

BOOK HIGHLIGHTS

Indefensible: A decade of mass incarceration of migrants prosecuted for crossing the border

“Indefensible” examines the costs and failures of over a decade of criminalization of border migration. Fueled by moral panic and political posturing, Operation Streamline was launched in 2005 and added criminal convictions to the previous civil removal process. Operation Streamline is known for the disturbing spectacle of mass courtroom proceedings in which up to 80 shackled migrants are arraigned, convicted and sentenced for misdemeanor improper entry charges. While the Streamline courts have been scaled back in several districts, the legacy continues in federal courts, and includes related massive immigration prosecutions for both improper entry and felony re-entry. In 2015, half (49 percent) of all federal prosecutions were made up of what is essentially a crime of trespassing, in the form of improper entry and re-entry prosecutions.

Bipartisan reform efforts have focused on the failures of mass incarceration, yet much less attention has been paid to the growing criminalization of migration, with its attending connections to federal prison overcrowding and the for-profit prison companies that have benefited from new contracts. The costs associated for just the incarceration of migrants is conservatively estimated around \$7 billion since 2005, not including the enormous drain on court resources or human lives.

Despite the enormous costs and the wasted lives, research has not found incarceration to be an effective deterrent on migration. Trend analysis in “Indefensible” suggests that apprehensions and prosecutions are not correlated, and likely more closely tied to political directives. Research suggests that economic circumstances and family ties are much stronger influences on migrant behavior than the criminal courts and deportation process.

“Indefensible” documents a decade of failed policies and prosecutions, through the voices of those most impacted—including migrants, judges, felony defense attorneys, and human rights advocates, and calls for the de-prioritization and ultimate elimination of improper entry and re-entry prosecution. The power to end these wasteful, ineffective prosecutions lies in the hands of the U.S. Attorney General and the U.S. Attorneys in the border districts. Kenneth Magidson, U.S. Attorney for the Western District of Texas, recently testified at a hearing conducted by the U.S. Sentencing Commission that he does not believe that improper entry charges are effective and yet he feels pressured by Customs and Border Protection officials to continue the policy. As the nation grapples with the legacy of mass incarceration, now is time to change course on the criminalization of migrants.

Book highlights:

- Operation Streamline not only produced a dramatic growth of the improper entry misdemeanor prosecutions that it was designed to facilitate, but it also marked a huge increase in felony re-entry prosecutions at the same time in federal district courts along the border. (“Chertoff Effect”)
- Almost 70,000 migrants in 2015—including some who may have valid asylum claims— were criminally prosecuted for improper entry and re-entry, accounting for almost half of *all* federal prosecutions (49 percent). (A Case for Working Together)

- Nearly three quarters of a million people have been prosecuted in federal courts for the crime of improper migration since 2005, contributing to overcrowding in federal prisons.
- Currently, non-citizens make up 23 percent of the total federal prison population, yet only 7 percent of the total U.S. population.
- The incarceration costs for improper entry and re-entry are conservatively estimated at \$7 billion since 2005.
- Much of the taxpayer costs benefit politically powerful private prison corporations that profit from the incarceration of migrants. Operation Streamline and associated felony prosecutions have driven contracts for 13 new privately operated “Criminal Alien Requirement” prisons from 2000-2013. (New federal prisons)
- Improper entry is punishable by up to 180 days in federal jail, while improper entry is punishable by up to two years. More years may be added if the migrant has previous criminal convictions. (Executive Summary)
- Prosecuting migrants is not a substitute for civil removal, but instead postpones that process and adds additional costs associated with the criminalization (Estimate of costs).
- Trend analysis in “Indefensible” suggests that apprehensions and prosecutions tied to political directives, and there is no credible research to show that prosecutions and incarceration deters migration.

The politics of migration criminalization:

- Operation Streamline was formed under the directive of the Office of Homeland Security as part of a zero-tolerance “Secure Border Initiative,” with the intention of deterring migration with the threat of criminal conviction and incarceration for misdemeanors. But the explosion in immigration prosecutions also includes felony improper re-entry as well as the entry misdemeanors targeted by Streamline. (Chertoff Effect.)
- Prior to Operation Streamline, few were prosecuted for improper entry or re-entry. The crackdown on improper entry and re-entry was used as a bargaining chip by both George W. Bush and Barack Obama administrations to placate Congress in failed efforts to advance comprehensive immigration reform. While the strategy has proven a failure, high volumes of prosecutions continue. (Chertoff Effect)
- Annual re-entry prosecution filings increased smoothly at an average of around 17 percent per year from the beginning of the Clinton Administration until 2004, but jumped by more than 2,500 after the introduction of Operation Streamline in 2005. Prosecutions skyrocketed under the Obama Administration, increasing from 21,329 to 33,795 from 2009 to 2015. (Chertoff Effect)
- Combined prosecutions for improper entry and re-entry reached an all-time peak of 91,262 filings in 2013. (Chertoff Effect)
- Data analysis finds no apparent correlation between apprehensions, which began falling in 2000, and prosecutions which began rising in 2004. (Chertoff Effect)

The evolution of Operation Streamline and prosecutions in different districts:

- **Texas** districts, both in Streamline Courts and non-Streamline magistrate courts, are characterized by the highest volumes of “zero tolerance” prosecutions for misdemeanor improper entry.
- Operation Streamline was launched in 2005 in the Western District of Texas, as a 90-day Border Patrol experiment to target misdemeanor entry prosecutions, and spread to other border districts with federal funding. (TX 90-day experiment)
- Current prosecutions in Texas continue to focus on zero tolerance for improper misdemeanor entry, even in courts that are not officially “Operation Streamline.” (Texas current)
- The Southern Texas district prosecuted 21,656 improper entry cases in 2015, compared to just 1,592 in Arizona, which has a Streamline court in Tucson. (Texas current). Many are getting short sentences or time served, as determined at the discretion of judges.
- **Arizona** ended “zero tolerance” approaches to improper misdemeanor entry during the Obama administration, and instead employs “flip flop” plea bargains where defendants with prior

removals are charged with felony improper re-entry but almost always plea to misdemeanor entry charges with sentences determined by prosecutors rather than judges. Arizona's "flip flops" drove overall conviction patterns for improper entry between 2005 and 2014. (Prosecution patterns during Obama)

- Under pressure from the Border Patrol, reluctant court officials struggled to accommodate federal officials who were intent on implementing Streamline in Tucson in 2008. Interviews reveal misgiving from judges concerned about the resources and outcomes associated with the "zero tolerance" prosecution policy for improper entry. (Tucson pressure from Border Patrol)
- Felony re-entry carries a maximum sentence of 2 years, but that can be enhanced with many additional years in prison depending on criminal history, while the misdemeanor entry charge comes with a jail term of up to six months. (Tucson pressure from Border Patrol)
- As prosecution shifted to "flip-flops," the process became scripted with prosecutors determining the sentences in the plea deals, denying judges any discretion. (Tucson pressure from Border Patrol)
- Between 2005 and 2015, total convictions for improper entry rose from 63 percent to 72 percent. And looking only at convictions for border-crossing cases that were initially charged with re-entry as the top charge, the proportion convicted for improper entry rose from 15 percent in 2005 to 49 percent 2014. (Prosecution patterns during Obama)
- **California's** high levels of migrant crossings and apprehensions is exceeded only by Tucson, but the state has never adopted zero-tolerance Operation Streamline courts, instead focusing resources on more serious offenses, resulting in far fewer prosecutions, but longer average sentences. (California different approach)

Potential for excessive sentencing and incarceration:

- While some defendants in felony re-entry cases will receive a misdemeanor jail sentence of no more than six months, many defense attorneys report that those actually convicted of felony re-entry are still filling privately-operated federal prisons. (Operation Streamline only part of the problem)
- U.S. Federal Sentencing Guidelines offer a base level for sentencing felony re-entry of up to two years, harsher than sentencing guidelines for more serious offenses like possessing a gun in a school zone or possessing injurious devices on federal land. (Advisory Sentencing Guidelines)
- The base sentencing guideline may be enhanced with many more years in prison, based on previous convictions. (Advisory Sentencing Guidelines)
- The U.S. Sentencing Commission indicates that the current average sentence for re-entry is 17 months. (Is "flip flop" better?)

Exorbitant costs do not result in deterring migration:

- Research has not found threats of conviction or incarceration to deter migration, which is more strongly influenced by economics and family ties. (Doubts about deterrence)
- Research from the University of Arizona has found that most migrants have strong ties to the U.S., with three quarters having previously lived or work in the U.S, and more than half with family members who are U.S. citizens. (Doubts about deterrence)
- Research findings are echoed by court officials and judges interviewed in "Indefensible" who recognize the powerful influence of family connections, and question the deterrence of prosecution and incarceration. (Doubts about deterrence)
- Retired Judge Felix Recio from Brownsville, Texas, says: "These prosecutions have no deterrent effect whatsoever. People will just continue crossing. We share culture, religion, food, families, and music. How are we going to stop that?" (Doubts about deterrence)
- Former U.S. Attorney for Arizona Paul Charlton criticizes the drain on the federal courts: "The question is, how do we dedicate our resources; how best can we use limited resources to create a deterrent effect? The flood of immigration cases is a big drain on the entire federal criminal justice system as a whole: pretrial services, U.S. marshals, jail beds, sentencing reports, prison cells and so on." (Big drain of federal courts)

- Gladys Monteverde shares why she returned to the U.S. after her first deportation: “I was so scared because I have nobody in Mexico. So as soon as I got there I called my mom and my family... I just wanted to go home.” (Doubts about deterrence)

A path forward:

- Efforts to reduce mass incarceration must include efforts to end the criminalization and prosecution of migrants. (Path forward)

Recommendations:

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

Grassroots Leadership fights to end for-profit incarceration and reduce reliance on criminalization and detention through direct action, organizing, research, and public education. Justice Strategies is a nonprofit research organization dedicated to providing analysis and solutions to advocates and policymakers pursuing more humane and cost-effective approaches to criminal justice and immigration reform. Learn more at: <http://www.justicestrategies.org/> and <http://grassrootsleadership.org/>.

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