

Decriminalizing Migration: Ending Prosecutions for Border Crossing Violations

August 2019

The Trump administration has weaponized provisions in federal law in the most abusive way to demonize immigrants and tear families apart. Two of the most harmful, costly, and unnecessary provisions in federal immigration law are Sections 1325 and 1326 of Title 8 U.S.C., which make it a federal crime for someone to enter the U.S. somewhere other than an official port of entry. The legislative history of these provisions reveals them to have been born from white supremacist ideology and politics.

Striking these harmful laws would leave border crossing as a civil offense, rather than a federal crime. Such repeal is a critical and necessary step toward a humane and just approach to migration law and policy. As long as they remain on the books, Section 1325 and 1326 will fuel the unjust incarceration of immigrants and leave children permanently scarred by the trauma of separation. The National Immigrant Justice Center calls on Member of Congress to support their repeal.

Background: A dark legislative history grounded in racist ideology

Federal laws that criminalize immigrants were first promoted by eugenicists in the early 20th Century.ⁱ Coleman Livingston Blease, a white supremacist Senator from South Carolina, introduced the law criminalizing border crossings to please nativists who wanted to stop Mexican migration during the 1920s.ⁱⁱ The law was broadly written to harness growing anti-Mexican sentiment and punish unauthorized entry by barred classes like Asian immigrants.ⁱⁱⁱ Blease's law passed and became 8 U.S.C. § 1325, ultimately subjecting any immigrant who entered the U.S. outside a lawful entry point to fines and imprisonment.^{iv} The law has been utilized in the decades since to ascribe immigrants with criminality and then penalize immigrants for that association.^v

Recent history of prosecutions and family separation

Prosecutions for border crossings were low until 2005, when U.S. Attorneys increased mass prosecutions under President George W. Bush as part of the national securitization of immigration enforcement.^{vi} By 2009, under the Obama administration, U.S. Attorneys prosecuted more than 50,000 cases of unlawful entry or reentry.^{vii}

The Trump Administration has pushed the statutes to their limits, with the number of prosecutions soaring to 89,000 in 2018.^{viii} This “zero tolerance” approach was formally announced in April 2018,^{ix} the same month Department of Homeland Security (DHS) officials instructed border agents to separate children “so that the parent or legal guardian can be prosecuted.”^x Border prosecutions thus became the centerpiece of the administration's family

separation policy, with more than 2,300 children torn from their parents in a manner so cruel and systematic as to constitute torture.^{xi}

While the official policy of prosecuting every adult for border crossing technically ended in June 2018, newly released documents show that border-crossing prosecutions continue to result in separations to this day.^{xii} As long as laws exist to criminalize border crossing, thousands of migrants will continue to face federal prosecutions every year, subjecting noncitizens to second-class injustice, denying due process protections, and separating families.

Operation Streamline – the use of mass prosecutions

In 2005, the Bush administration launched “Operation Streamline,” a program in which DHS and the Justice Department target and prosecute migrants *en masse* for unauthorized border crossings. The process involves mass hearings in which up to 80 migrants are arraigned, found guilty, convicted and sentenced for unlawful entry in one fell swoop. The program expanded as prosecutions accelerated under the Obama administration, before scaling down and changing names in 2016.^{xiii} Streamline resurged and moved into new districts and continues to expand under the Trump administration.^{xiv}

Streamline proceedings violate human rights, international treaty obligations, and due process rights of immigrants.^{xv} Defendants are dragged into court and tried in hand cuffs and ankle shackles. The judge reads a script that includes questions requiring rote answers. Defendants in Streamline cases are typically detained for 1 to 14 days before appearing in court for the first time. These individuals frequently have no counsel until their hearings, allowing little time to consult with an attorney to understand the charges, consequences of conviction, and potential avenues for legal relief. Because a single attorney often represents dozens of defendants at a time, he or she might not be able to speak confidentially with each client or might have a conflict of interest among clients without even realizing it.^{xvi}

In San Diego, federal defenders have pointed out that the Streamline process violates equal protections by depriving noncitizens charged with unlawful entry of the benefits and advantages of either the district’s federal misdemeanor court *or* the district’s federal felony court.^{xvii} Moreover, defendants going through the proceedings suffer in reprehensible conditions in border patrol stations where they are held pre-trial in cold, overcrowded facilities, lacking adequate food, water and medicate care.^{xviii}

Prosecution of asylum seekers violates due process protections and international law

Illegal entry and reentry prosecutions systemically violate the rights of asylum seekers.^{xix} The referral of asylum seekers for criminal prosecution is fundamentally incompatible with U.S. commitments under the Refugee Convention, which prohibits states from penalizing refugees for their manner of entry.^{xx} In 2015, the DHS Inspector General found that the use of illegal entry prosecutions was likely placing the U.S. in violation of its international treaty obligations; yet the Trump administration has doubled down on this illegal practice, *routinely* referring asylum seekers for prosecutions.^{xxi}

Even more insidiously, the Trump administration has implemented numerous policies that force asylum seekers to cross outside of ports of entry, leaving them vulnerable to prosecution.^{xxii}

The DHS Inspector General has found, and Customs and Border Protection (CBP) officials have confirmed, that turning people away at ports of entry as the administration has done through its so-called “metering” policy leads to an increase in illegal border crossings.^{xxiii} After being turned away, if they are able to make it across deadly crossing points outside the official entry points, migrants face the risk of being prosecuted, serving jail time, and having their children taken from them.

The use of criminal laws to regulate migration is abusive and wasteful

Repealing laws that criminalize border crossing would leave the civil enforcement system intact.^{xxiv} Undocumented immigrants prosecuted under 1325 and 1326 *also face* the same immigration enforcement measures as those the government chooses not to prosecute, including detention and deportation. Nonetheless, pundits are stoking fears by claiming that stopping illegal entry prosecutions is akin to open borders.^{xxv} Former Obama officials have gone so far as to say that decriminalization would attract hundreds of thousands of new migrants to the southern border, falsely asserting that the laws are “central” to immigration enforcement.^{xxvi}

No evidence exists to support the premise that border crossing prosecutions have had any effect on immigrants’ decisions to come to the U.S.^{xxvii} Similarly, the high level of criminal prosecutions and incarceration of immigrants has been going on for decades, and there is no evidence that it is deterring repeated reentry, let alone other crimes. Rather, border crossing prosecutions serve as a form of double punishment, applied in a discriminatory way that targets people of color.^{xxviii} Such prosecutions function as are part of a separate and unequal system that does not provide the same due process measures afforded to U.S. citizens. For this reason, immigrant rights and criminal justice groups have been calling for an end to federal prosecutions of border crossing violations for years.^{xxix}

Vast government resources are wasted on federal criminal prosecution and incarceration of immigrants.^{xxx} Illegal entry and re-entry are the most prosecuted federal crimes in the United States.^{xxxi} The explosion in the prosecution of immigration-related charges has led to ballooning costs for taxpayers,^{xxxii} associated not just with the price tag of mass incarcerations but of appointed public defenders, judicial resources and administrative court costs estimated at millions of dollars per month.^{xxxiii} Private companies are profiting, as new jails open to hold immigrant prosecuted for border crossings.^{xxxiv}

Prosecuting entry re-entry as a federal crime legitimates the targeting of immigrants. Section 1325 and 1326 drain federal resources, separate families, and disrupt communities. The criminalization of migration heaps second punishments and additional incarceration on immigrant communities of color already facing a punitive deportation and immigration detention system. The time for repeal is now.

Contact: Jesse Franzblau, Senior Policy Analyst, jfranzblau@heartlandalliance.org.

ENDNOTES

- ⁱ One of the most well-known eugenicists from this era is Madison Grant, who wrote a book called “The Passing of a Great Race,” which inspired Hitler. See, John Blake, “When Americans tried to breed a better race: How a genetic fitness ‘crusade’ marches on,” CNN, October 18, 2018, <https://cnn.it/32L9THB>.
- ⁱⁱ Becky Little, “How Border-Crossing Became a Crime in the United States,” History, July 1, 2019, <https://bit.ly/2J8KmjE>.
- ⁱⁱⁱ Asian immigrants were the first group of people to be labelled as “illegal” immigrants, starting with the Chinese Exclusion Act of 1882. The Immigration Act of 1917 established an “Asiatic barred zone” banning almost all immigration from Asia.
- ^{iv} Alina Das, “Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation,” University of California, Davis Law Review, Volume 52:171 (2018), <https://bit.ly/2y5CEk5>.
- ^v Kelly Lytle Hernandez, “How crossing the US-Mexico border became a crime,” The Conversation, April 30, 2017, <https://bit.ly/2q8lb95>.
- ^{vi} Doug Keller, “Re-thinking Illegal Entry and Re-entry,” Loyola University Chicago Law Journal, Volume 44, Issue 1 (Fall 2012), <https://bit.ly/2OcYQnb>.
- ^{vii} Judith A. Greene, Bethany Carson, Andrea Black, “Indefensible: a Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border,” Grassroots Leadership & Justice Strategies (July 2016), <https://bit.ly/29Shyd2>.
- ^{viii} Transactional Records Access Clearinghouse, “Immigration Prosecutions for 2018,” October 23, 2018, <https://bit.ly/2OcNUGj>.
- ^{ix} Human Rights Watch, “Q&A: Trump Administration’s ‘Zero-Tolerance’ Immigration Policy,” August 16, 2018, <https://bit.ly/2NMyuao>.
- ^x Katherine Hawkins & Jesse Franzblau, “Document Contradicts Administration’s Denials about Family Separation, Project On Government Oversight,” September 27, 2018, <https://bit.ly/2ShNQBy>.
- ^{xi} Human rights groups and international legal bodies have affirmed that family separations met the definition of torture. See Amnesty International, “USA: Catastrophic immigration policies resulted in more family separations than previously disclosed,” October 11, 2018, <https://bit.ly/2Z6vRIX>. See also “Emergency Request for Precautionary Measures Pursuant to Article 25 Rules of Procedure of the IACHR on Behalf of Parents Systematically Separated from Their Children at the United States-Mexico Border,” Submitted by attorneys for Petitioners pursuant to Article 25 of the Rules of Procedures of the IACHR, May 31, 2018, <https://bit.ly/2K1ZFfW>.
- ^{xii} Jesse Franzblau, “Family Separation Policy Continues, New Documents Show,” National Immigrant Justice Center, June 22, 2019, <https://bit.ly/2Z1zWrA>.
- ^{xiii} Operation Streamline was renamed the “Criminal Consequence Initiative” in FY 2016. See, Written Testimony of Ronald Vitiello, former U.S. Border Patrol Acting Chief, “Hearing on Declining Deportations and Increasing Criminal Alien Releases: The Lawless Immigration Policies of the Obama Administration Before the S. Comm, May 19, 2016, <https://bit.ly/2JUv7Kp>.
- ^{xiv} American Immigration Council, Fact Sheet, “Prosecuting Migrants for Coming to the United States,” May 1, 2018: <https://bit.ly/2LSH4An>. See also, Transactional Records Access Clearinghouse (TRAC), “Serious Criminal Immigration Convictions Still Infrequent Under Trump,” January 8, 2018, <https://bit.ly/2qQmslV>.
- ^{xv} Human Rights First, “Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions” (January 2018), <https://bit.ly/2ERDUIT>.
- ^{xvi} Joanna Jacobbi Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” 98 CALIF. L. REV. 481 (April 2010).
- ^{xvii} Kara L. Hartzler, Federal Defenders of San Diego, “United States of America v Oscar Chavez-Diaz,” Appellant’s Opening Brief, Case No. 18-mj-20098-KSC-AJB-1.
- ^{xviii} Guillermo Cantor, “Detained Beyond the Limit: Prolonged Confinement by U.S. Customs and Border Protection Along the Southwest Border,” American Immigration Council, August 18, 2016, <https://bit.ly/2YnAUKl>.
- ^{xix} Natasha Arnpriester and Olga Byrne, “Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions,” Human Rights First, January 18, 2018, <https://bit.ly/2BdC56R>.
- ^{xx} UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <https://bit.ly/2GCrFUA> [accessed July 22, 2019].

-
- ^{xxi} U.S. Department of Homeland Security (DHS), Office of the Inspector General (OIG), “Streamline: Measuring Its Effect on Illegal Border Crossing,” [herein ‘Streamline’ OIG]. OIG-15-95, May 15, 2015, <https://bit.ly/2JlQrn3>.
- ^{xxii} Jesse Franzblau, “Funding The Administration’s Hateful Border Policies Will Increase Abuse And Inflict More Harm On Migrants,” National Immigrant Justice Center, June 28, 2019, <https://bit.ly/2Z52QgL>.
- ^{xxiii} Department of Homeland Security (DHS), Office of the Inspector General (OIG), “Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy,” OIG-18-84, September 27, 2018, <https://bit.ly/2NhATFE>.
- ^{xxiv} Center for Human Rights, University of Washington, Human Rights Clinic, “Research Update: Court Documents Show How Federal Prosecution Criminalizes Immigrants,” November 15, 2018, <https://bit.ly/2XVO7Cc>
- ^{xxv} Jonathan Easley, “Democrats warn push for border crossing decriminalization will prove costly in 2020,” The Hill, July 11, 2019, <https://bit.ly/2YjF2IL>.
- ^{xxvi} Nick Miroff, Annie Linskey and Josh Dawsey, “At border, grim realities of crisis collide with 2020 campaign politics,” Washington Post, July 2, 2019, <https://wapo.st/30lqb22>.
- ^{xxvii} DHS, OIG, “Streamline” (2015).
- ^{xxviii} Latinos, led by Mexicans and Central Americans, have made up more than 90 percent of all immigrants imprisoned for unlawful entry and reentry. See, Mark A. Motivans, U.S. Department of Justice, Bureau of Justice Statistics, “Immigration Offenders In The Federal Justice System, 2010,” July 18, 2012, <https://bit.ly/2JVbwd9>.
- ^{xxix} American Civil Liberties Union, “Coalition Letter to Attorney General From 171 Organizations to End Streamline Prosecutions,” July 28, 2015, <https://bit.ly/1KvLt8H>.
- ^{xxx} Congress recently approved \$155 million for the U.S. Marshals to detain individuals for migration related offenses, including criminal prosecution for border crossings. See NGO letter opposing FY19 Border Supplemental, May 13, 2019, <https://bit.ly/2whgCK8>.
- ^{xxxi} Transactional Records Access Clearinghouse (TRAC), “Federal Criminal Enforcement,” <https://bit.ly/2GmRFCE>. [accessed July 22, 2019]
- ^{xxxii} Between 2005 and 2015 it cost an estimated \$7 billion to incarcerate immigrants in federal prisons. See Judith A. Green, *et al.*, “Indefensible,” at 143.
- ^{xxxiii} American Immigration Council, “Prosecuting Migrants for Coming to the United States,” May 1, 2018: <https://bit.ly/2LSH4An>.
- ^{xxxiv} See, for example, Paul Egan, “Private company to reopen prison near Baldwin to house 'criminal aliens',” The Detroit Free Press, May 2, 2019, <https://bit.ly/2GrGSXU>.