



HUMAN
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WATCH

TURNING MIGRANTS INTO CRIMINALS

The Harmful Impact of US Border Prosecutions



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Summary

“I have not lost the desire to try again”

When Human Rights Watch met Alicia S. (pseudonym) at a women’s shelter in Tijuana, Mexico, it had been two-and-a-half years since she had last seen her daughters. Alicia came to the United States without authorization in 2000. She met and married another unauthorized immigrant, and they had two US-born daughters, now 11 and 9 years old. At the age of 5, her younger daughter’s kidneys began to fail. In 2009, Alicia’s husband was deported (and she has not heard from him since). A year later, police stopped Alicia for pulling out of a parking lot without her lights on. Surrounded by several squad cars, she was arrested for not having paid a ticket for driving without insurance. She was taken away while her daughters cried in the back seat.

That was the last time Alicia saw her daughters. She was soon after deported to Mexico.

Her daughters are now in foster care. Soon after being deported, Alicia received word that her daughter had successfully received a kidney transplant. “I felt so much joy, I was so happy,” Alicia said, smiling at the memory even as she cried. “But I felt sad that I could not be in the hospital taking care of her.”

Alicia has tried to return to the US several times. The first time, she was stopped near the border and placed in immigration detention for three months. The second time, she was abandoned by smugglers without water and food in Texas, apprehended, and criminally prosecuted for the federal misdemeanor of illegal entry. She told us that at the hearing in federal court, where she stood with two dozen other defendants, “I begged the judge to forgive me, that I was desperate because of my daughters.” He gave her a criminal sentence of 13 days in prison. A lawyer later told her the conviction would make it almost impossible for her ever to get a US visa, and if she were to return, she could face prosecution for the felony of illegal reentry. But Alicia cannot imagine living without her daughters. She told us, “I have not lost the desire to try again.”¹

¹ Human Rights Watch interview with Alicia S. (pseudonym), Tijuana, Mexico, October 17, 2012.

Alicia S. is one of the tens of thousands of migrants each year who face criminal prosecution on top of deportation and other civil penalties, for illegal entry or reentry to the United States. Illegal entry, the misdemeanor of entering the country without authorization, and illegal reentry, the felony of reentering the country after deportation, are now the most prosecuted federal crimes in the United States.

The criminal prosecution of illegal entrants has grown exponentially over the past 10 years. In 2002, there were 3,000 prosecutions for illegal entry and 8,000 for illegal reentry; a decade later, in 2012, these prosecutions had increased to 48,000 and 37,000, respectively. These cases now outnumber other frequently prosecuted federal offenses such as drug, firearm, and white-collar crimes.

The US Department of Homeland Security (DHS), the agency that enforces US immigration laws, refers more cases for prosecution to the US Department of Justice than do the Federal Bureau of Investigations (FBI), the Drug Enforcement Administration (DEA), the Alcohol, Tobacco, Firearms, and Explosives agency (ATF), and the US Marshals service combined.² Nearly everyone charged with these offenses pleads guilty, and they end up serving federal prison sentences ranging from a few days to 10 years or more for felony reentry before they are eventually deported.

The rapid growth in federal prosecutions of immigration offenses is part of a larger trend in which criminal law enforcement resources have been brought to bear on immigration enforcement, traditionally considered a civil matter. The US government claims these prosecutions have two purposes: to keep dangerous criminals from entering the United States and to deter illegal immigration in general. As detailed below, however, a close examination of who is being imprisoned for illegal entry and reentry suggests that many of the prosecutions are not meeting their purported goals.

Many of the people now being criminally prosecuted for illegal entry and reentry have no criminal history or were convicted in the past of only minor, nonviolent crimes. And, as

² Syracuse University, Transactional Records Access Clearinghouse (TRAC), "Going Deeper" tool, Prosecutions for 2011, <http://tracfed.syr.edu/index/index.php?layer=crl> (accessed May 10, 2013). See also Migration Policy Institute, "Immigration Enforcement in the United States: The Rise of a Formidable Machinery," January 2013, <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> (accessed April 7, 2013), p. 10.

Alicia’s comments above suggest, many are not likely to be deterred by the threat of prison: people seeking to join their children or other loved ones are not likely to simply give up. Meanwhile, the costs of the increased prosecutions are significant and growing. The costs include an estimated \$1 billion annually in incarceration costs alone and lasting damage to the lives of migrants and their family members, tens of thousands of whom are US citizens or permanent residents.

This report is based on analyses of publicly available data from the US Sentencing Commission and other agencies, as well as 191 interviews with individuals charged with illegal entry or reentry, their families, other unauthorized migrants who have repeatedly entered the United States, criminal defense attorneys, immigration attorneys, prosecutors, judges, and representatives of humanitarian and advocacy organizations. In many cases, we corroborated details of individuals’ accounts with publicly available court records. This report was also informed by meetings with officials in the US Customs and Border Protection agency, and in two divisions within the US Department of Justice: the Civil Rights Division and the Executive Office of Immigration Review.

For years, federal prosecutors have claimed that prosecutorial resources for felony illegal reentry are focused on unauthorized migrants who pose a threat to public safety. In the past, a majority of people charged with felony immigration crimes indeed had a prior conviction for a serious felony. Data from the US Sentencing Commission reveals, however, that the criminal histories of defendants sentenced to federal prison under the “illegal entry offense” guideline has shifted dramatically over the past decade. In 2002, 42 percent had criminal convictions considered most serious by the Commission—such as a conviction for a crime of violence or a firearms offense—while only 17 percent had no prior felony convictions. By 2011, the proportion of defendants with convictions considered most serious had dropped to 27 percent, while the proportion of defendants with no prior felony convictions had increased to 27 percent.

The lack of selectivity in prosecution is exacerbated by the ways in which conviction for misdemeanor illegal entry and subsequent deportation can become a predicate for felony illegal reentry charges. Illegal entry and reentry prosecutions have grown along the US-Mexico border as part of US Border Patrol strategy to deter illegal immigration. Once convicted of illegal entry, including through a mass-prosecution program like Operation Streamline, a migrant who attempts to reenter the US illegally is more likely to be

prosecuted for illegal reentry because he or she now has a criminal record. With each new crossing and arrest, the criminal sanction becomes increasingly harsh. While the maximum sentence for a first-time misdemeanor entry conviction is six months, the sentence for illegal reentry is enhanced by every prior criminal conviction, up to a maximum of 20 years for a prior aggravated felony conviction. As one criminal defense attorney stated, “There’s a class of people doing life sentences on the installment plan.”

There is limited evidence on the extent to which these prosecutions deter illegal immigration. Given the powerful economic and political “push factors” driving migration to the US, and the fact that US demands for migrant labor far exceed the number of available visas, it is reasonable to conjecture that the deterrent effect of criminal prosecution in this area would be less than in many other areas, at least for migrants who are desperate. Such prosecutions are particularly less likely to deter migrants, even repeat offenders, when they are motivated by very basic human needs such as the desire to reunite with children or other close family members or evade violence or persecution at home.

The increasing reliance on criminal prosecution in this context also raises serious human rights concerns. As Human Rights Watch has previously documented, US civil immigration law fails to adequately protect families and makes it nearly impossible for many who have been deported to reunite with their families legally in the United States. Recent surveys, as well as reports from humanitarian organizations along the border, indicate that a growing number of people seeking entry into the United States are not traditional migrants but former long-term residents seeking to return to their families. Increasingly, the US immigration system is splitting families through deportation and then subjecting the deported family member to potentially lengthy prison terms for trying to reunite with loved ones. The focus on criminal prosecutions also means that asylum seekers fleeing violence or persecution can face serious obstacles to obtaining the protection guaranteed by international refugee law ratified by the United States.

Although international law does not explicitly prohibit the use of criminal sanctions against unauthorized immigrants, United Nations human rights experts have urged the use of civil law, and strongly cautioned against using criminal law, to punish illegal entrants. The UN special rapporteur on the human rights of migrants has stated, “[I]rregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security.”

The breadth and scope of criminal prosecutions for illegal entry and reentry, moreover, have led to procedural shortcuts, including rapid-fire group trials in Operation Streamline, that imperil the due process rights of immigration defendants.

The considerable financial costs of criminally prosecuting unauthorized migrants also militate against the current prosecution-heavy approach. A September 2012 report estimated that incarceration costs alone for those sentenced for illegal entry and reentry reached \$1 billion in fiscal year 2011. Defendants serving sentences for illegal entry and reentry are a source of the burgeoning federal prison population, and given overcrowding, many end up in costly facilities run by private prison companies. Other costs relating to criminal prosecution—including criminal defense attorneys, prosecutors, and more—add to the costs. Not surprisingly, a number of prosecutors, other law enforcement officials, and federal judges have criticized the huge reallocation of resources toward prosecuting people who do not pose a threat to public safety or national security, particularly when the civil immigration system has its own penalties for illegal entry and reentry.

Human Rights Watch acknowledges that all sovereign states have a legitimate interest in regulating entry into their territories. We recognize that states have a particular interest in deterring the illegal entry or reentry of persons who pose a threat to public safety. The US government has decided that this is best accomplished through criminal prosecution rather than just civil enforcement of immigration law. But the prosecutions of illegal entry offenses happening today are overbroad, reaching people who do not belong in prison, and are thus draining resources that could go to efforts to increase public safety and create a more secure, efficient, and humane immigration system.

As the Obama administration and Congress debate a potential overhaul of the country's immigration laws, there is a danger that prosecutions and statutory penalties for these offenses will increase in the name of increased "border security." But the US cannot afford simply more of the same. A program permitting legalization would be an important step in addressing the vulnerability of many migrants to abuse and the inequities of the current immigration system. But rights to family unity and to seek asylum, as well as to due process, will not be protected unless US policymakers also address the current misguided and costly overreliance on criminal prosecution in policing the border.

Prosecuting asylum seekers prior to adjudication of their asylum applications violates US obligations under international refugee law and should cease. And the significant impact criminal prosecutions have on unauthorized migrants seeking to reunite with children and other close family members, particularly where there is no evidence the migrants are dangerous, argues for applying civil rather than criminal immigration remedies and penalties. At the very least, the US government should take this opportunity to evaluate whether the existing emphasis on criminal prosecutions meets its intended goals, to limit the growth of such prosecutions (including by suspending Operation Streamline), and to ensure that US immigration practices are as respectful of fundamental human rights as they can be.

Recommendations

To the US Congress

- Amend US immigration law to better protect family unity:
 - Allow for family ties and other positive factors to be factored into any deportation decision, including in cases involving non-citizens with prior criminal convictions.
 - Allow non-citizens whose deportations under existing law bar them from returning to the United States to apply for waivers of these bars based on evidence of strong ties to US citizen or permanent resident family members.
- Amend the Immigration and Nationality Act to impose only civil penalties, not criminal penalties, on illegal entry and illegal reentry. At a minimum, restore the prior version of the statute—making illegal reentry punishable by up to 2 years in federal prison, instead of 20—and prohibit the prosecution of asylum seekers.
- Repeal or amend authorization for Operation Streamline and other programs that facilitate mass prosecutions and undercut the due process rights of those charged with illegal entry offenses.

To the US Department of Justice and US Attorneys

- Discontinue Operation Streamline and similar programs.
- Enact national guidelines recommending against prosecution of illegal entry and reentry where the migrant has close family ties or fears violence and persecution abroad.
- Support changes to the Sentencing Guidelines to ensure that the most severe sentences are imposed on those with convictions for serious, violent felonies.

To US Customs and Border Protection (CBP)

- Ensure that all asylum seekers are able to begin the process to apply for asylum when they are first apprehended by CBP personnel.
- Refer non-citizens for criminal prosecution only when they have recent convictions for serious, violent felonies.
- Discontinue Operation Streamline and similar programs.

- Develop a policy allowing CBP agents to consider factors such as close family ties and extenuating circumstances in deciding whether to grant parole.

To US Immigration and Customs Enforcement (ICE)

- Refer non-citizens for criminal prosecution only when they have recent convictions for serious, violent felonies.
- Ensure consistent, nationwide application of the existing ICE policy on prosecutorial discretion to limit deportations of non-citizens with ties to US families.

To the US Sentencing Commission

- Conduct a study assessing whether the current system of sentence enhancements for illegal entry offenses is furthering appropriate criminal justice goals and is well-tailored to best meet those goals.
- Revise the sentencing guideline for illegal entry offenses to ensure that the most severe penalties are imposed on those with recent convictions for serious, violent felonies.
- Conduct research to determine the proportion of defendants convicted of illegal entry offenses who have ties to US families, and the extent to which these ties impact reentry rates.

Methodology

This report is based on interviews and research conducted from February 2012 to April 2013. In all, Human Rights Watch conducted 191 interviews with individuals charged with illegal entry or reentry, their families, unauthorized migrants who have repeatedly entered the United States, criminal defense attorneys, immigration attorneys, prosecutors, judges, and representatives of humanitarian and advocacy organizations. We interviewed 55 people convicted of illegal entry or reentry, and interviewed family members or lawyers in another 18 cases—for a total of 73 separate case accounts. We examined publicly available court records in 62 cases, including some cases for which we also had interviews and some for which we did not. Finally, we corresponded with 35 individuals (including two whose family members we interviewed) serving sentences in federal prison for illegal entry or reentry, who consented to participate in our research.

The cases were identified in a variety of ways. In some cases, criminal defense or immigration attorneys and local advocates referred us to individuals and families. In other cases, interviews with migrants in Nogales, Tijuana, and Rosarito, Mexico led us to individuals who had been charged with illegal entry or reentry. We also identified defendants and attorneys through searches of news or legal databases, or communicated with the attorney or family directly after observing a court proceeding. Most of the individuals who corresponded with us, and some of the defendants and family members we interviewed, contacted Human Rights Watch directly after hearing from other inmates about our research.

Our cases do not constitute a random sample, but they include non-citizens both with and without strong ties to US families and with a variety of prior criminal records.

The cases documented in this report are largely from the federal court jurisdictions (federal districts) with the most illegal entry and reentry prosecutions—Arizona, New Mexico, the Western and Southern Districts of Texas, and the Southern and Central Districts of California. Human Rights Watch conducted interviews with some defendants while they were in detention awaiting sentencing or serving their sentences in Los Angeles, California; Raymondville, Marfa, Pecos, and El Paso, Texas; and Florence, Arizona. We conducted interviews with individuals who had been deported in Nogales, Tijuana, and Rosarito, Mexico, and with family members affected by these prosecutions in Arizona, California,

and Texas. In many cases, we obtained publicly available federal court documents from PACER (Public Access to Court Electronic Records) to corroborate information provided by defendants, family members, and attorneys.

We also documented cases and interviewed criminal defense attorneys, immigration attorneys, and prosecutors in the District of Columbia, Florida, Kansas, Minnesota, New York, and other states which we have not identified at the request of the interviewees. The views expressed by all assistant federal defenders are their own and not representative of their offices.

The majority of interviews were conducted in person; some were conducted by telephone or videoconference and are indicated as such in the relevant citations. Interviews were conducted in English, Spanish, or a combination of the two, depending on the interviewee's preference. Interviews in Spanish were conducted by a Human Rights Watch researcher fluent in Spanish or with the assistance of an interpreter. All participants were informed of the purpose of the interview and consented orally. No interviewee received compensation for providing information. Where appropriate, Human Rights Watch provided interviewees with contact information for organizations providing legal, counseling, or social services. We have used pseudonyms to protect the privacy of certain individuals at their request.

Human Rights Watch researchers and an intern observed illegal entry and reentry hearings, including Operation Streamline proceedings, in Brownsville, Del Rio, and El Paso, Texas; Tucson and Phoenix, Arizona; and Los Angeles, California. Human Rights Watch also reviewed press reports and reports by nongovernmental organizations.

We analyzed publicly available data and reports from the US Sentencing Commission, the Administrative Office of the US Courts, the Executive Office of US Attorneys, and the Bureau of Justice Statistics, as well as data from the Transactional Records Access Clearinghouse (TRAC). Human Rights Watch, with other advocacy organizations, met in February 2013 with US Customs and Border Protection officials and officials at the US Department of Justice (Civil Rights Division and the Executive Office of Immigration Review); we thank them for taking the time to provide information on this issue. We also submitted a list of questions to the US Department of Justice and requests for information under the Freedom of Information Act to US Customs and Border Protection and US Immigration and Customs Enforcement, to which we have yet to receive a response.

I. Background

Illegal entry and presence in the United States without authorization violate US civil immigration law and are punishable by removal from the country and other civil law penalties. The act of entering the United States without authorization (illegal entry) and the act of reentering after deportation (illegal reentry) are also federal crimes. Both offenses have existed as federal crimes in various forms since the early 20th century, but the sentences, rates of prosecution, and justifications for prosecution have changed over the years.

Illegal Entry and Reentry Crimes

Under US federal law, at 8 US Code Section 1325, a non-citizen who enters or seeks to enter the United States at a place other than a port of entry, or by fraud or false documents, commits a federal misdemeanor offense that is punishable by up to six months in prison. A subsequent conviction for illegal entry can be punishable by up to two years.³

Under 8 US Code Section 1326, reentering or being found in the United States without authorization after deportation constitutes felony illegal reentry. The non-citizen must have been formally removed before he or she reentered; he or she cannot have left the United States voluntarily.⁴

Over the years, Congress has amended the illegal reentry statute to increase the maximum penalties for different categories of defendants. In 1952, the maximum punishment for all people convicted of illegal reentry was two years in prison. In 1986, the Immigration Reform Act upped the maximum penalty to 20 years in prison for defendants who reenter the United States after prior convictions for aggravated felonies (lower maximum sentences apply to defendants with other prior criminal convictions).⁵ “Aggravated felony” in this context is defined in the same broad way as it is in the Immigration and Nationality Act, and can include nonviolent crimes and even state misdemeanors that match one of the many enumerated crimes.⁶ These changes reflect a change in the justification for these

³ Immigration and Nationality Act Section 275, 8 US Code Section 1325 (2012).

⁴ Immigration and Nationality Act Section 276, 8 US Code Section 1326 (2012).

⁵ See Doug Keller, “Re-thinking Illegal Entry and Re-entry,” *Loyola University Chicago Law Journal*, vol. 44, Fall 2012.

⁶ See Immigration and Nationality Act Section 101(a)(43), 8 US Code Section 1101(a)(43) (2012).

prosecutions: the penalties have increased as legislators' focus has shifted from deterring illegal reentry to targeting dangerous criminals who might commit new crimes in the US, with the existence of a prior criminal record serving as a proxy for dangerousness.⁷

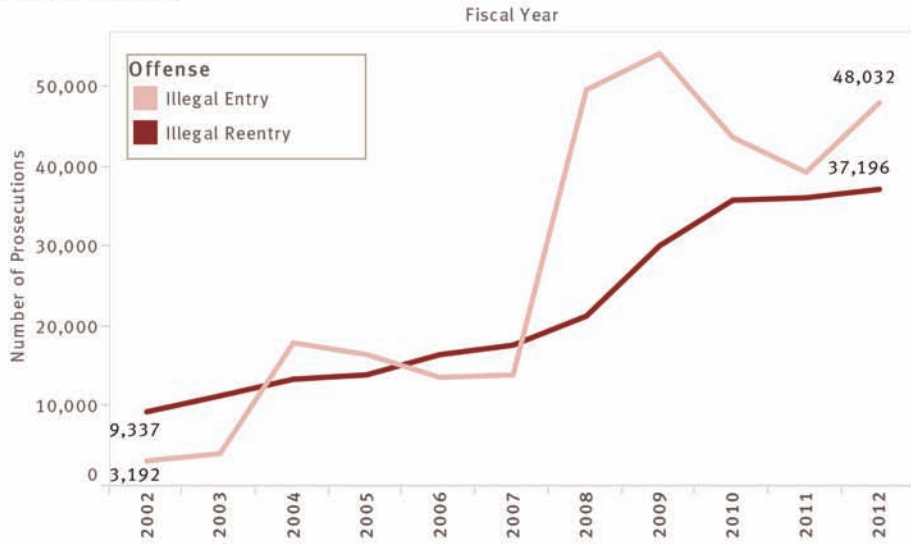
As Figure I demonstrates, prosecutions for illegal entry and reentry have increased significantly over the past decade. For most of the 1990s, relatively few border-crossers were charged with illegal entry. Prosecutions jumped dramatically in 2004, and under President Barack Obama, the surge has continued.⁸ Although illegal entry prosecutions have dropped slightly from a historic high of 54,000 in 2009, the level of prosecutions remains high. Illegal reentry prosecutions have increased dramatically as well, albeit more steadily.

⁷ See Keller, "Rethinking Illegal Entry and Re-entry," Fall 2012.

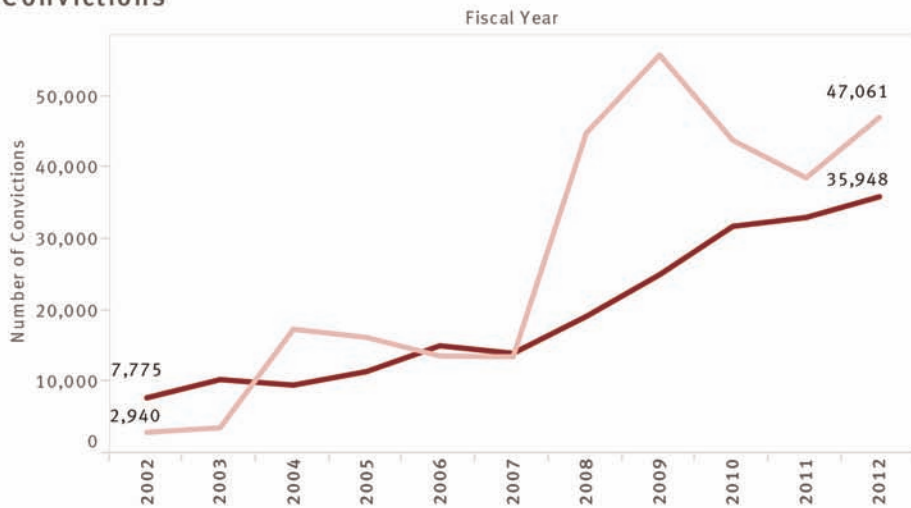
⁸ Transactional Records Access Clearinghouse (TRAC), "Lead Charges for Criminal Immigration Prosecutions: FY 1986-FY 2011," 2011, http://trac.syr.edu/immigration/reports/251/include/imm_charges.html (accessed April 12, 2013).

FIGURE 1: ILLEGAL ENTRY AND REENTRY PROSECUTIONS AND CONVICTIONS FROM 2002 TO 2012

Prosecutions



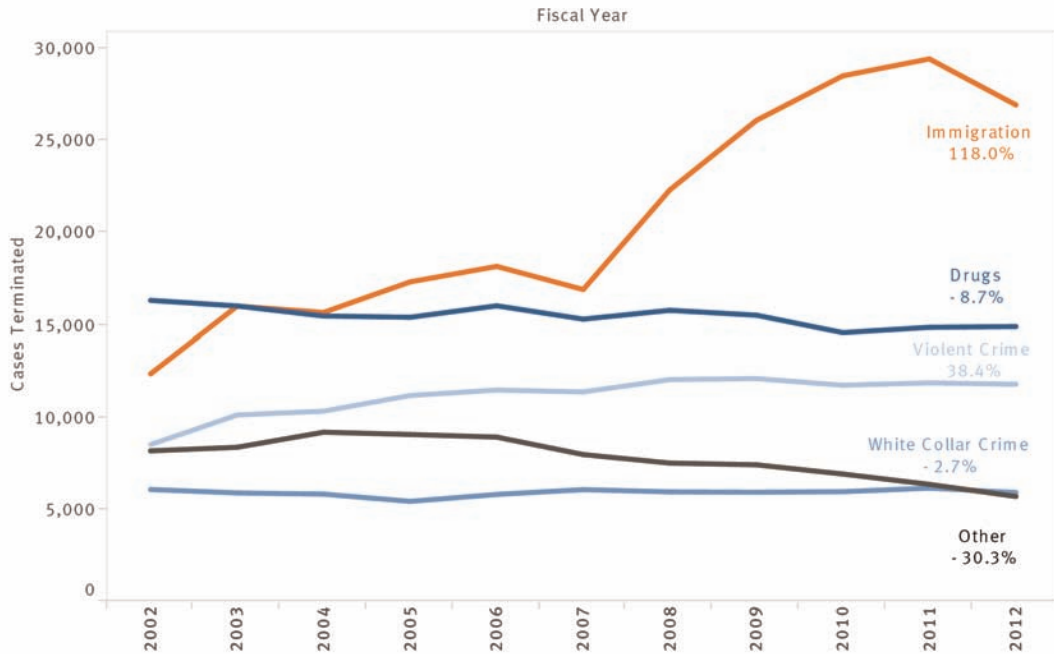
Convictions



Source: Transactional Records Access Clearinghouse (TRAC), Syracuse University, TradFed Express Tool, <http://tracfed.syr.edu/index/index.php?layer=crl>

Immigration cases now outnumber all other types of federal criminal cases filed in US district court.⁹ These cases do not include the tens of thousands of first-time illegal entry cases that conclude in federal magistrate court.

FIGURE 2: NUMBER OF CASES TERMINATED IN US DISTRICT COURTS BY OFFENSE CATEGORY AND PERCENT CHANGE 2002-2012



Source: Executive Office of the United States Attorneys, "Annual Statistical Reports", http://www.justice.gov/usao/reading_room/foiamanuals.html#reports, Accessed 04/15/2013.

What the Federal Sentencing Guidelines Say

Sentences within the federal criminal system are calculated according to guidelines promulgated by the US Sentencing Commission. The Commission is charged with developing guidelines to achieve “reasonable uniformity” among sentences for the same

⁹ Executive Office of US Attorneys, “Annual Statistical Reports,” 2002-2012, http://www.justice.gov/usao/reading_room/foiamanuals.html (accessed April 15, 2013). In 2012, immigration cases made up 40.6 percent of criminal cases filed. Eighty-five percent of “immigration cases” involved illegal entry or reentry charges. Administrative Office of US Courts, Caseload Statistics 2012, “Table D-2: Defendants Commenced, by Major Offenses, 2008 through 2012,” <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2012.aspx> (accessed May 6, 2013). Because drug cases often involve several defendants, the total number of defendants charged for drug offenses in US district courts in 2012 (31,739) was higher than the number of defendants charged with immigration offenses in US district court (26,572).

offenses, as well as “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”¹⁰

In 2005, the Supreme Court ruled in *United States v. Booker* that the sentencing guidelines were not mandatory and that judges have the discretion to depart from these guidelines.¹¹ Judges, however, must still consult the guidelines, and according to a 2012 report by the Commission, “[t]he sentencing guidelines have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time.”¹²

The sentencing guidelines apply to felonies and Class A misdemeanors (misdemeanors for which the maximum sentence is one year or less but more than six months).¹³ Sentencing guideline 2L1.2, for “Unlawfully Entering or Remaining in the United States,” applies to defendants convicted of felony illegal reentry or a second or subsequent charge of misdemeanor illegal entry.¹⁴

Guideline sentences are calculated based on a combination of the “offense level” and the defendant’s criminal history. The offense level for an illegal entry offense is based on the defendant’s prior conviction or convictions. Guideline 2L1.2 treats certain prior criminal convictions—for crimes of violence, drug trafficking (for which a sentence of 13 months or more was imposed), child pornography, firearms offenses, national security or terrorism offenses, human trafficking, or alien smuggling—as most serious, warranting a significant 16-level increase in offense level. Other prior convictions result in increases of 4, 8, or 12 offense levels.¹⁵

¹⁰ US Sentencing Commission, 2012 Sentencing Guidelines Manual, http://www.ussc.gov/Guidelines/2012_Guidelines/index.cfm (accessed April 12, 2013).

¹¹ *United States v. Booker*, 543 U.S. 220 (2005).

¹² US Sentencing Commission, “Report on the Continuing Impact of *US v. Booker* on Federal Sentencing,” 2012, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf (accessed April 25, 2013).

¹³ 18 US Code Section 3559(a)(6) (2012).

¹⁴ US Sentencing Guideline 2L1.2, Unlawfully Entering or Remaining in the United States (2012).

¹⁵ *Ibid.* A conviction for a drug trafficking offense for which the sentence imposed was 13 months or less results in an increase of 12 levels; a conviction for an aggravated felony, 8 levels; a conviction for any other felony, 4 levels; and convictions for three or more misdemeanors that are crimes of violence or drug trafficking offenses, 4 levels (with some variations for older offenses).

The defendant's criminal history category is determined based on the number and seriousness of the defendant's prior convictions, with I being least serious (including those with no or one minor prior conviction) and VI being most serious.¹⁶ Convictions that are more than 15 years old are generally not counted in assigning the defendant to a criminal history category, though they do count for the offense level.¹⁷

The offense level and the criminal history category are considered together to come up with a "guideline" sentence. For example, a defendant with one prior felony conviction for illegal reentry, for which he received a sentence of six months, who was then arrested for a second illegal reentry offense while on supervised release (i.e., probation), would be at offense level 12 and criminal history category III, and face a guideline sentence of 15 to 21 months. A defendant with one prior aggravated assault conviction who served one year in prison would be at offense level 24 and criminal history category II, and thus face a guideline sentence of 57-71 months.¹⁸ For all federal crimes, a defendant who pleads guilty will typically get a reduction in offense level for "acceptance of responsibility," and many defendants accept "Fast-Track" plea deals in which they receive a significant reduction in offense levels in exchange for a waiver of certain rights.¹⁹ So the above calculations are based on what defendants would face if they were convicted at trial.

In 2010, the US Sentencing Commission amended the sentencing guideline for "unlawfully entering or remaining in the United States" to recognize "cultural assimilation" as a valid reason for granting a lower-than-guideline sentence, to be considered in cases where, in part, "those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States."²⁰ The provision, however, has not necessarily led to more "departures" from the guidelines (more lenient criminal sentences). (For more information, see section III: Criminal Prosecutions Impinge on the Rights to Family Unity and to Seek Asylum.)

¹⁶ US Sentencing Guideline 4A1.1 (2012).

¹⁷ Ibid.

¹⁸ See US Sentencing Commission, 2012 Federal Sentencing Guidelines Manual, "Sentencing Table," http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Sentencing_Table.pdf (accessed April 7, 2013).

¹⁹ US Sentencing Guideline 3E1.1 (2012) ("Acceptance of Responsibility"); Memorandum for all US Attorneys from James M. Cole, deputy attorney general, US Department of Justice, "Department Policy on Early Disposition or 'Fast-Track' Programs," January 31, 2012, <http://www.justice.gov/dag/fast-track-program.pdf> (accessed April 7, 2013).

²⁰ US Sentencing Guideline 2L1.2.

The guideline for illegal entry offenses has been criticized by many criminal defense attorneys and some judges for being excessively harsh, and by some former and current assistant US attorneys for being vague and difficult to apply.²¹

Who is Being Prosecuted for Illegal Entry and Reentry?

Individuals convicted of immigration offenses (the vast majority of whom are convicted of illegal entry and reentry) come from very different populations than individuals convicted of other federal crimes. According to data received by the US Sentencing Commission, 88 percent of defendants convicted of immigration offenses in 2012 were Hispanic, while only 31 percent of defendants convicted of other federal crimes were Hispanic.²² Eighty-two percent of immigration offenders did not finish high school, while 37 percent of other federal offenders did not finish high school.²³

Among illegal entry cases prosecuted in district court in 2010 (which excludes the 40,000-plus cases processed in magistrate court), 86 percent of defendants were men.²⁴ The majority of defendants were under age 35, but 32 percent were 35 to 49 years old. Among illegal reentry cases, 97 percent of defendants were men, 42 percent were between 25 and 34 years old, and another 41 percent were 35 to 49. In 2010, of the 23,489 defendants charged with illegal entry or reentry in US district court, 32 illegal entry defendants and 50 illegal reentry defendants were US citizens. Seventy percent of illegal entry defendants and 85 percent of illegal reentry defendants were Mexican nationals.²⁵

²¹ See Keller, "Rethinking Illegal Entry and Reentry," Fall 2012. Thirty-four percent of federal judges surveyed in 2010 agreed that guideline sentences for these offenses are too long. US Sentencing Commission, "Results of Survey of United States District Judges from January 2010 to March 2010," June 2010, http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf (accessed April 7, 2013). See also Caleb E. Mason & Scott M. Lesowitz, "A Rational Post-*Booker* Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions," *Northern Illinois University Law Review*, 2011, http://www.niu.edu/law/organizations/law_review/pdfs/full_issues/31_2/Mason_6.pdf (accessed May 10, 2013).

²² US Sentencing Commission, 2012 Sourcebook, "Table 46: Demographic and Offense Information for Immigration Offenses," http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table46.pdf (accessed April 16, 2013).

²³ *Ibid.*

²⁴ Mark Motivans, US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Immigration Offenders in the Federal Criminal System, 2010," July 2012, <http://bjs.gov/index.cfm?ty=pbdetail&iid=4392> (accessed April 12, 2013), p. 22.

²⁵ *Ibid.*

Relevant Border Patrol Policies

Non-citizens apprehended entering the United States without authorization are expelled from the country in a number of different ways.

Voluntary Return

Border Patrol agents sometimes allow a non-citizen to depart voluntarily without going through a formal removal (that is, deportation). Processing time is shortest for voluntary return, and the non-citizen will not face any immigration penalties, such as a bar from entering the US at a later date.²⁶ In 2011, 324,000 individuals were returned in this manner or granted voluntary departure, a substantial decrease from 10 years earlier, when over 1 million individuals were returned voluntarily.²⁷

Removal

If a non-citizen is ordered removed—that is, deported—he or she faces penalties under both immigration law and federal criminal law if he or she tries to reenter.

If a non-citizen is deported through “expedited removal,” which does not require an order by an immigration judge, he or she is barred from the United States for five years.²⁸ If a non-citizen is ordered removed by an immigration judge, or accepts “stipulated removal,” he or she is barred from the United States for 10 or 20 years, depending on the number of removals; he or she is barred for life if ordered removed for an “aggravated felony.”²⁹ If a non-citizen tries to return to the US illegally after removal, he or she is subject to prosecution for illegal reentry.

²⁶ Testimony of Michael J. Fisher, chief, US Border Patrol, US Customs and Border Protection (CBP), before US House of Representatives, Committee on Homeland Security, Subcommittee on Border and Maritime Security, October 4, 2011, <http://www.dhs.gov/news/2011/10/04/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime> (accessed April 14, 2013).

²⁷ American Immigration Council, Immigration Policy Center, “A Decade of Rising Immigration Enforcement,” <http://www.immigrationpolicy.org/just-facts/decade-rising-immigration-enforcement> (accessed April 25, 2013). This figure includes individuals who received “voluntary departure,” a form of relief from removal granted by immigration judges. However, in fiscal year 2011, immigration judges granted voluntary departure in 30,385 cases, a small number compared to the almost 300,000 returned voluntarily by Border Patrol. US Department of Justice, Executive Office of Immigration Review, Office of Planning, Analysis, and Technology, “FY 2011: Statistical Year Book,” February 2012, <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (accessed April 22, 2013).

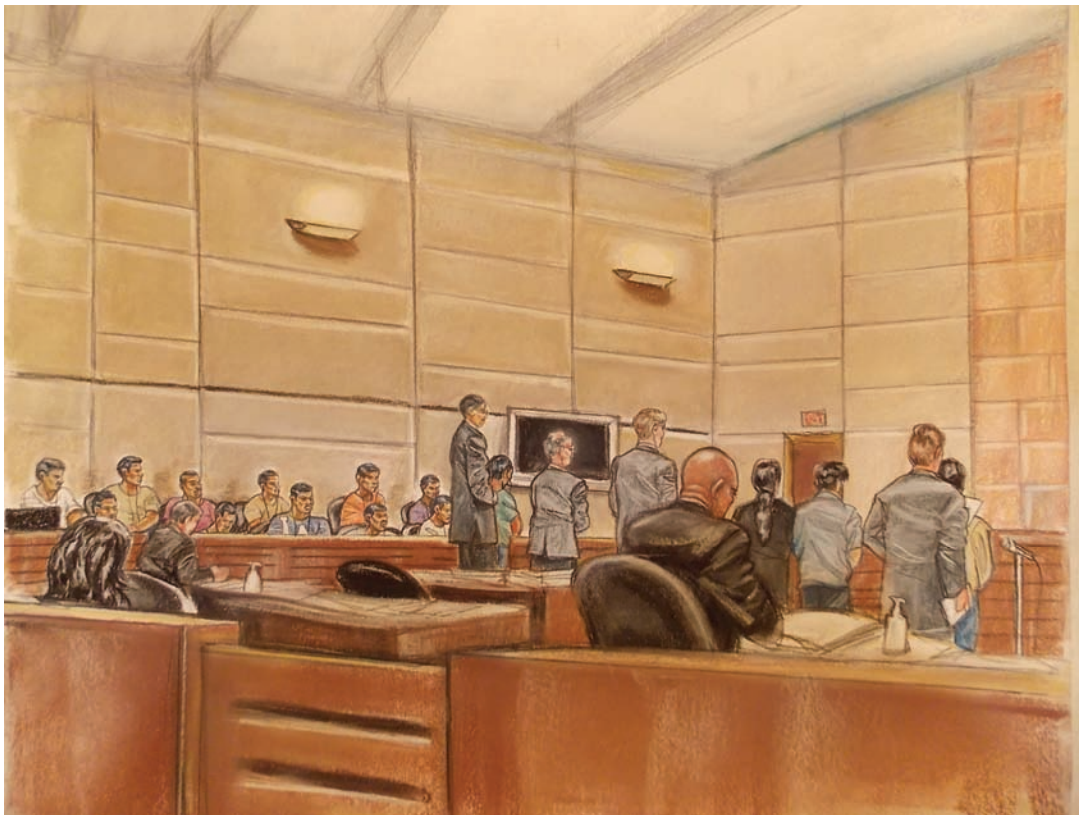
²⁸ Immigration and Nationality Act Section 212(a)(9)(A)(i) (2012).

²⁹ Immigration and Nationality Act Section 212(a)(9)(A)(ii) (2012).

The Obama administration deported a record 1.6 million non-citizens through such formal removals between fiscal year 2009 and 2012.³⁰

Referrals for Criminal Prosecution and Operation Streamline

Both US Customs and Border Protection (CBP) and US Immigration and Customs Enforcement (ICE) are empowered to refer unauthorized immigrants for federal criminal prosecution before formally deporting them. CBP refers significantly more cases. In 2012, CBP referred 86 percent of all illegal entry cases and 46 percent of all illegal reentry cases; ICE referred 1 percent of illegal entry and 25 percent of illegal reentry cases.³¹



An artist's rendering of an Operation Streamline hearing in Tucson, Arizona on May 6, 2013.

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³⁰ US Immigration and Customs Enforcement (ICE), "Removal Statistics," <http://www.ice.gov/removal-statistics> (accessed April 12, 2013).

³¹ Transactional Records Access Clearinghouse (TRAC), "Going Deeper" tool, Prosecutions filed by agency, 2012, <http://tracfed.syr.edu/index/index.php?layer=cri> (accessed May 10, 2013). See also TRAC, "Continued Decline and Shifting Focus Seen in Criminal Immigration Prosecutions," November 19, 2012, <http://trac.syr.edu/immigration/reports/300/> (accessed April 14, 2013).

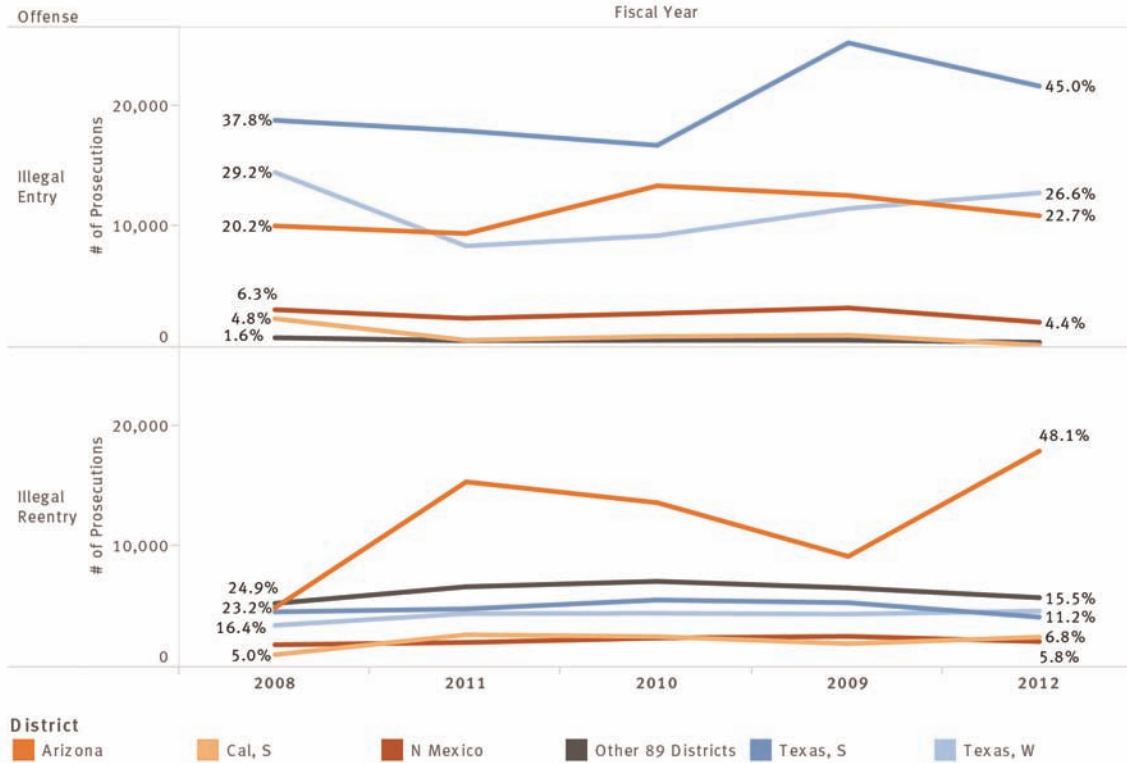
Before 2005, CBP only referred non-citizens with criminal records or repeat offenders for criminal prosecution. Others, including first-time migrants, were returned or removed. In 2005, however, that policy changed with the advent of Operation Streamline in Del Rio, Texas. Touted as a “zero-tolerance” program toward all non-citizens caught crossing the border without authorization, CBP claimed that they were prosecuting nearly everyone they apprehended in the Del Rio sector.³² CBP no longer promotes Streamline as a “zero-tolerance” program, and CBP does not come close to referring every migrant apprehended for criminal prosecution; immigration authorities in 2010 made about 17 federal criminal arrests per 100 apprehensions in Southwest Border Patrol sectors.³³ Rather, CBP describes criminal prosecution as one option in its “consequence delivery system,” which is designed to “uniquely evaluate each subject and apply the appropriate post-arrest consequences ... to break the smuggling cycle and end the subject’s desire to attempt further illegal entry.”³⁴

³² Joanna Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” The Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, University of California, Berkeley Law School, January 2010, http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (accessed April 25, 2013).

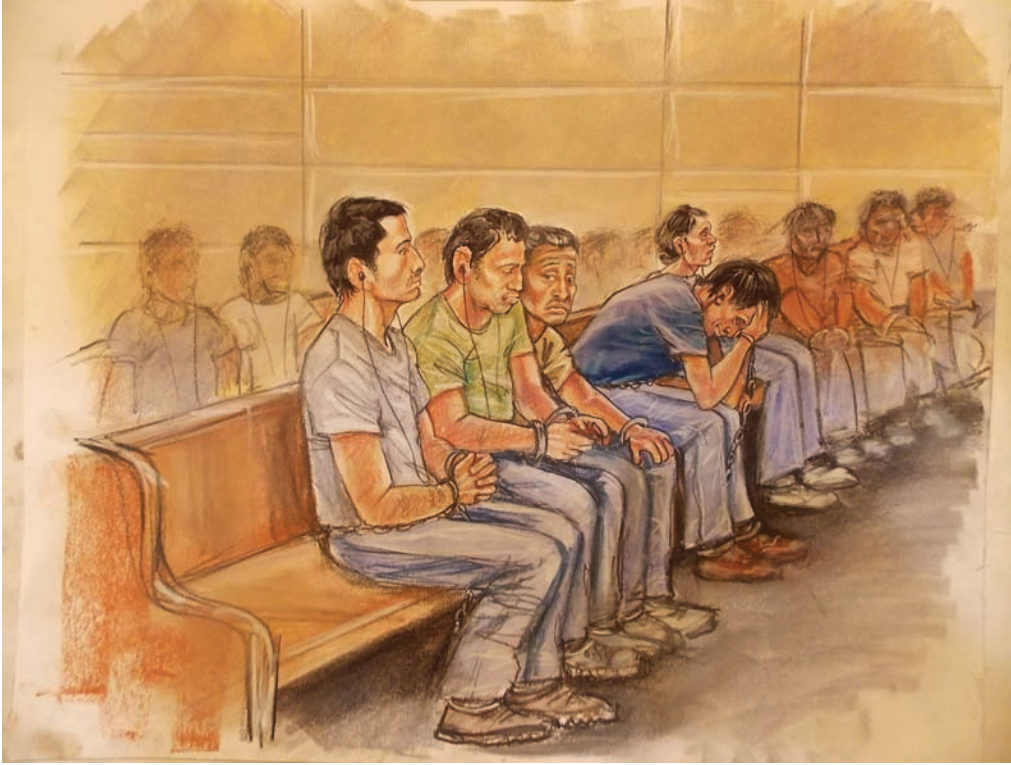
³³ Human Rights Watch meeting with US Customs and Border Protection, February 23, 2013; Motivans, “Immigration Offenders in the Federal Justice System, 2010,” July 2012, <http://bjs.gov/index.cfm?ty=pbdetail&iid=4392>, p. 8.

³⁴ US Customs and Border Protection, “2012-2016: Border Patrol Strategic Plan,” http://nemo.cbp.gov/obp/bp_strategic_plan.pdf (accessed April 12, 2013).

FIGURE 3: NUMBER AND PERCENTAGE OF PROSECUTIONS BY US FEDERAL DISTRICT (2008-2012)



Source: Transactional Records Access Clearinghouse (TRAC), Syracuse University. TRACFED Express Tool <http://tracfed.syr.edu/index/index.php?layer=crl>



An artist's rendering of an Operation Streamline hearing in Tucson, Arizona on May 6, 2013.
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Operation Streamline is active in many, but not all, federal courts in the Western and Southern Districts of Texas, New Mexico, and Arizona, making the Southern District of California the only exception among states on the southern border. Ninety-eight percent of prosecutions for illegal entry and seventy-seven percent of prosecutions for illegal reentry in 2012 were in the four judicial districts in which Streamline is active.³⁵ Not all of these prosecutions take place in the mass hearings characteristic of Streamline, but the push to prosecute is clearly greatest in the districts in which Streamline is active. A large number of prosecutions used to occur in the Southern District of California, but there has been a significant drop in recent years: the 2,727 cases prosecuted in the district accounted for just 3 percent of all illegal entry and reentry cases in 2012. Of those cases, only 206 were for illegal entry, representing just 0.4 percent of all illegal entry prosecutions.³⁶ In districts elsewhere in the country, there are only a couple of dozen prosecutions each year.

³⁵ TRAC, “Express” tool, Prosecutions under 8 USC Section 1325 and 1326 by judicial district, from fiscal year 2008 to 2012, <http://tracfed.syr.edu/index/index.php?layer=crl> (accessed May 10, 2013).

³⁶ *Ibid.*

II. Criminal Prosecutions Fail to Focus on Serious Threats

When Congress increased the maximum penalty for illegal reentry in 1988, lawmakers explained that their rationale was to target “alien drug traffickers who are considering illegal entry into the United States,” and cited in particular the example of a drug kingpin who was wanted for about 50 murders.³⁷ Prosecution policies today are generally set by individual US Attorneys and vary from district to district, but outside of programs like Operation Streamline, prosecutors continue to affirm that prosecutorial resources, particularly for charging felony illegal reentry, are reserved for dangerous criminals who are a threat to public safety.³⁸ Similarly, John Morton, director of US Immigration and Customs Enforcement (ICE), in testimony before Congress in March 2013, asserted that immigration enforcement resources are focused on the apprehension and removal of “individuals who fall within our highest enforcement priorities, namely national security and public safety threats.”³⁹

The US government has a strong public safety interest in keeping dangerous criminals from entering its borders. Human Rights Watch’s research, however, indicates that prosecutions are targeting many persons who pose no such threat. The rapid overall growth in criminal prosecution has been accompanied by the even more rapid growth in prosecution of unauthorized immigrants with no or minor criminal records.

The existence of a prior criminal conviction is not necessarily an accurate proxy for future dangerousness, particularly with regard to old convictions, and a prosecutorial policy built on such a faulty rationale can result in a system of preventive detention that violates fundamental rights.

³⁷ See Doug Keller, “Re-thinking Illegal Entry and Re-entry,” *Loyola University Chicago Law Journal*, vol. 44, Fall 2012.

³⁸ Anna Gorman, “Illegal reentry into the US increasingly leads to prison,” *Los Angeles Times*, March 16, 2008, <http://articles.latimes.com/2008/mar/16/local/me-crackdown16> (accessed March 28, 2013) (quoting Julie L. Myers, then assistant secretary of Immigration and Customs Enforcement, stating, “They are some of the worst.... They are people that citizens of any community would want off the streets.”); Kent Faulk, “Charges for illegal re-entry on rise in Alabama,” *Birmingham News*, September 25, 2011, http://blog.al.com/spotnews/2011/09/charges_for_illegal_re-entry_o.html (accessed March 28, 2013) (quoting US Attorney Joyce White Vance, stating, “We target people who are a risk to the community.”)

³⁹ Statement of John Morton, director, US Immigration and Customs Enforcement (ICE), “Regarding a Hearing on Immigration Enforcement,” US House of Representatives, Committee on the Judiciary, March 19, 2013, <http://www.ice.gov/doclib/news/library/speeches/130319morton.pdf> (accessed April 12, 2013).

Even if one assumes that prior criminal records can be a useful predictor of future dangerousness, the data show a significant shift in who is being sentenced under the sentencing guideline for illegal entry offenses.

Increased Prosecution of Unauthorized Immigrants with Minor Criminal Histories

Human Rights Watch is still awaiting responses to requests under the Freedom of Information Act for data from US Customs and Border Protection (CBP) and ICE, as well as a response to a request for information from the US Department of Justice (DOJ), on the criminal records of defendants charged with illegal entry and reentry from 2002 to the present. According to a recent Bureau of Justice Statistics report, only 20 percent of defendants charged with illegal reentry in 2010 had prior felony convictions for violent offenses.⁴⁰ An analysis of available data from the US Sentencing Commission (“the Commission”) indicates that this figure is part of a growing trend toward increased prosecution of immigrants with records, if they have records at all, for nonviolent or minor offenses.

⁴⁰ Mark Motivans, US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, “Immigration Offenders in the Federal Criminal System, 2010,” July 2012, <http://bjs.gov/index.cfm?ty=pbdetail&iid=4392> (accessed April 12, 2013), p. 26 (showing that 64.8 percent of defendants charged with illegal reentry and 20.3 percent of defendants charged with illegal entry (Class A misdemeanors only) in federal courts have a prior felony conviction).

Sentencing Commission Data: Limits and Discrepancies

One of the responsibilities of the US Sentencing Commission is the collection and analysis of sentencing data from federal court judgments, indictments, and other relevant documents.⁴¹ It receives and examines information on all cases in which the sentencing guidelines are applied (felonies and Class A misdemeanors, meaning misdemeanors for which the maximum sentence is one year or less but more than six months).⁴²

Commission data on Guideline 2L1.2, for “Unlawfully entering or remaining in the United States,” thus includes information on tens of thousands of illegal reentry cases, and a couple hundred second or subsequent illegal entry cases, but not information on first-time convictions for illegal entry. It therefore does not provide a complete look at all illegal entry and reentry cases.

The Commission’s data on the application of this guideline is also incomplete because the Commission excludes from its analysis cases in which the pre-sentence report—which details a defendant’s criminal, work, and family history—is missing. In fiscal year 2011, for example, the Commission excluded 8,164 cases of illegal entry offenses because the court had waived the pre-sentence report.⁴³ This may explain why the Commission’s total number of illegal entry offense cases each year is significantly lower than the number of convictions for illegal entry and reentry reported by the Transaction Records Access Clearinghouse, which analyzes data received from the Executive Office of US Attorneys.⁴⁴

⁴¹ US Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, “Introduction,” http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm (accessed March 28, 2013).

⁴² Human Rights Watch email correspondence with Christine Kitchens, US Sentencing Commission, Office of Research and Data, February 28, 2013; and telephone interviews with Christine Kitchens, March 4, 2013 and April 18, 2013. See also 18 US Code Section 3559, Sentencing Classification of Offenses.

⁴³ Human Rights Watch email correspondence and interviews with Christine Kitchens; and US Sentencing Commission, “Report on the Continuing Impact of *US v. Booker* on Federal Sentencing,” 2012, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf (accessed April 25, 2013), p. 52.

⁴⁴ For example, the Commission reported 21,487 cases in which Guideline 2L1.2 was applied in fiscal year 2011. TRAC, however, reported 33,602 convictions for illegal reentry and 33,044 convictions for illegal entry in fiscal year 2011. Even if we limit comparison of the Commission’s cases to TRAC’s data on illegal reentry convictions, there is a difference of 12,115 cases.

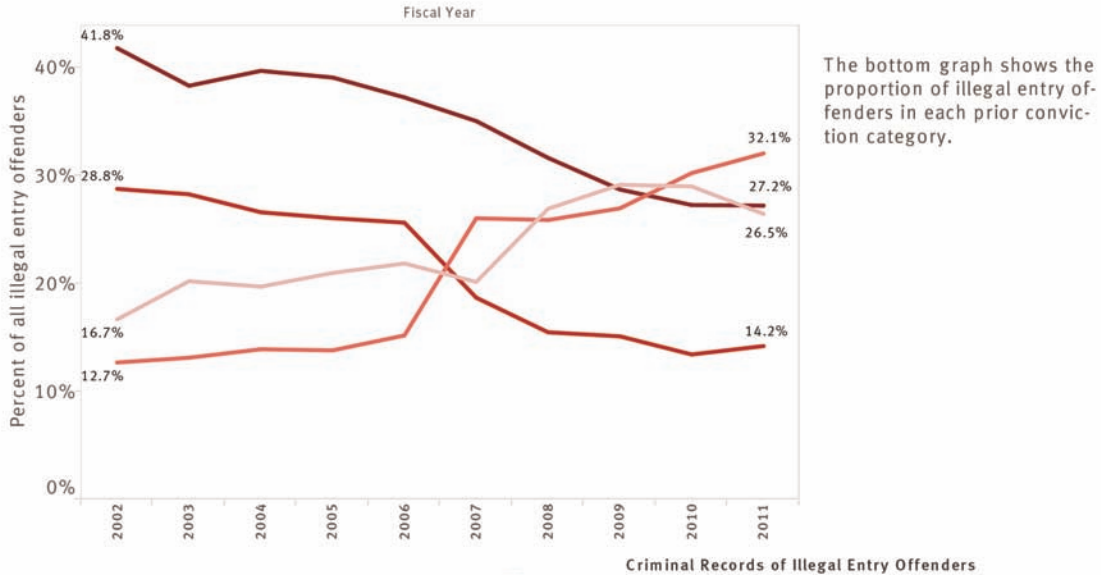
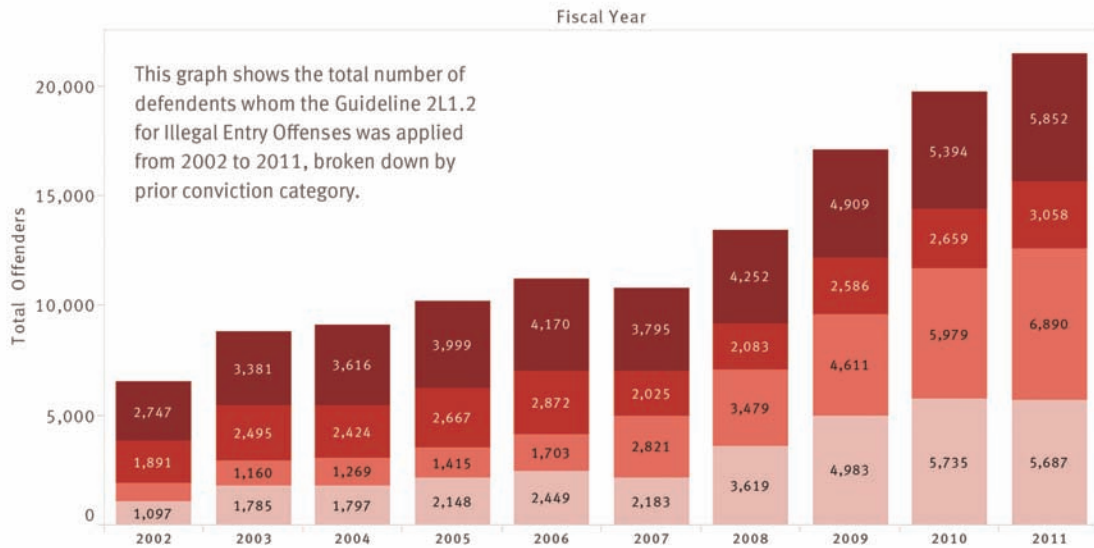
Guideline 2L1.2 for illegal entry offenses increases the offense level, and the possible sentence, based on the defendant's prior criminal record. Thus, by looking at Commission data on how the guideline was applied in each case, one can determine what kind of prior criminal convictions the defendant had. Even acknowledging the limitations of Commission data (see text box above), it is clear that the criminal backgrounds of defendants sentenced for illegal entry offenses are significantly less serious today than they were 10 years ago.

In 2002, 42 percent of defendants sentenced under guideline 2L1.2 for illegal entry offenses (“illegal entry offenders”) had prior convictions that warranted a 16-level increase in offense levels—such as a conviction for a crime of violence or a drug trafficking offense resulting in a sentence of 13 months or more.⁴⁵ Only 17 percent had no conviction warranting an increase in offense levels. But by 2011, the proportion of illegal entry offenders with prior convictions resulting in a 16-level increase had decreased to 27 percent, while defendants with no prior felony convictions had increased to 27 percent.⁴⁶

⁴⁵ US Sentencing Commission, “Guideline Application Frequencies (2002-2011),” http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/index.cfm (accessed April 25, 2013).

⁴⁶ Ibid. A prior felony conviction, or three or more misdemeanors that are crimes of violence or drug trafficking offenses, result in a 4-level increase. US Sentencing Guideline 2L1.2.

FIGURE 4: ILLEGAL ENTRY OFFENDERS BY PRIOR CRIMINAL CONVICTION FROM 2002 TO 2011



Source: US Sentencing Commission Guideline Application Frequencies (2002 - 2011) http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/GAF_FY2011.cfm Accessed: 4/9/2013.

- Criminal Records of Illegal Entry Offenders**
- No prior conviction resulting in increase
 - Prior felony or three or more misdemeanors resulting in a 4-level increase
 - Prior aggravated felony or drug conviction resulting in an 8 or 12-level increase
 - Prior felony conviction resulting in a 16-level increase

TABLE 1: ILLEGAL ENTRY OFFENDERS BY PRIOR CRIMINAL RECORDS FROM 2005 TO 2011

Criminal Records of Illegal Entry Offenders	Type of Offense	Fiscal Year						
		2005	2006	2007	2008	2009	2010	2011
No prior conviction resulting in increase	No conviction	2,148	2,449	2,183	3,619	4,983	5,735	5,687
Prior felony or three or more misdemeanors resulting in a 4- level increase	Prior felony or three or more misdemeanors resulting in a 4- level increase	1,415	1,703	2,821	3,479	4,611	5,979	6,890
Prior aggravated felony or drug conviction resulting in an 8 or 12- level increase	Aggravated felony	1,869	2,100	1,286	1,299	1,577	1,573	1,627
	Drug offense resulting in a sentence of less than 13 months	798	772	739	784	1,009	1,086	1,431
Prior felony conviction resulting in a 16- level increase	Drug offense resulting in a sentence of 13 months or more	2,448	2,369	2,022	2,224	2,496	2,404	2,720
	Crime of violence	1,367	1,573	1,529	1,791	2,117	2,532	2,689
	Alien smuggling	115	171	200	190	234	385	379
	Firearms	28	28	17	26	35	49	49
	Human trafficking	36	26	24	12	17	14	9
	Child pornography	4	2	3	6	7	8	6
	National security/Terrorism	1	1	0	3	3	2	0

Source: US Sentencing Commission Guideline Application Frequencies (2002 - 2011) http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/GAF_FY2011.cfm Accessed: 4/9/2013. Prior to 2005, the US Sentencing Commission did not publish data categorized by the types of offenses listed above.

This shift has occurred at the same time that these prosecutions have skyrocketed. The total number of illegal entry offenders increased by 227 percent during the 10 years analyzed. While the number of cases in which the defendant had a prior conviction for an offense considered most serious increased over the 10 years by 113 percent, the number of cases in which the defendant had less serious criminal histories (felonies less serious than “aggravated felonies” or three or more misdemeanors resulting in a 4-level increase) increased by 725 percent. The number of cases in which the defendant had *no* prior felony conviction nor any misdemeanor convictions resulting in an increase in offense levels increased by 418 percent.

TABLE 2: PERCENT CHANGE IN THE APPLICATION OF THE ILLEGAL ENTRY OFFENSE SENTENCING GUIDELINE FROM 2002 TO 2011

	2002	2011	Percent Change FY 2002 - FY 2011
No prior conviction resulting in increase	1,097	5,687	418%
Prior felony or three or more misdemeanors resulting in a 4-level increase	835	6,890	725%
Prior aggravated felony or drug conviction resulting in an 8 or 12-level increase	1,891	3,058	62%
Prior felony conviction resulting in a 16-level increase	2,747	5,852	113%
Total	6,570	21,487	227%

Source: US Sentencing Commission Guideline Application Frequencies (2002 - 2011), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/GAF_FY2011.cfm (accessed April 9, 2013).

Looking at this data another way, in 2011, 26 percent of those sentenced under this guideline had no prior felony conviction and 59 percent had prior felony convictions for nonviolent offenses.⁴⁷

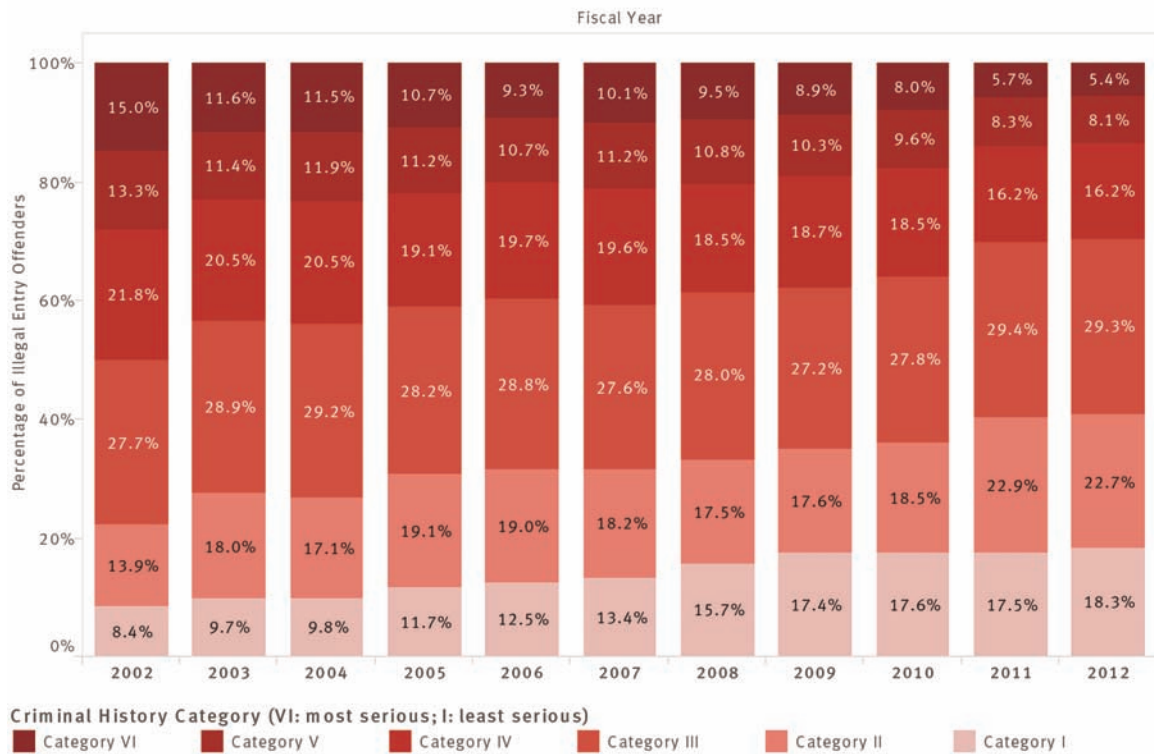
According to federal public defenders, pre-sentence reports are generally waived only when the defendant has no or minimal criminal history.⁴⁸ If one includes the 8,164 cases the Commission excluded from its analysis because of the absence of a pre-sentence report and adds those cases to the no-prior-felony category, the percentage of defendants with no prior felony conviction is even higher, at 46 percent.

⁴⁷ We have defined “nonviolent offense” to exclude “crimes of violence,” firearms offenses, child pornography, national security or terrorism offenses, human trafficking, and alien smuggling.

⁴⁸ A federal public defender in Texas told us that his office waives the pre-sentence report in cases where the defendant has no prior felony convictions and is eligible for a sentence of straight probation. Federal public defenders in Arizona said pre-sentence reports are generally waived in “flip-flop” prosecutions, where the defendant is charged with both illegal reentry and illegal entry, and then is offered a plea deal in which he or she would plead guilty to illegal entry and have the reentry charge dismissed. According to these attorneys, these prosecutions generally do not include people with serious prior criminal convictions. Human Rights Watch email correspondence with Chris Carlin, assistant federal defender, Alpine, Texas, April 10, 2013; and Human Rights Watch interview with Milagros Cisneros and Susan Anderson, assistant federal defenders, Phoenix, Arizona, April 2, 2013.

Commission data on the criminal history categories of defendants also provides evidence of a trend toward prosecuting individuals with minor or no criminal history. As noted above, the length of defendants' sentences for illegal entry offenses are based on their criminal history category, which gives a sense of both the number and seriousness of prior convictions, as well as their offense level. Whereas defendants in the most serious criminal history categories (IV, V, and VI) made up about 50 percent of all defendants sentenced for illegal entry offenses in 2002, by 2012, they only made up 30 percent of such defendants. At the same time, the proportion of defendants in the lowest criminal history categories (I and II) increased from 22 percent in 2002 to 41 percent in 2012.⁴⁹

Figure 5: Proportion of Illegal Entry Offenders in Each Criminal History Category from 2002 to 2011



Source: US Sentencing Commission Sourcebooks. < http://www.ussc.gov/Data_and_Statistics/Archives.cfm >. Accessed 4/14/2013

⁴⁹ US Sentencing Commission, Annual Sourcebooks (2002-2012), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/index.cfm (accessed April 25, 2013).

The rising number of prosecutions of people with minor criminal histories is in part the product of a self-perpetuating cycle: once convicted of illegal entry, an immigrant who attempts to reenter the US is more likely to be prosecuted for illegal reentry because he or she now has a criminal record. Prior convictions for illegal entry offenses alone could be sufficient to put a defendant in criminal history categories I, II, or III. Although we do not have access to the criminal records of these defendants, our documentation of specific cases (as discussed in greater detail in the next section) indicates that, in many cases, the prior convictions are illegal entry and reentry convictions.

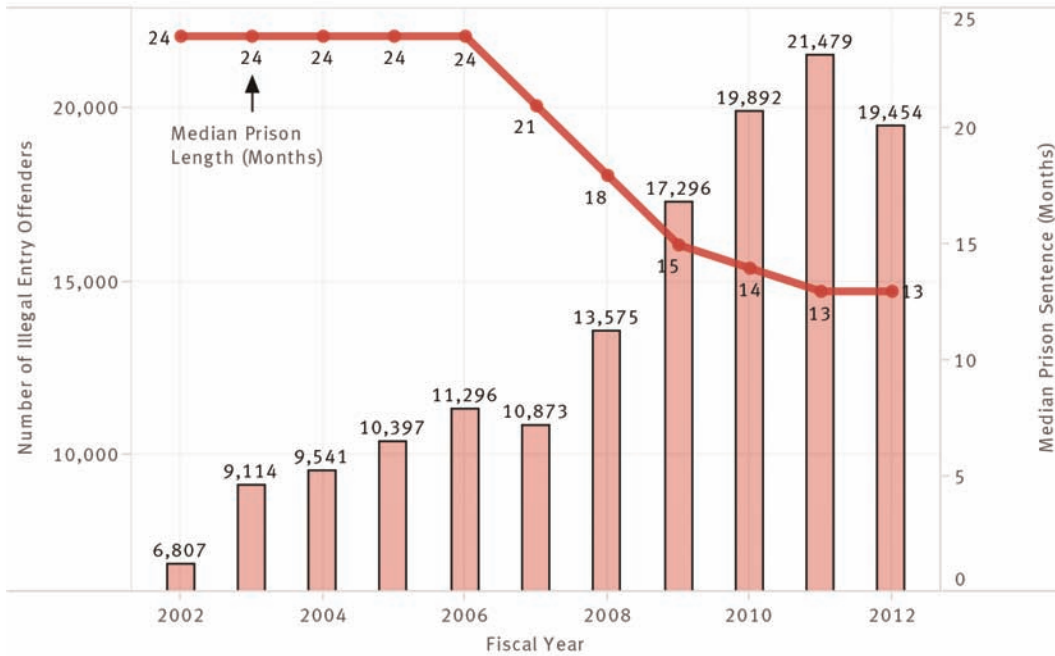
Average sentences for illegal entry offenses have also decreased significantly over the past 10 years. In 2002, the mean sentence for illegal entry offenses was 30 months, and the median sentence was 24 months.⁵⁰ In 2012, the mean sentence was 19 months, and the median sentence was 13 months.⁵¹ This is in large part due to the use of “Fast-Track” plea offers by the US government, in which defendants receive automatic reductions in calculations of offense level in exchange for waiving certain rights and agreeing to faster conclusion of their cases.⁵² But if these Fast-Track plea offers result in sentences the government considers appropriate punishment, the decrease in sentences may also indicate the US government views these defendants as less dangerous.

⁵⁰ US Sentencing Commission, 2002 Annual Sourcebook of Federal Sentencing Statistics, “Table 50: Mean and Median Sentences of Offenders Sentenced Under Immigration Guidelines by Departure Status,” http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2002/Table50.pdf (accessed April 25, 2013).

⁵¹ Ibid.

⁵² US Sentencing Commission, “Report on the Continuing Impact of *US v. Booker* on Federal Sentencing,” Part C: Immigration Offenses, 2012, http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_C8_Immigration_Offenses.pdf (accessed April 25, 2013), p. 118.

FIGURE 6: MEDIAN SENTENCE OF ILLEGAL ENTRY OFFENDERS FROM 2002 TO 2012



Source: US Sentencing Commission Sourcebooks. < http://www.uscc.gov/Data_and_Statistics/Archives.cfm > Accessed 4/14/2013. For 2004 and 2005, the USSC provides data in pre- & post- Blakely and Booker formats. The median sentences for these two years are a weighted median.

To some extent, these national trends may mask even more pronounced regional trends. According to a Justice Department report, in 2010, a high percentage of immigration defendants (including but not limited to those convicted of illegal entry offenses) had a prior violent or drug felony conviction in certain districts, such as the Central District of California (including Los Angeles), where 79 percent of immigration defendants had such prior records. In comparison, in New Mexico, the Western District of Texas, northern New York State, Michigan, and southern Florida, a relatively lower percentage (from 1 to 33 percent) of defendants had a prior violent or drug felony conviction.⁵³

⁵³ Motivans, “Immigration Offenders in the Federal Justice System, 2010,” July 2012, p. 28.

Critical Views of Judges and Attorneys

Our research and interviews with judges and attorneys provide additional evidence of an increased focus on prosecuting unauthorized immigrants with minor criminal histories. Magistrate Judge Philip Mesa in El Paso, Texas, who has spent 18 years presiding over illegal entry and reentry cases, told Human Rights Watch, “The people who before would have been prosecuted as misdemeanors are now being charged as felonies. Any who [would have gotten] voluntary return are now being prosecuted for misdemeanors.”⁵⁴ Judge Robert Brack in Las Cruces, New Mexico, who estimated he has sentenced defendants for felony reentry in over 11,000 cases, said in the majority of the cases he sees, “They have absolutely no criminal history.”⁵⁵ Judge Sam Sparks in Austin, Texas, issued a court order in 2010 demanding that the US Attorney’s Office provide “substantive reason(s)” why each of three illegal reentry defendants “without any significant criminal record” should be prosecuted, given the “mind boggling” costs.⁵⁶

Defense attorneys reported a similar pattern. Milagros Cisneros, an assistant federal defender in Phoenix, said that when she began 11 years ago, the majority of her clients were charged with illegal reentry after a prior aggravated felony conviction. Now she sees mainly people with lesser felony convictions or no felony convictions at all.⁵⁷ In El Paso, Texas, assistant federal defender Edgar Holguin similarly observed that 10 years ago, he only saw prosecutions of people with prior criminal convictions, but in the past 5 years, he increasingly sees people whose only prior convictions are for immigration offenses.⁵⁸ He said, “Clients used to ask, ‘Why am I getting so much time?’ Now they ask, ‘Why am I getting time at all?’”⁵⁹

⁵⁴ Human Rights Watch interview with Magistrate Judge Philip Mesa, El Paso, Texas, September 26, 2012.

⁵⁵ Human Rights Watch telephone interview with Judge Robert Brack in Las Cruces, New Mexico, April 25, 2013.

⁵⁶ *United States v. Juan Ordonez-Soto*, 2009-CR-590; *United States v. Ignacio Ontiveros-Vasquez*, 2009-CR-592; *United States v. Angel Hernandez-Garcia*, 2009-CR-597, Order, February 5, 2010. Notably, since the appointment of Robert Pittman as US Attorney for the Western District of Texas, the number of illegal reentry prosecutions has dropped 46 percent from a year earlier. According to the *Austin-American Statesman*, “[Judge] Sparks said in recent months that he has sentenced mostly undocumented immigrants who have serious criminal histories—not ones he had seen in recent years who did little else wrong besides return to the United States to work.” Steven Kreytak, “Prosecutions of immigrants in Austin down,” *Austin American Statesman*, September 29, 2012, <http://www.statesman.com/news/news/local/prosecutions-of-immigrants-in-austin-down/nSPjS/> (accessed April 12, 2013); and Steven Kreytak, “Federal judge questions immigration prosecutions,” *Austin American Statesman*, February 6, 2010, <http://www.statesman.com/news/news/local/federal-judge-questions-immigration-prosecutions-1/nRkNB/> (accessed April 29, 2013).

⁵⁷ Human Rights Watch interview with Milagros Cisneros, assistant federal defender, Phoenix, Arizona, April 2, 2013.

⁵⁸ Human Rights Watch interview with Edgar Holguin, assistant federal defender, El Paso, Texas, September 25, 2012.

⁵⁹ *Ibid.*

Maureen Franco in El Paso also noted, “[Defendants] are not caught ... [because they’ve] committed another crime. They’re caught coming across the border.”⁶⁰

The shift is less pronounced in districts that focus primarily on illegal reentry prosecutions (as opposed to illegal entry misdemeanors) such as in the Central and Southern Districts of California, where defense attorneys observed their clients generally have prior felony convictions. But even in these districts, attorneys noted seeing a decrease in people with serious criminal records and an increase in people whose prior convictions are for minor nonviolent offenses, such as drug possession.”⁶¹

Several attorneys also recounted cases in which the last offense had been committed 10 or more years ago, which raises serious doubts about whether these individuals are currently a threat to public safety. Angela Viramontes, an assistant federal defender in Riverside, California, observed of her illegal reentry clients, “I see a lot of people who have really transformed their lives.... A lot of these crimes they committed as young men.”⁶² Firdaus Dordi, an assistant federal defender in Los Angeles, California, described a case in which a client had committed two burglaries 16 and 13 years prior to his illegal reentry charge. “He had a drinking problem, he swore to his wife after the second conviction that he would clean up his act.” He committed no new offenses and instead became a “business owner, homeowner, [he did] great things in his community,” but he still received a two-year sentence for illegal reentry.⁶³ A judge in a 2011 illegal reentry case in New Mexico noted how the defendant’s criminal convictions were close to 20 years old and that “[i]t appears [the defendant] has been a good neighbor and a good community member over the last 20 years.”⁶⁴

⁶⁰ Human Rights Watch interview with Maureen Franco, federal public defender, El Paso, Texas, September 25, 2012.

⁶¹ Human Rights Watch telephone interview with Victor Torres, criminal defense attorney in San Diego, California, June 29, 2012; and interview with Shaffy Moeel and Bridget Kennedy, assistant federal defenders, San Diego, California, September 5, 2012. Candis Mitchell noted that many of her clients have no prior criminal convictions but are prosecuted for presenting false documents. Human Rights Watch interview with Candis Mitchell, assistant federal defender, San Diego, California, July 22, 2012.

⁶² Human Rights Watch interview with Angela Viramontes, assistant federal defender, Los Angeles, California, October 29, 2012.

⁶³ Human Rights Watch interviews with Firdaus Dordi, assistant federal defender, Los Angeles, California, August 30, 2012 and January 24, 2013. The two-year sentence his client received was already below the sentence he would have received under the US sentencing guidelines.

⁶⁴ *United States v. Agustin DeHoyos-Banderas*, 2011 US Dist. LEXIS 37812, No. CR 10-2674 JB (D. N.M. 2011).

According to court records and their own accounts, many defendants interviewed by Human Rights Watch similarly had no prior criminal convictions.⁶⁵ Several had prior convictions only for illegal entry or reentry.⁶⁶ While a significant number had prior felony convictions, and two had prior convictions for “alien smuggling,”⁶⁷ most involved nonviolent drug offenses. In a couple of cases, defendants had prior convictions for violent offenses that were over 15 years old.⁶⁸

Rapid-Fire Group Trials: Operation Streamline

One of the most significant reasons for the increase in prosecutions of unauthorized immigrants with no or minor criminal histories is Operation Streamline. Through the cooperation of CBP, the federal courts, the US Attorney’s Office, the US Marshals Service, ICE, and the Executive Office of Immigration Review, special proceedings have been created that quickly process people charged with illegal entry or reentry.⁶⁹ Operation Streamline’s name and exact prosecution policy varies from district to district, but all Streamline proceedings are fast and have predictable outcomes: a guilty plea from virtually every defendant for misdemeanor illegal entry.⁷⁰ One magistrate judge, who estimates he has presided over 17,000 cases, described his role as “a factory putting out a mold.”⁷¹

⁶⁵ The pre-sentence report is the court document that is most likely to include a complete record of a defendant’s criminal history, but these reports are confidential, and in many cases, the sentencing memoranda filed by the prosecutor and the defense attorney that reference the pre-sentence report are filed “under seal” and are not publicly available. Human Rights Watch was able to corroborate defendants’ accounts of their criminal convictions in many cases, however, such as where the sentencing memoranda were not under seal or where there was a published decision either by the sentencing judge in district court or the appellate court.

⁶⁶ Human Rights Watch interviews with Jorge G. (pseudonym), Marfa, Texas, September 21, 2012; Alberto M. (pseudonym), Marfa, Texas, September 21, 2012; Victor S. (pseudonym), Marfa, Texas, September 21, 2012; Sonia H. (pseudonym), Marfa, Texas, September 21, 2012; and Brenda R. (pseudonym), Pecos, Texas, September 24, 2012; Human Rights Watch telephone interview with Norma Pulcher, daughter of Rosa Emma Manriquez, October 24, 2012.

⁶⁷ Human Rights Watch interview with Jerry Lopez, Rosarito, Mexico, October 19, 2012; *US v. Cuellar-Valerio*, 2010 US Dist. LEXIS 98628 (N.M. 2010).

⁶⁸ Human Rights Watch interviews with Elmer Cardenas Gonzalez, Rosarito, Mexico, October 18, 2012; Heather Gonzales, wife of Elmer Cardenas Gonzales, Ontario, California, March 24, 2013; Milton Cruz, Los Angeles, California, October 29, 2012; and Micaela Remijio, fiancée of Milton Cruz, Riverside, California, February 28, 2013.

⁶⁹ Testimony of Michael J. Fisher, chief, US Border Patrol, US Customs and Border Protection (CBP), before the US House of Representatives, Committee on Homeland Security, Subcommittee on Border and Maritime Security, October 4, 2011, <http://www.dhs.gov/news/2011/10/04/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime> (accessed April 14, 2013).

⁷⁰ Human Rights Watch interviews with criminal defense attorneys and judges, in Texas, September 18, 20, 21, 25, and 26, 2012; and in Arizona, February 11 and 12, 2013; and Human Rights Watch court observations of Streamline proceedings in Brownsville, Texas, September 18, 2012; Del Rio, Texas, September 20, 2012; and Tucson, Arizona, February 11, 2013 and April 3, 2013. Data from the Administrative Office of US Courts includes only prosecutions of illegal entry and reentry in federal district court, not magistrate court (as in Streamline), but those statistics reveal a high percentage of defendants

Although Streamline proceedings result in convictions for misdemeanor illegal entry, they also play a significant role in the increasing felony prosecution of defendants with minor or no criminal history. Most defendants in Streamline do not have a prior criminal record.⁷² But once an immigrant has pled guilty in a Streamline proceeding to illegal entry, he or she becomes a “criminal alien,” increasing the likelihood of future prosecution for illegal reentry should he or she attempt to enter the United States again.⁷³ In Magistrate Judge Recio’s opinion, the US government has created a “felony class” of non-citizens; he emphasized that “where there’s no criminal history, no immigration history, the criminalization of these defendants is something that’s very difficult [for me].”⁷⁴ Human Rights Watch documented eight cases in which individuals with no prior non-immigration criminal histories were charged with or convicted of felony illegal reentry after a prior conviction for misdemeanor illegal entry.⁷⁵

Such cases are particularly troubling given that the “streamlined” process resulting in those first illegal entry convictions involves many shortcuts to the usual due process requirements. After CBP apprehends and refers a migrant to federal prosecution, he or she appears in federal court anywhere from one day to two weeks later. A single proceeding may include two dozen defendants or more than 100, depending on the district.⁷⁶ For all of

pleading guilty as well. In 2012, 826 of 876 defendants charged with illegal entry (94 percent) and 23,423 of 24,089 defendants charged with illegal reentry (97 percent) in district court pleaded guilty. Administrative Office of US Courts, Federal Judicial Caseload Statistics 2012, “Table D-4: Defendants Disposed of, by Type of Disposition and Offense,” <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/Do4Mar12.pdf> (accessed April 25, 2013).

⁷¹ Human Rights Watch interview with Magistrate Judge Felix Recio, Brownsville, Texas, September 18, 2012.

⁷² Human Rights Watch interviews with criminal defense attorneys and judges, in Texas, September 18, 20, 21, 25, and 26, 2012; and in Arizona, February 11 and 12, 2013.

⁷³ Since early 2013, the Streamline proceedings in Tucson, Arizona no longer include straight misdemeanor prosecutions, but only “flip-flop” prosecutions for both illegal entry and illegal reentry, as the proceedings only include defendants who previously have been formally removed from the United States. Although they all are offered (and accept) plea agreements to plead guilty to misdemeanor illegal entry and to have the felony reentry charge dismissed, the prevalence of “flip-flop” prosecutions increases the number of prosecutions for illegal reentry of defendants with no or minor criminal records. Human Rights Watch interviews with Magistrate Judge Bernardo Velasco, Tucson, Arizona, April 3, 2013; and with assistant federal defenders and criminal defense attorneys, Tucson, Arizona, February 11 and 12, 2013.

⁷⁴ Human Rights Watch interview with Magistrate Judge Felix Recio, September 18, 2012.

⁷⁵ Not all of the misdemeanor convictions occurred in Streamline proceedings, but these cases illustrate how increased prosecutions of misdemeanor cases are fueling increased felony prosecutions.

⁷⁶ Human Rights Watch court observations of Streamline proceedings in Brownsville, Texas, September 18, 2012; Del Rio, Texas, September 20, 2012; and Tucson, Arizona, February 11, 2013 and April 3, 2013; Human Rights Watch telephone interview with Brenda Sandoval, assistant federal defender in Yuma, Arizona, February 7, 2013.

these defendants, the stages of a federal criminal court case that normally could take months or even years are truncated into a single day.

All defendants are appointed a defense lawyer, but the amount of time they spend with their attorney before they plead guilty may be as little as 5 to 10 minutes.⁷⁷ Each lawyer, depending on the district, may be assigned 6 clients, several dozen, or over 100 per Streamline proceeding. Brenda Sandoval, an assistant federal defender in Yuma, Arizona, reported that she was recently assigned 107 clients. With the assistance of a colleague who offered to cover 20 of the cases, she ended up representing 87.⁷⁸

For the vast majority of defendants whom Border Patrol apprehends along the border, there are few defenses to the charge that they entered or reentered the country without US government consent. But the defenses that do exist—such as acquired or derivative citizenship⁷⁹ and a prior wrongful removal order—require considerable investigation. Firdaus Dordi, who has no Streamline clients as a federal public defender in Los Angeles, said he normally reserves at least two hours for his first meeting with his clients, and that sometimes just going through a client’s immigration file (the “A” file) and initial research can take three to four hours. If he does find a defense, investigation can sometimes take months.⁸⁰ At a minimum, a criminal defense attorney would have to ask questions about where a client’s parents and grandparents were born, to determine whether there may be a claim to citizenship. But several migrants who had recently been deported after serving a Streamline sentence reported to Human Rights Watch that their attorneys asked no questions about their families.⁸¹ A recent study by the University of Arizona Center for Latin American Studies found that only 40 percent of defendants said their lawyers had mentioned basic legal rights, and only 1 percent said their lawyers had inquired into family

⁷⁷ Human Rights Watch interviews with recently deported migrants, Nogales, Mexico, April 4 and 5, 2013; and with Ricardo Calderon, criminal defense attorney, Del Rio, Texas, September 20, 2012.

⁷⁸ Human Rights Watch telephone interview with Brenda Sandoval, February 7, 2013.

⁷⁹ Persons who are born outside the United States can gain citizenship through their parents in certain circumstances. To determine whether an individual is a US citizen, several facts and issues must be investigated and proven, including, but not limited to, the laws in effect at the time of the individual’s birth, the citizenship of the individual’s parents or grandparents, the amount of time the individual’s US citizen parent spent in the United States, and whether or not the individual’s parents were married. US Citizenship and Immigration Services, “Citizenship Through Parents,” last updated January 22, 2013, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=32dff9dd4aa3210VgnVCM100000b92ca60aRCRD&vgnnextoid=32dff9dd4aa3210VgnVCM100000b92ca60aRCRD> (accessed April 25, 2013).

⁸⁰ Human Rights Watch interviews with Firdaus Dordi, August 30, 2012 and January 24, 2013.

⁸¹ Human Rights Watch interviews with recently deported migrants, Nogales, Mexico, April 4 and 5, 2013.

connections.⁸² In the opinion of Magistrate Judge Bernardo Velasco, the defense attorneys function merely as “ushers on the conveyer belt to prison.”⁸³

The prosecutors in Streamline proceedings are generally not prosecutors from the US Attorney’s Office, but ICE or CBP attorneys who have been deputized as “special assistant US attorneys.”⁸⁴

Magistrate judges have their own obligations under the US Constitution to ensure each defendant understands the charges before him or her and the consequences of a guilty plea. In the past, magistrate judges might have addressed 70 defendants in unison and received guilty pleas uttered in unison, but in 2009, the Ninth Circuit US Court of Appeals ruled in *United States v. Roblero-Solis* that *en masse* plea hearings violate federal law.⁸⁵

Human Rights Watch observed that magistrate judges find different ways to get through so many cases while avoiding such *en masse* plea hearings. For example, in two hearings we observed in Tucson, Arizona, Magistrate Judge Leslie Bowen began by addressing all 60 to 70 defendants together, then called up five defendants at a time, providing some information to them as a group, and finally questioned defendants individually about their pleas.⁸⁶ But no matter what measures a judge takes, the outcome is almost always a foregone conclusion. Once the defendant pleads guilty, the magistrate judge sentences each defendant to time-served (usually a couple of days) or up to six months,⁸⁷ which the defendant serves in the custody of US Marshals or the Bureau of Prisons before being deported.

Although Streamline proceedings are fast, they require significant resources. In addition to the resources required for defense attorneys, prosecutors, judges, court interpreters, and

⁸² The Center for Latin American Studies, University of Arizona, “In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security: Preliminary Data from the Migrant Border Crossing Study,” March 2013, http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf (accessed April 12, 2013), p. 29.

⁸³ Human Rights Watch interview with Magistrate Judge Bernardo Velasco, February 3, 2013.

⁸⁴ Joanna Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” The Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, University of California, Berkeley Law School, January 2010, http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (accessed April 25, 2013).

⁸⁵ *United States v. Roblero-Solis*, 588 F. 3d 962 (9th Cir. 2009).

⁸⁶ Human Rights Watch court observations, Tucson, Arizona, February 11, 2013 and April 3, 2013.

⁸⁷ *Ibid*; Human Rights Watch interviews with assistant federal defenders and criminal defense attorneys, Tucson, Arizona, February 11 and 12, 2013.

other court staff, Streamline proceedings require the participation of the US Marshals, pretrial service personnel, and additional Border Patrol agents in the courtroom.

Secure Communities and State Immigrant Laws

As with Operation Streamline, federal immigration enforcement programs run by ICE likely play a major role in the spike in federal prosecutions of illegal entry and reentry. From 2006 to 2010, ICE referrals for prosecutions of illegal reentry more than doubled.⁸⁸ By 2012, 25 percent of prosecuted cases were from ICE referrals.⁸⁹ Under programs like Secure Communities, an unauthorized immigrant who comes into contact with local or state police can end up detained for ICE, and ultimately referred by ICE for criminal prosecution.⁹⁰ We examined a number of such cases. In some instances, the individuals had been arrested or convicted of new offenses (usually involving drugs). But in many other cases, defendants came to the attention of local law enforcement for things as minor as a traffic stop.⁹¹

In Arizona, some defense attorneys told us that some of their clients had ended up being referred for federal prosecution after they were asked about their immigration status by local police, as police are authorized to do under SB 1070, Arizona's new immigrant law enacted in April 2010.⁹² Daniel Anderson, a criminal defense attorney in Tucson, told us that in one case, a police officer had seen his client, who had been in Arizona for several years, at a bus stop and asked to see her papers; that encounter led to her prosecution in Operation Streamline.⁹³ And an unauthorized immigrant who had lived in Arizona for 17 years similarly told us he was prosecuted for illegal reentry after a traffic stop.⁹⁴

⁸⁸ Syracuse University, Transactional Records Access Clearinghouse (TRAC), "Criminal Immigration Prosecutions Are Down, But Trends Differ by Offense," March 17, 2010, <http://trac.syr.edu/immigration/reports/227/> (accessed April 14, 2013).

⁸⁹ TRAC, "Going Deeper" tool, Prosecutions filed by agency, 2012, <http://tracfed.syr.edu/index/index.php?layer=cri> (accessed May 10, 2013).

⁹⁰ Secure Communities allows local and state police to check fingerprints of people they arrest against federal immigration databases. US Immigration and Customs Enforcement (ICE), "Secure Communities," http://www.ice.gov/secure_communities/ (accessed May 9, 2013).

⁹¹ Human Rights Watch interviews with Yafit Muchtar, Los Angeles, California, October 12, 2012; Adriana Quesado, El Paso, Texas, September 27, 2012; Carlos Santana, Tijuana, Mexico, October 23, 2012; Mark O'Brien, San Diego, California, October 22, 2012; Antonio Camacho, Rosarito, Mexico, October 18, 2012; Susan Anderson, assistant federal defender, Phoenix, Arizona, February 15, 2013; and Peter Kirchheimer, attorney-in-charge of the Eastern District Office, Federal Defenders of New York, Brooklyn, New York, July 11, 2012.

⁹² The provision empowering police to inquire into immigration status was enjoined until the Supreme Court's decision to uphold that particular provision in *Arizona v. United States*, 567 US __ (2012).

⁹³ Human Rights Watch interview with Daniel Anderson, Tucson, Arizona, February 11, 2013.

⁹⁴ Human Rights Watch interview with Alberto Brockman Rodriguez, Tucson, Arizona, April 3, 2013.

Prosecutors in Maricopa County, Arizona, have been using the new state law to bring felony charges against non-citizens found with false work authorization documents.⁹⁵ Two assistant federal defenders in Arizona told us they had clients with no prior criminal record who were convicted under Arizona law on false document charges and then faced higher maximum sentences during the ensuing federal illegal reentry prosecution because of the state felony conviction.⁹⁶ We interviewed one person who had served a two-year state prison sentence for such a conviction, and was soon after sentenced to a six-month federal prison sentence for illegal reentry.⁹⁷ If he had not been convicted of a felony, he would have been eligible for deferred action under the Obama administration's new policy for immigrants who were brought without authorization as children.⁹⁸

In other cases, defendants had not had any contact with law enforcement after reentering the United States, but ICE agents arrested them in their homes or at work.⁹⁹

To support its claim that it gives priority to the removal of those who are a threat to public safety, the Obama administration has touted statistics indicating it has removed a record number of non-citizens with criminal convictions. But in 20 percent of the cases in 2011, the criminal convictions were for immigration offenses, such as illegal entry or reentry, and did not suggest the individuals posed a threat.¹⁰⁰ And, as noted above, our research indicates that even among those with criminal convictions for non-immigration offenses, many have convictions for offenses committed decades ago, raising additional doubts about the dangerousness of the individuals prosecuted for illegal entry offenses.

⁹⁵ Jim Walsh, "Latinos assail Maricopa County Attorney Montgomery over ID-theft charges," *The Republic*, February 15, 2013, http://www.azcentral.com/news/articles/20130215latinos-assail-maricopa-county-attorney-montgomery.html?nclick_check=1 (accessed April 14, 2013).

⁹⁶ Human Rights Watch interview with Susan Anderson and Milagros Cisneros, February 15, 2013.

⁹⁷ Human Rights Watch videoconference interview with Mario S. (pseudonym) in Phoenix, Arizona, April 3, 2013.

⁹⁸ Ibid. See US Citizenship and Immigration Services, "Consideration of Deferred Action for Childhood Arrivals," updated January 18, 2013, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f1947of7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f1947of7310VgnVCM100000082ca60aRCRD> (accessed April 14, 2013).

⁹⁹ Human Rights Watch interviews with Elmer Cardenas Gonzalez, October 18, 2012; Heather Gonzales, wife of Elmer Gonzales, March 24, 2013; Milton Cruz, October 29, 2012; Micaela Remijio, fiancée of Milton Cruz, February 28, 2013; and Firdaus Dordi, August 30, 2012 and January 24, 2013.

¹⁰⁰ US Department of Homeland Security, "Immigration Enforcement Actions: 2011," Annual Report, September 2012, http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (accessed April 25, 2013).

Diverting Resources from Serious Crimes

A number of law enforcement officials have noted that the increasing criminal prosecution of unauthorized immigrants with no or minor prior criminal histories has diverted resources from more pressing law enforcement and border security concerns.

Terry Goddard, who was attorney general of Arizona from 2003 to 2011, has been outspoken in his criticism of the federal government's border enforcement policies. "I never could understand why so much was being put into these particular individuals, who were not our high-level criminals.... [I]t's a use of resources disproportionate to the threat," he told Human Rights Watch. He also asserted,

Certainly apprehending and deterring illegal entry is part of border security, but it's not the whole enchilada. Border security involves criminal conspiracy, significant criminal conspiracy.... I see a failure of law enforcement, a failure of basic intelligence, to analyze the operations of the cartels to identify their leaders and disrupt their operations.... Some of the resources that went into deportation and Operation Streamline could have been used very effectively for international cooperation and the detection, the analysis, prosecution, and incarceration of some of [their leaders].¹⁰¹

Goddard said that if the US government were serious about going after illegal entry by migrants, they would target resources on smugglers and not the individuals who are smuggled. According to a Justice Department report, in 2010, "alien smuggling" represented only 4.7 percent of all immigration matters concluded, while unlawful entry or reentry constituted 93 percent.¹⁰²

In 2012, Arizona US Marshal David Gonzales said that 80 percent of the individuals detained under his jurisdiction were arrested on an immigration charge, and he echoed the

¹⁰¹ Human Rights Watch interview with Terry Goddard, former Arizona attorney general, Phoenix, Arizona, April 1, 2013.

¹⁰² Motivans, "Immigration Offenders in the Federal Justice System, 2010," July 2012. Notably, almost half of all defendants charged with "alien smuggling" are US citizens, while over 99 percent of defendants charged of illegal entry or reentry are non-citizens (0.3 percent of defendants were found to be US citizens).

concern that resources were being drained from more important security concerns, such as activity by Mexican organized crime.¹⁰³

Carol Lam, former US Attorney for the Southern District of California, was fired in 2007; US Department of Justice officials stated she did not prosecute enough immigration cases. She explained her decision not to prosecute cases that “simply drove the statistics”:

If two-thirds of a U.S. attorney’s office is handling low-level narcotics and immigration crimes, young prosecutors may not have the opportunity to learn how to do a wiretap case, or learn how to deal with the grand jury, or how to use money laundering statutes or flip witnesses or deal with informants and undercover investigations.... That’s not good law enforcement.¹⁰⁴

¹⁰³ Lillian Reid, “US Marshal sees threat in Mexican mafia, not illegal immigration,” *Verde Independent*, October 10, 2012, <http://verdenews.com/main.asp?SectionID=1&SubSectionID=1189&ArticleID=50575> (accessed April 14, 2013).

¹⁰⁴ Solomon Moore, “Push on Immigration Crimes Is Said to Shift Focus,” *New York Times*, January 11, 2009, http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=all&_r=0 (accessed April 12, 2013).

III. Criminal Prosecutions Impinge on the Rights to Family Unity and to Seek Asylum

My heart is there. My body is here.

—Juan S. (pseudonym), Tijuana, Mexico, October 22, 2012

For 10 years now, I've been presiding over a process that destroys families every day and several times each day.

—Judge Robert Brack, Las Cruces, New Mexico, April 25, 2013

Nearly every person charged with illegal entry or reentry who spoke to Human Rights Watch said they came to the United States for one of three reasons: 1) to seek work; 2) to reunite with family, often after many years of residence in the United States; or 3) to flee violence or sometimes persecution abroad. For purposes of prosecution under the US statutes prohibiting illegal entry and reentry, the motives with which people seek to enter the US are irrelevant. But their motives for entry highlight why criminal prosecutions may be misguided and, in some cases, impinge on fundamental human rights.

International human rights law acknowledges that every country has a clear interest in regulating the entry and stay of migrants in its territory, and it does not explicitly prohibit the use of criminal sanctions against unauthorized immigrants. However, United Nations human rights experts have emphasized the importance of using civil rather than criminal law to accomplish this task. The UN special rapporteur on the human rights of migrants has noted, “[Irregular entry or stay] are not per se crimes against persons, property, or national security.”¹⁰⁵ Moreover, “[ir]regular entry or stay should never be considered criminal offences.”¹⁰⁶ Likewise, the UN Working Group on Arbitrary Detention has determined that “criminalizing illegal entry into a country

¹⁰⁵ UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Francois Crepeau, UN Doc. A/HRC/20/24, April 2, 2012, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf (accessed May 10, 2013), para. 13.

¹⁰⁶ *Ibid.*

exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention.”¹⁰⁷

The criminal prosecution of unauthorized migrants raises particular concerns where the migrants in question have been separated from their children or other close family members by deportation, and when they may be eligible for asylum under international refugee law. In each case, when there is no genuine threat to public safety, the United States has chosen to criminally prosecute conduct that undermines rights that the government appropriately has an interest in protecting and promoting, namely the rights to family unity and to seek asylum from persecution.

Though this chapter focuses on these two categories, we note there are also serious questions about whether criminal sanction and incarceration are appropriate punishments for migrants seeking work. In several cases Human Rights Watch documented or observed, defendants spoke about dire economic needs, often for medical or education expenses. One man we met in a Texas jail, who was facing a likely sentence of 8 to 14 months in federal prison for illegal reentry after prior illegal entry and reentry convictions, asked his attorney, “Can we ask the judge for less time because my children have nothing to eat?”¹⁰⁸

Family Unity

The stereotypical migrant who enters the US illegally is a young, single man seeking work. But increasingly, such migrants are older and have previously lived in the United States, sometimes for many years. Many are trying to rejoin their families, including US citizens and permanent residents.¹⁰⁹

Staff at a women’s migrant shelter in Tijuana reported that the large majority of migrants they see are no longer people who are trying to cross for the first time, but people who were

¹⁰⁷ UN Human Rights Council, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4/, January 10, 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go8/100/91/PDF/Go810091.pdf?OpenElement> (accessed May 10, 2013), para. 53.

¹⁰⁸ Human Rights Watch interview with Jorge G. (pseudonym), Marfa, Texas, September 21, 2012; Human Rights Watch court observation, El Paso, Texas, September 26, 2012.

¹⁰⁹ Damien Cave, “Crossing Over, and Over,” *New York Times*, October 2, 2011, <http://www.nytimes.com/2011/10/03/world/americas/mexican-immigrants-repeatedly-brave-risks-to-resume-lives-in-united-states.html?pagewanted=all> (accessed March 27, 2013).

recently deported,¹¹⁰ a trend also noted by staff at a humanitarian organization that aids migrants in Nogales.¹¹¹ A recent study of 1,000 Mexican deportees found that one-fourth said they had US-born children and 28 percent considered the United States home.¹¹²

Human Rights Watch has requested but not yet received information from ICE and CBP on ties to families in the United States among the unauthorized immigrants they have referred for criminal prosecution, but recently released data indicates that in the past two years, over 205,000 parents of US citizens were deported.¹¹³ That number does not include the many deportees with US citizen or permanent resident spouses, parents, or siblings.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, states that no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”¹¹⁴ Article 23 provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state,” and that all men and women have the right “to marry and to found a family.”¹¹⁵ The UN Human Rights Committee, the international expert body that monitors compliance with the ICCPR, has stated that despite a state’s power to regulate entry or residence, non-citizens may still enjoy the protection of the Covenant, particularly when considerations of respect for family life arise.¹¹⁶ The right to found a family, the Committee has noted elsewhere, includes the right “to live together.”¹¹⁷ Even

¹¹⁰ Human Rights Watch interview with Mary Galvan, Instituto Madre Assunta para Mujeres Migrantes, Tijuana, Mexico, October 16, 2012.

¹¹¹ Human Rights Watch interviews with Sister Alma Delia Isais Aguilar, Nogales, Mexico, April 4, 2013; and with Sister Maria Engracia Robles, Kino Border Initiative, Nogales, Mexico, April 5, 2013.

¹¹² Center for Latin American Studies, University of Arizona, “In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security, Preliminary Data from the Migrant Border Crossing Study,” March 2013, http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf (accessed April 14, 2013). See also Michael Danielson, “Documented Failures: The Consequences of Immigration Policy on the US-Mexico Border,” Kino Border Initiative, Jesuit Refugee Service/USA, Jesuit Conference of the United States, February 2013, http://www.jesuit.org/jesuits/wp-content/uploads/Kino_FULL-REPORT_web.pdf (accessed May 2, 2013) (finding almost one in three parents deported between January and March 2012 had at least one child living in the United States).

¹¹³ Seth Freed Wessler, “Nearly 205K Deportations of Parents of US Citizens in Just Over Two Years,” *Colorlines*, December 17, 2012, http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html (accessed January 22, 2013).

¹¹⁴ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 17.

¹¹⁵ *Ibid.*, art. 23.

¹¹⁶ UN Human Rights Committee, General Comment No. 15, “The position of aliens under the covenant” (Twenty-seventh Session, 1986), UN Doc. HRI/GEN/1/Rev.1 at 18 (1994), para. 5.

¹¹⁷ UN Human Rights Committee, General Comment No. 19 (The Family), Protection of the Family, the Right to Marriage and Equality of the Spouses (Thirty-ninth session, 1990), UN Doc HRI/GEN/1/Rev.6 at 149 (2003), para. 5.

where the government has a strong interest in deporting an individual because of the non-citizen's prior criminal convictions, the right to family unity should be weighed against the seriousness of the offenses.

Yet family ties are given little weight in US immigration law in determining whether a person should be deported, and even where they may be a factor, most non-citizens have little opportunity to provide evidence of such ties.¹¹⁸ Once a non-citizen is ordered removed by an immigration judge, he or she is barred from the United States for at least 10 years—or, if deported for certain criminal convictions, for life. These life-changing decisions are made in immigration court hearings that may raise serious due process problems (including no right to appointed counsel), as previously documented by Human Rights Watch,¹¹⁹ or outside of proceedings altogether, through “stipulated removal,” which non-citizens have subsequently reported they were pressured or misled to accept, even when they might have been eligible to apply for permission to stay.¹²⁰ Susan Anderson, an assistant federal defender, reported that three-quarters of her clients charged with illegal reentry had been removed without ever seeing an immigration judge.¹²¹

Immigration law is also particularly harsh on those who have long lived in the US without status, leave the US temporarily (often to visit a sick or dying relative), and then try to enter

¹¹⁸ Under Immigration and Nationality Act Section 240A, a form of relief called “cancellation of removal” is available for unauthorized immigrants who have resided continuously in the United States for 10 years and can demonstrate that a US citizen or permanent resident parent, spouse, or child would suffer exceptional and unusual hardship, a standard that requires hardship beyond the usual hardship suffered because of deportation. This form of relief is available only for 4,000 individuals per year. A similar form of relief is available for permanent residents, with no cap. But the standard of “exceptional and unusual hardship” is hard to meet, and people with certain criminal convictions are barred from these waivers. About 8,000 unauthorized immigrants and permanent residents were granted cancellation of removal in fiscal year 2011, representing about 2 percent of all persons removed in that year. US Department of Justice, Executive Office of Immigration Review, Office of Planning, Analysis, & Technology, FY 2011 Statistical Year Book, February 2012, <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (accessed April 29, 2013).

¹¹⁹ Human Rights Watch and American Civil Liberties Union, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, July 25, 2010, <http://www.hrw.org/reports/2010/07/26/deportation-default-o>; Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, December 2, 2009, <http://www.hrw.org/reports/2009/12/02/locked-far-away-o>; Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 16, 2007, <http://www.hrw.org/reports/2007/07/16/forced-apart-o>.

¹²⁰ Human Rights Watch interview with Natalia D. (pseudonym), San Juan, Texas, September 16, 2012. See also Jennifer Lee Koh et al., “Deportation Without Due Process,” a joint publication of Western State University College of Law, Stanford Law School, and the National Immigration Law Center, 2011, http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf (accessed April 14, 2013).

¹²¹ Human Rights Watch interview with Susan Anderson and Milagros Cisneros, assistant federal defenders, Phoenix, Arizona, February 15, 2013.

again illegally; such individuals' prior unlawful stay bars them from the US regardless of family ties.¹²² For the vast majority of these people, there is no legal way to return and if apprehended, they are often put in expedited removal proceedings that ignore the fact that they have been long-term residents, making them ineligible for certain kinds of relief from deportation.

Not surprisingly, non-citizens who are barred from returning and separated from their families are highly motivated to reenter the United States illegally. When they do return, many end up prosecuted for illegal entry or reentry. Those most desperate to be with their families return again and again, undeterred even by repeat prosecutions and long prison sentences. The University of Arizona study of 1,000 Mexican deportees referred to above found that more than half said they were going to try to cross again; 70 percent who considered the US home indicated they would keep trying to enter.¹²³ In several cases we documented, defendants who had served federal sentences for illegal reentry stated they did not plan to try again, because they feared getting more time if they returned. But others remain undeterred and end up serving back-to-back criminal sentences. Said one criminal defense attorney, "There's a class of people doing life sentences on the installment plan."¹²⁴ Alicia Estrada, whose brother is mentally disabled and has repeatedly reentered illegally, recognized the pull his family had on him: "If we stay here, we're going to see my brother live his life in jail."¹²⁵

In criminally prosecuting non-citizens who have been separated from their families for illegal entry and reentry, the US government is giving insufficient attention to the right to family unity, a fundamental human right. The laws creating criminal penalties for illegal entry and reentry provide no exceptions for individuals whose motive is to rejoin their children or other close family members, and the agencies whose decisions lead to prosecutions also do not take these ties into account. As Candis Mitchell, an assistant federal defender, noted, "The guy who is coming in to reunite with family is treated as just as culpable as someone who is paid to bring drugs into the US."¹²⁶ The failure to protect family unity begins with US immigration law, and that law needs to be reformed. But the use of federal criminal law against those seeking reunification with their families also undermines this fundamental human right.

¹²² 8 US Code Section 1182(a)(9)(C)(I)(i) (2012).

¹²³ Center for Latin American Studies, "In the Shadow of the Wall," p. 15.

¹²⁴ Human Rights Watch telephone interview with Victor Torres, June 29, 2012.

¹²⁵ Human Rights Watch interview with Alicia Estrada, sister of Reynaldo Estrada-Baltazar, Azusa, California, October 24, 2012.

¹²⁶ Human Rights Watch interview with Candis Mitchell, assistant federal defender, San Diego, California, July 20, 2012.

“They didn’t take a minute to look at her situation ... [to ask] why are we separating her from her family”



Rosa Emma Manriquez with her US-born grandson. © Private

In March 2012, Rosa Emma Manriquez, a 62-year-old grandmother, was sentenced to four months in federal prison for illegal entry. She is now living in Ciudad Juarez, Mexico, several hundred miles and a world away from her six adult children and numerous grandchildren, who are all US citizens or permanent residents.

According to her daughter, Norma Pulcher, Manriquez was told from childhood that she had been born in Texas and was a US citizen. Although she had no birth certificate to prove it, she had lived without incident in the US for over 40 years, living a quiet life that revolved around cleaning houses, going to church, and being with her family. She had a Social Security number and a valid Texas drivers’ license, which she had used for years to travel to Juarez to visit or shop.

In the fall of 2011, Manriquez went to Juarez for dental work. On her way back, she was stopped at the port of entry in El Paso, Texas. According to the complaint, she presented her driver’s license and said she was a US citizen, as she always had. She was charged with illegal entry based on a false claim to US citizenship. Pulcher and her siblings hired a criminal defense lawyer, but she said, “[H]e did nothing for my mom. My mom said he never even talked to her, just once before the court, and he told her that if you want to be free, you just need to plead guilty. He never told her that pleading guilty meant she was going to be deported to Mexico.” Manriquez was deported immediately afterward.

With no family in Juarez, Manriquez tried to return two months later with false documents. This time, after pleading guilty again to illegal entry, she was sentenced to four months and transferred from the jail in Pecos to the Federal Detention Center in Houston. The entire process was horrifying to her family. Pulcher described how her eight-year-old son Christopher cried at the sentencing hearing when he saw his grandmother’s hands shackled to her feet.

Being in jail in Pecos was hard on Manriquez, Pulcher told Human Rights Watch. She was taken to the emergency room at one point when she experienced shortness of breath, and was diagnosed with high blood pressure and anxiety disorder. But the federal detention facility in Houston was even worse. “She said it was very rough,” Pulcher said. “Never, never in her life had she been in one of these places, the Christian lady in federal prison.... Every time I went to see her, all of us would cry. She would start crying so bad, she’d start shaking.”

Manriquez now lives in Juarez alone. All the lawyers her family has consulted have said the same thing: because she pled guilty the first time, all doors were closed and she would never be able to come back to the United States.

When her mother was deported, Pulcher felt like “she had died,” and she began to be treated for depression. She continues to worry about her mother’s safety in Juarez and has considered moving to Mexico to be with her mother, but she cannot make that decision for her husband and her son.



Rosa Emma Manriquez at a family dinner with her US citizen daughter, Norma Pulcher. © Private

Pulcher lost her stepson last year; he died while serving in the US military in Afghanistan. Before he died, he had tried to help the woman he considered “granny” by contacting his congressional representative. Pulcher is angry that the US government has taken her mother away from her as well: “It doesn’t matter how much pain and suffering children and grandchildren are going through, it didn’t touch [the US officials’] hearts. They didn’t take a minute to look at her situation ... [to ask] why are we separating her from her family?”¹²⁷

¹²⁷ Human Rights Watch telephone interview with Norma Pulcher, October 24, 2012. A call to the prosecutor for comment on this case was not returned.

There is no data yet available on how many unauthorized immigrants referred for prosecution have US citizen or permanent resident children or other close relatives, but the defense attorneys, judges, and prosecutors we interviewed all said that many of them do have immediate family members who are US citizens or permanent residents. Estimates varied from district to district, but in Los Angeles and San Diego, where there are few prosecutions for illegal entry but many prosecutions for illegal reentry, several defense attorneys estimated that 80 to 90 percent of their clients charged with illegal reentry have US citizen family members.¹²⁸ When asked how often he sees illegal reentry defendants with US citizen family members, Judge Robert Brack in Las Cruces, New Mexico estimated he sees it in 30 to 40 percent of his cases, adding, “It’s an everyday occurrence.”¹²⁹

Individuals charged with illegal entry are less likely to be returning to join US families, but even among these defendants, ties to US citizen or permanent resident family are not uncommon. When asked about clients’ ties to US citizen families, Heather Williams, who represents six clients every day she is on duty for Operation Streamline in Tucson, said, “All six clients a day, they’re coming here usually to reunite with family members or because their situation is so desperate.”¹³⁰ In the course of this research, Human Rights Watch observed Streamline hearings in Tucson, Arizona and Brownsville and Del Rio, Texas, as well as numerous hearings outside the Streamline process; we observed many defendants tell the judge that they had previously resided in and have immediate family in the United States.¹³¹

A significant number of these defendants also appeared to have strong ties to the United States based on their having been raised in the country. Human Rights Watch observed several defendants in hearings speak fluent English and participate without the help of an interpreter, which Magistrate Judge Philip Mesa noted is “not unusual.” In his

¹²⁸ Human Rights Watch telephone interview with Victor Torres, June 29, 2012; Human Rights Watch interviews with Liliana Coronado, assistant federal defender, Los Angeles, California, August 30, 2012; with Firdaus Dordi, assistant federal defender, Los Angeles, California, August 30, 2012 and January 24, 2013; and with Brandon LeBlanc, assistant federal defender, San Diego, California, September 5, 2012.

¹²⁹ Human Rights Watch telephone interview with Judge Robert Brack in Las Cruces, New Mexico, April 25, 2013.

¹³⁰ Human Rights Watch interviews with Heather Williams, first assistant federal defender, by telephone, August 1, 2012, and in Tucson, Arizona, February 13, 2013.

¹³¹ Human Rights Watch courtroom observations in Brownsville, Texas, September 18, 2012; Del Rio, Texas, September 20, 2012; and Tucson, Arizona, February 11, 2013.

experience, “One or two out of ten will be English-speaking. There are defendants who don’t speak Spanish, who grew up in the US.”¹³²

Defendants who grew up in the US from a young age, whose entire families are in the US, and who have no ties to the countries of their birth are so common, the US Sentencing Commission in 2010 amended the sentencing guideline to recognize “cultural assimilation” as a valid reason for granting a lower-than-guideline sentence, to be considered in cases where, in part, “those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States.”¹³³

Nearly every defense attorney interviewed, however, stated they had rarely seen judges cite this provision in granting lower sentences. Because there are many defendants in this situation, reducing sentences every time someone has strong family ties arguably would defeat the purpose of the guideline, which aims to set the sentence for the majority of defendants. For example, in ruling on a case in which the defendant had grown up in El Paso since the age of 10 and had parents, siblings, and children in the US, the judge noted, “Unfortunately, the Court sees a number of illegal aliens who come into the United States around age 10, and the Court has trouble distinguishing [the defendant] from the many others before the Court.”¹³⁴ Angela Viramontes, an assistant federal defender in Riverside, California, said she had heard a judge tell her colleague, “If I apply it in this case, I’d have to apply it to all cases.”¹³⁵ Defense attorneys also noted that “cultural assimilation can be a double-edged sword,”¹³⁶ as judges sometimes see these very ties as evidence that the defendant is likely to come back and should be more harshly sentenced in order to provide a stronger deterrent.

Human Rights Watch acknowledges that many illegal reentry defendants with strong family ties have prior criminal convictions in the United States, and human rights law recognizes that the privilege of living in any country as a non-citizen may be conditional upon obeying

¹³² Human Rights Watch interview with Magistrate Judge Philip Mesa, El Paso, Texas, September 26, 2012.

¹³³ US Sentencing Guideline 2L1.2, Unlawfully Entering or Remaining in the United States (2012).

¹³⁴ *United States v. Santibanez-Salais*, 2011 US Dist. LEXIS 21199 *12 (D. N.M. 2011).

¹³⁵ Human Rights Watch interview with Angela Viramontes, assistant federal defender, Los Angeles, California, October 29, 2012.

¹³⁶ Human Rights Watch telephone interview with Milagros Cisneros, assistant federal defender in Phoenix, Arizona, September 10, 2012; Human Rights Watch interviews with Susan Anderson, April 2, 2013; and with Davina Chen, assistant federal defender, Los Angeles, California, September 6, 2012.

that country's laws. But as we have previously documented, the US government regularly withdraws that privilege without adequately weighing family ties, evidence of rehabilitation, and other factors against the seriousness of the criminal offense.¹³⁷ In the vast majority of deportations for criminal convictions, the non-citizens are deported for nonviolent offenses.¹³⁸ No matter how many years have passed since the offense was committed and no matter how minor the offense was, it is almost impossible for non-citizens deported for criminal convictions to enter the United States, even for a visit, regardless of family ties.

For example, Heather Gonzales, a US citizen, reported that when her husband, Elmer Gonzales, applied for permission to reenter the United States, the interviewing officer initially was positive. “[He said], ‘I’m going to get you back home, I think I can, your case is good, you’re a good guy, I can tell, you haven’t been convicted of anything for over a decade’—it had been 15 years,” she told Human Rights Watch. “And then the supervisor comes back [and says,] ‘You’re never coming back.’”¹³⁹

“Whether they deport her or release her ... we’re still a family”

Benny Lopez is a 38-year-old US citizen born in Kansas. He and his wife, Gabriela Cordova-Soto, have four US-born children. Until Christmas 2011, the family lived in a comfortable home in Wichita, Kansas, where Benny had a successful siding and remodeling business. In September 2012, when Human Rights Watch met him, he and his children were sharing a cramped apartment in a small Texas border town, waiting to find out if Gabriela will ever be allowed to return to the US.

Gabriela was nine months old when she was brought to the United States. She is now 35. She was a legal resident and grew up in Texas and Kansas, where she and Benny met. Benny said that in their twenties, he and Gabriela were hanging out with the wrong crowd and got into drugs. Gabriela was convicted of possession of methamphetamine in 2005. Benny was a US citizen and he went into drug treatment, but Gabriela, who was put on

¹³⁷ Human Rights Watch, *Forced Apart*, July 16, 2007.

¹³⁸ *Ibid.*

¹³⁹ Human Rights Watch interview with Heather Gonzales, Ontario, California, March 24, 2013.

probation and did not serve any time in prison, was deported. In November 2005, she lost her status as a legal resident and was told she was permanently barred, as an “aggravated felon,” from returning to the US.

With only distant relatives in Mexico and no real experience living there, Gabriela soon returned to the United States to be with her family.¹⁴⁰ Benny said, “We just changed our whole lives.” Benny started a successful business and began building a new home. Their twin daughters regularly made the honor roll; their oldest son was a star chess player. For five years, said Benny, “We were going to church every Sunday, on Wednesdays. We were just living life like we should be.”

In 2010, immigration authorities came to their house and arrested Gabriela again. The fact that she had changed her life did not matter for immigration purposes, and she was deported again—even though in the meantime, the Supreme Court had ruled a drug possession conviction like Gabriela’s did not constitute an “aggravated felony.” Benny tried to maintain two households, but it was too difficult, and he gave up his business and the house he had just finished building. He and the children moved to Piedras Negras, Mexico, just on the other side of the border, so the family could be together. But Benny and his children were unable to live a productive life in Mexico. They do not speak Spanish and Benny could



Benny Lopez (right) and his four US-born children, in their Texas apartment, near the Mexican border. Their mother, formerly a permanent resident of the US, was deported after a conviction for drug possession. Lopez uprooted his family from his native Kansas to be closer to his wife. ©2012 Grace Meng/Human Rights Watch.

¹⁴⁰ The exact manner of Gabriela Cordova-Soto’s entry is part of ongoing litigation. The National Immigrant Justice Center is currently representing her in her effort to reopen her earlier deportation case.

not earn enough money to support the family. When Benny's truck was stolen, he suspected drug traffickers were responsible; the police would not investigate.

Benny and the children returned to the United States. When Gabriela tried to join them, she was caught and prosecuted for illegal reentry. She has been in federal jail since September 2012. "Whether they deport her or release her here legally, we're still a family," Benny said. "I can't just leave their mom. I know it's hard on the kids. What am I to do? I don't know what to do."¹⁴¹

The impact of family separation and prosecution falls not only on the defendants themselves, but also on their US family members. Firdaus Dordi, an assistant federal defender in Los Angeles, estimated that in 12 years of practice, among his clients alone, about 6,000 US citizen children have likely been directly affected by illegal reentry prosecutions of their parents.¹⁴² For Heather Gonzales, whose husband and father of their two children was deported and then prosecuted for illegal reentry, when the US government "took away one illegal person, they ruined the lives of three US citizens."¹⁴³

Several defendants told Human Rights Watch that they had come back because their deportation had been hard on their children, the impact varying from depression and decreased performance in school to abusive conditions that could have led them to end up in the custody of the state.

Artemio Lechuga-Lechuga, for example, whom we interviewed in the federal detention center in El Paso, Texas, told us he came back to the US because his 16-year-old daughter, a US citizen, is mentally disabled and recently had become pregnant.¹⁴⁴ His wife, a permanent resident, agreed that their daughter "started showing signs of depression more strongly ... [and] things got worse" when her father was deported in 2010.¹⁴⁵ The rest of his family was suffering as well. He was concerned about his sons, including his 13-year-old

¹⁴¹ Human Rights Watch interview with Benny Lopez, Eagle Pass, Texas, September 19, 2012.

¹⁴² Human Rights Watch interview with Peter Kirchheimer, attorney-in-charge of the Eastern District Office, Federal Defenders of New York, Brooklyn, New York, July 11, 2012; and telephone interview with Heather Williams, August 1, 2012.

¹⁴³ Human Rights Watch interview with Heather Gonzales, March 24, 2013.

¹⁴⁴ Human Rights Watch interview with Artemio Lechuga-Lechuga, El Paso, Texas, September 25, 2012.

¹⁴⁵ Human Rights Watch interview with Adriana Quesado, El Paso, Texas, September 27, 2012.

who was starting to get in trouble with the police and using drugs. Without his income, his wife was unable to make the mortgage payments on their house, so she and the six children were about to lose their home. Although the only offenses on his record apart from illegal entry and reentry are traffic violations, he is permanently barred from gaining legal status through his wife, in part because of mistakes an immigration lawyer made in 2000.¹⁴⁶ He now has a felony conviction for illegal reentry, as well as a misdemeanor conviction for illegal entry.¹⁴⁷

Others reported how the pain their deportation had brought on their parents and siblings compelled them to return. Roberto Huerta Huerta, a former permanent resident who had lived in the US since he was 14, said that he was deported after a conviction for possession of one gram of cocaine. According to the complaints in his two cases for illegal reentry, Huerta had tried to reenter and been removed six times.¹⁴⁸ He wrote in a letter while serving a one-year sentence,

[My mother] already had a heart condition when I got arrested and by the time I was deported her condition worsened to the point where she was constantly being hospitalized. This last time I crossed the border line was to see her because I was afraid she might die and I would not be able to attend her funeral.”¹⁴⁹

Huerta also left a son behind in the US. He told us that when his son was killed, he was unable to go to the funeral.¹⁵⁰

In several cases, defendants or their attorneys reported that they had returned to the US because of specific family emergencies. Heather Williams recounted a case in which her client returned illegally because his permanent resident wife was dying of cancer; he had been denied permission to enter temporarily, and he wanted to arrange for his oldest

¹⁴⁶ Human Rights Watch interview with Artemio Lechuga-Lechuga, September 25, 2012

¹⁴⁷ Court documents in *United States v. Artemio Lechuga-Lechuga*, 2012-CR-1931 (W.D. Texas 2012).

¹⁴⁸ Court documents in *United States v. Roberto Huerta Huerta*, 2007-CR-190 (Ariz. 2007) and 2011-CR-4189 (Ariz. 2012).

¹⁴⁹ Letter from Roberto Huerta Huerta to Human Rights Watch, September 24, 2012.

¹⁵⁰ *Ibid.*

daughter to take legal custody of her younger siblings.¹⁵¹ In another case, a judge in a 2011 illegal reentry case in New Mexico gave a below-guideline sentence, noting that there was strong evidence the defendant had returned to the United States because of reports his children were being sexually abused.¹⁵²

In several cases, people cited fear of losing custody or seeking to regain custody of their children as a reason they returned. Yanir Pioquinto Cruz, interviewed while serving a Streamline sentence in Florence, Arizona, reported he had entered illegally because he had heard that his US citizen wife, struggling with a drug addiction, had lost custody of their five children to the child welfare system in Atlanta, Georgia. His goal had been to keep his parental rights and return with his children to Mexico.¹⁵³ Maureen Franco, an assistant federal defender in El Paso, recounted the case of a client who had been told by a caseworker that if he did not come get his children, they would end up in foster care.¹⁵⁴

¹⁵¹ Human Rights Watch telephone interview with Heather Williams, August 1, 2012.

¹⁵² *United States v. Ledezma-Ledezma*, 808 F. Supp. 2d 1301 (D. N.M. 2011)

¹⁵³ Human Rights Watch telephone interview with Yanir Pioquinto Cruz, April 8, 2013.

¹⁵⁴ Human Rights Watch interview with Maureen Franco, federal public defender, El Paso, Texas, September 25, 2012. Similar accounts were shared in Human Rights Watch interviews with Milagros Cisneros, April 2, 2013; and with Shaffy Moeel, assistant federal defender, San Diego, California, September 5, 2012.

“Though I’m in jail here, I feel closer to my kids than I did there, free”

Roberto Lopez, called Robert, first came to the United States when he was three years old and grew up in Los Angeles, California. He has four US-born children; his mother and siblings live in the United States as well. He is now 28 years old and spoke fluent English in a calm, low voice when we interviewed him in a federal detention center. He is currently serving a sentence of four-and-a-half years for illegal reentry.¹⁵⁵

Despite living in the US since he was a toddler, Robert has no legal status. In 2006, after being put into removal proceedings for a criminal conviction for assault, Robert left the United States and moved to Mexico under a voluntary departure order. He found life in Tijuana hard. He worked two jobs but could not make enough to send money to his family in the US. Like other Mexicans who had lived in the United States for many years, he reported being regularly harassed by the Mexican police.



Three of Robert Lopez’s US-born children.
© Private



Robert Lopez and his US-born daughter.
© Private

Still, Robert stayed in Tijuana for several years, believing that an application for permanent resident status for him was pending in the US. (He did not know that his criminal conviction

¹⁵⁵ Human Rights Watch interview with Robert Lopez Francisco, Los Angeles, California, October 11, 2012.

could make it nearly impossible to return.) But then his mother told him his wife Amanda had developed a drug addiction. He told Human Rights Watch, “You hear all this bad news [in Tijuana], and you feel like you’re in jail because you’re incapable of doing anything.” Robert worried that his children could be taken away from his wife and end up in foster care. So in 2010, he tried to return. He was caught at the border and deported in his first attempt, but he made it to Los Angeles the second time.

Robert said that for a year he worked and visited Amanda regularly at a rehabilitation center. But he suspected his wife was still using drugs. Robert filed for divorce, sought custody of their children, and was granted emergency custody. He said, “That’s when my wife called immigration.”

Robert said that he had pleaded guilty in 2003 on the advice of his public defender, who said he would only receive two or three weeks in jail, and Robert did not think it would lead to deportation. Instead, he received a one-year sentence and served 11 months. He has no other criminal convictions. But under the federal Sentencing Guidelines, a single prior conviction for a “crime of violence,” whether stemming from a fight or from murder, can lead to a significant prison sentence. His sentence of four-and-a-half years for illegal reentry is over four times as long as the time he served for his assault conviction 10 years earlier.

Robert does not regret coming back to the US. His children are now in the custody of his mother. He wishes that his 54-year-old mother, who works seven days a week as a housekeeper, could rest instead of raising four kids, and he is sorry to have “left her with a big responsibility.” But at the same time, “Even though I’m in jail here, I feel closer to my kids than I did there, free.” He reports his children are “happy, they’re healthy.” When he asks them if they want to go back to their mother, they say they would rather stay with their grandmother.

What Robert’s children do not fully understand is why he is in prison. “My oldest daughter, she asks me, ‘Did you commit a crime?’ And I say, ‘I came back for you.’”¹⁵⁶

¹⁵⁶ Ibid. The special assistant US attorney assigned to this case declined to comment because the case is pending on appeal.

Immigration law separates these families, but the federal criminal system makes the situation even worse for families. As Jorge Luis Lopez-Duran wrote from prison, where he was serving a 100-day sentence for illegal entry,

The emotional and economic [impact] that my detention has had on my loved ones, especially my children is incomprehensible.... In school they are being taught that criminals belong in prison for not obeying the laws. In some sense they see me as a criminal but in another sense, they see me as their father ... whose crime is wanting to be with his children.¹⁵⁷

Over and over, defendants and their family members expressed a desire for a process that would allow them to enter the US and reunite with their family legally. Heather Gonzales wished there could be some probationary period in which her husband, despite his criminal record, could have stayed in the US legally: “We do have to implement the law, but in a way that families who have been here and people who are being productive can remain here to still have a family, and still be productive in the community as they have been.”¹⁵⁸

¹⁵⁷ Letter from Jorge Luis Lopez-Duran to Human Rights Watch, October 12, 2012.

¹⁵⁸ Human Rights Watch interview with Heather Gonzales, March 24, 2013. Similar concerns were expressed in Human Rights Watch interviews with Mark O'Brien, San Diego, California, October 22, 2012; Alicia Estrada, Azusa, California, October 24, 2012; Daniel Tabacznyf, Florence, Arizona, February 12, 2013; and Micaela Remijio, Riverside, California, February 28, 2013.

“An 11-year-old girl needs her mother”

After living in the United States for over 20 years, Sonia H. (pseudonym) went to Mexico, not to move back to the country of her birth but to bury her son, a Mexican police officer who had been killed in a roadside shootout. Sonia, 50, shared her story while sitting in a jail in Marfa, Texas, awaiting sentencing for an illegal reentry conviction.

When Sonia’s son was killed in 2011, she felt she had to go to Mexico to bury him. But, Sonia said, “My whole life is in the US.” Her other son, a US citizen, had petitioned for her to gain legal status, and she had been saving money to pay for the second part of the application. She and her long-term partner, a permanent resident, were raising an 11-year-old daughter, also a US citizen. Sonia had a good job at a dry cleaner, where the owners valued her so much they drove her to and from work, since she could not get a driver’s license as an unauthorized immigrant.

In January 2012, Sonia tried to return to the US illegally using false documents and was immediately caught and convicted of illegal entry. According to her current attorney in Texas, the federal judge in the earlier case recommended that she not be deported, but he had no power to enforce that recommendation. Thus, after serving 45 days in jail for her illegal entry conviction, she was deported immediately through expedited removal. She said a Border Patrol agent told her to “sign here.” If she had been put into regular removal proceedings, she might have been eligible to apply for cancellation of removal, an application for legal status in which her many years of residence in the US and the impact of deportation on her US family would have been considered by an immigration judge. Sonia had never been in trouble with the law before. “I never even drove without a driver’s license,” she said.

Sonia moved her daughter to Mexico and they tried to live in Chihuahua, her home state, but Chihuahua is one of the Mexican states most affected by crime and violence related to drug trafficking. Sonia said there were shootouts in front of her daughter’s school and rumors that kidnappers

were targeting schoolchildren as potential victims. She said her daughter begged her, “Mommy, let’s go, let’s go.” Sonia’s sister encouraged her to try, saying, “Your daughter is suffering.”

Sonia’s daughter, as a US citizen, was sent to California, but when Sonia tried to join her, she was caught again and charged this time with felony illegal reentry, as well as fraud. “I realize I committed a crime presenting false papers,” Sonia said. “But I only did it for my daughter’s sake.”

Sonia was glad that her daughter is safe in California, but she had heard her daughter was having trouble sleeping and concentrating in school. She also had a new fear, that child protective services might take her daughter away from her father because he has a drinking problem. Her voice broke as she said, “Imagine what will happen to me if I lose my daughter after I lost my son.”

According to Elizabeth Rogers, the supervisory assistant federal defender in the Alpine, Texas, office, Sonia exemplifies recent changes in how federal criminal law is being applied in immigration cases: “Four years ago, [Sonia] wouldn’t have been prosecuted.”¹⁵⁹

Sonia’s daughter did not know her mother was imprisoned, and thought she was in Mexico waiting for permission to return. Sonia talked to her once a week, using phone cards that cost her \$20 for 15 minutes, and her daughter kept asking her, “Are you going to come? When are you going to come?” Sonia described a card her daughter had sent her to send to President Obama, which said, “My mom had to go back to Mexico because my brother was killed. If you had that happen, what would you do? All I ask is that you let my mom be with me. An 11-year-old girl needs her mother. If you refuse, then I ask God to forgive you.”¹⁶⁰

¹⁵⁹ Human Rights Watch interview with Elizabeth Rogers, supervisory assistant federal defender, Marfa, Texas, September 21, 2012.

¹⁶⁰ Human Rights Watch interview with Sonia H. (pseudonym), Marfa, Texas, September 21, 2012.

Asylum Seekers

In recent years, Mexico has seen a staggering increase in violence related to Mexican government efforts to combat organized crime. The widespread crime, as well as abuses committed by the Mexican security forces, have had a tremendous impact on Mexican society, including on many who have no ties to illegal activity.¹⁶¹ According to recent figures released by Mexico's federal government, over 70,000 Mexicans were killed from December 2006 to December 2012 in drug-related violence, and more than 26,000 people went missing or were "disappeared" in Mexico during the same period.¹⁶² Virtually none of these serious crimes have been adequately investigated and prosecuted; less than 2 percent of crimes reported in Mexico lead to convictions.

Not surprisingly, US federal defense attorneys, particularly along the Texas-Mexico border, report that an increasing number of their clients say they entered the United States because of fear of violence. In several cases documented by Human Rights Watch, citizens of Central American countries also cited fears of ongoing violence as a reason for coming to the US. Defendants in 14 out of 73 cases documented by Human Rights Watch cited crime, violence, or persecution in their home countries as a reason for trying to enter the United States, while several defendants currently in prison said the same in letters to us.¹⁶³ Norma Ramirez told Human Rights Watch that her brother, a former permanent resident, has served a total of over 13 years in prison for three reentry convictions: "The way things were in Juarez, with all the violence and all the shootings, he preferred being incarcerated here."¹⁶⁴

The use of the federal justice system to criminally prosecute individuals who are fleeing violence abroad would seem to be a misguided and wasteful expenditure of prosecutorial

¹⁶¹ Human Rights Watch, *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's 'War' on Drugs*, November 9, 2011, <http://www.hrw.org/reports/2011/11/09/neither-rights-nor-security-0>; *Mexico's Disappeared: The Enduring Cost of a Crisis Ignored*, February 20, 2013, <http://www.hrw.org/reports/2013/02/20/mexicos-disappeared>.

¹⁶² *Ibid.*

¹⁶³ Human Rights Watch did not independently investigate these cases to determine whether they would necessarily constitute claims to asylum under US law, but the fact that a good number of migrants we spoke with cited fear as a reason for seeking to enter the US suggests that at least some asylum seekers may be among those prosecuted. A 2013 report by a migrant humanitarian organization found that 4.3 percent of migrants surveyed between March and August 2012 cited violence as a reason for migrating, with a significantly higher percentage (12.7 percent) of Central Americans citing it as a reason. Danielson, "Documented Failures: the Consequences of Immigration Policy on the US-Mexico Border," February 2013. It should be noted that even if only a small percentage of all migrants have potential asylum claims, the absolute number would be in the thousands, if not higher.

¹⁶⁴ Human Rights Watch interview with Norma Ramirez, sister of Jose Fernando Ramos Cardoza, El Paso, Texas, September 26, 2012.

resources. The problems were highlighted in three cases reported to Human Rights Watch in which defendants said that men associated with organized crime had actually compelled them to cross the border. One defendant, Robin Whiteley, even won his case at jury trial, one of the few times a defendant has ever been acquitted of illegal reentry.¹⁶⁵

Even more problematic is the potential impact on asylum seekers. Not all persons who fear returning to Mexico or another country have a fear of persecution that would support a claim to asylum under US law.¹⁶⁶ However, based on our research, Human Rights Watch believes that prosecutions for illegal entry or reentry may include a number of defendants with a colorable claim to asylum. The Universal Declaration of Human Rights, which is considered reflective of customary international law, provides that everyone has a right to seek asylum from persecution.¹⁶⁷

The criminal prosecution of individuals fleeing violence or persecution at home is problematic for at least two reasons. First, the prosecutions impede the asylum process, which is intended to assist the most vulnerable migrants.¹⁶⁸ Criminal prosecution and incarceration can delay asylum applications, exacerbate trauma or psychological problems, and potentially discourage people from pressing their asylum claims at all. Thus, illegal

¹⁶⁵ Human Rights Watch interview with Stephen Castro, Pecos, Texas, September 24, 2012; videoconference interview with Juan Cruz Guera, Phoenix, Arizona, April 2, 2013; interview with Lorrie and Royce Whiteley, Austin, Texas, September 14, 2012; interview with Robin Whiteley, Tijuana, Mexico, October 22, 2012; and telephone interview with Nigel Cohen, attorney for Robin Whiteley, August 14, 2012. In 2012, 2 out of 24,089 cases were acquitted, and both were acquitted by bench trial. The 45 defendants who were tried by jury were all convicted. Administrative Office of US Courts, Federal Judicial Caseload Statistics 2012.

¹⁶⁶ Under US law, general violence or strife is not a grounds for seeking asylum. An asylum applicant must provide evidence of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Immigration and Nationality Act Section 101(a)(42)(A), 8 US Code Section 1101(a)(42)(A). Mexicans who fear particular persecution on one of these grounds, however, have increasingly sought to apply for asylum. See Molly Hennessy-Fiske, "More Mexicans seek asylum in U.S. as drug violence rises," *Los Angeles Times*, October 28, 2012, <http://articles.latimes.com/2012/oct/28/nation/la-na-texas-asylum-20121028> (accessed April 10, 2013) (stating that applications have tripled from five years ago, and the approval rate has increased from 7 to 9 percent).

¹⁶⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 14.

¹⁶⁸ A conviction for illegal entry or reentry should not generally bar a non-citizen from pursuing protection before removal, under the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) (to which the US is bound through ratification of the related 1967 Protocol). Convention relating to the Status of Refugees (1951 Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954; Protocol relating to the Status of Refugees (1967 Protocol), done January 31, 1967, entered into force Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. By ratifying the 1967 Protocol in 1968, the United States bound itself to respect articles 2 through 34 of the 1951 Refugee Convention. See article 1(F) of the 1951 Refugee Convention for categories of persons who may not be eligible for refugee status. Human Rights Watch remains concerned about whether the US government might construe multiple reentry convictions as a "particularly serious crime" that would deny eligibility for asylum or withholding of removal. 8 US Code Section 1101(a)(43)(O).

entry and reentry prosecutions can be at cross purposes with another goal of US immigration law—the recognition and protection of genuine refugees.

Second, charging such individuals with illegal entry or reentry contravenes a fundamental principle of international refugee law: asylum seekers should not be penalized for using improper means to enter the country where they are seeking asylum. Article 31(1) of the 1951 Refugee Convention states, “The Contracting States shall not impose penalties, on account of their *illegal entry* or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”¹⁶⁹ The protections of article 31 have been interpreted to include asylum seekers (those whose claims have not yet been adjudicated) because it cannot be determined at the point of entry whether the person qualifies as a refugee or not.¹⁷⁰

Ordinarily, when a US Border Patrol agent apprehends a non-citizen who expresses a fear of returning to his or her native country, CBP is supposed to refer the individual to a US Citizenship and Immigration Services asylum officer, who will provide a “credible fear interview,” in which the non-citizen is given a chance to explain his or her fear. If the person passes the credible fear interview, the case will be referred to an immigration judge for proceedings to determine whether he or she should be granted asylum or another form of relief under international law.¹⁷¹ If an asylum seeker has been previously removed, however, CBP would refer the person to a “reasonable fear interview,” which has a higher standard of proof, but also allows the asylum seeker to eventually have his or her claim reviewed by an immigration judge.¹⁷²

¹⁶⁹ 1951 Refugee Convention, art. 31(1) (emphasis added).

¹⁷⁰ See United Nations High Commissioner for Refugees, “Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers,” February 26, 1999, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3c2b3f844> (accessed May 10, 2013).

¹⁷¹ US Citizenship and Immigration Services, “Obtaining Asylum in the United States,” last updated March 10, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed April 10, 2013).

¹⁷² US Citizenship and Immigration Services, “Questions & Answers: Reasonable Fear Screenings,” last updated September 4, 2009, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b1b2549bf0683210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed April 10, 2013).

Edgar Holguin, an assistant federal defender in El Paso, stated that in his experience, this approach is not consistently followed. Instead, most of those who have been previously deported are referred for criminal prosecution before being given a reasonable fear interview.¹⁷³ Some of the cases we investigated support this view. Maira Alvarado, the wife of Joel Reyes-Isais, told Human Rights Watch that she and her husband entered the United States together after beatings and threats from the police in Ciudad Juarez. When they were apprehended, Alvarado had just fallen from a bridge and suffered serious injuries—a broken nose, broken leg, and fractured skull—and was taken to the hospital. She said her husband told Border Patrol, “We’re running because the police of Juarez are trying to kill us,” but he was referred for criminal prosecution without a reasonable fear interview.¹⁷⁴ Reyes had been previously removed after a conviction for a drug offense in 2007 and so spent four months in federal jail awaiting sentencing for illegal reentry before he was transferred to immigration custody, where he was finally able to request asylum.¹⁷⁵ Advocates elsewhere in the United States have recently reported encountering cases in which CBP appears to have conducted inadequate screening for fear of persecution during apprehensions along the southern border.¹⁷⁶

“A lawyer can’t help you with nothing”

Brenda R. (pseudonym), a 45-year-old former long-term resident of Dallas, Texas, has tried three times to return to the United States because of her fears of staying in Mexico. Each time, she says, she was criminally prosecuted and given no chance to apply for asylum.

In April 2012, Brenda’s two adult non-citizen sons were killed in Mexico. They had grown up in the United States, but one was deported to Mexico and the other had gone back voluntarily. They were living together in a small town in the state of

¹⁷³ Human Rights Watch interview with Edgar Holguin, assistant federal defender, El Paso, Texas, September 25, 2012.

¹⁷⁴ Human Rights Watch email correspondence with a researcher in the Law Offices of Carlos Spector, May 9 and 10, 2013.

¹⁷⁵ Human Rights Watch interview with Maira Alvarado, El Paso, Texas, September 27, 2012; court records for Joel Reyes-Isais, showing sentence of time-served, four months after the charges were first filed.

¹⁷⁶ Email from Katharina Obser, Women’s Refugee Commission, to Human Rights Watch, November 9, 2012; email from Barbara Hines, University of Texas Law School, Immigration Clinic, to Human Rights Watch, October 3, 2012; Detention Watch Network listserv emails to Human Rights Watch, September 26 and 27, 2012 (reports from immigration attorneys in New Jersey, New York, and Pennsylvania).

Chihuahua, a site of considerable drug-related violence. Brenda said her sons were not involved in any criminal activity, but one had befriended a woman said to be the girlfriend of a local drug trafficker. After receiving threats, Brenda's son and his brother decided to leave town, she said. But before they could leave, they were gunned down in the parking lot of a bar.

Brenda traveled to Chihuahua to bury her sons. She said, "I [also] went to investigate.... When I got [to the crime scene], there were still blood stains and bone fragments of my sons." Fighting back tears, she said, "I felt [one of my son's] presence saying, 'Please, mom, take me from here ... please bring me home.'" She started to ask questions about the investigation and filed a formal complaint with the Chihuahua state human rights commission. She hoped it would help bring some attention to the case, even though local residents and the police warned her to stop her inquiries, stating it was too risky for them to investigate the case.

When Brenda tried to return in June 2012 to her husband and two US-citizen children in Dallas, Texas, Border Patrol apprehended her and referred her for criminal prosecution for "illegal entry." She said she tried to explain her fear of returning to Chihuahua, but the agent just told her "sign here." She was convicted, spent five days in jail, and then (according to court documents) was returned voluntarily to Mexico. A month later, she tried again by presenting a friend's border-crossing permit in El Paso and was charged with document fraud. Brenda said, "I described my fear. I cried with immigration." Her husband tried to get her a lawyer, but she said the Border Patrol agent responded, "The lawyer can't help you with nothing." She was convicted of document fraud, sentenced to nine days in jail, and deported by expedited removal soon afterward, according to court documents.

In September 2012, Brenda tried to cross again and was criminally prosecuted and convicted of illegal entry, as part of the "Retributive Justice Initiative." She was serving her 60-day sentence when we interviewed her, and she continued to struggle with the trauma of what had happened to her: "Every time I close my eyes, all I see is the photos of [my sons] shot and ... in their caskets."¹⁷⁷

¹⁷⁷ Human Rights Watch interview with Brenda R. (pseudonym), Pecos, Texas, September 24, 2012; court documents from *United States v. [name withheld]*. The assistant US attorney on this case declined to comment because he could not recall the case.

In addition to the trauma criminal prosecution and incarceration may impose on asylum seekers, an asylum seeker who is not given a credible fear interview before being prosecuted and deported faces significant challenges to seeking refugee protection, including longer waits in detention and a higher standard of proof once his or her asylum claim is heard.¹⁷⁸

The case of Juan Alanis-Gonzalez provides an example. Family members told Human Rights Watch that Alanis-Gonzalez had been repeatedly kidnapped and assaulted by organized crime groups in Matamaros, Mexico; his attorney showed Human Rights Watch photos of injuries he allegedly suffered in the attacks. When he tried to reenter the United States shortly after one such attack, Border Patrol apprehended him and referred him for criminal prosecution because he had been previously deported. A federal judge deemed him incompetent to stand trial and sent him to a facility in North Carolina for psychological treatment. Thirteen months later, US Marshals returned Alanis-Gonzales to Brownsville, Texas for continued prosecution,¹⁷⁹ and he was sentenced to prison for 21 months, a sentence he will have to complete before even starting the process of seeking protection as a refugee.¹⁸⁰

The rapidity with which most illegal entry and reentry cases are prosecuted can also have a particularly severe impact on asylum seekers. As described in greater detail in the next section, the volume of cases has led the Department of Justice to institute a national policy in which “Fast-Track” plea agreements are offered, with substantially reduced sentences, to most illegal reentry defendants. In about half the federal districts, these agreements require the defendants to waive their right to immigration remedies.¹⁸¹ In at least one

¹⁷⁸ For example, Brenda would have been transferred to immigration detention after completing her sentence. There, if she expressed a fear of persecution, she should have been referred for a “reasonable fear interview.” According to Denise Gilman at the University of Texas School of Law Immigration Clinic, the current wait for a credible fear interview is one to two months, but the wait for a reasonable fear interview is six months. Gilman further noted that with asylum seekers who are in proceedings after having their prior removal orders reinstated, immigration judges generally assume they do not have the power to release them on bond. In other words, Brenda would have to wait in detention six months for a credible fear interview, and if she passed that, stay in detention even longer while awaiting a decision before an immigration judge, all after criminal prosecution and incarceration for illegal entry. Human Rights Watch telephone interview with Denise Gilman, University of Texas, School of Law, Immigration Clinic, October 5, 2012.

¹⁷⁹ Human Rights Watch interviews with Maria Linda Gonzales, attorney, and with Lilia G. Alanis and Orlando Alanis-Trevino, Brownsville, Texas, September 18, 2012.

¹⁸⁰ *United States v. Juan Alanis-Gonzalez*, 11-CR-815, Judgment (S.D. Tex. 2012).

¹⁸¹ Human Rights Watch telephone interview with Kari Converse, assistant federal defender in Albuquerque, New Mexico, February 6, 2012; and follow-up email correspondence, March 26, 2013 and April 26, 2013.

district court, in Phoenix, Arizona, the standard plea agreement goes even further to specify, “The defendant admits that he does not have a fear of returning to the country designated in the previous order.”¹⁸² Milagros Cisneros, an assistant federal defender in Phoenix, expressed concern that 30 days—the amount of time defendants have to decide whether to accept the agreement—is insufficient for an attorney to investigate a potential claim for asylum.¹⁸³ For one client of Kari Converse who expressed a fear of persecution, the choice seemed clear: accept the plea deal or risk a much higher sentence. Converse’s client was able to eventually have a hearing on his claim before an immigration judge.¹⁸⁴

Consistent with US and international law, asylum seekers should be able to seek asylum “irrespective of [their] status,” which means at any time and regardless of any plea agreement.¹⁸⁵ However, we remain concerned that these plea agreements may discourage asylum seekers from continuing the application process, particularly if they are offered as part of a fast Streamline proceeding.¹⁸⁶

¹⁸² Human Rights Watch interview with Milagros Cisneros, April 2, 2013.

¹⁸³ *Ibid.*

¹⁸⁴ Human Rights Watch telephone interview with Kari Converse, February 6, 2012; and follow-up email correspondence, March 26 and April 26, 2013. Converse noted in her last email that the plea agreements offered by the US Attorney’s Office in her district no longer require a waiver of all immigration remedies.

¹⁸⁵ Immigration and Nationality Act Section 208(a) (2012).

¹⁸⁶ Human Rights Watch has reviewed at least one plea agreement used in Tucson as part of “flip-flop” prosecutions, and found it included a waiver of all immigration remedies. *United States v. Roberto Moran Diaz*, Case No. 12-26809M, US District Court, District of Arizona-Tucson, filed May 15, 2012.

IV. Is It Worth It?

The US government's stated rationale for prosecutions for illegal entry and reentry is two-fold: they help deter illegal immigration and keep dangerous criminals outside the United States. There is reason to question whether increasing reliance on prosecutions is doing as much to deter illegal immigration as the government seems to think, and with increasing numbers of nonviolent migrants being swept into prison, the prosecution-heavy approach to border control cannot be said to be targeting mainly dangerous criminals. To the extent that the current approach is advancing important goals, moreover, its successes should be weighed against its costs.

The costs to the federal government of prosecuting so many cases are tremendous and continue to grow. Even as the federal inmate population increases, the population of inmates in state prisons around the United States has started to drop, as state governments have begun asking whether the costs of incarcerating so many people, and in particular nonviolent drug offenders, outweigh the benefits.¹⁸⁷ If the impact on non-citizens with strong family ties in the US does not get consideration, at least the costs of an overcrowded federal prison population should prompt US officials to consider the amount spent prosecuting and incarcerating people, many of whom never committed a serious offense and most of whom will eventually be deported.

Limited Deterrent Effect

Setting criminal justice policy is not an exact science, but in the case of illegal entry and reentry, the behavior the federal statutes prohibit is particularly challenging to control through criminal sanctions for several reasons.

The number of unauthorized migrants apprehended in recent years near the southern border has decreased significantly.¹⁸⁸ US Customs and Border Protection (CBP) has

¹⁸⁷ Brad Plumer, "The US prison population is shrinking. But will it last?" *Washington Post*, January 5, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/05/americas-prison-population-is-shrinking-but-will-it-last/> (accessed April 14, 2013).

¹⁸⁸ US Customs and Border Protection (CBP), US Border Patrol, "Southwest Border Sectors, Total Illegal Alien Apprehensions by Fiscal Year,"

credited the decrease to both enhanced enforcement efforts and changes in the US and Mexican economies. But to the extent CBP's border enforcement activities have played a role, it is not clear that criminal prosecution, as opposed to other aspects of enforcement, merits the credit.

In general, deterrence requires information about the consequences of a criminal act reaching the potential offender, generally through consistent application of the law.¹⁸⁹ But it is difficult to design a system that can inform millions of non-citizens of a US criminal law and how it may be applied. Despite the rapid growth of prosecutions, only a small percentage of unauthorized immigrants are referred for criminal prosecution.

In the southwest border patrol sectors in 2010, immigration authorities made about 17 federal criminal arrests per 100 apprehensions.¹⁹⁰ Juan Rocha, a federal public defender, recounted a case in which his client, a migrant farmworker, had been apprehended 53 times before he was criminally prosecuted. After having been returned or civilly removed each time, he was understandably shocked to find himself criminally prosecuted for the first time.¹⁹¹ The threat obviously had not gotten through to him. Although such statistics often lead lawmakers to call for increased prosecution, the current level of prosecutions is already overwhelming the federal courts, to the point that in 2011, the chief judge of the US District of Arizona declared a judicial emergency.¹⁹² Notably, rates of apprehension of unauthorized migrants are also down significantly in southern California, where Operation Streamline is not active, as well as in districts where the program is ongoing.¹⁹³

http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/appr_swb.ctt/appr_swb.pdf (accessed April 26, 2013). In 2000, there were 1.64 million apprehensions nationwide by CBP; by 2012, there were 357,000.

¹⁸⁹ See Valerie Wright, The Sentencing Project, "Deterrence in Criminal Justice: Evaluating Certainty versus Severity of Punishment," November 2010, <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf> (accessed April 26, 2013) (summarizing research indicating enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment).

¹⁹⁰ Mark Motivans, US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Immigration Offenders in the Federal Criminal System, 2010," July 2012, <http://bjs.gov/index.cfm?ty=pbdetail&iid=4392> (accessed April 12, 2013), p. 8.

¹⁹¹ Human Rights Watch telephone interview with Juan Rocha, August 8, 2012.

¹⁹² United States Courts, "Judicial Emergency Declared in District of Arizona," January 25, 2011, http://www.uscourts.gov/News/NewsView/11-01-25/Judicial_Emergency_Declared_in_District_of_Arizona.aspx (accessed April 14, 2013).

¹⁹³ CBP, US Border Patrol, "Total Illegal Alien Apprehensions by Fiscal Year," http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/nationwide_appr_2000_2012.ctt/nationwide_appr_2000_2012.pdf (accessed April 26, 2013) (showing apprehensions in San Diego decreased from 152,000 in 2000 to 28,461 in 2012).

CBP also claims that its statistics indicate a reduced rate of recidivism among unauthorized migrants who are referred for prosecution, either through Operation Streamline or standard prosecution.¹⁹⁴ And the agency claims it is increasingly using criminal prosecution, through Operation Streamline and otherwise, where it is likely to have the strongest deterrent effect, such as against suspected smugglers or migrants with prior criminal convictions.¹⁹⁵ US Immigration and Customs Enforcement (ICE) has similarly indicated that one of its main targets for deportation is “repeat offenders.”¹⁹⁶

While all governments obviously have a legitimate interest in deterring people from repeatedly violating the law, an effective strategy needs to take into account the motivations of offenders. When it comes to immigration offenses, that means the motivations people have for entering and reentering the United States. As noted by an assistant federal defender in Los Angeles, “The motivations for committing [illegal reentry] are not the motivations for committing most other crimes.... [I]t’s basically your desire to be with your family.”¹⁹⁷

Numerous defense attorneys and judges told Human Rights Watch how criminal prosecution and even lengthy prison sentences frequently do not deter people from trying to enter the United States again, particularly when they have strong family ties to the US. Ricardo Calderon, a defense attorney in Texas who regularly represents clients in Streamline, said, “I’ve had people come back as clients—they return pretty often. Some return within the same week or month, generally within the year.”¹⁹⁸ At the time of our interview, Ricardo M. (pseudonym) had tried to return to the United States four times—and been detained or prosecuted each time, up to four months the last time, when he was held as a material witness in an alien smuggling case—but he remained steadfast in his desire

¹⁹⁴ Human Rights Watch meeting with US Customs and Border Protection (CBP), February 23, 2013. See also US Government Accountability Office (GAO), “Border Patrol: Goals and Measures Not Yet in Place to Inform Border Security Status and Resource Needs,” February 26, 2013, <http://www.gao.gov/assets/660/652331.pdf> (accessed April 26, 2013). This GAO report analyzes data on recidivism in different sectors and finds the recidivism rate has decreased overall, but is highest in San Diego, El Centro, and Tucson.

¹⁹⁵ Ibid.

¹⁹⁶ US Immigration and Customs Enforcement (ICE), “Removal Statistics,” <http://www.ice.gov/removal-statistics/> (accessed April 26, 2013).

¹⁹⁷ Human Rights Watch interviews with Firdaus Dordi, assistant federal defender, Los Angeles, California, August 30, 2012 and January 24, 2013.

¹⁹⁸ Human Rights Watch interview with Ricardo Calderon, criminal defense attorney, Del Rio, Texas, September 20, 2012.

to return to his wife and two US-born daughters.¹⁹⁹ “The thought [that] prosecution will be effective when their entire family is in the US is questionable,” said Magistrate Judge Bernardo Velasco.²⁰⁰ A US Department of Justice (DOJ) report found that 14 percent of immigration offenders were readmitted to federal prison within three years, and most of them were returned for another immigration offense.²⁰¹

Not all who seek to reenter repeatedly are people who are motivated to return to US families. One man, who said he wanted to go to the US to work to pay for his younger sister’s education, had been convicted twice through Streamline and most recently served a 75-day sentence, but he said he would try again.²⁰² But given the millions of people the US has deported in recent years, and the decrease in migration from Mexico, it is likely that an increasing proportion of “repeat offenders” have family ties.

In most analyses of criminal recidivism, strong family ties are generally seen as a positive factor associated with reduced likelihood of future crimes. In the context of illegal entry crimes (which are neither violent nor property offenses), however, strong family ties are actually a motivating factor for recidivism. For many defendants, deciding not to offend again actually requires them to cut off ties from their families, and several of the defendants who told Human Rights Watch they would not try to reenter had done precisely that.²⁰³ One man who had served 77-month and 90-month sentences for illegal reentry said from Mexico, where he plans to stay, “[The hardest part is] to accept the fact that you’ve lost everybody, your kids, your baby’s mom. The prison people become your family. You have to be mentally prepared to lose everybody.”²⁰⁴

To the extent that CBP seeks to avoid indiscriminate prosecution of migrants and to target particularly dangerous offenders, the selective use of criminal prosecution as part of a “consequence delivery system” is a commendable effort. But CBP’s categories do not adequately take into account whether rejoining family members is a motive for any

¹⁹⁹ Human Rights Watch interview with Ricardo M. (pseudonym), Tijuana, Mexico, October 16, 2012.

²⁰⁰ Human Rights Watch interview with Magistrate Judge Bernardo Velasco, Tucson, Arizona, April 3, 2013.

²⁰¹ Motivans, US Department of Justice, “Immigration Offenders in the Federal Justice System, 2010,” July 2012, p. 36.

²⁰² Human Rights Watch interview with Manuel D. (pseudonym), Nogales, Mexico, April 4, 2013.

²⁰³ Human Rights Watch interviews with Elmer Cardenas-Gonzales, Rosarito, Mexico, October 18, 2012; and with Jerry Lopez, Rosarito, Mexico, October 19, 2012.

²⁰⁴ Human Rights Watch videoconference interview with Pedro H. (pseudonym) in Rosarito, Mexico, November 5, 2012.

particular migrant. Criminal statutes and prosecution policies that seek to deter recidivism without consideration of family ties as a motive are doomed to fail.

Significant Financial Costs

While politicians and policymakers continue to debate whether or not criminal prosecutions for illegal entry and reentry are meeting their goals, the sharp increase in such prosecutions continues to incur tremendous costs.

The rapid increase in the number of non-citizens serving prison sentences for illegal entry offenses is contributing to the burgeoning and overcrowded federal prison system. As of March 2013, 22,526 persons were incarcerated for immigration offenses in the federal prison system.²⁰⁵ Because many immigration offenders serve short sentences, the number of immigration offenders in the federal prison population at any given time does not fully capture the increase in numbers of offenders entering the federal prison system each year.

According to a recent Congressional Research Service report, in 2010, immigration offenders accounted for approximately 30 percent of all inmates entering the federal prison system, a significant increase from 1998, when they comprised 18 percent of all inmates entering the system.²⁰⁶ Although drug offenders continue to make up the largest category of offenders in the federal prison system, the number of immigration offenders among new admissions now approaches the number of drug offenders among new admissions.²⁰⁷ In contrast, the proportion of federal inmates incarcerated for a violent offense decreased from 12 percent in 1998 to 6.4 percent in 2010.²⁰⁸

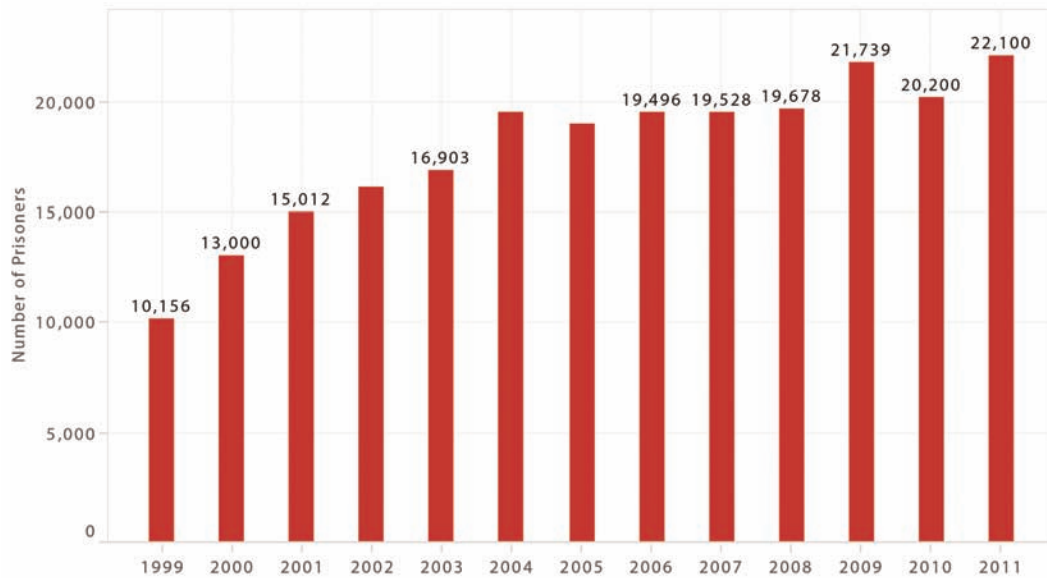
²⁰⁵ US Department of Justice, Federal Bureau of Prisons, "Quick Facts About the Bureau of Prisons," last updated March 30, 2013, <http://www.bop.gov/news/quick.jsp#4> (accessed April 25, 2013).

²⁰⁶ Nathan James, Congressional Research Service, "The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options," January 22, 2013, <http://www.fas.org/sgp/crs/misc/R42937.pdf> (accessed April 14, 2013).

²⁰⁷ *Ibid.*, p. 5.

²⁰⁸ *Ibid.*

FIGURE 7: IMMIGRATION OFFENSE PRISONERS IN FEDERAL PRISON ON SEPTEMBER 30, EACH YEAR (1999 - 2011)



Source: Bureau of Justice Statistics, "Prisoners in 20xx." <http://www.bjs.gov/index.cfm?ty=pbse&sid=40>. For years 2002, 2004, & 2005 totals are estimated from Mark Motivans, "Immigration Offenders in Federal Justice System, 2010", Bureau of Justice Statistics, 2012, because the data for those years was not provided in BJS' "Prisoners in 20xx". All prisoner counts are the number of immigration offense prisoners in federal prisons on a single day of the year, September 30, except for the year 2011, when data was from December 31, 2011.

In addition to time spent in federal prison after conviction, non-citizens charged with illegal entry or reentry are also detained pre-conviction because they are ineligible to receive bond while awaiting the conclusion of their case. Pre-trial detention of non-citizens for immigration offenses increased 664 percent from 1995 to 2010, and thus is the primary factor in the doubling of pre-trial detainees in the federal system from 1995 to 2010.²⁰⁹ A September 2012 report examining both pre- and post-conviction incarceration calculated that in fiscal year 2011, the US government spent over \$1 billion incarcerating individuals convicted of illegal entry and reentry.²¹⁰

Many non-citizens held in pre-trial detention or serving sentences for illegal entry or reentry are held in private prisons. The Associated Press reported in 2012 that the Federal

²⁰⁹ US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Pretrial Detention and Misconduct in Federal District Courts, 1995-2010," February 2013, <http://www.bjs.gov/content/pub/pdf/pdmfcdc9510.pdf> (accessed April 26, 2013). In 2000, immigration defendants comprised 22 percent of suspects in US Marshals custody. By 2010, they made up nearly half (46 percent) of suspects booked by US Marshals.

²¹⁰ Alistair Graham Robertson et al., Grassroots Leadership, "Costs and Consequences," September 2012, http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf (accessed April 26, 2013).

Bureau of Prisons has contracts worth \$5.1 billion with private companies to hold criminal non-citizens.²¹¹

The cost of incarcerating non-citizens convicted of immigration offenses might be the easiest expense to calculate, but it is not the only one. Because these are criminal prosecutions, the government is obligated to ensure representation by defense counsel, as well as increased resources for prosecutors and courts.

Heather Williams, until recently the first assistant federal defender in Tucson, Arizona, has estimated that the cost of defense attorneys for Operation Streamline in Tucson alone would amount to \$2.9 million for fiscal year 2013.²¹² According to Williams, defense attorneys assigned to Streamline defendants in Tucson are fluent in Spanish, but if interpreters were needed, that would add another \$1.5 million for fiscal year 2013. As she noted, these calculations do not include the unknown costs of court hearings (court staff, magistrate judges, US Marshals, special assistant US attorneys, Border Patrol), nor the cost of infrastructure (space for court staff and space to hold defendants pre- and post-trial). These costs would be in addition to her estimate of at least \$100 million for incarceration of Streamline defendants in Tucson each year.²¹³

Human Rights Watch is awaiting information from DOJ on the total costs of these prosecutions. But in 2009, DOJ requested a funding increase of \$231.6 million for fiscal year 2010 to support its contributions to immigration enforcement along the southwest border.²¹⁴ Specifically, DOJ requested an additional \$8.1 million and 75 positions for the US Attorneys' offices to respond to "cross-border criminal activities and to the increases in immigration cases resulting from the substantial increases in Border Patrol Agents and the U.S. Government's overall effort to gain operational control of the border"; an additional \$144.3 million and 700 positions for the US Marshals, including \$11 million for courthouse construction, to allow the US Marshals to "meet its responsibilities for protecting and

²¹¹ "Private prisons profit from illegal immigrants," *Associated Press*, August 2, 2012, http://www.cbsnews.com/8301-201_162-57485392/ap-private-prisons-profit-from-illegal-immigrants/?pageNum=2 (accessed April 25, 2013).

²¹² Statement of Heather Williams, first assistant federal defender, before the US Senate, Judiciary Committee, Briefing on Operation Streamline, Washington, DC, February 22, 2013.

²¹³ *Ibid.*

²¹⁴ US Department of Justice, FY 2010 Budget Request, "Safeguarding our Southwest Border, +231.6 million in Enhancements," <http://www.justice.gov/jmd/2010factsheets/pdf/safeguarding-our-swb.pdf> (accessed April 14, 2013).

securing federal detainees before, during, and after their judicial proceedings”; and an additional \$44.6 million for the office of Federal Detention Trustee to “meet the substantial increases in Southwest Border arrests resulting from federal prosecutions.”²¹⁵

Magistrate Judge Felix Recio questioned the goal of expending such resources: “Who’s benefiting from this system? [Judges with] our salaries?”²¹⁶ Ray Ybarra, formerly an assistant federal defender in Tucson, Arizona, said, “The only people who are benefitting are private attorneys who get paid \$125 per hour and people who get jobs, with more border patrol agents and judges.”²¹⁷

Due Process Shortcuts

Human Rights Watch has concerns about the violation of defendants’ due process rights in illegal entry and reentry prosecutions. We plan to detail these concerns in a subsequent report, but outline some of them below.

Defense attorneys repeatedly expressed frustration at being part of a system in which their ability to represent their clients was severely limited.²¹⁸ Gabriel Reyes, who previously worked at an immigrant advocacy organization, described the criminal justice system’s treatment of his clients charged with illegal entry and reentry:

We thought [the immigration system] was egregious... but this is totally different. This is like that on steroids: you will sit in jail, you will be in the general population, you will end up with a criminal conviction. And after that happens, good luck with the immigration system.²¹⁹

Reyes’ colleague, Chris Carlin, noted that in one of his cases involving a woman who had repeatedly been prosecuted for trying to enter illegally, a federal judge had even tried to recommend that she not be deported: “I’m running up against a system that literally,

²¹⁵ Ibid.

²¹⁶ Human Rights Watch interview with Magistrate Judge Felix Recio, Brownsville, Texas, September 18, 2012.

²¹⁷ Human Rights Watch telephone interview with Ray Ybarra, then-assistant federal defender in Tucson, Arizona, July 31, 2012.

²¹⁸ Human Rights Watch interview with Heather Williams, Tucson, Arizona, February 13, 2013.

²¹⁹ Human Rights Watch interview with Gabriel Reyes, Chris Carlin, and David Fannin, assistant federal defenders, Alpine, Texas, September 21, 2012.

there is nowhere to run. There is nowhere to go.... The horrible part about that case [is that] before she ever got here, mistakes were made that prevent her from ever adjusting status.”²²⁰ Robin Whiteley, who was a permanent resident, was deported for a drug possession conviction that was later ruled not to be an “aggravated felony” by the Supreme Court, and he is now seeking to reopen his case based on wrongful removal. But the first two times he was charged with illegal reentry, he says his appointed criminal defense attorney pressured him repeatedly to plead guilty, telling him in effect, “‘The best thing for you to do is be a good cow,’ and that’s how they run us, as cattle.”²²¹

Operation Streamline is one of the most dramatic examples of how mass prosecutions have led to procedural short cuts, putting the basic due process rights of defendants at serious risk. As noted above, the defenses that are available for defendants charged with illegal entry or reentry—US citizenship and prior unlawful removal—are difficult to investigate and present in the short period of time Streamline attorneys have with their clients.

Deirdre Mokos, a federal public defender in Tucson, described a case in which her client had been deported after a conviction for possession of less than 30 grams of marijuana. He had been brought to the United States when he was five years old, and some aspects of his story raised concerns for Mokos, who had previously practiced immigration law. She requested his “A” file representing his immigration history, but in the meantime, against her advice, he pled guilty. When she received the “A” file one month later, she saw that although he had been deported as an unauthorized immigrant, he actually had been a lawful permanent resident (unbeknownst to him). He was ultimately able to retain his status as a permanent resident. She believes if he had been appointed an attorney with no background in immigration law, he would never have found out about the wrongful removal.²²²

But even outside of Operation Streamline, the breadth and scale of these cases have forced the creation of new avenues for rapid prosecution that result in tremendous

²²⁰ Ibid.

²²¹ Human Rights Watch interview with Robin Whiteley, Tijuana, Mexico, October 22, 2012.

²²² Human Rights Watch telephone interview with Deirdre Mokos, assistant federal defender in Tucson, Arizona, March 4, 2013; and email from Deirdre Mokos to Human Rights Watch, April 26, 2013.

pressure to accept the government's offer of a plea agreement and waive important rights. Defendants who are offered "flip-flop" agreements in which they are charged with both illegal entry and illegal reentry, but plead guilty to illegal entry, have about two weeks to decide. Defendants charged with illegal reentry, under a national Fast-Track policy implemented by the Department of Justice in January 2012, have anywhere from 3 to 8 weeks to decide, depending on the district.²²³ One assistant federal defender called these Fast-Track agreements a "quiet hammer" in the hands of prosecutors.²²⁴

In some districts, these plea agreements require defendants to waive "all challenges, constitutional or otherwise, to reinstatement of defendant's prior deportation/removal order."²²⁵ In Phoenix, as noted above, the plea agreement requires the defendant to "admit[] that he does not have a fear of returning to the country designated in the previous order."²²⁶ Human Rights Watch found that criminal defense attorneys regularly see cases in which the defendant was wrongly denied relief from removal. Sometimes, with the help of immigration attorneys, they have even been able to prove lawful permanent residents were wrongfully deported and have their permanent resident status restored.²²⁷

Several attorneys described cases in which their clients had turned out to be US citizens under complex laws governing acquired and derivative citizenship, but in some cases they had been removed repeatedly before they ever found an attorney who investigated that possibility. Sara Peloquin, a federal public defender in San Diego, recounted having represented several clients who turned out to be US citizens. In one case, her client had served 41 months on a prior illegal reentry conviction before he reentered, was charged, and was assigned to her. She emphasized that many attorneys, judges, and immigration

²²³ Human Rights Watch interview with Davina Chen, assistant federal defender, Los Angeles, California, September 6, 2012 (citing 4 weeks); interview with Susan Anderson and Milagros Cisneros, assistant federal defenders, Phoenix, Arizona, February 15, 2013 (citing 3 weeks); and telephone interview with Sara Peloquin, assistant federal defender, San Diego, California, April 26, 2013 (citing 6-8 weeks).

²²⁴ Human Rights Watch interview with Davina Chen, September 6, 2012.

²²⁵ Sample plea agreement provided by Kari Converse, assistant federal defender in Albuquerque, New Mexico, to Human Rights Watch.

²²⁶ Sample plea agreement provided by Milagros Cisneros, assistant federal defender in Phoenix, Arizona, to Human Rights Watch.

²²⁷ Gabriel Reyes, Sarah Rose Weinman, and Kim Ybarra, "These Lives Matter: Collaboration and Success in a Joint Federal Defender-Immigration Case," post to *Immigrant Justice* (blog), National Immigrant Justice Center, August 24, 2012, <http://immigrantjustice.org/staff/blog/these-lives-matter-collaboration-and-success-joint-federal-defender-immigration-case#.UXr3dKLqmSp> (accessed April 26, 2013); Human Rights Watch interview with Brandon LeBlanc, assistant federal defender, San Diego, California, September 5, 2012.

officials had looked at this case: “This client who’s been deported twice, twice charged with illegal reentry, and deported erroneously with a pending N600 (certification of citizenship) appeal had been a US citizen from the time he was born.”²²⁸

“I’ve had four or five US citizens, every lawyer has had at least one,” said Maureen Franco, a federal defender in El Paso, Texas. “The more they prosecute, the more it’s happening.”²²⁹ Given the significant problems with due process within the civil immigration system, the federal criminal system has the capacity to further perpetuate serious violations.

The plea agreements also require defendants to waive all rights to other possible sentence reductions, which renders individual factors irrelevant in sentencing decisions. In Tucson, Arizona, where flip-flop plea agreements in Streamline proceedings have eliminated any room for variance in sentencing, there is nearly no discussion of individual circumstances. “A lot of [my clients] feel their human condition should matter, but it doesn’t,” said Daniel Anderson, who regularly represents defendants in Streamline.²³⁰ In contrast, in Texas, where magistrate judges still decide individual sentences, Human Rights Watch observed that defense attorneys and defendants raise such factors as a need to pay for treatment for a family member’s illness or the desire to reunite with US family as motives to enter the country.

In addition to raising due process concerns and questions about whether they are undercutting the requirement that federal sentencing consider “the history and characteristics of the defendant,”²³¹ streamlined procedures contribute to the dehumanizing impact of the US criminal justice system on tens of thousands of non-citizens.

The drive to prosecute cases, even where the defendant is a victim of egregious prior due process violations, is particularly striking. One illegal reentry case was recently dismissed in Massachusetts, a state in which only 44 people were prosecuted for illegal

²²⁸ Human Rights Watch telephone interview with Sara Peloquin, April 26, 2013.

²²⁹ Human Rights Watch interview with Maureen Franco, federal public defender, El Paso, Texas, September 25, 2012.

²³⁰ Human Rights Watch interview with Daniel Anderson, criminal defense attorney, Tucson, Arizona, February 11, 2013.

²³¹ 18 US Code Section 1553 (2012).

reentry in 2011. Judge William G. Young severely questioned the prosecutor’s decision to pursue this case:

The basic fairness considerations in this case favor a decision declining to prosecute Ms. Bolieiro. Ms. Bolieiro was a lawful permanent resident. Yes, Ms. Bolieiro was convicted of a drug offense, was ordered deported, and was actually removed. Moreover, her reentry into the United States under this set of circumstances was a crime. But it is also fact that the conviction precipitating this set of events was constitutionally invalid. She was deprived of legal status by a deportation order based on what has now been judged to be a constitutionally infirm conviction. The current prosecution is thus attempting to enforce a deportation order that stems from a now-vacated, constitutionally unjust conviction. The wisdom of pursuing a case under such circumstances is dubious at best.... [I]t is inexplicable why the government has continued to pursue this criminal case.²³²

“Was it worth it for us to do this to him?”

Carlos Santana grew up in San Diego, California from the age of 4 and was a legal permanent resident.²³³ His mother and sister are naturalized US citizens. Carlos was a nursing assistant with an interest in art and graphic design.

Nine years ago, Carlos, who is slightly built, got into a fight at a gay bar in Oregon. “It’s the only fight I’ve ever been in,” he told Human Rights Watch in Tijuana, Mexico. Carlos said he was convicted of attempted assault 2 in the lesser degree, which he was told could eventually be expunged.

Carlos was not deported immediately, but he said in 2009, with nothing else on his record, he went to court to pay a traffic ticket, where he was apprehended and deported permanently to Mexico for his prior conviction, which was classified as an “aggravated felony.”

²³² *United States v. Lucia Maria Bolieiro*, Memorandum and Order, CR 11-10221-WGY, District of Massachusetts, February 13, 2013.

²³³ Carlos Santana’s full name is Juan Carlos Salgado Santana, but he goes by Carlos Santana.

Upon arrival in Mexico, Carlos, who is HIV-positive, said Mexican health officials told him it would be a year before he could get the medications he needed. He knew he would not survive without these drugs, so he immediately returned without permission to the United States. Soon afterward, he met Mark O'Brien, a US citizen, and although it was difficult for him to get the kind of work he was used to without a permanent resident card, Carlos and Mark began planning a life together in San Diego. Then, in April 2011, Carlos was biking home from Mark's apartment when he was stopped by the police, perhaps because he was biking in the wrong lane. The police referred Carlos to immigration authorities and he was eventually charged with felony illegal reentry.

Carlos received a sentence of one-and-a-half years; his attorney told him he could have received five years. Carlos and Mark had agreed that if Carlos was sentenced to more than one year, they would end their relationship, but Mark continued to visit him in prison. Carlos was first held in the federal detention center in downtown San Diego and then sent to a private facility run by the Corrections Corporation of America at Otay Mesa. Mark was angered by the way Carlos was treated at the facility in Otay Mesa: "Why are you housing him with drug dealers and gang members? This guy's only form of a weapon is a piece of paper—that's it—illegal documentation." Mark reported that Carlos was beaten up by other inmates, forced to sleep on the floor because there was not enough space, and denied food and other privileges on an arbitrary basis. Mark was particularly distraught that Carlos' imprisonment was just a precursor to his deportation: "Save us all some money, deport him, so we can get on with our lives."

He could not understand why the US government chose to treat Carlos this way. "Why can't we have a process that looks at individuals to allow him to come back? He can't even get a visa.... What did he do wrong to be closed completely out of ever coming back to the United States, to his mom, his dad, his sister, his sister's husband, his nephews, everybody here that he knows?... Was it worth it for us to do this to him? I've never been so disheartened with my country."²³⁴

²³⁴ Human Rights Watch interviews with Carlos Santana, Tijuana, Mexico, October 23, 2012; and with Mark O'Brien, San Diego, California, October 22, 2012. A call to the prosecutor for comment on this case was not returned.

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TURNING MIGRANTS INTO CRIMINALS

The Harmful Impact of US Border Prosecutions

Illegal entry and reentry to the United States are today the most prosecuted federal crimes. Although immigration enforcement is normally a civil law matter—involving fines and deportation—US officials claim that increased criminal prosecution is necessary to deter illegal immigration and keep dangerous criminals out of the country.

Turning Migrants Into Criminals—based on statistical analysis and nearly 200 interviews with migrants, family members, government officials, and experts—examines the recent increase in immigration prosecutions, their growing costs, and their human impact.

Human Rights Watch found that many of these prosecutions involve defendants who are not easily deterred because they seek to reunite with their US citizen children or other close family members; some are fleeing violence and persecution abroad. And the US government's own data suggests that an increasing number of non-dangerous migrants are getting swept into prison. In 2002, 42 percent of those prosecuted had prior convictions for crimes considered most serious by the US Sentencing Commission and only 17 percent had no prior felony convictions. In 2011, those figures were well on their way to reversing: the proportion previously convicted of the most serious offenses had dropped to 27 percent, and the proportion with no prior felony conviction had increased to 27 percent. Meanwhile, the prosecutions impose significant financial costs on the US, from incarceration in the expensive and overcrowded federal prison system to additional court staff, defense attorneys, prosecutors, and US Marshals.

Turning Migrants Into Criminals concludes that the current focus on criminal prosecution of immigration offenders is misguided and in many cases impinges on fundamental human rights. It urges US policymakers and officials to take steps to ensure that asylum seekers and non-violent offenders seeking to rejoin loved ones are not prosecuted. More generally, it urges policymakers to reassess the current prosecution-focused approach and ensure that government resources are being used effectively to protect public safety and advance US immigration objectives.



Men recently deported from the United States wait in line to be registered with Mexican authorities at the border in Nogales, Mexico.

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