

Introduction

At its most basic, “cimmigration” law describes the convergence of two distinct bodies of law: criminal law and procedure with immigration law and procedure. For most of the nation’s history, these operated almost entirely free of the other. Criminal law and procedure was thought to be the province of prosecutors, criminal defense attorneys, and the state and federal judges who oversee criminal prosecutions every day. Immigration law, in contrast, was confined to immigration courts housed within the executive branch of the federal government and staffed by immigration attorneys, immigration judges, and prosecutors employed for many years by the Immigration and Naturalization Service (INS) and now the Department of Homeland Security (DHS) or Department of Justice.

That division has undeniably become a historical relic. The world of criminal courthouses has collided with the world of immigration courthouses. The substantive criminal law that defines what constitutes a state or federal crime has increasingly come to turn on a person’s immigration status. Criminal procedure norms embodied in court rules and constitutional amendments have made special allowances for immigration law enforcement concerns and the citizenship status of defendants. Meanwhile, immigration law now frequently turns to a migrant’s criminal history to dictate whether imprisonment is merited while the government decides whether to mete out immigration law’s greatest sanction, deportation, and its close cousin, exclusion from the United States.

These developments are unquestionably significant to the migrants whose liberty and ability to live in the United States are at stake. But they are also immensely important to the attorneys who have taken on the weighty task of defending migrants facing criminal prosecution or placed in “removal” proceedings, the modern technical term for what used to be called “deportation” and “exclusion” proceedings. These changes to the practice of criminal law and immigration law are just as relevant to the prosecutor whose interest is “that justice shall be done,” as the Supreme Court

says is their duty.¹ No matter the side on which an attorney falls, sound representation requires understanding the consequences at stake for the parties—the individuals that defense attorneys represent and the communities in whose name prosecutors appear before courts.

With those attorneys in mind, this book lays out crimmigration law's contours. It tracks the legal developments that have created crimmigration law and explains the many ways in which the stark line that once appeared to keep criminal law firmly divided from immigration law has melted away. In doing so, it highlights crimmigration law's most salient features—its ability to substantially raise the stakes of criminal prosecutions by dramatically expanding the list of crimes that can result in removal from the United States, its willingness to freely rely on crimes that apply only to migrants, and its vast dependence on detention as a means of policing immigration law.

WHAT IS CRIMMIGRATION LAW?

As with any area of law, understanding crimmigration law doctrine requires first identifying a working definition of what the term “*crimmigration*” means. Unlike criminal law or immigration law, there is no ready-made interpretation. This is a new area of law that largely emerged in the last three decades and evolves daily, sometimes in radical and unpredictable directions. That is not to say, however, that it is a term devoid of meaning. Generally, “crimmigration law” refers to the intersection of criminal law and procedure with immigration law and procedure. This broad outline can be filled by the details of three trends that have dominated the evolution that criminal law and immigration law have undergone in recent years: criminal convictions now lead to immigration law consequences ever more often; violations of immigration law are increasingly punished through the criminal justice system; and law enforcement tactics traditionally viewed as parts of one or the other area of law have crossed into the other making enforcement of immigration law resemble criminal law enforcement and turning criminal law enforcement into a semblance of immigration law enforcement. The end result, Juliet Stumpf wrote in the 2006 article that for the first time provided a conceptual framework for crimmigration law, is that the line between criminal law and immigration law “has grown indistinct” such that today “immigration law and the criminal justice system are merely nominally separate.”²

¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

² Juliet Stumpf, *The Crimmigration Crisis*, 56 AM. U. L. REV. 367 (2006).

This book is organized so as to follow the three trends that characterize crimmigration law's development. It begins in Part 1 by addressing the many ways in which migrants are subjected to "removal" proceedings (a term that includes deportation and exclusion from the United States) as a result of having been involved in criminal activity. In Part 2, it then turns to a discussion of features of criminal prosecutions in state and federal courts that are unique to noncitizens—either because they involve substantive criminal offenses or procedural devices that apply only to noncitizens or that have a special focus on noncitizens. Lastly, in Part 3, the book addresses the increasingly overlapping and codependent enforcement tactics utilized in the criminal and immigration contexts. Some of the enforcement initiatives to be addressed—for example, Secure Communities and the 287(g) programs—are unique to crimmigration law, while others—in particular detention—operate under exceptional authority allowing them to take uniquely expansive forms.

CRIMMIGRATION LAW'S LEGAL LINEAGE

Though its moniker as a "nation of immigrants" is rooted in an accurate—if exaggerated—version of history, the United States is also a nation that has long been accustomed to excluding migrants deemed undesirable. As far back as 1788, the Continental Congress urged states to enact laws to prevent the arrival of "convicted malefactors from foreign countries."³ Several states did so within a few years. Throughout this era, the states retained the power to regulate immigration, and, with a few exceptions in the late 1700s, the federal government kept its focus on other matters. As the country expanded over the course of the next seventy-five years, many other states followed their founding predecessors by also limiting the entry of criminals.⁴

By the time the federal government returned its attention to immigration law in the closing decades of the nineteenth century, it too had developed a special eye for crime. The Page Act of 1875, the law that marks the modern beginning of the federal government's regulation of immigration, prohibited the entry of convicted felons.⁵ Sixteen years later, Congress introduced into immigration law a provision that remains a source of

³ *New York v. Miln*, 36 U.S. 102, 112 (1837).

⁴ See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–46 (1993).

⁵ See Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477.

much confusion to lawyers and judges—exclusion on the basis of having committed a “crime involving moral turpitude.”⁶ Another predecessor of today’s immigration law provisions that turn on criminal involvement was adopted in 1922—that year Congress decided that narcotics offenses justified deportation.⁷

Despite immigration law’s early reliance on criminal law to decide upon whom to allow to enter into or remain in the United States, the Supreme Court made clear that deportation was not to be considered a form of punishment. It was, instead, the Court announced in *Fong Yue Ting v. United States*, nothing more than “the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated.”⁸ The Court has yet to show much inclination to reconsider this position. At most, it indicated in a 1954 opinion, *Galvan v. Press*, that “were we writing on a clean slate” it might hold the Constitution’s Ex Post Facto Clause—the constitutional provision that in most situations prohibits legislatures from criminalizing conduct that already occurred—applicable to deportation. But, as the Court added, “the slate is not clean.”⁹ It is instead filled with repeated judicial declarations that immigration law is a form of civil law and more than a century’s worth of legislative reliance on this fundamental characterization. Because immigration law is deemed civil, most of the constitutional procedures required for criminal prosecutions do not apply. When it comes to immigration court proceedings, there is no Fifth Amendment privilege against self-incrimination, Sixth Amendment right to counsel, and only a limited Fourth Amendment prohibition against unreasonable searches and seizures.

PRACTICE POINTER

For more than a century, the Supreme Court has repeated that the process of admitting and deporting people from the United States is civil rather than criminal. As a result of immigration law’s civil characterization, a host of constitutional provisions that apply to criminal proceedings either do not apply or apply in a much more limited fashion:

⁶ See Immigration Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

⁷ Act of May 26, 1922, ch. 202, Pub. L. No. 227, 42 Stat. 596; see *Matter of V-*, 1 I. & N. Dec. 293, 295 (BIA 1942) (applying this provision to exclusion proceedings).

⁸ *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893).

⁹ *Galvan v. Press*, 347 U.S. 522, 531 (1954).

- *Fourth Amendment:* The Fourth Amendment's prohibitions against arbitrary arrest and unreasonable searches are largely inapplicable in removal proceedings. Evidence obtained through law enforcement actions that would normally violate the Fourth Amendment if introduced in a criminal prosecution can be admitted in removal proceedings to show that a person is removable from the United States. The Supreme Court has identified two exceptions for egregious or widespread constitutional violations, but these have been interpreted exceedingly narrowly.
- *Fifth Amendment:* The Fifth Amendment ensures that no one shall be prosecuted multiple times for the same offense (the Double Jeopardy Clause), protects defendants from being forced to incriminate themselves (the privilege against self-incrimination), and guarantees basic due process protections (Due Process Clause). The Double Jeopardy Clause does not bar the same activity serving as the basis of a criminal prosecution and immigration prosecution. The privilege against self-incrimination prevents migrants from being forced to admit information that could result in criminal prosecution, but it does not keep immigration judges from making adverse inferences about a migrant's immigration status. Similarly, though the Due Process Clause ensures that migrants receive a hearing at which they are provided the opportunity to be heard, it does not require a hearing before a judicial officer (thus immigration judges are actually part of the Executive Branch).
- *Sixth Amendment:* None of the guarantees that the Sixth Amendment provides—the right to counsel, including appointed counsel; the right to a jury trial; the right to a speedy trial; or the right to confront adverse witnesses—are applicable to removal proceedings. The Fifth Amendment Due Process Clause protects versions of some of these rights but almost always to a lesser extent than the Sixth Amendment.

Likewise, the Federal Rules of Evidence and Federal Rules of Criminal Procedure do not apply to removal proceedings.

Even though the Supreme Court has long made clear that the constitutional protections afforded to criminal defendants do not apply in immigration court, immigration has nonetheless appeared within criminal proceedings since the late nineteenth century. The Chinese Exclusion Act of 1882—a law infamous for using explicitly race-based criteria to identify people prohibited from entering the United States—punished by up to one year of imprisonment anyone who helped a Chinese person enter the

United States without authorization.¹⁰ An amendment enacted a decade later required all Chinese laborers in the United States to get a certificate of residence from the government indicating their lawful presence. Crucially, they could only receive this certificate if they obtained the affidavit of at least one white witness attesting to the Chinese applicant's residence. Congress, the Supreme Court surmised in an 1893 decision, might have imposed the white witness requirement after having grown tired of the "suspicious nature" of testimony provided by Chinese witnesses in the past "arising from the loose notions entertained by the witnesses of the obligation of an oath." Left unmentioned was the fact that white witness requirements were not unique to the Chinese Exclusion Act. A Maryland statute enacted in 1860, for example, included the heading "Immigration of Free Negroes" under which it required free black residents of the state wishing to travel to another state to obtain judicial permission based "on the written recommendation of three respectable white persons known to be such by the judge or judges of said court."¹¹

Though its exclusive application to Chinese migrants, its punishment method, and the white witness requirement were all significant, the Chinese Exclusion Act played an important role in crimmigration law's history due to a fourth provision—one that granted executive branch officials the power to determine whether a particular person was subject to imprisonment as a punitive sanction for committing a crime. There was no room for the standard criminal procedure that usually precedes imprisonment—presentation before a neutral judge in which the prosecution is required to prove critical facts beyond a reasonable doubt. Four Chinese men challenged that process claiming that if they were going to be imprisoned, it could come only after receiving the benefits of a criminal trial. In *Wong Wing v. United States*, the Court agreed. Punitive imprisonment is permitted for having done nothing more than failed to comply with immigration laws, the Court concluded, but only if the defendant's guilt is established by a criminal proceeding.¹²

Roughly thirty years later, Congress did just this, criminalizing migration through a statute that reflects the racism that led to the Chinese Exclusion Act. In the late 1920s Coleman Livingston Blease, a senator from South

¹⁰ Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, §§ 7, 11, 22 Stat. 58, 60–61 (repealed by Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600).

¹¹ See *Fong Yue Ting*, 149 U.S. at 727, 730 (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 598 (1889)); THE MARYLAND CODE: PUBLIC GENERAL LAWS AND PUBLIC LOCAL LAWS, 1860, art. 66, § 50.

¹² *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

Carolina and the state's former governor, shepherded a criminalization proposal through Congress. Throughout his career as a politician and a lawyer, Blease had repeatedly vocalized his racist views. For example, as South Carolina's governor, he told an audience of elected officials in 1912, "Whenever the constitution of my state steps between me and the defense of the virtue of the white woman, then I say to hell with the Constitution." Several years later, as a lawyer defending white men who attacked a black man who had himself been accused of raping a white woman, Blease warned the jury that acquittal would mean "every Negro in South Carolina will say, I can ravish a white woman and the law will vindicate me." On numerous occasions, he used vile epithets to refer to African Americans. His hatred did not end there. Displaying his distaste for all things foreign, he once remarked on the floor of the U.S. Senate, "The virtue of one little 16-year-old girl is worth more to America than every book that has ever come into it from any other country."¹³ Enacted in 1929, the statute that Blease promoted made unauthorized entry a federal crime punishable by up to a year in prison. That same statute also authorized as much as two years imprisonment for people who enter the United States without authorization after having previously been deported.¹⁴ Both crimes remain on the books today, though punishable by up to six months imprisonment for a first-time unauthorized entry conviction and twenty years imprisonment for first-time unauthorized reentry conviction.¹⁵

This early interaction between criminal law and procedure and immigration law and procedure might suggest that crimmigration law developed in the late nineteenth or early twentieth century. It did not for one principal reason: the government did not use these powers very much. In the ninety-two years between 1892 and 1984, all of 14,287 people were excluded from the United States due to a criminal conviction or narcotics violation (categories that the federal government reported separately). Another 56,669 were deported for these reasons between 1908 and 1980. Combined, 70,956 people were removed on the basis of a conviction in the eight or nine decades preceding the mid-1980s. All that changed dramatically within a few years such that in fiscal year 2013 alone U.S. Immigration and Customs Enforcement (ICE) reported having removed 216,810 people

¹³ Bryant Simon, *The Appeal of Cole Blease of South Carolina: Race, Class, and Sex in the New South*, 62 *J. S. HIST.* 57, 83 (1996); Daniel W. Hollis, *Cole Blease: The Years Between the Governorship and the State, 1914–1924*, 80 *S.C. HIST. MAG.* 1, 6–7 (1979); 71st CONG. REC. 5432 (March 17, 1930) (statement of Sen. Coleman Blease).

¹⁴ See Act of March 4, 1929, ch. 690, §§ 1-2, 45 Stat. 1551, 1551.

¹⁵ See INA §§ 275(c), 276(b).

with a criminal conviction on their record.¹⁶ In other words, criminal activity appears to have affected the ability of more than three times as many people to live in the United States in 2013 than throughout most of the twentieth century combined.

A second reason why crimmigration law did not take hold until the late 1900s is that immigration law enforcement was of a wholly different character than traditional criminal policing. For example, detention of migrants facing removal, the form of punishment that most emblemizes criminal law enforcement, was the exception during the century leading up to the 1990s. Indeed, from the 1950s until the 1980s, the INS had a policy of not using detention except in unusual circumstances or near the Mexican border. Like immigration officials' reliance on criminal activity, the use of detention to police immigration law increased substantially in a matter of years. By 2001, over 200,000 people were being detained each year while they waited to learn whether they would be allowed to remain in the United States. The immigration detention population has continued to grow steadily since then. In fiscal year 2011, for example, 429,247 people were detained pending immigration proceedings. Meanwhile, for a time Congress required that ICE pay for a minimum of 34,000 beds per night, almost guaranteeing that the historically anomalous annual detention populations of the early twenty-first century would not become a momentary blip.¹⁷

CRIMMIGRATION LAW'S THREE HEADS

Neither history nor statistics can explain crimmigration law's multiple parts. The number of people removed due to having committed a crime has grown because the number of crimes that can result in immigration

¹⁶ See U.S. IMMIGRATION & NATURALIZATION SERV., 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 175 tbl.60 (1997) (providing exclusion data for 1892–1984); *id.* at 183 tbl.65 (providing deportation data for 1908–1980); U.S. DEP'T OF HOMELAND SECURITY, IMMIGR. & CUSTOMS ENF'T, ICE IMMIGRATION REMOVALS: FY 2013 ERO ANNUAL REPORT 3 (2013) (providing 2013 statistics).

¹⁷ See DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 126 fig.30 (2013) (providing 2001 data); U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011 ANNUAL REPORT 5 tbl.4 (2012) (providing FY 2011 data). For the 34,000 bed mandate, *see e.g.*, H.R. 3547, Consolidated Appropriations Act, 2014, Div. F, U.S. Immigr. & Customs Enf't.

problems has expanded. Similarly, the number of people in immigration detention has multiplied because Congress has boosted immigration officials' legal power to detain and provided them with the money to do so. At the same time, the number of people prosecuted for immigration-related crimes has increased because the criminal justice system has become a central feature in the way some states and the federal government seek to control immigration. Each of these trends developed over the years in a series of legislative or policy amendments. All are equally significant to the creation of crimmigration law.

Crimmigration's first part, removing migrants on the basis of criminal activity, expanded steadily throughout the 1980s and 1990s. Building off the statutory provision enacted in 1922 that authorized deportation upon conviction for a narcotics offense, Congress targeted migrant drug offenders with vigor during the last decades of the twentieth century. The Anti-Drug Abuse Act of 1986, for example, replaced a narrow reference to opiate addiction in the list of crimes that could lead to deportation with a wide-ranging provision authorizing deportation upon conviction of any state, federal, or foreign country's offense relating to a controlled substance. This provision, often described as the "controlled substance offense" basis of removal, remains a part of the Immigration and Nationality Act (INA) and makes frequent appearances in immigration court proceedings because of its broad language.¹⁸

More groundbreaking than that statutory shift was an immigration law amendment that came two years later in the Anti-Drug Abuse Act of 1988. That public law added the term "aggravated felony" to the INA and in the process changed the severity of the consequences meted out on migrants convicted of criminal activity as well as the practice of immigration law. Amended repeatedly over the next decade and a half, the aggravated felony provision now encompasses twenty types of crimes ranging from murder to altering a passport. Despite its name, some state misdemeanors come within its purview.¹⁹

While more and more crimes were becoming possible bases of removal, Congress also found time to raise the stakes of immigration-related activity in criminal courtrooms while federal prosecutors boosted

¹⁸ INA § 237(a)(2)(B)(i); *see* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207 (amending INA § 212(a)(23), 8 U.S.C. § 1182(a)(23)).

¹⁹ INA § 101(a)(43); *see* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (amending INA § 101(a), 8 U.S.C. 1101(a)); *Guerrero-Perez v. INS*, 242 F.3d 727, 737 (7th Cir. 2001) (concluding that the term "aggravated felony" can include misdemeanors).

resources devoted to pursuing immigration-related criminal activity, crimmigration law's second branch. The decades-old crime of unauthorized reentry became much more consequential in 1988 when Congress raised the maximum sentence to fifteen years imprisonment for anyone convicted of unauthorized reentry after having been convicted of an aggravated felony. The maximum sentence currently stands at twenty years imprisonment. Repeated convictions for unlawful entry, meanwhile, may be punished by as much as two years in a federal prison. Document fraud offenses also became more heavily punished. In 1986, Congress increased the penalty for possession or use of a false immigration document to two years imprisonment.²⁰ A decade later Congress even authorized courts to strip individuals of any property used to commit passport fraud.²¹

During the 1980s, Congress also added new immigration-related crimes to the federal penal code. The Immigration Reform and Control Act of 1986 that famously provided legalization paths for millions of unauthorized migrants also made it a federal crime to hire unauthorized workers and increased the penalty for knowingly or recklessly smuggling people into the United States. Another statute enacted that year criminalized marrying solely for the purpose of obtaining an immigration benefit. Ten years later Congress created a host of crimes as part of the mammoth Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Falsely claiming to be a United States citizen, voting in a federal election, and participating in the false preparation of an immigration application were suddenly criminalized.²²

²⁰ INA § 276(b)(2) (providing the current maximum punishment for unauthorized reentry); INA § 275(a)(3) (providing the current maximum penalty for unauthorized entry); see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4469–70 (raising the maximum sentence to fifteen years); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d), 100 Stat. 3537, 3542 (criminalizing marriage fraud); Immigration Reform and Control Act of 1986 [hereinafter IRCA], Pub. L. No. 99-603, § 103, 100 Stat. 3359, 3360 (amending 18 U.S.C. § 1546) (increasing the document fraud penalty).

²¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, § 217, 110 Stat. 3009, 3009-571 (codified at 18 U.S.C. § 982(a)(6)(A) (2012)).

²² IRCA § 101, 100 Stat. 3359, 3360 (codified at INA § 274 A, 8 U.S.C. § 1324a (2012)) (criminalizing employment of unauthorized migrants); *id.* at 112 (regarding smuggling); IIRIRA, §§ 213, 215, 216, 110 Stat. 3009, 3009-571 (codified at INA § 274 C(e), 8 U.S.C. § 1324c(e) (2012), 18 U.S.C. § 1015(e) (2012), 18 U.S.C. 611(a) (2012)).

It did not take long for federal prosecutors to put these new powers into use. Arrests for immigration crimes doubled from 1994 to 1998, doubled again from 1998 to 2004, and yet again from 2004 to 2008.²³ Indeed, arrests for immigration crimes grew faster than any other type of federal crime from 2006 to 2010.²⁴ This trend shows no sign of abating. In 2010 a full 46 percent of individuals arrested and booked by the United States Marshals Service for suspicion of any federal crime found themselves in that predicament because of an immigration offense.²⁵ Just about all of the increase in federal arrest rates—95 percent—from 1998 to 2018 can be attributed to immigration crime cases.²⁶

This has had a profound impact on federal criminal law practice. While just over 5 percent of the criminal cases appearing in federal courts in 1993 listed an immigration crime as the most serious offense, that percentage jumped to 13.4 percent in 1997 and 18.2 percent in 2001, well above the proportion of the population that was not a United States citizen.²⁷ Immigration prosecutions and convictions now make up one of the two most frequently pursued types of crime in the federal court system, competing with drug offenses for the top spot.²⁸ Not surprisingly, federal prosecutors spend an enormous amount of time on immigration cases. Almost 45 percent of matters concluded in 2010 involved an immigration crime; the next most consuming category, drug crimes, appeared in just shy of 20 percent of cases.²⁹

Not to be outdone, several states have also turned to their traditional criminal law systems to target individuals who violate federal immigration law. Over 100 state laws were enacted between 2010 and 2012 dealing with state and local law enforcement powers regarding immigration.³⁰

²³ MARK MOTIVANS, FEDERAL JUSTICE STATISTICS, 2010, at 4 (Dec. 2013).

²⁴ *Id.* at 2.

²⁵ *Id.* at 3.

²⁶ MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998-2018, at 1 (Aug. 2019), available at <https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf>.

²⁷ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUS. 1997 ANNUAL REPORT 188 tbl.D-2, 198 (providing 1993 and 1997 data); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2005 ANNUAL REPORT 11, 225, 227 tbl.D-2 (providing 2001 data).

²⁸ See MOTIVANS, *supra* note 23, at 17 fig.9, 22 tbl.13.

²⁹ *Id.* at 12 tbl.6.

³⁰ 2012 *Immigration-Related Laws and Resolutions in the States* (Jan. 1-Dec. 31, 2012), NAT'L CONFERENCE OF STATE LEGISLATURES tbl.1 (Jan. 2013), <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-jan-december-2012.aspx>.

Most prominently, Arizona's Senate Bill 1070—which critics called the “show me your papers” law—relied quite heavily on the state's criminal law enforcement authority. One provision, for example, made it a misdemeanor to fail to register with the federal government as required by federal law.³¹ Another part of the statute criminalized unauthorized migrants searching for work in public places, usually sidewalks.³² A third section permitted warrantless arrests by police officers if they developed probable cause that a person committed an offense that would allow removal from the United States.³³ The Supreme Court struck down all three provisions. It did so, however, not because states are necessarily prohibited from regulating immigration through their criminal processes, but on the much narrower basis that Arizona's legislation treaded on ground in which Congress had already legislated. The Constitution's Supremacy Clause, therefore, led the Court to conclude that federal law trumped state law in these instances. It does not, however, prohibit the state from requiring its police officers to ask ICE about the immigration status of a person lawfully detained. As a result, that provision survived a constitutional challenge.³⁴

Crimmigration law's third feature, the intermingling of law enforcement tactics, also expanded quite significantly beginning in the 1980s. The lax procedural protections of immigration proceedings began to appear in criminal investigations and prosecutions, while the heavy-handed enforcement strategies that characterize criminal law policing made their way into investigations of possible immigration law violations. Though the Fourth and Fifth Amendments formally apply to immigration law, they have historically done so in a much more limited fashion than is true of criminal proceedings. Similarly, courts have consistently held that the Sixth Amendment has no relevance to immigration law, but it is a cornerstone of criminal procedure.

In recent years, immigration law's posture toward Fourth, Fifth, and Sixth Amendment rights has bled into criminal law. The Supreme Court has long held that the Fourth Amendment applies quite crudely under immigration law. The exclusionary rule, for example—the powerful incentive to police officers to comply with the Fourth Amendment lest they risk losing the ability to use evidence against the defendant—does not apply to

³¹ ARIZ. REV. STAT. § 13-1509(a), *held unconstitutional* by *Arizona v. United States*, 567 U.S. 387, 402-03, (2012).

³² *Id.* § 13-2928(c), *held unconstitutional* by *Arizona*, 567 U.S. at 403-44.

³³ *Id.* § 13-3883, *held unconstitutional* by *Arizona*, 567 U.S. at 410-411.

³⁴ *Id.* § 11-1051(b), *upheld* by *Arizona*, 567 U.S. at 415.

ordinary constitutional transgressions. Rather, it applies only to “egregious” or “widespread” Fourth Amendment violations.³⁵ In some instances, police officers investigating traditional criminal activity have flouted the Fourth Amendment but have been able to use the unconstitutionally obtained evidence in immigration court.³⁶

In a similar vein, the Fifth Amendment Due Process Clause has historically applied more loosely to immigration court than criminal court proceedings. Immigration judges, for example, regularly address multiple respondents at once. In contrast, Federal Rule of Criminal Procedure 11(b) requires a judge presiding over a plea hearing to address each defendant “personally in open court” to ensure that the defendant understands the nature of the charges against her and the consequences of pleading guilty or *nolo contendere*. This obligation is rooted in the Due Process Clause’s requirement that a plea be knowing and voluntary.³⁷ Despite Rule 11(b)’s seemingly clear mandate, criminal proceedings involving immigration crimes have come to resemble the *en masse* style of immigration court proceedings. Under Operation Streamline, federal judges throughout the country now address large groups of defendants—sometimes as many as 100—simultaneously.

Likewise, the Sixth Amendment right to counsel, which has never been applied to immigration proceedings but has been called a cornerstone of fair criminal proceedings, has surfaced in a more superficial iteration in immigration-related criminal proceedings. The Supreme Court’s 2010 decision in *Padilla v. Kentucky*³⁸ broke new ground by clarifying that criminal defendants’ constitutional guarantee of effective assistance of counsel includes receiving accurate advice about the immigration consequences of conviction. In an interesting and important twist, however, the *Padilla* Court actually adopted a two-part test that waters down the prevailing ineffective assistance framework, itself long criticized as too weak to actually help defendants.

While this has been happening in criminal courtrooms, immigration officials have busied themselves adopting some of the tactics of criminal policing. Since receiving statutory authorization to carry firearms in 1990, immigration law enforcement agents have increasingly resembled police agencies charged with investigating crime. ICE now has law enforcement

³⁵ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051–52 (1984); see *Oliva-Ramos v. Att’y Gen.*, 694 F.3d 259, 272 (3d Cir. 2012).

³⁶ See *Puc-Ruiz v. Holder*, 629 F.3d 771, 775–80 (8th Cir. 2010).

³⁷ See *McCarthy v. United States*, 394 U.S. 459, 467 (1969).

³⁸ 559 U.S. 356 (2010).

units that resemble SWAT teams, including military-style uniforms and powerful weapons, and regularly restrains detainees using handcuffs and shackles. ICE counts among its inventory armored personnel carriers, while its border-focused twin agency, U.S. Customs and Border Protection (CBP), owns drone aircraft more commonly associated with the Defense Department.

Most palpably, immigration officials have devoted enormous energy and money to boosting ICE's detention capacity. For a time, ICE was able—indeed, required by a directive in funding legislation—to pay for a minimum of 34,000 beds each night to hold people suspected of having violated some INA provision.³⁹ Later, Congress stopped requiring the agency to maintain a specified minimum number of beds. At the same time, it increased ICE's detention budget, meaning the agency could pay for more beds than had previously been required. Though ICE takes pains to describe its custodial sites as “detention centers” or “service processing centers”—anything but a jail or prison—most of these beds are located in facilities that are in many ways indistinguishable from jails or prisons. Barbed-wire fencing surrounds them, movement by detainees and visitors is severely restricted, and they tend to be located in remote locations far removed from legal services. Guards, meanwhile, constantly watch detainees, physical abuse is rampant, and medical care remains lamentable. Many others are actually kept in jails or prisons that ICE simply pays to house its detainees. All at a cost that has approached \$3 billion annually in recent years.

This detention population does not account for everyone confined due to crimmigration law's rise. Of all individuals awaiting trial on federal criminal charges of any type, those alleged to have committed an immigration offense are most likely to wait inside a federal prison or contracted facility. Immigration defendants made up fully 45 percent of federal defendants detained prior to their case coming to some resolution in 2010. Even people accused of having committed a violent crime were less likely to be detained while their cases made their way through the district courts.⁴⁰ Almost everyone charged with an immigration crime is eventually convicted. Upon conviction, many are sent into the custody of the Federal Bureau of Prisons (BOP) for incarceration. At the end of September 2019, 5.3 percent of BOP prisoners—approximately 8,300 people—had been convicted of an immigration offense. This marks a steady decrease in the percentage of

³⁹ Consolidated Appropriations Act, H.R. 3547, Div. F, Security, Enforcement, and Investigations, U.S. Immigr. and Customs Enf't, Salaries and Expenses (2014).

⁴⁰ See *MOTIVANS*, *supra* note 23, at 28 tbl.8.

immigration offenders in federal custody. In 2001, for example, immigration offenders constituted 10.8 percent of federal prisoners, more than double their 2019 percentage. Indeed, immigration offenders reached 11.2 percent of the federal prison population in September 2005 and did not dip below 10 percent until 2013 when they represented 9.9 percent of the prison system's population. Their representation in federal prisons has dropped every year since then.⁴¹

CRIMMIGRATION LAW ENTITIES

To turn the doctrinal and policy entanglement of criminal law and immigration law into an operational reality, crimmigration law depends on an array of public and private entities. The federal government's Department of Homeland Security is most obviously a key actor, but so too are other governmental units. In particular, state and local governments are hugely important in crimmigration law enforcement both because of their size and because their role is frequently overlooked in discussions of traditional immigration law. This section briefly maps the various entities involved in crimmigration law.

State and local law enforcement plays an enormous role in crimmigration law. The vast majority of police officers in the United States are employed by a city, county, or state government; thus the bulk of police work is in the hands of these officials. Likewise, state and county prosecutors pursue most criminal prosecutions. There were approximately 17 million criminal cases lodged in state trial courts in 2018, a far cry from the 88,553 cases filed in federal district courts that year.⁴² Each of the roughly three-quarters of a million state and local police officers stationed throughout the country is responsible for investigating criminal activity and

⁴¹ This data is derived from the 2013 to 2019 annual Bureau of Justice Statistics reports series titled "Prisoners," including E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 17 tbl.16 (Sept. 2014), which provides data for 2001 to 2013, available at <https://www.bjs.gov/content/pub/pdf/p14.pdf>.

⁴² NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2018 DATA 7 (2020), available at http://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf; FEDERAL JUDICIAL CASELOAD STATISTICS : TABLE D-U.S. DISTRICT COURTS-CRIMINAL DEFENDANTS COMMENCED, TERMINATED, AND PENDING (INCLUDING TRANSFERS), DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2017 AND 2018, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <https://www.uscourts.gov/statistics/table/d-cases/federal-judicial-caseload-statistics/2018/03/31> (download data table).

bringing alleged perpetrators to the attention of prosecutors.⁴³ Any one of these investigations can lead to a criminal prosecution and conviction that creates immigration law problems for people who lack United States citizenship. These police officers, therefore, play an important role in implementing crimmigration law.

State and local prosecutors, of course, are not obligated to pursue any particular investigation brought to their attention by police officers. They can decline to prosecute for almost any reason. Perhaps they believe the facts don't support the charge. Maybe they agree to drop a charge in favor of a guilty plea to an alternative offense. And sometimes they might even refuse to move forward with a criminal case because they have better ways of spending the office's resources. There is no legal impediment to exercising prosecutorial discretion in these ways. As the Supreme Court explained in 1978 and has repeated since then, "the decision whether or not to prosecute . . . generally rests entirely in [the prosecutor's] discretion."⁴⁴ Indeed, though clear data doesn't exist, it appears that prosecutors choose not to pursue about a third of felonies and a tenth of misdemeanor cases.⁴⁵ All of these decisions affect the criminal and immigration law consequences defendants without U.S. citizenship face; thus state and local prosecutors, like police officers, have a significant impact on crimmigration law.

State court judges play a similarly important role. Not only do they oversee state criminal prosecutions, but since 2010 they have increasingly been called upon to determine whether defendants receive the type of advice about potential immigration consequences of conviction that is constitutionally required. The Sixth Amendment right to counsel, the Supreme Court recognized that year, obligates defense attorneys to determine whether a client is clearly going to face immigration consequences if convicted and advise accordingly. State trial court judges now carry the majority of the work of ensuring that defense attorneys provide this type of advice prior to accepting a plea. They also review post-conviction relief applications to determine whether a conviction was entered in compliance with this Sixth Amendment obligation. As chapter 5 explains, neither is an easy task.

Federal law enforcement officers, prosecutors, and judges perform much the same function as their state and local counterparts. There are about 132,000 federal law enforcement officers empowered to arrest suspects in 2016. Though more than half a million fewer than the number of

⁴³ BRIAN A. REAVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011).

⁴⁴ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

⁴⁵ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1129 (2008).

state or local police officers, they are much more directly plugged into the crimmigration pipeline. Roughly half of federal officers, it turns out, are employed by DHS. In 2016, this translated into 62,125 law enforcement officers at DHS alone, including 43,724 at CBP and 12,400 at ICE.⁴⁶ The department's CBP is charged with regulating cross-border movement of people and goods. DHS's other principal immigration law enforcement agency, ICE, identifies and arrests people suspected of violating civil or criminal immigration law. Together, CBP and ICE were responsible for bringing 55 percent of defendants to the attention of federal prosecutors in 2016.⁴⁷ In turn, those prosecutors—ninety-three U.S. attorneys and approximately 6,000 assistant U.S. attorneys that they employ—are responsible for litigating most of the federal government's trial work, including prosecuting allegations of federal immigration crimes in federal district courts. While being prosecuted for a federal crime, many individuals are subject to pretrial detention under the control of the U.S. Marshals Service, a division of the Department of Justice. Upon conviction, federal prisoners are transferred into the custody of the Justice Department's Federal Bureau of Prisons. A convicted individual can appeal to the federal court of appeals in which the district court is located.

While awaiting removal proceedings, ICE holds migrants in immigration detention centers, though county governments or private prison corporations frequently operate these facilities. DHS attorneys prosecute these cases in one of the nation's fifty-seven immigration courts. Immigration judges presiding over those cases then decide whether a migrant is entitled to remain in the United States, and members of the Board of Immigration Appeals (BIA or Board) review those decisions when the losing party appeals.⁴⁸ Despite being called "courts" and "judges," neither the immigration courts nor the immigration judges who oversee hearings there are part of the judicial branch. Instead, these are Justice Department tribunals run by Justice Department officials. Even the BIA members who hear appeals are Justice Department employees. A migrant who loses at the BIA can appeal to the federal courts, at which point federal judges become

⁴⁶ CONNOR BROOKS, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2016–STATISTICAL TABLES 1, 3 tbl.1 (Oct. 2019), available at <https://www.bjs.gov/content/pub/pdf/fleo16st.pdf>.

⁴⁷ MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUDICIAL STATISTICS, 2016–STATISTICAL TABLES 6 tbl. 1.2 (Dec. 2020), available at <https://www.bjs.gov/content/pub/pdf/fjs16st.pdf>.

⁴⁸ For more on appeals to the BIA, *see* 8 C.F.R. §1003.3 and IMMIGRATION COURT PRACTICE MANUAL §§ 6.1-6.2 (last revised June 10, 2013).

involved. Interestingly enough, appeals go directly to the courts of appeals, the federal court system's intermediate layer, rather than to the federal district courts.⁴⁹ In most circumstances, immigration courts and the BIA are obligated to abide by precedential circuit court decisions issued by the circuit court from which the case arises.

A NOTE ON LABELS

Before proceeding, it is worth taking a moment to describe the various terms used throughout the book. There is a great deal of controversy over the most appropriate term to use to describe people who are not United States citizens and who have violated immigration law. Political conservatives tend to favor some variation of "illegal alien," while liberals adopt the more sanguine "undocumented immigrant." Except in a few instances where these terms appear in quotations or titles, this book does not use either. Instead, people who are potentially removable from the United States are described as such: as potentially removable or simply as removable. This has the benefit of avoiding political catchphrases while simultaneously increasing legal accuracy.

I take a similar position regarding the term used to describe people generally who are not United States citizens. The INA uses "alien," a term that is patently offensive because it conjures images of invasion, danger, and otherworldness from which only military might and the occasional superhero can protect us. The term "immigrant" lacks the offensiveness of "alien," but it is also not suitable for general use in a legal text because it has a very specific legal meaning.⁵⁰ It is, as lawyers like to put it, a "term of art" that essentially means a person not a United States citizen or national authorized to live and work in the United States indefinitely. Where it appears in this book, therefore, immigrant is used interchangeably with "lawful permanent resident" or "permanent resident."

To refer to people who were not United States citizens when they came to the United States, this book uses the term "migrant." A migrant can become a United States citizen through naturalization, but even then they never lose that essential characteristic of having traveled to the United States from another country. In addition, using "migrant" allows me to distinguish between "immigrants" and people who lack authorization to be in the United States without entangling myself in the dead-end political rhetoric of "illegal alien" versus "undocumented immigrant."

⁴⁹ INA § 242(h)(2).

⁵⁰ INA § 101(a)(15).

CHAPTER OUTLINE

To properly understand crimmigration law's three parts, it is necessary to discuss each in detail. The rest of the book takes on this task.

In three chapters, Part 1 will address the most significant substantive and procedural effects that attach to a criminal record in immigration court. Chapter 2 begins this discussion by identifying the principal methods through which the Immigration and Nationality Act authorizes removal of individuals who have committed a crime. This will entail discussions of the aggravated felony, controlled substance offense, and crimes involving moral turpitude grounds of removal, as well as immigration law's peculiar definition of "conviction." Chapter 3 follows by discussing various options that exist for people who are not U.S. citizens to remain in the United States despite having been convicted of a crime. In particular, this chapter addresses cancellation of removal for lawful permanent residents and nonlawful permanent residents, protection under the Convention Against Torture, readjustment of status, waivers available under INA § 212(h), and options for relief under now-repealed (but still relevant) INA § 212(c). After two chapters about substantive immigration law's emphasis on criminal activity, chapter 4 turns to procedural issues that arise in immigration law proceedings involving crime. In particular, chapter 4 addresses the contentious issue of obligatory detention of many noncitizens who have been convicted of a crime. It first explains the legislative origins of INA § 236(c), the statute's so-called mandatory detention provision; then it recounts the Supreme Court's decision to uphold this power. This chapter also includes a discussion of avenues for avoiding a finding that the mandatory detention provision applies and closes with a discussion of recent federal cases about the scope of § 236(c) detention.

After Part 1's examination of the immigration court system, Part 2 turns to the criminal justice system's treatment of people thought not to be United States citizens. Chapter 5 begins this discussion by addressing the highly important and ground-shifting developments in Sixth Amendment right to counsel doctrine affecting criminal defense attorneys who represent noncitizen clients. The Supreme Court's decision in *Padilla v. Kentucky* takes center stage in this chapter. First, it explains the *Padilla* Court's reasoning and the line of cases that has developed since then, including the Court's 2013 decision in *Chaidez v. United States*⁵¹ holding that *Padilla* does not apply retroactively. The chapter then explores the criminal defense attorney's obligations under *Padilla*. Chapter 6 follows by turning to immigration activity that constitutes a federal crime. In particular, this chapter takes a close look at illegal entry and

⁵¹ 568 U.S. 342 (2013).

illegal reentry, the two most commonly prosecuted immigration crimes. In addition to explaining the conduct that these offenses sanction, this chapter addresses prosecutorial trends and common defense strategies. Lastly, this chapter includes a discussion of key policy initiatives that have facilitated federal prosecutions of immigration crimes, notably Operation Streamline and fast-track plea agreements. The book's focus on the criminal justice system ends in chapter 7 with an examination of the criminal law methods used by states to regulate immigration. In particular, this chapter discusses state crimes specifically targeting noncitizens and state law limitations on bail for some noncitizens. This chapter also discusses types of laws that have been deemed beyond the scope of states' powers, notably provisions of Arizona's well-known Senate Bill 1070 which the Supreme Court held unconstitutional.

Lastly, Part 3 moves beyond the substantive and procedural legal developments addressed in the first two parts and instead homes in on the tools that state and federal law enforcement officials have used to enforce crimmigration law. Chapter 8 begins Part 3 by highlighting the area of the country that is most often associated with immigration law enforcement—the nation's border. Here the book discusses unique legal features of border policing, with a special emphasis on the Mexican border region. In particular, it addresses the permissibility of suspicionless searches at ports-of-entry, the allowable use of race-based criteria to enforce immigration law along the border, and overlapping authorization granted to law enforcement agencies regarding drug and immigration laws. The next chapter, chapter 9, returns to detention, but with a focus on the development of the immigration detention system and consequences of detaining individuals pending removal, including the recent drastic expansion in the use of detention to enforce federal immigration laws. In an effort to give readers a sense of what detainees experience, this chapter discusses conditions within immigration detention centers. It also addresses alternatives to detention. Chapter 10 follows by chronicling the pivotal role that states and localities have filled in enforcing crimmigration law in recent years. Particular attention is given to the Secure Communities program, 287(g) program, and the use of ICE detainees to identify and apprehend potentially removable individuals. The chapter also discusses the creation of “sanctuary city” policies throughout the country.

FURTHER READING

- César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2013).
- Juliet Stumpf, *The Crimmigration Crisis*, 56 AM. U. L. REV. 367 (2006).