



# **MIGRATION, RACE, & CRIMINALIZATION: FEDERAL CRIMINAL ENTRY & REENTRY LAWS IN THE UNITED STATES**

SUBMISSION TO THE  
INTER-AMERICAN  
COMMISSION ON HUMAN  
RIGHTS

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*Immigrants' Rights Policy Clinic, part of  
the Center for Immigration Law and  
Policy at the UCLA School of Law*

**UCLA**

School of Law

**Center for Immigration  
Law and Policy**

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## ACKNOWLEDGMENTS

On March 7, 2023, various organizations working on issues related to racism and human mobility in the Americas presented a public hearing before the Inter-American Commission on Human Rights (“IACHR”) regarding racism and migration. A report detailing the findings presented during the hearing was submitted to the IACHR in June 2023. This white paper represents the portion of the report prepared by the Center for Immigration Law and Policy (“CILP”) at the UCLA School of Law.

CILP is grateful to all the partners whose contributions to the groundbreaking hearing made this white paper possible. We would like to thank Dixie Gallardo Aldana, who showed immense bravery in sharing her story during the IACHR hearing. We would also like to thank the students of the UCLA Immigrants’ Rights Policy Clinic who worked on the hearing and drafted this white paper under the supervision of Prof. Talia Inlander and Astghik Hairapetian: Ilin Bor, Sareen Khakh, and Isaac Selwyn. We are also grateful to Nina Rabin of the Immigrant Family Legal Clinic at the UCLA School of Law; as well as Megan Hauptman of the National Immigration Project of the National Lawyers Guild (“NIPNLG”). Thanks are also due to Gabriela Oviedo and Helen Kerwin of the Center for Justice and International Law (“CEJIL”). We express our thanks, as well, to the following individuals: Priya Morley, Natalie Monsanto, Amanda Pinheiro, and Joe Berra of the Promise Institute for Human Rights at the UCLA School of Law; the students of the International Human Rights Clinic at the UCLA School of Law: Anne Dulka, Adhil Adhil, Michelle Leonard, and Jessica James; Hayley Burgess of CILP; Sofia Espinal of CEJIL; Otelio Castillo, Marisol Aguilar, Ángeles Cruz, and José Antonio Aguilar of RacismoMX; Jessie Valcin, Paulina Olvera, and Lizeth Jimenez of Espacio Migrante; John Lazarre, Erik Crew, Guerline Jozef, Daniel Tse and Nicole Phillips of Haitian Bridge Alliance; Rabi Kabamba DaSilva Filipe, Tsion Gurmu, Nekessa Opoti, and Nana Gyamfi of the Black Alliance for Just Immigration; Odilia Romero, Gladys Tzul, and Alba Gonzalez of Comunidades Indígenas en Liderazgo; Silvia Raquec of Asociación Pop No’j; Syed Hussan of the Migrant Workers Alliance for Change; Sirine Shebaya of NIPNLG; Ricardo Ramírez and Mayte Porragas; and, Blaine Bookey of the Center for Gender and Refugee Studies at the UC College of the Law, San Francisco.

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*Isaac Selwyn, student of UCLA's Immigrant Rights Policy Clinic (center-left) and Dixie Gallardo Aldana, client of UCLA's Immigrant Family Legal Clinic (center-right) provide testimony before the Inter-American Commission on Human Rights (IACHR) on March 7, 2023 at UCLA (Photo by Bryan Giardinelli, Breathe New Winds Photography)*

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## I. INTRODUCTION

*"My children and I still carry tremendous pain from the years that we were forcibly separated by the U.S. immigration system. I hope that sharing my experience with the Inter-American Commission will help bring attention to the many parents and others who have suffered because of where we are from."*

*— Dixie Gallardo Aldana, client of UCLA's Immigrant Family Legal Clinic*

The borders of the United States are governed by laws and policies that are rooted in racism, causing profound harm to Black, brown, and indigenous migrants in the Americas today. Recent U.S. policies—like Title 42<sup>[1]</sup> and "Remain in Mexico"<sup>[2]</sup>—have received significant attention. But the racism of these laws is nothing new.

For nearly a century, the U.S. has used laws governing its borders—specifically federal entry and reentry laws—to criminalize the movement of people. Initially passed in 1929, the U.S.'s illegal entry and reentry laws—now codified at 8 U.S.C. §§ 1325 and 1326— are the most



prosecuted federal crimes today. Rooted in a history of racism, these laws still impact tens of thousands of migrants every year, the overwhelming majority of whom are from Mexico and Latin America.

This white paper lays out how the U.S.’s criminalization of migration in Sections 1325 and 1326 is racist in both motivation and impact, violates Inter-American human rights jurisprudence, and should be proactively addressed by the Inter-American Commission on Human Rights (“IACHR”).

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## **II. HISTORY: BORDERS, CRIMINALIZATION, AND RACE**

### **A. Borders have been marked by racism throughout American history.**

Borders, criminalization, and race have been entangled from the beginnings of U.S. history. The U.S.-Mexico border has its roots in racist sentiment against Native Americans and Mexican peoples;<sup>[3]</sup> as then-senator John C. Calhoun stated, creating and maintaining this physical divide was crucial to ensuring that “[o]urs... is the Government of a white race.”<sup>[4]</sup>

U.S. citizenship laws were likewise discriminatory from the start.<sup>[5]</sup> But it wasn’t until 1882, with the passage of the Chinese Exclusion Act, that Congress first passed legislation governing who could enter the United States in a manner clearly motivated by a desire to exclude an entire racial group.<sup>[6]</sup> Though it began by targeting Asians, immigration law evolved to restrict numerous racial or social demographics that were considered undesirable.<sup>[7]</sup> Congress achieved these objectives through quotas, tests, and outright bans.<sup>[8]</sup> Numerous immigration laws relied on racist beliefs—including the Undesirable Aliens Act of 1929, which first made entry and reentry into the United States a federal crime.<sup>[9]</sup>

### **B. The racist origins of the U.S.’s federal entry and reentry laws.**

The 1929 Undesirable Aliens Act was a legislative effort aimed at reducing Mexican immigration.<sup>[10]</sup> “Expert” eugenicists, who testified before Congress, painted Mexican people as having a “predisposition to criminality, feeble-mindedness, insanity, and a propensity for disease, illness, and physical disability.”<sup>[11]</sup> This new Act balanced racist objectives of

preventing “contamination of American family stocks by alien hereditary degeneracy”<sup>[12]</sup> with economic concerns about imposing a quota that would restrict businesses’ ability to exploit Mexican laborers. As the solution, Congress arrived at criminalizing entry and reentry: Latine people crossing the border could be criminalized, marginalized, deported, and kept from becoming permanent residents while leaving the door open for necessary labor.<sup>[13]</sup>

Just over 20 years later, the criminalization of migration first enshrined in the Undesirable Aliens Act was reenacted through the McCarran-Walter Act.<sup>[14]</sup> The atmosphere in which the 1952 codification passed was also abundant with anti-Latine rhetoric, slurs, and goals. It came three months after the introduction of Senate Bill 1851, nicknamed the “Wetback Bill.” That law sought to prosecute those who sheltered undocumented immigrants as a way of dealing with the Mexican migrant “problem.”<sup>[15]</sup> Accusations of both social and biological inferiority justified these laws.<sup>[16]</sup>

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### **III. PRESENT: FEDERAL ENTRY AND REENTRY**

#### **A. Sections 1325 and 1326 criminalize migration.**

Migration to the United States continues to be criminalized. Section 8 U.S.C. § 1325 penalizes first-time border crossing “at any time or place other than as designated by immigration officers.” Section 8 U.S.C. § 1326 criminalizes re-entering the country following a removal order. Generally, immigration law in the United States is treated as a civil matter.<sup>[17]</sup> But criminal convictions—including for illegal entry or reentry—can lead to long prison sentences, prevent migrants from securing lawful status (including asylum), and may form the basis of deportation proceedings for those already residing in the country.<sup>[18]</sup> Criminal convictions may also trigger mandatory detention in immigration prisons while migrants await removal hearings, even after their criminal proceedings have concluded.<sup>[19]</sup>

#### **B. Federal entry and reentry laws disparately impact Latine people.**

Illegal entry and reentry are the most prosecuted federal crimes in the United States today, with tens of thousands of people charged every year.<sup>[20]</sup> The overwhelming majority of those subject to criminal prosecution under these laws are Latine.<sup>[21]</sup> In 2022, 17,106 people were prosecuted for entering the United States: 3,436 were charged for first-time entry<sup>[22]</sup> and 13,670 people were charged for re-entering.<sup>[23]</sup> Ninety-three percent of those prosecuted under Section 1325 and 96% of those prosecuted under Section 1326 in 2022 were Latine.<sup>[24]</sup> Mexican migrants are particularly impacted: 75% of those charged under Section 1325 and over 72% of those charged under Section 1326 in 2022 were Mexican nationals.<sup>[25]</sup> And while the law doesn’t mandate incarceration, Latine people are more likely to be sentenced to prison when charged under Section 1326; indeed, they accounted for 99 percent of people sentenced for illegal reentry in 2021.<sup>[26]</sup>

Black, brown, and indigenous migrants, particularly those from Mexico and Latin America, also disproportionately suffer the harms of these laws in ways not captured by numbers

alone. Latine people are apprehended by federal and non-federal agents, many of whom cannot communicate with those arrested in Spanish, indigenous, or other non-English languages.<sup>[27]</sup> If criminally prosecuted, migrants may spend years in federal prison before being transferred to immigration custody.<sup>[28]</sup> Conditions in immigration facilities are deeply inhumane, dangerous, and sometimes deadly.<sup>[29]</sup>



*Representatives from groups across the Americas present testimony before the IACHR on March 7, 2023 at UCLA (Photo by Bryan Giardinelli, Breathe New Winds Photography)*

Federal entry and reentry convictions are also a central driver of family separation at the border. A combination of racist history, proximity to the U.S.-Mexico border, and racially targeted law enforcement has led Latine children to be disproportionately impacted by family separation and its harms.<sup>[30]</sup> During the Trump administration, the U.S. government used Sections 1325 and 1326 as a “legal justification” for separating Black, brown, and indigenous parents from their children.<sup>[31]</sup> Parents facing an illegal entry or reentry prosecution are held in criminal custody before their proceedings; because minors are not subject to prosecution under these laws, children are sent elsewhere.<sup>[32]</sup> Parents and children can be detained in facilities hundreds of miles apart with no information about when they can be reunified.<sup>[33]</sup> The Trump administration used this reality to charge thousands of parents with Sections 1325 and 1326 for the explicit purpose of tearing them away from their children under its so-called “zero tolerance” policy, a practice that drew significant public backlash.<sup>[34]</sup> While this policy is no longer in effect, the harm of family separations continues to this day. Straying from campaign platforms, the Biden administration has continued to separate



families at the border and backed out of talks about compensating migrants for the harms they faced for separations that occurred during the Trump administration.<sup>[35]</sup>

Black, brown, and indigenous migrants will continue to suffer as long as the U.S.'s federal entry and reentry laws remain in effect. Dixie Gallardo Aldana, who testified before the Commission on March 7, 2023,<sup>[36]</sup> is a Guatemalan woman who came to the U.S. seeking safety, but was instead prosecuted for illegal reentry and separated from her 12-year-old son. Her story, along with the tens of thousands of others whose lives have been upended by these racist laws, provide the most compelling proof of the need for the Inter-American Commission's intervention.<sup>[37]</sup>

### **C. The federal entry and reentry laws' racism has not been adequately addressed by U.S. law.**

Not only do Sections 1325 and 1326 violate international human rights law, as discussed below, but they have also been challenged in American courts for violating domestic law. Since September 2020, courts have decided more than 20 challenges filed by legal advocates across the country attacking the constitutionality of federal entry and reentry laws.<sup>[38]</sup> All but one of these challenges failed, with courts holding the demonstrated evidence of racism in these statutes as irrelevant or insufficient.<sup>[39]</sup>

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*As these racist laws continue to operate at the U.S.-Mexico border, the Inter-American Commission has an important role to play in holding the U.S. accountable for the ongoing harm these statutes cause to Black, brown, and indigenous migrants in the Americas.*

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A single case has acknowledged the discriminatory intent and impact of these laws. In *United States v. Carrillo-Lopez*, a district court judge struck down Section 1326 for violating the Constitution's guarantee of equal protection.<sup>[40]</sup> The judge addressed the racist history which gave rise to the law as well as its current effects to find Section 1326 unconstitutional. The compelling evidence forced even the U.S. government to concede that the federal illegal reentry statute disparately impacts Latine people;<sup>[41]</sup> yet the government persisted in trying to preserve the law. It appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, which reversed the lower court in May 2023, holding that the federal illegal reentry statute is valid.<sup>[42]</sup>

With no other court having found the illegal entry or reentry laws invalid as of this writing, migrants remain subject to criminal prosecution under Sections 1325 and 1326. As these racist laws continue to operate at the U.S.-Mexico border, the Inter-American Commission has an important role to play in holding the U.S. accountable for the ongoing harm these statutes cause to Black, brown, and indigenous migrants in the Americas.

## IV. EXAMINING ENTRY AND REENTRY LAWS UNDER INTER-AMERICAN HUMAN RIGHTS STANDARDS

Sections 1325 and 1326 violate Inter-American human rights law. The American Declaration of the Rights and Duties of Man (“Declaration”) recognizes rights relevant to migrants, including Latine people who seek asylum at the U.S.-Mexico border. As an Organization of American States (“OAS”) member state and party to the OAS Charter, the U.S. is bound by the human rights law set forth in the Declaration.<sup>[43]</sup>

Federal illegal reentry and entry laws violate multiple human rights protected under the American Declaration, including Equality Before the Law (Article II), Liberty and Protection from Arbitrary Arrest (Articles I, XXV), Asylum (Article XXVII), Due Process (Article XXVI), Fair Trial (Article XVIII), and Family (Articles V-VII). In the following sections, we examine how these rights are implicated by Sections 1325 and 1326.

### **A. Article II: Equality Before the Law**

The right to equality under Article II of the Declaration requires that a state’s practice or law not be “based on racial motives.”<sup>[44]</sup> If a state practice depriving a group of their rights is in place “mainly owing”<sup>[45]</sup> to a group’s physical characteristics and the fact that they belong to a specific group, it will be considered a discriminatory action.

An act can be discriminatory even if the wording of the law or policy “is or appears to be neutral.”<sup>[46]</sup> Even when it is not possible to prove discriminatory *intent*, a state’s action violates this right if the law has discriminatory “disproportionate *impact*.”<sup>[47]</sup> Either is independently sufficient to establish a violation of the right to non-discrimination, and both intent and impact are present and can be demonstrated in the case of Sections 1325 and 1326.<sup>[48]</sup>

We submit that an analysis of discriminatory intent should include a historical analysis to contextualize the original motivation of these laws. As described above, the criminalization of migration under Sections 1325 and 1326 is rooted in racial subjugation and exclusion.<sup>[49]</sup> Given the explicit eugenicist origins of these laws, the violations of rights flowing from the application of these laws are inextricably tied to an individuals’ race.

Furthermore, Sections 1325 and 1326 have an overwhelmingly discriminatory disproportionate impact, as the vast majority of those criminally prosecuted are Latine.<sup>[50]</sup> Thus, these laws are discriminatory in violation of Article II of the Declaration. The violations of other fundamental rights caused by the application of these laws should be understood in this context.

Additionally, States are obliged “to adopt positive measures to reverse or change discriminatory situations that exist in their societies that prejudice a specific group of

persons.”<sup>[51]</sup> There have been no meaningful steps taken by the U.S. government to reverse or change these laws, despite its obligation to do so.



*Representatives from groups across the Americas present testimony before the IACHR on March 7, 2023 at UCLA (Photo by Bryan Giardinelli, Breathe New Winds Photography)*

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## **B. Articles I and XXV: Liberty**

Article I of the Declaration protects the right to liberty, while Article XXV protects individuals from arbitrary arrest. These rights require “immigration policies that are premised on a presumption of liberty.”<sup>[52]</sup> Specifically, the Inter-American Commission on Human Rights has stated that “immigration violations ought not to be construed as criminal offenses,”<sup>[53]</sup> and that “a violation of immigration law can never be equated to a violation of criminal laws that warrants the use of the State’s punitive authority.”<sup>[54]</sup> But Sections 1325 and 1326 do precisely this: they impose criminal sanctions—including sentences of imprisonment of up to 20 years—for entering the United States without authorization.

The Inter-American Court of Human Rights<sup>[55]</sup> has likewise found that criminal detention for migration was arbitrary: “imposing a punitive measure on an immigrant who reenters a country in an irregular manner subsequent to receiving a deportation order cannot be considered [a] legitimate purpose.”<sup>[56]</sup> This is precisely the class of individuals subject to



criminal prosecution under Section 1326. The incarceration of migrants convicted under Sections 1325 or 1326 is thus arbitrary in violation of the right to liberty as protected by the Declaration.

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*The Inter-American Commission on Human Rights has stated that “immigration violations ought not to be construed as criminal offenses,” and that “a violation of immigration law can never be equated to a violation of criminal laws that warrants the use of the State’s punitive authority.” But Sections 1325 and 1326 do precisely this: they impose criminal sanctions—including sentences of imprisonment of up to 20 years—for entering the United States without authorization.*

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### **C. Article XXVII: Asylum**

The right to asylum under Article XXVII of the Declaration requires that every person have the right to “seek and receive” asylum in accordance with “international agreements” and “the laws of each country” in which asylum is sought. Both these criteria must be satisfied for this right to exist.<sup>[57]</sup>

The Commission has recognized the right to seek and receive asylum under international law, taking into account the protections established in the Convention Relating to the Status of Refugees 1951 and the 1967 Protocol Relating to the Status of Refugees.<sup>[58]</sup> Under U.S. domestic law, all people who are at a land border, port of entry or physically present in the United States are entitled to seek asylum.<sup>[59]</sup> Those who meet the legal criteria are granted asylum.<sup>[60]</sup>

The right to seek and receive asylum in the U.S. is protected under Article XXVII of the Declaration. Yet Sections 1325 and 1326 subject to criminal prosecution people entering the United States, including those with legitimate claims for asylum. This criminalization prevents individuals from accessing their right to seek and receive asylum, as many are unable to access asylum procedures in prison or are deported before asylum hearings can take place.<sup>[61]</sup> Prosecuting individuals under Sections 1325 and 1326 thus violates Article XXVII of the Declaration.

## **D. Articles XXVI, XVII, and V-VII: Due Process, and the Right to Family Life and Rights of Children**

The rights to family life and to due process are also implicated by the criminalization of migration under Sections 1325 and 1326. Articles V, VI, and VII of the Declaration give every person the right to protection of family; to establish a family and to receive protection thereof; and recognize the right to special protection, care, and aid for all children, as well as women during the pregnancy and nursing period. Articles XVIII and XXVI protect the rights to fair trial and due process, respectively. In proceedings that can lead to deportation, the Commission has required that States balance their concern for general welfare with the fundamental rights of migrant families such as the right to family life and the rights of mothers and children.<sup>[62]</sup> This includes providing an opportunity for an individual's rights to be duly considered before deportation.<sup>[63]</sup> Where a violation occurs because the State does not balance these interests, the State will also be responsible for an independent violation of due process if it does not provide an effective remedy.<sup>[64]</sup>

Sections 1325 and 1326 separate families, as a criminal conviction will result in adult family members being separated from their children to serve their sentences in federal prisons.<sup>[65]</sup> The criminal proceedings, which are often a precursor to the deportation of parents, do not take into consideration or provide opportunities for migrants to testify to the family and children's best interests.<sup>[66]</sup> This violates the rights to family life and special protection of children. Additionally, there are no clear judicial mechanisms available to migrants to challenge these violations of their rights or pursue a remedy, which results in a further violation of their rights to due process and a fair trial. These practices violate Articles V, VI, VII, XVIII, and XXVI of the Declaration as interpreted by the Commission.

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*The history and current impact of the U.S.'s criminalization of federal entry and reentry is fundamentally incompatible with international human rights law. Reforming migration in the Americas must center racial justice and reckon with the structural racism in laws like Sections 1325 and 1326.*

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## **V. RECOMMENDATIONS**

The history and current impact of the U.S.'s criminalization of federal entry and reentry is fundamentally incompatible with international human rights law. Reforming migration in the Americas must center racial justice and reckon with the structural racism in laws like Sections 1325 and 1326. The Inter-American Commission can and should address the criminalization of migrants at the U.S.-Mexico border. We urge the Commission to start with the following actions:

1. Conduct a working visit to the United States to observe Section 1325 and Section 1326 proceedings and meet with individuals in federal criminal and immigration detention convicted of these crimes.
  2. Publish a report based on these observations with a focus on U.S. federal criminal entry and reentry laws as a key issue of immigration and racial justice in the Americas.
  3. Formally condemn family separation, mistreatment of migrants at the border, and the racist history and current racist impacts of federal entry and reentry laws in the Commission's recommendations to the U.S.
  4. Recommend that the United States review its laws which criminalize migration, including Sections 1325 and 1326, and employ all necessary means, including repealing, to ensure compliance with Inter-American standards.
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## VI. ENDNOTES

[1] In March 2020, the Centers for Disease Control and Prevention invoked 42 U.S.C. § 265 ("Title 42")—a law that prevents people from entering U.S. territory for public health reasons—to justify closing U.S. borders in response to the COVID-19 pandemic. The Title 42 order's effectiveness toward preventing Covid-19 transmission was and remains controversial. See Jasmine Aguilera, *Biden is Expelling Migrants on COVID-19 Grounds, but Health Experts Say That's All Wrong*, Time (Oct. 21, 2021), <https://time.com/6105055/biden-title-42-covid-19/>. What is clear is that Title 42 has severely limited migrants' ability to seek asylum and has disproportionately kept out those who are from Latin America, do not have existing family in the U.S., and lack economic resources. See Adam Isacson, *How the Biden Administration May Keep Asylum Out of Reach After Title 42*, Washington Office on Latin America (Feb. 17, 2023), <https://www.wola.org/analysis/biden-asylum-after-title-42/#:~:text=The%20transit%20ban,request%20asylum%20in%20those%20countries>.

[2] Formally called "Migrant Protection Protocols" (MPP), the Trump-initiated "Remain in Mexico" policy forced migrants seeking asylum in the U.S. to wait in Mexico, drastically decreasing the number of people who could meaningfully seek asylum. See, e.g., *Know Your Rights: Migrant Protection Protocols and "Remain in Mexico"*, National Immigrant Justice Center (Mar. 2021), <https://immigrantjustice.org/know-your-rights/know-your-rights-migrant-protection-protocols-remain-mexico>. The program, which the Biden administration attempted to end in February 2021, continues to be the subject of litigation by Republican-led states. See Kelsey Ables, *U.S. Judge in Amarillo halts Biden administration's attempt to end "remain in Mexico" policy*, The Texas Tribune (Dec. 16, 2022), <https://www.texastribune.org/2022/12/16/remain-in-mexico-mpp-judge-ruling-migrants/>.

[3] Joseph Kowalski, *Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples*, 5 Am. Indian L.J. 645, 648 (2017).

[4] *Id.*; see also Cong. Globe, 30th Cong., 1st Sess. 98 (Jan. 4, 1848) (statement of Senator Calhoun).

[5] See Naturalization Act of 1790, 1st Cong., 2nd Sess., Ch. 3 at 103 (March 26, 1790) (requiring a naturalization applicant to be a "free white person").



[6] An act to execute certain treaty stipulations relating to Chinese, ch. 126, 22 Stat. 58 (May 6, 1882); see also *Major US Immigration Laws, 1790 – Present*, Migration Policy Institute (Mar. 2013), <https://www.migrationpolicy.org/sites/default/files/publications/CIR-1790Timeline.pdf>. See also Michael Luo, *The Forgotten History of the Purging of Chinese from America*, *The New Yorker* (Apr. 22, 2021), <https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america>.

[7] See, e.g., Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 1 *Law & Contemp. Probs* 4, 5-17 (2009).

[8] The Dillingham Commission of 1907-1910 drove decades of immigration policy based on racist pseudoscience derived from testimony from white supremacists, cranial measurements, and factually inaccurate anthropology. See *Highlights from the Library Collection: Immigration Commission Reports*, U.S. Citizenship and Immigration Services (Dec. 13, 2019), <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/highlights-from-the-library-collection-immigration-commission-reports>.

[9] Undesirable Aliens Act, Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

[10] See generally Benjamin G. O'Brien, "A Very Great Penalty:" Mexican Immigration, Race, and 8 U.S.C § 1326, 37 *Md. J. Int'l L.* 39 (2022).

[11] *Id.* at 42.

[12] *Id.* (quoting *The Eugenical Aspects of Deportation: Hearings Before the Comm. on Immigr. & Nat.*, 70th Cong. 3 (1928) (statement of Dr. Harry H. Laughlin)).

[13] *Id.* at 40.

[14] *Id.* at 46.

[15] *Id.* at 46, 47.

[16] Brief for Professors Kelly Lytle Hernández, Mae Ngai, and Ingrid Eagly as Amici Curiae Supporting Respondent, *US v. Palomar-Santiago*, 593 U.S. \_\_\_ (2021) (No. 20-437).

[17] *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, American Immigration Council (Mar. 2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aic\\_twosystemsofjustice.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf).

[18] See 8 U.S.C. § 1182(a)(2); *Id.* § 1227(a)(2); see also *Federal criminal sentencings for illegal reentry*, U.S. Immigration and Customs Enforcement (Oct. 18, 2017), <https://www.ice.gov/news/releases/federal-criminal-sentencings-illegal-reentry>.

[19] See 8. U.S.C. § 1226(c).

[20] *Fact Sheet: Immigration Prosecutions By the Numbers*, National Immigrant Justice Center (Nov. 14, 2022), <https://immigrantjustice.org/staff/blog/fact-sheet-immigration-prosecutions->

numbers#:~:text=Prosecutors%20charged%203%2C436%20people%20in,district%20court%20in%20FY%202021

[21] *Id.*

[22] *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1325 FY22 Monthly Defs Filed with Nationality*, U.S. Department of Justice (Dec. 2022), <https://www.justice.gov/usao/page/file/1460656/download>.

[23] *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1326 FY22 Monthly Defs Filed with Nationality*, U.S. Department of Justice (Dec. 2022), <https://www.justice.gov/usao/page/file/1460666/download>.

[24] *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1326 FY22 Monthly Defs Filed*, U.S. Department of Justice, <https://www.justice.gov/usao/page/file/1460661/download>.

[25] *Prosecuting Immigration Crime Report: Fiscal Year 2022, 8 USC § 1325 FY22 Monthly Defs Filed*, U.S. Department of Justice, <https://www.justice.gov/media/1183776/dl?inline>.

[26] See *Fact Sheet: Immigration Prosecutions by the Numbers*, *supra* note 20.

[27] See, e.g., *Policing and Latino Immigrants: Summary of Findings from HRW's Report, "Get on the Ground!": Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, Human Rights Watch (Sept. 12, 2019), .

[28] See, e.g., *Illegal Reentry Offenses*, United States Sentencing Commission (Apr. 2015), <https://www.ussc.gov/research/research-publications/illegal-reentry-offenses>.

[29] See, e.g., *Conditions in Migrant Detention Centers*, American Oversight (Jan. 20, 2021), <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers>.

[30] See Elisa Minoff, *Entangled Roots: The Role of Race in Policies that Separate Families*, Center for the Study of Social Policy (Oct. 2018), <https://cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf>.

[31] Caitlin Dickerson & Geoff Bennett, *How a Trump-era policy that separated thousands of migrant families came to pass*, Public Broadcasting Station (Aug. 13, 2022), <https://www.pbs.org/newshour/show/how-a-trump-era-policy-that-separated-thousands-of-migrant-families-came-to-pass>.

[32] Catherine E. Shoichet, *Children and parents are being separated at the border. Here's what we know*, Cable News Network, Inc. (Jun. 18, 2018), <https://www.cnn.com/2018/06/18/us/immigration-family-separations-questions/index.html>.

[33] Erica Bryant, *Children are Still Being Separated from Their Families at the Border*, Vera (Jun. 23, 2022), <https://www.vera.org/news/children-are-still-being-separated-from-their-families-at-the-border>.

[34] Caitlin Dickerson & Geoff Bennett, *supra* note 31.

[35] See Anna-Catherine Brigida & John Washington, *Biden Is Still Separating Immigrant Kids from Their Families*, Texas Observer (Nov. 21, 2022), <https://www.texasobserver.org/the-biden-administration-is-still-separating-kids-from-their-families/>; Nicola Narea, *Biden is defending key Trump immigration policies in court*, Vox (Jan. 25, 2022), <https://www.vox.com/22893065/biden-family-separations-title-42-border-court>. See also

*La ardua labor de un grupo de abogados para reunir a padres e hijos separados en la frontera*, Univision (Feb. 12, 2023), available at <https://t.co/5AZtUQMojB>.

[36] See Comisión Interamericana de Derechos Humanos, 186 PS - 6 - RE | Situación de la movilidad humana desde un enfoque étnico-racial (Mar. 9, 2023), available at 39:53 of <https://youtu.be/o4f-OD808jQ?t=2393>; see also <https://promiseinstitute.law.ucla.edu/project/inter-american-commission-on-human-rights-visit-to-ucla/>.

[37] See *generally Rooted in Racism: The Human Impact of Migrant Prosecutions*, National Immigration Project (Dec. 2021), [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/pr/2021\\_21Dec\\_Rooted-in-Racism-Report.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec_Rooted-in-Racism-Report.pdf).

[38] See *Explainer: Equal Protection Challenges to Prosecutions Under 1325 and 1326: The Groundbreaking Decision in Carrillo-Lopez*, National Immigration Project 6-7 (Dec. 2021), [https://nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/pr/2021\\_21Dec-1325-6-Handout.pdf](https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec-1325-6-Handout.pdf) (collecting cases); see also *United States v. Jimenez-Joachin*, -- F.Supp3d --, 2022 WL 17736798 \* 1 (D. Mass. Dec. 16, 2022) (collecting cases).

[39] *Explainer: Equal Protection Challenges*, *supra* note 38, at 6-7.

[40] *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996 (D. Nev. 2021); see also Ken Ritter, *US Judge in Nevada: Felony deportation law unconstitutional*, Associated Press News (Aug. 19, 2021), <https://apnews.com/article/nevada-immigration-race-and-ethnicity-racial-injustice-laws-6e3ebe4ba12d971ec9ed199c005b31b5>.

[41] *Carrillo-Lopez*, 555 F. Supp. 3d at 1027.

[42] *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023); see also Rio Yamat, *US asks appeals court to reverse deportation law ruling*, Associated Press News (Dec. 8, 2022), <https://apnews.com/article/nevada-immigration-reno-mexico-government-united-states-8eb9c3575aa00aa149d95d0bef9f928e>.

[43] See *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.95 Doc. 7 rev. at 550, para. 87 (1997).

[44] *Expelled Dominicans and Haitians v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 282, para. 399 (Aug. 28, 2014).

[45] *Id.* at para. 404.

[46] *Nadege Dorzema et al. v. Dominican Republic* Inter-Am. Ct. H.R. (ser. C) No. 251, para. 235 (Oct. 24, 2012).

[47] *Id.* at para. 235 (emphasis added).

[48] See Parts II and III of this brief, above.

[49] See Part II of this brief, above.

[50] See Part III of this brief, above.



[51] Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 104 (Sept. 17, 2003).

[52] Cuban and Haitian Nationals Detained At and Deported from the Carmichael Road Detention Center v. Bahamas, Case 12.071, Report No. 459/21, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II, doc. 473 para. 51 (2021).

[53] Report on Immigration in The United States: Detention and Due Process, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II., Doc. 78/10, para. 38 (Dec. 2010).

[54] Cuban and Haitian Nationals Detained, *supra* note 52, at para. 49. See also, Commission on Human Rights, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, U.N. Doc. E/CN.4/2003/85 at para. 73 (December 30, 2002) (“[I]rregular migrants are not criminals per se and they should not be treated as such.”).

[55] The Commission may draw from the Inter-American Court of Human Rights’ interpretations of the American Convention in interpreting and applying the Declaration. See John Doe et al. v. Canada, Case 12.586, Report No. 78/11, Inter-Am. Comm’n H.R., OEA/Ser.L./V/II.141 Doc. 29 paras. 69-73 (July 21, 2011).

[56] Velez Lloor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, para. 169 (Nov. 23, 2010).

[57] The Haitian Centre for Human Rights, *supra* note 43, at para. 151.

[58] *Id.* at para. 155.

[59] 8 U.S.C. § 1158(a)(1). New regulations attempting to limit asylum access are being challenged by advocates. See Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023); Immigrants’ Rights Advocates Sue Biden Administration Over New Asylum Ban, American Civil Liberties Union (May 11, 2023), <https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-biden-administration-over-new-asylum-ban>.

[60] See 8 U.S.C. § 1101(a)(42); *Id.* § 1158; 8 C.F.R. § 208.1 *et seq.*

[61] *UNHCR’s Views on the Detention of Asylum Seekers: Using international law to advocate against detention of individuals seeking protection in the U.S.*, United Nations High Commissioner (Sep. 2022),

<https://www.unhcr.org/631f449d4.pdf>; see also *Fact Sheet: Prosecuting People for Coming to the United States*, American Immigration Council (Aug. 2021), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

[62] Wayne Smith and Hugo Armendariz et al v. United States, Case 12.56, Inter-Am. Comm’n H.R., Report No. 81/10, para. 57 (June 12, 2010).

[63] *Id.* at para. 59.

[64] *Id.* at para. 62.

[65] See *Rooted in Racism: The Human Impact of Migrant Prosecutions*, *supra* note 37.

[66] See United States Sentencing Commission, *Primer on Immigration Offenses* 40 (2021), [https://www.ussc.gov/sites/default/files/pdf/training/primers/2021\\_Primer\\_Immigration.pdf](https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Immigration.pdf) (stating that a defendant's motive for illegal reentry is not a basis for downward departure from sentencing guidelines and that motivation to care for a family member must be exceptional in order to qualify).