "pretrial detention can approach or even exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail."³⁶⁶ As for migrants released on bail, if they return for trial, they risk federal felony liability.³⁶⁷

<https://foxsanantonio.com/news/local/eagle-pass-council-reclaims-shelby-park-mayors-private-property-claim-rescinded-amidst-public-outcry> [<https://perma.cc/5WL9-SBX4>].

359. *Id.*

360. Interview #9 with judge (May 15, 2023) (on file with author, at 28).

361. *Supra* II.a.

362. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466–68 (2004); Wright, *supra* note 28, at 87–91.

363. Even prosecutors acknowledged the impossibility of a trial, saying, "If anyone asks for a jury trial, I'm dismissing the case because of the expense of bringing a trial in these low-level cases." Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 4).

364. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 12).

365. Wright, *supra* note 28, at 86.

366. Bibas, *supra* note 363, at 2493.

367. *See* Interview #1 with defense counsel (July 6, 2022) (on file with author, at 25); *see also* 8 U.S.C. §§ 1325, 1326.

As explained in subsection (e) of Part II, there are myriad issues to litigate in OLS cases—many of which require a trial to be fully vetted and preserved for appeal. Aside from litigable legal issues, there are triable fact issues presented in OLS cases. Attorneys and judges mentioned entrapment defenses, questions about where migrants were apprehended and whether it was on private or public land, whether property lines were marked in a way that provides notice to trespassers, and which landowner has the power to exclude a migrant from a particular property.³⁶⁸ But the practical realities of OLS make litigating these issues nearly impossible.³⁶⁹

As one defense attorney explains:

[The p]roblem that pervades [the] whole program is once the client is deported, they lose [the] right to go to trial. Three options, plead guilty, no show and forfeit bond, file writ challenging process. But [there's] no way to really litigate issues of guilt or innocence. We know criminal trials don't happen very often, but what makes it unique is that there's no real threat of a criminal trial. Typically, we litigate in shadow of criminal trial, but there's no trial threat here, so it completely changes the dynamic. Everything we do in a criminal case is dependent on litigating in a trial. Can't litigate evidentiary issues. Can't correct bad state practices. Changes 'the school bus into a clown car.' All the complaints of the criminal justice system being coercive, this is that 'on steroids.'³⁷⁰

Defense counsel feel impotent without the leverage that the threat of trial provides.³⁷¹ One defense lawyer expressed:

A feeling of helplessness in that, while the State keeps saying, "Well, let's deal with it at trial." Well, yeah, I would do that normally, but I feel like I've been stripped of the sword. You know the huge sword of defense. I can't use the lack of evidence until trial. I can't use the gaps in the police report or any of that stuff. . . I feel the most frustrating thing is, I feel like I'm just getting people to the shore, but I'm not sure I'm helping. I mean they're not drowning, anyway. . . it makes me feel like a bad attorney.³⁷²

The inability to air these issues in public has real costs: as Bibas explains, "as between trials and plea bargains, trials are more public and so are riskier

368. In the first and one of only two OLS misdemeanor trials, the actual landowner didn't testify.

369. See Bibas, *supra* note 363, at 2473 ("[I]nstead of allowing juries to air and wrestle with the hard, troubling cases, prosecutors may hide them from view. If, for example, prosecutors bargain away most cases involving dubious confessions, they avert public scrutiny of police interrogation tactics . . . By pressing the easiest cases, prosecutors turn jury trials into rubber stamps or mere formalities.").

370. Interview #11 with defense counsel (June 15, 2023) (on file with author, at 2–3).

371. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 25).

372. Interview #12 with defense counsel (June 20, 2023) (on file with author, at 26).

places to cut corners.”³⁷³ When trials fail to provide a meaningful check, opportunities to cut corners and violate rights increase. Meanwhile, state actors can curate messaging to the public that oversimplifies the facts on the ground.

D. *Opacity and Manipulability of Criminal Justice Data*

*“Some people in Austin are more interested in big numbers than justice.”*³⁷⁴

The final lesson of OLS is about the opacity and manipulability of criminal justice data. As Law Professor Ngozi Okidegbe explains:

[C]riminal legal institutions are not merely data creators. Criminal legal institutions are also carceral knowledge sources that function as hegemonic sites for the production and validation of knowledge. One of their purposes is to produce knowledge about public safety that drives criminal legal policies, practices, and outcomes. And like all knowledge, the knowledge produced and validated by these sources is inherently incomplete and is constructed in relation to the political, economic, and social standpoints of its creators. For this reason, the data derived from the knowledge produced by these sources tends to reflect the status quo and taken-for-granted assumptions around the relationship between public safety and its promotion through incarceration.³⁷⁵

Rather than maintain the status quo, Texas weaponized incomplete and misleading criminal justice data to justify both the existence and expansion of OLS and reify stereotypes about migrant criminality. For example, the Border Protection Unit counts drug apprehensions and arrests as “OLS” cases even when they lack a nexus to the border.³⁷⁶ One defense attorney acknowledged, “they’re very shady about the numbers” because Abbott includes drug seizures in his OLS statistics even when it’s not clear whether the drugs crossed the border or were “cooked [in] somebody’s kitchen [. . .] a block away from the courthouse.”³⁷⁷ Similarly, OLS proponents routinely fail to mention that the drug cases and human smuggling cases overwhelmingly involve U.S. citizen defendants rather than accused migrants.³⁷⁸

373. Bibas, *supra* note 363, at 2476.

374. Interview #3 with prosecutor (July 22, 2022) (on file with author, at 4).

375. Okidegbe, *supra* note 35, at 2025.

376. Perla Trevizo & Lomi Kriel, *Fact-checking Texas leaders’ claims about Operation Lone Star*, TEX. TRIB. (Apr. 27, 2022), <https://www.texastribune.org/2022/04/27/texas-operation-lone-star-greg-abbott-border/> [https://perma.cc/NVR2-CWAA].

377. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 19–20).

378. *But see* ACLU OLS REPORT, *supra* note 15, at 19.

The governor doesn't provide detailed, sourced information about OLS cases, for example, the percentage that are low-level, or the percentage that involve U.S. citizen defendants. Instead, Abbott makes hyperbolic claims like quantifying fentanyl seizures by the number of "lethal doses" rather than weight in kilograms.³⁷⁹ In August 2023, Governor Abbott tweeted "Operation Lone Star Stats," claiming that OLS had completed over 414,000 apprehensions, over 33,200 criminal arrests, bused over 31,900 migrants to sanctuary cities, and seized over 426 million lethal doses of fentanyl.³⁸⁰ But there was no source for these statistics, no link, and no supporting documentation. This is not simply a one-off. The Border Crisis Update page of the Office of the Texas Governor contains a YouTube video claiming that "Texas has done more than any state ever to secure our border" and contains links to donate to border wall construction and other immigration enforcement efforts. But it has no actual data about the number of OLS cases, what charges are involved, whether federal law enforcement is involved, where fentanyl seizures are occurring, and whether the seizures have anything to do with border security.³⁸¹

Texas has no state-run case management system to provide free access to court records. Instead, Texas counties and courts contract with one of three private vendors, iDocket, ICON, and Tyler Technologies, to provide online access to court records at a cost to those with subscription plans.³⁸² This makes the work of fact-checking Texas's claims about OLS both difficult and expensive. One attorney reviewed all the arrests in one small rural county, and out of 500 arrests, only eleven were drug cases, and those were all drug possession rather than trafficking cases—the lion's share of the cases were non-violent, low-level offenses.³⁸³

At times, it seems that the primary purpose of OLS is to generate attention-grabbing numbers rather than address illegal immigration. Admittedly, the numbers involved in OLS are compelling. As one defense attorney expressed, "politically, to be able to say we've done 5,000 arrests or however many and it shows how many people are crossing, I was, I was actually very surprised. I didn't realize how many people cross like that, and so I think . . . those kinds of numbers do create this fear."³⁸⁴

379. See, e.g., Video posted by Governor Abbott Press Office (@GovAbbottPress), YOUTUBE, *Two Years of Operation Lone Star* (Mar. 7, 2023), <https://youtu.be/dtROBhl8be0?si=sNBBwAEYj-P6Gbmb> [<https://perma.cc/83SR-ATKL>].

380. Greg Abbott (@GregAbbott_TX), X, *Operation Lone Star Stats* (Aug. 23, 2023, at 10:24 ET), https://twitter.com/GregAbbott_TX/status/1694369979158634843?s=20 [<https://perma.cc/35L5-DH9A>].

381. *Operation Lone Star*, OFFICE OF THE TEX. GOVERNOR, <https://www.operationlonestar.texas.gov/> [<https://perma.cc/4B6N-LSQP>] (last visited Oct. 10, 2025).

382. *Uniform Case Management System*, TEX. JUD. BRANCH, <https://www.txcourts.gov/programs-services/uniform-case-management-system/> [<https://perma.cc/34B8-287F>] (last visited Oct. 10, 2025); see, e.g., *Subscription Plans*, IDOCKET.COM, https://idocket.com/sub_plans.htm [<https://perma.cc/U4Y5-NZ9X>] (listing pricing for subscription plans for iDocket).

383. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 19-31).

384. *Id.* at 19.

All the interview subjects described OLS as politically motivated. For example, one subject said, “[T]his is our governor’s way to thumb his nose at [President Biden].”³⁸⁵ Another explained, “I call it Governor Abbott’s \$4 billion election campaign, and so I think the politics are working in Governor Abbott’s favor in most of Texas.”³⁸⁶ And yet another noted, “The politics in all of this smells.”³⁸⁷ Most did not think the program was effective at deterring illegal immigration.³⁸⁸ One prosecutor noted that only six months into the program, he had started to see repeat defendants, including one person who had been arrested for trespass three times in the same county already.³⁸⁹ Data suggests that OLS is correlated with a shift of migration to states further west—but it’s unclear if OLS is the cause of that shift.³⁹⁰ To the extent that OLS has shifted migration west, it’s also responsible for a surge in the number of migrant deaths in the deserts of New Mexico.³⁹¹ Many interviewees noted how expensive the program was and how legislative decisions to fund OLS at current levels meant that other valuable programs were underfinanced.³⁹²

Yet another feature of OLS that mutes community resistance and obscures the costs of OLS is the fact that local communities don’t foot the bill. As law professor Russell Gold notes, “Among the many pathologies of American criminal law is the way in which our systems diffuse and hide costs and decision-making across numerous actors and levels of government.”³⁹³ Gold argues that “a county should get only as much criminal law enforcement as it is willing to pay for”³⁹⁴ because “[s]carcity forces the government to make hard choices about what more enforcement is worth, including the opportunity costs of different possible expenditures.”³⁹⁵ OLS presents a criminal legal system unfettered by Gold’s suggested constraints. This scarcity isn’t present in OLS at the local level because the funding is provided at the state level, and now it appears the Trump administration will reimburse Texas for nearly all it has spent.³⁹⁶ This results in a massive reallocation of resources from taxpayers across the United States to small rural border communities like Kinney County. This sleight of hand obscures the costs associated with

385. Interview #1 with defense counsel (July 6, 2022) (on file with author, at 23).

386. Interview #2 with defense counsel (July 22, 2022) (on file with author, at 19).

387. Interview #3 with prosecutor (July 22, 2022) (on file with author, at 5).

388. *See, e.g.*, Interview #1 with defense counsel (July 6, 2022) (on file with author, at 24).

389. Interview #5 with prosecutor (Aug. 17, 2022) (on file with author, at 2).

390. Serrano, *supra* note 32.

391. Uriel J. García, *After El Paso Joined Abbott’s Border Crackdown, The Number of Dead Migrants in The New Mexico Desert Surged*, TEX. TRIB. (June 16, 2025), <https://www.texastribune.org/2025/06/16/texas-operation-lone-star-border-el-paso-deaths-migrants-new-mexico/> [<https://perma.cc/E79R-Y999>]; *see also* Rodríguez, *supra* note 313 at 475–82 (discussing increasing deadliness of immigration enforcement and weaponization of the border).

392. *See, e.g.*, Interview #3 with prosecutor (July 22, 2022) (on file with author, at 5).

393. Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. U. L. J. 842, 843 (2024).

394. *Id.* at 846.

395. *Id.* at 874.

396. *See* Hernández, *supra* note 32.

generating the politically powerful criminal justice data used to justify the continued existence and expansion of OLS.³⁹⁷

CONCLUSION

Republicans are learning from the experiments of OLS and developing more extreme strategies for immigration enforcement. The Trump administration's strategy of rendering migrants to prisons in Guantanamo,³⁹⁸ El Salvador,³⁹⁹ and elsewhere builds upon Governor Abbott's use of Texas prisons to house migrants charged with low-level misdemeanor trespassing offenses. These practices blur the lines between immigration and pretrial detention on the one hand and punitive imprisonment on the other. Similarly, both practices allow a community to expel migrants deemed threatening before affording them due process.⁴⁰⁰ Republican politicians are paying attention and learning from OLS.

Progressives also need to be attentive to OLS and learn from its rapid deployment and the harms it has caused to both individual migrants and the rule of law. Most of those handling OLS cases felt that the program should end or be drastically reformed. In sentiments echoed by most of the research subjects, one attorney explained: "It's not helping. . . We had that eighteen-wheeler where fifty-three [. . .] people were found [dead] inside. . . And maybe there were great intentions to begin with, but I think when you figure out something's not working, maybe we should just stop putting money into it."⁴⁰¹ Another attorney described OLS as "political theater" and said "Texas is more concerned with appearing to be doing something than actually [doing something] because the actual solutions would probably be less visible and less politically popular."⁴⁰²

Those closest to its machinery have begun to articulate why OLS doesn't solve the border crisis and expressed a desire for comprehensive immigration reform:

These are huge questions with very few answers, but it exacerbates the stew—it makes things explode when you have people who are looking

397. For discussion of the costs of data collection, see Jessica M. Eaglin, *Racializing Algorithms*, 111 CAL. L. REV. 753, 779–82 (2023).

398. Sacha Pfeiffer, *Trump Said He'd Send 30,000 Migrants to Guantánamo. He's sent about 500*, NPR (June 23, 2025), <https://www.npr.org/2025/06/23/nx-s1-5436898/trump-guantanamo-gitmo-migrants> [<https://perma.cc/BNG6-22C5>].

399. Armando Garcia & Laura Romero, *Migrants Who Were Sent to CECOT Are the Responsibility of US, El Salvador Tells UN*, ABC NEWS (July 7, 2025), <https://abcnews.go.com/US/migrants-cecot-responsibility-us-el-salvador-tells/story?id=123551909> [<https://perma.cc/GJ59-Z342>].

400. See e.g., *Dept. Homeland Security v. D.V.D.*, 145 S. Ct. 2153 (2025); *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025).

401. Interview #7 with defense counsel (Dec. 28, 2022) (on file with author, at 47); see also Juan Lozano et al, *Toll Now at 53 in San Antonio as Families Wait for Answers*, ASSOCIATED PRESS (June 29, 2022), <https://apnews.com/article/politics-immigration-san-antonio-4eca301da8c5f318843c129406b98615> [<https://perma.cc/5CB7-NE3T>].

402. Interview #13 with defense counsel (June 27, 2023) (on file with author, at 32–33).

at it as what political gain can I get out of this chaos instead of how do we solve this so that we don't have this chaos? . . . There are no easy answers, but there are answers. It just takes the will of leaders to make them come to fruition.⁴⁰³

Headlines about OLS have directed our collective attention to the border and the problems posed by immigration. But now we must pause. We must contemplate the lessons to be learned from Texas's grand experiment and how to approach this next phase of immigration enforcement. LPDO's attorneys have litigated against OLS tirelessly and creatively for nearly five years, but criminal defense lawyers alone cannot halt the growth and expansion of OLS and similar programs. Combatting OLS demands a multi-faceted approach that includes criminal and civil litigation, community organizing, courtwatching, data collection, public education, and legislative advocacy.

In her 2000 essay, *A Few Rules for Predicting the Future*, Octavia E. Butler writes, "our tomorrow is the child of our today. Through thought and deed, we exert a great deal of influence over this child, even though we can't control it absolutely. Best to think about it, though. Best to try to shape it into something good."⁴⁰⁴ It is not enough to point out the flaws of OLS—we must think about how we can use its lessons to shape something better. As Butler writes, "there's no single answer that will solve all of our future problems. There's no magic bullet. Instead, there are thousands of answers—at least. You can be one of them if you choose."⁴⁰⁵

403. Interview #10 with retired judge (May 23, 2023) (on file with author, at 61–62).

404. Octavia E. Butler, *A Few Rules for Predicting the Future*, ESSENCE 264 (May 2000).

405. *Id.* at 165.

APPENDIX A

TABLE OF COURT OBSERVATIONS

Court Date Observed	County	Judge
5/17/2022	Kinney	Not noted
5/17/2022	Maverick	Reed
5/21/2022	Maverick	Not noted
6/2/2022	Kinney	Amos
6/14/2022	Maverick	Reed
6/15/2022	Kinney	Amos
8/12/2022	Jim Hogg	Molina
8/25/2022	Jim Hogg	Yanez
8/31/2022	Kinney	Trull
10/5/2022	4th Court of Appeals	Panel
10/18/2022	Kinney	Alcala
12/13/2022	Kinney	Larsen
12/14/2022	Kinney	Larsen
12/15/2022	Kinney	Powell
12/15/2022	Jim Hogg	Perks
12/16/2022	Kinney	Powell
12/20/2022	Kinney	Larsen
6/6/2023	Zapata	Reed
1/19/2024	Webb	Martinez
2/2/2024	Webb	Martinez
5/20/2024	Maverick	Reed