

TRANSFORMING THE SYSTEM



PROMOTE FAIRNESS AT THE INTERSECTION OF

Immigration and Criminal Justice

Some immigrants experience mandatory detention, racial profiling, and due process violations because of laws and policies that violate their human rights. There is a severe lack of due process for immigrants in detention. Mandatory detention and lack of discretion for immigration judges to grant bond has resulted in immigrants being held in detention for lengthy periods of time without any progress or change in their cases.⁵⁶⁵ Such laws and policies violate the principles of equal justice, due process, and proportionality under our criminal justice system. It is important to remember that crime has gone *down* in cities like Phoenix and New York in periods during which immigrants were moving there, indicating that immigrant families often add stability to neighborhoods.⁵⁶⁶

The fact is that crime has gone *down* in cities like Phoenix and New York in periods during which immigrants were moving there, indicating that immigrant families often add stability. Nonetheless, immigrants may experience infringements of their rights due to laws and policies that violate the principles of equal justice, due process, and proportionality under our criminal justice system. For example, mandatory detention and lack of discretion for immigration judges to grant bond has resulted in immigrants being held in detention for lengthy periods of time without any progress or change in their cases.

Policies should ensure that due process is respected for everyone and that law enforcement agents are bound by the dictates of the law. Lawmakers should renew our country's commitment to international human rights; eliminate collaborations between local law enforcement and immigration authorities; protect the human rights of families and children who migrate; eliminate the expansion of exclusion based on aggravated felonies; eliminate the use of detention for immigration-related matters; stop deportations; and provide individuals in immigration proceedings access to lawyers.

⁵⁶⁵ Michael Tan, *Immigration Detainees Have the Right to Due Process, Too*, ACLU (Sept. 2012), <https://www.aclu.org/blog/immigration-detainees-have-right-due-process-too>.

⁵⁶⁶ Ruben G. Rumbaut & Walter A. Ewing, Immigration Policy Center, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-born Men* (Spring 2007), [http://www.americanimmigrationcouncil.org/sites/default/files/docs/Imm%20Criminality%20\(IPC\)](http://www.americanimmigrationcouncil.org/sites/default/files/docs/Imm%20Criminality%20(IPC)) (finding that overall crime rates have decreased where immigration rates increased).

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Renewing our commitment to international human rights norms

An independent review commission should operate on the federal and local levels, providing meaningful review of immigration enforcement practices with a focus on human rights protections. This commission should make regular reports and recommendations on community relations and security to local and federal governments. An internal complaint process for reporting human and civil rights violations must be accessible and transparent to provide timely investigation of all claims.

The Department of Homeland Security (DHS) should:

- ▶ Provide training and certification for local and federal agents on human rights;⁵⁶⁷
- ▶ Establish an independent review commission;⁵⁶⁸
- ▶ Provide oversight of the complaint review process;
- ▶ Hold officials accountable when they violate domestic or international human rights principles.

Local, state, and regional officials should support community education programs to inform border communities about civil and human rights. The education program must be coupled with improvements in the internal complaint and review process of the DHS.⁵⁶⁹

567 US Human Rights Network Human Rights, *Violations Against Immigrant Worker Civil, Labor, and Human Rights Defenders*, http://www.ushrnetwork.org/sites/ushrnetwork.org/files/8_new_orleans_workers_center_for_racial_justice_and_coalition.pdf; see also ACLU, United States' Compliance with the International Covenant on Civil and Political Rights, (September 2013), https://www.aclu.org/files/assets/american_civil_liberties_union_shadow_report_to_the_u.s._fourth_periodic_report_final.pdf; Border Network For Human Rights, *Behind Every Abuse is a Community* 10-14 (June 2006), http://www.borderaction.org/PDFs/BNHR_Report_to_HRC.pdf.

568 Border Network for Human Rights, the Border Action Network, and the U.S.–Mexico Border and Immigration Task Force, U.S.–Mexico Border Policy Report, *Effective Border Policy: Security, Responsibility and Human Rights at the U.S.–Mexico Border* (Nov. 2008), <https://law.utexas.edu/humanrights/borderwall/communities/municipalities-US-Mexico-Border-Policy-Report.pdf>.

569 Ibid.

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Protecting the human rights of child migrants and families

Our communities should act with care and compassion toward child migrants who have increasingly arrived at the border after fleeing violence and poverty in their home countries, and are attempting to reunite with their families. Unfortunately, our government has responded to this serious refugee situation by substantially increasing family detention and putting both children and families on a fast-track deportation process without legal representation.⁵⁷⁰ This is a grave injustice and does not reflect our national values. Instead, we should implement policies that preserve families' and children's domestic and international human rights protections, particularly when they are in detention; provide them with legal representation; improve community support by providing case management services to all children upon reunification; and address the driving factors that push children to make a perilous journey.

To facilitate the protection of the human rights, the **Administration** should:

- ▶ Allow parents who have Temporary Protected Status (TPS)—which provides temporary refuge to those already in the U.S. who cannot safely return home due to ongoing armed conflict, natural disasters, or other extraordinary circumstances⁵⁷¹—to apply for derivative TPS for their children.
- ▶ Expedite applications under the Central American Minors (CAM) Refugee/Parole Program, which seeks to provide certain minors with a legal, safe alternative to undertaking dangerous, unauthorized journeys to the United States by enabling minors affected by violence in Central America to legally reunite with their parents who are living lawfully in the United States;⁵⁷²

570 Esther Yu-Hsi Lee, "Obama Administration Promises to Ramp Down the Detention of Migrant Moms and Kids," *Think Progress* (June 25, 2015), <http://thinkprogress.org/immigration/2015/06/25/3673367/family-detention-centers-johnson-advocates/>; see also Human Rights First, *How to Manage the Increase in Families at the Border* (June 2014), <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>; Julia Preston, "U.S. Will Step Up Deportations, Focusing on Central Americans," *The New York Times* (May 2016), <http://www.nytimes.com/2016/05/14/us/us-will-step-up-deportations-focusing-on-central-americans.html?rref=collection%2Ftimestopic%2FDeportation>: "The families applied for asylum, but the vast majority—86 percent, according to a report by the Transactional Records Access Clearinghouse, a group that studies federal data—went to court without lawyers. Court records show that asylum seekers have a very low chance of success without lawyers."

571 Kate Jastram and Kathleen Newland, United Nations High Commissioner for Refugees, *Family Unity and Refugee Protection* (June 2003), <http://www.unhcr.org/3bd3d4a14.pdf>; see also Letter from Robert D Evans to Senator Edward Kennedy, American Bar Association (January 2007), http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/immigration/2007jan22_tpsderivative_l.authcheckdam.pdf.

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- ▶ Broaden access to the CAM Program by allowing parents without legal status to file for their children to come to the United States and permitting children with viable refugee claims who do not have a parent in the United States to apply;⁵⁷³
- ▶ Use executive authority to permit a larger number⁵⁷⁴ of unaccompanied children into the United States as refugees and expand the use of humanitarian parole⁵⁷⁵ to include children fleeing harm and/or reuniting with family;⁵⁷⁶ and
- ▶ End support of interdiction policies that deny children the opportunity to seek protection.

The **Administration** and **Congress** should:

- ▶ Invest in community-based and comprehensive youth violence prevention strategies;
- ▶ Make assistance to foreign police and military entities conditional on compliance with basic human rights standards, particularly in El Salvador, Guatemala, Honduras, and Mexico, and use this leverage to reduce corruption and dissuade “mano dura” policies (heavy-handed criminal law policies that violate human rights);⁵⁷⁷
- ▶ Strengthen the regional systems of protection for children and migrants in Central America and Mexico, particularly in child welfare, asylum, humanitarian visa, and anti-trafficking systems;

572 Faye Hipsman and Doris Meissner, *Migration Policy Center, In-Country Refugee Processing in Central America: A Piece of the Puzzle* (2015), <http://www.migrationpolicy.org/sites/default/files/publications/In-Country-Processing-FINALWEB.pdf> [hereinafter In-Country Refugee Processing Report].

573 Statement of Mary Meg McCarthy of the National Immigrant Justice Center to the Senate Subcommittee on Immigration and the National Interest Hearing on Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration’s Central American Minors Refugee/Parole Program (April 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/NJIC%20CAM%20Testimony%202015_04_23.pdf.

574 *In-Country Refugee Processing Report* (“In fiscal year (FY) 2014, almost 69,000 unaccompanied minors seeking entry into the United States were apprehended by the U.S. Border Patrol, up from 39,000 in FY 2013 and 24,000 in the prior year.”).

575 Statement of Mary Meg McCarthy op cit. (“Under humanitarian parole, U.S. Citizenship and Immigration Services (USCIS) has the authority to allow individuals into the United States for a temporary period of time based on an urgent humanitarian need.”)

576 Ibid.

577 Statement by the Mesoamerican Working Group on the Impact of U.S. Security Assistance on Human Rights in Mexico, Central America, and Colombia (Oct. 2014), <http://cepr.net/documents/Statement%20by%20the%20Mesoamerican%20Working%20Group%2010-29-2014.pdf>; see also, Peter J. Meyer, et al., Congressional Research Service, *Unaccompanied Children from Central America: Foreign Policy Considerations* (April 2016), <https://fas.org/sgp/crs/homesec/R43702.pdf>; Human Rights Watch, *Closed Doors: Mexico’s Failure to Protect Central American Refugee and Migrant Children* (Mar. 2016), https://www.hrw.org/sites/default/files/report_pdf/mexico0316web_0.pdf.

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- ▶ End economic agreements and policies that displace people and fail to uphold human and labor rights;⁵⁷⁸
- ▶ Sign, adopt, and ratify the International Convention on the Protection of All Migrant Workers and Their Families and the Convention on the Rights of the Child.⁵⁷⁹

Congress should:

- ▶ Require that the “best interests of the child” be a primary consideration in all procedures, actions, and decisions made by a federal agency or court regarding unaccompanied children and principal child applicants, including in deportations determinations that would result in family deportation. As opposed to unaccompanied children, principal child applicants have families and are the principal applicants for relief from deportation through means such as asylum;⁵⁸⁰
- ▶ In asylum cases, base the definition of “membership in a particular social group” on the immutable characteristics test first used in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), which says that membership in a particular social group can be based either on a shared characteristic members cannot change or a characteristic they should not be required to change;⁵⁸¹
- ▶ Mandate the appointment of legal counsel for all children in removal proceedings, including a mix of private pro bono representation and direct representation by appointed lawyers;⁵⁸²
- ▶ Establish a national legal service program to provide children with information about their legal rights and conduct individual legal assessments;
- ▶ Permit immigration judges the discretion to appoint an independent child advocate who will advocate for the best interests of the child when necessary. Unaccompanied children

578 *E-Verify Program: Hurting Workers, Business and Our Economic Recovery*, NELP (July 2011), <http://www.nelp.org/content/uploads/2015/03/EVerifyHurtingWorkersBusinessandourEconomicRecovery.pdf?nocdn=1>.

579 G.A. Res. 44/25, *Convention on the Rights of the Child* (Nov. 20 1989); *see also* G.A. Res. 45/158, *International Convention on the Protection of the Rights of All Migrant Workers and Their Families* (December 18 1992).

580 Center for Gender and Refugee Studies and Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf.

581 *Matter of Acosta*, 19 I. & N. Dec. 211, 211 (BIA 1985).

582 *See generally* Benjamin Good, “A Child’s Right to Counsel in Removal Proceedings,” 10 *Stan. J. C.R. C.L.* 109 (2014).

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may require special protections given that they face legal proceedings that could lead to deportation and are without an adult to advise them and ensure their welfare.⁵⁸³

The **Department of Justice** should:

- ▶ Exempt children from the expedited removal process,⁵⁸⁴ which is a summary, out-of-court removal proceeding done by a DHS officer rather than through an appearance before an immigration judge, and ensure that children can consult with legal services before accepting voluntary return;⁵⁸⁵
- ▶ Ensure that children and families seeking refugee status are provided with adequate representation prior to removal or adjudication;⁵⁸⁶
- ▶ Exempt families escaping violence from the expedited removal process and ensure that they can consult with legal services before accepting voluntary return or adjudication.

The **Department of Homeland Security** should:

- ▶ End the use of family detention and utilize a range of alternatives, including placing families in community-based case management services or licensed child welfare programs that support the least restrictive form of custody, safety, and access to legal services;⁵⁸⁷
- ▶ Ensure that children and other people in vulnerable situations are not exploited or abused in short-term or long-term custody. This includes creating greater oversight and accountability to prevent shackling, handcuffing, inhumane detention conditions,

583 *A Treacherous Journey Report supra* note 580.

584 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 PL 110-457, December 23, 2008, 122 Stat 5044 (Unaccompanied children cannot be placed into expedited removal proceedings. However, accompanied children are still vulnerable.).

585 American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (June 2015), http://immigrationpolicy.org/sites/default/files/docs/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf. ("Expedited removal is used when a noncitizen encounters immigration authorities at or within 100 miles of a U.S. border with insufficient or fraudulent documents."); see also Necessary to End Family Detention and Reform Procedures, Agree 188 Organizations, Women's Refugee Commission (May 2015), <https://www.womensrefugeecommission.org/news/press-releases-and-statements/2256-family-detention-sign-on-2015-05> ("Many Central American mothers and their children fleeing violence have been subjected to expedited removal and 'mandatory detention,' often in remote locations that severely inhibit access to counsel, due process, and protection."); Jerry Markon, "Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So," *The Washington Post* (March 3, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html ("A senior Justice Department official argues that three- and four-year-olds can learn immigration law well enough to represent themselves in court.").

586 American Immigration Council Report *supra* note 585.

587 National Immigrant Justice Center, *The Real Alternatives to Family Detention* (July 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/TheRealAlternativestoFamilyDetention.pdf>.

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inadequate access to medical care, and verbal, physical, and sexual abuse by implementing public, enforceable standards for all DHS detention facilities.⁵⁸⁸ These facilities should be the responsibility of accountable public entities and not that of private for-profit corporations.

- ▶ Ensure that every accompanied and unaccompanied child from contiguous countries such as Mexico is screened by licensed child welfare professionals to ensure appropriate care while in detention and adequate screening for immigration relief. Refrain from interviewing children from non-contiguous countries such as El Salvador, Guatemala, or Honduras who will be screened by licensed child welfare professionals in the custody of the Office of Refugee Resettlement. Current screening practices should also be improved so that child survivors of trafficking and persecution are effectively identified, referred for appropriate services. When appropriate, agents should assist with trafficking certification.⁵⁸⁹
- ▶ Clarify DHS standards for prosecutorial discretion to recognize that children are eligible for a favorable exercise of that discretion, especially when deportation is against the child's best interests.⁵⁹⁰
- ▶ Promote favorable prosecutorial discretion,⁵⁹¹ the authority of an agency or officer to decide what charges to bring and how to pursue each case, for all children should trump a child's categorization as an enforcement priority if they have recently crossed the border. There are three enforcement priority levels that categorize people who are at the greatest risk of deportation. Priority One focuses on people who are threats to national security, border security, and public safety; Priority Two focuses on people who are misdemeanants and have recent immigration violations; Priority Three focuses on

588 ACLU, *Conditions of Confinement in Immigration Detention Facilities* (June 2007), https://www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf; see also ACLU, *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (June 2014), <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>; From the National Immigrant Justice Center's 2014 Policy Brief, there were reports of the CBP keeping holding rooms at extremely cold temperatures and children were barely fed and placed in three-point shackles. A 14-year-old girl, K.A., reported CBP repeatedly confiscating her asthma medication and her inhaler and not returning her inhaler to her until after she was suffering from an asthma attack. J.R., another 14-year-old girl, reported only being fed twice a day with a frozen sandwich and a rotten burrito; other children also detailed the lack of food and constant vomiting due to the food that was provided. Multiple other children reported that the bathroom was situated in plain view of all the other detainees with a security camera in front of it, so there was no privacy whatsoever. A.B., a 15-year-old boy, and several other children reported instances of being shackled with three-point shackles from ankles to waist to wrists.

589 Hearing before the Inter-American Commission on Human Rights, *Human Rights Situation of Migrant and Refugee Children and Families in the United States* (October 2014), https://www.aclu.org/files/assets/iachr_-_human_rights_situation_of_migrant_and_refugee_children_and_families_in_the_united_states-v2.pdf.

590 Memorandum from Janet Napolitano, Secretary of Homeland Security, to David Aguilar, Alejandro Mayorkas, and John Morton, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

591 Immigration Policy Center, *Understanding Prosecutorial Discretion in Immigration Law* (Sept. 2011), http://www.immigrationpolicy.org/sites/default/files/docs/IPC_Prosecutorial_Discretion_090911_FINAL.pdf.

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people who have previous immigration violations. There is specific guidance on prosecutorial discretion and immigration detention for each priority level;⁵⁹²

- ▶ De-prioritize deportations that would result in family separation.

Customs and Border Protection (CBP) should implement an access policy for civil society to allow for regular oversight and monitoring of its facilities. DHS should place child welfare professionals to oversee the care and custody of all children in CBP custody.⁵⁹³

Fostering vibrant, safe, and stable border communities

Throughout the Southwest border region, there are urban and rural communities with a long history of diversity, economic vibrancy, cooperation, and deep roots in the area. Border communities, like communities throughout the country, are entitled to human rights, due process, and policies that recognize their dignity, humanity, and the constitutional protections that this nation values. Unfortunately, policymakers have far too often thrown border communities under the bus by pursuing policies in the name of security that in reality undermine both safety and human rights.

These injustices are frustrating to communities but not inevitable. We can and should make commonsense policy changes to uphold human rights, due process, and safety in all of our communities. ICE agents, Border Patrol agents, police officers, and other law enforcement officers working in the border region should receive regular training in human rights, including civil rights, ethics, and community relations.

The pending Supreme Court case of *Hernandez v. Mesa* is a clear example of what can go wrong when border agents believe that they are above the law.⁵⁹⁴ According to the complaint, on a summer day in 2010, 15-year-old Sergio Hernandez and some friends were playing on a ramp

592 National Immigration Project and Immigrant Legal Resource Center, *Advisory on Immigration Enforcement: Summary of New Priorities and Program Changes Announced by President Obama* (Nov. 2014), http://www.ilrc.org/files/documents/ilrc_enforcement_2_pager-final.pdf; see also Immigration Policy Center, *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System* (Dec. 2012), http://www.immigrationpolicy.org/sites/default/files/docs/falling_through_the_cracks_3.pdf; Madison Burga and Angelina Lerma, "The Use of Prosecutorial Discretion in the Immigration Context after the 2013 ICE Direction: Families are Still Being Torn Apart," 42W. *State Univ. L. Rev.* 25, 28 (2015), <http://lawscl.org/cgi/viewcontent.cgi?article=1001&context=wslawreview>.

593 Letter from Child Welfare Professionals at CBP Border Stations to Department of Homeland Security, (January 2015), http://www.luc.edu/media/lucedu/chrc/pdfs/Child_Welfare_Professional_Recommendation%20FINAL%201%2022%202015%20WITH%20ORGS.pdf; see also Betsy Cavendish and Maru Cortazar, Appleseed, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors* (2011), <http://bit.ly/1mt5hbi>.

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on the Mexican side of the border between Mexico and the United States.⁵⁹⁵ He and his friends were chased by some border agents and fled. Agent Mesa drew his firearm at the unarmed Hernandez and shot him in his head. While only 60 feet separated the two, Hernandez was technically shot in Mexican territory.⁵⁹⁶ The circumstances of the death were initially denied by Custom and Border Protection (CBP). However, cell phone video footage clearly demonstrated that the police had acted aggressively.⁵⁹⁷ This case has sparked outrage concerning accountability at the border and CBP's secrecy and abusive practices. Law enforcement agencies should be held accountable for such human rights violations and create a work culture where such conduct is clearly impermissible.

Recent reviews and investigations of the CBP show that there is a lack of accountability, which fosters corruption and creates an atmosphere of impunity surrounding the use—and abuse—of power, including the use of deadly force.⁵⁹⁸ CBP's practices amount to extensive civil and human rights abuses. There are also legal issues at stake, specifically due process issues. The zero-tolerance program followed by the CBP has created a mass assembly-line justice system where individuals are apprehended, handed over to U.S. Marshals, placed in county jails to await trial at a federal courthouse, sentenced in a matter of hours or days, sent to a Federal Bureau of Prisons facility to serve their sentence, and then handed over to ICE for removal proceedings. Lack of oversight and unenforceable custody standards have contributed to cruel, degrading ill-treatment of individuals detained and held in the custody of CBP personnel. Further reports looking into the CBP's culture of abuse show denial of food and water; overcrowding in holding rooms that may also be unreasonably hot or cold; denial of medical care for acute or chronic conditions; verbal abuse ranging from profanity to racial slurs and sexual harassment; physical abuse that borders on torture with individuals forced to remain in prone positions for extended periods of time; psychological abuse often paired with threats or intimidation to coerce individuals into signing legal documents they do not understand; confiscation of personal belongings prior to repatriation, including critical identity documents and currency; and excessive use of force, including deadly force, through beatings, Tasers, or firearms.⁵⁹⁹

594 American Civil Liberties Union Statement on Human Rights Violations on the United States–Mexico Border (Oct. 2012), https://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final_0.pdf.

595 *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015).

596 *Ibid.*

597 *Chronology of Border Patrol Use of Force Issues since 2010*, Southern Border Communities Coalition (Feb. 22, 2014), <http://southernborder.org/chronology-of-border-patrol-use-of-force-issues-since-2010/>.

598 Walter Ewing, "Corruption Flourishes Within CBP," *Immigration Impact* (Dec. 10, 2015), <http://immigrationimpact.com/2015/12/10/corruption-flourishes-within-cbp/>.

599 Statement on Human Rights Violations, *supra* note 594.

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The **Department of Justice** should:

- ▶ End Operation Streamline and de-prioritize prosecuting illegal entry and illegal reentry.⁶⁰⁰ Operation Streamline is a program that requires the federal criminal prosecution and imprisonment of all people crossing the border unlawfully. Under Streamline, instead of being processed for deportation, apprehended migrants are detained for 1 to 14 days before appearing in court. Counsel is frequently not provided until courtroom appearances and judges combine the initial appearance, arraignment, plea, and sentencing into one mass hearing for the 70 to 80 defendants processed daily;⁶⁰¹
- ▶ Enforce 90- and 180-day custody review processes and oppose any expansion of mandatory detention.⁶⁰² These custody review processes take place when an individual has been given final order of removal, deportation, or exclusion but remains in detention 90 days after the final order has been given. ICE reviews the individual's custody status to decide whether to release the individual or continue to detain him/her to try to remove him/her from the U.S. If the individual remains in custody after this at the 180-day mark, the review process happens again;⁶⁰³
- ▶ Prosecute and punish CBP agents for acts of deadly force, excessive force, and other crimes.⁶⁰⁴ CBP officers violate the organization's use of force policy and at times use deadly force as a result of frustration rather than necessity; there are many examples of abuse of power especially with the culture of impunity and violence that surrounds the CBP;⁶⁰⁵

600 *US: Reject Mass Migrant Prosecutions, "Operation Streamline" Program Unjust, Wasteful*, Human Rights Watch (July 28, 2015), <https://www.hrw.org/news/2015/07/28/us-reject-mass-migrant-prosecutions>.

601 Chris Rickerd, *Immigration Reform Should Eliminate Operation Streamline: Prosecuting and Incarcerating Migrants is Unnecessary, Expensive, and Overwhelms Border Jurisdictions*, ACLU, https://www.aclu.org/files/assets/operation_streamline_issue_brief.pdf: Operation Streamline raises due process concerns. Migrants have little time (from a few minutes to only a half hour) with their attorney. Yet some defendants are U.S. citizens or have claims to relief. Because attorneys represent up to 80 defendants at a time, they may not be able to speak confidentially with each client, or may have a conflict of interest among clients.

602 *See generally* U.S.–Mexico Border Policy Report *supra* note 568.

603 *Guide to 90-Day Custody Review Process*, Florence Immigrant and Refugee Rights Project (2013), <http://firrp.org/media/90-Day-Custody-Review-Guide-2013.pdf>.

604 *See generally Hernandez*, 785 F.3d at 117.

605 Vahe Mesropyan, *United States Custom and Border Protection Engages in Excessive Force for Which There Is No Accountability*, Submission to the United Nations Universal Periodic Review of United States of America (2015), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=1632&file=EnglishTranslation>.

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- ▶ Educate the defense bar on these distinctions to ensure that the immigration consequences of seemingly minor criminal law charges are fully considered.⁶⁰⁶ Since the 2010 *Padilla* ruling by the Supreme Court, criminal defense attorneys must advise noncitizen clients about the potential immigration consequences of accepting a guilty plea. Failure to do so, the Court held, constitutes a violation of the Sixth Amendment guarantee of effective counsel.⁶⁰⁷

Customs and Border Patrol (CBP) should:

- ▶ Implement nationwide data collection and public reporting of all Border Patrol roving patrol⁶⁰⁸ and checkpoint activities including stops, referrals to secondary inspection, and searches aggregated by demographics to include perceived and actual race, ethnicity, and immigration status;
- ▶ Reduce the zone of CBP operations from 100 to 25 miles from the border for boarding vehicles, and from 25 to 10 miles for entering private property. CBP should conduct sector-by-sector analysis as required by existing regulations to determine whether a shorter distance would be reasonable;⁶⁰⁹
- ▶ Exclude urban and sensitive areas, and all other areas not within three miles of the border from drone and additional invasive surveillance;⁶¹⁰

606 See *Padilla v. Kentucky*, 559 U.S. 356, 130 (2010).

607 Muzaffar Chishti and Claire Bergeron, "Supreme Court Rules that Attorneys Must Inform Criminal Defendants of the Immigration Consequences of Pleading Guilty," *Migration Policy Institute* (April 2010), <http://www.migrationpolicy.org/article/supreme-court-rules-attorneys-must-inform-criminal-defendants-immigration-consequences>; see also *What We Do*, Immigrant Defense Project (IDP), <http://www.immdefense.org/what-we-do/defender-support/>: Since the Supreme Court's landmark *Padilla v. Kentucky* decision, IDP has focused on training public defenders. IDP also provides the Padilla Support Center, which is a regional assistance center offering legal support to defense attorneys representing immigrants in New York City. Guilty pleas to even minor, nonviolent offenses can have major ramifications for immigrants who are lawful permanent residents, have lived and worked in the city for years, and are responsible for supporting families that may include U.S. citizens. The Padilla Support Center will ensure that attorneys have access to information on these legal repercussions, to ensure that each New Yorker has a fair day in court, regardless of immigration status.

608 Ruth Maurice, *When Can Roving Border Patrols Stop and Question You?*, NOLO, <http://www.nolo.com/legal-encyclopedia/when-can-roving-border-patrols-stop-question.html>; see also "Border Agency's Roving Patrol Tactics Questioned," *Washington Times* (Nov. 2014), <http://www.washingtontimes.com/news/2014/nov/2/border-agencys-roving-patrol-tactics-questioned/> ("Roving patrols, operated by foot, bicycle, or vehicle, can be set up within 100 miles of the U.S. border to supplement checkpoints. Border Patrol agents can stop and search vehicles without a warrant").

609 American Civil Liberties Union of New Mexico: Regional Center for Border Rights, *Guilty Until Proven Innocent: Living in New Mexico's 100-Mile Zone* (May 2015), <https://www.aclu-nm.org/wp-content/uploads/2015/05/ACLU-NM-GuiltyUntilProvenInnocentFinal5-15-2015-21.pdf>.

610 *Senate Deal Threatens Communities*, Southern Border Communities Coalition (SBCC) (Dec. 2015), <http://www.alliancesd.org/senate-deal-threatens-communities/>; see also Jay Stanley, *Up to 20% of Border Patrol Drone Flights are Inside the United States*, ACLU (Oct. 2 2014), <https://www.aclu.org/blog/20-border-patrol-drone-flights-are-inside-united-states?redirect=blog/technology-and-liberty-immigrants-rights/20-border-patrol-drone-flights-are-inside-united>: There have been many instances of the CBP loaning out their drones to other federal and local agencies for use. The technology used by the CBP drones allows for the persistent reconnaissance, surveillance, tracking, and targeting of evasive vehicles and people moving on foot in cluttered environments. Due to the fact that the border consists of any land within 100 miles of the geographical border of the US, drones can operate well into actual U.S. territory.

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- ▶ Equip all CBP officers and agents who interact with the public with body-worn cameras paired with privacy protections;
- ▶ Scale back military-type training tactics and equipment of CBP officers and agents;⁶¹¹
- ▶ Provide annual training for CBP agents on Fourth Amendment protections against illegal searches and seizures, Fourteenth Amendment prohibitions on racial profiling, and on stereotyping and implicit bias;
- ▶ Enhance de-escalation training and improve language skill training for new officers and agents;
- ▶ Disband and prosecute border paramilitary vigilante organizations;⁶¹²
- ▶ Implement public and enforceable short-term custody standards to ensure that DHS short-term holding facilities meet basic humanitarian standards. There are serious violations at CBP short-term holding facilities, specifically that they are neither safe nor sanitary;⁶¹³
- ▶ Provide additional training to CBP officers and agents about their obligation to protect and provide due process to potential victims of crimes, trafficking, and domestic violence, or people in need of asylum.

The **Department of Homeland Security (DHS)** should:

- ▶ Clarify to their agents? to the public? to immigrants in detention? or? that immigration laws are enforced solely by federal immigration officials;
- ▶ Create a transparent, uniform DHS process for receiving, processing, and investigating all complaints in multiple languages, to align with best practices and joint recommendations submitted recently by NGOs;⁶¹⁴

611 SBCC, *An Uneasy Coexistence: Security and Migration Along the El Paso-Ciudad Juarez Border* (Jan. 2012), <http://southernborder.org/an-uneasy-coexistence-security-and-migration-along-the-el-paso-ciudad-juarez-border/>: "There is a culture of cruelty against migrants by Border Patrol and other law enforcement agents. The Border Patrol sits on a blurry line between military and police: charged with defending a border against external threats (a military mission) but also charged with protecting and serving civilians in regions near the border (a police mission). Border Patrol officials occasionally refer to the agency as a "paramilitary" organization, and local activists criticize Border Patrol for evolving in a more military direction. They refer not just to the weapons that agents carry or the training they receive, but to the allegedly heavy-handed nature of their tactics."

612 *The Nativists: Profiles of 20 Anti-immigration Leaders*, Southern Poverty Law Center (Spring 2008), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2008/spring/the-nativists?page=0,3>.

613 Jessica Jones and Katharina Obser, *Family Detention and the Flores Settlement Agreement*, Women's Refugee Commission and Lutheran Immigration Refugee Service (July 2015), <https://www.womensrefugeecommission.org/images/zdocs/Flores-Settlement-and-Family-Detention-July-2015.pdf>.

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- ▶ Inform complainants of the status of their complaint and the outcome of the investigation in a timely manner;
- ▶ Prohibit DHS personnel, including CBP agents, from using race, ethnicity, and other protected characteristics as a factor in routine investigatory stops, detentions, and searches except where a reliable, current suspect description or affirmatively required statutory determination like asylum eligibility exists;⁶¹⁵
- ▶ Move away from wasteful spending projects like drones, fences,⁶¹⁶ and Operation Stonegarden (a federal grant program that funds state, local, and tribal law enforcement agencies to enhance their capabilities to jointly secure U.S. borders and territories);⁶¹⁷
- ▶ Deploy 1,000 rescue beacons, transmission towers with an emergency button that sends out a distress signal to CBP when activated, with water drums, radio call buttons, and 911 cell relay in the desert, including throughout Arizona, the Lower Rio Grande Valley, Imperial County in California, and the New Mexico Bootheel region, to save migrants and others who fall into distress because of heat and other circumstances;⁶¹⁸
- ▶ Extend federal aid programs aimed at preventing migrant deaths to include areas in the South Texas interior that have CBP checkpoints but are ineligible for funding under current rules;
- ▶ End the use of dangerous repatriations, such as the Alien Transfer Exit Program and night deportations. Before the Alien Transfer Exit Program, immigrants were deported across the border from where they were caught, but under the transfer program immigrants that are caught in California are flown to Texas border cities to cross the border back and those caught in Texas are flown west to cross the border in California.⁶¹⁹

614 American Civil Liberties Union, *Recommendations to DHS to Improve Complaint Processing* (2014), https://www.aclu.org/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf.

615 American Civil Liberties Union of New Mexico: Regional Center for Border Rights, *Guilty Until Proven Innocent: Living in New Mexico's 100-Mile Zone* (May 2015), <https://www.aclu-nm.org/wp-content/uploads/2015/05/ACLU-NM-GuiltyUntilProvenInnocentFinal5-15-2015-21.pdf>.

616 *Securing the Border: Fencing, Infrastructure and Technology Force Multiples: Statement for the Record to the Senate Homeland Security and Government Affairs Committee* (May 2015), <https://immigrationforum.org/wp-content/uploads/2015/05/051115-Statement-for-Record-HSGAC-Border-Technology-Final.pdf> (statement by Joshua Briesblatt of the National Immigration Forum); see also *An Agency Out of Control: Widespread Border Patrol Abuses in Southwest Border Communities*, Congressional Ad-Hoc Hearing on Redefining Border Security: *Border Communities Demand to be Heard in the Comprehensive Immigration Debate* (Sept. 2013), (statement by James Duff Lyall, American Civil Liberties Union), <http://www.acluaz.org/sites/default/files/documents/ACLU%20Testimony%20-%20Redefining%20Border%20Security%20-%20James%20Lyall%20-%20Sept%202013,%202013.pdf>.

617 *Factsheet: Operation Stonegarden*, National Immigration Forum (Feb. 2010), <https://immigrationforum.org/blog/operation-stonegarden/>, (“Funds are to be used for additional law enforcement personnel, overtime pay, and travel and lodging for deployment of state and local personnel to further increase our presence along the borders.”).

618 Ibid.

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The timing of deportations has important implications for the security and protection of migrants;⁶²⁰

- ▶ Ensure that individuals' personal belongings (cash, IDs, phones, etc.) are returned prior to repatriation;
- ▶ Create a right to counsel in all stages of immigration enforcement actions and proceedings and permit phone and in-person access by attorneys and child advocates;⁶²¹
- ▶ Provide access to independent human rights and nongovernmental organization monitoring and include permit interviewing of immigrants who are detained in CPB custody;
- ▶ Mandate an independent and thorough investigation for all allegations of excessive and deadly force;
- ▶ Place CBP under increased oversight by an independent DHS Border Oversight Task Force comprised of border stakeholders, in addition to the DHS's Office of Inspector General and the Office of Civil Rights and Civil Liberties. Any Border Oversight Task Force should have subpoena power so that it can hold accountable agents who abuse their power and have accurate accounting for taxpayer resources;
- ▶ The DHS Secretary should be required to report to Congress on the use of force, including compliance with its own policies, incidents causing serious injury or death, and review and disciplinary measures.

619 Richard Marosi, "U.S. Makes Deported Immigrants Take the Long Way Home," *The Los Angeles Times* (Sept. 29, 2011), <http://articles.latimes.com/2011/sep/29/local/la-me-immigrant-deport-20110930>: "The Alien Transfer Exit Program breaks up families and deports immigrants into lawless border cities where they are preyed on by criminal gangs. Gangs in those regions monitor the border crossings, waiting to pounce on deportees, according to some immigrants and advocacy groups."

620 Jesuits and Kino Border Initiative, *Our Values on the Line: Migrant Abuse and Family Separation at the Border* (Sept. 2015), http://jesuits.org/Assets/Publications/File/REPORT_2015_Our_Values_on_the_Line.pdf: "Mexican border cities like Nogales tend to have high levels of violence and migrants are particularly vulnerable to abuse by criminals and corrupt police and other public officials in Mexico. This vulnerability is greater after the civic and religious organizations that provide shelter to migrants have closed their doors for the night. As such, migrants deported after dark are at greater risk, and this is a practice that should be largely limited or eliminated altogether, whenever possible."

621 The American Bar Association recently passed a resolution advocating that "[c]ounsel should be appointed for unaccompanied children at government expense at all stages of the immigration process." ABA, House of Delegates, Resolution 113 (February 2015), http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/113.pdf; see also Ingrid V. Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court" 164 *U. of Penn. L. Rev.* 1 (Dec. 2015), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

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Resolving the inconsistency between the definitions of “conviction” and “aggravated felony” under immigration and criminal law, and related consequences

Increasingly over the last two decades, Congress has arbitrarily expanded the categories of people subject to deportation and exclusion, sweeping up families, workers, and others with deep roots in our country, substantial contributions to our society, and long records of lawful behavior. Under immigration law, the definition of “conviction” is considerably more expansive than under comparable state criminal law. An immigrant can be found “convicted” even when a criminal court has withheld adjudication of guilt or vacated the conviction after the individual has successfully completed a rehabilitation program.⁶²² Many of these laws stem from policy shifts during the 1990s. In New York State, for example, there is often a preference for participation in deferred adjudication programs. However, participation in these programs usually requires an initial plea of guilty. For purposes of immigration law, a deferred adjudication program that results in the dismissal of all charges is still considered a “conviction” if the defendant had pled guilty.⁶²³ These individuals would then face mandatory removal, even though under criminal law their charges have been dismissed.⁶²⁴

An immigrant convicted of an “aggravated felony” faces mandatory detention and likely deportation. Aggravated felonies permanently bar lawful permanent residents and non-lawful permanent residents from applying for asylum, naturalization, cancellation of removal, and voluntary departure. Over the years, the definition of “aggravated felony” has been greatly expanded to include offenses that are neither felonies nor aggravated under criminal law definitions.⁶²⁵ As initially enacted in 1988, the term “aggravated felony” referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices. Congress has since expanded the definition of “aggravated felony” on numerous occasions, but

622 Also note that under INA § 101(a)(48)(A), the definition of “conviction” includes any offense for which a person is found “guilty”—including when a person pleads guilty in a deferred adjudication proceeding; see also Bryan Lonagan, The Legal Aid Society, *Immigration Detention and Removal: A Guide for Detainees and their Families* 9 (rev. June 2007), http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center/Immigration%20Detention%20and%20Removal%20-%20A%20Guide%20for%20Detainees%20and%20Their%20Families%20_English_.pdf. (definition of conviction includes deferred adjudications and no contest pleas).

623 Lonagan *supra* note 522.

624 Ibid.

625 See *United States v. Pacheco*, 225 F.3d 148 (holding that a misdemeanor conviction with a suspended sentence of more than one year is an “aggravated felony” within the meaning of 8 U.S.C. § 1101(a)(43)(F)&(G)).

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has never removed a crime from the list. Today, the definition of “aggravated felony” covers more than 30 types of offenses, including simple battery, theft, filing a false tax return, and failing to appear in court.⁶²⁶ It is imperative that the Immigration and Nationality Act reflect our common understanding of fairness under the criminal justice system and that both the criminal laws and the immigration laws be used to protect all of our rights to due process, dignity, and fair treatment.

To restore due process in the immigration system, **Congress** should:

- ▶ Change the definitions of “conviction” and “aggravated felony” in the immigration law to be consistent with current federal and state criminal laws;
- ▶ De-criminalize the immigration system by repealing the 1996 laws;⁶²⁷
- ▶ End the retroactive application of the 1996 laws;⁶²⁸
- ▶ Only allow bars to entry based on “moral character” in exceptional cases;
- ▶ All bars to entry based on prostitution should be eliminated;⁶²⁹
- ▶ Restore discretion and due process for all individuals who come into contact with the criminal justice and immigration systems;⁶³⁰
- ▶ End permanent deportation.⁶³¹

626 *Aggravated Felonies: An Overview*, Immigration Policy Center (Mar. 2012), <http://www.immigrationpolicy.org/sites/default/files/docs/aggravated-felony-fact-sheet-march-2012.pdf>, (“In most federal courts, a conviction for any offense listed as an “aggravated felony” is grounds for deportation, even if the crime was not considered an “aggravated felony” at the time of conviction”).

627 *A Call to Decriminalize the U.S. Immigration System—#Fix96 Statement Sign-on Form*, Families for Freedom (May 24 2016), <http://familiesforfreedom.org/organizing/alerts/call-decriminalize-us-immigration-system-fix96-statement-sign-form>; see also #Fix96: *End the Mass Criminalization of Immigrants*, Immigrant Justice Network, <http://immigrantjusticenetwork.org/resources/fix96/> (last visited July 8, 2016)

628 Ibid.

629 Immigrant Defense Project, *Representing Noncitizen Criminal Defendants: A National Guide* (2008) 36 (noting that “[i]f there is evidence of ... prostitution ... inadmissibility may be found even where there is no conviction or admission.”).

630 Ibid. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that due process right extends to all “persons” in the United States).

631 Ibid.

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Ending collaborations between state criminal and federal immigration systems

Over the past 10 years, the federal government has enforced federal immigration laws with the assistance of local law enforcement officers through such programs as Secure Communities and its most recent iteration, the Priority Enforcement Program (PEP). These programs require that biometric data such as fingerprints transmitted by state and local law enforcement agencies to the FBI are automatically shared with the DHS. Not only does this take away resources from local police organizations, it also destabilizes the relationship between the police and immigrant communities.⁶³² Such enforcement programs also lead to racial profiling, the targeting of Latino residents, and the erroneous arrests of U.S. citizens by ICE.⁶³³ A growing number of states and municipalities have declined to participate in these programs due to these concerns,⁶³⁴ and the Presidential Commission on 21st Century Policing recommended that local law enforcement activities be “decoupled” from immigration enforcement.⁶³⁵

To further the policy objective of encouraging the cooperation of communities in maintaining public safety, **the Administration** should:

- ▶ Terminate the Priority Enforcement Program;⁶³⁶
- ▶ Continue demanding that law enforcement work with the community, not with ICE;

632 Immigration Policy Center, *Balancing Federal, State, and Local Priorities in Police-Immigrant Relations: Lessons from Muslim, Arab, and South Asian Communities Since 9/11* 9 (June 2008), <http://www.immigrationpolicy.org/sites/default/files/docs/Police-ImmigRelations05-08.pdf>; see also H.R. 100, 112th Cong., Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, (2011), [http://www.opencongress.org/bill/112-h100/text\(requireing local police to enforce federal immigration laws\)](http://www.opencongress.org/bill/112-h100/text(requireing%20local%20police%20to%20enforce%20federal%20immigration%20laws)); Border Network For Human Rights, *Behind Every Abuse is a Community* 10-14 (June 2006), http://www.borderaction.org/PDFs/BNHR_Report_to_HRC.pdf.

633 Aarti Kohli, Peter L. Markowitz & Lisa Chavez, The Chief Justice Earl Warren Institute On Law And Social Policy, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Oct. 2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

634 See Press Release Federal Secure Communities Program, Office of New York Governor Andrew M. Cuomo, *Governor Cuomo Suspends Participation in Federal Secure Communities Act* (June 2011), <http://www.governor.ny.gov/press/06012011FederalSecureCommunitiesProgram>; see also Julia Preston, “States Resisting Program Central to Obama’s Immigration Strategy,” *The New York Times*, (May 6, 2011), <http://www.nytimes.com/2011/05/06/us/06immigration.html>; Maria Sacchetti & Noah Bierman, “Patrick Says He Won’t Sign The Secure Communities Act,” *Boston Globe* (June 2011), <http://www.boston.com/Boston/metrodesk/2011/06/secure-communities/fU45XhhjsoGSGWYxVg2N8O/index.html>; Ordinance, Policy for Responding to ICE Detainers, Cook County Board of Commissioners (Sept. 2011), <http://altopolimigra.com/wp-content/uploads/2011/12/CookCountyDetainers.pdf>.

635 *Final Report of the President’s Task Force on 21st Century Policing*, President’s Task Force on 21st Century Policing (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

636 Immigrant Legal Resource Center, *Ending Local Collaboration with ICE: A Toolkit for Immigrant Advocates* (Aug. 2015), http://www.ilrc.org/files/documents/toolkit_final.compressed.pdf.

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- ▶ End 287(g) agreements, which allow for local law enforcement to agree to enforce immigration matters.⁶³⁷

Immigration enforcement practices should not be transformed into a criminal justice matter. Immigration enforcement is a civil process and demands civil enforcement. Criminalizing immigration exposes it to the many biases in the criminal justice system that have been discussed in this document. Moreover, it is imperative that local law enforcement does not inject itself into the area of immigration enforcement in order for the United States to comply with its international treaty and human rights obligation.

To this end, the **Administration** and the **Department of Homeland Security** should prohibit local law enforcement from collaborating with ICE.⁶³⁸

637 Ibid.

638 See CPD, *supra* note 90, at 12.