



RESEARCH AND ADVOCACY FOR REFORM

**Comments of  
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**On Proposed Rules to Expand Bars  
to Eligibility for Asylum Based on  
Criminal Histories**

**Before the Department of Homeland  
Security and the Department of  
Justice**

**January 21, 2020**

*Submitted via <https://www.regulations.gov/document?D=EOIR-2019-0005-0001>*

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Re: 84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AC41; Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility

January 21, 2020

To Whom It May Concern:

I am writing on behalf of The Sentencing Project in response to the above-referenced Proposed Rules to express our strong opposition to the Proposed Rules to amend regulations relating to eligibility for asylum published in the Federal Register on December 19, 2019.

Founded in 1986, The Sentencing Project engages in research and advocacy to achieve a fair and effective U.S. criminal justice system. As a Senior Research Analyst, I conduct and synthesize research on criminal justice policies on topics ranging from the opioid crisis to racial disparities in the justice system. I am a co-author of our report “Immigration and Public Safety,” and have authored an analysis of the federal prison population titled “Federal Prisons at a Crossroads,” both published in 2017 (see enclosed CV).

For the reasons detailed in the comments that follow, the Department of Homeland Security and the Department of Justice should immediately withdraw their current proposal, and instead dedicate their efforts to ensuring that individuals fleeing violence are granted full and fair access to asylum protections in the United States.

Thank you for the opportunity to submit comments on the Proposed Rules. The enclosed comments include hyperlinks to relevant sources which I request that you please review. Please do not hesitate to contact me, Nazgol Ghandnoosh ([nghandnoosh@sentencingproject.org](mailto:nghandnoosh@sentencingproject.org)), to provide further information.

Sincerely,  
Nazgol Ghandnoosh, Ph.D.  
Senior Research Analyst

Enclosed: CV

**DETAILED COMMENTS submitted by The Sentencing Project in opposition to the Proposed Rules re Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640; EOIR Docket No. 18-0002, A.G. Order No. 4592-2019; RIN 1125-AA87, 1615-AC41**

**I. INTRODUCTION**

On December 19th, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) issued a joint set of Proposed Rules that would add seven *categorical* bars related to criminal history to asylum eligibility. This proposal runs counter to the growing understanding in domestic policy of the evidence and research on criminal histories, namely that they: can accompany innocence, are disproportionately imposed on the poor and people of color, need not reflect an elevated public safety risk, and highlight the need for investments in prevention, drug treatment, and restorative justice. Rather than allowing customized assessments of asylum cases involving criminal histories, DHS and DOJ are suggesting a one-size-fits-all approach that would stifle considerations of innocence, bias, rehabilitation, and treatment.

The proposed set of changes adds the following seven *categorical* bars to asylum eligibility related to offenses committed in the United States: (1) any conviction of a felony offense; (2) any conviction for “smuggling or harboring” under 8 U.S.C. § 1324(a), even if the asylum seeker committed the offense for the purpose of bringing her own spouse, child or parent to safety; (3) any conviction for illegal reentry under 8 U.S.C. § 1326; (4) any conviction for an offense “involving criminal street gangs,” with the adjudicator empowered to look to any evidence to determine applicability; (5) any second conviction for an offense involving driving while intoxicated or impaired; (6) any conviction *or accusation of conduct* for acts of battery involving a domestic relationship; (7) and any conviction for several newly defined categories of misdemeanor offenses, including *any* drug-related offense except for a first-time marijuana possession offense, any offense involving a fraudulent document, and fraud in public benefits.

DHS and DOJ already impose a mandatory asylum bar on those convicted of “serious nonpolitical crime outside the United States” or a “particularly serious crime” in the United States. **The Sentencing Project strongly urges DHS and DOJ to reject expanding these mandatory restrictions because they do not serve the interest of public safety while unnecessarily gutting the asylum protections enshrined in United States and international law.**

**II. A NON-TRIVIAL NUMBER OF PEOPLE WITH CRIMINAL RECORDS ARE INNOCENT AND WILL BE UNJUSTLY EXCLUDED FROM ASYLUM PROTECTION**

Legal cases and media coverage have established that a non-trivial number of innocent people become entangled with the criminal justice system, ranging from an accusation of a gang affiliation to a murder conviction. Wrongful convictions are the result of many factors, including the failure of criminal justice practitioners to uphold the legal standards of their work, to false admissions of guilt in plea negotiations in order to avoid the most punitive consequences. For example:

- **Gang affiliation**

A growing number of recent cases and investigations have demonstrated the overly broad net that law enforcement agents have cast in identifying gang members. For example, Chief U.S. District Judge Virginia A. Phillips [barred the city of Los Angeles](#) from enforcing nearly all of its gang injunctions in 2018, anticipating that most of those affected by the injunctions suffered due process violations. These injunctions are civil court orders that bar suspected gang members from associating with friends or family members in areas where the gang is known to exist. Following an audit from the Los Angeles City Attorney's Office and the Los Angeles Police Department, the city had already reduced the number of people subject to such injunctions from 8,900 to 1,450. In January 2020, the *Los Angeles Times* [reported](#) that over a dozen of the city's officers were being investigated on suspicion of falsifying information they gathered during stops, incorrectly portraying people as affiliated with gangs to boost their stop statistics.

- **Homicide**

The Innocence Project [reports](#) that in the past three decades, “367 people in the United States have been exonerated by DNA testing, including 21 who served time on death row.” 130 of these exonerees were wrongfully convicted of murders, many as a result of false confessions and eyewitness misidentifications. In [Corley v. United States \(2009\)](#), the Supreme Court referenced the history of 20th-century dictatorships and recent research to argue that the pressures and isolation of custodial police interrogation “can induce a frighteningly high percentage of people to confess to crimes they never committed.” Youth and people with learning disabilities are especially susceptible to these psychological pressures.

- **Guilty Pleas**

People plead guilty to crimes they did not commit in the United States sometimes to avoid the “trial penalty,” the draconian sentence they would face if found guilty at trial, resulting from the dramatic increase in [prison terms](#) since the 1970s. Nearly all (98%) of guilty convictions in [U.S. federal courts](#) were the result of guilty pleas in 2018, as were 94% of felony convictions in [U.S. state courts](#) in 2006—a dramatic increase in recent decades. Jed S. Rakoff, U.S. District Judge for the Southern District of New York, [notes](#) that the infrequency of jury trials runs counter to the intentions of the Founding Fathers because these trials serve “not only as a truth-seeking mechanism and a means of achieving fairness, but also as a shield against tyranny.” Among 354 individuals exonerated by DNA analysis, the National Association of Criminal Defense Lawyers [writes](#), “11% had pled guilty to crimes they did not commit, and the National Registry of Exonerations has identified 359 exonerees who pled guilty.”

Concerns about barring innocent people with criminal histories from seeking asylum should be sufficient cause for rejecting these Proposed Rules. But there are several reasons to reject this proposal even for people who are not factually innocent, as described next.

### III. PEOPLE IMPACTED BY UNWARRANTED RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM WILL BE DISPROPORTIONATELY BARRED FROM ASYLUM PROTECTION

Innocent or guilty in the United States, people of color are disproportionately impacted by the criminal justice system. In 2015, The Sentencing Project [reported](#) that blacks and Latinos comprised 56% of the incarcerated population, yet only 30% of the U.S. population. The roots of this disparity precede criminal justice contact: conditions of socioeconomic inequality contribute to higher rates of some violent and property crimes among people of color. The disparities in the criminal justice system resulting from differential patterns of criminal offending are considered “warranted” disparities. But four features of the justice system exacerbate this underlying inequality and produce unwarranted disparities: 1. Many ostensibly race-neutral policies and laws have a disparate racial impact; 2. Criminal justice practitioners’ use of discretion is—often unintentionally—influenced by racial bias; 3. Key segments of the criminal justice system are underfunded, putting blacks and Latinos—who are disproportionately low-income—at a disadvantage; 4. Criminal justice policies exacerbate socioeconomic inequalities by imposing collateral consequences on those with criminal records and by diverting public spending from more effective crime-reduction policies.

Researchers have found the greatest disparities between criminal activities and enforcement in lower level offenses. For example:

- **Drug Crimes**

An ACLU [report](#) found that blacks were 3.7 times as likely to be arrested for marijuana possession than whites in the United States in 2010. This disparity expands at [later stages](#) of the criminal justice system so that 57% of people in state prisons for drug offenses are people of color, even though whites comprise over two-thirds of drug users, and are likely a similar proportion of sellers.

- **Gang Affiliation**

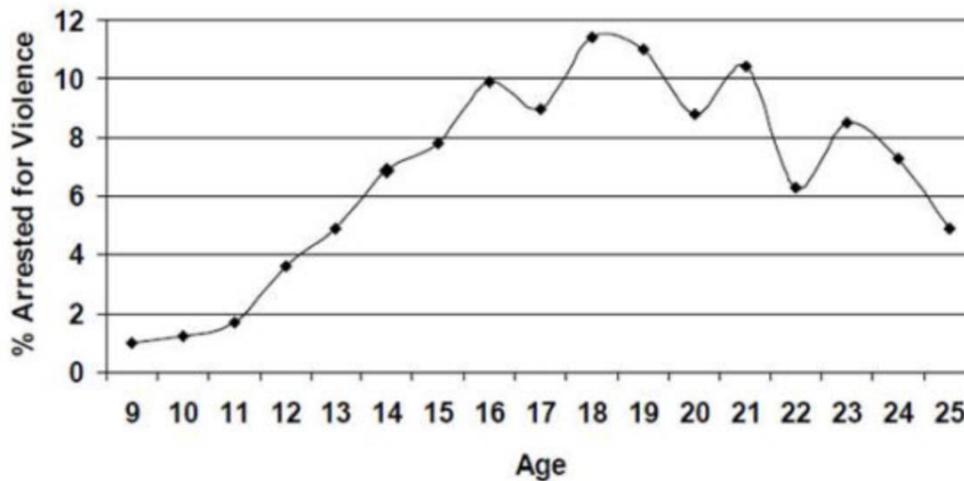
People of color, particularly African Americans, are especially likely to be identified as gang members. For example, from 2010 through 2017, everyone arrested under Mississippi's gang law was black, reports the [Jackson Free Press](#), even though the Mississippi Association of Gang Investigators found that 53% of verified gang members in the state were white. In Chicago, 95% of the 65,000 individuals in the police department’s gang database are black or Latino. In New York City, only [1%](#) of the 18,000 people in the police department’s gang database are non-Hispanic white.

Barring people with certain criminal records from seeking asylum would ossify these disparities, rather than allow for an opportunity to stem further harm.

#### IV. PEOPLE WHO ARE NO LONGER A PUBLIC SAFETY RISK WILL BE EXCLUDED FROM ASYLUM PROTECTION

Setting aside concerns about innocence and biased enforcement, additional categorical asylum bars against people with criminal histories flies in the face of growing understanding domestically that a criminal conviction is a poor metric for assessing current public safety risk. Criminal offending peaks during the late teenage years and declines in the early 20s, as illustrated by criminological research on the age-crime curve (Figure 1). The National Institute of Justice [explains](#) that while specific versions of this curve vary for different populations, “This bell-shaped age trend, called the age-crime curve, is universal in Western populations.”

Figure 1: An Age-Crime Curve



Source: Loeber, R., and R. Stallings. 2011. “Modeling the Impact of Interventions on Local Indicators of Offending, Victimization, and Incarceration,” in *Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood*, eds. Rolf Loeber and David P. Farrington, New York: Springer: 137-152.

Criminologists Alfred Blumstein, of Carnegie Mellon University, and Kiminori Nakamura, of University of Maryland, [have demonstrated](#) that after the passage of time, even people convicted of violent crimes pose the same public safety risk as the general public.

In recent years, domestic U.S. policies have become increasingly aligned with criminal justice research by moving away from lifelong extra-legal punishment for criminal convictions and by encouraging successful community reintegration. In particular:

- **Re-entry**

In 2008, President George W. Bush signed into law the Second Chance Act—recently reauthorized by the First Step Act—making substantial investments to help the 650,000 people

released annually from prisons nationwide to re-enter society as “[self-sustaining and law-abiding](#)” members of society. Support for re-entry has also grown among states, such as with California’s previously-named Department of Corrections adding “and Rehabilitation” to its name in 2005, after having disavowed the goal in the 1970s. President Barack Obama [inaugurated](#) a “National Reentry Week” in the final week of April 2016, to “reform the federal approach to reentry by addressing barriers to reentry, supporting state and local efforts to do the same, and engaging the private sector to provide individuals who have earned a second chance the opportunity to participate in the American economy.” For the past two years, President Donald Trump has proclaimed April as [Second Chance Month](#), to celebrate those who have successfully re-entered society after prison and expand opportunities for those working towards this goal, emphasizing “[our belief in second chances for all who are willing to work hard to turn their lives around.](#)”

- **Ban the Box**

In December 2019, President Donald Trump signed into law the [Fair Chance Act](#), legislation to “ban the box” on job applications for federal agencies and contractors, requiring these employers to make a conditional job offer before subjecting a prospective employee to a criminal background check. This change would improve hiring prospects at the country’s largest employer, the federal government, for the over 70 million people in the United States who have an arrest or conviction record. This builds on the “ban the box” policies at a number of businesses [including](#) Walmart, Koch Industries, JP Morgan Chase, Target, Home Depot, and Bed, Bath & Beyond. This reform also complements state and local reforms: According to the National Employment Law Project, [35 states and more than 150 cities](#) have adopted “ban the box” policies. Thirteen states have extended these hiring requirements to private employers as well.

Domestically, public-sector and private-sector reforms increasingly reflect the understanding that criminal histories should not be equated with public safety risk given that many people with such histories do not pose any greater risk to society than those without records. The Proposed Rules run counter to this evidence-based understanding.

## **V. PEOPLE WHOSE CONVICTION IS THE RESULT OF PAST RELOCATION EFFORTS, TRAUMA, OR LIMITED OPPORTUNITIES WILL BE EXCLUDED FROM ASYLUM PROTECTION**

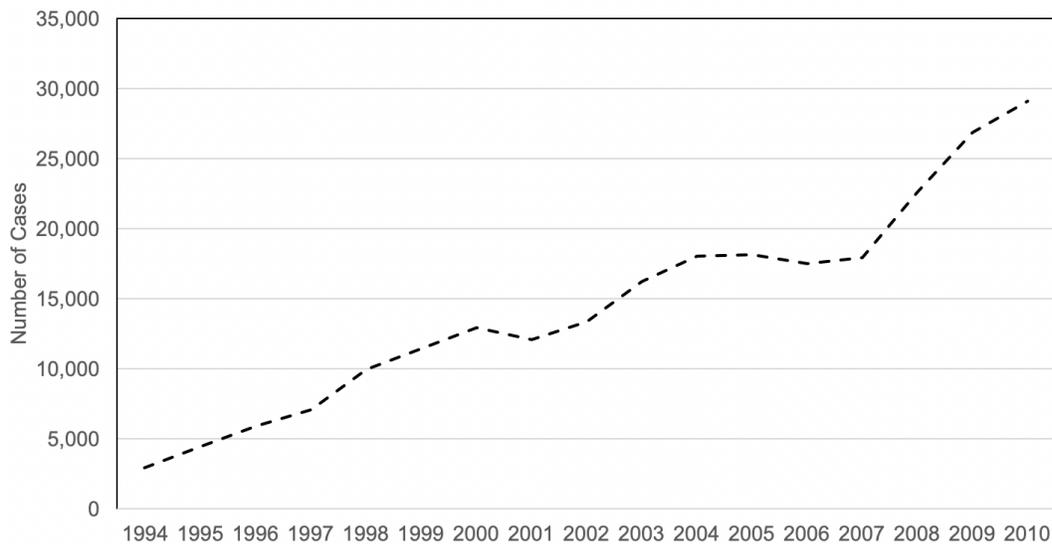
The mandatory asylum bars of the Proposed Rules would preclude at least two additional considerations.

**First, for some individuals, a criminal history reflects an immigration law violation, which until recent decades, the United States treated as a civil rather than criminal offense.** It is unclear how public safety would be advanced by denying asylum to individuals whose most serious crime is an immigration law violation. If not for the redirection of immigration law violators into the

criminal system, individuals who previously illegally sought entry into or resided in the United States would not be barred from applying for asylum under the Proposed Rules.

Non-citizens are currently under-represented in the total U.S. prison population, making up 6% of the U.S. prison population while comprising 7% of the total U.S. population, according to research [from](#) The Sentencing Project. This reflects the fact that foreign-born residents of the United States, including those who are undocumented, commit crime less often than native-born citizens. Yet non-citizens are increasingly over-represented in federal prisons. In 2017, 22% of the federal prison population were non-citizens. The increased use of imprisonment for immigration law violations is a major driver of the over-representation of non-citizens in federal prisons. Among non-U.S. citizens who received a federal prison sentence in 2015, 66% were convicted of an immigration law violation as their most serious offense. This high proportion is the result of the dramatic increase in immigration case filings in U.S. District Court and in federal prison sentences for immigration law violations. Between 1994 and 2010, while the undocumented population in the United States roughly [doubled](#), the number of defendants against whom immigration cases were filed in U.S. district court grew by 889% (Figure 2). Between 2000 and 2015, during a period in which the [undocumented population](#) grew by roughly 24%, the number of [federal prison sentences for immigration law violations](#) doubled, from 11,403 to 20,757. In its analysis of federal criminal cases in 2015, the United States Sentencing Commission [noted](#) that 82% of sentenced immigration cases involved “unlawful reentry into the United States or unlawfully remaining in the United States without authority” and another 12% involved transporting undocumented people across the border.

**Figure 2: Immigration Cases Filed in U.S. District Court, 1994-2010**



Source: Motivans, M. 2012. “Immigration Offenders in the Federal Justice System, 2010.” U.S. Department of Justice, Bureau of Justice Statistics. Retrieved from: <https://www.bjs.gov/content/pub/pdf/iofs10.pdf>

**Second, lack of access to education and opportunities, trauma, and lack of access to drug treatment, are all important drivers of crime and drug use. Many people commit crimes while under the influence of drugs and sell drugs in order to purchase their own.** The Bureau of Justice Statistics [reports](#) that 58% of people in state prisons and 63% of those serving jail sentences between 2007 and 2009 reported having a drug use disorder in the year prior to their admission. These facts indicate that better economic and social opportunities, and improved access to drug treatment, would prevent many of the crimes for which people are incarcerated. The Proposed Rules would bar people who failed to overcome these underlying criminogenic factors in our society from asylum protection.

## VI. CONCLUSION

The bars to asylum based on allegations of criminal conduct are *already* sweeping and over-broad in nature and scope. Any conviction for an offense determined to be an “aggravated felony” is considered a *per se* “particularly serious crime” and therefore a mandatory bar to asylum. “Aggravated felony” is a notoriously vague term, which exists only in immigration law. Originally limited to murder, weapons trafficking, and drug trafficking, it has metastasized to encompass hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses such as misdemeanor shoplifting, simple misdemeanor battery, or sale of counterfeit DVDs. In [Sessions v. Dimaya \(2018\)](#), the Supreme Court struck down a provision of the Immigration and Nationality Act that led to the deportation of immigrants convicted of an “aggravated felony,” including “a crime of violence,” for being unconstitutionally vague.

The existing crime bars should be narrowed, not expanded. Even for those not categorically barred from relief, the immigration adjudicator maintains full discretion to deny asylum. As DHS states, “Asylum is a discretionary immigration benefit”—DHS and DOJ should preserve this discretionary authority by rejecting the creation of additional mandatory bars to asylum eligibility.



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