



A Legacy of Injustice

The U.S. Criminalization of Migration

Executive Summary

**NATIONAL
IMMIGRANT
JUSTICE CENTER**

A HEARTLAND ALLIANCE PROGRAM

July 2020

A Legacy of Injustice

The U.S. Criminalization of Migration

Executive Summary

More than a century ago, lawmakers who promoted eugenics and racial segregation enacted laws allowing criminal prosecution of migrants who enter (or, in some circumstances, reenter) the United States without authorization. The Trump administration uses these laws to separate family members, perpetuate injustices in the criminal and immigration legal systems, and summarily violate the rights of asylum seekers. **The National Immigrant Justice Center (NIJC) supports the call to end criminal prosecution of the acts of unauthorized entry and reentry. We issue this report as part of the growing body of literature and evidence illustrating that repeal is long past due.**

People who enter or reenter the United States without authorization are subject not only to civil immigration enforcement, but also federal criminal prosecution.¹ Applied in combination, these two legal systems both exacerbate racial and ethnic discrimination and fuel the mass incarceration of people of color.

One provision of Title 8 of the United States Code (Section 1325) makes it a misdemeanor to enter the United States without authorization; another (Section 1326) makes it a felony to reenter the country without authorization after a prior deportation or removal order.

Demands to repeal these two provisions rose to prominence in the national press during the 2019 Democratic presidential primary debates. Yet calls for decriminalization are far from new. Immigrant rights advocates and communities have advocated for repeal of these provisions for decades.

This report traces the legislative and political history of the laws used to prosecute people for entering or returning to the United States without authorization. Interviews with people directly impacted by these laws illuminate some of the most pervasive and systemic harms caused by these prosecutions.

NIJC's Findings

From June 2019 to April 2020, NIJC investigated the state of migration-related prosecutions in the United States, involving field research in Texas, Arizona, and California. Our research found that the U.S. government's prosecution of unauthorized entry and reentry consistently results in (1) permanent separation of family members, (2) routine violation of international and domestic asylum law, (3) violation of basic due process protections provided to individuals facing criminal charges, and (4) persistent dehumanizing and racist treatment of migrants by federal officials, including immigration officers.

Throughout the report, we tell stories of individuals whose rights have been circumvented during their migration-related prosecutions.

Among those individuals are:

- **Alexis**, a transgender Guatemalan woman, who was prosecuted, suffered discriminatory abuse in detention, and deported without an opportunity to present her asylum claim.
- **Ana**, a mother to three U.S. citizen children and grandmother, who is permanently separated from her family after being prosecuted for unauthorized entry and deported.
- **Juan**, who was arrested by immigration officials as he left the federal courthouse just after the government dropped its charge of unauthorized entry. Immigration and Customs Enforcement (ICE) then shuffled Juan between California detention centers, where he eventually contracted COVID-19.

The history of the enforcement of prosecutions

The provisions of law that criminalize unauthorized migration were enacted by white supremacist politicians in the 1920s. The laws were relatively dormant for decades, until they were revived in the 1990s as part of a series of policies that fueled the policing and incarceration of communities of color. Entry and reentry prosecutions again surged with the restructuring of the immigration enforcement landscape following 9/11, and continued at high rates during the era of mass deportations under the Obama administration. The Trump administration has employed the laws in ways that systematically violate rights and harm immigrant communities.

Migration prosecutions fuel racist and deadly systems of mass incarceration

Entry and reentry prosecutions have contributed significantly to mass incarceration of people of color in the United States, including at privately run federal prisons built exclusively for non-citizens. These prosecutions also have put thousands of immigrants at risk by keeping them locked up while serving their sentences or awaiting hearings during the COVID-19 pandemic. The pandemic has laid bare the systemic harms and excessive waste inherent in the complex infrastructure behind migration-related prosecutions.

Recommendations

NIJC calls for the repeal of laws that criminalize unauthorized entry and reentry. Congress also must take bold legislative action to disentangle the criminal legal and immigration systems. This report provides recommendations that start with repealing these laws, along with policy and legislative changes that are needed until then.

Specifically, we recommend that Congress (1) repeal laws used to prosecute entry and reentry offenses; (2) defund the administration's programs that have fueled migration-related prosecutions; (3) end mass prosecutions as well as prosecutions of vulnerable populations and asylum seekers; (4) ban contracting with for-profit prisons used to hold people facing migration-related prosecutions; and (5) demand the immediate release of people trapped in detention during the COVID-19 pandemic. Until repeal is achieved, NIJC recommends that federal agencies and future administrations (1) halt prosecutions for unauthorized entry and reentry; (2) end the use of for-profit prison facilities; and (3) begin to investigate the systemic racism and violations of domestic and international law that result from unauthorized entry and reentry prosecutions.

The New Way Forward Act (H.R. 5383), introduced in the U.S. House of Representatives in December 2019, provides a significant opportunity to resolve many of these problems, including rolling back migration-related prosecutions and harmful immigration laws that, for decades, have led to racial profiling and have resulted in disproportionate incarceration and deportation of people of color.

Read the full report at immigrantjustice.org/LegacyofInjustice.

1. This report focuses on prosecutions for violations of 8 U.S.C. § 1325 and 8 U.S.C. § 1326, and not on other immigration-related offenses, such as prosecutions relating to 8 U.S.C. § 1324, which includes penalties for harboring, transporting, smuggling, and encouraging unauthorized immigration. Federal investigation and prosecutions under Section 1324 have also been used in abusive ways to target parents and sponsors of unaccompanied children, chill free speech, and retaliate against immigrant rights organizing. For the purposes of this report, however, "migration-related prosecutions" refers to prosecutions for unauthorized entry and reentry only.