

INDEFENSIBLE:

A DECADE OF MASS INCARCERATION OF MIGRANTS
PROSECUTED FOR CROSSING THE BORDER

JULY 2016



INDEFENSIBLE:

**A DECADE OF MASS INCARCERATION OF MIGRANTS
PROSECUTED FOR CROSSING THE BORDER**

**grassroots
leadership**
helping people gain power

**JUSTICE
STRATEGIES**

By: Judith A. Greene, Bethany Carson, Andrea Black

Design & Layout: Catherine Cunningham

ACKNOWLEDGMENTS

Grassroots Leadership and Justice Strategies would like to give special thanks to those who have been instrumental in the creation of this book:

For her skillful preparation of a case study: Suzannah Maclay.

For their bravery in sharing their stories and dedication to working for migrant justice: Francisco Aguirre, Cecilia Equihua, Francisco Equihua Lemus, Eduardo Jose Garza,* Maria Garza,* Hortencia Medina, Gladys Monteverde.*

For sharing their time, experience and perspectives on entry and re-entry prosecutions:

- The following federal judges: Judge Alia Moses, Judge Charles Pyle, Judge Dorina Ramos, Judge Felix Recio, Judge Bernardo P. Velasco.
- The following federal public defenders and private criminal defense attorneys: Eréndira Castillo, Milagros Cisneros, Donna Coltharp, Chloe Dillon, Jodi Goodwin, Kara Hartzler, Saul Huerta, Deirdre Mokos, Sean Riordan, Kyle Welch, Ray Ybarra Maldonado, several Federal Public Defenders in the Western District of Texas that wish to remain anonymous.
- Mexican Consulate officials José Alejandro Urban Flores and Pedro de Velasco Garza, Former U.S. Attorney for the District of Arizona Paul Charlton and Former Arizona Attorney General Terry Goddard.

For sharing their knowledge and insight on entry and re-entry prosecutions, and for their tireless resistance to migrant prosecutions and incarceration: Astrid Dominguez of the ACLU of Texas, James Duff Lyall of the ACLU of Tucson, Carlos Garcia of Puente Arizona, Isabel Garcia of the Coalición de Derechos Humanos, Vicki Gaubeca of the ACLU New Mexico Regional Center for Border Rights, Matthew Lowen of the American Friends Service Committee, and Francisca Porchas of Puente Arizona.

For their support in coordinating border visits, their warm hospitality, sharing their work, and making valuable connections: Ramona P. Casas of ARISE in McAllen; many other ARISE staff; Eréndira Castillo; Amanda Garces of the Coalición de Derechos Humanos; and Nestor Rios of Justice Strategies.

For their support in shaping and envisioning the book, editing multiple drafts and supervising the project: Cristina Parker and Bob Libal of Grass-roots Leadership.

Photo Credits:

Courtroom sketches on front and back cover, Lawrence Gipe.¹

Bottom left photo on front cover, Steve Johnston and Paige Winslett.

* The names of these interviewees have been changed and any resemblance to real names or other individuals or their circumstances is purely coincidental.

CONTENTS

Executive Summary (vi)

Key Findings (viii)

Recommendations (ix)

- 1- Introduction (1)
- 2- The roots of criminalization reach back to the end of the “Bracero Program.” (6)
- 3- For immigrant rights advocates and criminal justice reformers, a case for working together (11)
- 4- The “Chertoff Effect” results in a massive immigration crackdown in a trade-off for reform that never came (13)
- 5- A highly politicized climate, media hype and root causes of migration collide in Arizona (22)
- 6- In Texas, a 90-day experiment mutates and spreads (30)
- 7- In Tucson, court officials struggle to improve the model under pressure from the Border Patrol (33)
- 8- In California, a different approach results in fewer migrant prosecutions (42)
- 9- Operation Streamline, while shocking, is only part of the problem (45)
- 10- The Obama administration intensifies the prosecution effort (46)
- 11- The current state of migrant prosecutions in Arizona (47)
- 12- The current state of migrant prosecutions in Texas (55)
- 13- The current state of migrant prosecutions in California (67)
- 14- Prosecution patterns shift during the Obama administration (71)
- 15- Advisory sentencing guidelines recommend severe sentence enhancements that can “supersize” prison terms (77)
- 16- Is a flip-flop “better than nothing at all?” (85)
- 17- A decade in, there are serious doubts about the power of any “deterrence effect” (87)

- 18- Migrant prosecutions are the “big drain” on the federal court system (100)
 - 19- Trailing the mass prosecutions, a new brand of federal prisons enters the market (102)
 - 20- The unjust impact on defendants’ human rights (106)
 - 21- Border Patrol agents apprehend migrants and Border Patrol lawyers prosecute them (112)
 - 22- What is the effect on migrants themselves, and on their families and communities? (115)
 - 23- Stories from the people who are prosecuted for crossing the border (125)
 - 24- A windfall for private prisons on the taxpayer’s dime (141)
 - 25- A conservative estimate of incarceration costs since 2005 (143)
 - 26- Resistance against migrant prosecutions (145)
 - 27- Beyond Streamline: working at the intersection of criminal justice and immigration policy (158)
 - 28- Final considerations about the way forward (161)
- End notes (165)

Charts & Tables

- Chart 1. Migrants Apprehended by Federal Authorities, Fiscal Years 1986-2013 (16)
- Chart 2. Chart 2. 8 USC 1325 Improper Entry Prosecutions Filed, Fiscal Years 1986-2015 (17)
- Chart 3. 8 USC 1326 Reentry Prosecution Cases Filed, Fiscal Years 1986-2015 (18)
- Table 1. Increased Border Enforcement FY2003-2004 (21)
- Chart 4. Criminal Prosecution Filings for Border Crossing Offenses, FY2005–2015 (46)
- Chart 5. Criminal Prosecutions and Convictions for Reentry, FY2005–2015 (73)
- Chart 6. Prosecutions Filed for Border Crossing Offenses in Arizona, FY2005–2015 (75)
- Chart 7. Conviction Charges for Border Crossing Cases Originally Filed for Re-entry Prosecution in Arizona, FY2005-2014 (76)
- Table 2. Convictions in Cases Initially charged as Re-entry from October 2012 to March 2014 (76)
- Table 3. Estimated Expenditures for Incarceration of Migrants Prosecuted for Improper Entry and Re-entry 2005-2015 (143)

EXECUTIVE SUMMARY

December 2015 marked the 10th anniversary of the launch of a program to target for criminal prosecution migrants who had crossed the border without authorization. It was named “Operation Streamline.” It is known for the mass hearings (often lasting less than two hours) in which up to 80 migrants are arraigned, found guilty, convicted and sentenced for 8 USC 1325 (improper entry, a misdemeanor) simultaneously. The policy has long been decried by immigrant rights advocates. However, the mass hearings of Operation Streamline, as shocking as they are, are only the tip of the iceberg.

Lesser known by the general public, media, and even some immigrant rights and criminal justice reform advocates, is the widespread expansion of 8 USC 1326 (re-entry, a felony) prosecutions over the past decade that came with the Streamline program. Though border officials in some sectors say that Operation Streamline has ended, the numbers of migrants prosecuted in federal courts is still massive in sheer numbers.

The criminal prosecution of migrants crossing our southern border has had profound impacts on the federal courts and federal prisons over the last decade. In 2015, improper entry and re-entry prosecutions accounted for almost half of all federal prosecutions (49 percent). Improper entry is punishable by up to 180 days in federal jail while improper re-entry is punishable by up to two years. And if the migrant has a serious prior criminal history, many more years may be added to the sentence.

Almost a quarter of those in the Federal Bureau of Prisons (BOP) prison population are non-citizens (23 percent). Using the data available, we conservatively estimate the incarceration costs for those convicted of improper entry and re-entry at more than \$7 billion since the start of Operation Streamline in 2005.

This book provides an oral history of the evolution of Operation Streamline over 10 years and its legacy today. We document the beginnings of Op-

eration Streamline and the evolution of targeted migrant prosecutions. We explore how the program took hold across border districts in distinct ways. We examine how an already politicized issue collided with media hype and, “moral panic” over immigration levels. We describe how ambitious and powerful individuals and agencies within the newly formed Department of Homeland Security launched this huge, targeted prosecution program. We interviewed more than three dozen people who work inside the federal criminal justice system, or who have been impacted by it, for this book. We have attempted to amplify their voices by using their own words as often as possible.

In looking back at 10 years of mass prosecution of migrants, we have an opportunity to examine how and why the program emerged. We can also examine the harm it has caused against the scant evidence that it has achieved the stated goal of deterring migration at the southern border. There exists in the story of migrant prosecutions an intersection where those working for immigrant rights and for criminal justice reform can join hands to work together. Finally, we can find inspiration in the ample opportunities for resistance and in this book we highlight the efforts of those who are organizing to bring an end to prosecution of migrants at the border.

KEY FINDINGS

Throughout the book, we found widespread wastefulness — in terms of people’s lives, taxpayer dollars, and court resources — producing few, if any, positive results. It was clear from talking to actors throughout this system that it is broken in every way. Our findings include:

1. Since 2005, nearly three quarters of a million people, have been prosecuted in our federal courts for the crime of improper migration: 412,240 for improper entry and 317,916 for re-entry. This escalating system of migrant prosecutions is making a significant and growing contribution to mass incarceration, and to overcrowding in our federal prison system.
2. We conservatively estimate that just the costs entailed by the jail and prison terms that result from criminal prosecutions for improper entry and re-entry total at least \$7 billion since 2005. A large share of this tax burden produces increased profits for the country’s leading private prison corporations.
3. Economic circumstances and family responsibilities overwhelmingly drive improper migration, and there is no convincing evidence that incarceration is a deterrent for people facing these pressures. The resulting human costs to those prosecuted, their families and communities are incalculable.
4. The system is not seen as effective by most of the judges and lawyers that participate in the process day in and day out. They say that Operation Streamline and the related felony prosecutions are driven by politics, not by good policy.

RECOMMENDATIONS

We recommend that officials with the power to effect change take the following actions:

1. The Attorney General should move to de-prioritize and ultimately end improper entry and re-entry prosecutions.
2. U.S. Attorneys in the border districts should use their enormous power to de-prioritize improper entry and re-entry prosecutions and devote their resources to focus on crimes that threaten public safety and/or cause serious harm to the well-being of our nation.
3. The U.S. Sentencing Commission should reject any proposed amendments to increase sentences for improper entry and re-entry, and should actively seek to remedy already exorbitant sentences. The base offense level should be reduced so as to decrease sentencing recommendations relative to the many more serious offenses currently assigned to Level 8.
4. Insofar as the current political climate does not allow for constructive legislative action, members of Congress who comprehend the harms done by these prosecutions should call on the Department of Justice and the U.S. Attorneys to end them.

Finally, until the Department of Justice, the U.S. Attorneys and the Sentencing Commission take the actions recommended above, we urge that — to the extent that they are not bound by rigid plea agreements or guideline constraints — federal district court and magistrate judges reflect about the inexorable harms these prosecutions visit upon migrants and their families. Understanding that most face immediate removal, judges should give thoughtful consideration of whether “time served” might be the most appropriate sentence.

1 INTRODUCTION

The year 2015 marked a decade since the start of “Operation Streamline,” along with the widespread expansion of criminal prosecutions of migrants to the U.S. To mark this ignominious anniversary, we write this book to investigate and reflect on the impact of these targeted prosecution programs in the decade since their inception.

For many decades prior to the launch of “Operation Streamline,” improper migration was almost entirely addressed by application of existing civil law provisions for removal of persons that enter the U.S. without authorization. Criminal prosecution adds an unnecessary and extremely costly (both in fiscal and human terms) layer to the removal process.

Sharply expanding migrant prosecutions, which impact mainly Mexican nationals, have greatly increased disparity with regards to race, ethnicity, nationality and citizenship status in the federal justice system. Criminal prosecutions of migrants at the border have had a profound impact on the racial and citizenship makeup of those in the federal courts and federal prison population. Improper entry and re-entry reached 49 percent of total prosecutions in 2015, and currently non-citizens comprise 23 percent of the total Federal Bureau of Prisons (BOP) prison population, with 15 percent of the total made up of Mexican nationals. By comparison, non-citizens make up only 7 percent of the total U.S. population.²

A recent Bureau of Justice Statistics report indicated that of the people serving time for an immigration violation in the federal prison system, 92 percent are Hispanic or Latino. Slightly over two-thirds had been convicted and sentenced in a Southwest border district federal court, with nearly three-quarters coming from the Southern Texas, Arizona and Southern California districts. They comprised 97 percent of the increase of the growth in that offense category between 2002 and 2010.³

While civil detention continues to be in the news, most recently with the detention of families from Central America, Operation Streamline — and migrant prosecutions more broadly — have largely remained hidden. This book exposes the overlay between the systems and shows how — since 2005 — migrant prosecutions have become integrally interlinked with civil detention and removal, a phenomenon that was relatively rare ten years ago.

To do that, we spoke to actors at different stages in the process, including judges, public defenders, advocates, activists, former prosecutors, as well as individuals who have been prosecuted and their families to learn about their experiences.⁴ Our intent is to lift up the voices of people in the system, including people directly affected as well as those operating the system day-to-day, and shine a light on the realities of the system. Our goal is to reveal the devastating impacts of this largely unseen process in the hope that policymakers, advocates, and the media will take action to end it.

As part of our investigation, we had research teams on the ground for weeks, speaking with stakeholders in Texas and Arizona, and speaking by phone with stakeholders in California. What we found was widespread wastefulness — in terms of people's lives, taxpayer dollars, and court resources — producing few, if any, positive results. It was clear from talking to actors throughout this system that it is broken in every way.

The system of migrant prosecutions is now massive and vast: since 2005, more than 730,000 people have been prosecuted in our federal courts for the crime of improper migration, 412,240 for improper entry and 317,916 for re-entry. This expanding system of migrant prosecutions is making a significant and growing contribution to mass incarceration, and to massive overcrowding of our federal prison system.

The full financial cost of these prosecutions has never been calculated, but we estimate that just the costs entailed by the jail and prison terms which result total at least \$7 billion since 2005. A large share of this tax burden produces increased profits for the country's leading private prison corporations.

There is no convincing evidence that sending migrants to jail or prison serves as a deterrent since the economic circumstances and family responsibilities that drive improper migration are overwhelming.

The system is not seen as effective by most of the judges and lawyers that participate in the process day in and day out. They say that Operation Streamline and the related felony prosecutions are driven by politics, not by good policy.

The recent national debate about the need for comprehensive immigration reform was polluted by what sociologists call a “moral panic” — a fear-mongering process sparked largely by politicians and the mass media that politicizes a policy issue, arousing a level of social concern that thrusts rational solutions beyond our grasp.

Thirty years ago, the U.S. was in the grips of a similar moral panic about illegal drugs. The response of our leaders was to initiate the “War on Drugs,” passing a frenzy of laws that almost everyone now agrees was a mistake. We need to learn from our mistakes back then and recognize that it is better not to pass laws or initiate sweeping policies from a position of moral panic.

We hope that this investigation and reflection will help criminal justice reform advocates to understand this segment of the federal prison population as they labor to unlock the keys to decarceration. It is similarly important for immigration reform advocates to set their sights beyond the confines of civil detention and to look at the devastating impact criminal prosecution and incarceration has on migrants and their families.

As the book is being written, the U.S. is in the midst of a heated electoral season and debates around immigration policies have captured the nation’s attention. What is the way forward? What will be President Obama’s legacy, and how will the next administration choose to move forward on this issue? Will it maintain the status quo, or expand the prosecutions even further, like “Michael Chertoff on steroids”? Or, can the next administration forge a new path toward more humane and effective responses to the problems surrounding the influx of migrants fleeing economic hardship and violence in their home countries? It is a clear choice. Now is the time to get hold of these issues.

We hope that this book will inspire policy-makers and advocates in the immigration and criminal justice arenas, as well as the media, to take a hard look at this wasteful, ineffective and inhumane system of migrant prosecutions.

This book enabled us to examine the criminalization of migrants from a variety of perspectives. After briefly introducing the history of this criminalization, we outline why this issue needs to be addressed by both immigrant rights and criminal justice reform advocates. We then provide background about the evolution of “Operation Streamline,” examining the “Chertoff Effect” during the Bush administration, and the political landscape which helped to foster development of a massive enforcement buildup on the border, and the swing toward criminalization and prosecution.

We then review the origin of “Operation Streamline” in Del Rio, Texas, and how it evolved in Tucson, Arizona, before examining why it was not introduced in California.⁵ We next investigate how the huge increase in prosecution of migrants is greatly enriching the private prison industry, before turning to an in-depth examination of how prosecution for improper entry and re-entry (8 USC 1325, a petty misdemeanor, and 8 USC 1326, a felony offense) currently operates in Texas, Arizona and San Diego, California.

We assess how the federal sentencing guidelines result in disproportionately harsh sentences for migrants charged with improper re-entry (1326), while challenging the notion that “Operation Streamline” provides a “good deal” for all defendants. California provides a useful case study to demonstrate that the massive ramp-up in the other districts was wasteful and unnecessary.

We then turn to policy issues implicated in the criminalization of migrants: investigating whether “Operation Streamline” deters re-crossing; how “Operation Streamline” diverts resources from more important federal prosecution matters; and how “Operation Streamline” has created a powerful lobby for increased criminalization and intensification of border enforcement.

We assess the impact of mass prosecution on defendants’ constitutional rights, including due process and effective assistance of counsel, as well as the impact on people who fear returning to their home countries and the troubling trend of Border Patrol lawyers prosecuting people apprehended by their own agents.

Next we take an in-depth look at the effect of criminalization on migrants themselves and on their families and communities, and we attempt to assess the cost of these prosecutions to U.S. taxpayers, before turning to look at the growing resistance to migrant prosecutions. We encourage immigrant rights advocates to expand their focus beyond “Operation Streamline” and form alliances with criminal justice reform advocates, since — after all — these are criminal prosecutions and prison terms which precede the civil removal process.

We end with recommendations which center on the challenges to reform and the mechanisms by which federal government officials can end the prosecution of migrants.

2 THE ROOTS OF CRIMINALIZATION REACH BACK TO THE END OF THE “BRACERO PROGRAM.”

The “Bracero Program” was named for the Spanish term for manual laborers. It was begun through negotiated agreements during World War II to provide legal access for Mexicans to enter the U.S. on a temporary basis in order to supply the workers needed to fill a labor shortage. The governmental provision was formalized by Congress after the war, and became extended to more and more workers over time.

Within a decade a massive flow of “legal” migrants back and forth over the border was allowed. The Bracero practice became embedded in the U.S. labor market for agriculture and unskilled workers, and it was providing financial support for the many families the workers left behind in Mexico.⁶

By the mid-1960s, U.S. labor unions and their allies were mounting resistance to the Bracero Program. Congress ended the program in 1964, but the labor flow continued apace without authorization. The access networks that had been legally established under the program continued to operate on a clandestine basis. Termination of the Bracero Program simply converted what had been a deeply entrenched pattern of annual (often seasonal) migration into the “problem” of improper entry.

By the 1980s, politicians began to exploit the issue, gaining political capital by demonizing migrant workers as “illegal aliens.” President Reagan reframed the problem as a “national security” menace. As his administration ramped up interventions in Central America by supporting paramilitary or-

Termination of the Bracero Program simply converted what had been a deeply entrenched pattern of annual (often seasonal) migration into the “problem” of improper entry.

ganizations across the region, which led to increased violence, a new wave of migrants joined the flow of migrants from Mexico.

Over time the border enforcement “crackdown” made it more and more difficult for migrants to return to their home countries, so they planted permanent roots in the U.S., settling into newly formed home communities and establishing families. Thus a circular flow of migrant workers under the Bracero Program morphed into a one-way flow of migrant traffic, increasingly dependent on “coyotes” — tough border crossing guides who were associated with drug cartels and other Mexican crime networks. The inevitable result was that by the 2000s, the permanently settled, unauthorized migrant population had ballooned in the U.S.⁷

By the mid-2000s the demonization of “illegal immigrants” had developed into wholesale criminalization of migrants across most of our border with Mexico. In 2005 the U.S. Federal Court in Del Rio, Texas, had developed a program they dubbed “Operation Streamline,” a procedure that would grow over time to process upwards of 80 migrants at a time, bound by heavy metal shackles, who had been arrested by Border Patrol agents at the border. By 2008 the rest of the border districts — with the exception of the Southern District of California — had replicated the model.

The court sessions (which will be described in great detail below) take from one to three hours, collapsing into a single event what would otherwise typically be separate hearings — arraignment; detention hearing; guilty plea or trial; and sentencing hearing — for each individual migrant.

Operation Streamline facilitated a dramatic expansion of improper entry prosecutions. The innovation added criminal processes to what had previously been handled in a non-criminal civil process of removal. Now the civil removal process waits until the person convicted of improper entry to the U.S. (8 USC 1325) serves a jail sentence of up to six months in federal custody, usually held under lock and key by a private prison company.

Tucsonians who are immersed in the daily Streamline process as judges and attorneys are well aware of the process of criminalization, and its grim repercussions for migrants and their families. Magistrate Judge Bernardo P. Velasco of the Federal District Court in Tucson says that prosecution of

migrants takes an appalling toll:

If you believe that every nation has a right to protect its own borders or it ceases to be a nation, then you must accept that under any kind of immigration policy, not everyone will be allowed to enter. That said, there have been some horrible personal consequences because of what we've done, what we're doing, and what we may do in the future in the area of immigration policy.

Deirdre Mokos⁸, a 14-year veteran federal public defender in Tucson, considers criminalization of people who are essentially harmless to be a wasteful, exploitive practice:

It costs \$30,000 per year to incarcerate someone. What is the point of that? If there was any sort of work program for them in Mexico, people wouldn't need to come here to work and support their families. Many people are prosecuted because they have prior drug convictions. They are not dangerous.

Most of the people we represent do not come from the middle class in Mexico. They're people who are already living on the edge, having a very hard time making it. And locking them up can't be good for the children they've left in Mexico. If the kids have no guidance and don't go to school it contributes to the social breakdown back in these communities. But you've got this whole big industry that's feeding off of these prosecutions. That's the status quo at the moment, but in reality these people are only trespassing on U.S. soil.

It costs \$30,000 per year to incarcerate someone. What is the point of that? — Deirdre Mokos

People viewing the process from the outside with a perspective of human rights and social justice see prosecution of migrants as part of the larger machinery of social exclusion. Matthew Lowen, Program Coordinator for the American Friends Service Committee in Arizona, points to both the destructive effect on immigrant families, and the punishing, oppressive impact of the enforcement process:

Streamline raises two primary issues. First is the issue of family separation. Not every defendant speaks up in court but over time you start to hear snippets of their stories. Many have built good lives here in the U.S., even if they are “undocumented.” We are criminalizing these people only because of their geographic position. There is no one among us who wouldn’t say, “I would do whatever I could to be with my family.”

Second, we seem to have made criminalization the answer to everything we don’t like in this country. We do it because we think it will stop whatever that is, or at least it will hurt the people who are doing whatever that is, and make them feel bad — instead of addressing the root cause, which in this case is primarily economic.

The Streamline “reform” is creating a whole new class of criminalized people, and the impacts of our zeal for criminalization are long lasting, affecting their family life, denying them a decent place to live, stopping them from getting an education, cutting them off from the most basic human needs.

Recent “comprehensive immigration reform” proposals that have languished in Congress have talked about how undocumented people must get to the back end of some imaginary line in order to wait their turn to become a U.S. citizen. But with our current criminalization campaign, so many people would be automatically excluded as ineligible. We are creating a disadvantaged subclass within an already disadvantaged subclass of people, and it pisses me off to no end!

Astrid Dominguez, Advocacy Coordinator for the ACLU of Texas, says that for many people, seeing Streamline in action awakens them to a new understanding of the brutal impact we inflict on people when the things they do simply to survive are treated as crimes:

When people actually witness an Operation Streamline hearing, they are shocked. During a border tour, the ACLU of Texas took members and donors to an Operation Streamline hearing. They saw how immigrants are brought in en masse and heard about their family ties in the U.S. while observing people who simply crossed the border shackled through the entire hearing. Due process doesn’t look like this.

Witnessing a hearing really helps people understand the problem of criminalizing migration.

3 FOR IMMIGRANT RIGHTS ADVOCATES AND CRIMINAL JUSTICE REFORMERS, A CASE FOR WORKING TOGETHER

The policy shift from reliance on the civil deportation process to criminal prosecution, resulting in mass criminalization of migrants, is but a decade old. But it is a problem that should be immediately recognized by both immigrant rights advocates and activists as well as those who work for criminal justice reform.

Efforts for immigration reform have not been quick to address the growing problem of prosecution of migrants, perhaps because the issue falls beyond the civil immigration detention and deportation system and is seen as a “criminal justice” issue. At the same time, criminal justice reformers have largely not tackled the problem as well, perhaps because the defendants are not citizens, because state-level advocates do not have experience confronting problems in the federal justice system, or because immigration is seen as politically divisive.

This gulf sorely needs to be bridged, especially in the new era of bipartisan support for ramping down the drug war and reducing the level of prison populations across the country. The Obama administration has moved to de-prioritize drug cases at the Department of Justice (DOJ), and states like New York and California have embraced criminal justice policies that have reduced the number of people in their prisons by tens of thousands.

Some observers will remember that the “drug war” itself was geared up for battle by get-tough rhetoric from politicians and lurid media depictions of a “crack crisis.” Criminalization of addiction fueled harsher laws, flooded

There is no lack of irony in seeing a criminalized “border crisis” emerge just as policymakers and the public have come to regard the war on drugs as largely ill-conceived and unwarranted.

the courts with drug caseloads that called for “rocket-docket” dispositions, and generated an unprecedented “prison boom.” There is no lack of irony in seeing a criminalized “border crisis” emerge just as policymakers and the public have come to regard the war on drugs as largely ill-conceived and unwarranted.

Almost 70,000 migrants — including some who may have had valid asylum claims — were criminally prosecuted at the border, during federal fiscal year 2015. Improper entry and re-entry are now the two top criminal charges being filed in our federal court system; together they comprise 49 percent of the entire number of the cases filed for federal prosecution nationwide.

Moreover, the sharp increase in felony prosecution of migrants that began with the surge in the mid-2000s has caused a shift in the demographics of those sentenced in the federal courts. By 2011, half of all people sentenced were Hispanic. In FY2015 the proportion of Hispanics remained high, at 52 percent, compared with 24 percent for Whites and 20 percent for Blacks.⁹

Clearly both immigration advocates and criminal justice reformers must take notice because roughly 15,000 migrants are now serving time for felony re-entry in a federal prison. Most of them are in private prisons run by companies like the Corrections Corporation of America (CCA) and the GEO Group under contract with the Federal Bureau of Prisons (BOP). When they complete their sentence they will be handed over to Immigration and Customs Enforcement (ICE) for detention until the deportation process can be completed.

Improper entry and re-entry are now the two top criminal charges being filed in our federal court system

There has to be a realization by both immigrant rights advocates and criminal justice reformers that this is a cross cutting issue. Criminalization of migration is an important part of the problems which impede current efforts to reduce mass incarceration, just as criminalization of drugs was a major policy fiasco embedded in the criminal justice agenda of every President from Ronald Reagan moving forward until Obama. It is time for all who are concerned about immigration policy, mass incarceration, and prison privatization to work together for change.

4 THE “CHERTOFF EFFECT” RESULTS IN A MASSIVE IMMIGRATION CRACKDOWN IN A TRADE-OFF FOR REFORM THAT NEVER CAME

In 2005 Michael Chertoff was appointed to lead the Department of Homeland Security (DHS). But that was not his first federal appointment by George W. Bush. In 2001 he had been named head of the criminal division in the Department of Justice (DOJ), where — after 9/11 — he devised and oversaw the legal tactics the administration would use in waging its “war on terror.”

While in the DOJ, Chertoff undertook an unprecedented role in the exercise of hierarchical authority over prosecutorial decision-making across criminal cases in all districts in the states. Under his rule, U.S. Attorneys across the country were commanded to vigorously prosecute immigration offenses, as well as gun crimes and low-level drug sales. The result was that these cases increasingly supplanted white collar and public corruption prosecutions, with white collar cases dropping from 50 percent of the federal criminal caseload to just 28 percent in 2007.¹⁰

Once Chertoff took charge of DHS, he quickly turned to working with allies in Congress and the DOJ to press forward his ambitious agenda to increase border enforcement and expand Immigration and Customs Enforcement (ICE) detention bed capacity, primarily through private prison contracts. During his first two years at DHS, a remarkable number of events marked a turning point in the federal effort to crack down on unauthorized migration:

January 2005 Rep. Jim Sensenbrenner, R-Wisconsin, and five House Committee chairs sent a letter to President Bush demanding a doubling of Border Patrol agents, a tripling of immigration investigators and the addition of 60,000 new detention beds.

July 2005 S.1438 was introduced by Sen. John Cornyn, R-Texas, proposing an increase of 20,000 detention beds.

November 2005 The “Secure Border Initiative” was launched by ICE proposing use of new congressional funding initiatives for the border wall, the virtual fence, more Border Patrol agents and more detention beds.

December 2005 Operation Streamline was introduced in Del Rio, Texas, to prosecute people who cross the border without authorization.

December 2005 H.R. 4437, sponsored by Rep. Sensenbrenner was passed by the House. Its provisions included 700 miles of border fencing, reimbursement for states that aid in immigration enforcement and for local authorities that provide detention beds, a mandatory minimum sentence of ten years for document fraud, and increased penalties for “aggravated felonies.”¹¹

May 2006 ICE signed a contract with the Corrections Corporation of America to provide a “family detention center” at its T. Don Hutto prison in Texas. That same month construction began for a private 2,000 bed “tent city,” comprised of windowless Kevlar “pods,” and operated by Management Training Corporation at Raymondville, Texas, under an ICE contract.

June 2006 ICE officials announced that they needed 35,000 new detention beds to hold immigrants awaiting deportation.

August 2006 Chertoff announced the end of “catch and release,” terminating a longstanding practice whereby migrants from Central America would no longer be allowed to proceed to their destination with an order to report to immigration authorities; henceforth they would be detained at the border.

September 2006 The daily detention population had swelled to 27,521 by the end of the month, up from an average of 19,000 before July.

December 2006 A six-state dragnet of meatpacking plants owned

and operated by Swift & Company involved more than 1,000 federal enforcement officers and resulted in 1,282 arrests of immigrants.

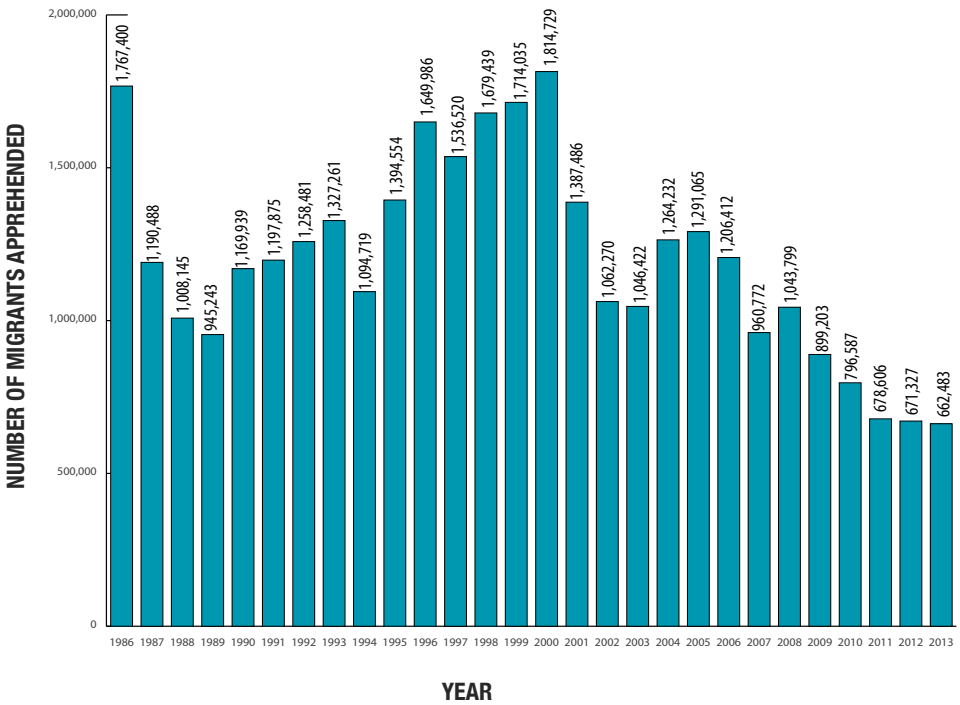
Throughout 2006 The number of ICE fugitive operation teams tripled and by the end of September the number of “immigrant fugitives” arrested had grown by 260 percent.

The timeline above makes it clear that Operation Streamline was launched within a broader set of aggressive measures that Chertoff undertook to expand the capacity of DHS to fulfill the goals of his “Secure Border” initiative.

As will be explained in more detail below, initiation of Streamline not only produced a dramatic growth of the improper entry misdemeanor prosecutions that it was designed to facilitate, it also marked a huge increase in felony re-entry prosecutions at the same time in federal district courts along the border we share with Mexico.¹²

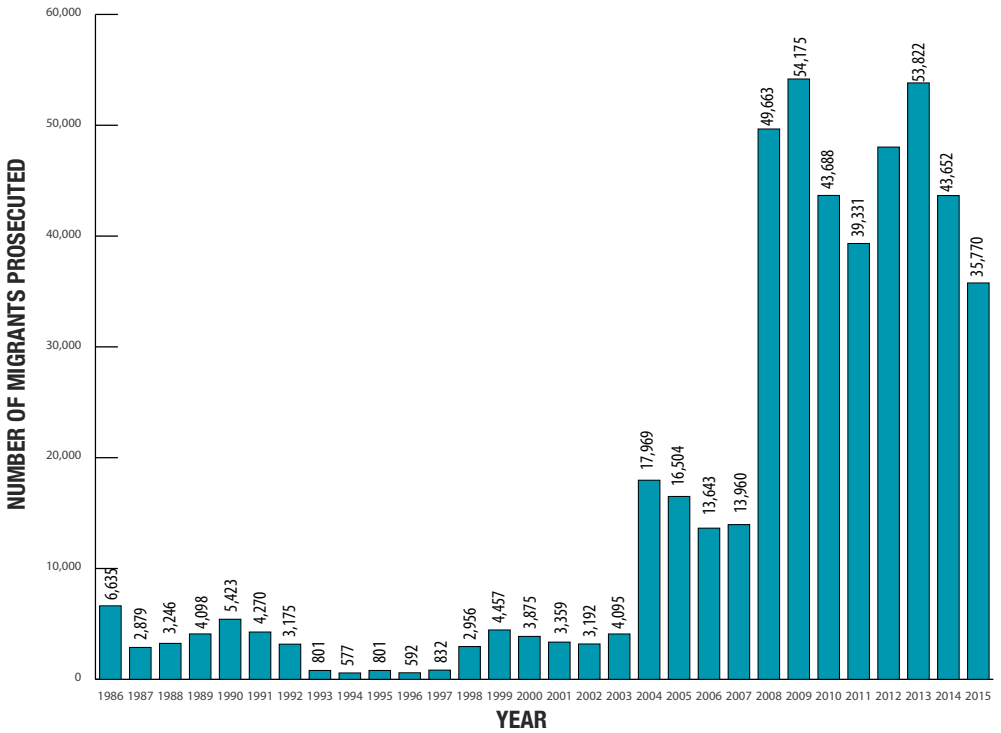
However, comparing data about apprehensions of migrants from the Department of Homeland Security (Chart 1) with immigration enforcement data from the U. S. Department of Justice files that are compiled and made available to the public by the Transactional Records Access Clearinghouse at Syracuse University (Charts 2 and 3), it appears that there is no apparent correlation between cases filed for prosecutions by U.S. Attorneys, which have been trending upward overall, and the number of apprehensions, which have been trending downward since FY2000.

Chart 1. Migrants Apprehended by Federal Authorities, Fiscal Years 1986-2013 (Source: U.S. Department of Homeland Security)



While apprehension of migrants increased steadily through the 1990s, Chart 2 shows that criminal prosecution of migrants for improper entry were relatively rare during that period. Improper entry prosecutions increased sharply starting in the mid-2000s, a period when apprehensions were sharply *declining*.

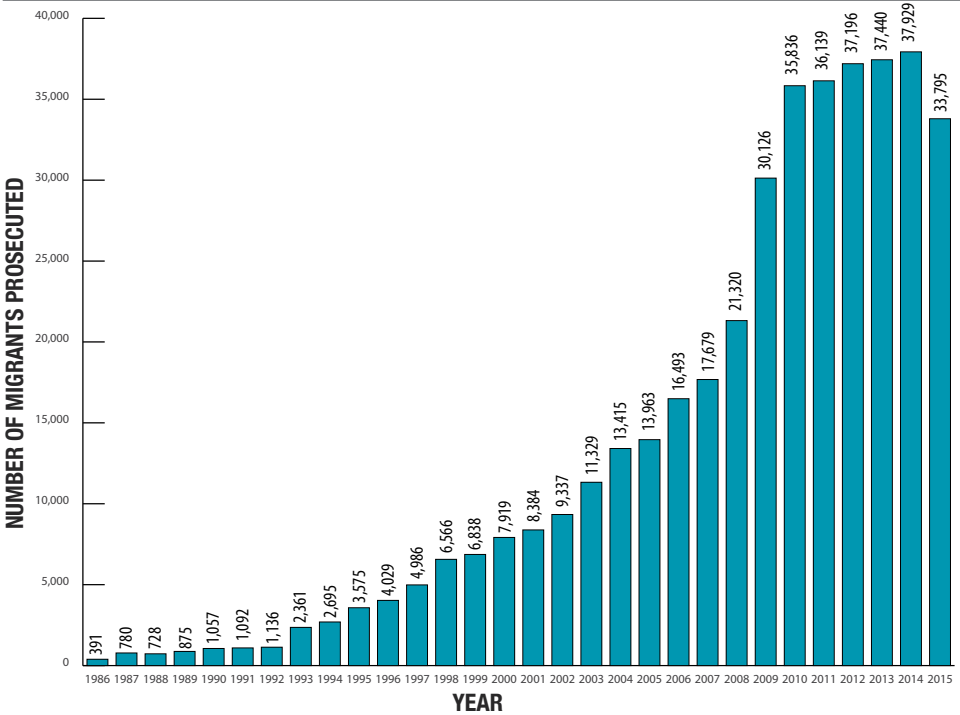
Chart 2. 8 USC 1325 Improper Entry Prosecutions Filed, Fiscal Years 1986-2015
(Source: TRACFED/Transactional Records Access Clearinghouse at Syracuse University)



After 2004, filings for improper entry followed a choppy pattern of fluctuation, with higher levels of filings appearing to coincide with presidential election campaigns. Since FY2013, prosecution filings for improper entry have dropped by more than one-third.

Prosecution trends differ, however, when comparing the fluctuating number of filings for improper entry with the more steady increase in filings for re-entry (Chart 3).

Chart 3. 8 USC 1326 Reentry Prosecution Cases Filed, Fiscal Years 1986-2015 (TRACFED/Transactional Records Access Clearinghouse at Syracuse University)



As will be explained below, felony re-entry prosecutions are handled by Assistant U.S. Attorneys (AUSAs) as part of their normal district court case-loads, while misdemeanor improper entry cases are handled by Customs and Border Patrol (CPB) attorneys who have been “cross-designated” by the Department of Justice (DOJ) to prosecute these cases for Operation Streamline. Perhaps this may explain the erratic and apparently politicized patterns in the misdemeanor filings.

From the beginning of the Clinton administration, until 2004, prosecution filings for re-entry increased quite smoothly at increments averaging about 17 percent per year. But in FY2005, the year that Operation Streamline was first introduced, the number of re-entry prosecutions jumped by more than 2,500, and after the beginning of the Obama administration, re-entry filings took off like a rocket, increasing from 21,329 in FY2009 to 33,795 in FY2015.

Paul Charlton served under George W. Bush as U.S. Attorney for Arizona from 2001 to 2006, before the advent of Operation Streamline in his state. A conservative ex-prosecutor who describes himself as a “drug hawk,” Charlton watched the buildup of border enforcement from center stage:

Back in the 1990s, immigration prosecutions were unusual. Our Assistant U.S. Attorneys needed to be taught how to do them, had to be shown how to cross-examine people using a translator and so forth. These cases were relatively rare until the tide began to change with waves of unauthorized entries, especially here in Arizona.

I recall that it was after I became the United States Attorney for Arizona that the total number of unauthorized aliens detained along the Arizona-Mexican border started to exceed 50 percent of all people detained in federal custody in the entire U.S. That’s when I began to feel that Arizona was the focal point.

Magistrate Judge Bernardo P. Velasco, who sits in the Tucson District Court, saw the rising tide of get-tough immigration enforcement policies put in place by the Bush/Chertoff regime, and sustained now under the Obama administration:

I’ve been on this bench since 1982. Since the George W. Bush administration began we have seen a concerted effort to punish migrants as “law-breakers.” Under the current administration, Operation Streamline exists to demonstrate to Congress that we’re sealing the border so that they can pass comprehensive immigration reform. None of that has actually happened, of course.

Donna Coltharp, Deputy Federal Public Defender in the Western District of Texas, thinks that both presidents were hoping that clamping down on the flow of migrants over the border could calm the clamor over “illegal

Under the current administration, Operation Streamline exists to demonstrate to Congress that we’re sealing the border so that they can pass comprehensive immigration reform. None of that has actually happened, of course. — Judge Bernardo P. Velasco

immigration” so that cooler heads in Congress could move a comprehensive reform agenda forward.

Historically in the U.S., being tough on immigration policies tends to accompany the desire to do more for certain types of illegal immigrants. President Bush wanted to do something on border issues so he had to prove his bona fides. However, he was not able to accomplish anything, and Obama as well. When he came into office the number of cases went up. The crackdowns in both administrations may have been designed to placate a very vocal segment of the population so they could accomplish something positive on the immigration front.

From the beginning of Operation Streamline the likelihood of a migrant who was apprehended being criminally prosecuted for crossing the border has snowballed. In FY2005 the odds of being prosecuted were just one in 42. Apprehensions began to fall that year, but the number of prosecutions was climbing. By the 2008 election the odds were one in 15, and by FY2013 (the most recent date for which apprehension information was available) the odds of being prosecuted were one in seven.

A closer look at the ramp-up of border enforcement during the mid-2000s reveals an ironic result. Table 1 shows that in FY2004, apprehension of migrants increased by 21 percent, and the Department of Homeland Security referred 65 percent more cases involving immigration offenses to the Department of Justice for prosecution. The number of convictions for immigration offenses jumped by 70 percent that year, yet the increased case volume resulted in a sharp drop in the median sentenced imposed, from 15 months in 2003 to just one month in 2004. This was because the bulk of the new convictions were for improper entry cases, a petty offense handled in magistrates court, and about half of these cases received no time behind bars at sentencing.¹³

Table 1. Increased Border Enforcement FY2003-2004 (Sources: Department of Homeland Security and the Transactional Records Access Clearinghouse)

	FY2003	FY2004	Change
Apprehensions	1,026,422	1,264,232	+ 21%
Referrals	23,926	39,491	+ 65%
Prosecutions Filed	20,771	37,765	+ 82%
Convictions	18,316	31,208	+ 70%
Median Sentence	15 months	1 month	- 93%

During 2007, comprehensive immigration reform had been a major focus in Congress. The *Secure Borders, Economic Opportunity and Immigration Reform Act of 2007* was fashioned as a compromise between pro-immigration members seeking a “path to citizenship” for thousands of immigrants residing in the U.S. without proper documentation, and a loud restrictionist demand for increased border enforcement. The debate was fierce and no agreement was ever forged to move the bill to a vote. During FY2008, on the heels of legislative failure, criminal prosecutions for improper entry sharply increased with a 256 percent surge of filings in magistrate’s court. The median sentence for 1325 improper entry convictions remained very low.¹⁴

Prosecution filings for reentry reached 21,320 in FY2008, a more modest increase from 17,679 in FY2007. By FY2013 the combined growth for improper entry and re-entry prosecutions of migrants had reached an all-time peak of 91,262 filings.

5 A HIGHLY POLITICIZED CLIMATE, MEDIA HYPE AND ROOT CAUSES OF MIGRATION COLLIDE IN ARIZONA

Looking back at the political landscape that helped to foster development of the massive enforcement buildup on the border and the swing toward criminalization and prosecution, both ex-public officials and reform advocates point to politicization of the issue as the driving force. Paul Charlton, the U.S. Attorney in Arizona from 2001 to 2007, was very disturbed by the way both the local and national media exploited the situation, only making things worse:

Back when I was the United States Attorney, Lou Dobbs began to use his CNN news program to focus heavily on the border. Chris Simcox, then founder of the “Minuteman Civil Defense Corps” (and currently being prosecuted here in Phoenix for child sex abuse) was leading a “Civil Homeland Defense” operation on the border, claiming to be assisting the Border Patrol. Simcox became a national “poster boy” for our border issues thanks to Dobbs.

The sheer numbers of crossers were real, due to geography and barriers elsewhere along the border. Arizona had become a popular location for crossing and even more popular for those inclined to protest. The media played along happily. Around that time, I met with the editorial board of Arizona Republic newspaper to point out that this frenzy around immigration issues in our state was a creation of the media. They listened politely, but they continued to publish their dramatic border stories.

Jodi Goodwin, an immigration attorney in Harlingen, Texas, and former President of the Texas Chapter of the American Immigration Lawyers Association (AILA), sets the mid-2000s boom in migrant prosecutions within a larger context of repressive measures that date back to the Clinton admin-

istration. She says that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 foreshadowed the explosion of public fear and political fear-mongering that erupted in the wake of the 9/11 attacks on the U.S.:

The increase in prosecutions is a result of post 9/11 anti-immigrant fear. The 1996 legislation made it easier for Customs and Border Patrol to deport people without a hearing. Then there was a rise in criminal prosecution after 9/11. There was also a lot of anti-immigrant sentiment among Republican politicians who wanted to stir things up. Even if they were not morally opposed to immigration, it was in their interest to stir things up to support their political agenda. The timing also coincided with the creation of the Department of Homeland Security.

After having served as the mayor of Phoenix for six years during the 1990s, Terry Goddard was Arizona's Attorney General from 2003 to 2011. He is now an attorney in private practice, and currently serves as faculty in the National State Attorneys General Program at Columbia University Law School.

Goddard dismisses the notion that his state's border has a serious problem of violent crime:

Until 2002, much of the boundary between Arizona and Mexico had been an open border — in many senses. The concept of transnational border identity was pretty much understood and accepted.

Many retirees shuttled to Mexico all the time for inexpensive healthcare, while Mexican laborers crossed back and forth for agricultural work and other opportunities to make money to support their families. The main driver of the change in our attitudes toward our Mexican neighbors was economic. People got worried about whose jobs they were taking.

Goddard goes on to place heavy blame on one the state's most prominent public officials for stirring up public resentments around the issues of crime and immigration:

Labor issues aside, in 2002 things began to get highly politicized after Russell Pearce, a newly elected representative in the legislature from Mesa, started his anti-immigrant campaign. Measures he could not win through the legislative process, he won through a series of ballot

initiatives relating to voter ID, employment verification, denial of public benefits, denial of bail for immigrants if arrested, and finally culminating in the infamous SB 1070 “show us your papers” law.¹⁵

Russell Pearce was highly successful in his anti-immigrant messaging, and the impact was pretty instantaneous in terms of border trade. Businesses saw cancellation of their trucking contracts. Routes for legal transport were shifted away from us because Arizona was seen as so hostile to Mexico.

According to Goddard, Pearce gathered support from more neophyte legislators who had moved into Arizona from other states and who were drawn to his harsh anti-immigrant rhetoric:

Many newcomers elected to our legislature during a political swing to the right were unaware of the historical context of border migration and of our bicultural traditions. From longstanding benign neglect of immigration issues, the pendulum swung to hatred and oppression of migrants.

Russell Pearce was also able to enlist influential national interests to further his cause. The American Legislative Exchange Council (ALEC) had helped him draft and enact his notorious “show us your papers” SB 1070 legislation. Once enacted, ALEC promoted the bill as a model for other states to follow, according to Goddard:

The American Legislative Exchange Council, long a strong advocate for prison privatization, saw immigration enforcement as a new issue that could yield massive numbers of detainees and prisoners for the private incarceration market. Arizona became their testing ground. After SB 1070, the ALEC/Pearce agenda was poised to include mandatory reporting of undocumented people by bus drivers, teachers and hotel workers.

As the U.S. economy entered rough waters, Pearce was able to exploit the situation, further souring the public mood with his “blame the immigrants” bombast, Goddard continues to say:

To make matters worse, Arizona was hit hard by the mid-decade real

estate meltdown, which made it very difficult to discern what was happening with the job market. Until then, we had experienced a huge shortage of skilled construction workers. Building crews were 50 to 60 percent undocumented people.

Suddenly there was no employment for anyone, undocumented and citizens alike. There was widespread confusion about why we were in such deep economic trouble. Janet Napolitano said it was about mortgages, not immigration, but many of our other politicians simply blamed the problem on the border.

Once the national media focused its spotlight on the issues in Arizona, Goddard says that the so-called “immigration crisis” on the border helped to dash hopes for pragmatic reform of U.S. immigration policies:

I think our border issues with Mexico would never have been such a dominant national issue but for Lou Dobbs on CNN and Fox News. Migrants were no longer staying in Arizona; we had become the national migration transit point. Governor Jan Brewer did at least 10 interviews with Fox in 2010 alone. Her claims made “violent crime and danger on the border” a national story.

Meanwhile, Sandra Day O’Connor brought together leadership in our state to look at repairing Arizona’s image and I was pushing hard for Comprehensive Immigration Reform. The polls were showing that 70 percent of state residents supported CIR. Yet until he was successfully recalled by the voters, the national media outlets made Russell Pearce look like a national hero, “protecting the civil rights of all Americans.”

Goddard continues to speak out against what he insists is a trumped-up border “crisis” manufactured to deflect attention for the need for more rational policies to safeguard cross-border commerce and reduce exploitation of opportunities for organized crime and corruption:

The murder of a prominent ranch owner located near the border in 2010 appeared attributable to illegal immigration and quickly became a national story. I said at the time that the tragedy should be seen as an example of how safe the border actually is, given that there hadn’t been another serious violent crime reported on the border while half a

million people were crossing on foot that year. Arizona's ex-Governor Raúl Castro lived with his wife on the border at Nogales until he died this year; she still feels safe walking her poodles along the border.

While McCain, Brewer and Napolitano debated about how many Border Patrol officers should be allocated to our state, they never really established what a "secure border" actually means for business and commerce. Our current border policies have nothing to do with results, but everything to do with public posturing. Our legislators seem to think that the coyotes are just working in small, unconnected operations. They underestimate the cartels, the paramilitary involvement, the mining interests, etc. A wall is not going to solve anything.

A wall is not going to solve anything. — Terry Goddard

Judge Velasco, a magistrate judge of the Federal District Court in Tucson, points to the bipartisan nature of political support for the border crackdown:

It's really a matter of politics. There's this sense in both parties that prosecuting illegal entry is something we should do. Republicans think we should just do it. Democrats think it will help them reach the bigger goal of comprehensive immigration reform.

It's like what Franklin Delano Roosevelt did during the height of the depression: "Let's do something, even if it turns out to be wrong." We're doing this in the effort to try something. We're processing cases that satisfy the country as a whole.

We live in a society where we've reprioritized all kinds of things. No one used to care much about DUI's, even when there was a kid in the car. Today you go to prison for that. Once an issue rises near the top of the priority list for whatever reason, cost issues become immaterial — especially when an issue becomes politicized.

Judge Velasco says that the politicization of immigration has sparked a torrent of enforcement action along the Arizona border:

Back when I was a federal public defender the numbers of immigration prosecution were very low because the Border Patrol didn't used to open

a prosecution file unless someone had 14 prior arrests. By the time they were prosecuted on 1325 they had been caught crossing multiple times. Now it's a lot like the drug war, yet the price of drugs hasn't changed, so what's the real impact of this huge enforcement effort?

Historically, we've been doing these prosecutions for a long time. With or without Streamline we probably always will, because half of the drugs and the immigrants come in through the Tucson sector. But the current flood of prosecutions are only happening because we've created all these opportunities for immigrants so we can enjoy the benefit of their cheap labor. The other thing we don't say is that we love the drugs.

And the politicization of immigration has helped to institutionalize the massive prosecution effort, winning continued bipartisan support over two successive administrations. According to Judge Velasco:

The goal of immigration enforcement in each border sector is to apprehend and deter. Texas came up with Streamline in order to deter people from crossing in their sector. Their hope was to make them all go to a different sector. Politically it sounded so good, it was soon brought to Arizona.

The U.S. Attorney has all of the discretion. When Streamline started here it was strictly a Border Patrol program with the blessing of a U.S. Attorney who said, "If Border Patrol wants to provide the needed resources and staff for our office, then they can do it."

With the Obama administration came a new U.S. Attorney who said in effect, "Now we're going to roll up our sleeves and go after people with prior records." For them it's still a shared cost within the executive, but now they are doing more selective prosecutions with their focus on people with prior records. Still, as a whole, the numbers have finally begun to go down under this administration.

Isabel Garcia, Director of Coalición de Derechos Humanos in Tucson, is the nation's most prominent critic of Operation Streamline and SB 1070. She has a long and distinguished career in the legal profession. She had been a federal public defender some years ago, and until she retired in July 2015, she was the chief public defender in Pima County.

But you can't solve social, economic, or political issues using criminal law. — Isabel Garcia

Garcia points to a yet larger political motive, and a broader set of actors on the stage:

The basic problem is due to the rise of globalization. The powers that be were thinking, "Let's use Arizona as our new policy gateway because it's the perfect place for fomenting hatred, for pushing anti-rights and anti-human measures against immigrants."

John McCain would not have been fighting so hard to build up the border right after NAFTA unless he already knew what the impact of NAFTA would be on the Mexican economy. But you can't solve social, economic, or political issues using criminal law. If we really wanted to solve these problems, we would address them on the front end, not on the back end.

6 IN TEXAS, A 90-DAY EXPERIMENT MUTATES AND SPREADS

The town of Del Rio, located in the Western District of Texas next door to Ciudad Acuña, Mexico, was the site chosen in 2005 for the first launch of Operation Streamline. The pilot was originally conceived as a 90-day experiment, but under the watchful eye of Michael Chertoff it became permanent and quickly spread to other federal courts within the border districts.

Federal District Court Judge Alia Moses took the lead with the Border Patrol in designing the first Streamline process:

Operation Streamline was started here in Del Rio in 2005. It was just for misdemeanors here — not felonies — and then the other districts mutated it. It was not my idea. It came from Border Patrol Sector Chief Paul Berg. We intended to get the migrants' attention and warn them not to cross if they want to come back legally.

The parties got together to discuss how to set up the process, how to preserve due process while handling the high volume of cases. Congress gave money to districts that wanted to implement Operation Streamline, but they did not define how to implement it. That was left up to each district. Prosecution for illegal re-entry 1326 was never part of the original concept of Operation Streamline here in Del Rio.

In the Southern District of Texas, the federal court in Brownsville did not begin a Streamline process until the summer of 2008. Jodi Goodwin, immigration attorney in nearby Harlingen, Texas, and former President of the Texas Chapter of AILA, says that the courts used to be concerned with more serious border crimes. “In the old days, before Operation Streamline, both 1325 and 1326 prosecutions were rare,” she says. “Prosecutions were focused more on transportation and smuggling.”

Felix Recio was a federal magistrate judge in Brownsville for 14 years until his retirement at the end of 2013. He recalls how the process was initiated in his court:

The initial discussions about implementing Operation Streamline in Brownsville occurred at a meeting of federal officials in New Mexico. Participants included the Border Patrol, the U.S. Attorney's Office, the U.S. Marshal's Service and the judges. The Border Patrol explained that their goal was to flood certain border areas with agents and to initiate increased prosecutions in order to move the immigration flow to areas where they could capture more people.

The incentive would be that if they were arrested within this area, they would be given the opportunity for a misdemeanor conviction with probation immediately. They were giving probation on first entry so that it would be a violation of probation at a felony level if they came back. They believed that a tougher sentence would create greater deterrence.

Judge Recio had many misgivings about how the process was implemented and what impact it would have on migrants' rights for the future:

In return for a probation sentence, defendants had to give up their appellate rights. I thought that it was unconstitutional to give up your right to appeal before you know what would happen in the future. No one has ever challenged it. Someone should.

I always thought that misdemeanor 1325 cases deserved to have an appointed attorney because there was a liberty interest involved. Before I was appointed, the Border Patrol itself would prepare the cases and explain the rights to defendants. They were prosecuting 100 people a day without an attorney appointed.

When I came on the bench, I started appointing public defenders and the private bar to represent defendants. The Federal Public Defender's Office went from three to ten attorneys, and the private bar also grew. All of the involved agencies have increased exponentially. Meanwhile, the court has the same four judges and overall court staffing hasn't increased.

They were prosecuting 100 people a day without an attorney appointed. — Judge Felix Recio

Goodwin credits the Streamline judges with advancing the role of defense attorneys in the Brownsville court:

When the Operation Streamline program first started in Brownsville, the Spanish interpreter explained the process to defendants — what it meant to plead guilty, etc. The federal public defender was just there as a supporting attorney. Everyone always pled guilty. The judges saw that this procedure was not going to work and enlisted federal public defenders to perform interviews and explain the defendants' rights and the consequences of the pleas.

Streamline was launched in McAllen, Texas, in 2008 — the same time as in Brownsville. Magistrate Judge Dorina Ramos traces a similar experience to Judge Recio's:

I became a judge in 1996, at a time when there was no legal counsel for defendants in Magistrates court. Back then I gave a lot of suspended sentences. After the 9th Circuit in California held that defendants needed counsel, the court began appointing federal public defenders to represent them. At that time prosecutors weren't yet present in court.

We would have court on Friday afternoon after Thursday night raids the Border Patrol held in the bars in McAllen. At the time we conducted a group response with defendants. Now with the 9th Circuit holding, it is "up close and personal," because of the numbers being processed through court. Now there are usually no more than 24 petty defendants arraigned at a time.

7 IN TUCSON, COURT OFFICIALS STRUGGLE TO IMPROVE THE MODEL UNDER PRESSURE FROM THE BORDER PATROL

A number of insider views of the 2008 launch of Streamline in the Tucson Magistrates Court provide details about how it was shaped by court officials who, for the most part, were quite reluctant to embrace the concept. Saul Huerta, a former federal appellate defender now in private practice in Tucson, says that in the beginning there were many hot potatoes to be juggled in the process:

Operation Streamline was developed by Border Patrol and modeled after operations that were already in place in Yuma, Arizona and Del Rio, Texas. Border Patrol officials approached the court regarding this operation. But issues arose regarding the court's ability to accommodate such a process.

One of the potential solutions involved holding hearings at a Border Patrol station. This idea, however, was rejected in part because the station was located on an Air Force base. Ultimately, the court accommodated these hearings by utilizing the special proceedings courtroom at the Tucson Federal district courthouse. The special proceedings courtroom was normally used for initial appearance hearings, naturalization ceremonies, and investitures.

Originally the Border Patrol intended to process 100 people a day in the Streamline court. After security concerns were raised, the idea of processing defendants in shifts was considered. However, the program that was implemented started with just 40 defendants. Over time the number increased to 70, with a maximum cap of 75. On most days now, there are from 20 to 40 defendants, although on Mondays it is usually at or close to the maximum of 75.

Magistrate Judge Charles R. Pyle has served on the bench in Tucson for

14 years. He recalls how the court officials struggled to accommodate the demands set forth by some federal officials who were intent on implementation of Streamline in Tucson:

When we were first approached about implementing Operation Streamline in Tucson, it was clear that the Department of Homeland Security was very interested in our agreeing; the Department of Justice, not so much. There was a big meeting in the courthouse in December 2007, with then Chief Federal District Judge John Roll presiding.

Border Patrol officials were there. David Gonzales, the Federal Marshal in Arizona was present at the meeting along with Stacia Hylton who was the Federal Detention Trustee at the time of the meeting (she went to the U.S. Marshals Service as director a few years later). Virtually all of the Tucson federal judges were there, as well as our federal public defender, Jon Sands. Altogether a high-powered collection of people.

The Streamline proponents outlined what they wanted to do. They made a pretty slick presentation, after which our people described what the impact on Tucson court operations would be.

The meeting was a brilliant display of separation of powers. The Border Patrol seemed to think it was already a “done deal.” The U.S. Marshals, responsible for moving prisoners and detaining them pretrial, immediately starting to talk about the logistics for busing and housing. But Judge Roll made it clear that it was something for us to consider, and that after we had done so, we would let them know our thinking.

Judge Pyle says that despite whatever misgivings he and others at the meeting had, the decision was not really theirs to make:

A lot of us at the table disagreed with the concept, but we felt that it wasn't our call. Amongst ourselves, most believed that it would be

When we were first approached about implementing Operation Streamline in Tucson, it was clear that the Department of Homeland Security was very interested in our agreeing.

— Judge Charles R. Pyle

extraordinarily difficult and very resource intensive — but that if need be, we could do it.

The only clear dissenting voice was from the public defender, Jon Sands. He said it was a moral outrage; that it violated the Constitution. He vowed that his office would contest it vigorously with litigation. But Judge Roll was pretty clear that it wasn't our call.

Once the Tucson court committed to Operation Streamline, Judge Pyle says they made an effort to avoid aspects of the Texas “model” they found especially troubling:

The enforcement folks wanted to get going right away, but we insisted that Streamline not be started up during the Holidays. So, operations began in January 2008. Magistrate Judges Edmonds and Velasco decided how we would do it; their plan was impressive. In the mornings we would turn our Special Proceedings Courtroom into an interview room.

In Laredo and Del Rio, our court staff had observed that judges were appointing a single lawyer to represent all 80 defendants in a single hearing. Obviously if you've got 80 clients, all you're doing is lecturing to a mass of people.

Judge Velasco insisted that in our court there would be no more than six defendants per lawyer. Fifteen tables would be set up with chairs on each side so defense lawyers would have places to interview their clients. From 9:00 a.m. to noon or 12:30, the Marshals would bring out the defendants to their attorneys as requested.

Our public defenders strongly opposed the program, and they never have been big participants. They primarily got involved to gain plaintiffs for their lawsuits. The private bar has stepped in to fill the breach. The incentive for them is the quick turnaround time on payments, because cases are closed so quickly.

Operation Streamline officially started in the Tucson magistrate's court in January 2008. Before that date, the court was handling a small stream of both improper entry and re-entry cases. According to Judge Pyle:

In 2001 when I was first appointed to the federal bench, the magistrate calendars were already heavy with 1325 cases. While defendants were represented by counsel, there were no AUSAs or Border Patrol representatives in the courtrooms at these initial hearings. Only later did the AUSAs start attending the sessions.

Given the sentencing range of zero to 180 days, we had pretty full discretion. Almost all the judges would give time served to defendants with no criminal history, and with a relatively minor criminal record no more than 90 days. A prior DUI or drug sales case would jack up the sentence a few notches more.

Judge Pyle describes how, once Streamline was introduced, the U.S. Attorney's Office (USAO) shifted its focus over the first half-decade of operations:

When the program started, the concept was a "zero tolerance" prosecution policy. Their thinking was that it would be a more effective deterrent for people who didn't have a criminal history, who would be intimidated and frightened by going through a criminal process. They thought that such people would never try to cross over again."

Around 2009 or 10, apprehensions were really starting to go up. The Border Patrol was apprehending upwards of 1,000 people a day — 300,000 per year. That's five times what they're doing now. We started Streamline initially with 30 defendants or so; then we moved to 40 or 50 over time. The volume spiked at 70 for many years, but recently the numbers have slowed.

As the volume of cases targeted for prosecution increased, Streamline prosecutors often handled people with prior removals from the U.S. by charging them with 1326 felony re-entry after an order of deportation (a charge which carries a maximum of two years with sentencing enhancements of up to 10 or 20 years depending on criminal history), but instead of filing the case in district court, the defendant is offered the opportunity in the Streamline court to plead down to a 1325 misdemeanor charge of improper entry, and to accept a short jail term of no more than six months duration. These cases are known in Arizona as "flip-flops." Judge Pyle describes the situation before 2013:

In the beginning, a third to half of the defendants would be people with no prior criminal history, charged with just 1325. The rest would be “flip-flops” with a set plea agreement and sentence if they agreed to plead guilty. We had discretion as to how much time we wanted to impose in the pure 1325 cases. Most of these defendants got time served; hardly anyone got more than 30 days.

In 2013, Eric Markovich, now a magistrate judge in Tucson who was then chief of the criminal division of the USAO, ended the “zero tolerance” approach to first-time border crossers. He shifted prosecution priorities to more serious cases. All Streamline cases henceforth would be handled as “flip-flops.” Judge Pyle explains:

When Eric Markovich ended the “zero tolerance” policy, he determined that every defendant had to have at least one prior removal and perhaps also some criminal history to qualify for Streamline. Since then, the cases have all been “flip-flops.”

Jessie Finch, Assistant Professor of Sociology at Stockton University, conducted a multi-year study of the roles and attitudes of judges and attorneys who have participated in the Tucson Streamline process. She says that as the target population for prosecution shifted, the nature of the daily legal process evolved. The process became more scripted and standardized and the sentences that prosecutors stipulated in their plea offers were regularized:

The original proceedings in early 2008 were less scripted than when I completed my observation. Earlier in the history of the proceeding, both attorneys and judges had more autonomy over the defense and sentencing. Attorneys were able to argue for sentence variations based on mitigating circumstances and judges were in charge of delivering sentences — often giving time-served to first time offenders.

As the program progressed and became more and more standardized and “streamlined,” these unscripted portions fell away. The proceedings I regularly observed were done almost exclusively through the use of Change of Plea Agreements [the flip-flop instrument], in which government prosecutors used very specific “equations” to stipulate sentencing. Judges became figureheads who merely assured that

defendants understood the plea they were entering instead of deciding sentences. Average sentences now range between 30 and 180 days.¹⁶

The sentencing “equations” prosecutors use when setting stipulated plea offers are not set in stone, but over many months of courtroom observation and interviews, Finch was able to trace the basic calculations:

Based on my fieldwork talking to attorneys and judges, the “equation” used to provide sentencing for defendants is in the hands of the prosecutors and is continually evolving, but generally, lower sentences mean less prior immigration and criminal history. One respondent told me, “30 days always means the only thing they have is one prior deportation, no criminal history. It always means that. That’s the one thing you can guess.”

Generally, this sentence is doubled (60 days) if the defendant went through one of the Remote Repatriation Programs. Beyond these clear-cut distinctions, each case is handled based on specific priors (adding 15-30 days for certain misdemeanors; more time for felonies, etc.) and days are added until defendants max out at 180.

Almost all “flip-flop” defendants agree to plead guilty to the lesser offense, which is punishable by up to six months. In return for the lesser charge, defendants agree to give up a number of rights, including the right to trial, and the right to challenge or appeal their conviction (except on the issue of ineffective assistance of counsel).¹⁷ As a result, they are formally charged, accept their plea agreement, plead guilty and are sentenced, all in a matter of hours.

The condensation of all these criminal procedures into one brief court session was troubling to many — participants in the truncated court process and outside observers alike. Finch says that while the standardization of the “flip-flop” process left judges with a very limited role, the way the process is administered nonetheless varies from judge to judge:

Current proceedings also vary based on the different judges who are presiding. Due to the oddity of en masse proceedings — and although much of the organization and structure are standardized and standardization increased over time — there is no singular script for judges to follow.

For example, in my fieldwork in September of 2013, one judge asked each defendant only two “yes/no” questions before sentencing them. In the subsequent week, a different judge on OSL duty asked defendants twenty-five questions, some open-ended or requiring longer responses, some individually and some in groups. This variation is meaningful because perceptions of the process diverge based on which judge is presiding. There have also been several Ninth Circuit Court of Appeals rulings on how such proceedings can be carried out.

Huerta, the former federal appellate defender, was deeply engaged in the litigation effort mounted by federal public defenders to challenge the Streamline process:

I was a federal public defender from 1999 until 2013, so I was there at the start of Operation Streamline in 2008. At first Jon Sands, the chief federal public defender in the district, indicated that his office would not take part in Streamline.

We’d heard how Streamline was taking place in Del Rio with just one attorney handling all of the cases each day. But then Sands’ position (or the position of the federal defender office) changed, and one assistant federal public defender was assigned to be at Streamline every day, apparently to keep an eye on the overall process.

That’s how I ended up talking with Streamline defendants and to see if anyone wanted to raise an appeal of the process. At that time I handled both trial cases and appeals. I handled Streamline appeals along with my colleague Jason Hannan.

The legal challenges were brought in an effort to provide a measure of individualized consideration despite the regimented nature of the process, Huerta explains:

Jason Hannan and I did not argue that the process was unfair because that is simply not an option within federal law. Instead, we made two arguments: first, that the courts had to provide a minimum amount of due process and that this procedure did not meet this minimum requirement; and second, that one or more of the criminal procedure law requirements under “Rule 11”¹⁸ had been breached — for example,

the detailed procedures to be followed by the court in accepting a change of plea.

The idea was that if we slowed the process down, it would ensure that the courts conducted the hearing properly. We lost some of our appeals; for instance, a judge can still explain all their rights to multiple defendants together at the same time. But we won on the provision that judges have to individually ask if each person understands their rights.

Huerta says that the decision to routinize “flip-flop” cases in the Tucson court was designed — at least in part — to stave off further appeals:

At first, the Streamline process could include people with no removal orders under 1325, but in 2013 the prosecutorial authority decided that they wanted to avoid appeals in these cases. Appeal waivers, however, could only be obtained if there was a benefit offered for accepting a negotiated plea.

So they decided to focus on cases where they could bring a 1326 charge in order to offer a shorter “flip-flop” sentence under 1325. Henceforth, they only prosecuted people that had previously been deported. Some of these 1325 “flip-flop” convictions involve no prior criminal history whatsoever, just a prior removal order.

The practical effect is that people can’t appeal except in “habeas” cases, or “ineffective assistance of counsel” cases. These appeals are usually done pro se [or, representing oneself], and are generally moot by the time they come up in court because their sentences have already been served and the person has been turned over to immigration authorities, and most likely removed.

Isabel Garcia, of Coalición de Derechos Humanos in Tucson, also describes the shift to “flip-flop” cases as a strategy to avoid legal challenges:

The Tucson Streamline court handled straight-up 1325 cases for many years. But the Federal Public Defender’s Office was winning a lot of appeals. First they tried to make them look like fools in court in order to push other defenders to fall in line. Then, as the number of apprehensions dropped, they switched to “flip-flops” – where a defendant has to waive the right to appeal in order to get the benefit of

a short sentence.

Huerta thinks that ultimately a lack of resources resulted in pulling back on federal defender representation in the Streamline court:

In 2013 the federal defenders office decreased representation of Streamline clients to just one day a week. It is my understanding that this change was made due to budget cuts and the Tucson federal defender office's desire to prioritize their resources on higher-impact cases, more assaults, fraud, etc. It is my understanding that this decision was explained at a talk by Leticia Marquez, the attorney in charge of the Tucson office, though I was not present for this talk.

Despite intense criticism, political pressure to expand Operation Streamline continues unabated. Judge Pyle says that when the Arizona USAO backed away from prosecuting first-time border crossers, the state's most powerful politicians pushed hard to reinstate the policy and tried to triple the size of Streamline in the Tucson court:

Our U.S. Sens. John McCain and Jeff Flake have made it clear that they prefer a return to the broader prosecution guidelines of the 'zero tolerance' regime. Had the comprehensive immigration reform bill they both supported a few years ago actually passed, it would have tripled the size of Streamline. We would have had to build a new courthouse. As it is now, we are having to remodel the holding area to double its size.

Between 2013 and 2014, the federal courts in Yuma, Arizona, El Paso, Texas, and the Rio Grande Valley of Texas closed down their Operation Streamline courts, though prosecution of improper entry cases continues. Astrid Dominguez, Advocacy Coordinator of the ACLU of Texas says that the Rio Grande Valley court probably ended their Streamline process due to lack of resources, but that prosecutions for improper entry continue:

What I heard is that the Sector didn't have any support from federal partners. The Sector has not stopped referring folks for prosecution; what has stopped is the Streamline principle of "zero tolerance," referring people who otherwise would not have been prosecuted.

The Streamline courts have survived, however, in Tucson, Del Rio and Laredo.¹⁹

8 IN CALIFORNIA, A DIFFERENT APPROACH RESULTS IN FEWER MIGRANT PROSECUTIONS

The Southern District of California is planted firmly on the boundary between the U.S. and Mexico, yet that federal court has yet to implement Operation Streamline. According to Joanna Jacobbi Lydgate, an attorney who studied Operation Streamline at the Earl Warren Institute on Race, Ethnicity and Diversity at UC Berkeley, the United States Attorney's Office decided to retain its own targeted approach to prosecution of unauthorized migrants. She points to the populous nature of the U.S./Mexico border, where metropolitan San Diego meets Tijuana and Mexicali to produce very high rates of border crossings, and the second highest rate of apprehensions, exceeded only by Tucson.²⁰

Lydgate reports that the USAO in San Diego is committed to keeping most of its prosecutorial power focused on serious crimes. That office is more sparing in its prosecution of immigration crimes than in other border districts, choosing to charge 1326 only in cases involving serious prior criminal records. Lydgate suggests that this policy should be seen as a model for adoption by the other districts.

Laura Duffy, the U.S. Attorney for the Southern California District, says that her office uses a number of factors when deciding whether or not to prosecute a migrant for re-entry under 1326:

We choose to do the ones that we feel present the greatest threat. The practical reality is that we operate with finite resources. We make the best choices that we can, given the resources that we have. If we prosecuted every single re-entry, that would represent a 2,000 percent increase in our caseload... [W]e are considering the most serious cases on every single day.²¹

Unauthorized migrants with little or no prior records are generally han-

dled through the traditional civil immigration system in California. Fairly recently the USAO has begun to implement a “flip-flop” approach for some re-entry cases. This new practice will be described below by federal defenders who practice in the district.

Federal public defenders who handle cases in the Southern California District agree that adopting the Streamline model would have been a waste of resources in their court. Chloe Dillon, a federal public defender who works with the independent nonprofit Federal Defenders of San Diego, catalogs the reasons why:

I think at least in part it is a resource issue. We don't have the infrastructure in San Diego to do Operation Streamline. It would be forcing something on the court. Right now we have our hands full. It would be the U.S. Attorney putting tremendous burden on the court.

The AUSAs want to do more serious prosecutions but they never get to it because their hands are full. They don't want to prosecute less serious crimes; they want to do more. Operation Streamline is recognized as not handling serious crimes and so they did not want to do it.

Laura Duffy has made repeated statements in the past three years that her office intends to prosecute more serious crimes, but then nothing changes. Some federal defenders who have been here a long time say it's been the same all along, that the USAO keeps saying they plan to focus on more serious cases but then there was no change, not until recently when the level of some cases has actually gone down. Maybe there is more weeding out of cases in San Diego than in Tucson.

Dillon says that lack of federal court resources was not the only problem. Lack of detention beds was also a factor:

The San Diego area already has a problem with bed space for federal criminal prosecutions. Streamline would exacerbate that. We have one high-rise building that can't fit the number of people in the system, a contract facility in downtown San Diego and another Corrections Corporation of America facility close to the border. They are all way past capacity.

The Marshals also use some space in Bakersfield and a CCA facility in

Arizona to house people before sentencing. “Rule 5” states that people have to be brought to court without any delay. We are already litigating delays in bringing people to court. This would really be exacerbated by adding Operation Streamline.

But beyond the issue of resources and the desire to prioritize more serious offenses, Federal Public Defender Kara Hartzler says that the legal culture in California is just different from attitudes in the other border states:

I don’t think California has the stomach for Operation Streamline — the idea of parading people through a chute like cattle. There is no tolerance for that here. Moreover, the San Diego Federal Defender’s office is pretty litigious, and the U.S. Attorney’s Office here knows that.

I don’t think California has the stomach for Operation Streamline — the idea of parading people through a chute like cattle. There is no tolerance for that here. — Kara Hartzler

9 OPERATION STREAMLINE, WHILE SHOCKING, IS ONLY PART OF THE PROBLEM

“Operation Streamline” is really only the visible tip of the huge iceberg made up of the felony re-entry prosecutions across our border with Mexico. That is the phrase used by most people in referring to the special condensed prosecution proceedings that were set up by the federal courts to handle misdemeanor improper entry prosecutions in magistrates’ courts in most of the border districts.²²

Magistrate judges are not empowered to take a guilty plea for felony re-entry cases, so those must be sent to U.S. District Court judges for disposition and sentencing. While many U.S. District Courts may target re-entry cases for a special “fast track” calendar where defendants are offered a quick plea offer that will give them a discounted sentence if they accept, the process is not “Operation Streamline” per se, and many re-entry cases continue for many months before they are disposed, as will be explained in more detail below.

Further, while many defendants in 1326 cases will, under the advisory federal guideline system, receive a sentence of six months or less (the same sentence range provided in the federal criminal code for 1325 cases) some others will be sentenced to a term considerably longer than six months. Many defense attorneys report that they’ve seen 1326 felony cases resulting in five or more years behind bars.

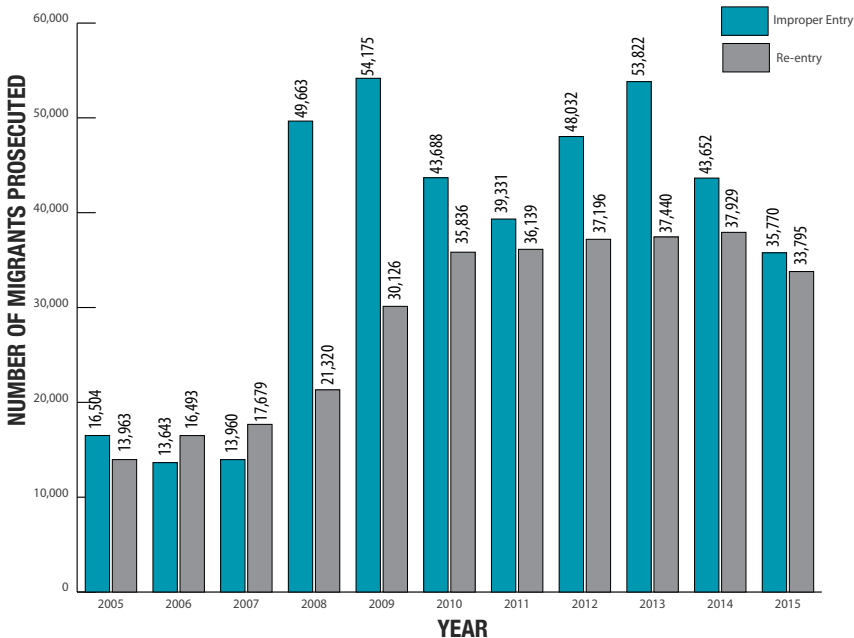
It is these longer felony sentences that have fueled a brisk market for additional capacity in the federal prison system, and resulted in lucrative contracts with a private prison industry that is ever eager to provide extra bed space. The bottom line, however, is that even if “Operation Streamline” were to be discontinued tomorrow in all federal districts, the courts would continue to prosecute both 1325 and 1326 cases, just as the Southern California District has always chosen to do.

10 THE OBAMA ADMINISTRATION INTENSIFIES THE PROSECUTION EFFORT

Prosecution filings for improper entry cases hit a high of 54,175 cases in FY2009, a period which included the first nine months of the new Obama administration. Prosecution filings for re-entry soared by 41 percent that same year. Border Patrol referrals comprised 82 percent of all immigration cases, with Immigration and Customs Enforcement (ICE) a distant second, accounting for just 15 percent.²³

As illustrated in Chart 4, between the introduction of Operation Streamline and FY2013, the total number of criminal prosecutions for border-crossing offenses had tripled. Then the overall number of border-crossing prosecutions fell by 24 percent, but by FY2015 the number of re-entry prosecutions nearly equaled the number for improper entry.

Chart 4. Criminal Prosecution Filings for Border Crossing Offenses, FY2005–2015 (TRACFED/Transactional Records Access Clearinghouse)



11 THE CURRENT STATE OF MIGRANT PROSECUTIONS IN ARIZONA

What strikes an observer sitting in the afternoon magistrate's session of the Federal District Court in Arizona is the spectacle: the daily²⁴ show of parading 40 to 50 defendants through court (down from a high of 75 people). Men and women, wearing the same clothes in which they made their border crossing one to five days ago, are seated in rows of approximately 20 people. Their wrists and ankles are shackled with heavy chains. Some defense attorneys offer their clients special tips about how to shuffle along so as to not trip on their chains as they go up to the stand.

From the initial explanation of the charges through the plea and sentencing, the process takes two to three hours and involves a multitude of people: U.S. Attorneys, Border Patrol agents, U.S. Marshals Service guards, defense attorneys, interpreters, court clerks and the judge. Everyone in the courtroom, aside from the defendants and a few family members, are employed, either directly or indirectly, by the federal government to process these cases.

Despite how appalling it is to see, the court process itself is, for the most part, a formality. By the time defendants come to court, they have already spoken with their attorney and made the decision whether to accept the U.S. Attorney's plea offer. Tucson Magistrate Judge Charles R. Pyle explains that since the USAO adopted a policy of using Streamline only for "flip-flop" cases, his role became largely routine:

In a "flip-flop" case, the judge only has discretion to reject a plea outright. We cannot lower or raise the agreed upon sentence. I have

Some defense attorneys offer their clients special tips about how to shuffle along so as to not trip on their chains as they go up to the stand.

rejected some pleas when a defendant wanted to accept the plea without actually admitting their guilt. Otherwise Streamline sessions are pretty brainless for me.

Judge Bernardo P. Velasco echoes the complaint, and says he must rely on the defense bar to safeguard the interests of their clients:

I don't have much discretion. I have to trust the defense lawyers as the ones actually spending time with the defendants. A judge's function is to satisfy the minimum criteria of due process: to make sure a person understands what they're giving up for what they're getting, and the possible consequences of doing so.

But Deirdre Mokos, a federal public defender in Tucson, says that the leverage held by the prosecutors in offering a “flip-flop” plea makes it very hard for a defender to refuse:

Since Streamline started accepting only 'flip-flops,' where they charge defendants with both 1325 and 1326, all discretion has been taken away because the USAO is saying if my client accepts the offered amount of jail time, then the 1326 felony charge will be dismissed. I have to explain to my clients that for some, refusing the plea offer could mean a lot more time.

Prior to the formal process, defense attorneys (either federal public defenders or Criminal Justice Act (CJA) court-appointed attorneys from the private bar)²⁵ meet with defendants in the morning before that afternoon's court session. Attorneys will typically be assigned three to six clients. They will explain the process, the rights an individual has, and the consequences of taking a plea and will interview the individual to ascertain any defenses or mitigating circumstances. If the defendant needs more time, the attorney will seek a continuance, which is usually granted.

The attorneys we spoke with felt that they had sufficient time to interview their clients and assess their cases. Eréndira Castillo is a highly accomplished attorney who had represented migrants as a federal public defender for many years in Tucson. She continues to do so now in private practice as a CJA panel attorney, and explains how she conducts the interview process:

In the morning I have an opportunity to speak to each of my Streamline

clients individually. I usually am able to devote about 45 minutes with each of them. I spend some time just assessing whether they are competent to face the court process, asking if they're too tired, too hungry, too ill, etc., to proceed.

If they speak Spanish, I translate the complaint and the charges, making sure they understand that it's a criminal, not civil process, and that this judge cannot deport them. Then I go through the criminal procedure, explaining what rights they have. I take them through the process that will happen in court in the afternoon, explaining what to expect.

If they have a family contact number I will make a call right in front of them to explain the situation they are in. If I feel that a client needs more time to fully understand the process, or if they are injured and appear to need medical attention, I ask the prosecutor to agree to a continuance and to keep the plea offer open. I've not had any problems getting their agreement in such cases.

Some observers have noted that not all attorneys take the same care in interviewing their clients. Judge Pyle says that most — but not all — defendants are dealt with on an individual basis:

Conscientious lawyers spend some 30 minutes just calling the families, and the judges have been pretty supportive of that. Some lawyers just sit their clients down in the jury box and talk to them all at once, but most are conscientious about conducting individual interviews.

On the prosecution side, Judge Pyle explains, cases are not handled by real AUSAs:

From the beginning, Streamline cases were not prosecuted by actual AUSAs. We've had the same two 'special assistant AUSAs' — Border Patrol lawyers cross-designated to handle these cases — the whole time. I believe that their paychecks come from the Department of Homeland Security.

As a result of federal litigation,²⁶ the court has made modifications over the years to comply with due process concerns arising from their initial practice of handling defendants as a group rather than in an individualized manner. Judge Pyle welcomed the changes, but says that compliance has not

been easy for him:

When I first started with Streamline I held large group hearings. I was never comfortable with it but that was the way I was trained. Then a 9th Circuit Court opinion came out that was critical of those group advisements, and I stopped doing them. The problem is that it makes hearings much longer and physically demanding for a judge.

I bring in a cup of green tea; it's the only proceeding where I bring any sort of beverage other than water. On days when I have 75 cases calendared, I'll have coffee brought in to me. Otherwise at times I might start almost blanking out mentally. The grueling process is physically uncomfortable, and with a full load of 75 cases, it takes me two and a half hours.

Most judges and defense attorneys say that they take great pains to improve the court experience for defendants. Judge Pyle describes how he manages the Streamline sessions with as much thought and care as the truncated process allows:

We've tried to do Streamline in the most humane way we can. It would be very hard to bring another legal challenge now because all cases are now "flip/flops" and defendants potentially face felonies if they are not successful on appeal. It's made a big difference to us judges that defendants have access to a lawyer to determine any legitimate legal claims they may have; to contact their families to let them know what was going on; to deal with their consulates.

I bring eight defendants before me at a time. With groups any smaller than that, the process would take far more time, and that would be uncomfortable for both the court staff and the defendants. I used to do the women's hearings first, but now I do them last because I really don't want them standing up there in front of a big group of men.

At the beginning of each group I ask each individual their name. That's just a local rule of court that would be easy to ignore, but I feel a judge should act like he cares what a guy's name is. At end of the plea process the rules require that defendants can allocute — say anything they want to tell me — before I sentence them.

I ask each person individually if they want to say something. But we've brought them to the courthouse at 3 a.m., tired and frightened. We've held them in a court pen with nothing to eat but granola bars. So almost always no one wants to say anything. — Judge Charles R. Pyle

I ask each person individually if they want to say something. But we've brought them to the courthouse at 3 a.m., tired and frightened. We've held them in a court pen with nothing to eat but granola bars. So almost always no one wants to say anything. If one person does say something, however, 20 more will do so too, and I want to hear whatever they have to say.

As has been described above, the Arizona Federal Public Defender's Office was opposed to Operation Streamline and the expanded prosecution of improper re-entry cases from the beginning. The Federal Public Defender's Office currently handles a share of 1326 re-entry cases, but the office restricts their representation for individuals who appear in Operation Streamline court to Mondays only.

The shift to an “all flip-flop” policy in the Tucson Streamline court has both increased and standardized the sentences meted out to defendants who accept the plea agreement. CJA panel attorney Castillo explains the apparent logic of the plea offers:

The plea offers are designed to deter re-entry by increasing the penalty according to a person's prior history. If they have no Alien Transfer Exit Program removal in their history and no criminal history, the offer would be a 30 day jail sentence.²⁷ If either of these factors is present, it increases a 30 day sentence to a 60 days. Additional criminal convictions and/or multiple prior entries in their record will increase the sentence offer further, up to the limit of 180 days under 1325.

Tucson federal defender Mokos explains that many defendants are shocked to find themselves forced to agree to a 1325 misdemeanor jail term due to a threat that they will otherwise be prosecuted for a 1326 felony re-entry after

removal:

The lowest sentence goes to people that have no prior criminal convictions, just a prior removal. Some of them might have gotten an expedited removal without realizing it since they never saw an immigration judge. They thought they'd made a voluntary departure, but here they stand in federal court, facing a minimum of 30 days.

The Mexican Consulate in Tucson also plays a role in the Streamline process of “flip-flop” prosecutions. José Alejandro Urban Flores, Chief of the Protection Department, and Pedro de Velasco Garza, an attorney in the Legal Affairs Office explain the assistance they offer Mexican nationals who are processed through Streamline:

We were not consulted when Streamline was being organized by the courts, but as soon as we learned of it we reacted, raising concerns and working with local officials to make sure that the process is as respectful of the human rights of Mexican nationals as possible.

Our staff has been meeting with Mexican nationals since Operation Streamline started up to explain the process and the basis of the crime to them. They need to have the necessary information, and all the right tools to make an informed choice, so they can face the process understanding the legal background. We determine if they are fluent in Spanish or only in indigenous languages, and we allow them to use our call center to call their families in the U.S. and Mexico. We also ask people whether they have been abused or not treated correctly in Border Patrol or U.S. Marshals Service custody.

Mexican Consulate staff try to help migrants after they are released from custody, and assist families and human rights workers to track down missing migrants:

We try to help them obtain their personal belongings after they serve their sentence, and have negotiated an agreement with Border Patrol officials to retain their property for thirty days after their sentence is served.

We work with families and with human rights organizations like No More Deaths and Derechos Humanos to help them track down

migrants who have disappeared, and have regular meetings with the Pima County medical examiner to help identify remains of those that have died crossing the border. So far in 2015 alone 160 people have died.

Defendants who refuse to accept the “flip-flop” plea offer are then calendared to appear in District Court to answer for the 1326 felony improper re-entry charge. Their cases will be handled in the same fashion as those involving defendants who prosecutors deemed unworthy of a “flip-flop” offer in the Streamline court. Tucson CJA panel attorney Saul Huerta explains how prosecutors make decisions to bypass Streamline and file cases directly in the District Court:

Defendants with prior 1326 convictions, or prior serious convictions such as drug convictions or crimes of violence are not typically offered a Streamline “flip-flop,” unless the prior conviction is very old.

Some people are charged with 1326 (and not offered a Streamline “flip-flop”) because they helped their alien smuggling guide in some way, or because they backpacked marijuana as the fee for getting help to come over the border (in the latter case, they may plead to possession of marijuana). If a defendant turns out to have been placed under federal supervised release in a prior case, the Streamline “flip-flop” is withdrawn. This is likely because the prosecutors do not want to interfere with a previous judge’s order of supervision, or treat it lightly.

Defendants in 1326 cases typically have a detention hearing two days after their initial District Court appearance. After that, the U.S. Attorney’s Office has 30 days to indict them, at which point there’s an arraignment hearing. Unless the case is designated for “fast track” status (see page 76), it takes an average of five to eight months before the defendant enters a plea and faces sentencing.

Both federal public defenders and CJA panel attorneys represent defendants facing re-entry charges in the District Court. Huerta, who represents many Streamline defendants, also represents many 1326 felony clients:

I take 1326 cases, but fewer — one case maybe every three to eight weeks. These cases usually take about six months to resolve if my client

agrees to plead guilty; and seven to eight months if my client decides to go to trial.

12 THE CURRENT STATE OF MIGRANT PROSECUTIONS IN TEXAS

The Texas border with Mexico is divided into two federal court districts: the Western, which includes Austin, Del Rio, El Paso, San Antonio, Waco, Alpine, Midland/Odessa, Ft. Hood and Pecos; and the Southern, which includes Brownsville, Laredo, McAllen, Victoria, Corpus Christi, Galveston and Houston. We visited the border cities of Del Rio in the Western District and Brownsville and McAllen in the Southern district.

Operation Streamline at the Texas border looks significantly different than the proceedings in Tucson described in the above section. In both the Western and Southern Districts of Texas, condensed mass prosecutions are conducted only in improper entry cases. Initial appearances for re-entry convictions are also done as a group by a magistrate judge, but there are no “flip-flop” plea offers in these courts.

Although the Western Texas Federal court district was the birthplace of Operation Streamline, District Judge Alia Moses, a U.S. District Court judge who guided the implementation of the program in 2005, emphasized that in Del Rio Operation Streamline is, and has always been, limited to those being charged with improper entry (8 USC 1325) rather than re-entry (8 USC 1326):

Only district judges do 1326 sentencing. Operation Streamline is strictly for first time offenders who are charged with misdemeanors before the magistrate judge. We do not have “flip-flops”²⁸ in Del Rio.

Even so, Judge Felix Recio, the retired magistrate judge in Brownsville, highlights that the condensed proceedings of misdemeanor improper entry cases through Operation Streamline are uniquely problematic:

In 1325 dockets we combined the initial appearances, pleas, and sentencing into one hearing. This is unique to Operation Streamline

proceedings. We don't do this for other misdemeanors.

If Operation Streamline is defined by governmental officials as the mass prosecution of migrants charged exclusively with improper entry in one-to-two hour sessions involving special magistrate court proceedings, most federal courts on the border are not utilizing “Operation Streamline.” However, while federal officials claim that the Southern district in Texas no longer participates in Operation Streamline, the fact remains that the Southern Texas district prosecuted 21,656 improper entry cases in Fiscal Year 2015 compared to just 1,592 in Arizona, the state with the notorious Operation Streamline court in Tucson.²⁹

Should we still call it Operation Streamline? Border Patrol says it's over, but they are still referring people for prosecution in large numbers. Whatever they're called, these prosecutions are inhumane and a waste of money. — *Astrid Dominguez*

This volume of cases could simply not be managed without the kind of mass, assembly-line procedures that characterize Operation Streamline. Astrid Dominguez of the ACLU of Texas critiques Border Patrol's assertion that Brownsville is no longer participating in Operation Streamline:

In 2014, Brownsville stopped prosecuting cases in separate Operation Streamline sessions. But has it really stopped or did they just change the name? Should we still call it Operation Streamline? Border Patrol says it's over, but they are still referring people for prosecution in large numbers. Whatever they're called, these prosecutions are inhumane and a waste of money.

According to Federal Public Defender Kyle Welch, in McAllen Operation Streamline is not an across the board policy, but targets specific geographic areas:

Border Patrol started the Operation Streamline program. They do not prosecute people across the board. They target different sectors every night for prosecution in Streamline court.

How people crossing the border are referred for prosecution and who is referred is somewhat of a mystery, because Border Patrol does not release

more than vague indications of how it makes these decisions. Dominguez describes why this is troubling:

I've been asking Border Patrol agents about how they screen cases: who do they send for prosecution; how do they decide? But they don't have an answer. If they do decide to prosecute, it has a huge impact on a person's life and on their family. Often Border Patrol is criminalizing someone who has no criminal record, making it harder for them ever to come back to their family, and if they are able to return, making it much harder for them to adjust their status in the future.

Moreover, how the policy is implemented seems to be dependent on the particular Border Patrol officials making decisions at the time. According to Magistrate Judge Dorina Ramos in McAllen, “Whenever there is a change in Border Patrol staff, I see changes in who is brought before my court.”

In the version of Streamline found in Texas border courts, judges have more discretion in sentencing than in Tucson's Operation Streamline because they are not locked into simply accepting or rejecting a predetermined “flip-flop” plea deal. Magistrate Judge Ramos in McAllen describes her level of discretion:

I have sentencing discretion within the six month range. Usually the sentence will be time served if the person is undocumented with no prior deportations and no criminal history. If they come back within six months I give a longer sentence. In my court, some days I give sentences up to 180 days because of their existing history.

A federal public defender in the Western District of Texas says that district court judges have a great deal of discretion in felony re-entry cases because sentencing guidelines are advisory:

Judges have advisory guidelines³⁰ and each has their own approach to guideline sentencing. Some will refer to them, others will not. Some will go only so far outside guidelines.

Still, there are very few individuals who plead not guilty to re-entry charges, and many cases are “fast tracked,” so district court procedures retain a similar feel to the predetermined, rote nature of the flip-flop prosecutions seen in Tucson.

The attorney only told me to plead guilty so that they would deport me as quickly as possible. — *Eduardo Jose Garza*

Defense attorneys can request a continuance to investigate fear claims or derivative citizenship, but the risks of receiving a longer sentence for not accepting Streamline or “fast track” deals remain too high for pleading not guilty to be a rational option for defendants. Eduardo Jose Garza, who was prosecuted for improper re-entry after living in McAllen with his family for many years, said defense attorneys instructed him to plead guilty to re-entry charges without much inquiry into his individual situation, “The attorney only told me to plead guilty so that they would deport me as quickly as possible,” he said.

From the vantage point of federal public defenders and private defense attorneys alike, there isn’t much room for defense attorneys to advise anything else. In addition to the risk of additional time incarcerated, it is very difficult to mount a defense in entry and re-entry cases because the only way to do so is to prove that the defendant has status for being in the country legally, or that the prior deportation was unlawful. All that is necessary to get a conviction on a re-entry charge is physical presence in the courtroom and record of a prior deportation. The state doesn’t have to produce any evidence at all that the defendant was caught crossing the border. As a federal public defender in the Western District of Texas said, “It’s frustrating because you can’t mount a defense when the client’s body is the primary evidence.”

Each judge does have some discretion regarding how to structure the court procedures. We found that even in the same city, questions are asked slightly differently in each courtroom. Some judges ask certain questions once to a line of 12 or 15 defendants and request individual answers, and others repeat the question for each defendant. The way defendants are seat-

It’s frustrating because you can’t mount a defense when the client’s body is the primary evidence. — *Federal Public Defender*

ed and instructed to proceed up to the bench is also constructed according to the preference of each judge, in the way they find to be most efficient or individualized. Most judges read the charges against defendants themselves, while some have the U.S. Attorneys read off the charges. In some courtrooms, defendants are allowed by judges to raise medical concerns not being addressed in detention, while in others these concerns went unmentioned.

While in nearly all courtrooms defendants remain shackled throughout the entire proceeding, Judge Ramos has instructed court security officials to remove the chains except on days with larger numbers of defendants:

I don't like defendants being shackled in my court. I have an agreement with the U.S. Marshals Service that they will take the shackles off before court. However, we agreed they would keep them on if there were over 40 people in court. It is a personal request and is up to each individual judge in McAllen.

In all of the prosecutions we observed at the Texas border, defendants were asked incredibly private questions such as history of mental illness and what medications they were currently taking in front of the entire group of 12 to 15 defendants and the entire courtroom. It is impossible to avoid this while still continuing to hold prosecutions en masse, and there are surely people who do not volunteer this information to the judge because they are uncomfortably doing so in front of the group.

It is impossible upon observing these proceedings to deny the inherently dehumanizing nature of prosecuting people en masse. However, we did find that the physical setup of the courtroom and how the proceedings are structured can either further this dehumanization or restore a small thread of dignity to the proceedings. It also has a bearing on whether defendants feel comfortable speaking up in court to share their story with the judge.

Consistent with who is typically processed through Operation Streamline in Tucson, Goodwin, an immigration attorney in nearby Harlingen, Texas, and former President of the Texas Chapter of AILA, says that most migrants being prosecuted on entry charges in Brownsville are male Mexican nationals.

The majority of people in the Brownsville 1325 docket are Mexican

with a few Central Americans. Mostly men, a few women.

McAllen Federal Public Defender Kyle Welch explains the difficulty of seeing people prosecuted who have risked so much to get to the border, or who have grown up living in the U.S.:

There are some really sad cases. There are so many people coming from Guatemala and Honduras and what they go through to get here: some have traveled weeks, months to get to the border with U.S., some encounter problems along the way, some pay really large sums of money. They then get apprehended within 30 minutes of crossing the border. These are tough cases. We also see people who graduated high school here, have family here — and then they mess up and get deported.

The characteristics of people sentenced on improper entry and re-entry charges have changed during McAllen Magistrate Judge Ramos' time on the bench:

In the beginning of the program, the typical person in Operation Streamline court had no criminal history, they could not read or write. Now the U.S. Attorney decides which cases are charged with 1325 illegal entry versus 1326 illegal re-entry and which people are sent through the Operation Streamline program. Some days people charged with 1325 include a criminal history and a prior deportation, a felony.

In Del Rio, a much higher percentage of defendants in 1325 mass prosecutions are from El Salvador, Honduras and Guatemala, and express a fear of returning. Judge Moses confirmed that Del Rio sees more Central Americans than in the Southern District. She believes that this is because Border Patrol “clamped down” their enforcement there, so they shifted up the border.

According to District Judge Moses, 90 percent of people charged with improper re-entry in Del Rio have a prior criminal history. “The majority of 1326 cases that come before me have horrible criminal convictions,” she said.

Yet Judge Moses says that can include people whose only prior criminal convictions are their immigration record for improper entry and re-entry:

Someone with an illegal entry and one misdemeanor will usually be processed through Streamline court. Illegal re-entry cases generally involve criminal aliens with serious convictions. Illegal aliens are usually charged with 1325. They may get charged with 1326 but only if they have a long immigration record. By the time I see them, if they only have an immigration record, then there are lots of immigration charges.

Donna Coltharp, Deputy Federal Public Defender of the Western District of Texas, says that those prosecuted for improper entry in Del Rio are typically crossing for the first time, and for those prosecuted for re-entry, their prior offense is often previous entries:

My understanding is that the Del Rio 1325 docket is a zero tolerance program for first time offenders. For the 1326 cases, for defendants who have an offense in the past, often the crime is repeated entries.

In Del Rio, from 30 to 80 people are prosecuted daily on improper entry charges, with greater volume on Mondays. According to Coltharp, this presents a significant challenge in legal representation and requires a great expenditure of resources:

The machinery it takes to support attorneys doing 1325 cases is significant; there is so much paperwork going back and forth. It called on a lot of staff resources. We had 4-6 attorneys plus investigators in the Del Rio court on any day. They talked to 40-80 people at a time, interviewing them regarding their biographic data, any defenses and mitigation factors. They are very disheartening cases and hard work. It is also enormously expensive work.

Coltharp also points out that the vast majority of the District Court docket is consumed by improper re-entry cases:

Currently, the Del Rio District court docket is filled with 1326 charges day after day. It is a rare exception if it is some other charge.

In Brownsville and McAllen large numbers of people are also referred for prosecution every day. This presents a significant addition to any one judge's docket, so Goodwin says that in Brownsville, magistrate judges take two-week shifts, adding improper entry and re-entry cases to the typical docket

they hear in magistrate court.

Judge Recio, a retired magistrate judge in Brownsville, describes what these figures mean cumulatively:

As a magistrate judge, I was responsible for all the steps in a 1325 case. In 1326 cases, I was responsible for all the steps leading up to a finding of guilt that the district judge would handle. During my time on the bench, I handled over 18,000 misdemeanor 1325 cases and almost 6,000 felony 1326 cases which constituted about 60 percent of my docket. The Southern District of Texas handles 28 percent of the nation's criminal docket.

It's clear that in both Texas border districts, improper entry and re-entry charges occupy an enormous amount of time and resources and place an unequal strain on these courts.

With this volume of cases comes huge challenges in representation. Methods of representation for improper entry and re-entry defendants vary between court districts, and even specific cities. Attorneys can be federal public defenders or private defense attorneys, and have varying time constraints and numbers of clients to represent. Federal defenders all assist in conducting interviews of defendants as they have only one hour between when those being prosecuted are brought to the courtroom and when proceedings begin. Welch, a federal public defender in McAllen, describes that federal defenders in his court handle the vast majority of entry and re-entry cases, occupying the majority of their caseload:

Court starts at 9 a.m. Federal public defenders are in court one hour beforehand to interview people along with investigators. One FPD then stays on to handle the docket in court. The FPD office takes all 1325 and 1326 cases except where there is a conflict or they have a private attorney. Immigration cases represent about 75 percent of our caseload; at least two thirds of them are 1326 cases. 1325 cases do not occupy that much of our caseload.

In Brownsville, federal defenders were initially overwhelmed by the program, so they relied heavily on Criminal Justice Act (CJA) attorneys to assist in representing clients on improper entry cases. Today, the Federal Public

Defender's Office represents all entry cases and the majority of felony re-entry cases. Like in McAllen, the majority of the caseload of the Federal Public Defender's Office is immigration cases. Goodwin describes the transition that took place:

At the time the FPD office had four or five attorneys so they were very stretched. The FPD increased their staffing, adding one attorney, but they still could not keep up with the volume of cases so Criminal Justice Act attorneys along with the judges decided CJAs would take on some of the cases. For two years FPDs took 25 percent of the cases and CJAs took 75 percent. Then the FPD ramped up its staffing, adding three or four more attorneys and an investigator. Since 2011, the FPD office does all the illegal entry/1325 cases. For the illegal re-entry/1326 cases, CJAs do 25 percent of the cases and the FPD offices does 75 percent. 80 percent of the FPD cases are immigration cases.

Goodwin describes a process of representation with federal defenders including group rights presentations and brief interviews prior to morning court:

For the 1325 docket the FPD has a rotating schedule with duty attorney to represent the individuals charged. The court will have between 10 and 50 people on a given day; there is usually a higher number on Mondays with backup from the weekend. Before court begins at 10 or 10:30 a.m. one to two FPDs will give a groups rights presentation followed by brief individual interviews. During this time pretrial staff also interview people. The FPDs get the pretrial report and do their own interview. They don't have time to investigate the cases or explore immigration options that morning, but they can ask for a continuance to follow up.

In Del Rio until 2014, federal defenders provided representation in nearly all 1325 cases which required each defender to take on an enormous caseload. Currently, the Federal Public Defender's Office is no longer taking improper entry cases in Del Rio. Their caseload is now primarily composed of re-entry cases, which Coltharp says still requires significant time:

The FPD office did Operation Streamline court in Del Rio until last

At sentencing, more than one judge has said, “All of your clients are the same, have the same reasons for being here, I don’t need to hear it. We are all numb.” — Donna Coltharp

year. We pulled in attorneys from Austin and San Antonio to help support the caseload. The average caseload per attorney was huge, 200 1325/1326 cases per attorney. Currently FPDs are only doing 1326 cases. Our office spends a lot of time looking at collateral attacks for 1326 charges. It is frightening what we see as a result of not having an attorney in immigration court.

Coltharp discusses how the interaction of 1326 charges with immigration law poses challenges for defenders, and a real possibility of missing valid reasons for dismissing a charge:

We were also very concerned about the duty to advise people about the immigration consequences of their pleas. We were asking ourselves how far does this extend. Our staff identify 20 to 30 derivative U.S. citizenship³¹ cases a year in the 1326 docket alone. It is frightening to think how many cases we may miss. A derivative U.S. citizenship case can entail hundreds of hours of staff time, both attorneys and investigators.

Even today, with a reduced re-entry caseload compared to before 2014, Coltharp says that there is not enough time to provide the investigation these cases deserve:

For 1326 cases, there are too many cases per attorney. No one wants to hear that these cases should take more time but they do and should.

Aside from the case volume and the time limitations, Coltharp says it’s difficult for defenders to overcome compassion fatigue in the courtroom:

Our job is to stop the process long enough for the judge to hear details of the case. It is really hard to do this. Our challenge is to stop the process long enough that the judge doesn’t feel like they are all the same person. At sentencing, more than one judge has said, “All of your clients

are the same, have the same reasons for being here, I don't need to hear it. We are all numb."

Those who are convicted on improper entry charges and given time served are typically quickly deported. The whole process happens so quickly that it is difficult to guard the rights of those convicted. Goodwin describes how difficult it can be for an individual expressing credible fear to not simply be deported:

Normally people are taken straight to the bridge or deported after court so the FPD needs to affirmatively flag the individual's wish to apply for asylum in order to get someone transferred to detention and not automatically deported. I have had to be forceful in making this request, filing a G-28³² and a letter explaining their request to ask for relief in order to stop the normal process.

Dominguez of the ACLU of Texas describes the dangers faced by migrants deported without their identification or belongings:

Once they are deported, the people who got prosecuted don't get their belongings back. Without their identity documents they can't even cash a check back home. Without ID they are vulnerable, they may be thrown in jail again for not being able to identify themselves in Mexico or they may be forcibly "recruited" by criminal gangs that prey on newly deported migrants.

The entire process is so systematized and predetermined that it is extremely difficult to humanize those being prosecuted, take into account individual circumstances, or safeguard rights of migrants in or out of the courtroom.

WHO IS PROSECUTED FOR IMPROPER ENTRY?

These are real examples from what migrants' attorneys told the judge about their clients in court proceedings during our observations at the Brownsville, McAllen, and Del Rio magistrate courts in Texas. All of these individuals were charged and prosecuted for improper entry. However, if the same people return after they are deported, they risk being charged with felony re-entry.

- A woman who is a survivor of domestic violence living in U.S. was put into criminal proceedings when police decided they didn't need her as a witness anymore. Her children were placed in the custody of Child Protective Services since she is their sole caregiver.
- A man who is married with a 19-year-old U.S. citizen daughter. His wife is sick with cancer and he has re-entered the country 12 times.
- A man with three U.S. citizen children in Ohio, ages 2, 4 and 5 years old, with his common law wife. He has three entry convictions in a two month period.
- A man who has lived in the U.S. for 18 years and was arrested for the first time for marijuana possession. He is here to support his seven younger siblings.
- A Mexican man whose wife has diabetes requiring daily dialysis. He is trying to make money to provide medical support for her.
- A man from Honduras whose brother and his brother's wife were recently killed by gangs. His other brother and his own son were also killed, and he asked for the military's help in getting his son's body. He had been deported once before.
- A man supporting two children, ages 4 and 8, who is heartbroken because he put all his money into a field of crops that didn't grow.
- A man from El Salvador who had been a fisherman. Gangs pressured him to steal from other boats or distribute narcotics. He tried instead to grow corn and tomatoes, but it was dry and the crops didn't grow. He came to the U.S. in desperation.
- A man from Honduras with three prior deportations who has a U.S. citizen wife and three children. His wife won't join him in Honduras because of violence, and he wanted to come back because his daughter always asks for him. He told the judge he would tell his daughter he tried his best.
- A woman from Mexico who was being hassled on her way home from work from a black truck she believed to be associated with kidnapers that had recently begun following her. She came out of fear and to support her mother.
- A man from Mexico who has a U.S. citizen wife and three children in Florida. One of his children is deaf, and his 13-year-old is being difficult, so he came to help his wife take care of their children.
- A 43-year-old man who is married with two U.S. citizen children. He paints cars for a living and has lived in the United States for more than 20 years in Texas and Mississippi.

13 THE CURRENT STATE OF MIGRANT PROSECUTIONS IN CALIFORNIA

As was explained above, the U.S. Attorney's Office for the Southern District of California has not established an Operation Streamline docket, although the office does prosecute both improper entry and re-entry cases, focusing mainly on re-entry violations. According to Chloe Dillon, an attorney with the Federal Defenders of San Diego, a nonprofit community-based defender agency, recently Assistant U.S. Attorneys (AUSAs) have begun a charging practice that echoes the Tucson-style "flip-flop" cases:

The prosecution of 1325/1326 cases has changed in the three years that I have been at the Federal Defender's Office. When I first started, all cases came through as 1326 felonies with enhancements. In the last year to year and a half, they started a quasi-Operation Streamline structure. People are charged with a "flip," a misdemeanor 1325 and a felony 1326, with the offer to plead quickly to a maximum of six months.

To be frank, it has been a welcome change because before we had to fight really hard to get a person's charges reduced to a misdemeanor or to get a dismissal. Sometimes an AUSA would be willing to bargain down to a misdemeanor, but generally everyone was just getting charged with 1326 unauthorized re-entry. Now a large swath of people are coming through as "flips."

For the most part, even the individuals charged with a "flip" have some type of criminal history or other aggravating factors, such as using false documents, although the prior crimes may include nothing more than convictions for immigration offenses. Dillon says that charging policies are in flux and do not always appear to be consistent:

There is not a hard line in terms of what to prosecute; it is more about the resources the Border Patrol had in the field. I rarely see someone

who has never used false documents, has no criminal history and only a couple of voluntary returns/deportation. Those people are generally not prosecuted.

In San Diego they have not fine-tuned whom they offer the “flip” offers to versus felonies only. They have moved towards being stricter with violent prior convictions. For those, they won’t bargain at all, they will fight to the end. They are offering “flip” offers or early misdemeanors to those with significant time outside the U.S. without trying to come back in. It’s not consistent and it’s frustrating to clients.

Assistant U.S. Attorneys are moving toward a policy where if there is a prior misdemeanor 1325, then they don’t have to deal with a 1326 charge because they can prosecute under the 1325 provision that says that a subsequent commission of improper entry (which is an easier case to prove) carries a felony sentence under 1325 of up to two years in prison. Why do you need more? The only reason for prosecuting under 1326 is to seek an enhanced sentence.

A lot of improper re-entry cases are eligible for a “fast track” process. Under this program, if a qualifying defendant agrees to plead guilty within an expedited timeframe and also agrees to give up certain pretrial and post-conviction rights, including the right to appeal and the right to a pre-sentence investigation, then the USAO will make a motion to the court for a shorter sentence. Kara Hartzler, also with the Federal Defenders of San Diego says that it is in the AUSA’s discretion whether to offer “fast track” or not, but some judges make this difficult in particular cases:

Certain judges give the AUSAs a really hard time if they give fast track to a recidivist, especially one with a criminal history. AUSAs are under pressure from judges to not go easy in some of these cases. They may put pressure on AUSAs to negotiate harder in certain cases where judges don’t think they qualify for fast track, for example if there is a prior re-entry.

While the Southern District of California is often held up as a model by advocates because it opposed the Operation Streamline “zero tolerance” model of prosecuting first time offenders for improper entry, Sean Riordan,

formerly a senior staff attorney with the San Diego ACLU and now a federal public defender in the Eastern District of California, says he questions whether that should be the case:

As horrific as Operation Streamline is, I have valid misgivings of holding up San Diego as a good model because of how harsh the sentences are that they do get. Operation Streamline has a large number of cases with relatively small sentences versus San Diego which has small numbers of cases but very harsh sentences. If there are going to be sentences for 1326 prosecution then what's the model to use? Are folks who are highest priority getting attention under Operation Streamline?

Dillon says that while she is no longer dealing with a full caseload of improper entry and re-entry cases, the USAO is still bringing a fair number of these cases forward for prosecution, though the numbers have declined in recent years:.

When I started, 1325/1326 was all of my caseload for the first six months, then 90 percent for a year to year and a half, then 75 percent in the second year. 1325/1326 cases are still over half (60 percent) of my caseload. After the initial period, federal defenders start to make decisions with their supervisor about types of cases they take. Generally in the office, entry and re-entry cases are 50 percent of their caseload.

Federal defenders who have been here for eight to ten years say they handled a lot more illegal re-entry cases before. Now the practice has improved as well as the level of sophistication. We have a more manageable caseload.

Hartzler, who is an appellate attorney in the Federal Defenders Office of San Diego, conducts litigation to challenge the underlying removal orders in re-entry cases:

Our office does lots of litigation challenging the underlying removal orders. In San Diego, 50 percent of the appellate cases are these challenges. The Mendoza-Lopez case in 1987 held that for re-entry cases one of the elements is a previous deportation. However, if that previous deportation violated due process and there was prejudice then you can't use a prior deportation for the 1326 charge, but you could

still charge improper entry.

For the challenge you have to show that a due process violation caused prejudice and that the person exhausted their administrative remedies or was deprived of judicial review. It is a huge leverage that we have in certain cases, e.g. a lawful permanent resident where the judge got the law wrong, where a judge did not advise the person of relief, or in expedited removal cases. In these challenges we end up getting a misdemeanor.

The Federal Defenders of San Diego is an independent nonprofit organization that contracts with the court to represent defendants. Dillon says that arrangement helps to loosen constraints faced by other federal public defenders. Hartzler agrees, and says her office is trying to share litigation strategies with others:

The leadership in our office encourages us to fight all the issues. We are sharing what we have learned with other offices. We have created a Listserv for attorneys to ask questions and share briefs. We are encouraging others to bring these challenges as it has been very effective for us.

14 PROSECUTION PATTERNS SHIFT DURING THE OBAMA ADMINISTRATION

During FY2009 virtually all cases, (99 percent) where the prosecution charge filed was misdemeanor improper entry, were filed in the five federal districts that lie along the U.S. border with Mexico. The Southern District of Texas handled nearly half of all such filings that year. And, the five border districts accounted for 78 percent of felony prosecution filings for re-entry, with Arizona handling almost one third of these.

By FY2010 the number of all felony immigration filings in the five border district courts had jumped by 77 percent compared to FY2007 – notwithstanding that the volume of Border Patrol apprehensions along the southwest border had dropped by 48 percent during the same period.

At the beginning of FY2010 the sentencing tariff for improper entry remained very mild, with more than half of these cases receiving no time at all behind bars, driving the median sentence to zero. Meanwhile the median sentence for re-entry was just six months.³³

But the mix of case filings had begun to fluctuate at the beginning of that year, with misdemeanor improper entry filings declining while filings for felony re-entry increased. Arizona took the lead in the shift to re-entry filings, with an increase of 31 percent for the first quarter of the fiscal year. In the Southern District of California improper entry filings declined by some 40 percent, while re-entry cases increased by 28 percent.³⁴

By FY2011 the Southern District of Texas was again handling almost half of all filings with a lead charge of improper entry. The five border districts continued to account for 78 percent of filings of cases with a lead charge of re-entry, but by that year Arizona was handling more than two-fifths of these cases, up from just 31 percent in FY2009.

The total number of new prosecution filings for border-crossing offenses reached an all-time high of 91,262 in FY2013. The two border districts in

Texas – Southern and Western – together handled 85 percent of all prosecution filings charged with improper entry. Arizona continued to sprint ahead in filings for felony re-entry, handling 48 percent.

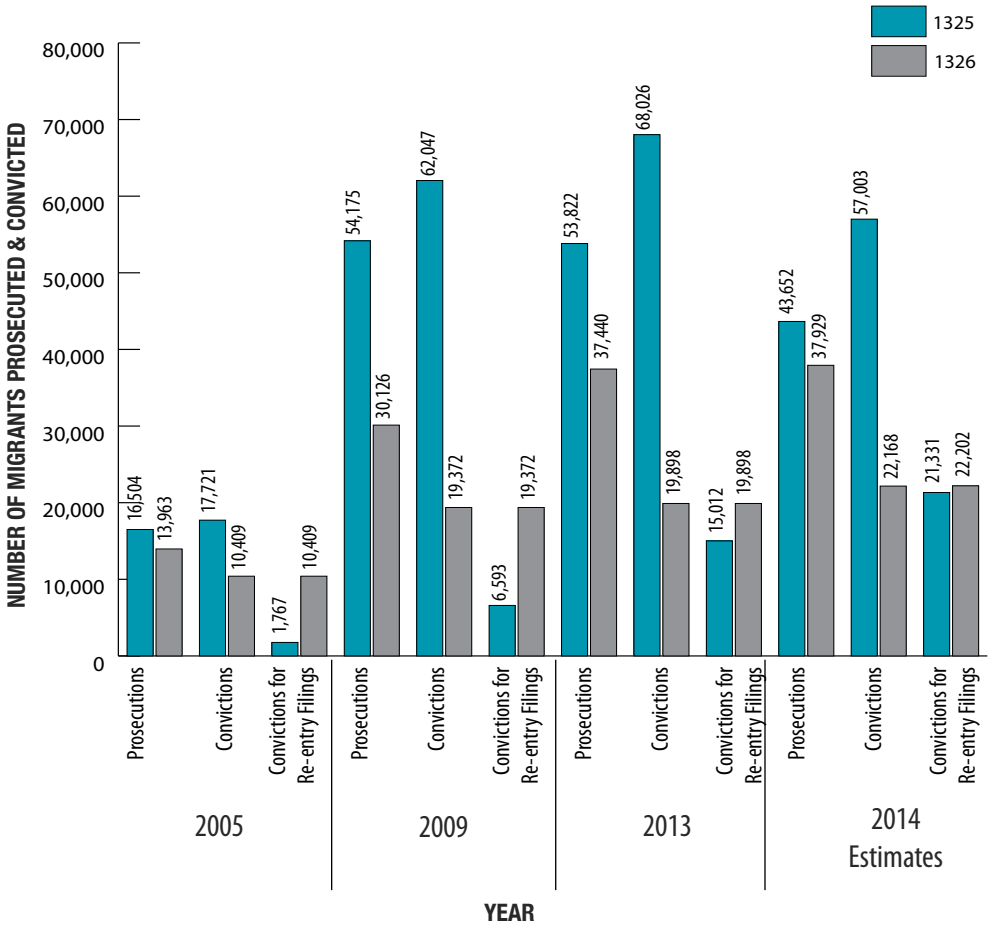
Two years later, the shift in criminal prosecution filings for border-crossing offenses was even sharper. The two Texas districts were handling 95 percent of all filings for misdemeanor improper entry in the nation, and Arizona was handling half of all felony re-entry filings, compared to just 31 percent in FY2009.

The shift away from misdemeanor filings towards felony filings was led by the Operation Streamline court in Tucson, where -- over time -- an increasing number that carried a top felony charge of re-entry also carried a misdemeanor charge of improper entry. The combination of charges indicated that prosecutors were willing to offer plea bargains – termed by judges and attorneys alike as “flip-flops” – to defendants who had entered the country again after at least one removal, and thus faced possible conviction and sentencing for a felony in the district court.

By 2013 prosecutors in the Tucson magistrates court had begun to offer a “flip-flop” in virtually every case. The bargain offered in exchange for a guilty plea would be a stipulated term of incarceration. As described above, depending on a defendant’s prior criminal history (if any) and the number of prior improper entries, the stipulated term might range from one month up to the full six-month term authorized for improper entry.

Since the year that Operation Streamline was introduced in Del Rio, the increasing use of “flip-flop” plea bargains in Tucson’s magistrates court has largely driven the overall conviction patterns illustrated in Chart 5.³⁵

Chart 5. Criminal Prosecutions and Convictions for Reentry, FY2005–2015
(TRACFED/Transactional Records Access Clearinghouse)



In FY2005 54 percent of criminal prosecution filings for border-crossing cases were filed with a top charge of improper entry, rising to 64 percent in FY2009, but then returning to 54 percent by FY2014. Total convictions for improper entry, however, rose from 63 percent in FY2005 to an estimated 72 percent in FY2014. And looking only at convictions for border-crossing cases that were initially charged with re-entry as the top charge, the proportion convicted for improper entry rose from just 15 percent in FY2005 to an estimated 49 percent by FY2014.

Since so many felony re-entry charges were increasingly plea-bargained down to the misdemeanor charge of improper entry, a 172 percent rise in felony prosecution filings between FY2005 and FY2014 is associated with just a 113 percent estimated rise in felony convictions.

The great majority of “flip-flop” plea bargains have occurred in Arizona, but some plea bargains are also offered in the Southern California district, where they are called “flips.”³⁶ But in New Mexico and in both of the Texas districts that share a border with Mexico, as well as in all remaining U.S. districts, “flip-flops” are virtually unheard of. Nearly every case that was filed for prosecution as a felony re-entry outside of the two westernmost border districts has been convicted for that same felony offense.³⁷

Charts 6 and 7 drill down to illustrate the dramatic shift toward “flip-flop” plea bargains in Arizona. Chart 6 shows the pattern of prosecution filings for border-crossing offenses over the past 16 fiscal years. Before FY2005 prosecution filings for misdemeanor improper entry were extremely rare. Yet, the same year that Operation Streamline was initiated in Del Rio Texas, misdemeanor improper entry filings in Arizona exploded from just 52 in FY2004 to 1,194, for an overall increase in border-crossing prosecutions of 67 percent.

By FY2008, when Tucson activated an Operation Streamline of its own, misdemeanor improper entry prosecutions rocketed again by 257 percent, coupled with a 15 percent fall in felony reentry prosecutions, compared with FY2007. After FY2010 Arizona filings for improper entry begin to decline, with a sharp drop in 2013. By FY2015, improper entry fell to less than 10 percent of all border-crossing prosecution filings in Arizona.

Chart 6. Prosecutions Filed for Border Crossing Offenses in Arizona, FY2005–2015 (TRACFED/Transactional Records Access Clearinghouse)

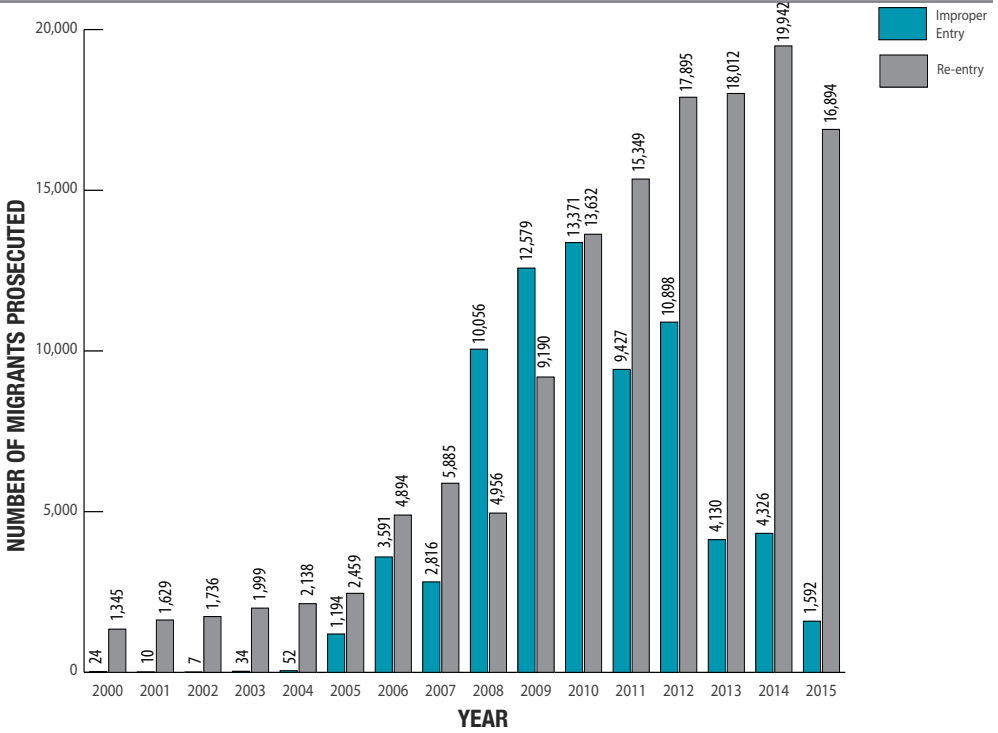
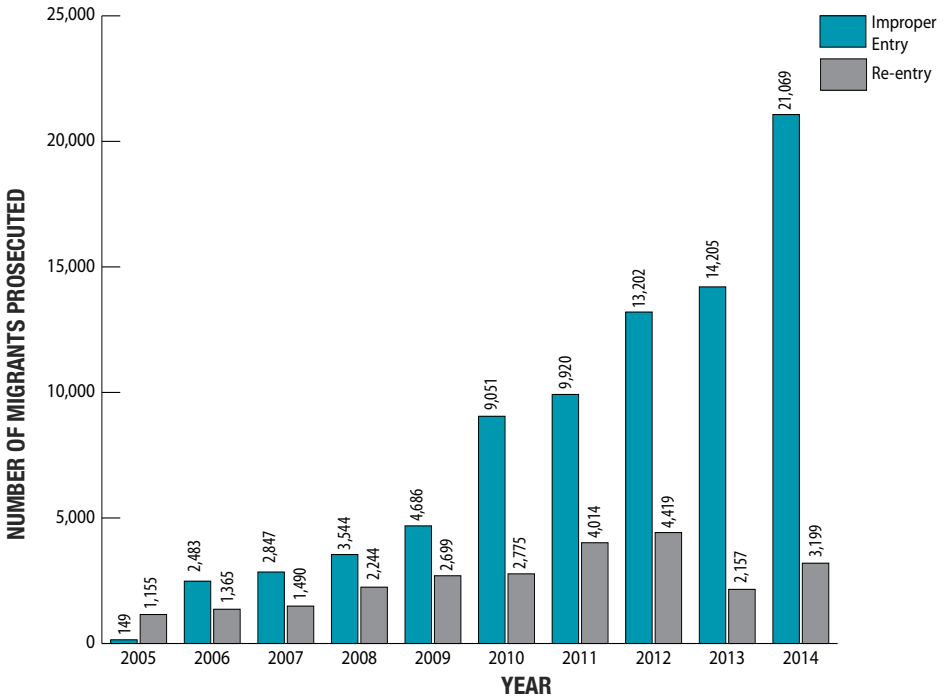


Chart 7 displays the conviction charges that have resulted from cases that were originally filed with felony re-entry charges in Arizona. In FY2005, plea bargains resulted in improper entry convictions in just 11 percent of these cases. That pattern was turned on its head by FY 2014, when an estimated 87 percent of felony reentry cases had been “flip-flopped” to improper entry charges.

Chart 7. Conviction Charges for Border Crossing Cases Originally Filed for Re-entry Prosecution in Arizona, FY2005-2014 (Transactional Records Access Clearinghouse)



Finally, Table 2 illustrates the extent of “flip-flop” plea negotiations during a recent period for each southwest border district, and the five districts combined, compared with the rest of the U.S. federal court districts.

Table 2. Convictions in Cases Initially charged as Re-entry from October 2012 to March 2014 (Sources: Transactional Records Access Clearinghouse)

	Convicted of Re-entry		Convicted of Entry	
	Number	Percent	Number	Percent
Arizona	3,010	11%	23,266	89%
California South	2,576	81%	623	19%
New Mexico	4,338	98%	106	2%
Texas South	5,768	99%	38	1%
Texas West	5,991	98%	111	2%
SW Border Subtotal	21,683	47%	24,144	53%
Rest of U.S.	7,931	99%	47	1%

15 ADVISORY SENTENCING GUIDELINES RECOMMEND SEVERE SENTENCE ENHANCEMENTS THAT CAN “SUPERSIZE” PRISON TERMS

Sentencing under the U.S. Federal Sentencing Guidelines (USSG) is based primarily on the seriousness of the conduct involved in the offense and the defendant’s prior criminal history. Taken together, these two factors determine a sentencing range a judge must consider in setting a term of imprisonment. The ranges are displayed on a “sentencing table” in the form of a grid, with a vertical axis that designates the offense level (1 to 43), and a horizontal axis that designates the criminal history category (I to VI).³⁸ Where these two elements converge, a sentencing range in months is displayed to advise the judge in selecting an appropriate prison sentence.

The federal guideline that pertains to 8 U.S.C. 1326, re-entry after removal, is USSG §2L1.2, which provides a “base offense level” of 8.³⁸ The sentencing ranges at this offense level increase from 0 to 6 months in criminal history category I (0 to 1 point); 4 to 10 months in category II (2 or 3 points); 6 to 12 months in category III (4 to 6 points); 10-16 months in category IV (7 to 9 points); 15 to 21 months in category V (10 to 12 points); and 18 to 24 months in category VI (13 or more points).

Classification of re-entry at Level 8 seems unduly harsh in comparison with many other federal offenses that involve a distinct threat to public safety or entail conduct that portends serious harm to life, to property, or to the integrity of our financial and commercial institutions.

Far more alarming forms of criminal conduct are scaled at that same level. These include mishandling of hazardous or toxic substances; insider trading; commercial bribery; and trespass on the grounds of the White House.

Moreover, many types of criminal conduct that pose danger to the well-being of the public are scaled as though they are less serious than migrant re-entry. An assault that threatens use of a firearm is scaled at base offense level 7. At base offense level 6, we find unlawful possession of a gun in a federal facility or a school zone; violation of food and drug laws and regulations; and possession of hazardous or injurious devices on federal land. Even discharge of a firearm in a school zone is scaled at level 6.

The guidelines allow for “discounts” under specific circumstances which can reduce the offence level. If a defendant “demonstrates acceptance of responsibility,” typically by entering a plea of guilty to the offense, the base offense level will be reduced by two levels to level 6. At this level the sentencing ranges increase from 0 to 6 months in criminal history category I, to 12 to 18 months in category VI. According to the U.S. Sentencing Commission, the most common criminal history category for people convicted with re-entry is category III.³⁹ The sentence range for category III at level 6 is 2 to 8 months, compared to 6 to 12 at offense level 8.

Moreover, if a defendant is offered a “fast track” plea bargain and pleads guilty within thirty days of being taken into custody, the prosecutor will move for a “downward departure” of four offense levels. Added to the two-level discount for acceptance of responsibility, this places a defendant at offense level 2. At that level, the availability of a 0 to 6 month sentence range extends all the way to criminal history category V.⁴⁰

On the other hand, the base offense level of 8 is also subject to an array of “specific offense characteristics” sentencing enhancements that can increase the applicable offense level dramatically. The sentencing judge is advised to apply the greatest enhancement applicable, as follows:

If the defendant previously was deported, or unlawfully remained in the United States, after:

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the

conviction receives criminal history points under Chapter 4 or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter 4 or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.⁴¹

Under this complicated scheme, a judge sentencing the least serious case involving a defendant with no prior criminal history is advised to choose a low-range sentence between 0 to 6 months. With discounts for both accepting responsibility and taking a “fast track” plea, the 0 to 6 range is recommended for a defendant with a criminal history category as high as category V.⁴²

Milagros Cisneros, a federal public defender in Phoenix, points out, however, that the “specific offense characteristics” enhancements will boost a defendant into very serious exposure at sentencing:

In Phoenix the typical fast track sentence could be six months or less provided there is little or no past criminal record. But if the record includes a significant criminal history or even one crime of violence, a defendant can face a 16-level enhancement. If their prior criminal history puts them in criminal history category VI, they could face an advisory guidelines range of 100 to 125 months. The fast track will give you two levels off if you are in category VI, and you will also get three levels off for acceptance of responsibility, which would put you at 63 to 78 months, with a cap at 78.

Judges are open to arguments about granting a variance which lowers a sentence below the range that the guidelines advise. But most often they allow this only in drug cases. Still, if a defense attorney believes that the guidelines sentence is too harsh, they can argue for a variance.

But you can't argue for a variance in a fast track case.

And Dillon at the Federal Defenders of San Diego says that these enhancements are unusually harsh, even within a sentencing structure that is notoriously severe:

The possible 16 level enhancement in the sentencing guidelines for 1326 cases has no parallel in any other criminal offense. It is a super crazy enhancement for 1326 and has a massive effect on sentencing. It is why we fight all these cases based on the categorical approach. Still judges hesitate to give lower sentences even if the prior sentence was wrong.

Prior criminal convictions are counted when a defendant is assigned a criminal history point score (see endnote 20), but certain types of priors can also increase the “base offense level.” Deputy Federal Public Defender Coltharp in Texas, argues that the provision for “specific offense” enhancements essentially recommends that the judge count many prior history convictions twice:

The sentencing guidelines punish you two times: there is a 16 offense level bump for certain kinds of prior convictions (or 12, 8, or 4 level bumps for others). And then the prior counts again as part of the criminal history. Defense attorneys hate and despise the 16 level bump. It creates a huge sentencing enhancement, and, depending on the defendant's criminal history, can produce sentences as high as ten years.

The federal sentencing guidelines were mandatory before 2005, when they became advisory after *United States v. Booker*, 543 U.S. 220, a U.S. Supreme Court decision. *Booker* held that the Sixth Amendment was violated when judges made findings of fact that would trigger an enhanced sentence. Such facts needed to be found by a jury or admitted by a defendant.

The possible 16 level enhancement in the sentencing guidelines for 1326 cases has no parallel in any other criminal offense. It is a super crazy enhancement for 1326 and has a massive effect on sentencing. — Chloe Dillon

Once the guidelines were deemed advisory, a raft of appellate court decisions set forth various factors that a judge might take into consideration in setting a sentence at “variance” to the guidelines — providing greater latitude for going outside the recommended sentence range. However, a judge is required to calculate the guideline range as a starting point before considering factors that might allow for a variance.

Such factors include that the criminal history category overstates the severity of a defendant’s criminal history; that a defendant’s crime does not pose the same danger to the community relative to other crimes; and that a judge may disagree with the policy set forth in the guidelines for a particular offense — but in such a case the judge must set forth sufficiently compelling reasons for doing so.⁴³

Tucson CJA panel attorney Eréndira Castillo says that since Booker, judges are more flexible in their sentencing practices:

The federal sentencing guidelines for 1326 cases are horrible, and the AUSAs generally follow them even though they’re now just advisory. I can argue for a variance, a shorter sentence than the guidelines propose, and I find judges pretty agreeable in granting them.

Federal Public Defender Kyle Welch in McAllen, Texas, agrees that Booker gives him more opportunity to argue for a sentence below the guideline recommendation.

Previously, the federal sentencing guidelines had been mandatory and the judges had to justify a departure in sentencing. Now they are advisory. Some judges are more wedded to the guidelines. You have to know your judge.

Federal public defenders focus on arguing about the appropriate offense level for the person’s criminal history, for example, is it an aggravated felony, or a crime of violence? In reviewing an individual’s case we ask: 1) are the guidelines appropriate; 2) is there punishment mitigation, for example, do they have extensive family in the U.S., have they lived here a long time, did they arrive as a small child, are there other factors of “cultural assimilation”?

Tucson Federal Public Defender Deirdre Mokos offers a similar assess-

ment from her experience in Tucson:

Now that judges have discretion defendants can get sentences that would have been prohibited by the guidelines. Defense attorneys are free to argue for a ‘variance’ (authorized under 18 USC 3553 on the basis of the nature of the actual crime, and/or the personal history or character of the defendant) which, if granted, gets their client less time. Typical arguments for a variance may center on their family issues, any long-term residence in the U.S., or a realistic and convincing plan for staying out of the U.S. in the future.

But Federal Public Defender Cisneros in Phoenix says there are instances in her district when judges will use their discretion in the opposite direction:

Our judges believe in “progressive sentencing” for repeaters, and they may reject a plea based on a prior record if the highest possible sentence in the guidelines is less than what the defendant got for a prior case. They say they like the “progressive” concept because it makes sentencing more “rational.”

Dillon reports that the “progressive sentencing” concept holds sway in Southern California also:

A primary sentencing concern of judges is that they can’t give less time than what a defendant got last time. They all have the mentality that a sentence has to go up even if it relates to old criminal history. The driving factor is that you don’t go down in sentences – you can’t give less time than he got the last time because this does not deter people. In some cases judges have gone down in subsequent sentence but not often. We put people in prison for all of this time and now we can’t stop doing it.

Despite their advisory status, the guidelines still hold a powerful influence over judges’ sentencing practices, and represent a level of harshness for re-entry offenses that is far in excess of the actual prohibited conduct, as compared to most other federal crimes. Dillon says that judges have fol-

We put people in prison for all of this time and now we can’t stop doing it. — *Chloe Dillon*

lowed the guidelines for a long time, and for the most part don't see why their sentencing practices should change:

They say, "These are sentences we have always given. We have to be fair across the board. We can't be uneven." We see this mind-set in all cases, not just illegal re-entry. "Does that mean all those sentences I gave were wrong?" Judges can't believe that.

The sentencing guidelines direct that many types of prior criminal offenses be double counted despite the person having already been punished in satisfaction of the prior criminal act. First, a prior conviction is counted in scoring a defendant's criminal history, and then counted again if it also falls into a "specific offense" category.

The guidelines make defendants proxies for their past crimes and call for them to be punished again for those offenses. Instead of a human being at sentencing, you represent a prior conviction... — Jose Gonzalez-Falla

Jose Gonzalez-Falla, a federal public defender in Austin, Texas, explains that since the sentencing enhancements can push the punishment far beyond what is otherwise warranted for the simple offense of re-entry, it's as though the defendant is being retried for old convictions as if they were new crimes:

The most troubling aspect of sentencing in an illegal re-entry case is the huge role a past conviction plays in driving the guideline range. Simply being here illegally should be treated differently than committing new crimes upon returning. But that's not what happens in court. The guidelines make defendants proxies for their past crimes and call for them to be punished again for those offenses. Instead of a human being at sentencing, you represent a prior conviction — an ounce of cocaine, a domestic assault, a drunk driving incident. When clients and their families complain about the unfairness of this I can only say that it's the law.

In addition, the way that criminal prosecutions have been interposed within an otherwise civil enforcement system has created a confusing tangle

Many clients are confused about why they are being prosecuted for re-entry when they never had an immigration judge hearing in the first place. — Sean Riordan

of complex legal processes. Federal Public Defender Riordan in the Eastern District of California finds that is exceptionally bewildering for his migrant clients:

With my clients it is notable how often a predicate removal order was through an administrative process, without seeing a judge. They know they were sent back but they don't know through what procedure. We see a lot of administrative or expedited removals, many with subsequent reinstatements of removal. Many clients are confused about why they are being prosecuted for re-entry when they never had an immigration judge hearing in the first place.

In light of the continued dominance of the guidelines sentencing advisories, it comes as no surprise that trials are very rare in federal district court. Cisneros reports that she has never taken a re-entry case to trial:

I've never had a trial in a 1326 case. Sometimes I'll tell the defendant to enter a conditional plea in order to preserve a specific issue on appeal. But I'd only go to trial if the defendant was irrational in rejecting a plea offer, or if the AUSA had not done the right thing according to the law. The system is so draconian and crazy, we never know what judges will do. It's a huge risk to reject a plea offer.

It's a huge risk to reject a plea offer. — Milagros Cisneros

16 IS A FLIP-FLOP "BETTER THAN NOTHING AT ALL?"

As indicated above, the sentence recommendations for improper re-entry in federal guidelines §2L1.2 are structured to begin at Level 8, a designation which may be increased all the way to Level 24, depending on the presence of certain prior convictions.

Given that the sentencing recommendations at the felony level are so harsh, it seems obvious why almost all migrant defendants agree to accept the “flip-flop” plea offers. Magistrate Judge Bernardo P. Velasco says that the Tucson Streamline court offers a valuable alternative to prosecution on the district court:

There is some sense that what happens in Operation Streamline is deplorable, but the reality is that Streamline is a tremendous benefit for some of these defendants. Streamline now takes no straight first-offender 1325 cases. It's only after some prior contact with law enforcement that qualifies them for prosecution under the 1326 felony charge, where they could be sentenced to years in prison.

But the basic choice for them is between depriving their family of food and other vital necessities for six months, and asserting rights that they indeed have. But if they lose at trial, they're going to be depriving their families' survival rights for years. Of course, fighting the process is defending the United States Constitution, not just their own rights.

Magistrate Judge Charles R. Pyle agrees, but says that Tucson's “flip-flop”

The basic choice for them is between depriving their family of food and other vital necessities for six months, and asserting rights that they indeed have. — Judge Bernardo P. Velasco

policy also benefits the prosecution:

Streamline defendants are getting a huge break with the plea offer. In district court under the guidelines they might face a maximum of 20 years, with a common sentence of three to four years for 1326, compared to 180 days for 1325. You can see why they plead guilty.

But there's a lot of arbitrariness in the criminal justice process. Over at the CCA prison in Florence they are mixed in with other people who are getting dramatically different time for the same offense. The question is, how are Streamline decisions being made? How many prosecutors are available in the district court? How many cases can they prosecute as felonies? From a prosecutorial standpoint Streamline sentences may seem way too light, yet better than nothing at all.

But perhaps these judges overstate their case. Federal sentencing guidelines recommend no more than 125 months in prison, even in the worst case — for a migrant with a prior violent felony conviction. Moreover, the DOJ authorizes prosecutors to offer “fast track” sentences in improper re-entry cases that are significantly below the federal guidelines in districts that demonstrate to the DOJ that they have “an exceptionally large number” of improper re-entry cases that will “significantly strain” prosecutorial resources. Furthermore, the U.S. Sentencing Commission indicates that the current average sentence for re-entry is just 17 months.

It may have problems but there are cases where a fast track offer is the best a given client could have done. — Sean Riordan

Riordan, a federal public defender in the Eastern District of California, says that the “fast track” policy offers a welcome option for his clients, given the harshness of the guidelines:

From my perspective and that of my fellow public defenders, for our clients' sake we are glad fast track exists, it may have problems but there are cases where a fast track offer is the best a given client could have done. We are not advocating for the demise of the fast track option.

17 A DECADE IN, THERE ARE SERIOUS DOUBTS ABOUT THE POWER OF ANY “DETERRENCE EFFECT”

In her investigation of Operation Streamline, Stockton University Assistant Professor Jessie Finch wrote that the creators of the initiative believed that it would prove to be effective in deterring unauthorized border crossing. But over time, a continuing stream of migrants that return after serving a sentence has belied their faith in deterrence:

Operation Streamline hoped to achieve both general and specific deterrence. By punishing offenders who were caught, the program sought to deter these specific individuals from coming back again personally, but also hoped that word would spread of the program and others generally would not even attempt to cross, knowing incarceration was a serious possible consequence.

Operation Streamline became a central part of the Border Patrol’s “Consequence Delivery System” where the agency no longer emphasized voluntary returns and instead focused on three punishment outcomes: Formal Removals (either before a judge through the civil immigration system or using Expedited Removals); Remote Repatriation (returning migrants to different ports of entry from where they were apprehended; this includes the Alien Transfer Exit Program (ATEP) and the Mexican Interior Repatriation Program (MIRP)); and Criminal Charges (including Operation Streamline, which accounted for 45 percent of immigration related prosecutions occurring from 2005-2012.

In an attempt to maximize specific deterrence, the program also began with an emphasis on prosecuting first-time crossers — that is, those apprehended by the Border Patrol for the first time were selected by agents to go through OSL. This caused an especially great outcry from

activist groups, but supporters of the program suggested that this was the most effective deterrence strategy by punishing crossers immediately and thereby preventing others from even their first attempt to cross the border illegally.

After a change of leadership in the United States Attorney's Office for the District of Arizona in 2013, the program shifted its focus to migrants who had prior criminal convictions in the U.S. — commonly referred to in legal parlance as “criminal aliens.” Often times, though, these defendants’ prior convictions are other 1325 illegal entry violations they had formerly received through OSL. Thus, there are now many repeat offenders going through OSL, calling into question the effectiveness of its “deterrence-focused” mission.

Extensive research on migration conducted by the Center for Latin American Studies at the University of Arizona found that migrants’ family ties were a far stronger influence on their behavior than the criminal court and/ or deportation process they experienced in the U.S.⁴⁴

Many migrants have strong roots in this country. Three quarters of the migrants interviewed by the University of Arizona research team after having been sent back to Mexico had previously lived or worked in the U.S., with the amount of time they had spent living among us averaging seven years.

More than half had family members in the U.S. who are citizens. For one in four, that family member was their child. More than one-quarter said that their home was actually in the U.S., not in Mexico. Family reunification is one of the criteria for application for lawful residence in the U.S. But there is a very strict quota system and it can take more than 20 years before the applicant is granted entry — not to mention the many reasons why, under our strict immigration laws, many migrants are not eligible in the first place. It is not surprising that the University of Arizona research team found that a majority of the migrants they interviewed intended to return to the U.S.

The research literature regarding the power of longer jail or prison sentences to deter people from future criminal activity does not bolster the arguments made by those who insist that deterrence is a major consequence

of the criminal justice process. Michael Tonry, a highly-respected academic expert on U.S. sentencing policy, points out that social science research over many decades addressing this topic leads to the conclusion that there is no credible evidence that increasing penalties reliably achieves even marginal deterrent effects.⁴⁵

In his recent review of research on deterrence, Tonry presents discouraging news for backers of tough sentencing guidelines and lengthy sentencing enhancements:

Policy makers would like to believe that penalties and penalty increases deter because those beliefs provide a basis for trying to do something about troubling social problems. The difficulty is that mistaken beliefs in deterrence may lead to adoption of seriously mistaken policies.

Furthermore, most close observers of the mass prosecution process for migrants in our border courts doubt that there is much — if any — deterrent power in the policy. Coltharp, federal public defender in Texas, insists that piling on more punishment does not address the reasons why people return:

In a majority of the 1326 cases, the defendants have families on this side of the border. The cost to them is beyond measure. They have U.S. citizen children and want them to have access to education and health benefits but also want to be with them. They can't stand to be apart. In addition, it is a huge responsibility on the spouse to be the sole caregiver. It is also hard to keep up two households. So they end up coming across.

We have an idea in this country that giving progressively higher sentences is a deterrent. It is not a deterrent. People will come back because they need to make a living or to be with their families. We need a different paradigm for the “revolving door” people.

On the other hand, District Judge Alia Moses makes an astonishing claim of zero recidivism in Del Rio, Texas, but offers no data to back up her assertion:

In Del Rio, yes, there is a deterrent effect. We don't see them again. In San Diego and Arizona it may be different because of their policies. The majority of first time defendants will come back in Arizona.

And Paul Charlton, the former U.S. Attorney for Arizona, now in private practice, also harbors a firm belief in deterrence, and says that he's seen hard data:

I am a believer in deterrence as an overall principle. I think that we have fewer bank robberies because we prosecute bank robbers. That is my mindset.

Operation Streamline had its birth in Texas, and there was an early Streamline operation started up in the Yuma sector. There seemed to be noticeable deterrence there; fewer people entering Yuma sector than in the past. I do believe in deterrence, and somewhere I have seen statistics showing that recidivism for people who go through Streamline is 10 percent, while recidivism for people that are not prosecuted is something like 27 percent. I'm not sure if there is any value to such statistics, but these data impressed me.

When you go home and your kids are hungry, you're going to have to forget your promise and come right back. — Judge

Bernardo P. Velasco

Tucson Magistrate Judge Bernardo P. Velasco seems to agree with Charlton, but he quickly qualifies his belief with an acknowledgment of the powerful forces that undermine the deterrent effect for many migrants:

I think there's some deterrent effect, unless you've come for economic reasons and are promising that you'll never come back. But when you go home and your kids are hungry, you're going to have to forget your promise and come right back. And how about the guy who has a criminal record and was deported, but who has absolutely no family or access to a job across the border?

Judge Charles R. Pyle in Tucson says that the overall picture is so complicated it is impossible to accurately pinpoint the extent of any deterrent effect:

We've seen a hugely increased security presence, with 4,000 Border Patrol Agents for 240 miles of international border in the Tucson sector alone. That's brought us a huge number of border prosecutions. Is prosecution a deterrent? There are so many factors that might have

caused a decrease in crossings: Arizona's SB 1070 anti-immigrant bill; Joe Arpaio stirring up anti-immigrant sentiment among the public and the huge downturn in construction trade.

With so many factors hitting all at once, it would be tough to isolate the effect of these prosecutions. People were already moving away from Arizona when SB 1070 hit them, and now — what with the level of violence — it's become extraordinarily difficult to cross. Even so, people will take the risk.

He says that migrants are spurred by profound considerations when they undertake the perilous journey from their homeland to *El Norte*:

Most of these people have very sincere and strong motivations for taking the risk. People are coming to the U.S. to send money back to their families, or because they already have children here.

A lot of really unfortunate things are going on in Mexico that force people into crossing the border. They face an impossible employment situation in Mexico; they face increased violence, what with even well-educated Mexicans now running drugs.

I don't give many lectures to them about why they should not be coming back, because I just don't think that what I have to say has much impact compared to, "But my wife and my children are up in Kansas," or, "I was about to be killed back in Michoacán."

Federal magistrate judges in Texas are similarly doubtful that Operation Streamline has deterrent power, and they are highly skeptical of statistical claims that it does. McAllen Magistrate Judge Dorina Ramos finds the whole program puzzling:

I have never understood the Operation Streamline program. I don't know if the program is doing any good. Aliens always return to the United States. I do not know if Operation Streamline has had any effect at all. Numbers can be fudged any way.

Judge Felix Recio, a retired magistrate judge in Brownsville, says that the bonds between the people of the Southwest and those in Northern Mexico are too strong to be broken by a law enforcement crackdown:

These prosecutions have no deterrent effect whatsoever. People will just continue crossing. We share culture, religion, food, families, music. How are we going to stop that? How many tough policies have been implemented over the last 100 years? Maybe they give people in the U.S. a sense of order, but they have no real impact. People are still coming every single day.

I don't know what these prosecutions have accomplished other than serving as a rationale for the growth of the government agencies. The only thing that affects whether numbers are high or low is what emphasis the different agencies want to put on it. Statistics can be manipulated by the different agencies.

These prosecutions have no deterrent effect whatsoever. People will just continue crossing. We share culture, religion, food, families, music. How are we going to stop that? — Judge Felix Recio

Federal Public Defender Deirdre Mokos in Tucson adds that fear and misery amplify the many reasons why people cross and recross the border. She says that people in desperate circumstances will defy the risks, even when they know what the consequences might be:

I don't think that prosecution produces much in the way of deterrence. When their need outweighs their concern about the sentence, they come back. I have seen people who have returned immediately after they went through Streamline. It's usually just due to desperation, or a sick family member. They hope that they won't get caught this time around. There are a number of people who come back because this is their home and they don't know how to live in Mexico, where they just have a really hard time.

And people come out of fear. Sometimes people enter the U.S. because they would rather spend time in prison than be dead in Mexico. Some of the 1326 sentences get astronomically high but a lot of people will plead anyway because they will face more time if they don't plead. All

testimony is generally public, so some people will tell me certain things they will never reveal in court.

Sometimes people enter the U.S. because they would rather spend time in prison than be dead in Mexico. — *Deirdre Mokos*

In the Southern District of California, where the sentences imposed for immigration cases are significantly longer — on average — than in any other border district, defense attorneys also insist that they do not see prosecutions of migrants as a deterrent. Chloe Dillon with the Federal Defenders of San Diego says she sees many of her clients return again and again:

I am really frustrated by these long sentences for 1326 felony illegal re-entry. They are not working in terms of deterrence. I have seen really long sentences of up to 10 years imposed.

Personally, some of my own clients have received sentences of five or six years, and several clients who have received prior sentences of five or more years have then come back. That is a lot of time. When you go to see someone in jail and they are getting more time than people who import drugs, it is really baffling to them. They say, “But, all I did was cross a line.”

There are studies that show that really long sentences don’t have an impact. Once you break the 6-month point, the extra time does not have an effect on recidivism. It’s the law of diminishing returns, which these long sentences have exceeded. We see a lot of repeat offenders, with three to five, even six prior convictions for 1325 or 1326. Given so many recidivists, so many people coming back, it shows that the tool they have chosen is not working.

Dillon says that some of her clients return to the U.S. to go back to prison, believing that they have no way to survive on the streets of either country:

Some people on multiple re-entry charges become institutionalized. One client I have has only had a couple of weeks out of custody in the last 15 years. He is diabetic, and he was afraid, not knowing how

They say, “But, all I did was cross a line.” — *Chloe Dillon*

he would fare on the outside. In prison he will get his meds; get fed hamburgers on Wednesdays; and he won't be robbed. He thinks things will be better in jail than being on the outside in Mexico where things are really rough for him.

We have a number of people in this situation. We took one to trial. Their legal defense was that they were coming in order to get arrested so they did not have the requisite intent to enter the U.S. unlawfully. They don't want to be in jail, but they could fare much worse in Mexico. After all this time incarcerated for illegal re-entry, they really have nothing on the outside.

Tucson CJA panel attorney Eréndira Castillo says that the immigration enforcement process itself wears down people's fear of the consequences, even when they are aware of the harsh prosecution policies, because larger economic forces have made their lives in Mexico untenable:

People now seem to have a better understanding that this is a criminal proceeding than before, indicating that there's more word of mouth going around about Streamline. But it seems that people will just tolerate whatever comes at them — including mistreatment — because the whole process is so dehumanizing and they feel that they don't have any rights anyway.

These prosecutions along the border are just propaganda to justify policy. They don't do anything to dissuade people from crossing. People don't want to leave home permanently. If they had the opportunity to come to the U.S. to work and then go back home, they would. But as it is, people will do whatever they need to do to survive. These migrants are all campesinos; they use to work their fields, growing corn to eat. But NAFTA is a big economic push-out, creating a whole new industry of misery.

Again and again, the themes of economic woes and family ties are in-

These prosecutions along the border are just propaganda to justify policy. They don't do anything to dissuade people from crossing. — Eréndira Castillo

You are not going to deter people who have to be with their families; anyone would cross the border again in those circumstances. — *Milagros Cisneros*

tertwined in the minds of those who are close to the prosecution process. Phoenix Federal Public Defender Milagros Cisneros is deeply moved by stories she hears from her clients, and she agrees that the process itself causes many migrants to return:

People with 1326 charges are mostly coming back because they have family here. You are not going to deter people who have to be with their families; anyone would cross the border again in those circumstances. And for many of them this is the only place they have known through their whole lives. It's really heartbreaking to see such cases. It's tragic!

The Border Patrol takes away their documents and their phones, which contain all their contacts' phone numbers. Their belongings get lost, and even if not, once they are deported it's hard — and very expensive — to get their documents sent to them. Documents are a huge issue. Without documents, they are “nobody,” as so many routine activities require proof of identity. In such a predicament, it's easier for them to come back into the U.S. than to try to live in Mexico.

Tucson CJA panel attorney Saul Huerta adds more reasons why deterrence may be a red herring so far as explaining recent reductions in the number of cases that land in the Tucson court:

A primary motivation for crossing and re-crossing is to help their families. In my experience, it seems about 80 percent cross to find work so they can send money home to their family in Mexico, while 20 percent come to be reunited with their family in the U.S. The number of cases are down this year. If Streamline was having a deterrent effect, why would it take a full seven years to take hold? It might be something else. There have been rumors that the Border Patrol has cut way back on overtime pay that agents had been previously receiving. There are also rumors that more migrants are crossing through Texas due to changes in smuggling routes. But I do not know the answer to the

reduction of cases coming through Streamline.

James Duff Lyall, an attorney at the Tucson office of the ACLU, is dubious about the validity of statistical claims about deterrence:

Border Patrol officials are too often allowed to make broad, unsubstantiated claims that Streamline serves as an effective deterrent, particularly when much of the anecdotal evidence — including the stated intentions of migrants themselves — suggests precisely the opposite: that the people who come to reunite with U.S. citizen children or other family members, or to escape desperate circumstances, are not deterred by these prosecutions. That fundamental human reality is obvious and intuitive, and yet the mass incarceration of migrants continues, with profound human and financial costs but little other effect.

Matthew Lowen, Program Coordinator at the Tucson American Friends Service Committee, thinks that the whole deterrence-through-prosecution policy is bankrupt:

Proponents of Streamline have not produced any meaningful proof of deterrence. On the other hand, findings from the report, “In the Shadow of the Wall” at the University of Arizona make it clear that most people dragged through the court process have no clear idea about what rights they had.⁴⁶

Seventy percent of those who think of the U.S. as their home say they will come back. They are not thinking about whether the border is easy or tough to cross — they are thinking of family, of opportunity, and how terrible the economy is in their native country. Our current policies don’t take into account these root causes. The lesson from all this should be that we should not be prosecuting and deporting these people.

From his vantage point as a two-term Attorney General of Arizona, Terry

The lesson from all this should be that we should not be prosecuting and deporting these people. — Matthew Lowen

Goddard paints the bigger picture from his years in law-enforcement. He says that the immigration enforcement effort launched at the border by the federal government during the Bush years was doomed to fail from the very beginning because it was way off-target:

My main criticism is that we beefed up the Border Patrol and Customs Enforcement to focus on illegal transportation of people. But this is not what the problem is about. It's about transportation of drugs; coyotes working for the cartels; and criminal military-style operations that are hard to find and stop. Meanwhile, we refuse to do anything about repatriation of cash to the cartels through the banking system.

All the border enforcement has accomplished is to increase the price of transportation and strengthen the stranglehold that the cartels have on their markets. It used to be good people, mom-and-pop operators, who moved folks through the desert because they thought it was the right thing to do. That's all gone away. The coyotes now charge \$4,000 to \$5,000 per person.

We've put billions of dollars into personnel to stop people crossing the border, but we haven't really wanted to stop the money flow. Several people have actually been caught and charged with money laundering, but none have spent a single day in prison.

My main criticism is that we beefed up the Border Patrol and Customs Enforcement to focus on illegal transportation of people. But this is not what the problem is about. — Terry Goddard

Francisca Porchas, organizing director at Puente, a migrant justice organization based in Phoenix, sees the same picture. She says that the obvious target should be the bosses of the narcotics trade and other ruthless crime networks that corrupt the system and exploit their hapless victims — not the migrants themselves:

Migration over the border has changed. The mom-and-pop coyote system is long gone; the narcos are controlling it now. They use the flow of people across the border as cover to distract attention from their

drug smuggling operations. We are hearing more and more stories of coercion and threats, and that coyotes are paying off Border Patrol agents for pre-arranged crossings.

Judge Ramos, in McAllen agrees, and says that the border-crossing trade has become a sophisticated industry, “I have seen an increased rise in human smuggling. It is an ongoing business — more high-tech than in the past.”

Jodi Goodwin has practiced immigration law for 17 years in the Southern District of Texas. She agrees that prosecuting individual migrants is not an effective way to curb migration:

The solution has to be global. That means changing the whole way we approach the issue of immigration. In other words, detaining families doesn't fix the problems for these families. We need to get rid of money from drug trafficking, get rid of the profit motive and organized crime, and legalize drugs.

This is a money-making opportunity based on corporate greed and those in power. Private corporations are part of the human trafficking process, making money off of the backs of people being detained. We need to get rid of corporate greed and the drive for power that individuals in this system have.

We need to change the way we approach economic development across the border, so that everyone has access to clean water and education. If people have these things then they won't leave their home countries. So many people are forced to leave. If they had a way to feed their families and could get a job back home, they would die to go back. Right now they don't have an option.

The solution has to be global. That means changing the whole way we approach the issue of immigration. In other words, detaining families doesn't fix the problems for these families.

— Jodi Goodwin

IN THEIR OWN WORDS: PROSECUTION IS NOT A DETERRENT

No one knows better than those prosecuted whether prosecutions will deter them from entering the United States again. From those we talked with, here's why they won't:

- Francisco Aguirre on why he returned to the U.S.: "I came back right away, a month later, because I didn't have any other option. In my mind I prefer to be in jail instead of being killed in El Salvador."
- Hortencia Medina on why her brother, Juan Carlos Hernandez,⁴⁷ and other immigrants return to the U.S.: "People are going to keep coming. You're not going to see anything that will stop them. When you have a goal in your mind, you're going to reach that goal. . . Like my brother said, 'I'm going to the United States, and I'm going to go.' It was his dream and he got here. He worked, got ahead, they caught him, he went back, he crossed again."
- Eduardo Jose Garza⁴⁸ speaking of how he responded to the judge's admonition not to return: "You say okay, but you have to come back. . . My family is here, I can't stay there. My family needs me."
- Gladys Monteverde,⁴⁹ on why she returned to the U.S. after her first deportation: "I was so scared because I have nobody in Mexico. So as soon as I got there I called my mom and my family... I just wanted to go home."
- Francisco Equihua Lemus, after serving more than two years in prison for re-entry trying to return to his daughters, and spending three years in Mexico after his deportation: "I've told my daughter, 'I want to come visit you.' What if I come quickly?"
- Cecilia Equihua, Francisco Equihua Lemus's daughter, speaking of her father: "I think that some days are good, but on others he gets tempted to come back to be with us. I think it is really difficult for him."

18 MIGRANT PROSECUTIONS ARE THE “BIG DRAIN” ON THE FEDERAL COURT SYSTEM

Another important policy issue often cited by both people within the criminal justice world and by “outside” critics of Operation Streamline is that Streamline, and especially the increase in felony re-entry prosecutions that came part and parcel with its launching, have siphoned up vital resources from the U.S. Attorney’s Offices and from other federal agencies that are sorely needed to handle far more pressing, serious criminal matters. Former U.S. Attorney for Arizona Paul Charlton makes this point eloquently:

I have this idea that federal law enforcement should be primarily concentrated on the cases that state and local authorities can’t do well – the best example being public corruption cases. It used to be that the FBI would not allow their agents to be stationed in their hometowns so as to make sure they could more easily investigate public corruption cases.

When immigration prosecutions began to increase in Tucson, it became a great drain on resources. The Arizona federal district is fairly unique in that beyond the typical complex federal prosecutions that require the best and brightest Assistant U.S. Attorneys, there are important state crimes we are compelled to prosecute.

This U.S. Attorneys Office acts as the district attorney for every felony crime that occurs on 21 separate Indian reservations within Arizona, including child sex abuse, serious assaults and homicides. Added to that we became responsible for perhaps the largest rising tide of

The flood of immigration cases is a big drain on the entire federal criminal justice system as a whole: pretrial services, U.S. marshals, jail beds, sentencing reports, prison cells and so on. — Paul Charlton

immigration cases. The USAO here has had to balance all that, while struggling to find resources for important priorities such as complex fraud and terrorism cases after 9/11.

Most AUSAs are naturally ambitious people who want to do challenging cases that put their skills to the test, so if you asked them whether they'd prefer more complex felony cases than these run-of-the-mill immigration cases, you know what they'd say.

The question is, how do we dedicate our resources; how best can we use limited resources to create a deterrent effect? And it's not just the USAO. The flood of immigration cases is a big drain on the entire federal criminal justice system as a whole: pretrial services, U.S. marshals, jail beds, sentencing reports, prison cells and so on.

A harder question is how much money should we spend to that goal? There is a law of diminishing returns to consider. As we increase spending on these prosecutions, it impacts our capacity to prosecute other crimes. Do we see more serious crimes increase as a result?

Chloe Dillon, working as a federal public defender in San Diego, affirms his point about this irrational allocation of resources in a single sentence, "It amazes me that the most prosecuted federal crime in the U.S. is trespassing."

It amazes me that the most prosecuted federal crime in the U.S. is trespassing. — *Chloe Dillon*

19 TRAILING THE MASS PROSECUTIONS, A NEW BRAND OF FEDERAL PRISONS ENTERS THE MARKET

Whatever else it is, the criminalization of migrants has been a great boon to the private prison industry. More than five years before Operation Streamline became a twinkle in Michael Chertoff's eye, officials at the federal Bureau of Prisons (BOP) appeared to feel the pinch of increased numbers of non-citizens being sentenced to their safekeeping. Some who were watching closely back then wondered if the real pinch was coming from the private prison industry and their allies in Congress.⁵⁰

In 1999, on the heels of a series of major operational disasters and scandals in private prisons under contract with state and local governments, state and local officials were casting a sharp eye to the industry and the pace of contracting at these levels began to slow. Suddenly the BOP announced that it would soon launch a brand new contracting initiative for “Criminal Alien Requirement” (CAR) prisons — essentially privately operated, segregated prisons for immigrant prisoners. The first two CAR prison contracts were tossed to the Corrections Corporation of America (CCA) in 2000. The contracts came just in time, because CCA had been teetering on the brink of bankruptcy as the state contracting flow began to dwindle to a trickle.

Once the federal market heated up, the industry began rolling in taxpayer dollars from both the BOP and the Immigration and Customs Enforcement (ICE) agency at The Department of Homeland Security (DHS). By 2013 the BOP had handed out new contracts for 13 new CAR prisons, an average of one contract every year. And the ICE detention market was also booming, since Congress had created a budget mandate that the agency is obliged to sustain a steady supply of 34,000 detention beds — whether needed or not.⁵¹

Thus the industry is now dependent on federal contracts to keep their accounting books written in black — not red — ink. Needless to say, this cre-

ates enormous lobbying pressure on federal officials, elected and appointed, and fattens the wallets of some of the best lobbyists that money can buy.

In a new book soon to be released by Routledge Press, Matthew Lowen in Tucson, writes that the economic benefits of criminalizing immigrants for the private prison industry run deep:

Much of the enforcement work that the federal government engages in is actually handled by for-profit private companies, which automatically creates a situation where expanding enforcement of immigration policies, especially those that criminalize immigrants, is incentivized by the possibility of new federal contracts for any number of detention, transportation, security or other service contracts.

There are currently over 250 immigrant detention facilities across the country; 62 percent of these facilities are run by for-profit private prison companies such as Corrections Corporation of America (CCA) and GEO Group. CCA alone brings in 44 percent of its annual revenue thanks to contracts with the federal government — right around \$750 million. With pay-outs this high, one need not look too far to find a trail of lobbying money and campaign donations to key political players.

From U.S. senators making immigration policy, to political advisors and elected officials in Arizona defending laws that further ensnare immigrants in the criminal justice system, the ties to the private prison lobby are powerful and growing stronger. Recent efforts at national immigration reform have been enlightening as to the important position that criminal prosecution programs such as Operation Streamline occupy. Legislation passed by the U.S. Senate in 2013 with the Corker-Hoeven amendment included specific requirements for the three-fold expansion of Streamline in the Tucson sector alone.

Though ultimately failing to pass in the House of Representatives, all indications are that any similarly styled immigration reform legislation will include significant increases in border security spending and programs. Sens. McCain and Flake have even introduced a legislative resolution aimed at ensuring programs like Streamline have no limitations placed on them, even though there is no indication of any

*desire by the Obama administration to do so.*⁵²

Magistrate Judge Recio in McAllen says that federal officials were not on the right track when they decided that private prison contracts would serve as a good solution for the bed supply necessitated by Operation Streamline:

In my view, officials in Washington D.C. were making decisions that would influence what would happen to us down here in the Valley. As long as people in Washington saw that privately contracted jail facilities had available beds, they wouldn't build federal facilities down here. However, just because you have a jail with bed space doesn't mean you have facilities that are acceptable to house undocumented aliens. They were not looking at the right criteria.

Former U.S. Attorney for Arizona Paul Charlton also offers an assessment — sharply critical — of the federal prison contracting bonanza for both prudent and ethical reasons:

Federal contracting for private prisons has been a disaster. I've seen lots of state and federal prisons, and I believe that the federal Bureau of Prisons operates some of the finest prisons in the world; fine institutions with professional staff who want to do good work and are paid well for it. In the private prisons, the profit motive stands behind all of it.

I embrace the profit motive myself. However, there are aspects of the federal government where I believe that profit should not be the guiding motive. I don't believe we should have a private military, and we ought not to do that with our prisons either.

I don't believe we should have a private military, and we ought not to do that with our prisons either. — Paul Charlton

Federal Public Defender Dillon says that Charlton's concerns are overlooked by court officials who seem to be unaware of both BOP policies regarding prisoners who are not citizens of the U.S., as well as the impact that the profit motive has on the level of services provided in the CAR prisons:

There is a broad misunderstanding, ignorance or simply lack of consideration by both AUSAs and judges as to the lack of rehabilitation programming available to non-citizens in the BOP system. They appear

to think the people get the same rehabilitative services, such as classes, job training, etc., even in illegal entry and re-entry cases. But to my knowledge people with these convictions are not eligible for services.

Time in custody for immigrants serving sentences for illegal re-entry is different than for other inmates. It is my understanding that private contract facilities are the preferred method for incarcerating non-citizens. People with the longest sentences may start at a BOP-operated facility, but by the end of their sentences many will have been sent to contract facilities to prepare for the deportation process. This is even a further disadvantage regarding recidivism.

20 THE UNJUST IMPACT ON DEFENDANTS' HUMAN RIGHTS

From the initiation of Operation Streamline, advocates and activists have charged that the truncated prosecution process constitutes an intolerable infringement on the rights of the defendants. The appalling spectacle in the Tucson Streamline courtroom that has been broadly conveyed in both words and sketches through social media has truly shocked the conscience of many members of the public across our land, yet appellate litigation has so far failed to end the practice, though important modifications have been won in the 9th Circuit Court of Appeals.

Critics on the ground in Tucson have long complained about how the assembly-line nature of the process appears to be a blatant disregard of proper criminal procedures before the bar. Lowen, who works with the American Friends Service Committee in Arizona, describes the way the process seems to ignore human, if not legal, rights in the interest of expediency:

Issues of due process and human rights are clearly being trampled in the Streamline process. When you go to observe the process in court it is downright maddening: the process is all tightly scripted; the courtroom staff is just going through the motions; business as usual; no questions asked.

Meanwhile, you see many people speaking perfect English, obviously long-term residents, asking when they can see their families. The judge responds that they will have to go to Mexico first.

You see indigenous-language speakers without interpreters; people who have injuries that are clearly not being dealt with. You hear claims of “credible fear” being raised at the very last moment, while some of their attorneys seem surprised to learn of it.

Federal Public Defender Milagros Cisneros complains that an appellate court decision regarding the pretrial rights of improper migrants are being

completely ignored in Arizona's federal courts:

The 9th Circuit Court of Appeals has made it clear that under the federal pretrial detention statute, we don't need to detain people who don't have papers. Even when they are charged with 1325 or 1326, they can still get released. Nonetheless, in Arizona they are still routinely detained.

In her view as a long-time defense attorney in both the state and federal courts in Arizona, Isabel Garcia is convinced that Operation Streamline is a clear violation of the due process rights our Constitution provides for criminal defendants:

Before Streamline and the Obama administration's "consequence delivery system" policy, our federal court was handling most of these unauthorized entry cases quickly, but not in such a conflated process. If you need to deliver "consequences" in every case, why not prosecute people formally?

Now the system has been resourced to the point it can deport half a million people a year, but only by melting down procedures in a way that destroys the principle of due process.

Defendants are interviewed by their attorneys right in the courtroom, with no right to privacy, even though some may have been trafficked by others being interviewed at the same time in the same room.

Back when I was a federal defender, I won a few 1325 cases since the only evidence came from what a Border Patrol officer had to say. But 1326 is another animal. They don't have to prove that someone crossed at all — only that they are here and that there is an old deportation order.

Plea bargaining is supposed to be a negotiation, but the sentence is predetermined by prosecutors before a defendant enters the courtroom

Plea bargaining is supposed to be a negotiation, but the sentence is predetermined by prosecutors before a defendant enters the courtroom for the first time. — Isabel Garcia

for the first time. The cases are so easy to prosecute, which explains why they are so numerous, compared to bank fraud.

It is very much like the drug war all over again, except that the big difference is the commingling of administrative and criminal proceedings; they are apprehended by the Border Patrol in an administrative process where they are questioned without any rights or protections, and then prosecuted in criminal court where they are supposed to have some protections.

Among her other concerns, Garcia worries that the truncated Streamline process is bleeding over into prosecution practices in other criminal courts:

Not only have we gone from formal deportation proceedings in civil immigration enforcement to expedited removal, reinstatement of removal, etc. — but now Operation Streamline has normalized disregard of formal procedural requirements in our criminal courts as well.

Instead of preliminary hearings we see use of the grand jury process, for example, where defense attorneys have no opportunity to challenge what is said by police officers. Why aren't the judges and lawyers more troubled by this?

You won't find much due process for U.S. citizens in many of our municipal courts. What we are willing to do to ourselves in the name of criminal justice is horrible, and Streamline is not an exception. — Judge Bernardo P. Velasco

But Tucson Magistrate Judge Velasco charges that defendants' rights are routinely trampled over in the rush to exact a plea and impose punishment in the lower courts in every jurisdiction — a pervasive problem that he finds appalling and far worse than Streamline:

Streamline took the national stage here in Tucson because of our liberal — largely Democratic — political culture. But Streamline is practically utopia compared to what we do every day to U.S. citizens in many courts across the land. You won't find much due process for U.S.

citizens in many of our municipal courts.

What we are willing to do to ourselves in the name of criminal justice is horrible, and Streamline is not an exception. Think about the debtors' prisons we're creating for economically stressed American citizens. Is this what we really want to do? The saving grace of Streamline — if there is one — is that we are just doing to others what we already do to ourselves.

Many observers are shocked to learn that migrants who may have a valid claim for asylum under our immigration laws are just shunted through the prosecution process with no seeming regard for their plight. Surely anyone who claims to have fled their home countries in fear for their very lives and the safety of their families is entitled to an investigation of their claim by immigration authorities with requisite training and skills.

The Inspector General for the Department of Homeland Security has questioned Border Patrol officials about the practice of sending migrants who express fear of return to Streamline for prosecution:

Using Streamline to refer aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.⁵³

Tucson CJA panel attorney Saul Huerta says that in theory Border Patrol agents are responsible for screening those they apprehend for “credible fear.” After many years of practice as both a federal public defender and an attorney in private practice he says the practice is perfunctory:

The Border Patrol arrest report has a section at the bottom where it is indicated whether the migrant has a “credible fear” about returning back home — pro forma⁵⁴ language for circumstances that should trigger further investigation of whether they have grounds for asylum in the U.S. In my experience, that section is completed in boilerplate language which indicates that the migrant does not have a credible fear.

For their part, Streamline judges insist that they have no jurisdiction to address issues of “credible fear.” Tucson Magistrate Judge Pyle asserts the

point tersely:

Defense lawyers will frequently say their client has a “credible fear” of being returned to their home country. I tell people that they’ll have to bring this up later in immigration court. I don’t mean to cut people off, but I’m not an immigration judge and I have no real legal authority to do anything about this issue.

Judge Velasco agrees, but adds a skeptical note — both about the claims sometimes made in his court, and about the fiercely competitive struggles between the diverse federal agencies that were culled together to form the Department of Homeland Security (DHS), and the aggressive competition between Border Patrol agents as they struggle to advance within their agency:

Three thousand years ago if you appeared before Solomon, all your problems would be solved right there. In our society, the process is far more complicated, and in this case it’s also bifurcated. We have criminal courts and civil immigration courts. A credible claim of fear is no defense to a criminal prosecution. The sooner I do my time, the sooner I can assert my asylum claim in the other court.

Moreover, while those families from Central America who are presenting themselves at ports of entry perhaps have legitimate fear for their lives, they are willing to surrender themselves to the authorities, and are ready to suffer the consequences. But a person who crosses the desert through the Tucson sector and says they have “credible fear” just might be coming for purely economic reasons.

Besides, the Border Patrol is only one part of the huge Department of Homeland Security. When they started to merge all these agencies to form DHS, the various personnel were fighting like mad not to lose power, arguing about who would be made supervisors over whom, even arguing over what their agency badges would look like. And don’t forget that within the Border Patrol, when agents catch someone, they get credit for catching illegal aliens, not people with “credible fear.”

Deputy Federal Public Defender Donna Coltharp argues that a palpable danger of increasing bloodshed has heightened fears for those now making

the trek across remote desert areas:

The claims of violence at and near the border have risen. I believe the majority of them are true. We are hearing more about deaths of fathers and brothers. We can see “empathy creep” in the courtroom. We are starting to hear from judges: “Everyone’s afraid.” “We know Juarez is dangerous.”

We ask people whether they have a fear of returning so that we can connect them with attorneys who can help them seek asylum. However, it is a huge disincentive to make a claim because of the fear it will add additional time to their case and they won’t usually win. Most clients don’t want to sit in custody that long.

At the peak of the Central American refugee crisis, it was very upsetting to see young adults, especially young women, prosecuted for illegal entry and for using false documents.

— *Chloe Dillon*

San Diego Federal Public Defender Chloe Dillon holds the U.S. Attorney’s Office in the San Diego District responsible for the problem, blaming them for a lack of proper judgment in making their charging decisions:

At the peak of the Central American refugee crisis, it was very upsetting to see young adults, especially young women, prosecuted for illegal entry and for using false documents. These were clearly young people fleeing harm.

The government should not be prosecuting these people. They actually have a legal obligation to protect them, and should be dismissing the charge. Instead the AUSAs would offer a plea to a misdemeanor with time served so these refugees could get out of Marshals’ custody. But really, they should not be bringing such cases at all.

21 BORDER PATROL AGENTS APPREHEND MIGRANTS AND BORDER PATROL LAWYERS PROSECUTE THEM

In all but the Southern District of California, it would appear the problem described above is further compounded in Streamline cases since the prosecutors handling them in court are typically not actually AUSAs. Rather, they are Border Patrol lawyers who have been authorized to serve this function. They remain Border Patrol employees on that agency's payroll, and it is rumored that they are paid less than AUSAs.

This situation would seem to blur the line between enforcement and prosecution when migrants are charged with unlawful entry. Since the charging process as well as most other important prosecutorial decisions are completely hidden from public view and lack accountable oversight, it is impossible to know what role these Border Patrol prosecutors actually play in screening the cases brought for prosecution by their own agents.

In the Tucson Streamline courtroom, their visible participation is perfunctory. Seated at the very back of the court behind the mass of defendants, they simply rise to attest that the pleas made by each group of defendants are "acceptable." Huerta says that the only time a Streamline defense attorney will deal directly with an actual AUSA is if their client refuses to plead guilty:

Cases in the Streamline court are prosecuted by "special" AUSAs — Border Patrol lawyers that have been cross-designated by the USAO to handle changes of plea and requests from defenders for better offers in 1325 cases. Only if a Streamline defendant rejects a plea offer is the case turned over to an AUSA for prosecuting in district court on the 1326 charge.

Dillon says that in the Southern District of California, where both 1325 and 1326 cases are formally prosecuted by AUSAs, the Border Patrol still plays a pretty decisive behind-the-scenes role in determining which mi-

grants get prosecuted and for what charge:

It is hard to say to what extent it is Border Patrol or the USAO that drives these prosecutions. It really varies. There are times when the Border Patrol's workload controls who is prosecuted more than the decisions of the AUSAs. At other times the AUSAs may have big multi-count indictments on their hands and so they weed out some 1325 or 1326 cases. Bottom line: It's about resources.

The intake unit of the USAO will perform complaint reviews with Border Patrol personnel, going through the probable cause statements and signing off on them. But in my experience they are not that strong a filter. Weak cases still get through. We see complaints that never should have been charged which then get dealt with in the early stage of case processing.

Each Border Patrol sector chief has total control. They are the “gods.” — Judge Felix Recio

Many others are troubled by the control that the Border Patrol — a para-military law enforcement agency — appears to exert over the judicial process. Brownsville's retired Magistrate Judge Recio is not convinced that individual agents are guided by any consistent policies, and says that there is no saying what the policies may be from district to district:

The enforcement of laws differs from district to district. There is no uniformity. Each Border Patrol sector chief has total control. They are the “gods.” Whoever is appointed by the president to run the agency is just a figurehead.

Border Patrol officers have a great deal of discretion as to whom they prosecute. It can be based on their prior convictions, or because the person arrested gives them attitude, or they just don't like the way they look.

Lyll of the Tucson ACLU is troubled that Border Patrol exerts such control over the process given its track record of abuse:

These people are funneled into this system by the U.S. Border Patrol,

Federal prosecutors ought to be more wary of colluding with an agency like [the U.S. Border Patrol]. — James Duff Lyall

an agency whose abusive and corrupt practices have been documented extensively. That includes the brutal and inherently coercive conditions to which migrants are subjected in Border Patrol custody, as well as excessive use of force, racial profiling, unlawful searches and seizures arising in Border Patrol’s “interior enforcement” operations. Federal prosecutors ought to be more wary of colluding with an agency like that.

Harlingen immigration attorney Jodi Goodwin says the whole Streamline program is driven by the Border Patrol:

The Border Patrol is in charge of the program and is pushing these prosecutions. They set the guidelines for who is prosecuted. They are not doing “full-on” Operation Streamline everywhere. They identify people caught within a specific geographic sector to be put through Operation Streamline. It is not about the number of times a person has crossed.

They do have a “guidelines of prosecution” chart that they use to pursue prosecutions overall. The factors include prior apprehensions, voluntary removals and deportations. But it is not specific to Operation Streamline.⁵⁵

Deputy Federal Public Defender Coltharp says that the Border Patrol goes to irrational extremes to meet their “zero tolerance” agenda:

In our sector the Border Patrol is arresting people who are on Greyhound buses in line to leave the U.S. on their own. The Federal Public Defender’s Office tried to challenge this practice but lost. Apparently it is a statute or policy that could be changed.

In our sector the Border Patrol is arresting people who are on Greyhound buses in line to leave the U.S. on their own. — Donna Coltharp

22 WHAT IS THE EFFECT ON MIGRANTS THEMSELVES, AND ON THEIR FAMILIES AND COMMUNITIES?

The voices of the people most impacted by this system — the migrants who are prosecuted and their families — are silenced at many points along the process. They often lack the opportunity to state why they have come to immigration officials when they are apprehended at the border, have no say in negotiating the plea deals they must accept or reject, and are provided minimal opportunity to speak in court. They face a lack of sufficient interpretation at all stages (especially those who speak indigenous languages) and lack means of communication to share their stories while incarcerated in remote federal prisons.

Furthermore, they are often overlooked by the mainstream immigrant rights movement and others seeking to paint a picture of immigrants that will be palatable to legislators. This silencing is intensely problematic as it is impossible to understand the true impact of a policy without seeking out the voices of those impacted by it. Tucson CJA panel attorney Eréndia Castillo eloquently states the dangers this presents:

It's the silencing of my clients that kills me the most. These are human beings whose stories need to be heard, but they are silenced. By stipulating Streamline sentences, there are no stories being told, no recognizing these human beings as people with a story and a life. Stipulated sentences have silenced these people's voices. That's a grave human cost. And if we do this here, we can do it anywhere. We can do it in the interior — far from the border — and we can do it to any other group of people we want to dehumanize.

It's the silencing of my clients that kills me the most. These are human beings whose stories need to be heard, but they are silenced. — Eréndia Castillo

It is vital to seek out these voices in order to understand who is affected by improper entry and re-entry charges, and how they, their families and communities are being impacted. While much more effort is necessary to accomplish this, there are a number of effects of this policy that emerged from our conversations with the migrants and their families we interviewed, as well as the stories that those being prosecuted and their counsel shared during our court observations.

It is clear is that most of these migrants and their families have been adversely affected by a web of interconnected and overpowering problems — some that are personal, as well as many broader social and economic difficulties — throughout their lives. In their native lands most have suffered dire poverty and lacked sufficient educational opportunities or adequate medical/mental health services. Many have lived in areas dominated by corrupt and violent drug cartels. Some have been subjected to gang violence, domestic abuse or homophobia.

Facing hardships such as these while having no hope for an authorized means of migration, it is inevitable that many people will struggle to obtain economic opportunity and/or personal safety by crossing the border. And so — despite increased border enforcement, nativist bigotry, xenophobia, and now the threat of criminal prosecution and incarceration — they continue to come.

If we do this here, we can do it anywhere. We can do it in the interior — far from the border — and we can do it to any other group of people we want to dehumanize. — *Eréndia Castillo*

FAMILY SEPARATION

Improper entry and re-entry prosecutions put more immigrant families at risk of separation by incarceration and deportation. After migrants are prosecuted for improper entry or re-entry, they are promptly deported after serving their sentence. They are subsequently barred from re-entry to the U.S. for a minimum of 10 years or possibly permanently barred from returning.

For Francisco Equihua Lemus, his improper re-entry charge has meant forcible separation from his daughters, whom he says “are everything to me in my life.” Throughout his 37 years in the United States, Equihua Lemus made great efforts to visit and provide for his daughters, and has returned after two deportations to be with them. He was running a construction business in Los Angeles when he was picked up for a broken taillight and deported after the police discovered his prior incarceration and deportation. He returned shortly afterward to be with his daughters, but was apprehended and sentenced to two years in a federal prison in New Mexico. It was too far for his family to visit during his incarceration.

Now he makes ends meet running a business in Michoacán, Mexico, where he has lived for three years. But he still longs to return to be with his family.

The separation has also been difficult on Equihua Lemus’ daughters. His daughter Cecilia Equihua, a law student at Loyola Law School, constantly tells her father not to return because of the risk of being incarcerated again. She describes the impact his incarceration and deportation has had:

It’s obviously had an emotional impact. He’s just not here. We don’t get to have the same kind of relationship that I would imagine other people have with their fathers, who want to be involved in their children’s lives.

Many of the migrants who are deported after being charged with re-entry have no family in their home country and are terrified to return. For Gladys Monteverde,⁵⁶ who was brought to the U.S. as a child, and was assaulted by a man who was since deported to Mexico, deportation was a traumatic experience. When talking about being deported to Nogales, Sonora, Mexico, she cries and repeats that she was scared, alone, and that she loves her family.

She returned quickly after each of her deportations, and the second time was tried for improper re-entry. Having spent time incarcerated on other charges related to her struggle with addiction, Monteverde is still visited in prison by her family and dreads her impending deportation more than her incarceration:

I will do my time, they can punish us, but don’t take us away from our

families. I just want to be home with my family.

This poignantly displays that the draw to be with family is so strong that it can even overcome the need for freedom. Yet, Monteverde is already separated from fully being able to share in the life of her family due to her incarceration. Many migrants are incarcerated too far from their family to receive visits, or are on the other side of a border their family cannot cross. Re-entry convictions not only separate people across borders, but also across bars.

It is clear that Hortencia Medina's brother was deported in August 2015 after a traffic stop. He spent a couple of months with his family in Reynosa, Tamaulipas, Mexico, who had not seen him in 12 years. In mid-October he tried to cross the border again to rejoin his wife and four U.S. citizen children in Kansas. However, he was apprehended. At the time we spoke with his sister, the family was trying to locate him. Medina described the family's terror that he would be charged with re-entry and given five to ten years in prison, as he had been warned by the judge when charged with improper entry.

I will do my time, they can punish us, but don't take us away from our families. I just want to be home with my family.

— *Gladys Monteverde*

After being separated for more than a decade from his family in Mexico by a border, Medina's brother could now also be separated from his wife and children in Kansas by incarceration.

Francisco Aguirre was threatened for more than a year with incarceration for improper re-entry before his charges were dropped in June 2016. He is a labor and immigrant rights organizer in the Portland, Oregon, area. Aguirre chose to plead not guilty to his re-entry charge. This is highly unusual, as most migrants are offered and accept a plea deal early in the process, partially because of the long incarceration many risk without the plea. Aguirre was being threatened with 20 years — the maximum possible sentence for re-entry under the federal code. He has been in the U.S. for 21 years since fleeing El Salvador, and has two young U.S. citizen daughters. He describes the reaction of his children to the prospect of their father going to prison on the re-entry charge:

“I support you dad. I’m going to be the President of the United States so you don’t have to go to jail” and “When you go to jail can we go with you?” — *Francisco Aguirre*

The older one is always saying, “I support you dad. I’m going to be the President of the United States so you don’t have to go to jail” and “When you go to jail can we go with you?”

The emotional cost to the children and families of those prosecuted is incalculable. Physical and emotional separation within families due to entry and re-entry charges extends far beyond the moment when migrants are deported or incarcerated. Multiple individuals we spoke with said that they or a family member had refrained from returning across the border for the funeral of an immediate family member because of the risk of being prosecuted upon their return to the U.S.

Francisco Equihua Lemus’ daughter Cecilia Equihua said that her father didn’t return to Mexico when his father died, even though he was extremely close to his parents. He knew he wouldn’t be able to return and wanted to remain close to his daughters.

Hortencia Medina said her brother was also absent at their father’s funeral:

He wasn’t there when my dad died in 2008... It was something heavy because when you lose a parent, distance doesn’t matter to you — you come no matter where you are. But he knew the consequences if he came back and we told him not to come because my father was already gone.

Migrants undergoing prosecution also miss other vital events in the life of their family. Eduardo Jose Garza’s wife was pregnant when he was picked

It was something heavy because when you lose a parent, distance doesn’t matter to you — you come no matter where you are. But he knew the consequences if he came back and we told him not to come because my father was already gone.

— *Hortencia Medina*

up in a traffic stop in which he was the passenger. He was incarcerated for four months and sent to six different facilities — all too far for his wife to visit. By time he was deported and made it back, he had already missed the birth of his child.

ECONOMIC HARDSHIP

Entry and re-entry prosecutions place huge economic hardships on immigrant families and communities. Some families who are separated decide to keep two households on either side of the border, dramatically increasing the cost of maintaining their family. On top of the emotional hardship of having a loved one deported, families must figure out how to survive without a breadwinner. It's much more difficult to provide financially for a family living in the U.S. from Mexico or elsewhere in Central America because of the value of the currency, lack of job opportunities, and difficulty of reestablishing oneself after deportation.

Equihua Lemus used to give his daughters money when he was working in the U.S. Now his daughter Cecilia Equihua says she refrains from telling him when she's having difficulty making a payment for fear it will prompt him to try to cross the border again.

Often it's immigrant communities who step in to help impacted families get by. When María Garza was pregnant and her husband Eduardo Jose Garza was deported, she made ends meet by selling food she made, and with the help of her neighbors and a McAllen-area immigrant organization called ARISE. Her landlord didn't charge her rent during the months her husband was incarcerated or while he was in Mexico.

Even those who are able to bond out while their improper re-entry prosecutions are in progress face financial strain. Aguirre has been fighting his re-entry charge for a year, living at home in Oregon with his wife and children, but is barred from working. He says community members helped pay his rent after he was first charged with re-entry, but it's been a struggle to make ends meet even with the help of his community, so the family often goes without electricity or other basic needs.

The support for many families facing entry and re-entry charges demon-

strates the extent to which they are valued members of their communities with strong social networks. As a result of anti-immigrant policies, these social networks are frayed by deportation and incarceration. Many community members are also unable to earn the full value from their labor due to their immigration status.

Those charged with improper entry and re-entry who return to the U.S., are permanently unable to reap the full benefit of their skills and labor because these charges make them ineligible to adjust their status. Even those, like Equihua Lemus, who is skilled at business and ran a construction company in the Los Angeles area, are forced to forfeit sizable percentages of their income to someone who maintains the name of the business.

NORMALIZED ENVIRONMENT OF FEAR

When migrants are first apprehended crossing the border, families often have difficulty locating them in the vast detention system and are terrified what may have happened to them. When Cecilia Equihua heard from family in Mexico that her father had tried to cross the border, she had no idea what might have happened to him and suspended one of her law school finals to search for him.

Hortencia Medina and her family heard from someone crossing the border with her brother, Juan Carlos Hernandez,⁵⁷ that he had been apprehended by Border Patrol. She had told her children that their uncle would be coming and recalls their questions when he didn't arrive:

It's something that you don't forget, how the kids ask me... "Why did my uncle not come? Because last night you told me that my uncle was going to be here, why did he not come?"

At the time we spoke with her, Medina still had no idea where her brother was detained and was extremely distressed about the time he could spend incarcerated. "Right now we are, as they say, with our hearts in our mouths about where he is, or what's going to happen," she said.

The prospect of deportation can also be terrifying, particularly to immigrants who have grown up in the United States, or are asylum seekers. Gladys Monteverde was kidnapped, raped, and held in a house for five days in

Mexico as a young woman. She said she was terrified the two times that she has been deported at the thought of her abuser finding her. She still dreads her impending deportation after serving her sentence for re-entry. Her fear of deportation was so strong that although she had an attorney who could have mitigated the time she would spend incarcerated, she decided to go into hiding rather than present herself at court.

The way in which authorities apprehended Monteverde is especially troubling given her history of trauma. After she did not appear at her court date, U.S. Marshals showed up to the motel where she and her partner were living. They pushed aside her partner, broke down the door, broke a few windows, and entered the small room wearing black face masks with weapons drawn. Monteverde said that they were yelling very loudly. They found her in the closet, pointed their guns at her and yelled at her to “stay down.”

These type of violent raids further traumatize victims of violence and are entirely inappropriate to use against people like Monteverde. Moreover, raids are often conducted with the assistance of local police, which breeds fear of local law enforcement in immigrant communities. Local police and sheriff’s offices also frequently collaborate with immigration officials when undocumented individuals are booked in local jails. These individuals can then be referred for re-entry prosecution.

Aguirre and his family have been impacted by their experience with local police. He says his wife is afraid to drive despite having a driver’s license. In fact for his family, all law enforcement are feared as agents of family separation:

When we’re driving and they [his children] see the police, they say, “Dad that’s the police are they coming to get you?” The older one cries when she sees the police.

Some migrants who have returned after being prosecuted and deported feel forced to limit their driving and make other lifestyle changes to avoid any potential interactions with the police. Eduardo Jose Garza catches rides with his boss to work when possible and doesn’t go out as much as he did before his last deportation:

You don’t drive that much anymore or go out in the street driving.

Knowing that you don't have a license you avoid driving. If you don't have a reason to go out, then why go out? You just hang around taking care of the house.

The fear of deportation resulting from local police collaboration with immigration authorities also intensifies the power of abusers in undocumented communities. Monteverde said her mother was married to a man who abused drugs and alcohol who would beat her badly and taunt her that if she called the police, they would only deport her.

The legal remedies created to attempt to rectify this situation, such as U-Visas, only apply if the victim feels safe reporting the abuse to police and wishes to press charges against their abuser. Even then, relief is only possible in cases where the abuse can be proven, and where it fits the definition of crimes that can be prosecuted under our criminal justice system. Even when all these conditions apply, immigrants reporting abuse may face uncooperative local police departments.

Hortencia Medina reflected on the unequal treatment immigrants face in the U.S.:

When you're an immigrant they don't treat you the same as an American citizen. There's discrimination and racism in both [immigration and the police]. When you're not a citizen sometimes they don't listen to you because the law is stronger than you are.

Immigrants who organize against these systems risk being targeted for retaliation. Francisco Aguirre believes that his re-entry charge was brought in retaliation for his immigrant rights organizing, and his family has been targeted for increased attention by various authorities including local police:

Our immigrant leaders in the community have been targeted because of the work we do. They want us to be quiet, to not say anything, so they find ways to criminalize us so they can send us back and let them keep destroying our communities.

Despite this, Aguirre believes that immigrants do have the power to combat this fear and criminalization:

I know it is in our culture to stay quiet and hide because we feel so

embarrassed when we hear that they're criminalizing us, when they're pressing charges on us. But when we stay quiet we don't get any support and we are part of those bad decisions. By being quiet we are part of the destruction of our community.

23 STORIES FROM THE PEOPLE WHO ARE PROSECUTED FOR CROSSING THE BORDER

HORTENCIA MEDINA

Hortencia Medina is an organizer with the immigrant community group ARISE near McAllen, Texas. Her brother was convicted of improper entry and was in improper re-entry proceedings at the time of her interview.

Hortencia Medina's brother, Juan Carlos Hernandez,⁵⁸ now 38, first came to the United States as a young man to find work, to help his family back in Mexico, and to build a more secure economic future. "I think that his dream was to get ahead, to advance himself, but to help his mom," Medina said. "I came from a family of 11, so sometimes we didn't have enough to eat." Medina left Mexico at age 16 to marry her husband and escape her family's poverty, and is now a lawful permanent resident with five U.S. citizen children. She has worked as an organizer with the immigrant community group ARISE for 15 years. Her brother has lived and worked for 13 years in Kansas with his wife and has four U.S. citizen children, ages 17, 15, 8 and 9 years old. Medina said this was not her brother's initial plan:

It was never, "I'm going to get married or I'm going to have kids." But when you arrive somewhere and you feel lonely, you start to work and you meet someone, you find a partner then you're going to have a relationship and have kids. And then you can't come back because you have kids and so you keep seeking out work.

The first time her brother was picked up by immigration officials was three years after he came to the United States, after a traffic stop in which he was the passenger. The police asked for insurance and a license and when the driver couldn't provide them, both were arrested and handed over to immigration authorities. He was held for three months in Carson City Jail until being tried for improper entry and deported. "He felt desperate because he had never been locked up for that long," Medina said. She said that the judge

warned him that time that he would receive five or 10 years in prison if he returned to the U.S.

Despite the judge's warning, her brother came back two weeks after he was deported. He entered without being apprehended, rejoined his family in Kansas and continued working. Although her brother couldn't be with the rest of the family in Mexico, he tried to be present in their lives as much as possible. "He couldn't be there but he sent things that he knew that we would like," Medina said. Still, it was difficult for her 11 siblings who had grown up close to be separated by a border:

It's really hard when you're in a country that's not your own and you don't have your family... I think of my brother who was here for so long without coming back to be with the family, with the most basic communication. And you do feel sad because there are Christmases and Mother's Days, or events that you remember that you do with your family that you can't do. And you have your immediate family but not your extended family that allows you to feel the support of your family. And since we've always been together... It was kind of hard for us.

Still, the knowledge of what her brother risked by crossing the border worried the family. Because he risked lengthy incarceration if apprehended crossing the border again, they urged him not to return to Mexico to bury their father:

He wasn't there when my dad died in 2008. My brother couldn't come and it was kind of sad because he couldn't be there. I remember that we were in the cemetery burying my father, and he was on the phone calling me about everything that was happening at that moment. And it's hard because there are times when you want to say goodbye and you think about coming back but how do you do it? It was something heavy because when you lose a parent distance doesn't matter to you, you come no matter where you are. But he knew the consequences if he came back and we told him not to come because my father was already gone. But it makes you think about all the moments that you lost with him, and that you had, that you experienced together that you do remember. It was something sad, but those are things that happen to us as immigrants. There are many things that you deny yourself of living,

things that are happening in the life of your family, because you can't do anything about it.

After all these years without seeing him and now they caught him again and they're going to lock him up. — Hortencia Medina

In August 2015, Medina's brother was deported after being picked up in an ICE raid at his workplace. He spent a month and a half with their mother and sister in Reynosa after not seeing them for 12 years. He again prepared to cross the border to rejoin his family. When we talked with Medina in mid-October 2015, she had just received news that her brother had been apprehended again crossing the border near McAllen.

This has taken an emotional toll on the family. "My sister was crying when she called me," Medina said. "She said, look, after all these years without seeing him and now they caught him again and they're going to lock him up." Since Medina lives in the McAllen area, near the Texas-Mexico border, she and her family were expecting to have her brother stay with them before continuing on to Kansas. She said she didn't know what to tell her children when he didn't arrive:

My children don't know that he is locked up yet. My nephews, my sister are all also sad because they know what happened.

When we spoke to her, Medina was still trying to locate her brother within the vast web of detention facilities, prisons and jails where immigrants are sent after being apprehended at the border. She and her family were apprehensive about what would happen to her brother:

We're pleading with God that the sentence they will give him won't be so much time, because he's young and that's so many years locked up there that he could use for some other productive thing. Imagine being locked up within four walls for so many years. I think it makes you depressed, the idea of what's going to be your future. Is your future going to be here locked up? What's going to happen? It is really sad.

Medina would like to see the sentencing reexamined. "If the crime is for crossing the border one or two times, and two times are already 10, 15

years... I don't think it's fair."⁵⁹

Medina doesn't see long sentences for re-entry or a border wall as posing much of a deterrent to immigrants determined to cross the border:

People are going to keep coming... There are some people who say, "We're going to put big bars beside the river so people won't cross." We, as human beings, are going to say, "How can we cross?" That won't be an impediment to us, you make a tunnel below or a ladder above and you cross.

Medina would like policy makers and those who have power within the system to realize the economic necessity behind why many immigrants come and that they are contributing to the community. "What we want is to work, to move our family forward, to advance ourselves, to give a future to our children, to give them what we never had ourselves," she said. "People that are continuing to support the government by continuing to work are not a burden. We come to work and we are contributing as citizens."

She sees recognizing these contributions as a solution to reducing the number of immigrants caught up in the immigration and criminal justice systems. "I think that one of the things that could be done is give undocumented people who are working the opportunity to obtain status or residency so they would be here legally."

EDUARDO JOSE GARZA⁶⁰

Eduardo Jose Garza is a father and community member in McAllen, Texas who was convicted of improper re-entry.

Eduardo Jose Garza has been in the U.S. for 14 years. He and his wife María Garza⁶¹ have three children and live near McAllen, Texas. Two years ago, he was tried for improper entry and sentenced to six months in prison, which he served in the Raymondville, Texas CAR prison, and the Houston and Laredo detention centers. He was then deported to Mexico. Most recently in January 2015, local police arrested him for driving without a license after a traffic stop. They held him at the Alamo police station, then transferred him to ICE custody in Mercedes. He was then transferred to Brooks County, which has a facility with a U.S. Marshals contract to detain

immigrants.

I told the judge that I have children here and everything and it's impossible to stay there [in Mexico] and leave my children here.

— Eduardo Jose Garza

Garza was brought to the federal court in McAllen on the charge of improper entry. There were 48 immigrants being tried in the same courtroom. Those who had no prior entries were given time served and deported immediately, while those who had entered before or had other criminal charges were given between one and six months in federal prison:

When you're there in the court, you feel bad... They treat you really badly. They don't talk to you how they should, as a human being. They bring you chained up as if you were a criminal.

He said he had only rudimentary legal representation. “The attorney only told me to plead guilty so that they would deport me as quickly as possible,” he said. “They locked me up for nothing else but being illegal here in the United States.” He was given a four month sentence, which he served in a total of six different facilities in Texas. They first brought him to a facility in Zapata, then to facilities in La Villa, Falfurrias, Paredes, and then Houston. He was at each facility for no more than one week, before spending most of the final month in El Paso, Texas. His wife was not able to visit during his incarceration because of the distance of the facilities from McAllen. He was deported to Mexico City.

When they were sentenced, the judge instructed the group not to return to the country again without authorization. Garza described his reaction:

When the attorney was translating, I told the judge that I have children here and everything and it's impossible to stay there [in Mexico] and leave my children here. After they deported me, I returned after 2 months.

Garza's incarceration and deportation were particularly difficult to deal with because his wife was pregnant when he was arrested. María Garza says that she got by selling food that she made. She also had help of neighbors, the community, and ARISE. Her landlords didn't make her pay rent during

I didn't get here in time. I came back immediately but my child had already been born. — *Eduardo Jose Garza*

the months that her husband was incarcerated and in Mexico. “I felt desperate,” she said. “It wasn’t easy... it’s frustrating... And more than anything there were so many questions from the children.”

“I didn’t get here in time. I came back immediately but my child had already been born,” Eduardo Jose Garza said. Reflecting on his time in Mexico, he said, “You feel powerless, when you’re over there and your family is here. There’s no way to explain it because it is painful to leave your family here.”

Garza would like to see an end to separating families and criminalizing immigrants who come to the United States to work. “[I would ask] that they don’t deport fathers of families anymore because it’s very hard for the children, without a father, they suffer a lot. That they leave people alone to work because that is the only thing they come to do here, to work and advance their family.”

GLADYS MONTEVERDE⁶²

Gladys Monteverde is an asylum seeker convicted of improper re-entry and serving a sentence at the Central Arizona Detention Center in Florence, Arizona.

Gladys Monteverde is a 41-year-old Mexican national. She first entered the U.S. at age five with her undocumented mother. Her entire family lives in the United States, in Casa Grande, Arizona. She has four U.S. citizen siblings, nine U.S. citizen nieces and nephews, two U.S. citizen children. She and her U.S. citizen partner, Flory Ibarra Sanchez,⁶³ have been together for 16 years.

Monteverde had a tumultuous childhood and youth. She suffered physical and verbal abuse from a nanny her mother paid to care for her while working in the Arizona/Mexico border town of San Luis Rio Colorado, Sonora. Monteverde was eventually left with the nanny full-time while her mother left to find work in the U.S. Her mother returned and brought her to the

United States, where her mother was in a relationship with a physically abusive man. They moved to Eloy, Arizona, to escape this abusive relationship. Her mother soon met and married a man who abused drugs and alcohol and would beat her badly. Her mother's new husband would taunt her that if she called the police, they would only deport her.

When Monteverde was in 12th grade, she was the victim of a vicious kidnapping and rape. She was held in a house in Mexico for approximately five days, until she was rescued by the Mexican police. Monteverde was taken to the hospital. The man was eventually arrested and sent to prison in the U.S. He has since been released and deported to Mexico. One year later, she was raped again by the father of children she babysat. In the course of the assault, he pursued and threatened her with a machete.

Monteverde continued to live with her family in Casa Grande. She is terrified when she thinks about her first abuser in Mexico and of being deported there herself. She says that she often sleeps with a knife and that she has never felt safe since these events. She dropped out of high school and never has returned or earned a GED. Sometime around 1995, she began to abuse crack cocaine and meth. She began shoplifting in order to support her habit. She had her two sons in 1999 and 2000. One was taken from her by Child Protective Services, and the other lives with her mother.

In 2000, Monteverde met Flory Ibarra Sanchez, the woman who has been her partner since that time. Ibarra Sanchez is a U.S. citizen. Monteverde's family accepts Ibarra Sanchez as her partner.

In 2005, Monteverde was arrested on an assault charge after a fight with Ibarra Sanchez. Police discovered a series of shoplifting and other offenses that rendered her deportable. She was taken to Florence Service Processing Center for removal proceedings. She was not represented by an attorney, but did receive limited services from the Florence Project, a nonprofit providing free legal services to detainees. Monteverde said she was incarcerated in Florence SPC for ten months and saw the judge only one time.

When Monteverde was ordered deported, the judge warned her that to return unauthorized to the U.S. would be a criminal offense. But, she said she didn't think about what that meant at the time because of the shock and

disbelief that she would be deported to Mexico. After several days at the Florence SPC, she says she was approached by ICE officers who told her she “had to” sign a number of papers. She signed even though she didn't want to and felt that she shouldn't. She was deported that evening to Nogales, Sonora. She said about that time:

My brother had someone he knew in Nogales, Sonora and he told me to call them and go stay with them. I did that and they let me stay with them for a couple of nights, but I was so scared. I had no family, no one in Mexico.

I couldn't really stay too long with this family. And there was nothing else for me there in Mexico. So, my sister and step-daughter came to get me and bring me back. They brought someone else's papers with them, and I used them to cross through the port of entry in Nogales. I have a small chain tattoo on my wrist, and they stopped me to ask about that, to ask if I was in a gang. Other than that, God helped me and I managed to get across. We went straight back to my mom's house. I was so happy to be home.

Over the next few years, Monteverde lived in Casa Grande with Ibarra Sanchez and was in and out of sobriety. She was arrested for shoplifting again in 2006. Despite her record and previous deportation, immigration officials did not come for her at the jail. She received three years of probation and successfully completed it.

In 2012 she was again arrested for shoplifting. This time, she had a private lawyer. At her hearing, the prosecutor said there was an ICE detainer placed on Monteverde at the jail, but that the ICE officer had failed to pick her up. The judge postponed the hearing for another date. Monteverde said the judge told her at the time, “I am going to release you today, because ICE hasn't shown up, and I will ask you to return on another date, and I want you to understand that ICE will be here to pick you up on that date.”

Monteverde told her attorney that she would not return. “I told my lawyer, ‘I am so sorry, but I cannot go back to court. I cannot be deported again.’ My lawyer said, ‘You know you will have a warrant put out for you, right?’” Monteverde knew she could not face being deported again.

They found her in the closet, pointed their guns at her and yelled at her to “stay down.” She was terrified.

At this time, Monteverde and Ibarra Sanchez were living in a motel in Pinal County, Arizona. Several weeks after Monteverde missed her court date, U.S. Marshals showed up at the motel. They knocked and announced themselves as Marshals looking for her. Monteverde hid in the closet and Ibarra Sanchez talked to the Marshals outside. They pushed her aside, broke down the door, broke a few windows, and entered the small room wearing black face masks and with their weapons drawn. Monteverde recalls that they were yelling and very loudly. They found her in the closet, pointed their guns at her and yelled at her to “stay down.” She was terrified. She thinks they said they had a warrant to deport her, but was too scared to remember.

The Marshals handcuffed her and brought her to the Casa Grande police station where they said ICE had issued a detainer to hold her in custody until ICE agents could pick her up. They read her Miranda rights and then took her to Florence SPC where she was put in a cell alone. After some time, she was taken to a small office with a few officers in it. One of them looked her up in a database. They discovered her prior deportation and presented her with what she called “a pile of papers” to sign. When Monteverde asked if she had to sign them, she said one officer said yes, but another told her, “No, you don’t — it makes no difference, because you will be deported whether you sign or not.” Very soon after, she was on the bus headed toward the Nogales border. Nobody had asked if she had family in the U.S., or if she feared returning to Mexico. She was in Mexico that night.

When Monteverde talks about being deported she cries and is unable to articulate in detail what it felt like to be alone in Nogales. She only repeats, “I was so scared. I was alone. I have nobody there. I love my family.”

Monteverde remained in Nogales, Sonora for a couple of weeks, boarding

I was so scared. I was alone. I have nobody there. I love my family. — *Gladys Monteverde*

again for a short time with a local family. Again, family members helped her cross back into the U.S. through a port of entry with someone else's documents.

Monteverde returned to Casa Grande. Again, she alternated between sobriety and holding down a job and falling into drug abuse. In 2014, she and Ibarra Sanchez got into a fight at a motel, and the police were called. They were both cited and released. Over the next few weeks, however, Monteverde said U.S. Marshals came to their motel room looking for her. Twice she hid and they did not find her. She was so afraid that she would be caught and deported again, that she decided to go live with her mother.

One night she and her sister got into a fight and Monteverde's son called the police because he was afraid they would hurt each other. The police came and discovered that Monteverde had a warrant out for a previous probation violation. She was taken to the Florence County Jail in Arizona.

This time she was charged with improper re-entry. Monteverde was assigned a federal public defender, who she said appeared with her in court four or five times prior to sentencing, but never spoke to her until the day of the sentencing. Every time she went to court she would plead with the judge to give her more time. She told him she had her whole family in the U.S. and she was trying to find a lawyer to help her with her immigration case. Monteverde said the judge had nothing to tell her about immigration issues, did not ask her if she feared to return, or tell her whether she would ever see an immigration judge. Monteverde believes the judge didn't address her concerns because it was criminal court and he didn't know about immigration. Monteverde said that she called the federal public defender's office to ask about immigration issues, but was told again and again that nobody could help her. Monteverde wrote to many lawyers, the Department of Homeland Security, and the United Nations refugee agency looking for help.

Finally, her federal public defender told her that they would have to go forward because the judge would not grant more continuances. The day of her hearing, Monteverde said that the public defender spoke with her for approximately five minutes before the hearing and told her she would accept a plea deal of two years incarceration for improper re-entry. She said she was not given an option, but that the public defender was very nice.

Monteverde said she thinks she was told in court she would serve only 50 percent of the time on the re-entry conviction. She began her sentence at Arizona's Perryville State Prison Complex. There, she said an officer told her she did not qualify for half time because she had two prior deportations. Monteverde still does not know how much time she is actually supposed to serve. So far, she has served six months at the Pinal County Jail before accepting the plea deal, and six months in Perryville. She was then moved to Florence Central Arizona Detention Center where, at the time of this interview, she had served four months.

But why take us away from our families and the only things we know? I don't understand that... I never dreamed all my life that this was possible. — Gladys Monteverde

When asked how she thinks about her future, Monteverde looked blank and had no response. Suddenly she smiled and said cheerfully "My brother came to see me! My family, they all miss me. They want me home. They will do anything." When asked again what she thought about what was going to happen next, she looked lost and she said, "I can only think of one day at a time. Maybe I should do it differently... But I know that my next stop is immigration and I have to say that I don't want to be deported. I have to go in front of a different judge and tell him I am sorry."

When asked how her family felt about her situation, Monteverde smiled and said:

My family is awesome. They will always help me. My mother says, "Mija, if they deport you, I will send you used clothes to sell!" I just trust in God that it will all be okay.

When asked how she would change the system if she could Monteverde said:

You know, I understand that they have to punish us, and that's ok, they can punish us. But why take us away from our families and the only things we know? I don't understand that... I never dreamed all my life that this was possible.

Monteverde does not believe that laws will keep people from returning

to their families in the U.S. She will try to return if she is deported again, because she feels that she has no other choice.

CECILIA EQUIHUA & FRANCISCO EQUIHUA LEMUS

Cecilia Equihua is a current J.D. candidate at Loyola Law School in Los Angeles. Her father, Francisco Equihua Lemus, was convicted of improper re-entry and deported. He currently runs a business in Mexico.

In 2001, Francisco Equihua Lemus, who had no prior record, was deported after serving four years in prison for the manufacture of methamphetamine.

Equihua Lemus came to the U.S. from Mexico as a young adult in the 1970s. He became a lawful permanent resident in the 1980s. After marrying a U.S. citizen, he had two U.S. citizen daughters, Cecilia and Lili Equihua.

When Cecilia Equihua was 7 years old, her parents separated. In 1997, after her father's arrest, Equihua and her younger sister, who were living with their father, were placed into foster care until the court approved their reunion with their mother. Once approved, the girls were taken to Nevada, where their mother lived.

Francisco Equihua Lemus returned to the U.S. because he wanted to better support his daughters and to be near them. Finding it difficult to support himself in Las Vegas, he moved back to California. Equihua Lemus was then able to contribute to financially support Cecilia and Lili. Although Equihua Lemus' work as an undocumented construction worker was demanding, he drove more than 200 miles to Las Vegas every Sunday to take his daughters to church. He did this for nine years until he was deported for the second time in 2010.



“I wasn't aware of everything my father had to sacrifice because I lived with my mother, and my father wasn't one to share his burdens,” said Cecilia Equihua. It wasn't until she was in college when she saw where her father lived — in a shed in someone's backyard. “It was very shocking that he

<< *Cecilia Equihua and her father, Francisco Equihua Lemus*

chose to live in those poor conditions just to be with my sister and I. I hadn't realized the day-to-day fear, moment-to-moment stress that he endured to be here," she said.

While living in the U.S., Equihua Lemus' father in Mexico became very ill and eventually passed. Cecilia said her father, who was close to his parents, chose not to return to Mexico to see his father, because he knew he would not be able to come back. "He forewent all of that for my sister and I," she said.

In November 2010, while driving home from visiting his daughters in Las Vegas, Equihua Lemus was pulled over for a broken taillight in Rancho Cucamonga, California. Highway patrol brought him to the local police station, where his fingerprints revealed his past conviction. The police called immigration authorities, and he was quickly deported. Equihua Lemus, who was desperate to be reunited with his daughters, returned to the U.S.

Cecilia, unaware of her father's plan, did not learn he that left Mexico until family members called her very upset and said her father attempted to cross the border and now was missing. Cecilia was devastated, and postponed one of her December law school finals while the family searched for her father. A week or two passed without word from her father when finally, she received a call from the Central Arizona Detention Center in Florence, Arizona. Her father had been apprehended while trying to cross the border, and was being charged with improper re-entry. She visited her father while he was detained there. She said of the experience:

Even for visitors, the facility wasn't inviting. It wasn't comfortable. They had us rounded up in a bus at the front of the facility and escorted by officers. Then, we were instructed to exit the bus and line up against the wall. It was as if we had done something too. I found it offensive.

Cecilia also tried to contact her father's public defender, who she said never returned her calls despite her father asking the public defender to speak with Cecilia. "I know that my father was confused in the process. I would ask him, 'What's going on? What was said?' And he couldn't tell me." Equihua Lemus was detained for six months while his case was in progress. "They treated me in a really ugly way in the court," he said. He was sentenced to

To me, what's important isn't the money," he said. "It's that I can't see my daughters as I would like, to be there for their most important moments — their end-of-year celebrations at school, their birthdays — that's what distresses me about being here.

— *Equihua Lemus*

serve two years and transferred to Cibola County Correctional Center in Milan, New Mexico.

Equihua Lemus is now living in Michoacán, Mexico. Cecilia is able to keep in contact with him, mostly by phone, though she visited once for a day. Equihua Lemus tries to keep himself busy with work, but Cecilia says he does miss them greatly. "I think that some days are good, but on others, he gets tempted to come back to be with us. I think it is really difficult for him, but he is really positive. He's making the best of it," she said.

"I got here and I felt like I had landed on another planet," Equihua Lemus said. "But I'm one of those people who knows how to adapt myself quickly to different people and customs." He described the peculiar experience of returning to Mexico after 37 years of living in the U.S.:

I got here and it was curious because the kids that were my friends here in Mexico when I was here were now 50-year-old men and I didn't know them anymore. Now they all had families, they were all old. I just tried to adjust and get to know people but I didn't go out much.

In the three years since he was deported, this has gradually changed and he now runs a successful business with multiple locations in Mexico. However, Equihua Lemus has not entirely assimilated to life in Mexico. "More than anything the food is hard to get used to," he said. "When you trade a plate of pancakes for a plate of beans, that part is really difficult." He misses the language and customs of the U.S., most of all because they remind him of his daughters. "Sometimes when somebody comes here and speaks English, I'm like, 'Wow,' because I feel like I'm in the U.S.," he said. "It makes me feel like I'm living in the U.S. with my children."

Although he prides himself on being someone able to adapt, the experience has been taxing. "Sometimes I feel the urge to leave here and try to

go to the U.S. again, but January 8, [2016] is three years since I went back to Mexico,” Equihua Lemus said. “In those three years, I’ve done really well economically but I look in the mirror and I look older.” While Equihua Lemus’ ability to sustain himself after being deported to Mexico is a huge achievement, there isn’t money left over to send back home.

For Equihua Lemus, the most difficult part of living in Mexico is the forced separation from his daughters. “To me, what’s important isn’t the money,” he said. “It’s that I can’t see my daughters as I would like, to be there for their most important moments — their end-of-year celebrations at school, their birthdays — that’s what distresses me about being here.” Despite the risks, he still often thinks of returning to the U.S. to visit his daughters. “I’ve told my daughter, ‘I want to come visit you. What if I come quickly?’ And she tells me, ‘No Dad, because then you’ll get into trouble and they’re going to lock you up again.’”

For me it would be a pleasure to be able to visit them. I was thinking if I could pay money as a deposit, like a bond, and go and visit my daughters for just a week, or get a Visa to go and visit them for three days, even if they would charge me \$50,000 or whatever amount, I would do it. — Equihua Lemus

Equihua Lemus dreams of a legal way that he could return to the U.S., even temporarily. “I love my daughters. They are a joy, and not only because they are my daughters. They’re everything for me in my life,” he said. “For me it would be a pleasure to be able to visit them. I was thinking if I could pay money as a deposit, like a bond, and go and visit my daughters for just a week, or get a Visa to go and visit them for three days, even if they would charge me \$50,000 or whatever amount, I would do it.” Despite his desire to return, the appeals of his daughter have so far persuaded him not to try crossing the border again. “I haven’t tried to come back,” he said. “Ceci is the one who tells me not to come.”

For Cecilia, the long separation from her father over multiple parts of her life has taken its toll:

I’ve missed many opportunities you’re supposed to have with your dad: where he teaches you things, helps you with homework, attends your

graduations, grounds you, gives you advice about boys. All of these things that people may take for granted, my sister and I miss out on, and my father misses out on them too.

Equihua Lemus also struggles with the fact that he cannot financially support his daughters. “I don’t tell him if I’m struggling to make a payment because I know he beats himself up over it, and I don’t want him to be tempted to come over again,” she said.

“I think for my sister and my father, it’s even more tragic because she had less time with him,” Cecilia said. Dealing with their father’s absence and navigating an unjust legal system continues to be a challenge. “The unfairness of it all makes me very angry. So, I’ve had to figure out how to cope with it in a healthy way,” she said.

Cecilia believes that part of the solution to the problem of disproportionate immigration consequences for criminal conviction is to provide discretion to judges. She’s appalled by recent legislation proposing a five-year mandatory minimum for improper re-entry:

Improper re-entry should not be a conviction at all. The entire immigration system needs to be carefully thought through. If proponents of these draconian laws saw beyond the paper to see what the laws are doing, they would see that more harm than good is happening. They are just making a bad situation worse.

Improper re-entry should not be a conviction at all...If proponents of these draconian laws saw beyond the paper to see what the laws are doing, they would see that more harm than good is happening. — Cecilia Equihua

24 A WINDFALL FOR PRIVATE PRISONS ON THE TAXPAYER'S DIME

It appears impossible to accurately calculate all of the expenditures that U.S. taxpayers have been bearing since the start of Operation Streamline and the simultaneous increase in felony re-entry prosecutions. Important cost elements, such as the expenses incurred for the court process itself, are elusive. We asked the court officials we interviewed if they knew where we might find any official cost reports, but no one seemed to think that any such existed.

Tucson Magistrate Judge Charles R. Pyle estimated that Operation Streamline in Tucson alone was costing taxpayers more than \$180 million a year:

The cost for attorneys is high, but so is cost of whole program. Fifteen lawyers working 20 days a month at \$600 or \$700 bucks a lawyer, means we spend over \$10,000 per day just for the lawyers. Given 20 days worked per month, that equals more than \$200,000 per month — as much as \$2.5 million per year. With transportation and everything else — housing, medical care — we're paying \$15 or \$16 million a month to the Marshals when the numbers are at peak. But if you think it's an important initiative, then cost figures wouldn't be the most salient issue.

On the other hand, District Judge Alia Moses, the originator of the very first Streamline court in Del Rio, Texas, in 2005, claims that the money that might be saved if the process was terminated would be minimal. She seems to argue that Streamline expenditures are more or less built into the overall costs of running the Del Rio Federal Court:

The government does not save much money by not prosecuting people

The cost for attorneys is high, but so is cost of whole program.

— Judge Charles R. Pyle

for improper entry or re-entry. Judges get a salary whether they hear those cases or not. People think that immigrants given voluntary return are taken directly to bridge. That's not true. They are processed and have to wait in detention. The only difference is that people charged with these offenses come to court, so the cost savings is minimal in the grand scheme of things. I refuse to have people use me or my courtroom as an excuse to not bring these cases. I'm not in a position to say don't bring a case. The taxpayers are paying my salary regardless; I will work the extra time.

Tucson Magistrate Judge Bernardo P. Velasco argues that even if the costs are substantial, they are dwarfed by the size of the overall federal budget. He adds that the expense of prosecuting migrants is far from the most salient issue in the minds of most Americans:

You could try to add up the expenditures for prosecutors, defense attorneys, private prisons, what have you, and it might look like a big number. But on a percentage basis these expenditures look minuscule. The entire federal judiciary system is just one-tenth of one percent of the federal budget. You could shut down the courts and never really affect the budget. You can argue cost issues, but most people will say, "Whatever the cost, this needs to be done. It just doesn't matter what it costs." If a person has been convicted of a crime and has been deported, who cares what it costs?

25 A CONSERVATIVE ESTIMATE OF INCARCERATION COSTS SINCE 2005

Even if sufficient data were easily available for each step in the process, from apprehension to the point when a migrant is handed over to Immigration and Customs Enforcement (ICE) for removal, a thorough analysis of the costs incurred by migrant prosecutions would probably require many hours of work by a professional price economist. Nonetheless, we made an effort — using as much information as was obtainable from the U.S. Marshals Service (USMS) and the federal Bureau of Prisons (BOP) to calculate a conservative estimate of expenditures for the jailing and imprisonment of migrants between 2005 and 2015.⁶⁴ This conservative estimate tops more than \$7 billion in incarceration costs since 2005.

Table 3. Estimated Expenditures for Incarceration of Migrants Prosecuted for Improper Entry and Re-entry 2005-2015

Year	BOP	USMS	Total
2005	\$366,812,927	\$ 216,894,996	\$583,707,923
2006	\$374,824,547	\$ 216,894,996	\$591,719,543
2007	\$399,241,449	\$216,894,996	\$616,136,445
2008	\$395,188,914	\$ 216,894,996	\$612,083,910
2009	\$448,460,641	\$182,470,689	\$630,931,329
2010	\$468,548,524	\$190,644,093	\$659,192,617
2011	\$533,065,718	\$ 216,894,996	\$749,960,714
2012	\$506,866,832	\$ 206,235,133	\$713,101,966
2013	\$467,165,573	\$226,755,553	\$693,921,126
2014	\$413,142,725	\$ 196,219,570	\$609,362,295
2015	\$381,447,692	\$176,614,265	\$558,061,957
Total	\$4,754,765,543	\$2,263,414,282	\$7,018,179,824

These huge costs are in addition to, not a replacement for, the costs of ICE's civil detention and processing.

It seems important to note here that the policy of prosecuting migrants was not introduced as a substitute for civil removal of migrants under the civil immigration system. Prosecution only postpones the removal process by months and (in numerous cases) years. These huge costs are in addition to, not a replacement for, the costs of ICE's civil detention and processing.

26 RESISTANCE AGAINST MIGRANT PROSECUTIONS

Many critiques of Operation Streamline have emerged since its inception in 2005, even from powerful players within the system. Judge Robert Brack, who presides over a federal court in Las Cruces, New Mexico, has been called “America’s Busiest Judge” because of the volume of defendants he has sentenced. He has been an outspoken critic, asserting, “We’re spending a lot of time catching these folks when we could concentrate on those penetrating our border to do us harm.”⁶⁵ He has also advocated a “Judge Brack exception,” saying that anyone separated from their family because of being sentenced in his court should be allowed back into the U.S. and given legal status.⁶⁶

From the program’s inception in Tucson, there were strong dissenting voices, such as that of Jon Sands, the head public defender who, according to Judge Charles Pyle, “called it [Streamline] a moral outrage; that it violated the Constitution. He vowed that his office would contest it vigorously with litigation.”

There were also other officials within the federal justice system who believed these prosecutions to be a drain on resources that could be better used towards other types of cases. Former Arizona U.S. Attorney Paul Charlton, though a strong believer in deterrence, believes that federal resources should

be used for offenses difficult to be prosecuted in other jurisdictions such as public corruption cases.

He called the increase of immigration prosecutions in Tucson “a great drain on resources.” Still

<< Tucson activists block a bus carrying migrants to be prosecuted at the federal courthouse, stopping Operation Streamline for a day (Photo: Paige Winslett)



others, like Judge Bernardo P. Velasco, see Operation Streamline as an outdated procedure that has continued despite a lack of enthusiasm for the policy. “The public’s interest in Streamline has declined over time,” Velasco said. “Now it’s just something we’re doing whether we like it or not.”

However, there are a number of political and financial incentives for some powerful individuals and institutions for continuing these prosecutions. Recently arriving immigrants are often used as political pawns, either through nativist rhetoric to boost party popularity or as bargaining chips to be traded for some intended reform for immigrants who have already been living in the U.S.

All of the Criminal Alien Requirement (CAR) prisons where those convicted of long re-entry sentences are sent are run by for-profit prison corporations who make money off every bed filled. Many of the facilities used by U.S. Marshals are also privately operated, when county governments subcontract their jail operations to private prison corporations. In these cases, the county government also has a profit incentive to keep the beds filled.

Additionally, the infrastructure required to apprehend, detain, prosecute, defend and incarcerate so many additional people has necessitated staffing increases throughout the entire system, from Customs and Border Protection (CBP) agents, prison guards, private courtroom security, prosecutors, federal public defenders and private defense attorneys.

The most powerful resistance to this system has come from those directly impacted by prosecutions themselves. There have been several revolts and hunger strikes by immigrants serving lengthy sentences in CAR prisons. Most recently, in February 2015, immigrants incarcerated at Willacy County Correctional Center in Raymondville rendered the facility uninhabitable after an uprising in protest for inadequate medical care, filthy toilets and maggot-infested food. The facility was closed, nearly all staff dismissed, and those incarcerated were sent to other fa-



itable after an uprising in protest for inadequate medical care, filthy toilets and maggot-infested food. The facility was closed, nearly all staff dismissed, and those incarcerated were sent to other fa-

<< Tucson activists perform street theater Operation Streamline court with puppets outside the federal courthouse (Photo: Steve Johnston and Paige Winslett)

cilities or deported.⁶⁷

Reports surfaced from those events that reveal more insidious aspects of the system incarcerating immigrants: The uprising was sparked by a heavy-handed response by a guard to a peaceful protest, and during the protest, immigrants in solitary confinement nearly burned alive because of negligence by first responders. This was the fourth uprising at a CAR prison since 2008.⁶⁸

In March 2015, immigrants at the Reeves County Detention Center went on hunger strike after they were placed in solitary confinement after speaking with an attorney pursuing a lawsuit against the facility. The attorney was suddenly denied access to the facility and his number was blocked so he could not receive calls from inside the prison.⁶⁹ Each of these incidents of mass resistance cast a spotlight on the injustice of migrant prosecutions and their incarceration in the inexcusable conditions at CAR prisons, and raised the prominence of the issue among advocates.

Additionally, though the vast majority of those facing re-entry charges plead guilty in exchange for a lower sentence, a rare few are fighting their prosecution. One of these is Portland immigrant rights activist Francisco Aguirre, who was charged with improper re-entry in 2014 and whose charges were finally dropped in June 2016 after a national campaign. He



U.S. Human Rights Conference participants call for an end to migrant prosecutions on the steps of the federal courthouse in Austin, Texas on the 10th anniversary of Operation Streamline. (Photo: Cristina Parker)

believes that the re-entry charge was in retaliation for taking sanctuary in a church to protect himself from deportation and organizing for an end to collaboration between immigration agents and local law enforcement. He views pleading not guilty to the re-entry charge as necessary resistance to show that the immigrant community cannot be silenced by further criminalization.

While his case is exceptional in terms of the likelihood that it was politically motivated, he has much in common with others charged with improper entry and re-entry such as the impact of the charges on his family and the incarceration time he risked for pleading not guilty. This on his family and the incarceration time he risks for pleading not guilty. This makes his decision a powerful act of resistance to the system of migrant prosecutions. (Read more about Aguirre's story on page 162.)

A number of organizations concerned with immigrant rights have become involved in pushing back against Operation Streamline and improper entry and re-entry prosecutions. Particularly in Tucson where mass numbers of immigrants are still officially prosecuted through Operation Streamline and "fast track" hearings that combine multiple stages of typical court proceedings, activists and attorneys have been organizing for years to resist this policy.

The End Streamline Coalition in Tucson has engaged in protests at the federal courthouse, court observations and creative direct actions for years. This has included an October 2013 civil disobedience action in which activists chained themselves to the bus bringing immigrants to court for prosecution through Streamline. The action succeeded in stopping the prosecutions

for the day. Another example from the End Streamline Coalition is a December 2015 action in which clergy interrupted Streamline proceedings inside the Tucson courthouse. These efforts have elevated some com-



<< Austin activists perform a street theater rendition of Operation Streamline court proceedings (Photo: Cristina Parker)

elling stories of individuals prosecuted through Streamline in the Arizona media and raised local awareness of the policy. Advocacy organizations and academic institutes have produced reports highlighting troubling aspects of the policy and making recommendations to modify and ultimately end the policy.

Legal challenges have also played a large role in winning incremental changes in Operation Streamline, winning at least minimal due process protections. The most significant of these was the December 2009 *United States v. Roblero-Solis* decision by the 9th Circuit Court of Appeals, which held that defendants must respond “guilty” or “not guilty” to their charges individually rather than *en masse*.⁷⁰ This slowed mass prosecutions slightly, but the decision did not outlaw the practice used today of asking defendants one question and having each respond in quick succession.

James Duff Lyall, of the Tucson ACLU, suggests that further legal challenges might include prohibiting the criminal prosecution of people with valid grounds for asylum in the U.S. This concern was highlighted in a 2015 report about Operation Streamline by the DHS Inspector General.⁷¹

Legal challenges have the potential to improve due process or winnow down the number of particularly vulnerable individuals ensnared by prosecutions. But a much broader policy solution is necessary to end, or even dramatically reduce, these unnecessary prosecutions. Lyall points out that Operation Streamline is an entirely discretionary policy:

The folly of prosecuting and incarcerating migrants en masse is clearly an issue that calls for broader policy solutions. We didn't used to — and we don't have to — prosecute tens of thousands of migrants a year, it was a policy decision to do that. The Department of Justice and the U.S. Attorneys in the districts that span the border have a great deal of influence over those policies, and those officials should be pressured to adopt more humane, rational priorities than those currently in effect in places like Tucson.

Prior to December 2015, the 10th anniversary of Operation Streamline, a national coalition of organizations began meeting to form strategy to achieve these policy changes. They identified the primary decision makers

with the ability to make these changes as the Department of Justice (DOJ) and U.S. Attorneys in border districts. In the summer of 2015, they sent a letter to Attorney General Loretta Lynch calling for an end to improper entry and re-entry charges, consistent with the DOJ's efforts to reduce the federal prison population. One hundred and seventy-one national, state and local human rights and faith-based organizations were signatories, endorsing the call for ending migrant prosecutions.⁷²

These people need to be included in immigration reform.

— Sean Riordan

Looking to the DOJ and the judicial branch for reform follows the example of recent deprioritization of other federal charges. For instance, in early 2014, the U.S. Sentencing Commission took two unanimous votes — one on an amendment to reduce drug sentences, and the other to apply these changes retroactively. Congress did not take any action on these recommendations, so they became binding policy beginning November 2014.⁷³

There are many within the courts who believe that the solution must come through congressional legislation rather than from the DOJ. Judge Bernardo P. Velasco, a magistrate judge in Tucson, Arizona, is critical of efforts by advocates to end prosecutions by targeting the courts:

The advocates here haven't really motivated the courts to change anything. And those who hate the program haven't done anything to change those truly responsible: our elected officials. This problem is about who we elect to public office, and how we draw our congressional districts. This is the end result of political gerrymandering and general elections, not of judicial functions.

Sean Riordan, a federal public defender in the Eastern District of California, also believes that immigration reform is necessary:

The issue of illegal entry/re-entry ties into immigration reform. We have tons of people here who need a second chance, an opportunity to legalize, and there is no way to do that now. And now they are felons. Their only crime is returning illegally. What needs to happen is immigration reform. These people need to be included in immigration

reform. We can spend all this money wrecking their lives or let them legalize and come out of the shadows.

While it would be ideal for the U.S. Congress to pass legislation that allowed people who are currently prosecuted on improper entry and re-entry charges to enter the country legally, there is no evidence in recent congressional efforts to suggest that this could be the outcome of “comprehensive immigration reform,” given the prevailing political climate. Rather, advocates have been obliged to play a defensive role in order to prevent new mandatory minimums or the extension of policies that further criminalize migrants in the name of national security.

In 2013, when Sens. Jeff Flake and John McCain attempted to extend Arizona-style Operation Streamline policies to other border districts, the ACLU brought a former magistrate judge and local police officials to Congress in order to dissuade members of Congress from supporting the measure. According to Riordan, local police officials testified that, “We are doing it ‘right’ here in San Diego and we don’t want Operation Streamline.”

The current political forces at play in the national debate concerning comprehensive immigration reform force many reform advocates to mobilize opposition to further criminalization measures, rather than to mobilize support for improving existing policies.

Donna Coltharp, Deputy Federal Public Defender in the Western District of Texas, says that harsher enforcement measures may have been introduced as a “trade-off” by politicians hoping that, in exchange, they could “accomplish something positive on the immigration front.” However, the intended comprehensive immigration reform never emerged, so only the harsh enforcement policies remain.

According to Ray Ybarra, a private attorney who represents migrants in Phoenix, reform advocates must recognize who within the system makes the decisions regarding these prosecutions, and focus their collective energy there:

It is a pretty fair characterization that judges do not have a lot of power. They have some discretion but they can’t vary their sentences a lot. Judges can only decide on the case before them. The question

is who puts the cases before the judges, who makes those charges? Border Patrol writes the charges asking for the prosecution and the U.S. Attorney makes the decision to go forward with the prosecutions. We need to focus on the Border Patrol and the U.S. Attorney's Office.

FRANCISCO AGUIRRE'S RESISTANCE STRUGGLE

Francisco Aguirre is a father and long-time organizer with Voz Worker's Rights and Education Project in the Portland, Oregon, area who was able to get his improper re-entry charge dropped after a nearly two-year struggle.

Francisco Aguirre has been in the U.S. for 21 years, since he left El Salvador at age 16 due to political persecution. "I never thought I would have to come to the U.S.," Aguirre said. "I decided when I saw that I couldn't live there, that my life was in danger."

Aguirre's first encounter with the immigration enforcement system was in 2000. He was working for Workers Organizing Committee, an organization that worked with day laborers in Portland, Oregon, as their only Spanish-speaking organizer. In the course of this work, he met two men working as day laborers who claimed it was their first day in town, and that they didn't have a place to stay. "I decided to let them stay at my house with the idea that the next day I would find them a place to stay," Aguirre said. At 4 a.m., the police showed up at his house and arrested Aguirre along with the two men, whom they accused of dealing drugs.

Immigration took me into custody and then they released me for 15 days. They gave me an option that if I testified in court against those two guys, I could go free. But I said there is nothing that I can testify because I don't know them.



Because Aguirre wouldn't testify, they took him into custody and charged him with the same offenses as the other two men. After spending a year in jail, most of

<< *Francisco Aguirre stands with his wife and daughters at Augustana Lutheran Church*

the charges against him were dismissed. He was offered a deal: If he pled no contest, he could go free. He didn't have the money to pay a private attorney. The court-appointed lawyer told Aguirre that it was not an admission of guilt, and did not warn him that it is treated as such by immigration officials. He spent an additional 90 days in jail after accepting the no contest plea and was transferred to Immigration and Customs Enforcement (ICE) custody and held there for one year and 3 months before being deported to El Salvador.

He returned to Portland right away because he did not feel he could safely remain in El Salvador. He later met his wife, had two daughters, and began regularly attending Augustana Lutheran Church.

In August 9, 2014, a county sheriff's deputy stopped Aguirre on suspicion of driving under the influence. He was given a date to appear in court, but was allowed to return home. However, in September, ICE agents came to his house and tried to take him into custody. He refused to open the door because they didn't have a warrant. He would later take sanctuary at Augustana Lutheran Church in Portland, Oregon, on September 19.

Aguirre spent 81 days in sanctuary at the church. On November 6, he and his supporters went to a hearing in Clackamas County for his charge of driving under the influence. He was hoping to be allowed to enter a diversion program. What he didn't know is he was also facing federal charges for having re-entered the country in 2000. A federal judge had issued an arrest warrant on for Aguirre October 1st for the federal re-entry charge. "It was a surprise, we didn't know," Aguirre said. "Right away they put me in handcuffs."

He was transferred to Multnomah County after his hearing and held overnight. Aguirre said of this experience:

I never thought that they would be taking me into custody because we didn't know that there was a federal warrant against me. Now I'm being threatened... because I re-entered without proper documentation. I'm being charged with re-entry and they are telling me I could get 20 years in jail.

Aguirre said the shock of the re-entry charges touched more than him

The community helped us at the beginning with paying the rent but I know people have their own things to deal with... They're always cutting the electricity off and when we get the money we reconnect the service. — *Francisco Aguirre*

and his supporters.

There were two officers who were transferring me from Clackamas County to Multnomah. One of them had tears in his eyes. I saw him and I turned around and I said, "It's okay to cry man, I know you can feel the injustice that is going on." He didn't answer me but I could see he was crying. A lot of people knew about what was going on.

His initial appearance for the federal charge was held the next morning. Aguirre remembers many U.S. Marshals agents present in the courtroom.

The first appearance was very intimidating because they had me in handcuffs — both hands and legs. My arms were tied up to my body and I was in the jail uniform with sandals and they asked me not to say hi or look around at anybody. If I did, that would be another charge. So I avoided saying anything to anybody in court. In court, the prosecutor did attack my record from a long time ago. He even accused me in court and in the media. He said that I was a drug dealer and that I was still selling drugs.

Aguirre said that the judge questioned that accusation because of Aguirre's prior testimony that he hadn't committed the crimes. Prosecutors said Aguirre was a danger to the community. If the judge had agreed, Aguirre would have been incarcerated while he fought the charges. Instead, the judge ordered him to be released the same day and ICE dropped the detainer they had placed on him when he was arrested.

Aguirre faced the threat of 20 years in a CAR prison — the maximum sentence for improper re-entry. He decided to plead not guilty to the re-entry charges although taking his case to trial presented a risk of receiving a much longer sentence if he lost. The U.S. Attorney's Office did not offer a plea deal, nor did Aguirre or his attorney request one:

We believe that the first time they sent me back it was not a lawful deportation. So many mistakes were made the first time they sent me back, and that's why I'm pleading innocent and requested that the case be dismissed.

His attorney's first application to dismiss the charges was denied, and he had three court hearings, drawn out over nearly two years. After his case gained the attention of national advocates, they were able to meet with the U.S. Attorney, and Aguirre's reentry charges were finally dropped in June 2016.

Aguirre believes that the re-entry charge and long sentence being threatened by the government were in retaliation for his very public organizing and resistance to the immigration enforcement system. "I believe they're threatening me because of the work that I do," Aguirre said.

I made my living here, I've got my daughters, my wife, I don't have anything else in any other country. Everything that I have is here. Why should I not fight for the freedoms and for the safety of my community? — *Francisco Aguirre*

Aguirre fought re-entry charges for nearly two years while living at home under supervised release. The extended legal process took a huge toll on Aguirre's family, financially and emotionally. One of the terms of his release was that he could not work:

These people really don't understand the tragedy they create by doing this to our communities. It's really hard. The community helped us at the beginning with paying the rent but I know people have their own things to deal with... They're always cutting the electricity off and when we get the money we reconnect the service.

Aguirre says his entire family has been targeted for heightened surveillance and investigation:

We were getting threatened by local authorities, the Fairview police. They were chasing us everywhere we go, but I stopped and I questioned them why they were chasing us. They stopped us and questioned my wife's immigration status. They know who we are, because police were

Who would be responsible if they sent me back and the next day I got killed? — Francisco Aguirre

here when ICE was trying to take me into custody. I was so public when ICE tried to take me into custody... because I want people to know what's going on. They didn't like that so they decided to threaten us — my whole family.

Aguirre said DHS investigators came to his home and accused Aguirre and his wife of fraudulently accepting food stamps. They required the couple to provide the last three years of taxes, bank accounts, and income:

We provided everything because we didn't do anything wrong. Now that we are more quietly working on my case, the authorities are taking advantage, finding a way to incriminate me so they can win. They are trying to paint me with a different face, a criminal face.

The impact of the ordeal on the entire family is clear. “My wife is very scared to drive even though she has a driver's license,” he said. “She starts shaking when police are very close to her.” Aguirre and his wife have two daughters who are four and five years old. He says they're always talking about his legal process:

It's hard to explain everything to them because they don't really understand. Their hearts get broken so easily because all they want is to be with their family. We even tried to find some help for them because I know they're really affected by this.

Despite all this, Aguirre is determined to continue to fight for his freedom:

Every moment when I see people in the community having trouble with the authorities on many issues it really inspires me to keep going. There are people who question me, who say, “Well you're not even born in this country. Why do you care?” You don't need to be born in a country to care about that country. We're all human beings and this is what I've been living for the last 21 years. I made my living here, I've got my daughters, my wife, I don't have anything else in any other country.

Everything that I have is here. Why should I not fight for the freedoms and for the safety of my community?

Aguirre believes that both U.S. Attorneys and judges have the power to end re-entry prosecutions in cases like his, even though both at times have said otherwise in his case:

They all throw the ball to each other and say, “Nope, it’s not me, it’s there.” That’s what their answer is for everything, “Nope, I don’t have the power, no I can’t do that.” Even the U.S. Attorney, “Nope, it’s not in my hands, it’s in the hands of the judge. I can’t decide.” But they are the ones that press the charges. They can stop that.

We need to target the U.S. Attorney in every city, every county, every state and they need to stop this attack on the immigrant community. A lot of immigrants are dying when they send them back to their original countries and even if they don’t accept it, they are guilty of killing those immigrants because they send them back to those dangers. Who would be responsible if they sent me back and the next day I got killed? The U.S. Attorney would be because he is the one who pressed those charges and fought for my deportation.

Aguirre also sees it as the responsibility of the broader public to speak out against this system. “People don’t understand that even if they were born in this country, the laws that we’re creating right now are destroying this country,” he said. “No matter if you are a U.S. citizen or not... Those laws are affecting everybody.”

27 BEYOND STREAMLINE: WORKING AT THE INTERSECTION OF CRIMINAL JUSTICE AND IMMIGRATION POLICY

In addition to determining where change in the system can happen, advocates must clearly identify what kind of policy change they are seeking. Operation Streamline has received much attention due to the shocking courtroom optics and serious due process concerns. But ending this policy without also deprioritizing improper entry and re-entry charges as a whole could create some chilling consequences for those being prosecuted.

According to officials at the Mexican Consulate, ending Operation Streamline without decriminalizing entry and re-entry could mean that some people might actually receive longer sentences:

Advocates in the U.S. should focus on decriminalizing these laws altogether, not just ending Operation Streamline, because if the courts end Streamline, people could get worse penalties. Without decriminalization, the courts could stop offering short jail sentences to people who have been previously removed in exchange for a guilty plea to improper entry, instead giving them felony sentences of 13 months, two years, or more for recrossing the border. So long as this is possible, we are okay with Streamline, because in that court people might get as little as a 30 or 60 day jail sentence, and no more than six months.

Phoenix attorney Ybarra agrees that advocates should focus on decriminalization rather than only the specific process through which people are prosecuted:

To me, the real issue with Operation Streamline, the 1325 and 1326 prosecutions, has never been about due process. The problem is the statutes themselves, the criminalization of migration... We need a mass civil rights movement against the Department of Justice and the U.S. Attorney's Office to stop the criminalization of migrants.

We need a mass civil rights movement against the Department of Justice and the U.S. Attorney's Office to stop the criminalization of migrants. — *Ray Ybarra*

Adding fuel to this argument is that Operation Streamline is no longer taking place in every border district. As is explained above, some districts that are still prosecuting large numbers of migrants are declining to officially label these as “Streamline” prosecutions. But rather than becoming preoccupied with a policy label, advocates should be concerned that prosecutions are continuing in massive numbers in the border districts, and that federal court districts in other parts of the nation also pursue these prosecutions.

The improper re-entry prosecution exposes a defendant to a much longer sentence, and thus is the leading driver of federal incarceration of migrants. Yet it has received much less attention in the media than the straight entry or “flip-flop” re-entry charge that is pled down to an entry charge. Advocates have tended to focus on entry cases where the majority of people prosecuted have little or no criminal records because the shocking sight of people being prosecuted en masse helps to garner public sympathy. However, according to federal public defenders, improper re-entry cases are some of the most heart-wrenching cases they deal with.

Donna Coltharp, Deputy Federal Public Defender of the Western District of Texas, has also seen that in many re-entry cases, defendants grew up in the U.S. and have strong family and cultural ties:

The typical person we see with crimes often has been here in the U.S. since he was a kid. The crime occurred while he was living here. He does not speak Spanish, he has no family in Mexico. He cries at the border when being dropped off by Border Patrol. He is going to come back.

Despite these compelling humanitarian cases, the vast majority of individuals plead guilty to the 1326 offense, because, in the words of a federal public defender in the Western District of Texas, “The client’s body is the primary evidence.” If they plead not guilty, according to the sentencing guidelines, they run the risk of up to 10 years in prison at the highest level

criminal offense category.

Judges are not bound to follow the guidelines and can take “departures” from the guidelines to increase or decrease sentences, so migrants who wish to plead not guilty are often threatened with a term much longer than what the guidelines recommend in order to pressure them to plead guilty. Diedre Mokos, a Tucson federal public defender, has observed that many of her clients will accept plea deals despite “astronomically high” sentences because they would otherwise risk an even longer sentence. Even for those with compelling cases, Milagros Cisneros, a public defender in Tucson, says that the way the system is designed makes it nearly impossible for defendants to go to trial. Indeed, she has never had a 1326 case go to trial.

Expanding focus from the mass Operation Streamline hearings to include all re-entry prosecutions holds many advantages for advocates resisting the system. While the mass hearings happen only in border districts, improper re-entry prosecutions are tried all over the country, providing an opportunity for local resistance in communities across the U.S.

Because re-entry prosecutions feed so many people into the federal prison population, it also provides the opportunity to join forces with criminal justice advocates already working to end mass incarceration by reducing the federal prison population. Improper re-entry prosecution highlights many of the same issues that criminal justice advocates are raising about federal drug prosecution: It has a disproportionate impact on people of color, it fails as a deterrent for criminalized activity, and it inflicts grave damage to families and communities. Expanding a focus to these prosecutions could harness the power of a united criminal justice and immigrant rights movement, unified upon the principle that incarceration is not an effective solution so long as root causes remain unchanged.

28 FINAL CONSIDERATIONS ABOUT THE WAY FORWARD

Most judges and lawyers that work within this dreadful system struggle to do the best they can. Many remain concerned about due process and have tried to invent creative solutions to the problem. However, this does not address the fundamental issue: Hundreds of thousands of migrants are still prosecuted for an action which, before 2005, was typically handled as a civil violation.

The power to end these wasteful, ineffective prosecutions lies in the hands of the U.S. Attorney General and the U.S. Attorneys in the border districts. Kenneth Magidson, U.S. Attorney for the Western District of Texas, recently testified at a hearing conducted by the U.S. Sentencing Commission that he does not believe that improper entry charges are effective and yet he feels pressured by Customs and Border Protection officials to continue the policy.

Judges must decide on cases that are brought before them. The sentencing statutes related to border-crossing offenses do not contain any mandatory minimum provisions. They simply provide statutory maximum terms for improper entry (no more than six months), and for re-entry (no more than two years, unless there are certain serious prior criminal convictions that raise the maximum to 10 or 20 years). Except for “flip-flop” plea deals, judges are free to give every migrant who admits guilt to improper entry time served.

The sentencing guidelines for re-entry offenses have been declared advisory; in the absence of a stipulated plea agreement, judges are free to impose any felony sentence which does not exceed the statutory caps. Yet, for im-

Hundreds of thousands of migrants are still prosecuted for an action which, before 2005, was typically handled as a civil violation.

proper re-entry cases, the reality of the day-to-day process is that fast track plea negotiations give judges little sentencing discretion. The power is really in the hands of prosecutors.

People can't wait 30 years to come here legally. If I were in their shoes and in need, I would be risking entering the U.S. illegally, too. — *Kenneth Magidson*

The huge increase in improper entry and re-entry prosecutions has been incredibly expensive in incarceration and court costs and constrain U.S. Attorneys in border districts from prosecuting other offenses that the Department of Justice has identified as higher priorities.

There is no convincing evidence that prosecuting migrants is a deterrent to re-entry. Kenneth Magidson, U.S. Attorney for the Southern District of Texas, recently testified at a U.S. Sentencing Commission hearing that he sees no deterrent effect to prosecuting improper entry cases. District Court Judge Alia Moses in Del Rio, Texas, claims to see a deterrent effect to these prosecutions. Yet at the same time she admits that, “People can't wait 30 years to come here legally. If I were in their shoes and in need, I would be risking entering the U.S. illegally, too.”

Entry and re-entry prosecutions are inherently unjust in criminalizing migration and falling almost entirely on people of color. Re-entry prosecutions can expose migrants to a lengthy term of incarceration simply due to prior crimes for which they have already been punished.

Taxpayers and communities lose out since the prosecution of migrants is a wasteful use of resources better put to enforcing laws that prohibit activities that truly threaten safety and economic security.

The primary financial beneficiary of entry and re-entry prosecutions is the private prison industry. In addition to the privately operated Criminal Alien Requirement (CAR) prisons, many of the U.S. Marshals' contract facilities are operated by a private prison corporation. The vast majority of those incarcerated in CAR prisons are serving sentences for entry and re-entry, and these corporations profit handsomely from these prosecutions. The resulting human costs to those prosecuted and their families is staggering.

Ending prosecution of migrants should be a key component in the efforts to reduce mass incarceration.

It is unconscionable that corporations are allowed to turn a profit from a failed policy that tears migrants away from their families and communities.

Ending prosecution of migrants should be a key component in the efforts to reduce mass incarceration. It must be addressed by both immigrant rights and criminal justice advocates and organizers. Migrant prosecutions highlight many of the same problems that criminal justice advocates have been fighting with drug charges — criminalization of communities of color, and the lengthy incarceration of people who do not pose a threat to public safety. Like the “War on Drugs,” this policy represents another failure to effectively address a social issue with complex root causes. A precedent has been set by the Department of Justice in the recent deprioritization of drug offenses. Certainly it is time to consider deprioritizing and ultimately ending entry and re-entry prosecutions.

It is imperative that both immigrant rights and criminal justice reformers recognize migrant prosecutions as a key point of intersection. Local advocates across the country working for decarceration in their counties can stop many referrals for entry and re-entry prosecution by supporting efforts to end collaboration between Immigration and Customs Enforcement (ICE) and local law enforcement.

Building alliances with criminal justice reformers could also help to end divisive rhetoric in the immigrant rights community, such as appeals that hinge on arguments that “immigrants are not criminals.” Carlos Garcia, executive director of the Phoenix-based grassroots migrant justice organization Puente, explains how such rhetoric unjustly demonizes people with

Like the “War on Drugs,” this policy represents another failure to effectively address a social issue with complex root causes. A precedent has been set by the Department of Justice in the recent deprioritization of drug offenses. Certainly it is time to consider deprioritizing and ultimately ending entry and re-entry prosecutions.

criminal records:

Cutting out people stigmatized as “criminal” from our circle of compassion might be politically convenient but it lacks both an understanding of the extent to which immigration itself has been criminalized and how historically unjust the criminal justice system is, especially for people of color.⁷⁴

We recommend that officials with the power to effect change take the following actions:

1. The Attorney General should move to de-prioritize and ultimately end improper entry and re-entry prosecutions.
2. U.S. Attorneys in the border districts should use their enormous power to de-prioritize improper entry and re-entry prosecutions and devote their resources to focus on crimes that threaten public safety and/or cause serious harm to the well-being of our nation.
3. The U.S. Sentencing Commission should reject any proposed amendments to increase sentences for improper entry and re-entry, and should actively seek to remedy already exorbitant sentences. The base offense level should be reduced so as to decrease sentencing recommendations relative to the many more serious offenses currently assigned to Level 8.
4. Insofar as the current political climate does not allow for constructive legislative action, members of Congress who comprehend the harms done by these prosecutions should call on the Department of Justice and the U.S. Attorneys to end them.

Finally, until the Department of Justice, the U.S. Attorneys and the Sentencing Commission take the actions recommended above, we urge that — to the extent that they are not bound by rigid plea agreements or guideline constraints — federal district court and magistrate judges reflect about the inexorable harms these prosecutions visit upon migrants and their families. Understanding that most face immediate removal, judges should give thoughtful consideration of whether “time served” might be the most appropriate sentence.

END NOTES

1. Gipe, Lawrence, “Untitled,” *Special Collections Online Exhibits*, accessed June 30, 2016, <http://speccoll.library>. And Gipe, Lawrence, “Shackled,” *Special Collections Online Exhibits*, accessed June 30, 2016, <http://speccoll.library.arizona.edu/online-exhibits/items/show/138>.)
2. United States, U.S. Census, *Foreign-Born Population of the United States*, <<https://www.census.gov/population/foreign/files/ST023/tab1-1a.xls>>, accessed on May 16, 2016.
3. Marc Motivans, *Immigration Offenders in the Federal Criminal Justice System*, 2010, Federal Justice Statistics Program, Washington, D.C.: July 2012.
4. Requests for interviews with both U.S. Attorneys and U.S. Marshals were declined.
5. We focused on these three districts because they are of particular interest to how streamline and mass prosecutions of migrants developed over time.
6. Douglas S. Massey and Karen A. Pren, “Unintended Consequences of U.S. Immigration Policy: Explaining the Post-1965 Surge from Latin America,” *Population and Development Review*, Vol. 38, No. 1, March 2012.
7. Massey and Pren.
8. Mokos’ views are her own, and do not represent the Federal Defender’s Office where she works.
9. United States, U.S. Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*, <<http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014>>, 2014. The remaining four percent of those sentenced fell into the “other” category.
10. Daniel Richman, “Political Control Of Federal Prosecutions: Looking Back And Looking Forward,” *Duke Law Journal*, Vol. 58, No. 8, May, 2009.
11. An “aggravated felony,” as defined in the Immigration and Nationality Act, INA 101(a)(43), 8 USC § 1101(a)(43), is an enumerated list of criminal offenses that Congress has decided should carry the most serious consequences under immigration law. The consequences include making individuals ineligible for immigration benefits, deportable and barred from relief from removal, and prohibited from ever returning to the U.S. The list of aggravated felonies was dramatically expanded in 1996 and now includes over 30 offenses. The list includes murder, rape, sexual abuse of a minor, drug or firearms trafficking, any offense that involve fraud or deceit, and crimes of violence or theft with a sentence of one year or more. Despite its label, the “aggravated felony” list also includes certain misdemeanors and offenses that are not in fact aggravated, including simple battery, filing a false tax return, and failing to appear in court. For more details see: <<http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview>>.
12. While national media coverage has highlighted the Streamline Court in Tucson as a notorious emblem of the explosion in immigration prosecutions, it is important to emphasize that the surge in both improper entry and re-entry prosecutions should be addressed with equal attention by

advocates and activists.

13. “Prosecution of Immigration Cases Surge in U.S., while Sentences Slump,” *Transactional Records Access Clearinghouse*, August 24, 2005. Immigration cases shown here include improper entry and re-entry, which typically comprise more than 90 percent of all immigration prosecutions, along with less common immigration offenses such as smuggling of people across the border, misuse of Visas, etc.
14. “Surge in Immigration Prosecutions Continues.” *Transactional Records Access Clearinghouse*, June 17, 2008.
15. SB 1070 is the controversial law that had been drafted by American Legislative Exchange Council (ALEC) activists and enacted Arizona in 2010. Among other provisions, SB 1070 criminalized mere presence in the state of an immigrant without the required documents, and required that all police must determine immigration status during a “Terry stop” or arrest if there is “reasonable suspicion” of “illegal” immigration — giving rise to the popular nickname, the “show us your papers, please” law.
16. Jessie K. Finch, “Legal Borders, Racial/Ethnic Boundaries: Operation Streamline and Identity Processes on the U.S.-Mexico Border,” Ph.D. dissertation, *School of Sociology, University of Arizona*, Co-Chairs: Dr. Celestino Fernández; Dr. Robin Stryker, 2015.
17. For information on additional eligibility requirements as well as background on the history of “fast track” cases, see: James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum on “Department Policy on Early or ‘Fast Track Cases’*, January 31, 2012, <<http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf>>.
18. “Rule 11” is the section of federal criminal procedure law which sets forth the legal requirements intended to assure the fairness and adequacy of the procedures on acceptance of pleas of guilty. Available at: <https://www.law.cornell.edu/rules/frcrmp/rule_11>, accessed May 4, 2016.
19. United States, “One-Year Follow-up Response of the United States of America to Priority Recommendations of the Committee on the Elimination of Racial Discrimination in its Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America,” accessed on May 5, 2016, <<http://www.ushrnetwork.org/resources-media/us-government-releases-cerd-review-1-year-follow-report-2015>>.
20. Joanna Jacobbi Lydgate, “Assembly-Line Justice: a review of Operation Streamline,” *California Law Review*, Vol. 98, Issue 48, 2010.
21. Sandra Dibble, “Questions raised about deportees’ re-entries,” *San Diego Union-Tribune*, August 20, 2011.
22. Operation Streamline has taken different forms in different districts, and use of the term is, to some degree, a matter of semantics. In a technical sense, Operation Streamline pertains to the special magistrate court calendar where many cases are adjudicated in an all-in-one-day session involving up to 70 or 80 defendants. But the volume of felony cases handled in the district courts also increased when Streamline was introduced. It is important to bear in mind that both 1325 and 1326 cases are of equal concern.
23. “Immigration Prosecutions at Record Levels in FY2009,” *Transactional Records Access Clearinghouse*, September 21, 2009.
24. The court now refrains from hearing Streamline cases on Fridays to clear the court for naturalization ceremonies.

25. The Criminal Justice Act (CJA), 18 U.S.C. § 3006A(a) mandates that each federal court district plan provide for legal representation by private attorneys “in a substantial proportion” of the district’s cases. See 18 U.S.C. § 3006A(a)(3). Milagros Cisneros, a federal public defender in Phoenix, says that the cases are split by Federal Public Defender’s Office managers. “Our supervisors get a daily list of defendants. Based on caseload, they decide how many cases to keep for us to handle, and how many to pass on for representation by the private bar. They tend to keep the higher stakes, more complex cases for us to handle,” she said.
26. In the 2009 case of Delcia Arqueta-Ramos, the 9th Circuit Court of Appeals made clear that each individual defendant must be questioned individually by the judge to ensure they understand their rights before they enter guilty pleas. See: <<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/20/10-10618.pdf>> and Robolero-Solis: <<http://cdn.ca9.uscourts.gov/datastore/opinions/2009/12/02/08-10396.pdf>>.
27. According to the Border Patrol, the “Alien Transfer Exit Program” (ATEP) is designed to “break the smuggling cycle” by moving Mexican nationals that are apprehended in one sector to another sector hundreds of miles away before removing them to Mexico.
28. “Flip-flops” are proceedings in which migrants are charged with 1326 re-entry and given the offer to plead instead to the 1325 entry charge if they plead guilty and accept the fixed-term plea bargain.
29. The data was obtained using analytic tools from TRACFED/Transactional Records Access Clearinghouse at <http://tracfed.syr.edu>
30. Sentencing guidelines apply only to felony re-entry cases (8 USC 1326) because improper entry (8 USC 1325) is a “petty misdemeanor.” But, as in the Tucson Streamline court, when prosecutors offer a negotiated plea with a stipulated jail sentence, judges have no discretion whatsoever.
31. Individuals in some cases may have obtained or “derived” U.S. citizenship automatically as children through the naturalization of their parents if specific conditions were met. A claim to derivative citizenship is a basis to plead not guilty to improper entry or re-entry.
32. A G-28 is a form filled out by an attorney or other qualified representative notifying the government that an individual has legal representation.
33. “Prosecutions Shift Under President Obama,” *Transactional Records Access Clearinghouse*, February 2, 2011.
34. “Criminal Immigration Prosecutions Are Down, But Trends Differ by Offense,” *Transactional Records Access Clearinghouse*, March 17, 2010.
35. “Despite Rise in Felony Charges, Most Immigration Convictions Remain Misdemeanors.” *Transactional Records Access Clearinghouse*, June 16, 2014. The report included data for just the first two quarters of FY2104. The FY2014 figures displayed in Chart 5 are estimates derived by using the actual number of prosecution filings that year and projecting conviction figures for improper entry and re-entry extrapolated from the actual proportional distributions in FY2013.
36. “Changes in Criminal Enforcement of Immigration Laws.” *Transactional Records Access*

Clearinghouse, May 13, 2014.

37. “Despite Rise in Felony Charges, Most Immigration Convictions Remain Misdemeanors.” *Transactional Records Access Clearinghouse*, June 26, 2014.
38. A defendant’s criminal history category is determined by a point system, set out in §4A1.1 of the Guidelines Manual, requiring points to be added for the following factors:
 - a. 3 points for each prior sentence of imprisonment exceeding one year and one month.
 - b. 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
 - c. 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
 - d. 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
 - e. 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

United States, U.S. Sentencing Commission, *2015 Chapter 4, Criminal History and Criminal Livelihood*, Washington, D.C.: accessed February 26, 2016, <<http://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-4>>.

38. United States, U.S. Sentencing Commission, *Sentencing Table*, Washington, D.C.: accessed February 26, 2016, <<http://www.ussc.gov/guidelines-manual/2012/2012-5asentab>>.
39. United States, U.S. Sentencing Commission, *Illegal Reentry Offenses*, April 2015, Washington D.C.: accessed March 3, 2016, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-re-entry-Report.pdf>.
40. A defendant in category VI (13 or more points, the worst record category) can only receive a departure of two offense levels, for a “fast track” disposition.
41. United States, U.S. Sentencing Commission, 2015 Chapter 2 L-X, §2L1.2. *Unlawfully Entering or Remaining in the United States*, Washington, D.C.: accessed February 26, 2016, <<http://www.ussc.gov/guidelines-manual/2015/2015-chapter-2-l-x#2l12>>.
42. The schedule of sentencing enhancements described here pertained to sentencing procedures as set forth in USSC sentencing guidelines at the time this report was released. In April 2016 the guidelines commission adopted a proposed amendment that would convert the “categorical approach” (boosting the guideline ranges to account for certain categories of prior offenses) to a system whereby the enhancements would be determined according to the length of any prison sentences that had been received for prior offenses. If adopted by Congress, the new enhancement scheme was to go into effect in November 2016.
43. United States, Office of General Counsel of the U.S. Sentencing Commission, *Departures and Variances Primer*, June 2015, Washington, D.C.: accessed May 5, 2016, <<http://www.ussc.gov/training/primers/departures-and-variances>>.
44. Jeremy Slack, et al., “*In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security*,” University of Arizona Center for Latin American Studies, March 2013, accessed March 4, 2016, <http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf>.

45. Michael Tonry, "Learning from the Limitations of Deterrence Work." *Crime and Justice*, Vol. 37, No. 1 2008.
46. Slack, et.al.
47. Name changed to protect identity.
48. Name changed to protect identity.
49. Name changed to protect identity.
50. Judith A. Greene, "Bailing Out Private Jails," *The American Prospect*, September 2001.
51. Bethany Carson and Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, April 2015, <<http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota>>.
52. Matthew Lowen, "Intimate encounters with immigrant criminalization in Arizona," *Intimate Economies of Immigration Detention: Critical Perspectives*, eds. D. Conlon and N. Hiemstra, Abingdon, Oxfordshire: Routledge, forthcoming in 2017.
53. United States, Department of Homeland Security Office of the Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, May 15, 2015, accessed May 9, 2016, <https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf>.
54. A Latin legal term meaning "as a matter of form."
55. In the course of her study of Operation Streamline, Jessie Finch requested a copy of this prosecution guideline chart. She was told that it is not available to the public.
56. Name changed to protect identity.
57. Name changed to protect identity.
58. Name changed to protect identity.
59. For improper re-entry with a single deportation, the sentence is capped at two years. However, this can increase with past criminal convictions. See Chapter 15 for details about how "special offense characteristics" result in much longer prison terms. Some judges may threaten longer terms than the guidelines actually specify, believing that this will deter re-entry. Even including cases where longer sentences were allowed, the U.S. Sentencing Commission reports that the average prison sentence in 2013 was 17 months. United States, U.S. Sentencing Commission, *Quick Facts: Illegal Reentry Offenses*, Washington D.C.: April 2016, accessed April 4, 2016, <<http://www.uscc.gov/research-and-publications/quick-facts/illegal-re-entry>>.
60. Name changed to protect identity.
61. Name changed to protect identity.
62. Name changed to protect identity.
63. Name changed to protect identity.
64. Estimates for imprisonment costs are based on population data for prisoners in BOP custody serving time for improper entry and re-entry, using the average annual expenditures reported for housing migrants in private prisons under BOP contracts. Migrants sentenced to serve less than two months' time remain in USMS custody to serve their sentences. This cost estimate was calculated by adjusting the number of people reported received by USMS on all immigration charges by a factor of ninety percent (an estimate of the proportion received that were held on

improper entry and re-entry charges), and then multiplying by the average number of days in custody and the average per day detention costs. In a few instances where data were missing, costs were extrapolated from data that were on hand.

65. Russell Goldman, "What's Clogging the Courts? Ask America's Busiest Judge," *ABC News*, July 23, 2008, <<http://abcnews.go.com/TheLaw/story?id=5429227>>.
66. Kung Li, "Operation Streamline," *ACLU*, August 5, 2013, <<https://www.aclu.org/blog/operation-streamline>>.
67. Daniel Blue Tyks, "Goodbye to Tent City," *Texas Observer*, March 26, 2015, <<https://www.texasobserver.org/south-texas-prison-riot-willacy-county-economic-future/>>.
68. Seth Freed Wessler, "The True Story of a Texas Prison Riot," *The Nation*, June 23, 2015, <<http://www.thenation.com/article/the-true-story-of-a-texas-prison-riot/>>.
69. Alicia Neaves, "Alleged Hunger Strike, Solitary Confinement Result of Reeves County Inmates Seeking Legal Action," *News West 9*, March 4, 2015, <<http://www.newswest9.com/story/28264962/alleged-hunger-strike-solitary-confinement-result-of-reeves-co-inmates-seeking-legal-action>>.
70. *United States v. Roblero-Solis*, Court of Appeals for the 9th Circuit, 588 F.3d 692, December 2, 2009.
71. Department of Homeland Security Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*.
72. *Coalition Letter to Attorney General from 171 Organizations to End Streamline Prosecutions*, ACLU, July 28, 2015, accessed May 24, 2016, <<https://www.aclu.org/letter/coalition-letter-attorney-general-171-organizations-end-streamline-prosecutions>>.
73. United States, U.S. Sentencing Commission, *Policy Profile Sensible Sentencing Reform: The 2014 Reduction of Drug Sentences*, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf>.
74. Carlos Garcia, "Not1More Means Not One More," *Puente*, accessed on May 10, 2016, <<http://puenteaz.org/blog/not1more-means-not-one-more/>>.



INDEFENSIBLE:

**A DECADE OF MASS INCARCERATION OF MIGRANTS
PROSECUTED FOR CROSSING THE BORDER**

“It’s frustrating because you can’t mount a defense when the client’s body is the primary evidence.” – A FEDERAL PUBLIC DEFENDER IN THE WESTERN DISTRICT OF TEXAS

“Instead of a human being at sentencing you represent a prior conviction...”

– JOSE GONZALEZ-FALLA, A FEDERAL PUBLIC DEFENDER IN AUSTIN, TEXAS

“Why take us away from our families and the only things we know?...I never dreamed all my life that this was possible.” – GLADYS MONTEVERDE,* WOMAN SERVING A SENTENCE FOR

IMPROPER RE-ENTRY AT THE CENTRAL ARIZONA DETENTION CENTER IN FLORENCE, ARIZONA

DECEMBER 2015 MARKED THE 10TH ANNIVERSARY OF “OPERATION STREAMLINE,” A PROGRAM TARGETING MIGRANTS WHO CROSS THE BORDER WITHOUT AUTHORIZATION FOR CRIMINAL PROSECUTION. THE POLICY IS NOTORIOUS FOR MASS HEARINGS IN WHICH UP TO 80 MIGRANTS ARE ARRAIGNED, FOUND GUILTY, CONVICTED AND SENTENCED FOR IMPROPER ENTRY, A FEDERAL MISDEMEANOR, SIMULTANEOUSLY IN ONE HEARING OFTEN LASTING LESS THAN TWO HOURS.

HOWEVER, THE MASS HEARINGS OF OPERATION STREAMLINE, LONG DECRIED BY IMMIGRANT RIGHTS ADVOCATES, ARE ONLY THE TIP OF THE ICEBERG. LESSER KNOWN IS THE WIDESPREAD EXPANSION OF FELONY RE-ENTRY PROSECUTIONS OVER THE PAST DECADE THAT CAME WITH THE CREATION AND EXPANSION OF THE STREAMLINE PROGRAM. SINCE 2005, NEARLY THREE QUARTERS OF A MILLION PEOPLE HAVE BEEN PROSECUTED IN OUR FEDERAL COURTS FOR THE CRIME OF IMPROPER MIGRATION.

INDEFENSIBLE IS AN ORAL HISTORY OF THE EVOLUTION OF OPERATION STREAMLINE OVER 10 YEARS AND THE MASS INCARCERATION OF MIGRANTS THAT CAME WITH IT. WE EXAMINE ITS LEGACY AND OPPORTUNITIES FOR RESISTANCE.

*NAME CHANGED TO PROTECT IDENTITY