

**Decriminalizing Migration: What Does it Mean and Why is it Important?
Frequently Asked Questions
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Decriminalizing migration has become a hotly debated issue. Immigrant communities and advocates continue to document harms associated with immigration-related prosecutions, and members of Congress have introduced legislation to repeal federal laws that make it a crime to enter the U.S. without authorization.ⁱ This FAQ aims to answer a series of common questions on the most pressing concerns relating to proposals to decriminalize migration.

What laws would change if Congress acts to decriminalize migration?

Members of Congress have proposed repealing Section 1325, Title 8 of the U.S. Code, which makes it a federal misdemeanor to enter the U.S. without authorization, and Section 1326, which makes it a felony to reenter the country without permission after a prior deportation or removal order. Repealing these provisions of law would mean that unauthorized entry and reentry into the country is treated as a civil offense and handled solely by the immigration system, rather than a federal crime handled by the federal criminal court system.

Where did the laws come from, and how are they used?

Federal laws that criminalize immigrants were promoted by eugenicists in the early 20th century.ⁱⁱ During the 1920s, a white supremacist senator from South Carolina introduced a law criminalizing border crossings to please nativists who wanted to stop Mexican migration.ⁱⁱⁱ In the decade after its passing, the U.S. prosecuted about 44,000 immigrants for unauthorized entry.^{iv} Prosecutions were low for decades after, until the George W. Bush administration started “Operation Streamline,” a program launched in 2005 in which the Department of Homeland Security (DHS) and the Justice Department target and prosecute migrants *en masse* for unauthorized border crossings.^v

Prosecutions for unauthorized entry were the driving force behind the Trump administration’s family separation policy in 2018, when the “zero-tolerance” directive required each U.S. Attorney’s Office to prosecute all DHS referrals of unauthorized entry violations.^{vi} This reckless application of the zero-tolerance policy meant that parents arriving at the southern border were torn from their children, referred for criminal prosecution, and then separated for weeks or months as they lingered in criminal and then civil immigration custody. Even after the

administration claimed to have ended the practice, family separations continue, including as the result of referrals for prosecutions.^{vii}

How would decriminalization change immigration enforcement at the border and in the interior?

Currently, people who enter the U.S. without authorization are vulnerable to *both* civil and criminal sanctions. When an individual is picked up by U.S. Customs and Border Protection (CBP) for crossing the border outside of a port of entry, they are either transferred to Immigration and Customs Enforcement (ICE) custody *or* referred for criminal prosecution. Those referred for prosecution go into U.S. Marshals custody and face trial in federal criminal court. After the criminal case is resolved, the person is transferred right back to CBP and then to ICE custody. Those who are not referred for prosecution *also* end up in ICE custody and go before an immigration judge. The difference is that those charged with unlawful entry or reentry must navigate their criminal case in federal district court while *also* trying to resolve their legal status in civil immigration cases.^{viii}

The U.S. has an expansive and unduly harsh immigration enforcement system to apprehend and detain migrants; it is inhumane to subject people to double punishment with criminal prosecution under Sections 1325 and 1326.

How do prosecutions fuel racial and ethnic disparities in the prison system?

Entry and reentry prosecutions fall almost entirely on people of color, and have increased from 27,367 in 2004 to 91,896 cases in 2018.^{ix} Unauthorized entry is punishable by up to 180 days in federal jail, while unauthorized reentry is punishable by up to two years in federal prison. More years may be added if the person has previous criminal convictions. Importantly, there's been a jump in recent years of cases of § 1326 prosecutions used to charge people with felonies despite having little or no prior criminal history.^x With high conviction rates for these federal offenses, many migrants are subjected to mandatory incarceration in federal prison for months or longer. Combined with racial profiling and discriminatory policing, such prosecutions compound the existing racial injustices that pervade the U.S. criminal justice system.^{xi}

Do migration related prosecutions divert resources from other government agencies?

The Government Accountability Office (GAO) reported in December 2019 that agencies had to divert resources to support the prosecution priorities outlined by the Trump Administration in 2017 and 2018, including personnel and physical space.^{xii} Migration related offenses have become the most prosecuted federal crimes in the country. U.S.C. § 1325 and § 1326 violations

make up 65 percent of all criminal prosecutions in federal court.^{xiii} In FY 2018, the Department of Justice charged 85 percent more immigrants with unlawful entry than the year prior, and increased felony reentry prosecutions by over 38 percent.^{xiv} While there is no precise accounting for costs, the government uses vast resources on prosecutions and subsequent incarceration of immigrants. Between detention costs and money for defense attorneys, prosecutors, and additional immigration and court personnel, the monetary figure exceeds well over a billion dollars per year.^{xv}

Would decriminalizing migration mean more people seek to enter or return to the U.S. without proper authorization?

Policies designed to deter immigration are morally unjust and unlawful.^{xvi} Moreover, there is no evidence to support claims that the threats of criminal prosecution and incarceration serve as a deterrent to migration. The government's assertion that programs like Operation Streamline, implemented to prosecute migrants *en masse* for unauthorized border crossings, deter unauthorized entry, are not backed up by facts.^{xvii} There are complex social and economic factors that lead to migration, including the need to seek safety from political persecution, unlivable environmental conditions, and close family ties in the U.S. More than 17 million U.S. citizen children have at least one foreign-born parent, providing family reunification as a rational incentive that drives people to migrate or return to the U.S. without authorization.^{xviii}

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ENDNOTES

ⁱ New Way Forward Act, H.R. 5383, 116th Congress (2019-2020), December 10, 2019, <http://bit.ly/2vktmT0>.

ⁱⁱ John Blake, "When Americans tried to breed a better race: How a genetic fitness 'crusade' marches on," CNN, October 18, 2018, <https://cnn.it/2uyJkZB>.

ⁱⁱⁱ Becky Little, "How Border-Crossing Became a Crime in the United States," History, July 1, 2019, <http://bit.ly/2O3Dxln>.

^{iv} See id.

^v Joanna Lydgate, "Assembly-Line Justice: A Review of Operation Streamline," Policy Brief, University of California Berkley Law, January 2010, <http://bit.ly/3aMaVH3>.

^{vi} U.S. Department of Health and Human Services, "Separated Children Placed in Office of Refugee Resettlement Care," Office of Inspector General Issue Brief, January 2019, <http://bit.ly/2Rxqpr9>.

^{vii} Laura Peña, "The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border," February 12, 2019, <http://bit.ly/36w7LUz>. See also Jesse Franzblau, "Family Separation Policy Continues, New Documents Show," National Immigrant Justice Center, June 22, 2019, <https://bit.ly/2Z1zWrA>.

^{viii} For a flow chart showing how immigrants facing criminal prosecutions end up in ICE custody, see Joann Batista, "Who Has Custody? An overview of the detention systems migrants face upon arrival at the U.S.-Mexico border," National Immigrant Justice Center, August 2019, <http://bit.ly/36CKvoc>.

^{ix} U.S. Department of Justice, Office of Public Affairs, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019, <http://bit.ly/2O3E3jj>.

^x United States Sentencing Commission, Quick Facts — Illegal Reentry Offenses, FY2014 - FY2018, <http://bit.ly/2U0qaX9>. Felony prosecutions of individuals arrested in the Mississippi raids is emblematic of this trend. See Roque Planas, “Trump Administration Prosecuting More Mississippi Workers After ICE Raids,” October 2, 2019, <http://bit.ly/2U2suwS>.

^{xi} See Ashley Nellis, “The Color of Justice: Racial and Ethnic Disparity in State Prisons,” The Sentencing Project, June 14, 2016, <http://bit.ly/2RxnVc6>.

^{xii} U.S. Government Accountability Office, “Immigration-Related Prosecutions Increased from 2017 to 2018 in Response to U.S. Attorney General’s Direction,” GAO-20-172, December 3, 2019, <https://www.gao.gov/products/GAO-20-172>.

^{xiii} “Prosecuting People for Coming to the United States,” American Immigration Council, January 10, 2020, <http://bit.ly/36wS6Vh>.

^{xiv} U.S. Department of Justice, Office of Public Affairs, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019, <http://bit.ly/2O3E3jj>.

^{xv} Doug Keller, “Re-thinking Illegal Entry and Re-entry,” 44 Loy. U. Chi. L. J. 65 (2012), <http://bit.ly/37yIKcT>.

^{xvi} See Eleanor Acer, “Criminal Prosecutions and Illegal Entry: A Deeper Dive,” Just Security, July 18, 2019, <http://bit.ly/38KecF7>; See also, Craig B. Mousin, “Rights Disappear When US Policy Engages Children as Weapons of Deterrence,” AMA Journal of Ethics, January 2019, <http://bit.ly/30XHFZD>.

^{xvii} Michael Corradini, Jonathan Allen Kringen, Laura Simich, Karen Berberich, & Meredith Emigh, “Operation Streamline: No Evidence that Criminal Prosecution Deters Migration,” Vera Institute of Justice, June 2018, <http://bit.ly/2TYWs4C>.

^{xviii} See “U.S. Citizen Children Impacted by Immigration Enforcement,” American Immigration Council, November 22, 2019, <http://bit.ly/2RuONJS>.