



A Legacy of Injustice

The U.S. Criminalization of Migration

**NATIONAL
IMMIGRANT
JUSTICE CENTER**

A HEARTLAND ALLIANCE PROGRAM

July 2020

Acknowledgments

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Cover photo: Attendees at Hugs not Walls, an annual event organized by Border Network for Human Rights in El Paso, Texas, bringing together families from the United States and Mexico who have been separated by the harmful U.S. immigration system. Photo by Jordyn Rozensky.

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Table of Contents

I. Introduction	2
II. How U.S. Law Makes Migration a Crime	3
III. Violations Stemming from Migration Prosecutions	5
IV. The History of the Enforcement of Prosecutions	11
V. Migration Prosecutions and the Racist Systems of Mass Incarceration	13
VI. Migration Prosecutions in the Time of Coronavirus	15
VII. Conclusion	16
VIII. Recommendations	16
Methodology	18
Endnotes	19

I. Introduction

Congress first criminalized the act of entering or reentering the country without authorization nearly a century ago, in pursuit of xenophobic and eugenicist policy goals.¹ For much of the last century, these laws sat largely unused. However, Congress revitalized these laws as part of the national trend toward mass incarceration of people of color. For nearly 20 years, the U.S. government has prosecuted migration-related offenses in greater numbers than any other type of federal offense in the United States. Most recently, the Trump administration has used migration-related prosecutions as part of its anti-immigrant policymaking in ways that systematically separate families and violate the United States' national

prosecutions in federal courts.⁶ They also fuel the incarceration of people of color, bringing together the civil and criminal immigration legal systems in ways that exacerbate the racial and ethnic discrimination against both.

Oliver, an NIJC client, experienced the injustices caused by migration-related prosecutions. In 2019, he fled death threats from gangs tied to corrupt police in Honduras. When he tried to assert his asylum claim at a port of entry, however, he was told to wait. After waiting three months in Mexico, Oliver attempted to cross the border elsewhere. Upon crossing, he was arrested and referred for criminal prosecution for unauthorized entry, despite his asylum request based on his fear of returning to Honduras.

Oliver was detained in U.S. Marshals custody for more than a month, where he recalls experiencing racist treatment from guards. He was then released on bond, and at his final hearing in February 2020, the charges were dismissed. As he left the courthouse, however, agents from the Department of Homeland Security's (DHS) Customs and Border Protection (CBP) took him into custody. After he was detained at a CBP holding facility for over a week, he was

transferred to DHS Immigration and Customs Enforcement (ICE) custody at the Otay Mesa Detention Center in San Diego, California, just before the COVID-19 virus began spreading in that facility. Oliver was placed in quarantine for part of his time with other individuals. However, at no time was he tested for the virus or provided a mask. Rather, he used his own shirt as a mask. "We don't deserve to be here," Oliver told his NIJC legal team. "Many people are getting sick



The border between Juarez, Mexico and El Paso, Texas

Photo by Jordyn Rozensky

and international legal obligations.²

Through a series of executive orders and actions starting in January 2017, the government has deepened its commitment to prosecuting people for entering or reentering the United States without authorization.³ Such prosecutions increased by nearly 50 percent from fiscal years 2017 to 2019,⁴ contributing to approximately 10 percent of the federal prison population on any given day⁵ and making up around 60 percent of all criminal

in this detention center.” He was finally released in June 2020, after NIJC intervened on his behalf. He is pursuing his asylum claim.

This report provides an in-depth look at how the U.S. government has used entry and reentry prosecutions to violate the rights of people like Oliver who are seeking asylum or who hope to return to their spouses or children, many of whom are U.S. citizens or lawful permanent residents. Our research found that such prosecutions destabilize and permanently separate families, violate international and domestic asylum laws and basic due process protections provided to individuals facing criminal charges, and perpetuate dehumanizing and racist treatment of migrants. Throughout the report, we share stories of additional individuals whose fundamental rights have been abused as a result of these prosecutions. We also provide an historical backdrop of the structural racism that shaped these laws, and examine how prosecutions have fueled mass incarceration along racial and ethnic lines.

Finally, we examine how the COVID-19 pandemic has affected those who are being prosecuted for migration-related offenses. As the pandemic began, the U.S. Attorney’s Office temporarily stayed most unauthorized entry court hearings.⁷ Yet the devastating impact of these prosecutions persists. Many people who faced charges for unauthorized entry or reentry prior to and during the pandemic remained trapped, months later, waiting for their hearings, in increasingly deadly jails and detention centers where the risk of infection is high.

This report concludes with recommendations for urgently needed executive and legislative changes to decriminalize unauthorized migration. We

Costly Prosecutions

Like many of the administration’s efforts to undermine the rights of immigrants, the explosion in the prosecution of migration-related charges has led to ballooning costs for taxpayers.⁸ While there is no precise accounting for total costs, 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.⁹ The Government Accountability Office (GAO) has found that agencies have been forced to divert significant resources to support the prosecution priorities implemented by the Trump administration in 2017 and 2018, including personnel and physical space.¹⁰

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 and prosecutions of asylum seekers, (4) ban contracting with for-profit prisons to detain people facing migration-related prosecutions, and (5) demand the release of people trapped in detention during the COVID-19 pandemic. We further recommend that federal agencies (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 migration-related prosecutions.

II. How U.S. Law Makes Migration a Crime

Under federal law, people who enter or reenter the United States without authorization are subject not only to civil deportation proceedings, but also to criminal sanctions. When CBP officers apprehend individuals who have entered the country without authorization, they may decide to refer them for criminal prosecution or send them to ICE custody for civil proceedings.¹¹ When CBP refers a person for prosecution, both their criminal and civil

proceedings are initiated; the latter is then stayed pending resolution of the former.

Civil immigration proceedings are conducted by the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ).¹² Generally, these civil immigration cases result in either an order of deportation or the granting of lawful status. During these proceedings, individuals are often held in ICE deten-

tion centers, which are primarily run by private prison corporations.¹³

By contrast, criminal prosecutions for migration-related offenses are conducted in federal courts and may result in incarceration in the DOJ's prison system.¹⁴

The laws that prosecute unauthorized entry and reentry are:

- **Section 1325** of Title 8 of the U.S. Code, which makes it a federal misdemeanor to enter the United States without authorization.
- **Section 1326** of Title 8 of the U.S. Code, which makes it a felony to reenter the country without permission after a prior deportation or removal order.

Those who are referred for criminal prosecution are detained in pre-trial custody in DOJ U.S. Marshals facilities. People who receive shorter sentences¹⁵ serve their time in the same facilities,

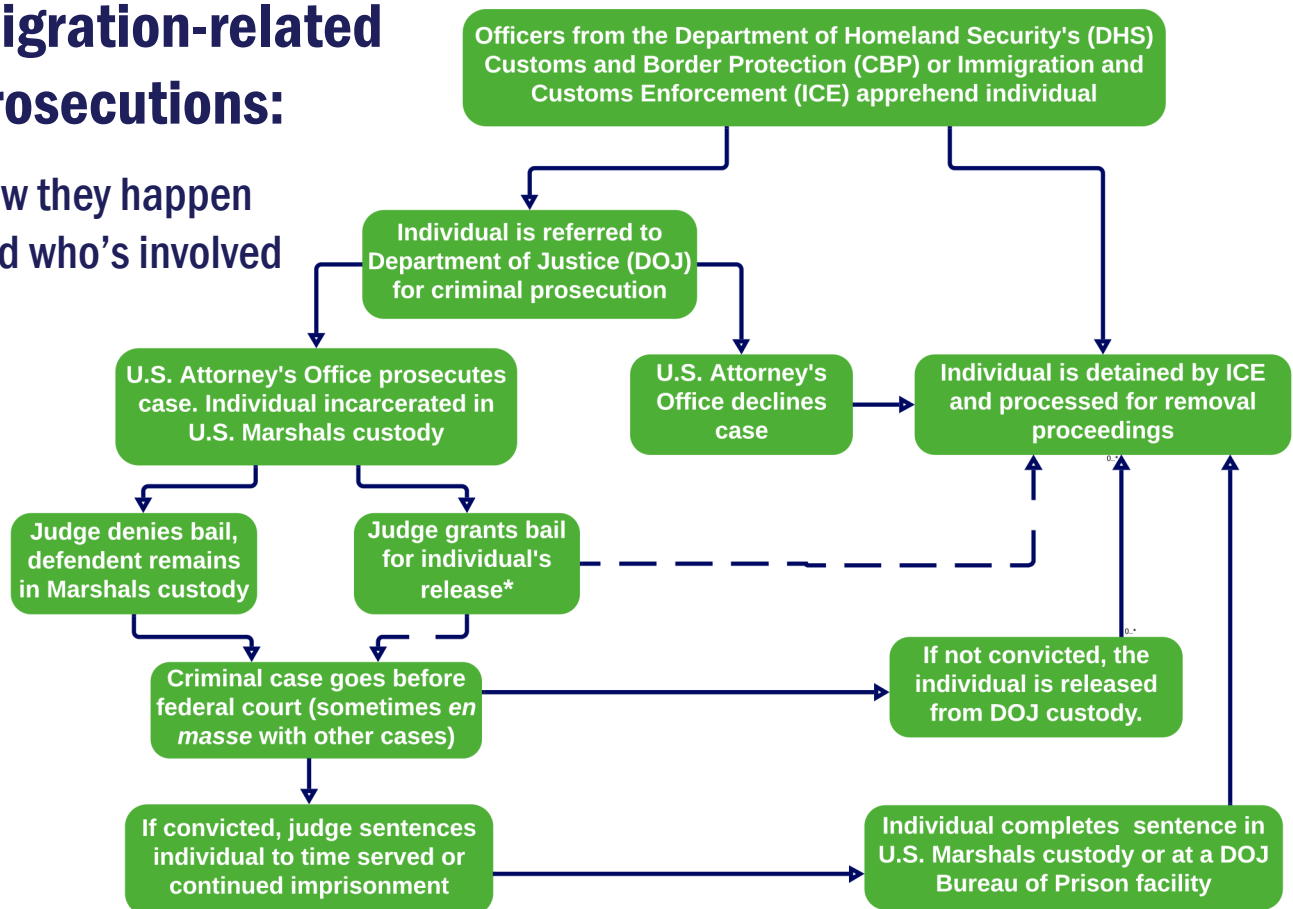
while those who receive longer sentences¹⁶ are sent to federal prisons controlled by the DOJ's Bureau of Prisons (BOP).¹⁷ After their criminal cases are resolved and any sentence served, individuals are then transferred back to either CBP or ICE detention for deportation proceedings.

Unauthorized entry is punishable by up to 180 days in federal jail for the first conviction, and up to two years for subsequent convictions.¹⁸ Unauthorized reentry is punishable by up to two years in federal prison, with up to 20 years in prison possible if the person has previous criminal convictions.¹⁹ As a result, an average of 11,100 people are in federal prisons on any given day serving time for migration-related convictions, and about 13,600 others are held in pre-trial detention by the U.S. Marshals.²⁰

While misdemeanor prosecutions for unauthorized entry are largely conducted in states along the southern border, unauthorized reentry felony prosecutions occur throughout the United States.

Migration-related prosecutions:

How they happen and who's involved



*DHS practices vary by district and case. In most cases, DHS agents take individuals into custody when they are released from U.S. Marshals custody; in some cases this does not happen until the conclusion of a person's criminal case.

Felony prosecutions for reentry violations impact thousands of individuals every year across the country, many of whom have been in the United States for years with strong family ties.²¹ U.S. Attorneys in non-southwest border districts charged 5,625 people with unauthorized reentry in 2018, an increase of approximately 26 percent from the year prior.²² Reentry prosecutions have increasingly been brought against individuals swept up in mass immigration enforcement operations, including mass workplace raids. An illustrative case is the August 2019 ICE operation that led to the arrest of 680 workers in Mississippi, the largest single-state operation in the agency's 16-year history.²³ Dozens of the workers arrested were prosecuted on felony charges for unauthorized reentry.²⁴

Furthermore, CBP's Border Patrol claims the authority to operate within a 100-mile "border zone" from any external U.S. boundary,²⁵ which includes the 10 largest cities in the United States, where border agents have free rein to pick up people for a myriad of suspected offenses and refer them for prosecution.²⁶ According to government reports,

CBP and ICE also work with local and federal law enforcement agencies to arrest people throughout the country for such criminal prosecutions.²⁷

James, an NIJC client, arrived in the United States from Mexico in 1991 as a child. He lived in the United States for 20 years with his parents and siblings, all of whom are lawful permanent residents or U.S. citizens. In 2010, police pulled James over in a routine traffic stop and turned him over to ICE. He was then coerced to sign for voluntary return to Mexico, without being informed of the consequences, a common practice at the time.²⁸ After returning to Mexico, he experienced cartel violence, including death threats from criminal drug networks with ties to the police, and he decided to return to the United States to seek safety and reunite with his family. In July 2019, he was apprehended at the border and referred for prosecution for unauthorized entry. At trial, however, the charges were dismissed. Nevertheless, just moments after the dismissal, DHS agents entered the courtroom and arrested James to detain him during his civil deportation proceedings.²⁹

III. Violations Stemming from Migration Prosecutions

NIJC launched an extensive investigation over the course of a year into rights violations stemming from migration-related prosecutions.³⁰ The investigation uncovered rights violations in unauthorized entry and reentry proceedings. The violations often included separating families, obstructing the right to asylum, denying due process protections, and dehumanizing and racist treatment.³¹

A. Separating families

International human rights law mandates that governments do not arbitrarily interfere with migrants' family unity.³² Yet by criminalizing the act of migration and prohibiting nuclear family members from lawfully reuniting,³³ the federal government regularly violates this obligation. Prosecutions routinely disrupt family unity when brought against individuals who are traveling with families, who are attempting to rejoin their families in the United States, or who are apprehended by DHS after having lived in the United States for many years with their families.

Perhaps the best-known recent example is the thousands of families separated at the southern border in 2018, when the Trump administration initiated its "Zero-Tolerance" policy.³⁴ In a memo kept secret until September 2018, DHS Secretary Kirstjen Nielsen signed off on a formal policy instructing CBP officers to remove children from their families in order to prosecute their parents.³⁵ While the officially reported number of separations between July 2017 and October 2019 reached over 5,400,³⁶ neither an accurate count of these children, nor the effects on them of prolonged separation from their parents, can be known.³⁷

At the peak of the Zero-Tolerance policy's implementation in 2018, NIJC represented three women who had fled their Central American homes with their children after surviving years of violence by partners and powerful gangs. All three requested asylum when they crossed the U.S. border, but CBP referred them for unauthorized entry prosecution and separated them from their children aged eight to 17. Only after finding lawyers, who advocated on their behalf, were they reunited with

their children. Others, without lawyers, suffered a different fate. The government admitted in 2018 that at least 400 children could not be reunited with parents who had been deported after their separations.³⁸

In June 2018, a federal district court judge in California ordered the administration to end its policy of prosecuting all parents for border crossing. But family separations due to prosecutions for unauthorized entry and reentry persist.³⁹ In January 2020, the same federal court ordered that the administration could continue to separate families when a parent has a criminal history, including migration-related convictions.⁴⁰

While the human rights abuses that surrounded Trump's Zero-Tolerance policy brought public attention to the plight of families fleeing to the United States to escape persecution, less public focus has been placed on those who come to this country to reunite with families with deep roots here. For decades, federal law and policy has required families to choose between permanent separation and making an unauthorized crossing to be together with their loved ones.⁴¹

More than 80 percent of the immigrants interviewed by NIJC had family members in the

United States and indicated they were trying to reunite with them.⁴² Thirty-three percent said they had children in the United States with whom they were hoping to reunite. More than half had lived in the United States before their prosecutions.

Ana, an NIJC client, is the proud mother to three U.S. citizen children and grandmother to a baby girl. Ana first arrived in the United States from Mexico in 1991 at the age of 17. In 2017, Ana traveled to Mexico to see her dying mother, not knowing this trip would leave her permanently separated from her loved ones. While taking care of her mother in Mexico, she attended a long-awaited visa interview. Her application was denied, and she was told to wait 10 years to apply again. Facing threats in Mexico, and desperate to see her children again, she attempted to return to the United States. Ana was arrested as she crossed the border, prosecuted for unauthorized entry, and ultimately deported. Today Ana remains in Mexico, separated from her family, and precluded from entering the United States lawfully, because of her previous unauthorized presence and criminal conviction for entering the country without permission to see her children.⁴³

Observing Family Separations in McAllen, Texas

NIJC observed ongoing family separations resulting from entry and reentry prosecutions in June 2019 while monitoring prosecution proceedings in the federal court in the Southern District of Texas, in the city of McAllen.

During one day of court, we observed two men who had been separated from their children, pleading for information about their children's whereabouts. A Salvadoran man told the judge his six-year-old daughter had been taken from him, and he asked to be released to see her. Yet he was sentenced to 30 days in prison for unauthorized entry. Another man from Honduras, appearing distraught and exhausted, told the court his four-year-old son had been taken from him. He was sentenced to 15 days in jail for unauthorized entry.⁴⁴

Weeks earlier, U.S. District Court Judge Ricardo H. Hinojosa had reprimanded government prosecutors at the McAllen court about ongoing separations, warning the government that taking a guilty plea from a parent who did not know the whereabouts of his child could be considered a coerced plea.⁴⁵ Judge Hinojosa told the government to provide information about every separation case, so the court was aware when a defendant had had their child taken from them.⁴⁶ Still, on the day NIJC visited the district court, Judge Hinojosa told us that he was concerned that there likely were still cases where children were separated without the knowledge of the local courts or defense attorneys.⁴⁷

B. Obstructing the right to asylum

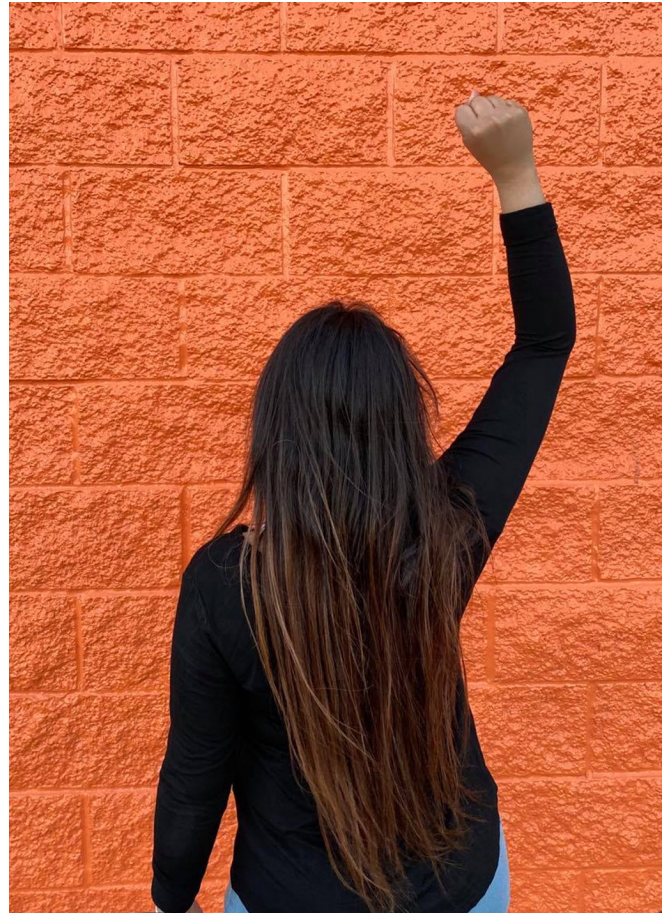
The U.S. government is bound by domestic and international legal obligations to protect people fleeing persecution and torture. Through its 1967 Protocol Relating to the Status of Refugees, the United States is a party to the obligations of the 1951 Refugee Convention, which prohibits governments from penalizing asylum seekers for their manner of entry.⁴⁸ Nonetheless, DHS consistently brings criminal charges against asylum seekers, the DOJ routinely pursues these charges, and federal courts conduct the related criminal proceedings.⁴⁹

Moreover, federal law requires that all individuals apprehended at the border be asked whether they are afraid to return to their home countries or would face persecution if they did so.⁵⁰ **Yet nearly 90 percent of the people we interviewed said that CBP had never asked them these questions. Fourteen were asylum seekers who told us the CBP officers who apprehended them at the border never asked them if they were afraid to return to their home countries before referring them for criminal prosecution.**

The answers to these questions determine whether an individual should be referred to an asylum officer for an initial screening known as a credible fear interview.⁵¹ Nearly five years ago, the DHS Office of Inspector General (OIG) raised concerns about CBP's practice of referring asylum seekers for criminal prosecution, noting the potential for violating U.S. treaty obligations.⁵² Members of Congress have expressed repeated concerns over ongoing criminal prosecutions against migrants who, during CBP processing, had expressed a fear of return to their countries of origin.⁵³

CBP failed to ask **Margo** if she feared returning to political violence in Honduras before referring her for criminal prosecution. Margo first came to the United States in 2014. She was detained and quickly deported. At 32 years old, she returned to the United States a second time in November 2018. She was fleeing gang violence and police corruption. She was again detained at the U.S.-Mexico border and was charged with a felony for unauthorized reentry. She pled guilty to the misdemeanor charge of unauthorized entry. When Margo completed her criminal sentence in February 2019, her civil immigration proceedings began,

and she was transferred to the custody of ICE, which placed her in a cell with ex-members of the same gang that had threatened her life in Honduras. After months of intervention from her attorney and after more than 100 people had tested positive for COVID-19 at her detention center, Margo was released in June 2020.⁵⁴



Margo on the day she was released from ICE detention

Photo shared with consent by Margo's attorney

Another asylum seeker, **Alexis**, feared returning to Guatemala when she arrived at the U.S. border. However, CBP never asked about her fear and failed to refer her for a credible fear interview, blocking any path to asylum. Alexis is a transgender person who fled Guatemala because of the violence she suffered as a result of her sexual orientation and gender identity.⁵⁵ She attempted to apply for asylum in Mexico, but threats from organized criminal networks forced her to leave. Because she feared waiting near the border, she crossed into the United States through the desert. When CBP agents arrested Alexis in August 2019,

instead of asking her whether she was afraid to return to her country of origin, they spoke derisively about her gender identity, grabbed her by the hair, yelled at her, and referred her for prosecution for unauthorized entry.

After her prosecution, Alexis was deported to Guatemala without ever getting an interview to express her fear, and despite having repeatedly told officers that she feared for her life in Guatemala. Her attorneys had to intervene for Alexis to return to the United States and to have the opportunity to seek asylum.

Convictions for unauthorized entry and reentry have adverse consequences for asylum seekers in several ways.⁵⁶ Immigration judges may decide to deny asylum on the basis of discretion⁵⁷ or deny a motion to reopen or to reconsider based on factors such as past convictions and manner of entry.⁵⁸ A conviction for unauthorized border crossing also impacts bond determinations and significantly reduces the ability of detained individuals to procure release and gain access to counsel for representation in asylum proceedings.⁵⁹

Prosecutors also use migration-related prosecutions to offer plea deals in exchange for compelling individuals to waive claims to asylum and/or protection under the United Nations Convention Against Torture.⁶⁰ Using such plea deals in this manner blocks pathways to relief and violates international and domestic prohibitions on non-refoulement, a core tenet of refugee law that prohibits the return of a person to a country where they have a well-founded fear of persecution.⁶¹ Such plea agreements often are presented to migrants as the only way to obtain release from custody to avoid more prison time,⁶² systematically dissuading individuals from asserting immigration protection claims.

Unauthorized entry prosecutions have been central to the government's attack on the U.S. asylum system. Internal memos reveal that, since early 2017, increasing such prosecutions was a key component of policymakers' plans to make seeking and obtaining asylum in the United States so difficult that the asylum program would ultimately crumble.⁶³

In July 2018, DHS issued guidance allowing asylum officers to consider an asylum seeker's conviction for unauthorized entry as a negative discretionary factor in an asylum application.⁶⁴ In December 2019, the administration also issued a proposed regulatory change that, if finalized, will categorically bar any individual who has been convicted of unauthorized reentry from requesting asylum.⁶⁵ Draft proposed rules that have been leaked to the media would do the same for people with a conviction for unauthorized entry.⁶⁶

Many of the people we interviewed described how their criminal prosecutions blocked their pathways to seeking asylum. Their stories revealed the steep odds asylum seekers face in winning protection, starting as soon as they are able to cross the border, because of the U.S. government's focus on prosecuting migrants.

Some individuals, like **Gustavo**, have had important papers confiscated by Border Patrol while being transferred between agencies for criminal prosecution. In November 2019, Gustavo attempted to seek asylum through legal channels at the U.S. port of entry at Nogales, Mexico, where border agents put his name on a list and told him to wait.⁶⁷ Gustavo's girlfriend had an injured leg, which, coupled with the threats of organized criminal networks in Nogales, made it impossible for the couple to stay there. They crossed through the desert, where they were apprehended by CBP. Gustavo was referred for prosecution for unauthorized entry and his girlfriend was sent to ICE detention. CBP officials took all his belongings, including the paperwork documenting the persecution he fled.⁶⁸ He was referred to U.S. Marshals custody to face criminal charges but was never given the opportunity to retrieve his papers, which were critical to his asylum claim.⁶⁹

Reaching the United States often means that migrants find safety from persecution, torture, and sometimes death. By criminalizing asylum seekers for crossing the border without authorization, and denying migrants the chance to present their asylum claims, the government systematically violates fundamental protections that have been enshrined in U.S. and international law since World War II.

C. Denying due process protections

Migration-related prosecutions raise inherent and unavoidable due process concerns.⁷⁰ DHS and DOJ prosecute many of these cases under the “Operation Streamline” program. Immigrants subject to Streamline in criminal proceedings frequently are not appointed counsel until the day of their hearings. They have little time to consult with an attorney to understand the charges that have been filed against them, the consequences they will face if they are convicted, or their potential avenues for legal relief, in a legal system that is completely foreign to most defendants.⁷¹ In an assembly-line manner, with as many as 80 defendants at a time, judges ask one person after another in open court to waive their constitutional rights.⁷² Translation services in court are often inadequate, posing challenges for individuals who speak indigenous and other rare languages.⁷³ Most immigrants in the Streamline program plead guilty, often without fully understanding the constitutional rights they forgo in the process.⁷⁴

When the practices of Streamline courts are subject to judicial review, the results are not favorable for the government. The U.S. Court of Appeals for the Ninth Circuit, for example, has vacated criminal convictions obtained through Operation Streamline after finding they violate Rule 11 of the Federal Rules of Criminal Procedure.⁷⁵ This rule sets forth the basic requirements for ensuring that a defendant has been properly advised prior to accepting a guilty plea.⁷⁶

Our interviews with people facing prosecution revealed that the assembly-line nature of Streamline proceedings undermined defendants’ ability to understand their rights, the nature and conse-

quences of their pleas, and the basics of the legal process in which they found themselves.⁷⁷ **Only 31 percent of the people we interviewed knew whether they were presently in the process of a criminal or immigration court proceeding. Only 44 percent understood what the purpose of the criminal prosecutions was, and only 63 percent said they understood what the next steps were in their legal process.**⁷⁸



Ysleta Border Patrol Station near El Paso, Texas

Photo by Jordyn Rozensky

NIJC’s interviews also reflected due process concerns with regard to language access. A 24-year-old man from Mexico said he had trouble understanding the court process because he was not provided an interpreter who spoke his indigenous Mixteco language.⁷⁹ A 35-year-old asylum-seeker from Guatemala said he similarly had trouble understanding the legal process because he was not provided an interpreter who spoke his indigenous language, K’iche’.⁸⁰

Further, people referred for unauthorized entry and reentry charges are held in pre-trial detention in CBP facilities under conditions that raise due process concerns as to whether the individual’s guilty pleas are voluntary or coerced by the specter of continued detention in CBP facilities or U.S. Marshals custody. **More than half the people we interviewed experienced overcrowding in CBP**

custody while waiting for their court hearings for entry or reentry charges. Twenty-four percent said guards did not allow them to have sufficient sleep, and 30 percent said they were not given enough food.

Ninth Circuit court briefs tell the story of one victim of Streamline who pled guilty to unauthorized entry after suffering trauma from being held in a cold and dirty CBP facility for three days with little food and no access to basic personal hygiene services, raising questions of coercion and competency of her plea in court.⁸¹ Defendants leave such pre-plea conditions in CBP detention to appear in court fatigued and confused, forced to navigate their legal proceedings without full cognitive functioning due to lack of sleep, hunger, and emotional stress. U.S. Marshals facilities, where defendants are also held in pre-trial detention, are no better.⁸²

Due process protections apply to all persons who are in the United States. Yet migration-related prosecutions regularly deprive migrants of procedural due process. As more migrants face unauthorized entry and reentry prosecutions, the due process violations escalate.

D. Dehumanizing and racist treatment

The treatment people describe when facing migration-related prosecutions reflects the institutional racism and discrimination embedded in the laws that outlawed migration nearly a century ago.⁸³

In NIJC's interviews, people reported that the abuse they endured at the hands of government officials stemmed from discrimination based on their race, sexual orientation, or gender. A 25-year-old man from Guatemala described the

treatment he faced in court: "It's discriminatory how the law is being applied...it's applied in a racist manner."⁸⁴ Many people said they experienced physical or verbal abuse, including insults and degrading statements, throughout their time in government custody. Examples included agents yelling at people in the course of arrest, telling them they do not belong in the United States, and making fun of them for not understanding English. A 31-year-old indigenous man from Mexico said border agents hit him and insulted him when they arrested him.⁸⁵ A 35-year-old Mexican man recalled agents shouting insults and profanity at him.⁸⁶ One 26-year-old Salvadoran asylum seeker described CBP guards in pre-trial detention as physically abusive.⁸⁷

Immigrants interviewed by NIJC reported inhumane and discriminatory treatment at CBP border facilities as follows:

- **30% described intimidating treatment by the guards**
- **50% reported verbal abuse**
- **76% were not allowed to shower**
- **61% were not given clean clothes**
- **52% did not have access to hygiene products**
- **28% were not given access to medical assistance**

Several people reported fearing for their lives and being treated less than human.⁸⁸ A 39-year-old asylum seeker from El Salvador said border agents treated people "like animals" in detention.⁸⁹

Challenging Discriminatory Treatment in Operation Streamline Proceedings

The Ninth Circuit Court of Appeals is currently considering a legal challenge against Streamline based on the discriminatory treatment, inhumane conditions, and trauma people suffer as part of their prosecution, including the practice of shackling.⁹⁰ In this case, the federal defenders of San Diego argue that immigrants charged with unauthorized entry and reentry offenses face an unequal system and are treated worse than U.S. citizens facing comparable charges in other courts.⁹¹ Similar cases have cited various anti-immigrant statements made by President Trump to argue that the abrupt decision to expand Streamline to the Southern District of California in 2018 originated from racially motivated animus.⁹²

IV. The History of the Enforcement of Prosecutions

Criminal sanctions for immigrants coming to the United States explicitly advanced racist policy goals. In the 1990s, Congress expanded these laws. A major surge in migration-related prosecutions came with the post-9/11 restructuring of the immigration enforcement landscape in the early 2000s, and prosecutions continued at high rates under the Obama administration. The Trump administration has weaponized these laws to new heights, using them to block asylum seekers and separate families.

Legislation rooted in racist ideology

Federal laws that criminalize the act of crossing the border without authorization were first promoted in the early 20th century.⁹³ During the hardships of the Great Depression, politicians saw the criminalization of migration as a way to attack Mexican migrants.⁹⁴ Secretary of Labor James Davis believed principles of eugenics should guide immigration policy. Secretary Davis aligned with other anti-immigrant policymakers, including a white supremacist South Carolina Senator named Coleman Livingston Blease, who advocated openly for segregationist policies and lynching.⁹⁵ Senator Blease introduced a law criminalizing unauthorized entry and reentry into the United States to please nativists, such as the Ku Klux Klan.⁹⁶ Senator Blease's bill became law in 1929.⁹⁷

When the federal immigration laws were overhauled in 1952, these provisions were codified at Sections 1325 (“illegal entry”)⁹⁸ and 1326 (“illegal reentry”)⁹⁹ of Chapter 8 of the U.S. Code, part of the Immigration and Nationality Act. Although the provisions led to thousands of illegal entry prosecutions in the first decade, the rate of prosecutions steadily dropped in ensuing decades.¹⁰⁰ By 1957, fewer than 2,000 people had been convicted under Sections 1325 and 1326.¹⁰¹ From the 1960s through the early 1990s, the government rarely prosecuted more than 10,000 people per year.¹⁰²

The Clinton Administration: The “tough-on-crime” approach to immigration

“Tough-on-crime” lawmaking in the 1990s significantly increased the most punitive aspects of U.S. immigration law, including increasing prison time for those charged with unauthorized reentry violations. The 1994 Crime Bill was one of the key contributors to mass incarceration,¹⁰³ with a severely harmful, lasting impact on Black and Latinx communities.¹⁰⁴ Significantly, the Crime Bill increased the statutory maximum penalty for unauthorized reentry defendants who had been deported following a conviction for a broad category of offenses defined in immigration law as an “aggravated felony.”¹⁰⁵

Two other laws signed in 1996—the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA)—further fueled mass incarceration and built the infrastructure for mass deportations that continues to grow today.¹⁰⁶ By 2000, reentry prosecutions reached 8,000 a year.¹⁰⁷ The length of sentences imposed for unauthorized reentry convictions grew drastically, doubling from a decade prior.¹⁰⁸

The Bush Administration: Remaking the immigration enforcement landscape

After 9/11, prosecutions for migration-related violations increased dramatically.¹⁰⁹ Amid a rising tide of anti-immigrant sentiment, the George W. Bush administration enacted policies that militarized and intensified immigration enforcement throughout the United States and along the border. Funding for immigration enforcement programs spiked.¹¹⁰ In 2001, the U.S. government convicted about 3,500 people for unauthorized entry; by 2004, that figure jumped to about 15,000.¹¹¹

In 2005, the Bush administration directed U.S. Attorney's offices to adopt an “enforcement with consequences” strategy¹¹² and launched the Operation Streamline program.¹¹³ As a result, prosecutions for unauthorized entry violations spiked from 16,000 in 2007 to over 50,000 in 2008.¹¹⁴ To this day, such mass prosecutions persist, systemically violating due process protections.¹¹⁵

The Obama Administration: Expansion of interior enforcement

The Obama administration directed resources toward ICE and CBP to increase immigration enforcement as the administration negotiated with Congress over comprehensive immigration reform.¹¹⁶ Legislative reforms were never achieved, but interior enforcement and border militarization programs fueled large-scale arrests and record numbers of deportations.

In 2013 alone, DHS removed 368,644 people from the United States.¹¹⁷ That same year, the DOJ prosecuted 20,159 felony reentry cases, an increase from 12,881 in 2007.¹¹⁸ Entry prosecutions reached an all-time peak of 65,597 in 2013, up from 50,804 in 2008.¹¹⁹

Administration officials prioritized resources to target and deport immigrants with “criminal” backgrounds.¹²⁰ However, for more than half of those who were deported from the border and labeled as “criminal deportees,” unauthorized entry was their most serious criminal conviction.¹²¹ For many, unauthorized entry or reentry was their only conviction.¹²²

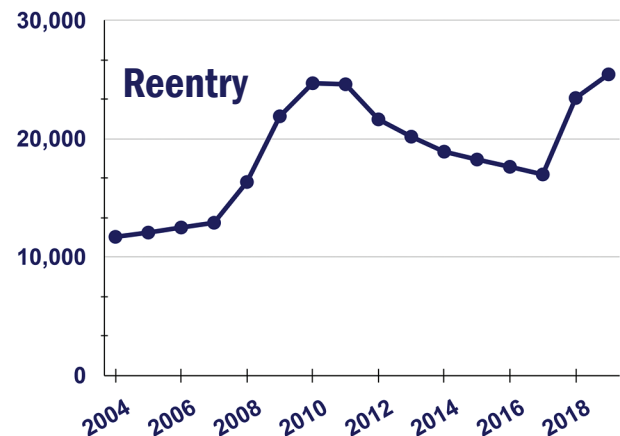
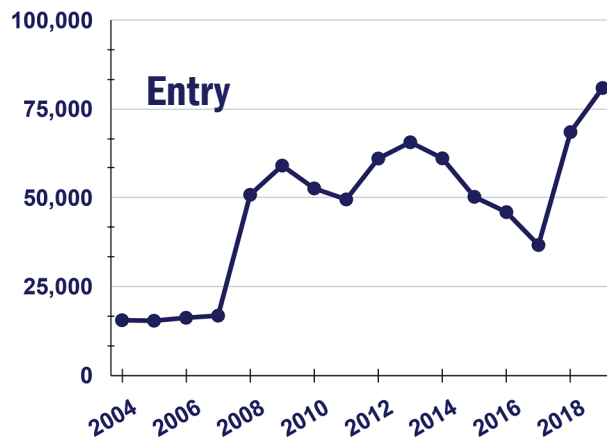
The Obama administration’s focus on border prosecutions decreased toward the end of the second term, including the scaling down and name change of the Streamline program to the “Criminal Consequence Initiative.”¹²³ The initiative sought to deter immigration using an array of enforcement measures and criminal prosecutions.¹²⁴ From 2013 to 2016, entry prosecutions dropped 30 percent to 45,915, and reentry prosecutions dipped 13 percent to 17,612.¹²⁵

The Trump Administration: Anti-immigrant policymaking becomes the priority

In the first two months of office in 2017, the Trump administration directed DHS and the DOJ to increase referrals and prosecutions for unauthorized entry and reentry violations.¹²⁶ The DOJ issued a memo in April 2017 instructing federal prosecutors to prioritize and increase such prosecutions of non-citizens.¹²⁷ In April 2018, the DOJ established a “Zero-Tolerance” policy, instructing U.S. Attorney’s offices at the southwest border to prosecute all migrants entering the United States without authorization, resulting in family separation on the border.¹²⁸

Federal prosecutions of migration-related offenses jumped by 66 percent from 2017 to 2018, while border apprehensions doubled.¹²⁹ By 2019, unauthorized entry prosecutions increased to more than 80,000; charges for reentry violations reached over 25,000.¹³⁰ The use of assembly-line courts also resurged.¹³¹ Streamline grew in the Southern Districts of Texas and Arizona and began for the first time in the Southern District of California in 2018.¹³²

Migration-related prosecutions per year



Source: 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.

V. Migration Prosecutions and the Racist Systems of Mass Incarceration

Migration-related prosecutions are a significant contributor to mass incarceration and have had a pernicious impact on the racial and citizenship makeup of those in federal courts and the federal prison population.¹³³ The country's prison population grew dramatically along racial lines over the past two decades, due in part to the increase in federal prison sentences for immigrants.¹³⁴

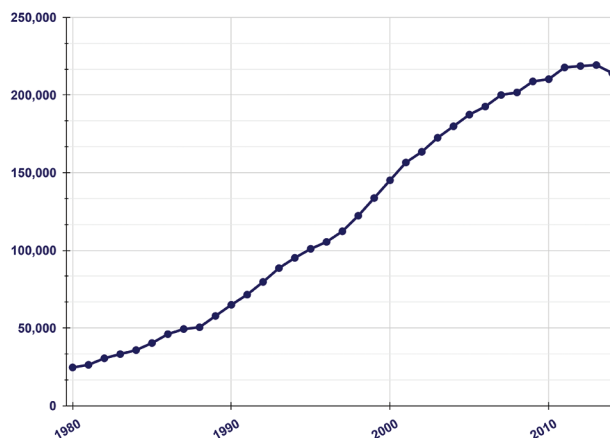
Undocumented immigrants who are referred for prosecution for unauthorized entry and reentry are shuttled between the criminal and immigration systems, where racial profiling and discrimination are common to both.¹³⁵ As a result, communities of color are disproportionately impacted.¹³⁶ Data on the U.S. prison population, race and citizenship, shows:

- Non-citizens comprise 19 percent of the total federal BOP prison population,¹³⁷ yet foreign-born individuals only make up 13.5 percent of the total U.S. population.¹³⁸
- The Latinx community represents around 32 percent of the federal prison population¹³⁹ but just 18 percent of the total U.S. population.¹⁴⁰
- Combined, imprisonment rates for Black and Hispanic adults are 5.9 and 3.1 times the rate for white adults, respectively.¹⁴¹

Michelle Alexander, whose work has shaped the national dialogue about racial justice and the criminal legal system, writes about the importance of examining the relationship between the systems of mass incarceration and mass deportations, especially the racial politics that enable them: "In recent decades, the system of mass incarceration has stripped away from millions of U.S. citizens basic civil and human rights until their status mirrors (or dips below) that of noncitizen immigrants within the United States. This development has coincided with the criminalization of immigration in the United States," she wrote in *The New York Times*.¹⁴²

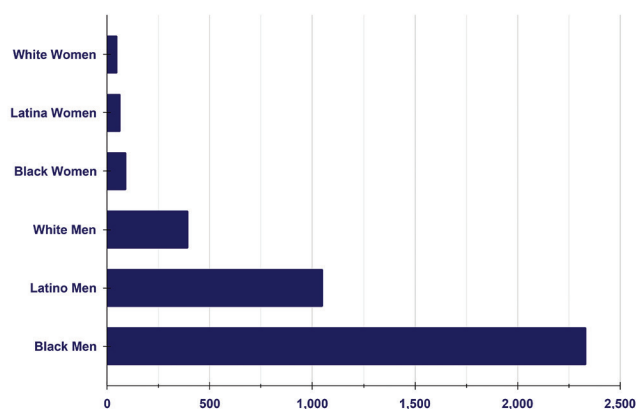
Luis Mayea Pulido¹⁴³ was brought to the U.S. from Mexico as a baby in 1979, grew up in the United States, and became a lawful permanent

Federal prison population 1980-2014



Source: <https://www.bop.gov/about/statistics/>

Rate of imprisonment by gender, race & ethnicity Per 100,000 people



Source: Bronson J. and Carson, E.A. (2019). *Prisoners in 2017*. Washington, DC: Bureau of Justice Statistics.

resident in 1986. He was deported in 2003, following a theft conviction that today would likely not be considered deportable under case law as it currently stands.¹⁴⁴ He returned multiple times without authorization to the United States to escape threats of violence in Mexico and to reunite with his family.

In 2017, Luis was arrested while standing at a bus stop near the U.S.-Mexico border and referred for prosecution for unauthorized reentry. At trial, Luis' attorneys argued that he was not an "alien," as he had acquired U.S. citizenship through his father, and therefore could not be prosecuted for unauthorized reentry. But the court rejected this argument, denying his citizenship after finding that both parents must have citizenship to confer

it onto a child, and sentenced him to six years in federal prison. Luis is now serving this sentence, even as he appeals the conviction on constitutional grounds.¹⁴⁵ "What the United States does not understand is not only am I wrongfully incarcerated," Luis wrote to NIJC from prison. "But I've also been sentenced to a form of torture, inhumane torture."

Migration Prosecutions Fuel Private Prison Profits During the Pandemic

The increase in migration-related prosecutions has fueled profits for the private companies that contract with the federal government to operate private prisons and detention centers. Most of the privately-operated prisons within the BOP are federal prisons built exclusively for non-citizens, known as Criminal Alien Requirement (CAR) prisons. The organizations Grassroots Leadership and Justice Strategies have documented the growth of CAR prisons, which make up approximately 10 percent of the overall federal prison population and where the large majority of those incarcerated are serving time on unauthorized entry and reentry convictions.¹⁴⁶ CAR facilities have been plagued by scandals and serious abuse.¹⁴⁷ The facilities are known as "shadow prisons" due to their parallel but separate relationship to immigration detention and criminal law enforcement generally.¹⁴⁸ The DOJ's Office of Inspector General found that privately run prisons contracted by BOP had higher rates of assaults than BOP-operated facilities, both on prisoners and staff.¹⁴⁹ Investigations have also found that people in these private prisons are subjected to shocking abuse and mistreatment and discriminated against by BOP policies that impede family contact and rehabilitative programs.¹⁵⁰

The Trump administration has dramatically expanded the use of privately-run CAR facilities. In February 2017, the DOJ reversed course

on the Obama administration's prior efforts to phase out the use of private prisons and opened the door for the DOJ to pursue new private contracts.¹⁵¹

In April 2017, the DOJ issued a new round of bids for CAR prisons. One of the ensuing contracts was a 10-year, \$398 million contract between DOJ and the GEO Group to reopen the North Lake Correctional Facility, a prison in the rural town of Baldwin, Michigan, that had closed in 2017.¹⁵² There are currently more than 1,500 people incarcerated there.¹⁵³

As the coronavirus pandemic spread through U.S. prisons, people at North Lake went on a hunger strike, protesting unsafe conditions, prolonged solitary confinement, lack of food, and accusing prison guards of segregating the facility by race.¹⁵⁴ By April 21, 2020, at least nine people inside had tested positive for the coronavirus.¹⁵⁵ Family members of those jailed in North Lake have called for their loved ones' release, noting that GEO Group refused to release information on COVID-19 test results, despite knowing of cases among staff.¹⁵⁶

The administration also continued to transfer people to the prison during the pandemic, because the BOP prohibition on transfers did not apply to private CAR prisons.¹⁵⁷ By the end of May 2020, GEO Group and BOP confirmed the first death of someone inside the prison due to COVID-19.¹⁵⁸

VI. Migration Prosecutions in the Time of Coronavirus

The COVID-19 pandemic has laid bare the severe harms and excessive waste inherent in the complex infrastructure behind migration-related prosecutions. Like all people in federal custody, people subject to charges for entry and reentry violations face a serious risk of contracting COVID-19 as it spreads through prisons and jails.¹⁵⁹ Jails, prisons, and detention centers were dangerous miscarriages of justice before the pandemic and became tinderboxes of infection as the virus spread. Decarceration became an imminent public health imperative.

Even as criminal prosecutions dropped overall in the early weeks of the U.S. pandemic,¹⁶⁰ ICE continued to refer people caught up in interior immigration enforcement to the DOJ for prosecution for unauthorized reentry.¹⁶¹ In some districts, the U.S. Attorney's Office also continued to pursue reentry charges for people referred by ICE, even where people had completed their civil immigration proceedings and been ordered deported.¹⁶² By the end of June 2020, news outlets reported more than 50,000 cases and 600 deaths of people held in federal and state jails, with both numbers increasing daily.¹⁶³ In May 2020, the BOP announced the death from COVID-19 of a 58-year-old man who was in prison for an unauthorized reentry conviction in San Pedro, California.¹⁶⁴

The daunting number of sub-agencies involved in unauthorized entry and reentry prosecutions puts people at a unique risk because of the frequency of transfers among facilities. Federal prisons and pre-trial detention facilities hold an average of 20,000 people at any given time for migration offenses alone, on top of thousands of additional people transferred to and from immigration detention before and following completion of their criminal proceedings.¹⁶⁵ Nearly all people subjected to entry and reentry prosecutions will be transferred in and out of the custody of CBP, ICE, U.S. Marshals, and sometimes the Bureau of Prisons, often within a span of days.

Juan's experience at the intersection of the criminal and immigration legal systems during the pandemic demonstrates how the government deploys both to inflict harm on immigrants and their families. Juan is a 36-year-old father and a victim of violent crime in the United States who tested positive for COVID-19 in the Otay Mesa Detention Center in June 2020. Juan had been deported in 2008 without an immigration court hearing after having lived in the United States since the age of 15, even though he was eligible for a path to citizenship at the time. He tried many times to return to be with his five U.S. citizen children but faced deportation each time. In 2018, he was arrested and referred for felony prosecution for unauthorized reentry. A judge dismissed that charge, and allowed Juan to be released on bond, but prosecutors still charged Juan with a misdemeanor for unauthorized entry. Juan had to return to court for his final hearing in February 2020, at which point the judge dropped the remaining charge. However, as Juan stepped away from the courthouse, a federal agent detained him and sent him to ICE detention. His COVID-19 symptoms began after he had been shuffled between California detention centers as the coronavirus spread.

NIJC and other advocates raised the alarm about deteriorating conditions in the Otay Mesa Detention Center, which holds people for both ICE and U.S. Marshals, in early April 2020, calling for the urgent release of those trapped inside.¹⁶⁶ Yet the number of confirmed cases of COVID-19 in Otay Mesa had reached over 100 by late April.¹⁶⁷ On April 30, a federal judge ordered the release of dozens of at-risk people in ICE custody from the facility.¹⁶⁸ But the order came too late for Carlos Escobar Mejia, who died a tragic and completely preventable death on May 6.¹⁶⁹ NIJC continues fighting to free Juan.

VII. Conclusion

The federal laws that criminalize unauthorized entry and reentry into the United States continue to inflict undue harm on migrants, as appears to have been the intent of the white supremacist lawmakers who enacted them more than a century ago. Repealing these laws is an essential step toward ending systemic injustices, reducing mass incarceration, and protecting fundamental human rights.

NIJC is committed to working in partnership with directly impacted individuals, families, and communities, as well as immigrant and civil rights advocates, to end criminal prosecutions for unauthorized entry and reentry into the United States. NIJC applauds members of Congress who have introduced and co-sponsored legislation to repeal these laws.¹⁷⁰ Until repeal is achieved, the use of criminal penalties for the mere act of crossing the border without authorization will continue to separate families, block access to asylum, and undermine due process protections.

VIII. Recommendations

Removing the threat of criminal penalties for unauthorized entry and reentry would mean that far fewer people would be subjected to the criminal justice system, would dramatically reduce the burden on criminal courts and federal prosecutors, and would mitigate harm inflicted on immigrant communities. Repealing these laws alone will still leave on the books a punitive civil detention and deportation system. The following recommendations, therefore, should be read within the context of a broader transformative vision of an immigration system in the United States that treats people with dignity and respects human rights for all.

U.S. Congress:

1. **Repeal criminal penalties for unauthorized entry and reentry:** Amend the Immigration and Nationality Act (INA) to repeal 8 U.S.C. § 1325 and 8 U.S.C. § 1326.
2. **Until repeal is accomplished, exercise the power of the purse** to mitigate the harms of 8 U.S.C. §§ 1325 and 1326 through must-pass spending bills.
3. **De-prioritize migration-related prosecutions:** Ensure that no funds are made available to the DOJ to implement the U.S. Attorney General’s April 2017 memo instructing federal prosecutors to prioritize criminal immigration enforcement or the April 2018 “Zero-Tolerance” policy.
4. **End *en masse* prosecutions:** Ensure that no funds are made available for the implementation of Operation Streamline or other programs that facilitate large-scale prosecutions and therefore undercut due process rights and other constitutional protections.
5. **End the prosecution of vulnerable populations and asylum seekers:** Ensure that no funds are made available to DHS to refer for prosecution or for DOJ to accept prosecutions of vulnerable individuals¹⁷¹ or asylum seekers under 8 U.S.C. §§ 1325 and 1326.
6. **End for-profit detention:** Ban for-profit federal prisons contracted by the DOJ, including Criminal Alien Requirement (CAR) prisons that hold people convicted under 8 U.S.C. §§ 1325 and 1326.
7. **Limit the prosecution-to-deportation pipeline:** Among other critical changes, amend the INA to change the definition of what constitutes an “aggravated felony” and remove the statutory penalty for people convicted for unauthorized reentry who had been deported following a conviction for an aggravated felony.

8. **Demand transparency and accountability:** Call on the administration to release information relating to the impact of migration-related prosecutions, contingent on future funding.
9. **Release people awaiting trial during the COVID-19 pandemic:** Order the urgent release of people held in pre-trial custody awaiting charges for unauthorized entry or reentry to reduce the populations in U.S. Marshals and BOP custody where COVID-19 has spread.

Department of Justice:

10. **Suspend unauthorized entry/reentry prosecutions:** Halt all unauthorized entry and reentry prosecutions under 8 U.S.C. §§ 1325 and 1326.
11. **Revoke existing guidance and de-prioritize prosecutions:** Revoke the 2017 Attorney General memorandum on prioritizing criminal immigration enforcement and the April 2018 “Zero-Tolerance” memo.
12. **End use of privately run CAR facilities:** Issue a memo suspending all private prison contracts, including revoking contracts for all existing CAR prisons.

U.S. Sentencing Commission:

13. **Reduce sentences for migration-related charges:** Reject any proposed amendments to increase sentences for unauthorized entry and reentry, and actively seek to remedy already exorbitant sentences.

Department of Homeland Security:

14. **Suspend referrals of unauthorized entry/reentry prosecutions:** Suspend all referrals by ICE and CBP for unauthorized entry and reentry prosecutions under 8 U.S.C. §§ 1325 and 1326.
15. **De-prioritize migration-related prosecutions:** Revoke the February 2017 memo on “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” that directed DHS agencies to prioritize targeting people for offenses including unauthorized entry or reentry.
16. **Remove special assistant attorneys from U.S. Attorney’s offices:** End the practice of assigning CBP or ICE officials as deputized or special assistant attorneys to U.S. Attorney’s offices to assist with migration-related prosecutions.

Office of Inspector General:

17. **Investigate past and ongoing practices:** The DHS Office of Inspector General should investigate abuses associated with migration-related prosecutions. Investigations should examine due process violations and follow up on the office’s previous recommendation that CBP issue guidance for non-citizens who express a fear of persecution or return to their country of origin.
18. **Investigate private detention facilities:** Initiate an investigation into the harmful impacts of 8 U.S.C. §§ 1325 and 1326 prosecutions, including costs and conditions in U.S. Marshals and CAR prisons.

Office for Civil Rights and Civil Liberties:

19. **Investigate past and ongoing civil rights abuses:** The DHS Office for Civil Rights and Civil Liberties should investigate the racist origins of 8 U.S.C. §§ 1325 and 1326 and the ongoing civil rights abuses stemming from entry and reentry prosecutions.

Methodology

This report is based on research and interviews conducted from June 2019 to May 2020.¹⁷² NIJC visited federal courts in McAllen and Brownsville, Texas; Tucson, Arizona; and San Diego, California, and observed hundreds of prosecutions of immigrants charged with unauthorized entry and reentry. We interviewed numerous stakeholders, including federal judges, criminal defense attorneys, federal public defenders, private and non-profit immigration attorneys, investigators, and community activists and organizers.

NIJC conducted 54 structured interviews with individuals charged with unauthorized entry or reentry. The individuals were awaiting their court appearances in U.S. Marshals custody, were in ICE detention awaiting their immigration proceedings, were released on bond, or were serving criminal sentences in federal prison. The survey consisted of 40 questions, capturing information on people's background, reason for migration, their treatment in custody and during the process, their understanding of the legal process, and other information relating to their case.¹⁷³ We interviewed additional individuals facing entry and reentry prosecutions, as well as their family members, attorneys, or friends who shared their stories with us outside of the structured interview format.

The majority of interviews were conducted by the author in person and by telephone. Interviews were conducted in English or Spanish, depending on the interviewee's preference. All participants were informed of the purpose of the interview and consented by signing a waiver. No interviewee received compensation for providing information. Where appropriate, NIJC provided individuals with contact information for organizations providing legal, counseling, or social services. We have used pseudonyms to protect the privacy of individuals, except in one case where an individual explicitly requested their name be used to help build awareness around their case.

In addition to interviews, we examined publicly available court records in more than 30 cases, including some cases for which we also had interviews. We corresponded with individuals out on bond as well as those serving sentences in federal prison for unauthorized entry or reentry, who consented to participate in our research.

In many cases, we obtained publicly available federal court documents from Public Access to Court Electronic Records (PACER) to corroborate information provided by defendants, family members, and attorneys. The cases do not constitute a random sample. Still, they included non-citizens both with and without strong family ties in the United States, people seeking asylum, people who had lived in the U.S for years, and those with a variety of prior criminal records. The individuals NIJC interviewed were identified in a variety of ways. A large number of the cases were identified through staff in NIJC's San Diego office, which provides legal support in immigration cases for people facing entry and reentry prosecutions.

NIJC submitted numerous requests under the Freedom of Information Act (FOIA) to the Department of Homeland Security, Immigration and Customs Enforcement, Customs and Border Protection, and the Department of Justice, for information to inform this report. We continue to appeal the requests that have been denied and pursue open requests. Records providing information about the Trump administration's "Zero-Tolerance" policy were obtained through FOIA requests filed in conjunction with the American Immigration Council and other partner organizations. This report also relied on publicly available data and reports from the U.S. Sentencing Commission, the Administrative Office of the U.S. Courts, the Executive Office of U.S. Attorneys, the Bureau of Prisons, and the Bureau of Justice Statistics, as well as data from the Transactional Records Access Clearinghouse.

Endnotes

1. This report focuses on prosecutions for violations of 8 U.S.C. § 1325 and 8 U.S.C. § 1326, and not on other migration-related offenses, such as prosecutions relating to 8 U.S.C. § 1324, which includes penalties for harboring, transporting, smuggling, and encouraging unauthorized immigration. Federal investigations and prosecutions under Section 1324 have been used in abusive ways to target parents and sponsors of unaccompanied children, chill free speech, retaliate against immigrant rights organizing, and are often interlinked with Section 1325 and 1326 prosecutions. Such abuses merit a close examination and scrutiny, but are beyond the scope of this investigation. See, e.g., Julie Mao and Jan Collatz, *Understanding the Federal Offenses of Harboring, Transporting, Smuggling, and Encouraging under 8 U.S.C. § 1324(a)*, legal memo, National Immigration Project of the National Lawyers Guild, September 28, 2017, https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2017_28Sep_memo-1324a.pdf.
2. Violations include violating the right to family unity, the right to seek asylum, and due process rights. See *infra* Section III.
3. See *infra* Section IV.
4. See U.S. Department of Justice, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019, <https://www.justice.gov/opa/pr/departments-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.
5. César Cuauhtémoc García Hernández, *Migrating to Prison: America’s Obsession with Locking Up Immigrants*, (New York: The New Press, 2019), at 83.
6. “Prosecutions for 2020,” Transactional Records Access Clearinghouse (TRAC), Syracuse University, report generated May 2020, <https://tracfed.syr.edu/results/9x705ed-667de5d.html>.
7. “Advocacy organizations to AG William Barr: Halt migrant prosecutions during COVID-19 crisis to save lives,” Grassroots Leadership, March 24, 2020, <https://grassrootsleadership.org/releases/2020/03/advocacy-organizations-ag-william-barr-halt-migrant-prosecutions-during-covid-19>.
8. Judith A. Greene, Bethany Carson, Andrea Black, *Indefensible: a Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border*, *Grassroots Leadership and Justice Strategies*, (July 2016) at 143, <https://grassrootsleadership.org/reports/indefensible-decade-mass-incarceration-migrants-prosecuted-crossing-border>. The price tag of mass incarcerations, on top of appointed public defenders, judicial resources and administrative court costs, is estimated at millions of dollars per month. See also “Prosecuting Migrants for Coming to the United States,” American Immigration Council, January, 10, 2020, <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.
9. Doug Keller, “Re-thinking Illegal Entry and Re-entry,” *Loyola University Chicago Law Journal*, Vol. 44, Issue 1 (Fall 2012), <https://pdfs.semanticscholar.org/1c90/a990eaac-c1547420ce3c7dad9d58c39dca71.pdf>.
10. 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, (Washington, DC: December 2019), <https://www.gao.gov/assets/710/702965.pdf>. See also U.S. Department of Justice, U.S. Attorney’s office, *FY 2017 Performance Budget Congressional Submission*, (2020), <https://www.justice.gov/jmd/file/821011/download>. U.S. Department of Justice, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019.
11. See 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, (Washington, DC: December 2019), at p. 12, <https://www.gao.gov/assets/710/702965.pdf>.
12. Removal proceedings are administrative proceedings to determine a non-citizen’s removability from the United States and their eligibility for relief under the Immigration and Nationality Act (INA). See 8 U.S.C. 1229a: Removal proceedings.
13. See Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, *Justice Free Zones: U.S. Immigration Detention Under the Trump Administration*, National Immigrant Justice Center, Human Rights Watch and American Civil Liberties Union (April 2020), <https://immigrantjustice.org/research-items/report-justice-free-zones-us-immigration-detention-under-trump-administration>.
14. See “Frequently Asked Questions: Criminal Prosecutions on the Border,” Project on Government Oversight, June 22, 2018, <https://www.pogo.org/analysis/2018/06/frequently-asked-questions-criminal-prosecutions-on-border/>.
15. People with no prior criminal history who face unauthorized entry charges typically are sentenced to time served if they accept a guilty plea. Defendants who have a prior conviction for unauthorized entry or other past charges, however, tend to face terms of imprisonment ranging from 10 to 180 days, and serve their sentences in U.S. Marshals custody. See 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, at p. 80 (Washington, DC: December 2019), <https://www.gao.gov/assets/710/702965.pdf>.
16. People convicted for unauthorized reentry tend to serve their sentences in BOP prisons. The average sentence for people convicted with unauthorized reentry charges in FY 2019 was nine months. See U.S. Sentencing Commission, *Quick Facts, Illegal Reentry Offenses, Fiscal Year 2019* (April 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY19.pdf.
17. See Grace Meng, *Turning Migrants into Criminals The Harmful Impact of US Border Prosecutions*, Human Rights Watch, (May 2013), <https://www.hrw.org/report/2013/05/22/>

[turning-migrants-criminals/harmful-impact-us-border-prosecutions](#).

18. See U.S. Sentencing Commission, *Unlawfully Entering or Remaining in the United States*, *Sentencing Guidelines*, § 2L1.2. (November 1, 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/CHAPTER_2_L-X.pdf.

19. *Ibid.*

20. Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2020," Prison Policy Initiative, March 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.

21. A 2015 U.S. Sentencing Commission report found nearly 50 percent of people sentenced for "illegal re-entry" had at least one child living in the U.S. See U.S. Sentencing Commission, *Illegal Reentry Offenses* (2015), <https://www.ussc.gov/research/research-publications/illegal-reentry-offenses>.

22. See 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, at p. 80 (Washington, DC: December 2019), <https://www.gao.gov/assets/710/702965.pdf>.

23. The grassroots group Mijente reported on how Homeland Security Investigations (HSI) affidavits showed how ICE used privately contracted investigative platforms to obtain information used in the Mississippi raids and reentry prosecutions of people arrested. See, "BREAKING: Palantir's technology used in Mississippi raids where 680 were arrested," Mijente, October 4, 2019, <https://mijente.net/2019/10/palantirpow-ersraids>.

24. Roque Planes, "Migrants Imprisoned After Mississippi ICE Raid Get Little Mercy In Court," *Huffington Post*, August 29, 2019, https://www.huffingtonpost.ca/entry/migrants-mississippi-ice-raid-court_n_5d67d7d4e4b063c341fc05e1?utm_hp_ref=ca-us-politics.

25. "Know Your Rights: In the 100-Mile Border Zone," American Civil Liberties Union, June 21, 2018, <https://www.aclu.org/know-your-rights-100-mile-border-zone>.

26. For data on CBP and ICE referrals for Section 1326 prosecutions, see "Prosecutions for 2019, Lead Charge: 8 USC 1326 - Reentry of deported alien," Transactional Records Access Clearinghouse (September 2019). See also U.S. Department of Justice, *Report to Congress on Prosecuting Immigration Crimes* (Washington, DC: August 2019), <https://www.justice.gov/usao/page/file/1205551/download>.

27. See U.S. Government Accountability Office, *Arrests, Detentions, and Removals, and Issues Related to Selected Populations*, GAO-20-36, (Washington, DC: December 2019), at 9-10, <https://www.gao.gov/assets/710/703032.pdf>. For information on ICE interior enforcement programs and use of detainers, see, U.S. Immigration and Customs Enforcement, *Budget Overview, Congressional Justification, Fiscal Year 2020* (Washington, DC: U.S. Department of Homeland Security, 2019) https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

28. See e.g., *Lopez-Venegas, et al. v. Johnson, et al.* No. 13-cv-03972-JAK-PLA (C.D. Cal., filed June 4, 2013).

29. Petition for Writ of *Habeas Corpus*, on file with the author.

30. The investigation included structured interviews with more than 50 individuals who were facing or had experienced unauthorized entry or reentry prosecutions; analysis of primary source records; interviews with defense attorneys, judges, advocates, and legal experts during site visits to border regions; and court monitoring in the Southern Districts of Texas, Arizona, and California. See *infra*, Methodology section.

31. There are more violations associated with migration-related prosecutions beyond the categories addressed in this report. For example, the government utilizes an expanding web of data-sharing programs to circumvent local laws and legal protections while targeting people for unauthorized reentry prosecutions. Attorneys from Just Futures Law have documented how DHS obtains information through expansive data-sharing programs, and warn that existing measures might be insufficient to protect against resulting constitutional violations. See Julie Mao (author), Paromita Shaw and Sejal Zota (Eds), *State Driver's License Data: Breaking Down Data Sharing and Recommendations for Data Privacy*, Just Futures Law (March 2020), <https://justfutureslaw.org/wp-content/uploads/2020/04/2020-3-5-State-DMV-Data-Sharing-Just-Futures-Law.pdf>.

32. *Universal Declaration of Human Rights*, 217 III A, International Bill of Human Rights, Article 12, December 10, 1948, [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)). The rights are also incorporated in treaties to which the United States has signed or is a party. See Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*, Article 11 of the *American Convention on Human Rights*, and Article 16 of the *U.N. Convention on the Rights of the Child*.

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39. See Laura Peña and Efrén C. Olivares, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, The Texas Civil Rights Project, (February 2019), <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-FINAL.pdf>.

40. *Ms. L. et al. v. U.S. Immigration and Customs Enforcement et al.*, Case No.: 18cv0428 DMS. <https://www.court-housenews.com/wp-content/uploads/2020/01/FamilySeparation-inJORDER.pdf>. See also “Statement of the National Immigrant Justice Center (NIJC), U.S. House Judiciary Committee Hearing Oversight of Family Separation and U.S. Customs and Border Protection,” National Immigrant Justice Center, July 25, 2019, <https://docs.house.gov/meetings/JU/JU00/20190725/109852/HHRG-116-JU00-20190725-SD014.pdf>.

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47. Interview, McAllen, Texas, June 6, 2019.

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162. In April 2020, the U.S. Attorney's Office in Maryland

pursued charges for an asylum seeker from El Salvador who was referred by ICE for unauthorized reentry (8 U.S.C. 1326), pulling him from the plane after his immigration proceedings were complete so he could face felony charges. Defense attorney on the case is Rosana Chavez. Criminal complaint on file with author.

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167. Kari Burns, "Otay Mesa DC Now Has Highest Number of Confirmed COVID-19 Cases," Freedom for Immigrants, April 28, 2020, <https://imm-print.com/otay-mesa-now-has-highest-number-of-confirmed-covid-19-cases>. See also U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19, Confirmed Cases*, <https://www.ice.gov/coronavirus> (last visited May 19, 2020).

168. Ed Cifuentes, "Federal Judge Orders Release of Dozens of Medically Vulnerable People at Otay Mesa Detention Center," American Civil Liberties Union of San Diego, April 30, 2020, <https://www.aclusandiego.org/federal-judge-orders-release-of-dozens-of-medically-vulnerable-people-at-otay-mesa-detention-center>.

169. Kate Morrissey, "First ICE detainee dies from COVID-19 after being hospitalized from Otay Mesa Detention Center," *San Diego Tribune*, May 6, 2020, <https://www.sandiegouniontribune.com/news/immigration/story/2020-05-06/first-ice-detainee-dies-from-covid-19-after-being-hospitalized-from-otay-mesa-detention-center>.

170. The New Way Forward Act, H.R. 5383, would repeal 8 U.S.C. §§ 1325 and 1326 as part of broader reforms that would roll back harmful immigration laws that have led to racial profiling and disproportionately resulted in the incarceration, deportation, and destruction of families of color and immigrant communities. The legislation was introduced in December 2019 by Representatives Jesús "Chuy" García (IL-04), Ayanna Pressley (MA-04), Pramila Jayapal (WA-07), and Karen Bass (CA-37). See National Immigrant Justice Center, *Decriminalize Immigration*, (Updated January 2020), <https://immigrantjustice.org/issues/decriminalize-immigration>.

171. Vulnerable populations include any person who is under 21 years of age or over 60 years of age; is pregnant; is a primary care-giver to children or elders; identifies as lesbian, gay, bisexual, transgender, or intersex; is victim or witness of a crime; is an asylum seeker; has filed a nonfrivolous civil rights claim in federal or state court; has a serious mental or physical illness or disability; or has a pending affirmative immigration application. See U.S. Congress, House of Representatives, New Way Forward Act, H.R.5383, 116th Cong., 1st sess., introduced December 10, 2019, at Section 102, (a) Custody and Bond Determinations (b)(7), <https://www.congress.gov/bill/116th-congress/house-bill/5383/text>.

172. This report focuses on prosecutions for violations of 8 U.S.C. § 1325 and 8 U.S.C. § 1326, and not on other migration-related offenses, such as prosecutions relating to 8 U.S.C. § 1324, which includes penalties for harboring, transporting, smuggling, and encouraging unauthorized immigration. Prosecutions under other migration-related offenses raise serious concerns that are outside the scope of this report. See *supra* note 1.

173. See *Data Collection for Policy Research, Prosecutions under 8 U.S.C. Sections 1325 and 1326*, National Immigrant Justice Center, <https://www.documentcloud.org/documents/6941475-Interview-Questions-English-2020.html>.