
Deconstructing Crimmigration

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INTRODUCTION

Born of fears of migrants ferrying drugs into the United States, fueled by concern of foreign terrorists, and concretized by a three-decades long securitization of migration, crimmigration law now occupies a prominent place in the country’s legal regime. This article

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tackles crimmigration law's seemingly fixed role in twenty-first century law enforcement practices in the service of displacing crimmigration from its remarkable status.

Unlike for much of the nation's history, today, immigration law poses a hornet's nest of pitfalls for migrants who encounter the criminal justice system. Dozens of types of crimes can result in forcible removal from the United States. Every year, that is the consequence that hundreds of thousands of people experience.¹ Partly as a result, the criminal justice system has developed a newfound sensitivity for immigration law. Since 2010, all criminal defense attorneys have been constitutionally obligated to advise clients who are not United States citizens of the immigration consequences of conviction.² This has injected immigration law directly into the criminal defense attorney's work and, indirectly, onto the radar of the prosecutors with whom defense attorneys engage and the judges who oversee their conduct. Moreover, since the end of President George W. Bush's second term, the single largest category of crimes prosecuted in federal courts nationwide target immigration law violations.³

Given shifts in the substantive and procedural frameworks governing immigration law and criminal law, it is no surprise that law enforcement tactics have similarly altered course. Confinement, long a feature of traditional criminal punishment but rarely used to regulate migration, has become commonplace in immigration operations. The Immigration and Customs Enforcement ("ICE") division of the Department of Homeland Security ("DHS") runs a sprawling detention estate. Across more than 600 facilities, it regularly confines over 300,000 people annually while they wait to learn whether they will be allowed to remain in the United States.⁴ ICE's counterparts on the

¹ See U.S. DEP'T OF HOMELAND SEC., 2016 YEARBOOK OF IMMIGRATION STATISTICS 107-15 tbl.41 (2017), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf> (reporting that from fiscal years 2007 to 2016, no fewer than 102,394 people with criminal histories were removed each year).

² See *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

³ See MARK MOTIVANS, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 21 fig.16 (2012), <https://www.bjs.gov/content/pub/pdf/iofjs10.pdf> (showing that immigration cases were the second most frequently filed type of case in federal district courts after 2007); ADMIN. OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 363-65 tbl.M-2 (2007), http://www.uscourts.gov/sites/default/files/statistics_import_dir/M02Sep07.pdf.

⁴ See César Cuauhtémoc García Hernández, *ICE Detention Population Closed Obama Era at Record Daily High*, CRIMMIGRATION.COM (Mar. 27, 2018, 12:30 AM), <http://crimmigration.com/2018/03/27/ice-detention-population-closed-obama-era-at-record-daily-high/> (describing detention population from fiscal years 2006 to 2017); *New Data on 637 Detention Facilities Used by ICE in FY 2015*, TRAC IMMIGR. (Apr. 12,

criminal end of the federal government's imprisonment apparatus likewise preside over an expansive population of prisoners. The federal pretrial detention system under the custody of the United States Marshals Service ("USMS") is overwhelmingly filled by people facing prosecution for the two most commonly prosecuted immigration crimes, unauthorized entry and unauthorized reentry.⁵ On the back end, the Federal Bureau of Prisons ("BOP"), responsible for confining everyone ordered to federal prison as punishment for a crime, sometimes counts more than 20,000 people under its watch who have been convicted of nothing worse than an immigration crime.⁶ Combined, these are the doctrinal and law-enforcement contours that crimmigration law has grown to take.

Instead of trudging further along the road of maximizing the security-focused features of immigration law and retooling criminal law into a means of punishing migrants, the United States should begin the long march toward deconstructing crimmigration. Legislators and high-ranking Executive Branch officials crafted crimmigration law's defining features. Courts have fit many of its specific manifestations into state and federal constitutional regimes. But it was academics who identified the common features spread across disparate legal developments and law-enforcement trends. Scholars articulated crimmigration law's framing, frequently pushing back against its growth even as they often overlooked critical dimensions of its problematic tendencies. As the source of intellectual insight into crimmigration law's many tentacles, scholars are uniquely well-positioned to identify its normative commitments, demand its demise, and identify a path toward a post-crimmigration legal regime.

Fully embracing the need for a retreat from the severity regime that birthed and nurtured crimmigration law in the United States over three decades, this article urges a new vision of migrants and migration. To that end, the article proceeds in three parts. Part I tells crimmigration law's birth story. Grounded in the anti-drug and anti-migrant hysteria of the mid-1980s, crimmigration law eventually

2016), <http://trac.syr.edu/immigration/reports/422/>.

⁵ See César Cuauhtémoc García Hernández, *Pretrial Immigration Prisoner Trends, Part 2*, CRIMMIGRATION.COM (Sept. 20, 2016, 4:00 AM), <http://crimmigration.com/2016/09/20/pretrial-immigration-prisoner-trends-part-2/> [hereinafter *Prisoner Trends*] (showing that immigration defendants were the largest category of pretrial detainees held by USMS from 2004 to 2013).

⁶ See César Cuauhtémoc García Hernández, *U.S. Prison Population Drops a Bit in 2016, Including for Immigration Crimes*, CRIMMIGRATION.COM (Jan. 12, 2018, 4:15 AM), <http://crimmigration.com/2018/01/12/us-prison-population-drops-a-bit-in-2016-including-for-immigration-crimes/> [hereinafter *Prison Population Drops*].

evolved to make room for the anti-terrorism and anti-gang concerns of the late twentieth and early twenty-first centuries. Fears of violence and border-crossing chaos justified strong-armed legislative responses and heavy-handed policing. As a result, crimmigration law's perniciousness is tightly wrapped up with its existence, as Part II illustrates. This is not an area of law characterized by harsh edges or the one-off example of excessiveness. Its very core is damaging. People, institutions, and the legal system itself suffer from crimmigration law's fundamental precepts. For these reasons, Part III urges a disentanglement of criminal law and immigration law. In support of this normative vision, I offer a three-part framework for imagining migrants and migration that contrasts sharply with the presently prevailing crimmigration regime.

I. CRIMMIGRATION LAW'S BIRTH

The fact that it is difficult to identify where criminal law ends and immigration law begins suggests that the doctrinal entanglement that is crimmigration law is a longstanding feature of United States jurisprudence. It is not. Instead, it is a recent development born of late twentieth century preoccupations and fanned by early twenty-first century fears.⁷

A. Legislative Origins

For most of the nation's history, criminal law and immigration law operated almost entirely independently of one another. That doctrinal divide began to converge in the mid-1980s when prominent Reagan administration officials, with the support of Congress, turned their attention to new arrivals pegged as public-safety risks.⁸ Beginning in the late 1970s and continuing through the early 1980s, over 125,000 Cubans left the island from the port of Mariel heading toward the United States.⁹ Another 15,000 Haitians came to the United States during the same period.¹⁰ Both were viewed as menacing. Derided as criminals, the Cubans were popularly depicted as the Castro regime's effort to rid itself of unwanted dregs and framed as a threat waiting to

⁷ See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2013) [hereinafter *Creating Crimmigration*].

⁸ *Id.*

⁹ JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY 82-83 (2d ed. 2010).

¹⁰ Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 579 (1998).

be unleashed in United States cities.¹¹ Haitian arrivals were similarly denigrated. Racialized into the existing African American population, they were accused of coming to the United States to bilk social welfare benefits and alleged to have ties to illicit drug activity.¹² By the mid-1980s, Central American migration took its turn in the policymakers' spotlight. Migrants, many belonging to indigenous communities, fleeing the civil wars ravaging the region sought safety in the United States only to be treated as immigration law scofflaws or Marxist ideologues.¹³

For policymakers and pundits, the shifting migration trends represented a lurking danger. Harkening to the leftist Sandinista government of Nicaragua, President Reagan famously warned that Soviet-backed forces were only two-days drive from Texas.¹⁴ In the view of Reagan officials, migrants surreptitiously entering the United States became associated with illicit drug trafficking.¹⁵ In turn, the Southwestern border of the United States took on an outsized role in concerns about public-safety and immigration that it has seldom relinquished. It became, as President George H.W. Bush explained when signing into law the Immigration Act of 1990, part of the federal government's "front lines" in the emerging war on drugs.¹⁶

Congress joined the fray by beginning a long series of legislative enactments entangling criminal law and immigration law. The Anti-Drug Abuse Act of 1986, for example, added to the Immigration and Nationality Act ("INA") the first, and still only, statutory reference to immigration detainers. Sometimes called "immigration holds," detainers are a request by federal immigration officials to a local law enforcement agency to maintain custody of a person suspected of having violated immigration law.¹⁷ Today, detainers occupy a central

¹¹ See, e.g., John S. Lang, *Castro's "Crime Bomb" Inside U.S.*, U.S. NEWS & WORLD REP., Jan. 16, 1984, at 27.

¹² Teresa A. Miller, *The Impact of Mass Incarceration on Immigration Policy*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 214, 226, 232 (Marc Mauer & Meda Chesney-Lind eds., 2002).

¹³ See *Creating Crimmigration*, *supra* note 7, at 1503-06.

¹⁴ Eleanor Clift, *Lambastes "Liberals" as Helping to Create Deficits: Reagan Uses Tough Tone on Trail*, L.A. TIMES (July 24, 1986), http://articles.latimes.com/1986-07-24/news/mn-31492_1_president-reagan.

¹⁵ See *Creating Crimmigration*, *supra* note 7, at 1504-07.

¹⁶ President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1OsUYZ1gw>.

¹⁷ See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3247 (1986).

role in federal-local collaboration on immigration law-enforcement matters. In March 2017, for example, ICE issued almost 14,000 detainees.¹⁸ This was almost double the number issued one year earlier, but far below the all-time high of 27,916 issued in March 2011.¹⁹ Though the 1986 act was momentous, it was neither the last nor the most significant congressional legislation adopted in the 1980s that addressed concerns about migrants' impact on public safety by conflating the doctrinal distinction between criminal law and immigration law. In 1988, Congress approved another version of the Anti-Drug Abuse Act ("ADAA").²⁰ Like its predecessor two years earlier, the ADAA of 1988 introduced a two-word term into the immigration-law lexicon that has had a profound impact on countless lives in the ensuing decades. Anyone convicted of an "aggravated felony," the 1988 act demanded, must be taken into the custody of federal immigration officials.²¹ In one simple legislative pronouncement, the modern era of mandatory immigration detention was born.

Congressional willingness to statutorily tie together criminal law and immigration law continued through the 1990s and into the twenty-first century. The 1990 law that President Bush described as a centerpiece of the fight against illicit drug activity expanded the number and type of crimes defined as aggravated felonies.²² His successor, President Bill Clinton, dethroned the aggravated felony slightly. Instead of remaining as the single marker of mandatory immigration detention, the Anti-Terrorism and Effective Death Penalty Act of 1996 subjected anyone convicted of a controlled substance, firearms offense, or several other crimes to mandatory confinement.²³ Within months, Congress and President Clinton returned to building crimmigration law's legislative infrastructure by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").²⁴ Among the many changes IIRIRA ushered

¹⁸ *Latest Date: Immigration and Customs Enforcement Detainers*, TRAC IMMIGR., <http://trac.syr.edu/phptools/immigration/detain/> (last visited Sept. 1, 2017).

¹⁹ *Id.*

²⁰ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

²¹ *Id.* at 4470 (amending INA § 242(a)) ("Deportation of Aliens Committing Aggravated Felonies").

²² See Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990).

²³ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276-77 (1996) (amending INA § 242(a)(2)).

²⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

into the INA, few are as politically salient and have as much impact today than the statutory authorization it created for state and local law enforcement agencies to collaborate directly with federal immigration officials through so-called 287(g) agreements.²⁵ Working under the auspices of a 287(g) agreement, local police officers and sheriff's deputies are essentially deputized to investigate, apprehend, and detain people suspected of having violated immigration law.²⁶ IIRIRA also included the mandatory detention provision that remains part of the INA — a broad command to confine a sweeping swath of migrants, including almost everyone subject to removal because of a criminal history.²⁷

Congressional legislating slowed noticeably in the first years of the twenty-first century. When a proposal was successfully pushed through both chambers, however, it followed the previous decades' punitive bent. In the aftermath of the attacks of September 11, 2001, Congress created the massive Department of Homeland Security in 2002. Among its many tasks, Congress assigned it principal responsibility regulating cross-border movement of people, investigating possible immigration law violations in the nation's interior, and detaining people waiting to learn whether they will be allowed to remain in the country.²⁸ No longer would these be responsibilities of the Justice Department.²⁹ They would instead be crucial components of Congress's vision ensuring the nation's safety. Four years later, the Secure Fence Act authorized construction of a border wall across the nation's southwest boundary.³⁰ Eventually, hundreds of miles of wall were erected.³¹

Where Congress slowed, the states tapped their legislative authority as independent sovereigns to enter the fray. None did so more prominently than Arizona and no example stands out more than its controversial Senate Bill 1070, derided by critics as the “show-me-your-papers” law. Though much of the Arizona law was enjoined by

²⁵ *Id.* § 133.

²⁶ *Id.*

²⁷ *Id.* § 305.

²⁸ See Homeland Security Act of 2002, Pub. L. 107-296, § 441, 116 Stat. 2135, 2192 (2002).

²⁹ *Id.* § 471.

³⁰ See Secure Fence Act of 2006, Pub. L. 109-367, § 2, 112 Stat. 2638, 2638 (2006).

³¹ See Richard Misrach, *Surreal Photos Show Walls Dividing U.S. and Mexico*, NAT'L GEOGRAPHIC (Sept. 2017), <https://www.nationalgeographic.com/magazine/2017/09/proof-border-wall-united-states-mexico/>.

the Supreme Court, the provision authorizing police officers to ask lawfully detained individuals about their immigration status was not.³² In 2017, Texas followed Arizona's lead by enacting its own law allowing immigration status inquiries.³³ Arizona and Texas were far from unusual. In 2010, when Arizona enacted S.B. 1070, forty-six state legislatures and Washington, D.C. enacted 208 laws about immigration, including thirty-seven emphasizing law-enforcement tactics and eight penalizing forms of human trafficking.³⁴ Five years later state-level interest remained high with forty-nine states plus Puerto Rico enacting 216 immigration-related laws. Of these, twenty-four focused on law enforcement and seven on human trafficking.³⁵

B. Race, Crime, and Terrorism

Spread across the three decades bridging the twentieth to the twenty-first centuries, crimmigration law's expansive legislative architecture arose from the specific fears and preoccupations of the era. First there was the anti-drug hysteria of the 1980s and 1990s,³⁶ then the anti-terrorism anxiety of the 2000s.³⁷ In different ways, both were tinged by racism.³⁸

When the 1980s began, few people gave illicit drug activity much thought. Opinion polls in 1981, for example, found that only three percent of United States respondents considered cuts to the supply of drugs to be the most important method of reducing crime.³⁹ Even law enforcement officials showed little interest in tackling drug use and sales as part of their crime-fighting objectives.⁴⁰ By the end of the

³² See *Arizona v. United States*, 567 U.S. 387, 411-16 (2012).

³³ S.B. 4, 2017 Leg., 85th Sess., § 752.053 (Tex. 2017).

³⁴ Gillian Johnston & Ann Morse, *2010 Immigration-Related Laws and Resolutions in the States*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 5, 2011), <http://www.ncsl.org/research/immigration/2010-immigration-related-laws-and-resolutions-in-t.aspx>.

³⁵ Ann Morse et al., *Report on 2015 State Immigration Laws*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 16, 2016), <http://www.ncsl.org/research/immigration/report-on-2015-state-immigration-laws.aspx>.

³⁶ See ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 46 (2d ed. 2009) (describing the spike in media reports and public concern about illicit drug use starting in the 1980s).

³⁷ See RICHARD JACKSON, *WRITING THE WAR ON TERRORISM: LANGUAGE, POLITICS AND COUNTER-TERRORISM* 30 (2005) (describing the terrorism events of September 11, 2001 as inducing an "epistemic anxiety" in many people in the United States).

³⁸ See *infra* notes 36-49 and accompanying text.

³⁹ KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 55 (1997).

⁴⁰ See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*,

decade, the United States had dramatically altered course due to increased attention from political elites.⁴¹ Shortly after President George H.W. Bush described illicit drug activity as the nation's "most pressing problem," a public opinion poll found that sixty-four percent of respondents considered drugs to be the most significant problem facing the country.⁴²

This shift did not result from happenstance. Instead, changes in drug policy represent a deliberate attempt by the Reagan administration to solidify its electoral base by fanning a moral panic. Intent on turning the Nixon-inspired goal of currying favor with white people by demonizing African Americans and Latinos — the so-called "southern strategy" — into concrete, lasting electoral success, Reagan officials pointed to illicit drug activity as the source of social upheavals and criminality.⁴³ News stories about drugs frequently revolved around attacks on authority.⁴⁴ Their campaign worked. The newfound concern about illicit drug activity became tied to fears that young people of color were running amok in urban centers. As George L. Kelling and James Q. Wilson put it in their famous and hugely influential 1982 magazine article about a predominantly black neighborhood in Newark, New Jersey, many people have a "fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."⁴⁵ Police using "broken windows" or "order maintenance" tactics, as the law enforcement trend that their article popularized is known, targeted minor instances of disorder with the goal of stamping out more serious criminal activity before it begins.⁴⁶ At the center of broken windows policing sat the black and Latino youth depicted as purveyors of illicit drugs. "Young minority males, caught up in the underclass world of crime, drugs broken families, and welfare dependency," writes David

61 UCLA L. REV. 1346, 1365 (2014).

⁴¹ See BECKETT, *supra* note 39.

⁴² *Id.* at 44.

⁴³ *Id.* at 54, 58-59.

⁴⁴ See *id.* at 75, tbl.5.4.

⁴⁵ George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

⁴⁶ See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing* *New York Style*, 97 MICH. L. REV. 291, 302 (1998).

Garland, were depicted as “desperate, driven, and capable of mindless violence.”⁴⁷

The image of young people of color filling cities with drugs and violence was not unique to the 1980s or even periods under Republican presidential leadership. The administration of President Bill Clinton, whose two terms covered most of the 1990s, adopted similar concerns about alleged perpetrators of drug activity and violent crime.⁴⁸ When he signed the Violent Crime Control and Law Enforcement Act of 1994, President Clinton lamented that “[g]angs and drugs have taken over our streets and undermined our schools.”⁴⁹ Touting that law two years later, Clinton’s wife, future Secretary of State Hillary Clinton, referred to the scourge of young “superpredators — no conscience, no empathy.”⁵⁰ Though neither used explicit racial descriptors when referring to perpetrators of crime, the allusion was difficult to miss.⁵¹

In the early years of the twenty-first century, the administration of President George W. Bush maintained the two-decade long pattern of vilifying people of color, but altered its concern to fears of terrorism. In the flurry of legislation enacted by Congress with the president’s support in the aftermath of the September 11, 2001 attacks, immigration law enforcement became firmly embedded within the United States’ national-security strategies. Meanwhile, the Bush administration responded through agency initiatives. Less than two months after the attacks, Attorney General John Ashcroft announced that the now defunct Immigration and Naturalization Service (“INS”) and the Customs Service — both of which would be folded into DHS two years later — would form crucial pillars of a government-wide anti-terrorism task force.⁵² Along with the Federal Bureau of

⁴⁷ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 136, 154 (2001).

⁴⁸ BECKETT, *supra* note 39, at 59-61.

⁴⁹ President William J. Clinton, Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994 (Sept. 13, 1994), <http://www.presidency.ucsb.edu/ws/?pid=49072>.

⁵⁰ C-SPAN, 1996: *Hillary Clinton on “Superpredators,”* YOUTUBE (Feb. 25, 2016), <https://www.youtube.com/watch?v=j0uCrA7ePno>.

⁵¹ See Travis Linnemann & Corina Medley, *Fear the Monster!: Racialised Violence, Sovereign Power and the Thin Blue Line*, in *THE ROUTLEDGE INTERNATIONAL HANDBOOK ON FEAR OF CRIME* 70 (Murray Lee & Gabe Mythen eds., 2017) (describing Clinton’s superpredator comment as racist).

⁵² John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, Address Outlining Foreign Terrorist Tracking Task Force (Oct. 31, 2001), https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.

Investigation, the INS and Customs Service would “serve one of the most important objectives in the war against terrorism . . . protecting our nation against terrorist aliens,” Ashcroft announced.⁵³ Though the attorney general steered clear of crude racialized assertions, his comments were tinged with references to the task force’s racialized edge. His only reference to terrorism suspects, for example, noted that three migrants had been arrested in Michigan for possessing falsified immigration documents. Upon arrest, they were found in possession of “a day planner containing notations in Arabic.”⁵⁴

Approximately eight months later, the Bush administration imposed a special registration requirement on citizens of twenty-five countries, all but one of which was majority Muslim.⁵⁵ Young male citizens of these countries who were at least sixteen-years old were required to present themselves at INS offices.⁵⁶ Though billed as an effort to identify and apprehend terrorist sympathizers, the National Security Entry-Exit Registration System (“NSEERS”), as the initiative was called, resulted in interviews with approximately 85,000 people.⁵⁷ Among those, only eleven were found to be associated with terrorism.⁵⁸

C. *Seeing Crimmigration Law*

For much of the time during which Congress and Executive Branch agencies were busying themselves building the legislative and regulatory infrastructure that became crimmigration law, scholars failed to recognize that seemingly distinct doctrinal and policy developments were part of a broader trend. That changed in the early 2000s when a group of academics conceptualized the emerging shift in

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ The full list of countries whose citizens were subjected to special registration was Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. Of this list, only North Korea’s population is not majority Muslim. See Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, MIGRATION POL’Y INST. (May 17, 2011), <http://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program>.

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.* DHS stopped using NSEERS in 2011, but did not rescind its regulatory authorization until December 2016. See Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 FED. REG. 94231 (Dec. 23, 2016) (8 C.F.R. §§ 214, 264).

law and policy under the rubric of crimmigration law. None did so more presciently and influentially than Juliet Stumpf in her foundational 2006 article *The Crimmigration Crisis*.⁵⁹ For the first time in the literature of any academic discipline, she described the merger of criminal law and immigration law norms focusing on alterations to substantive and procedural law as well as on-the-ground enforcement tactics.⁶⁰ These changes, she argued, have blurred the boundary between traditional criminal law and immigration law to the point that they have become indistinct. “[I]mmigration law and the criminal justice system,” Stumpf wrote, “are merely nominally separate.”⁶¹

After Stumpf’s groundbreaking article, other scholars spent the following decade identifying crimmigration law’s contours and critiquing its operations. Some jumped into the thicket of types of crimes that now bring adverse immigration consequences, tackling questions of normative principles and doctrinal dilemmas.⁶² Others turned to state and federal criminal law regimes’ increased willingness to attach significance to citizenship or immigration status.⁶³ For legal scholars in the United States, much of this attention centered on state-level attempts to ratchet up the severity for migrants caught in the criminal justice system. None was more prominent than Arizona’s controversial Senate Bill 1070, enacted in 2010 and derided by critics as the “show-me-your-papers” law.⁶⁴ Lastly, other scholars devoted enormous resources to learning about, contextualizing, and critiquing the many enforcement mechanisms that have taken on new or special roles as part of the crimmigration regime.⁶⁵ This rapidly expanding

⁵⁹ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) [hereinafter *The Crimmigration Crisis*].

⁶⁰ See *id.* at 381.

⁶¹ *Id.* at 376.

⁶² See, e.g., Mary Holper, *Redefining “Particularly Serious Crimes” in Refugee Law*, 69 FLA. L. REV. 1093, 1095 (2017) (criticizing the prevailing definition of “particularly serious crime” in asylum and refugee law as too broad); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1689 (2009) [hereinafter *Fitting Punishment*] (urging a return to proportional consequences after a misalignment caused by the “criminalization of immigration law”).

⁶³ See, e.g., Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in U.S. History: A Personal Account*, in BEHIND BARS: LATINO/AS AND PRISON IN THE UNITED STATES 159, 159-65 (Suzanne Oboler ed., 2009) (describing a mass prosecution of migrants in federal courts); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 NYU L. REV. 1126, 1131 (2013) (analyzing prosecutorial postures toward noncitizens in Los Angeles County, California; Harris County, Texas; and Maricopa County, Arizona).

⁶⁴ S.B. 1070, 2010 Leg., 49th Sess. (Az. 2010).

⁶⁵ See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. &

literature, spanning disciplines and national contexts, illustrates that Stumpff's insight remains remarkably prescient.

Outside the United States, especially Europe, academics have similarly adopted the crimmigration law rubric to explain phenomena operating within and across national boundaries.⁶⁶ Australia, for example, has developed a massive off-shore imprisonment system for migrants.⁶⁷ The United Kingdom's immigration detention practice has come under scrutiny.⁶⁸ And the European Union's externalization of border controls has received widespread academic attention.⁶⁹

While crimmigration's theoretical roots rest firmly with the academy, as its legislative and enforcement origins suggest, it has not remained confined to academia. Policy advocates in the United States and Europe issue reports on crimmigration's unique facets in different

CRIMINOLOGY 613, 628 (2012) [hereinafter *Overcriminalizing Immigration*] ("States . . . are increasingly using the criminal law as a tool to address the issue of migration . . ."); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016) (examining the state-federal relationship through the example of Secure Communities and the Priority Enforcement Program); Christopher S. Koper et al., *The Effects of Local Immigration Enforcement on Crime and Disorder: A Case Study of Prince William County, Virginia*, 12 CRIMINOLOGY & PUB. POL'Y. 239 (2013) (examining immigration policing in one suburban Virginia county).

⁶⁶ See, e.g., Izabella Majcher, "Crimmigration" in the European Union Through the Lens of Immigration Detention 5-8 (Glob. Det. Project Working Paper No. 6, 2013), https://www.globaldetentionproject.org/wp-content/uploads/2016/06/Crimmigration_EU_final.pdf (examining "crimmigration" in the European Union). For an example of crimmigration-themed collaborations, see *Call for Papers: Understanding Causes and Consequences of Criminalization of Migration*, PEACE INST. (Dec. 18, 2017), <http://www.mirovni-institut.si/en/call-for-papers-understanding-causes-and-consequences-of-criminalization-of-migration/>.

⁶⁷ See Michael Flynn, *How and Why Immigration Detention Crossed the Globe* 15-19 (Glob. Det. Project Working Paper No. 8, 2014), <http://www.refworld.org/pdfid/545b41254.pdf>.

⁶⁸ See generally ALEXANDRA HALL, *BORDER WATCH: CULTURES OF IMMIGRATION, DETENTION AND CONTROL* (2012); Christine Bacon, *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies 2* (Univ. of Oxford, Refugee Studies Ctr., Working Paper No. 27, 2005), <https://www.rsc.ox.ac.uk/files/files-1/wp27-evolution-immigration-detention-uk-2005.pdf>.

⁶⁹ See, e.g., Rutvica Andrijasevic, *From Exception to Excess: Detention and Deportations Across the Mediterranean Space*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 147, 150-52 (Nicholas De Genova & Nathalie Peutz eds., 2010) (describing the European Union's externalization of immigration control through, among other practices, financing immigration detention in North Africa).

political contexts.⁷⁰ Meanwhile, legislatures, enforcement agencies, and courts continue to give it life.

Now in its second decade, engagement with crimmigration remains vibrant. In the United States, it is a small but undeniably recognized part of the legal consciousness. Legislatures regularly debate and enact proposals that fit neatly into the crimmigration law rubric. Courts, in turn, are called to interpret the legality of those laws. At times, they have even urged broader recognition of crimmigration law explicitly.⁷¹ For their part, innumerable attorneys advertise their crimmigration legal services and bar associations organize crimmigration-themed educational events for their members.⁷²

D. *Crimmigration Doctrine*

Today, crimmigration law has evolved into a three-part doctrinal structure that grows out of its traditional criminal law and immigration law foundations. The legal doctrine that constitutes crimmigration law is most prominently characterized by the impact that criminal history has on immigration status. The INA contains dozens of provisions that trigger removal upon a conviction or, in some instances, mere commission of certain crimes.⁷³ Not surprisingly, immigration courts regularly issue removal orders against people with criminal records. For example, of the 194,718 people removed from the United States from November 21, 2014 to

⁷⁰ For an example from Europe, see MAAIKE VANDERBRUGGEN ET AL., POINT OF NO RETURN: THE FUTILE DETENTION OF UNRETURNABLE MIGRANTS 7-8 (2014). For an example from the United States, see Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, CTR. FOR AM. PROGRESS (Dec. 18, 2015, 9:29 AM), <https://www.americanprogress.org/issues/immigration/reports/2015/12/18/127769/how-for-profit-companies-are-driving-immigration-detention-policies/>.

⁷¹ See *Diaz v. State*, 896 N.W.2d 723, 728 (Iowa 2017).

⁷² See, e.g., *Where Immigration Law and Criminal Law Meet*, GUERRA L. FIRM, <https://www.guerralawfirm.net/Immigration/Crimmigration.shtml> (last visited Sept. 11, 2018) (advertising crimmigration legal services); CRIMMIGRATION INC., <http://www.crimmigrationinc.com/> (last visited Sept. 11, 2018) (same); *Crimmigration: Assistance to Criminal Defense Attorneys*, NOBLE & VRAPI, <http://www.noblelawfirm.com/crimmigration> (last visited Sept. 11, 2018) (same); *Crimmigration: The Intersection of Criminal and Immigration Law (CLE)*, ONONDAGA CTY. BAR ASS'N, <https://www.onbar.org/events/crimmigration-intersection-criminal-immigration-law-cle/> (last visited Sept. 11, 2018) (advertising a crimmigration-focused continuing legal education event); *Crimmigration: Immigration Issues in Criminal Law*, N.C. BAR ASS'N, <http://gateway.ncbar.org/store/seminar/seminar.php?seminar=95779> (last visited Sept. 11, 2018) (same).

⁷³ See Immigration and Nationality Act § 212, 8 U.S.C.A. § 1182(a)(2)(A)(i), (C); § 237, 8 U.S.C.A. § 1227(a)(2)(A)-(F) (2018) [hereinafter INA].

September 30, 2015, sixty percent (116,644 individuals) had a conviction.⁷⁴

A second component of crimmigration law operates largely within state and federal criminal proceedings. Numerous state legislatures have adopted laws criminalizing activity related to the act of migration or a person's lack of United States citizenship. For example, several states criminalize using fraudulent citizenship or immigration documents.⁷⁵ South Carolina bars unauthorized migrants from possessing handguns.⁷⁶ Multiple states have attempted to limit migrants' access to bail during the course of criminal prosecutions.⁷⁷ Most prominently, Arizona used its human smuggling crime, not an unusual feature of state criminal codes, to prosecute the migrants brought into the United States clandestinely creating a variant of human smuggling described as "self-smuggling."⁷⁸

Federal criminal law has likewise evolved to take into account immigration status. Multiple federal statutory provisions criminalize immigration activity; none more consequentially than the sections targeting unauthorized entry and unauthorized reentry.⁷⁹ Both offenses penalize entering the United States without the federal government's permission. Unauthorized entry does so as a misdemeanor punishable by up to six months imprisonment for a first offense.⁸⁰ Unauthorized reentry is a felony initially punishable by as much as two years imprisonment.⁸¹ The felony version applies only to individuals who have previously been removed from the United States.⁸² Despite being only two of many crimes punishable under federal law, prosecutions and convictions for unauthorized entry and unauthorized reentry occupy a remarkable role in federal courts. In fiscal year 2016, for example, federal courts oversaw prosecutions of 68,314 defendants whose most serious charged criminal offense was

⁷⁴ Data comes from U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, ERO-LESA STATISTICAL TRACKING UNIT, NOVEMBER 21, 2014 THROUGH END OF FISCAL YEAR 2015 REMOVALS (in author's possession).

⁷⁵ See CAL. PENAL CODE § 114 (2018); OR. REV. STAT. § 165.800(2), (4)(b)(D) (2018); WY. STAT. ANN. § 6-3-615(a) (2018).

⁷⁶ S.C. CODE ANN. § 16-23-530(C) (2018).

⁷⁷ See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 193-95 (2015).

⁷⁸ See *id.* at 190-91.

⁷⁹ See INA §§ 275-276, 8 U.S.C. §§ 1325-1326 (2018).

⁸⁰ INA § 275(a).

⁸¹ INA § 276(a)(2).

⁸² *Id.* § 276(a).

an immigration crime.⁸³ All but a small number of these prosecutions were for unauthorized entry or reentry.⁸⁴ That year, immigration crime prosecutions represented forty-three percent of all criminal cases brought in federal courts nationwide.⁸⁵ Nothing suggests that the pattern will reverse course soon. In an executive order issued early in his presidency, President Trump instructed the Justice Department to prioritize “prosecutions of offenses having a nexus to the southern border.”⁸⁶ In a separate executive order issued the same day, the president directed the attorney general and secretary of homeland security to “ensure[] that adequate resources are devoted to the prosecution of criminal immigration offenses.”⁸⁷ Attorney General Jeff Sessions has done just that. In an April 2017 speech to Customs and Border Protection employees, Sessions decried “criminal aliens” and urged federal prosecutors to “take a stand against this filth” by prioritizing prosecution of federal immigration crimes.⁸⁸

Criminal law’s final pillar encompasses enforcement tactics that uniquely impact migrants by blending features of traditional criminal law with some aspects of traditional immigration law. Within 100 miles of the nation’s southwest border, for example, anti-drug policing meshes with immigration law enforcement activity to operate in a constitutionally exceptional posture. There, according to the U.S. Supreme Court, the Fourth Amendment imposes fewer constraints on governmental intrusions into private affairs than is true of the rest of the country.⁸⁹ In federal district courts, criminal prosecution of immigration crimes regularly occurs through en masse hearings involving dozens of defendants. This is a stark contrast to the individualized attention typically afforded defendants in other federal

⁸³ See ADMIN. OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2016 ANNUAL REPORT OF THE DIRECTOR, at tbl.D-4, http://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2016.pdf (reporting 20,352 prosecutions for immigration offenses in federal district courts); *id.* at tbl.M-2, http://www.uscourts.gov/sites/default/files/data_tables/jb_m2_0930.2016.pdf (reporting 47,962 prosecutions for immigration offenses in federal magistrate courts).

⁸⁴ See ADMIN. OFFICE, *supra* note 83, at tbl.D-4.

⁸⁵ Data released by the Administration Office of the U.S. Courts counted 157,287 total criminal prosecutions. See *id.* at tbl.D-4; *id.* at tbl.M-2.

⁸⁶ Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8796 (Jan. 25, 2017).

⁸⁷ Exec. Order No. 13,768 § 11, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

⁸⁸ Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.

⁸⁹ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975).

criminal prosecutions.⁹⁰ On the flip side, large simultaneous hearings resemble the impersonal operations of immigration courts. Meanwhile, imprisonment — long a feature of criminal processes — has become a central component of civil and criminal immigration proceedings. ICE runs a detention network of over 600 facilities in which upwards of 400,000 people are confined annually.⁹¹ The USMS books into its custody roughly 100,000 people charged with, at worst, a federal immigration crime.⁹² And the BOP houses as many as 20,000 convicted immigration offenders on any given day.⁹³

From its early moments as part of the nascent war on drugs to its contemporary tripartite doctrinal and policy structure, crimmigration law has matured into a formidable feature of substantive law, procedural mechanisms, and field-level law enforcement in the United States. Combined, crimmigration law's components form a pernicious edge of U.S. law and law enforcement.

II. CRIMMIGRATION LAW'S PERNICIOUSNESS

Proponents of policies that tie together criminal law and immigration law frequently suggest that doing so makes the United States safer.⁹⁴ In doing so, they ignore or dismiss the many harms that crimmigration law creates. The harms that result from crimmigration law's modern role in United States law and policing practices are not aberrational features of its margins. Instead, crimmigration law's mere existence inflicts numerous harms on people, institutions, and the legitimacy of law itself.

A. Harms to People

Above all else, crimmigration law imposes an enormous cost on human life. Two examples of crimmigration law's adverse impact on people stand out: securitization and imprisonment.

⁹⁰ See *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

⁹¹ See sources cited *supra* note 4 (discussing recent detention population statistics).

⁹² See *Prisoner Trends*, *supra* note 5 (providing the number of persons booked by USMS classified by offense).

⁹³ See *Prison Population Drops*, *supra* note 6.

⁹⁴ See, e.g., Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks on Efforts to Combat Violent Crime (Aug. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-efforts-combat-violent-crime> (claiming that "if we want to reduce violent crime in this country, then we have to get serious about illegal immigration").

1. Securitization

At its core, crimmigration law promotes a security-centered view of migrants and migration. A foundational tenet involves demonization of migrants and discussions of migration as a threatening unknown. In crimmigration law's earliest moments, Cubans depicted as criminals and Haitians as drug dealers launched this trend.⁹⁵ More recently, Democrats and Republicans have repeated claims of migrant dangerousness to justify or promote similarly security-focused governmental responses. Speaking in November 2014, President Obama famously described his administration's immigration law enforcement priorities as focused on "felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids."⁹⁶ As the president was speaking, his top immigration enforcement official, Secretary of Homeland Security Jeh Johnson, released a memorandum launching an enforcement initiative called the Priority Enforcement Program under which "enforcement actions . . . will only be taken against aliens who are convicted of specifically enumerated crimes."⁹⁷

President Trump and senior officials within his administration have made similar declarations. Indeed, his successful run to the White House took its first major step when he suggested that many Mexican migrants are rapists.⁹⁸ Throughout the rest of the campaign and during the first eighteen months of his time in office, time and again he highlighted transnational gangs as an example of migrants' criminal propensity and as justification for his controversial border wall plans.⁹⁹ Only days into the presidency, Trump wrote in an executive

⁹⁵ See *Creating Crimmigration*, *supra* note 7, at 1504.

⁹⁶ President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

⁹⁷ Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enft et al., Secure Communities (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

⁹⁸ *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

⁹⁹ See, e.g., Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (referring to the dangers posed by "transnational criminal organizations"); Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends "Animals" Remark, Saying it Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html> ("[W]hen the MS-13 comes in, . . . I refer to them as animals.").

order that migrants who enter the United States clandestinely “present a significant threat to national security and public safety Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.”¹⁰⁰ Trump’s top law enforcement officer, Attorney General Sessions, has made much of the claims that migrants are responsible for criminality. He has described local policies limiting cooperation with federal immigration officials as likely to result in “tragic consequences,” pointing for support to the deaths of migrants found inside a tractor-trailer in a San Antonio parking lot.¹⁰¹ Even in ending Deferred Action for Childhood Arrivals, an initiative that was only available to individuals with the most minor criminal record, Sessions said that the nation would be “safer and more secure.”¹⁰²

Under Presidents Obama and Trump, the administration’s rhetoric often failed to align with the reality of its enforcement practices. Across the first seven years of Obama’s two terms, fifty-six percent of people removed from the United States had not been convicted of any crime.¹⁰³ Throughout this time, the most serious offense of conviction for those who had obtained a criminal record was often an immigration crime.¹⁰⁴ Early results from the Trump administration suggest a similar pattern with fifty-two percent of people removed in February 2017 having a criminal record.¹⁰⁵ Across President Trump’s first five months, a substantially smaller percentage of people arrested had no criminal record, twenty-six percent, but a similar tilt toward minor offenses remained.¹⁰⁶ Of those who had been convicted of

¹⁰⁰ Exec. Order No. 13,767, 82 Fed. Reg. at 8793.

¹⁰¹ Press Release, U.S. Dep’t of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial>.

¹⁰² Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, Attorney General Sessions Delivers Remarks on DACA (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

¹⁰³ César Cuauhtémoc García Hernández, *ICE Enforcement Actions: Something Old, Something New*, CRIMMIGRATION.COM (Feb. 14, 2017, 4:00 AM), <http://crimmigration.com/2017/02/14/ice-enforcement-actions/>.

¹⁰⁴ *See id.*

¹⁰⁵ Rosa Flores, *The Real “Bad Dudes”: A Look at Some of the Criminals ICE has Caught Recently*, CNN (Apr. 4, 2017, 7:55 PM), <http://www.cnn.com/2017/04/04/us/trump-ice-apprehensions/index.html>.

¹⁰⁶ César Cuauhtémoc García Hernández, *ICE Arrests 60,000 in Trump’s First Five Months*, CRIMMIGRATION.COM (Aug. 22, 2017, 4:00 AM), <http://crimmigration.com/2017/08/22/ice-arrests-60000-in-trumps-first-five-months/>.

something, forty-eight percent had been convicted of nothing more serious than a vehicular traffic, drug, or immigration crime.¹⁰⁷ Unlike the years of data available for President Obama's tenure, the limited window available under President Trump means that a comparison of the two administrations should not be overstated. Quite simply, not enough time has elapsed with President Trump in the White House to make a sound comparison to his predecessor.

Framed as potential or actual threats to the nation's well-being, migrants can more readily become targets for public safety campaigns.¹⁰⁸ Using federal and state laws, legislators and prosecutorial officials have gone to great lengths to newly criminalize some immigration-related activity while increasing the punitive potential of other activity inextricably tied up with migration. The federal criminal justice system has evolved so thoroughly into a means of punishing migrants specifically for their manner of migration that federal courts have become a central legal arena for determining the future of migrants.¹⁰⁹ Historically, alleged immigration law violations were pursued through the civil immigration court system or through less formal procedures wherein enforcement officers at or near ports-of-entry gave excludable migrants the opportunity to leave voluntarily or simply escorted the migrants to the border.¹¹⁰

Despite the reliance on the civil immigration law adjudication system, criminalization of migration is not new. On the contrary, unauthorized entry and unauthorized reentry have been federal crimes since 1929.¹¹¹ For most of the next eight decades, however, neither offense was used much.¹¹² In recent years, federal prosecutors have done an about-face. Prosecutions for immigration offenses now comprise the single largest category of crime pursued by federal prosecutors; indeed, almost half of all new criminal cases initiated in fiscal year 2016 were for migration-related activity.¹¹³ With President

¹⁰⁷ *Id.*

¹⁰⁸ See Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 *DENV. L. REV.* 1, 3 (2016) (discussing rhetoric's impact on the criminalization of migrants).

¹⁰⁹ See *Overcriminalizing Immigration*, *supra* note 65, at 635 (noting the significant jump in federal immigration crime prosecutions from 1993 to 2000).

¹¹⁰ See *Padilla v. Kentucky*, 559 U.S. 356, 360-64 (2010) (summarizing changes to immigration law that occurred across the twentieth century).

¹¹¹ See Act of March 4, 1929, ch. 690, § 2, 45 Stat. 1551, 1551 (1929).

¹¹² See, e.g., César Cuauhtémoc García Hernández, *Immigration Crime Cases in the 1970s*, *CRIMMIGRATION.COM* (Feb. 26, 2018, 12:18 AM), <http://crimmigration.com/2018/02/26/immigration-crime-cases-in-the-1970s/>.

¹¹³ See ADMIN. OFFICE, *supra* note 83, at tbls.D-4, M-2.

Trump and Attorney General Sessions encouraging federal prosecutors to prioritize these offenses¹¹⁴ — and to charge the most serious version applicable — there is every reason to assume that the percentage of the federal criminal docket devoted to immigration activity will rise.

To help the federal courts process so many people, the judiciary teamed up with United States Attorneys' Offices throughout the country to pare down procedural protections through Operation Streamline. Started in 2005 in rural Texas, Operation Streamline fast-tracks criminal prosecutions of federal immigration offenses by “running” dozens of cases simultaneously. As many as 100 defendants have faced a judge presiding over their cases.¹¹⁵ Overwhelmed by the vast number of immigration cases Operation Streamline allowed prosecutors to file, the chief judge of the U.S. District Court for the District of Arizona declared a judicial emergency for thirty days resulting in suspension of the Speedy Trial Act, the federal statute that ensures reasonably quick resolution of criminal matters.¹¹⁶ His predecessor — who began the process of requesting the judicial emergency declaration but was shot to death before completing it — had urged this rare step because, as he told the Ninth Circuit's chief judge, “The addition of what sometimes seems to be an inexhaustible number of law enforcement agents and federal prosecutors in Tucson division has now produced a tsunami of federal felony cases far beyond the management capacity of the four active district judges in Tucson division.”¹¹⁷ At the chief judge's request, the U.S. Court of Appeals for the Ninth Circuit subsequently extended the Speedy Trial Act suspension for one year.¹¹⁸ In coming to this conclusion, the Ninth Circuit's Judicial Council explained that the Arizona courts had seen their criminal caseloads grow sixty-five percent from 2008 to 2011 “because the Department of Homeland Security has increased border enforcement, and the United States Attorney's Office has increased its efforts to prosecute these cases along the United States-Mexico border.”¹¹⁹ In Tucson, federal judges oversaw 2,100 Operation Streamline cases per month in fiscal year 2014.¹²⁰ Though Operation

¹¹⁴ See Sessions, *supra* note 88.

¹¹⁵ See GARCÍA HERNÁNDEZ, *supra* note 77, at 230.

¹¹⁶ *In re Judicial Emergency Declared in District of Arizona*, 639 F.3d 970, 971 (9th Cir. 2011) (Judicial Council).

¹¹⁷ *Id.* at 980, Tab A.

¹¹⁸ See *id.* at 971.

¹¹⁹ *Id.* at 974.

¹²⁰ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 6 tbl.1 (2015), <https://www.hsdl.org/?view&did=>

Streamline had its most substantial impact on federal courts in Arizona, especially in Tucson, it has not been limited to that region. For a time, it existed in federal courts along most of the Southwest border.¹²¹

Federal efforts centered on terrorist acts planned or carried out by foreign people or entities have likewise furthered the criminalization of migration-related activity. In the immediate aftermath of the September 11, 2001 attacks, thousands of migrants were imprisoned ostensibly because of suspected ties to terrorist networks.¹²² Those suspicions were almost never substantiated. Instead of being released to resume their lives in the United States, however, many were removed.¹²³ Months later, when Congress enacted the Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (“PATRIOT”) Act, one of the key pieces of legislation enacted in response to the 2001 attacks, it included a provision authorizing indefinite detention of migrants.¹²⁴ Later, Congress expanded border surveillance operations, including “interdicting illegal movement of people . . . across the border,” as part of the security-focused Intelligence Reform and Terrorism Prevention Act of 2004.¹²⁵ That bill also provided for employment of 2,000 additional Border Patrol agents, 800 more ICE officers, and required DHS to pay for at least 8,000 detention beds nightly.¹²⁶

Adding to federal initiatives, several states have also used their public safety obligations to criminalize migrants. Crimes related to fraudulent use of identification documents have become commonplace. For example, one state prosecutor attempted to use federal income tax information to convict migrants of state identity theft and criminal impersonation crimes.¹²⁷ Had the prosecutor not violated the Fourth Amendment in obtaining the federal tax

767752 [hereinafter STREAMLINE].

¹²¹ See *id.* at 5.

¹²² See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS I (2003).

¹²³ See *id.*

¹²⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT ACT”) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-52 (Oct. 26, 2001) (codified at 8 U.S.C. § 1226a (2001)).

¹²⁵ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5201, 118 Stat. 3638, 3733-3734 (2004).

¹²⁶ See *id.* at § 5202-5204, 118 Stat. 3638, 3734-3735.

¹²⁷ *People v. Gutierrez*, 222 P.3d 925, 928 (Colo. 2009) (en banc).

information, the convictions might have stood.¹²⁸ Perhaps most creatively, an Arizona prosecutor used a criminal law meant to target people who are paid to bring migrants into the United States without authorization and turned it against the smuggled migrants.¹²⁹

2. Imprisonment

Among the many security-focused laws and tactics adopted by federal and state governments, none have had as much impact on migrants and their families as has immigration imprisonment. Historically, the federal and state governments rarely confined people while regulating immigration activity. Though the Supreme Court set the doctrinal framework for civil and criminal confinement due to immigration law violations in 1896,¹³⁰ with limited exceptions, neither form was used en masse until the closing decades of the twentieth century. In 1982, for example, the INS could detain approximately 1,700 migrants on average every day.¹³¹ By contrast, its successor, ICE, detained 28,168 people, on average, daily in 2015.¹³² The first budget approved by Congress under President Trump promised an even larger civil detention system. ICE received funding to make available 39,324 beds.¹³³ As it transitioned from President Obama to President Trump, ICE raised its daily detention average to a record-high 38,106.¹³⁴ The criminal side of immigration imprisonment has shown a similar growth over three decades. In 1980, for example, an annual census of the nation's prison population hardly mentioned immigration offenders.¹³⁵ Five years later, federal penitentiaries

¹²⁸ *Id.* at 928-29.

¹²⁹ See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1762 (2011).

¹³⁰ See *Wong Wing v. United States*, 163 U.S. 228, 235-38 (1896).

¹³¹ TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER* 47 (1996).

¹³² REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, U.S. DEP'T OF JUSTICE 88 n.33 (2016).

¹³³ César Cuauhtémoc García Hernández, *Congress Finds More Money for Immigration Imprisonment*, CRIMMIGRATION.COM (May 5, 2017, 4:00 AM), <http://crimmigration.com/2017/05/05/congress-finds-more-money-for-immigration-imprisonment/>.

¹³⁴ César Cuauhtémoc García Hernández, *ICE Transitioned from Obama to Trump with Record High Daily Detention Population*, CRIMMIGRATION.COM (Apr. 3, 2018, 12:30 AM), <http://crimmigration.com/2018/04/03/ice-transitioned-from-obama-to-trump-with-record-high-daily-detention-population/>.

¹³⁵ CAROL B. KALISH, U.S. DEP'T OF JUSTICE, *PRISONERS IN 1980*, at 3-4 (1981), <https://www.bjs.gov/content/pub/pdf/p80.pdf>. Interestingly, the only other mention of "immigration" in the report focused on internal "immigration to the Sun Belt." *Id.* at 3.

confined 865 people due to immigration crimes.¹³⁶ By 1995, however, the population of convicted immigration offenders had grown by over 300 percent to 3,612.¹³⁷ Soon that expansion had become the norm. In 2005, there were 18,100 convicted immigration prisoners locked up and in 2015 there were 14,900.¹³⁸ While it is formally a type of civil confinement, pretrial detention attached to federal criminal prosecutions has likewise seen an exponential increase. Whereas in 1994, there were 995 people in the custody of the USMS awaiting prosecution for an immigration crime on a given day, in 2011 there were 16,524 facing that situation — a jump of over 1,500 percent.¹³⁹

Firmly hovering at a historically unprecedented size, the immigration prison population costs the federal government an enormous sum. Every year, Congress devotes approximately \$2 billion to ICE for its civil detention population alone.¹⁴⁰ Costs for identifying who to haul into an immigration detention center are separately tallied. Because the BOP and USMS are not devoted exclusively to immigration imprisonment, identifying their immigration prison costs is more difficult. A 1999 study of the federal prison population found that “immigration offenders cost \$39,000 to incarcerate.”¹⁴¹ Adjusting that cost to account for inflation, the BOP’s 2015 immigration prisoner population would still reach roughly \$835 million. For its part, the USMS holds most of its immigration suspects along the Southwest border. In 2015, it spent approximately \$430 million incarcerating people in two Texas judicial districts and the Arizona judicial district where most immigration crime prosecutions occur.¹⁴² In contrast, the

¹³⁶ CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, PRISONERS IN 1996, at 11 tbl.14 (1997), <https://www.bjs.gov/content/pub/pdf/p96.pdf>.

¹³⁷ *Id.*

¹³⁸ E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015, at 31, app. tbl.6 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> (providing data for 2015); E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013, at 17 tbl.15 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf> (providing data for 2005).

¹³⁹ *Average Daily Population*, U.S. DEP’T OF JUST. ARCHIVES, <https://www.justice.gov/archive/ofdt/population.htm> (last updated June 2013).

¹⁴⁰ See César Cuauhtémoc García Hernández, *DHS Asks for More Detention Beds, Alternatives to Detention, Prosecutors, & Drones*, CRIMMIGRATION.COM (Feb. 11, 2016, 4:00 AM), <http://crimmigration.com/2016/02/11/dhs-asks-for-more-detention-beds-alternatives-to-detention-prosecutors-drones/>.

¹⁴¹ REBECCA L. CLARK & SCOTT A. ANDERSON, *ILLEGAL ALIENS IN FEDERAL, STATE, AND LOCAL CRIMINAL JUSTICE SYSTEMS* 25 (1999).

¹⁴² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-472, PRISONER OPERATIONS: UNITED STATES MARSHALS SERVICE COULD BETTER ESTIMATE COST SAVINGS AND MONITOR EFFORTS TO INCREASE EFFICIENCIES 49-51 tbl.6 (2016), <https://www.gao.gov/assets/680/677380.pdf>. I accounted for the District of Arizona, the Southern District of Texas, and the Western

USMS spent \$54 million that year in the judicial districts that include New York City, Chicago, and Los Angeles, the nation's three largest cities.¹⁴³

Despite its large scale and robust funding, the various sectors of the nation's immigration prison operations frequently lack basic semblances of human decency. ICE's civil detention practice relies on correctional standards used for criminal incarceration¹⁴⁴ but, because it is not deemed punishment as a formal matter of law, people are taken into the agency's custody without the procedural protections associated with criminal confinement.¹⁴⁵ Moreover, people are confined without a rigorous assessment of whether they pose a risk that justifies confinement.¹⁴⁶ Once there, conditions are often unhinged to any compelling interest. Toddlers, for example, have been kept inside locked cells and pregnant women shackled while in labor.¹⁴⁷ Deaths are not uncommon; at least 144 people died in a ten-year period from 2004 to 2014.¹⁴⁸ For its part, the BOP has at times utilized prisons that even ICE was no longer willing to use.¹⁴⁹ When this occurred with a county-owned, privately operated facility in South

District of Texas.

¹⁴³ See *id.* I accounted for the Eastern District of New York (based in Brooklyn), Southern District of New York (based in Manhattan), Northern District of Illinois (Chicago), and Central District of California (Los Angeles).

¹⁴⁴ See DORA SCHIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

¹⁴⁵ See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 536 (1999).

¹⁴⁶ See Mark Noferi & Robert Koulisch, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 50 (2014).

¹⁴⁷ See *e.g.*, *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 566-67 (6th Cir. 2013) (describing the detention and shackling of one pregnant woman during childbirth at a hospital); LEIGH BARRICK, AM. IMMIGRATION COUNCIL, DIVIDED BY DETENTION: ASYLUM-SEEKING FAMILIES' EXPERIENCES OF SEPARATION 16 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf (describing the experience of one migrant who was detained along with her two daughters, ages two and eleven, and separated from her eight-year-old nephew).

¹⁴⁸ See Megan Granski et al., *Death Rates Among Detained Immigrants in the United States*, 12 INT'L. J. ENVTL. RES. & PUB. HEALTH 14414, 14416 tbl.1 (2015).

¹⁴⁹ See Reynaldo Leanos Jr., *A Private Prison Company with a Troubled Past Looks to Reopen an Immigration Detention Facility in Texas*, PRI (June 13, 2017, 9:00 AM), <https://www.pri.org/stories/2017-06-13/private-prison-company-troubled-past-looks-re-open-immigration-detention-facility>.

Texas, inmates eventually rebelled, leaving the prison unusable.¹⁵⁰ The BOP's use of a private prison was not unusual. In a 2016 report, the Justice Department Inspector General noted that "most of the contract prison population consists of foreign national inmates . . . serving sentences for immigration violations."¹⁵¹ Contract prisons, the Inspector General added, were more likely to suffer from safety and security lapses, including assaults, than comparable facilities run by the BOP.¹⁵² At two facilities, all inmates were sent to a segregated confinement unit because of a lack of bed space rather than because of an individualized assessment of risk.¹⁵³ Relying in part on these findings, in August 2016 the Justice Department announced that it would reduce its reliance on private prisons.¹⁵⁴ That decision was rescinded early in the Trump administration.¹⁵⁵

In a particularly perverse twist, immigration imprisonment sometimes extends well beyond its authorization. Consider the plight of Davino Watson. Despite being a United States citizen, Watson was nonetheless held in an ICE prison for 1,273 days because ICE did not believe his citizenship claims.¹⁵⁶ Instead, the agency devoted considerable energy to removing him, including two trips to a federal district court and two decisions from the United States Court of Appeals for the Second Circuit.¹⁵⁷ ICE eventually "released Watson . . . into rural Alabama (where he knew nobody), without money, and without being told the reason for his release."¹⁵⁸ In immigration court, there is generally no right to appointed counsel.¹⁵⁹ Too poor to hire a

¹⁵⁰ See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1509-10 (2015) [hereinafter *Naturalizing Immigration Imprisonment*].

¹⁵¹ U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS 25 (2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁵² *Id.* at 14, 18.

¹⁵³ *Id.* at 29.

¹⁵⁴ Memorandum from Sally Q. Yates, Deputy Attorney Gen., to the Acting Dir., Fed. Bureau of Prisons, Reducing Our Use of Private Prisons (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download>.

¹⁵⁵ Memorandum from Jefferson B. Sessions III, Attorney Gen., to the Acting Dir., Fed., Bureau of Prisons, Rescission of Memorandum on Use of Private Prisons (Feb. 21, 2017), <http://www.politico.com/f/?id=0000015a-6d3f-d49b-a77a-7fbf234a0001>.

¹⁵⁶ See *Watson v. United States*, 865 F.3d 123, 136 (2d Cir. 2017) (Katzmann, C.J., concurring in part and dissenting in part).

¹⁵⁷ See *id.*; *Watson v. Holder*, 643 F.3d 367 (2d Cir. 2011); *Watson v. United States*, 179 F. Supp. 3d 251 (E.D.N.Y. 2016); *Watson v. United States*, 133 F. Supp. 3d 502 (E.D.N.Y. 2015).

¹⁵⁸ See *Watson*, 865 F.3d at 129.

¹⁵⁹ INA § 240(b)(4)(A), 8 U.S.C. § 1229a (2018); see Ingrid V. Eagly & Steven

lawyer, Watson proceeded on his own.¹⁶⁰ “Had an attorney been available to him at the outset, plaintiff probably promptly would have been declared a citizen and released almost immediately after he was arrested, if he were arrested at all,” district court Judge Jack Weinstein wrote in a February 2016 order.¹⁶¹

That would not be the end of Watson’s ordeal. Adding a special sting to the wound of his three-and-a-half-year imprisonment, the federal government resisted Watson’s attempt to recover civil damages under the Federal Tort Claims Act.¹⁶² Though the district court entered an \$82,500 judgment in Watson’s favor on a false imprisonment claim,¹⁶³ the government ultimately carried the day when the Second Circuit held that claim was time barred.¹⁶⁴

B. Harms to Institutions

For all the indignity and physical maltreatment that securitization and imprisonment policies inflict on migrants, crimmigration law’s adverse impact extends to a more intangible forum: the core governmental institutions that provide important law enforcement functions.

1. Local Governments

Crimmigration law’s foundation in criminal law norms means that it is perhaps not surprising that the local governments that operate most of the law enforcement agencies in the United States are integral components of contemporary policing of migration. Of the many federal governmental entities involved in crimmigration law enforcement, none works more closely with local agencies than ICE. With over one million officers patrolling every city and county in the

Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 3 (2015).

¹⁶⁰ See *Watson*, 179 F. Supp. 3d at 266-68.

¹⁶¹ *Id.* at 257.

¹⁶² See *Watson*, 133 F. Supp. 3d at 506; see also *Watson*, 865 F.3d at 126-27 (describing the federal government’s cross-appeal).

¹⁶³ Judgment in a Civil Action, *Watson v. United States*, No. CV14-6459 (JBW), 2016 WL 4733379 (E.D.N.Y. Mar. 1, 2016).

¹⁶⁴ See *Watson*, 865 F.3d at 130.

country,¹⁶⁵ police departments and sheriff's offices are crucial force multipliers for ICE's 20,000 employees.¹⁶⁶

Multiple ICE initiatives depend on the legwork local law enforcement agencies perform every day and, correspondingly, with the funding that states and localities provide. The 287(g) program, for example, authorizes local law enforcement officers — working pursuant to a contractual agreement between ICE and the local law enforcement agency — to investigate and enforce federal immigration laws.¹⁶⁷ In effect, the 287(g) agreement enlists local police and sheriff's deputies to act as ICE officers. A separate ICE initiative, the Secure Communities program, did not deputize local law enforcement officers and did not emanate from a specific implementing memorandum agreed to by the local agency and ICE.¹⁶⁸ Instead, Secure Communities depended on the investigative efforts of local law enforcement officers to flag potentially removable individuals.¹⁶⁹ When a police officer or sheriff's deputy submitted fingerprints to the centralized criminal history database that the FBI runs, DHS would in turn sift the fingerprints through their own databases.¹⁷⁰ Without the local law enforcement agency expending resources for on-the-ground investigations, arrests, and criminal history queries, DHS would not access the fingerprint data. After the program received intense criticism from advocates and elected officials, the Obama administration announced in November 2014 that it would replace it with an initiative called the Priority Enforcement Program ("PEP").¹⁷¹ Though PEP targeted a narrower range of migrants, like Secure Communities, it too relied on fingerprint data gathered by local law enforcement agencies.¹⁷² Soon after President Trump took office, he issued an executive order directing PEP's end and Secure Communities' return.¹⁷³ Further, ICE's persistent reliance on immigration detainers, requests that a local law enforcement agency continue confining a person already in its custody, also required local

¹⁶⁵ DUREN BANKS ET AL., U.S. DEP'T OF JUSTICE, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 2 tbl.1 (2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf>.

¹⁶⁶ U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2017, at 34, <https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf>.

¹⁶⁷ INA § 287(g), 8 U.S.C. § 1357 (2018).

¹⁶⁸ See Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1130-31 (2013).

¹⁶⁹ *Id.* at 1126-27.

¹⁷⁰ See *id.* at 1127-28.

¹⁷¹ Memorandum from Johnson, *supra* note 97, at 1, 3.

¹⁷² *Id.* at 2.

¹⁷³ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

cooperation.¹⁷⁴ For a time, ICE claimed local law enforcement agencies had no choice but to comply with detainers.¹⁷⁵ Eventually, they shifted to their current position to detainers as merely requests.¹⁷⁶ The detainer form used at the end of 2017 asks for notification of a pending release or continued custody for up to forty-eight hours.¹⁷⁷ Regardless the form, ICE's detainers always turn on the ability of local law enforcement agencies to perform core criminal policing activity. To be sure, 287(g), Secure Communities, PEP, and immigration detainers are not the only ICE initiatives that cannot function without local involvement. They are merely the most noteworthy.

By becoming involved in policing migration, local law enforcement agencies carry measurable costs. Most tangibly, local governments face financial liability for engaging in constitutionally dubious policing tactics at the behest of, or to further, the immigration policy goals of the federal government. For example, cities and counties whose police or sheriff's departments have complied with immigration detainers by confining people in violation of the Fourth Amendment have had judgments entered against them.¹⁷⁸ Those that assign their law enforcement agents to policing immigration law pursuant to a 287(g) agreement must cover related expenses themselves.¹⁷⁹ Even local law enforcement agencies that do not have any formal or voluntary involvement with ICE indirectly subsidize federal immigration priorities. The pavement-level investigative resources used by Secure Communities and other information-sharing initiatives relies on local expenditures.¹⁸⁰

¹⁷⁴ See *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1152 (Mass. 2017).

¹⁷⁵ See Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165 (2008).

¹⁷⁶ See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, at 156-57 (2013) [hereinafter *Rendition Resistance*].

¹⁷⁷ *Immigration Detainer — Notice of Action*, DEP'T OF HOMELAND SEC., <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> (last visited Sept. 11, 2018). The language regarding a request for notification resembles the language used from 1983 to 2011. See *Rendition Resistance*, *supra* note 176, at 155.

¹⁷⁸ See, e.g., Steve Mayes, *Woman at Center of Landmark Immigration Case Settles Suit That Changed Jail Holds in State, Nation*, OREGONIAN (May 18, 2015), https://www.oregonlive.com/clackamascounty/index.ssf/2015/05/woman_at_center_of_landmark_im.html (reporting that Clackamas County, Oregon, paid Maria Miranda-Olivares, who was confined in the county jail due to an immigration detainer, \$30,100 plus legal fees).

¹⁷⁹ INA § 287(g)(1), 8 U.S.C. § 1357 (2018).

¹⁸⁰ See CATHOLIC LEGAL IMMIGRATION NETWORK, INC., *THE COST OF STATE & LOCAL INVOLVEMENT IN IMMIGRATION ENFORCEMENT 3-4* (2014), https://cliniclegal.org/sites/default/files/cost_of_involvement_in_immigration_enforcement_version_5_mm.pdf

Local involvement in immigration policing also poses a reputational cost. At times, migrants' concerns about being tucked into the immigration detention and removal pipeline have resulted in fear of local governmental authorities. In the months following President Trump's election, for example, numerous cities with large migrant populations reported substantial decreases in the number of calls to police call centers.¹⁸¹ Similarly, Denver prosecutors were forced to drop criminal prosecutions because, too afraid of ICE to appear in court, victims refused to continue cooperating.¹⁸² Aware of the chilling effect that involvement with immigration policing can have, law enforcement leaders frequently distance themselves from ICE.¹⁸³ On occasion, local officials have even attempted, unsuccessfully, to convince ICE to stop representing itself as "police" to highlight the distinction between ICE and local officers.¹⁸⁴

2. Federal Government

Despite its role leading the development of crimmigration law, the federal government also suffers harms. With a reach into virtually every corner of the United States and separated into numerous entities, to speak of the federal government is, in at least one way, misleading. It is not a monolith. On the contrary, its constituent parts sometimes do not communicate. In other instances, they are

(explaining that the federal government does not reimburse localities for costs associated with Secure Communities).

¹⁸¹ See, e.g., *City of Chicago v. Sessions*, 888 F.3d 272, 280 (7th Cir. 2018) (describing Chicago's conclusion that "persons who are here unlawfully — or who have friends or family members here unlawfully — might avoid contacting local police to report crimes").

¹⁸² Mark Joseph Stern, *Bad for Undocumented Immigrants, A Gift to Domestic Abusers*, SLATE (Mar. 8, 2017, 1:24 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/denver_city_attorney_kristin_bronson_on_the_trump_immigration_crackdown.html.

¹⁸³ POLICE EXEC. RESEARCH FORUM, VOICES FROM ACROSS THE COUNTRY: LOCAL LAW ENFORCEMENT OFFICIALS DISCUSS THE CHALLENGES OF IMMIGRATION ENFORCEMENT 1 (2012), https://www.policeforum.org/assets/docs/Free_Online_Documents/Immigration/voices%20from%20across%20the%20country%20-%20local%20law%20enforcement%20officials%20discuss%20the%20challenges%20of%20immigration%20enforcement%202012.pdf (noting that "many local law enforcement agencies would prefer to stay out of the immigration debate" because a "public perception that local police are de facto immigration agents can erode the trust that police have worked to develop with . . . immigrant communities").

¹⁸⁴ See, e.g., Letter from Christopher S. Murphy et al., Members of Congress, to John F. Kelly, Sec'y of Homeland Sec. (Apr. 13, 2017), <https://www.murphy.senate.gov/download/ct-congressional-delegation-to-dhs-secretary-kelly> (asking, on behalf of the entire Connecticut congressional delegation, that ICE stop using "police").

constitutionally positioned as overseers of a coordinate branch's actions.

Statutory and policy decisions that have created crimmigration law have turned the federal courts into the site of its heavy-handed policing. Nationwide, federal judges spend inordinate amounts of time presiding over immigration crime prosecutions. But instead of passively participating as neutral arbiters of cases that executive branch officials like DHS personnel and prosecutors employed by United States Attorneys Offices choose to pursue, crimmigration law has thrust federal judges into the role of active collaborators. Operation Streamline asks judges to relax some of the criminal procedure norms that characterize federal criminal prosecutions leading, in the view of some of them, to a perversion of justice. One federal magistrate who sits in Brownsville, Texas, for example, described implementing Operation Streamline in his court as “a factory putting out a mold.”¹⁸⁵ Another explained, with evident alarm, that Operation Streamline “has caused us to conduct hearings in a way that we’ve never had to conduct them before, and in a way that other jurisdictions don’t have to.”¹⁸⁶ Nonetheless, she and her colleagues, “try very hard to conduct their hearings in a way that is understandable” to defendants with little formal education and minimal understanding of the United States’ legal system.¹⁸⁷ Facing a constitutional challenge to Operation Streamline, the Ninth Circuit declared that it is a “shortcut” that is nonetheless “reasonable.”¹⁸⁸

Defense attorneys are similarly affected. Lawyers who regularly represent clients in Operation Streamline proceedings have described themselves as “not really practicing law” or characterized proceedings as akin to a “cattle call.”¹⁸⁹ A federal judge who oversees many Operation Streamline cases said defense attorneys resemble “ushers on the conveyor belt to prison.”¹⁹⁰ Left with only minutes to advise clients about how best to proceed in the face of complicated legal doctrine, “serious questions” exist about whether attorneys are

¹⁸⁵ HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 35 (2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf.

¹⁸⁶ JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST., ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 12 (2010).

¹⁸⁷ *Id.*

¹⁸⁸ *United States v. Roblero-Solis*, 588 F.3d 692, 693 (9th Cir. 2009).

¹⁸⁹ See Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1351 n.405 (2010).

¹⁹⁰ HUMAN RIGHTS WATCH, *supra* note 185, at 38.

guiding defendants to “considered and intelligent” pleas as required by Rule 11 of the Federal Rules of Criminal Procedure.¹⁹¹ At times, for example, they are unlikely to have satisfied their duty to reasonably investigate whether a particular client charged with an immigration crime is in fact a United States citizen.¹⁹²

C. Harms to Law

Aside from crimmigration law’s impact on people and governmental institutions, it also damages the law’s role in contemporary social relations. Expansive procedural justice literature now exists identifying the important role that perceptions of bias play in altering the legitimacy of law.¹⁹³ One of procedural justice’s most significant tenets is that compliance with the law is improved when law enforcement officers and courts apply law fairly.¹⁹⁴ While much of the literature stems from traditional criminal policing or civil law acquiescence, Emily Ryo’s innovative scholarship focuses on immigration and immigration imprisonment’s effect on attitudes toward law.¹⁹⁵ Migrants engage in moral assessments of laws affecting their lives because they are, as Ryo succinctly explained, “moral agents.”¹⁹⁶ Laws that conflict with widespread perceptions of moral legitimacy are more likely to be disobeyed.¹⁹⁷ For example, a perception that immigration authorities engage in racially biased policing is tied to a greater probability of viewing violations of immigration law as permissible.¹⁹⁸ Stringent policing measures that have an actual or perceived racial skew could effectively decrease compliance with immigration law and increase doubts about the legitimacy of immigration law enforcement authorities.¹⁹⁹ Similarly, in

¹⁹¹ See Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 146-47 (2009) [hereinafter *Managing Migration*].

¹⁹² See GARCÍA HERNÁNDEZ, *supra* note 77, at 233.

¹⁹³ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 61 (2006); Margaret B. Kwoka, *Leaking and Legitimacy*, 48 UC DAVIS L. REV. 1387, 1426 (2015).

¹⁹⁴ See sources cited *supra* note 193.

¹⁹⁵ See, e.g., Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574, 575 (2013) [hereinafter *Deciding to Cross*]; Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 L. & SOC. INQUIRY 109, 109 (2006) [hereinafter *Through the Back Door*].

¹⁹⁶ *Deciding to Cross*, *supra* note 195.

¹⁹⁷ *Through the Back Door*, *supra* note 195, at 127.

¹⁹⁸ *Deciding to Cross*, *supra* note 195, at 590.

¹⁹⁹ *Id.* at 593.

her study of the legal attitudes of migrants held by ICE, Ryo found “that there is a significant relationship between immigrant detainees’ fair treatment perceptions and their perceived obligation to obey U.S. immigration authorities.”²⁰⁰ Imprisoned migrants are remarkably inclined to express a belief in the importance of obeying the law.²⁰¹ That starting point, however, shifts if they experience mistreatment. The more likely an individual detainee was to report having personally suffered or witnessed others suffering verbal insults, humiliation, or threats by detention center staff, the more likely they were to disagree that it is important to “obey the law even if it goes against what they think is right.”²⁰²

Abuses of the kind that undercut law’s legitimacy are emblematic of crimmigration law. In immigration courts, migrants are subjected to high-stakes, life-changing adjudications without the benefit of appointed counsel. Roughly two-thirds of migrants in removal proceedings go without an attorney; for detained migrants, the overwhelming majority do not have access to a lawyer.²⁰³ Separately, the penalty of forcible removal from the United States is itself viewed as punishment meted out for the transgression of violating immigration law, often for what are commonly perceived to be morally upstanding reasons: reuniting with relatives, pursuing economic opportunities, or seeking safety.²⁰⁴ On the criminal end of the spectrum, crimmigration law imposes criminal punishment for unlawfully entering the United States in violation of immigration law.²⁰⁵ This is anything but morally dubious to unauthorized migrants and others who sympathize with their situation. At times, crimmigration law’s emphasis on increasing criminal consequences of immigration law violations threatens to tread on well-established norms of international humanitarian law. According to the DHS Inspector General, for example, Border Patrol agents sometimes refer people who express credible fear of persecution, which is the first step in the process of requesting asylum, for criminal prosecution under

²⁰⁰ Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 L. & SOC. REV. 99, 102 (2017).

²⁰¹ *Id.* at 115.

²⁰² *Id.* at 111, 117.

²⁰³ Eagly & Shafer, *supra* note 159, at 7, 8.

²⁰⁴ See *Deciding to Cross*, *supra* note 195, at 594 (“To many would-be migrants, as well as U.S. citizens, there is a lack of moral credibility to a law perceived as preventing individuals from working to support their families.”).

²⁰⁵ See INA §§ 275, 276, 8 U.S.C. § 1325, 1326 (2018).

Operation Streamline.²⁰⁶ This subverts their ability to pursue humanitarian protection.²⁰⁷

The same can be said of crimmigration law enforcement measures. Initiatives such as 287(g) and Secure Communities turn local police officers, the caretakers of public safety, into the gatekeepers of the immigration detention and removal pipeline. ICE's reliance on local law enforcement officers equates fear of encountering the police with fear of becoming entangled with ICE. The sweeping scope of mandatory detention laws erase individualized treatment of migrants in favor of a dehumanized categorical assessment of risk.²⁰⁸ The congressional requirement that DHS pay for a minimum of 34,000 beds to be available nightly, described by critics as a "bed quota," created an air that the detention policy was motivated by profit for private prison corporations and financially invested local governments rather than for a more defensible justification.²⁰⁹

Meanwhile, immigration prisons are no strangers to physical violence, sexual abuse, and detainee deaths. Locking up mothers and children easily clashes with most notions of morally righteous practices.²¹⁰ More fundamentally, tacking a second round of imprisonment onto the incarceration meted out as criminal punishment, justified by describing immigration detention as civil, not criminal, confinement, rings of a willful naivety of immigration imprisonment's punitiveness.

Adding to these examples, ICE has recently shown itself unusually willing to search for potential immigration law violators in or near state courthouses. In El Paso, ICE arrested a woman as she left the courtroom where, moments earlier, she had requested a protective order from an abusive partner.²¹¹ A video recording plainly

²⁰⁶ STREAMLINE, *supra* note 120, at 16.

²⁰⁷ *Id.*

²⁰⁸ See INA § 236(c), 8 U.S.C. § 1226(c) (2018).

²⁰⁹ For a description of the bed quota, see *Naturalizing Immigration Imprisonment*, *supra* note 150, at 1504 n.354. For an article revealing criticisms by many advocates, see William Selway & Margaret Newkirk, *Congress's Illegal-Immigration Detention Quota Costs \$2 Billion a Year*, BLOOMBERG BUSINESSWEEK (Sept. 26, 2013, 8:16 PM), <https://www.bloomberg.com/news/articles/2013-09-26/congresss-illegal-immigration-detention-quota-costs-2-billion-a-year>.

²¹⁰ See Marilynne Robinson, *A Moral Crisis Grips the US Border*, GUARDIAN (June 3, 2018, 2:00 AM), <https://www.theguardian.com/commentisfree/2018/jun/03/us-immigration-ice-migrant-children-refugees>.

²¹¹ Marty Schladen, *ICE Detains Alleged Domestic Violence Victim*, EL PASO TIMES (Feb. 16, 2017, 5:16 PM), <https://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/>.

contradicted the arresting Border Patrol agent's claim that the woman was arrested on the sidewalk.²¹² Despite the DHS Inspector General substantiating allegations that the agent lied on a criminal complaint against the woman, federal prosecutors chose not to pursue criminal charges against him.²¹³ Elsewhere in Texas, ICE agents arrested a man inside an Austin courthouse.²¹⁴ A few months later, Juan Coronilla-Guerrero was found dead alongside a road.²¹⁵ In Colorado, where ICE made fifty-two courthouse arrests in a seven-month period, officers tackled a man in the courthouse doorway.²¹⁶ On a separate occasion, they arrested a man as he ended a conversation with his lawyer.²¹⁷ When asked if they had a warrant, the officers responded "yes."²¹⁸ When asked to see it, they responded "no."²¹⁹ On the other side of the country, a lawyer in Brooklyn asked plainclothes officers outside a courthouse if they were ICE agents, and they refused to answer.²²⁰ As a result of ICE's newfound willingness to use courthouses as arrest sites, the highest judicial officials of California, Washington, Oregon, New Jersey, and Connecticut asked the agency to stop.²²¹ Their pleas were not successful.²²² On the contrary, Attorney General Sessions and then-Secretary of Homeland Security John Kelly suggested that ICE had been pushed to focus on courthouses because some state and local governments had sought to disentangle themselves from important crimmigration policies — namely, by restricting local police

²¹² *Id.*

²¹³ See Ted Hesson, *Travel Ban Set to Expire*, POLITICO (Sept. 22, 2017, 10:00 AM), <http://www.politico.com/tipsheets/morning-shift/2017/09/22/travel-ban-set-to-expire-222432>.

²¹⁴ See Ryan Autullo & Taylor Goldenstein, *Immigrant Taken by ICE from Austin Courthouse Was Killed in Mexico*, AUSTIN AM.-STATESMAN (Sept. 19, 2017, 3:40 PM), <http://www.mystatesman.com/news/immigrant-taken-ice-from-austin-courthouse-was-killed-mexico/bfntga0HYA378iitM4VT8J/>.

²¹⁵ See *id.*

²¹⁶ See Chris Walker, *ICE Courthouse Busts Ten Times Higher Than City Knew*, WESTWORD (Sept. 19, 2017, 8:04 AM), <http://www.westword.com/news/immigration-agents-breaking-protocol-during-courthouse-arrests-in-denver-9499512>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Leon Neyfakh, *Secret Police*, SLATE (Sept. 15, 2017, 4:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/plainclothes_ice_agents_in_brooklyn_refused_to_identify_themselves.html.

²²¹ See Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J. F. 410, at 412-13 (2017).

²²² *Id.* at 413-14.

compliance with immigration detainers or limiting ICE's access to locally-run jails.²²³

Whatever the motivation and however legally sound it might be,²²⁴ courthouse arrests have a chilling effect on people concerned with ICE's authority. In Denver, for example, the city attorney announced that its office had concluded it could not move forward with four criminal domestic violence prosecutions because victims were too afraid of ICE to appear in court.²²⁵ Meanwhile, in New York a coalition of social service providers complained to the state court system's leaders that "[w]ith each new report of an immigration arrest [in or near a courthouse], mistrust of the court system grows and access to justice withers."²²⁶ ICE's actions understandably lead to fear of appearing for judicial matters. Yet without the participation of victims, witnesses, plaintiffs, and defendants, courts cannot perform their basic duty of taking evidence and applying the law. In effect, ICE's courthouse arrest practice has instilled fear in some migrants that makes it impossible for the courts to resolve legal disputes in which those migrants are involved. To be sure, this remains the exception rather than the norm. No data yet suggest that migrants en masse are steering clear of courthouses. But without a change of policy, more courthouse arrests are likely.²²⁷ And with more arrests, more fear can be expected.

In this toxic mix of substantive laws and enforcement tactics, the crimmigration legal regime loses its moral defensibility. "In creating mass incarceration," writes Jonathan Simon in his indictment of

²²³ Letter from John F. Kelley, Sec'y, Homeland Sec., and Jefferson B. Sessions III, Attorney Gen., U.S. Dep't of Justice, to Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court (Mar. 29, 2017), <http://apps.washingtonpost.com/g/documents/national/attorney-general-and-homeland-security-secretary-defend-immigration-arrests-at-courthouses/2394/>.

²²⁴ See César Cuauhtémoc García Hernández, *ICE's Courthouse Arrests Undercut Democracy*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/opinion/immigration-ice-courthouse-trump.html>. For an important doctrinal critique of courthouse arrests, see generally Lasch, *supra* note 221, at 411.

²²⁵ See Stern, *supra* note 182.

²²⁶ Letter from Immigrant Def. Project et al., to Janet DiFiore, Chief Judge, New York Court of Appeals, Lawrence K. Marks, Chief Administrative Judge, N.Y. State Unified Court Sys., <https://www.immigrantdefenseproject.org/wp-content/uploads/Letter-to-Judges-DiFiore-and-Marks-05042017.pdf>.

²²⁷ Press Release, Immigrant Def. Project, IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017 (Dec. 31, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf> (reporting a 1,200 percent increase in reports of ICE courthouse arrests in New York from 2016 to 2017).

California's enormous prison population, "California abandoned the soul of the prisoner and lost its own."²²⁸ Crimmigration law's single-minded pursuit of heavy-handed regulation of migration similarly ignores its adverse human impact. In favor of a securitized vision of migration, crimmigration law upends longstanding relationships between federal and local law enforcement agencies. It alters the work of federal courts and chips away at their pursuit of equal treatment under the law. It creates an obstacle to the ability of state courts to do their work. In doing so, crimmigration law ceases to promote the public good.

III. POST-CRIMMIGRATION

Crimmigration law's destructive path is well-refined. After three decades in which the substantive and procedural law constituting crimmigration has developed and during which various policies have been experimented with, it is now a firmly embedded feature of the United States legal system. But crimmigration law's quick rise reveals an alternative path forward. Just as it was born of a fear-driven vision of migrants, it can tumble onto itself if its foundational precepts are jeopardized. Subverting the hegemony of the myth of migrant criminality is a tall order, to be sure. Precisely for that reason, the moment is ripe for scholarly critiques of crimmigration's existence rather than simply its contours. Two strains of theoretical consideration have developed in immigration law and criminal law scholarship, membership theory and human dignity, that present a compelling, if incomplete, vision of a legal regime regarding migration that turns away from the securitizing fetish.²²⁹

A. Membership

From the earliest days of the development of a federal legal regime governing migration, United States immigration law has explicitly articulated a membership selection function.²³⁰ Through the panoply of rules governing who receives the federal government's permission to come into the United States and who does not, immigration law demarcates who is worthy of inclusion in the political community and,

²²⁸ JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* 85 (2014).

²²⁹ See *infra* Parts III.A, B.

²³⁰ See *The Crimmigration Crisis*, *supra* note 59, at 397.

conversely, who is not.²³¹ Those who are excluded from full membership, the “aliens” of formal immigration law statutes, are not erased from the discussion; they are instead imagined in an oppositional position to members of the political community.²³² For much of United States history, obtaining full, formal membership in the polity as a United States citizen required legal classification as a white person.²³³ Even now, though citizenship is no longer formally tied to racial categorization, obtaining full membership requires, as Devon Carbado writes, access to “whiteness as American identity.” That is, as having “the capacity, as a racial subject, to be a representative body . . . for the nation.”²³⁴

To be American is to be white; to be not white is to be not American.²³⁵ Take, for instance, United States citizens who are questioned about their citizenship status simply because they live near the Mexican border. Border Patrol agents patrolling borderland highways are permitted to stop individuals who they reasonably suspect of lacking authorization to be present in the United States. This is the case even if that suspicion is derived in part because of the suspect’s “Mexican appearance.”²³⁶ At permanent checkpoints along roadways, those same agents are allowed to stop everyone without having to resort to the Fourth Amendment’s individualized suspicion requirement, which is normally required of law-enforcement seizures.²³⁷ The Supreme Court concluded that this is a “limited” intrusion on borderland residents and anything else would be “impractical” for Border Patrol agents.²³⁸ Similarly, United States citizens are regularly detained by immigration authorities. Precise figures remain unavailable, but a detailed analysis by Jacqueline Stevens estimates that ICE locked up 20,000 citizens from 2003 to 2011.²³⁹ Consider Davino Watson, who was born in Jamaica but became a United States citizen as a child.²⁴⁰ Despite repeated claims,

²³¹ *Id.*

²³² See Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 J. GENDER, SOC. POL’Y & L. 101, 110 (2010).

²³³ See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006).

²³⁴ See Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 637-38 (2005).

²³⁵ See *id.*

²³⁶ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975).

²³⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

²³⁸ *Id.*

²³⁹ See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 630 (2011).

²⁴⁰ *Watson v. United States*, 179 F. Supp. 3d 251, 261 (E.D.N.Y. 2016).

ICE detained him for 1,273 days until finally conceding that he had been a citizen all along.²⁴¹ According to Stevens, ICE has “deported thousands more” United States citizens.²⁴²

Racial categorization is a famously difficult task.²⁴³ For this reason, law and law enforcement have often sought suitable proxies. At varying times, prostitution, poverty, and leftist radicalism have been equated with non-whiteness and non-Americanness.²⁴⁴ Since the late twentieth century, crimmigration law has used criminality as the central marker of desirability for membership determination.²⁴⁵ In doing so, it becomes the latest iteration of a centuries-long process of linking full membership in the political community with a racialized identity. Like immigration law, criminal law and criminal law enforcement tactics distinguish between people who are desirable and those who are not. In Juliet Stumpf’s words, these areas of law demarcate insiders and outsiders.²⁴⁶ “Both criminal law and immigration law are,” she wrote, “at their core, systems of inclusion

²⁴¹ See *Watson v. United States*, 865 F.3d 123, 136-37 (2d Cir. 2017) (Katzmann, C.J., concurring in part and dissenting in part).

²⁴² Stevens, *supra* note 239, at 630.

²⁴³ See Gary D. Sandefur et al., *Racial and Ethnic Identification, Official Classifications, and Health Disparities*, in *CRITICAL PERSPECTIVES ON RACIAL AND ETHNIC DIFFERENCES IN HEALTH IN LATE LIFE* 25, 25 (Norman B. Anderson et al. eds., 2004) (“[R]acial and ethnic identities are often contested within and across groups.”).

²⁴⁴ See CHUCK COLLINS ET AL., *ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY & INSECURITY* 43 (2005) (“In the thirty years following World War II, race was a principal barrier to economic advancement for people of color.”); TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920*, at 196 (1992) (explaining in that in turn-of-the-twentieth century New York City, moral reformers tied prostitution to “the environment of the immigrant and working-class neighborhood”); TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA* 56 (2003) (disparagingly claiming that “[i]n America, the anarchists took advantage of the open-door policy and arrived in droves with the intention of creating havoc”); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE* 6 (2005) (describing early-twentieth century claims that migrants racialized as non-white were an “uneducated proletariat” being liable to be exploited in a manner “that little ‘differs from the slave trade’”).

²⁴⁵ See *The Crimmigration Crisis*, *supra* note 59, at 382 (noting that crime-based removal expanded “[s]ince the late 1980s”); *id.* at 384 (noting that criminal prosecutions of immigration activity increased starting in the mid-1980s); *id.* at 385 (describing the role that the attacks of September 11, 2001 had on the development of crimmigration law); *id.* at 388 (noting that appropriations increases starting in the mid-1980s turned DHS immigration law enforcement entities into “the largest armed federal law enforcement body”).

²⁴⁶ See *id.* at 380.

and exclusion.”²⁴⁷ In ways that are sometimes different and sometimes not, both “marshal the sovereign power of the state to punish and to express societal condemnation for the individual offender.”²⁴⁸ Criminal law and immigration law, like their crimmigration law offspring, include and exclude, reward and punish, sanctify and condemn, always through a racial prism.

Instead of a racialized membership theory, Carolina Núñez suggests putting aside formal assessments of inclusion and exclusion in favor of an alternative rooted in individualized assessments of ties to the United States.²⁴⁹ Analyzing a pair of United States Supreme Court decisions, *United States v. Verdugo-Urquidez*,²⁵⁰ which focuses on the Fourth Amendment’s territorial reach, and *Boumediene v. Bush*,²⁵¹ which turns on the territorial outer boundary of federal courts’ power to grant writs of habeas corpus, Núñez concludes that the Court’s reasoning in these cases “call[s] for a reevaluation of the meaning of membership that cuts through antiquated shortcuts and proxies to arrive at more accurate measures of belonging.”²⁵²

In *Verdugo*, the Court addressed a situation in which a person who was not a United States citizen was forcibly arrested outside the United States and brought to the United States at the behest of United States law enforcement officials.²⁵³ Turning to the Fourth Amendment to exclude evidence of criminal activity, *Verdugo* argued that the constitutional limitation against unreasonable searches and seizures operates in a territorial binary.²⁵⁴ If the aggrieved individual is inside the territorial United States when the challenged governmental conduct occurs, the Fourth Amendment applies, he claimed.²⁵⁵ A plurality of the Court disagreed. Even if they are inside the United States, people who are not citizens of this country “receive constitutional protections when they have . . . developed substantial connections with” it.²⁵⁶ While the Court’s holding was limited to the

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 379.

²⁴⁹ See D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 137 (2011).

²⁵⁰ 494 U.S. 259 (1990).

²⁵¹ 553 U.S. 723 (2008).

²⁵² See Núñez, *supra* note 249.

²⁵³ See *Verdugo-Urquidez*, 494 U.S. at 262.

²⁵⁴ Brief for Respondent at 18, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (No. 88-1353), 1989 WL 1127207, at *18.

²⁵⁵ *Id.* at *20.

²⁵⁶ *Verdugo-Urquidez*, 494 U.S. at 271.

Fourth Amendment, in articulating its “substantial connections” metric, it relied on decisions interpreting various clauses of the First, Fifth, Sixth and Fourteenth Amendments.²⁵⁷

Eighteen years later, *Boumediene* presented the Court with somewhat the inverse dilemma: does federal law reach beyond the territorial United States when the aggrieved individuals are themselves outside the United States?²⁵⁸ Confined at the United States Naval Station at Guantanamo Bay, Cuba, the plaintiffs sought to tap the constitutional privilege of habeas corpus.²⁵⁹ A majority of the Court concluded that they were entitled to do so.²⁶⁰ To Núñez, “*Verdugo* is a paradigmatic example of . . . a ‘post-territorial’ approach to membership that distributes rights according to more fundamental indicators of membership, including an individual’s ties to the surrounding community and her sense of obligation to the United States.”²⁶¹ In contrast, she adds, “*Boumediene* . . . adopted a more functional approach that examined the actual, de facto power that the United States exerts over the detainees. The detainees, the Court explained, answered exclusively to U.S. law”²⁶²

More recently, the Court had occasion to revisit *Verdugo* and *Boumediene* in a case involving deadly cross-border shootings by federal law enforcement officers.²⁶³ In 2010, Border Patrol agent Jesus Mesa, Jr., shot and killed fifteen-year-old Sergio Adrián Hernández Güereca.²⁶⁴ At the time, Mesa was in the United States as he patrolled the international boundary between Ciudad Juárez and El Paso.²⁶⁵ Sergio was a mere sixty feet south in México.²⁶⁶ Video captured by a passerby caught the gruesome scene when Mesa unloaded a series of shots and almost immediately Sergio’s body fell limp onto the concrete culvert that joins — or, as the Court prefers, “separates” — this sprawling border community.²⁶⁷ Sergio’s parents sued, hoping to

²⁵⁷ See *id.*

²⁵⁸ *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

²⁵⁹ See *id.*

²⁶⁰ See *Boumediene*, 553 U.S. at 771.

²⁶¹ Núñez, *supra* note 249, at 92.

²⁶² See *id.* at 121.

²⁶³ See *Hernandez v. Mesa*, 137 S. Ct. 2003, 2004-05 (2017).

²⁶⁴ *Id.* at 2005.

²⁶⁵ *Id.*

²⁶⁶ See *id.*

²⁶⁷ See *id.* at 2004-05; see also Brief for Petitioners at 3, *Hernández v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118), 2016 WL 7156393, at *3 (describing the distance between Mesa and Sergio).

inflict civil liability on Mesa.²⁶⁸ Their lawyers squarely asked the Supreme Court to determine how *Verdugo* and *Boumediene* apply to this deadly example of border exceptionalism.²⁶⁹ They asked the Court to “avoid[] creating a legal no-man’s land in which federal agents can kill innocent civilians with impunity.”²⁷⁰ The Court turned down the invitation. Instead of clarifying whether *Verdugo* or *Boumediene* control the Constitution’s reach, the Court remanded the case for lower courts to decide if Sergio’s parents even had a private right of action that entitled them to sue the federal officer.²⁷¹

In a different way, activism by unauthorized migrants brought to the United States as children also questions membership theory. Dreamers, as they are frequently called, claim a close association with communities in the United States even while no one disputes that they lack the mark of formal acceptance: lawful immigration status. In the words of an article by one prominent activist, “Dreamers are Americans Too.”²⁷² They are not alone. Almost ninety percent of respondents in one poll said these young people should be allowed to remain in the United States, reflecting agreement that Dreamers possess some collectively-recognized membership ties.²⁷³ Measured through the *Verdugo-Boumediene* doctrinal tension, Dreamers would seem to benefit.

Others might not fare so well. People who flee to the United States in search of physical safety, for example, sometimes do so without relatives, friends, or acquaintances preceding them. Compared to long-term residents of the United States, whether people with longstanding legal permission to live here or young people who have never had the federal government’s formal authorization, new arrivals seeking asylum remain vulnerable under membership theories articulated by *Verdugo*, *Boumediene*, or scholars.

Whatever courts choose to do about the proper interaction between *Verdugo* and *Boumediene*, the reasoning in both undoubtedly casts doubt on traditional measures of membership.²⁷⁴ Meanwhile, the

²⁶⁸ See *Mesa*, 137 S. Ct. at 2004-05.

²⁶⁹ Brief for Petitioners, *supra* note 267, at *i.

²⁷⁰ *Id.* at *1.

²⁷¹ See *Mesa*, 137 S. Ct. at 2007-08.

²⁷² Lorella Praeli, *Dreamers Are Americans Too*, TIME (Feb. 1, 2018), <http://time.com/5129642/donad-trump-daca-dreamers-congress/>.

²⁷³ Jennifer De Pinto et al., *Most Americans Support DACA, But Oppose Border Wall*, CBS NEWS (Jan. 18, 2018, 12:37 PM), <https://www.cbsnews.com/news/most-americans-support-daca-but-oppose-border-wall-cbs-news-poll/>.

²⁷⁴ See Núñez, *supra* note 249, at 134.

different outcomes for sympathetic Dreamers and equally sympathetic asylum-seekers illustrate this debate's importance. In this uncertainty there is room to develop an alternative membership theory upon which to build a post-crimmigration legal regime.

B. Dignity

Any alternative theoretical frame that might begin to unravel crimmigration's deep hold on contemporary law and policy must center on a clear-eyed moral vision of migrants and migration.²⁷⁵ An alternative theory must grapple with the human fallibility of migrants as it must with the remarkable ability of humans to see themselves as exceptional. This mix of imperfect migrants and delusional citizens means that an alternative theoretical approach to crimmigration must put at the forefront the politicization of morality.

Without contesting the particular way in which morality has been politicized, any alternative theory will be susceptible to subversion through piecemeal attacks and disconnected appeasement. No matter how well-meaning, critiques that are not inextricably paired with an alternative morality risk condoning violence in the name of reform.²⁷⁶ Consider, for example, criticisms lodged at the procedures by which capital punishment is imposed. Whether focused on the role of judges in meting out death or the racially imbalanced use of such sentences, these are fundamentally questions about legal process rather than the "violent racist ethos at the core of capital punishment."²⁷⁷

Crimmigration is likewise filled with examples of troubling laws and policies that are frequently critiqued from administrative efficiency, cost, or other prudential considerations. Some scholars have attacked civil immigration detention for its shoddy treatment of migrants' health.²⁷⁸ Others have criticized the use of criminal law to regulate migration.²⁷⁹ Many have inveighed against some aspect of the broad array of types of crimes that can now result in removal.²⁸⁰ Indeed, in

²⁷⁵ See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 300 (2017) [hereinafter *Abolishing Immigration Prisons*].

²⁷⁶ See *id.* at 266-74.

²⁷⁷ See *id.* at 268-69.

²⁷⁸ See, e.g., Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167, 169 (2016).

²⁷⁹ See *Managing Migration*, *supra* note 191, at 137-40; Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 68 (2012); Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 644 (2015).

²⁸⁰ See *The Crimmigration Crisis*, *supra* note 59, at 382-84.

suggesting paths to “undoing” the “criminal-immigration convergence,” Allegra McLeod posits a need to “reorient[] the conceptual framework that shapes U.S. immigration law and politics.”²⁸¹ McLeod imagines an alternative in which law and policy aim to limit migration. Instead of a legal regime centered on crimmigration, McLeod proposes “creating incentives to return . . . and working to better and more equitably manage the complicated structural factors that lead individuals to permanently re-settle”²⁸² McLeod does not grapple with the growing body of literature indicating that economic development in the form of “investments . . . in infrastructure for health, education, and investment,” one of her proposed paths away from crimmigration, frequently expands migration; it is, in other words, a poor means of “creating incentives to return for immigrants in primary receiving states.”²⁸³ McLeod’s focus on curtailing migration suggests that people who continue coming outside her proposed strictures would be acceptable targets of demonizing rhetoric and heavy-handed enforcement. Likewise, Juliet Stumpf’s proposal to incorporate proportionality into governmental responses to immigration law violations problematizes forcible removal from the United States but only when it exceeds individualized assessments of culpability.²⁸⁴ Her analysis minimizes structural factors affecting migration and prioritizes “value to the nation” as measured by family ties and potential labor market participation.²⁸⁵ Despite the obviously substantial shift that Stumpf’s proposal demands, like the existing crimmigration-centered legal regime, her account continues to subsume the migrant to the sovereign. Following more than a century’s worth of migrant regulation,²⁸⁶ including the development and growth of a crimmigration frame,²⁸⁷ Stumpf’s proposal imagines the migrant as an object of sovereign prerogative rather than an autonomous agent with an innate worth that cannot justifiably be stripped.²⁸⁸

²⁸¹ Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 178 (2012).

²⁸² *Id.* at 176-77.

²⁸³ *See id.* at 175-76.

²⁸⁴ *See Fitting Punishment*, *supra* note 62, at 1729-31.

²⁸⁵ *Id.* at 1731.

²⁸⁶ *See* Page Act of 1875, 43d Cong., 2d Sess., ch. 141 (1875).

²⁸⁷ *See The Crimmigration Crisis*, *supra* note 59, at 382.

²⁸⁸ *See Fitting Punishment*, *supra* note 62, at 1731.

There is an attractive quality to privileging the sovereign's role because nation-states, after all, remain primary actors in structuring human mobility. It is the existence of the nation-state, specifically the recognition and policing of the state's outer boundary, that creates the phenomenon of modern migration. But privileging the nation-state also comes with the possibility, indeed, the expectation, that states will use their advantage to imprison, banish, and separate people who lack the appropriate markers of membership, bridging the gap between membership theory and dignity. Any semblance of inherent dignity could be subsumed by a juridical mandate that dignity inhere only at the direction of the state and to the extent that the state benefits. As Hannah Arendt wrote of the twentieth century Europe's aliens, this raises all the hallmarks of standing on the precipice of losing the "right to have rights."²⁸⁹

These critiques add enormous value to the collective understanding of crimmigration law and policy. For all their merit, however, they do not threaten crimmigration's hold on the legal and policy consciousness. On the contrary, by normalizing a legal framework that categorizes some migrants as desirable and others as undesirable, many crimmigration law and policy critiques inadvertently reify it. In her analysis of early DREAM Act advocacy, for example, Elizabeth Keyes warns of the dangers of a worthiness rationale as the normative underpinning for law reform.²⁹⁰ She concludes that "an overemphasis on worthiness has the danger of using the inspiring efforts of this exceptional movement to justify exclusion, and even vilification, of those who fall short of the ideal."²⁹¹

Instead of continuing to craft critiques of the evolutionary pathway of an inherently unsettled field of law, building a post-crimmigration legal infrastructure requires doing more than finding fault in the laws and policies that constitute crimmigration. Law and policy regulating migrants can successfully leave behind its crimmigration ancestry only if scholars acknowledge that today's law and policy are neither happenstance nor inevitable. Nor are they symbols of a dysfunctional regime. Rather, crimmigration law and policy's existence and specific manifestations are "design features" born of peculiar political contestations.²⁹² Some design features are more jagged than others, but they all prop a legal and policy regime with a racist past and

²⁸⁹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 294 (Harcourt ed., 1976).

²⁹⁰ Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 *NEV. L.J.* 101, 155 (2013).

²⁹¹ *Id.*

²⁹² See *Abolishing Immigration Prisons*, *supra* note 275, at 274.

racializing present that treats migrants as dangerous invaders — aliens — in our midst.²⁹³

Positioning the inherent dignity of migrants as humans at the center of immigration law and policy discussions could move membership theory toward a more humane, post-crimmigration alternative. As used here, dignity simply captures the proposition that, no matter a person's accolades or transgressions, we remain complicated, imperfect, and sometimes self-contradictory social beings. People's worth does not come from their accomplishments. Instead, their worth comes from their status as people.²⁹⁴ "What of the idea that immigrants can be valuable, worthy members of society, who have sometimes considerable flaws — but whose flaws do not make them unworthy of membership in our society?" asks Elizabeth Keyes.²⁹⁵ Respecting one's dignity does not provide immunity from rapprochement. It is simply a prohibition against treatment that strips people of their ability to meet "life's necessities."²⁹⁶

Immigration crime does not exist. Rather, it is made by legislative decisions to regulate cross-border movement through the criminal justice system and policy decisions to devote substantial personnel and financial resources to ferreting out some migrants who enter the United States without the federal government's permission. Tellingly, migrants have limited power to alter substantive laws criminalizing migration-related activity or policies directing investigative and prosecutorial resources towards suspected violations of immigration law. Recognizing the structural components of existing migratory patterns, Bill Ong Hing recommends inverting standard metrics to augment respect for the humans at migration's core.²⁹⁷ Instead of viewing migrants as the only actors in the migration process who bear responsibility, he proposes a structural perspective through which the United States bears "a responsibility to ensure that [migrants] receive the assistance that they need to find their place here. If they or their

²⁹³ See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 272 (1997).

²⁹⁴ See *Furman v. Georgia*, 408 U.S. 238, 273 (1972).

²⁹⁵ Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 221-22 (2012).

²⁹⁶ I borrow the phrase "life's necessities" from *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

²⁹⁷ See Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1899 (2007).

children cannot succeed at that, then we have failed, and we must be held accountable.”²⁹⁸

As a doctrinal matter, dignity is not foreign to United States law. Indeed, dignity is an important component of constitutional law regulating criminal punishments.²⁹⁹ In that vein, the concept forms the normative foundation for a series of judicial decisions over conditions of confinement in California state prisons. Addressing the troubling conditions in which California forced many of its prisoners to live, the United States Supreme Court took a strong stance in support of respecting the value of prisoners’ lives, no matter the actions that led to their confinement.³⁰⁰ “Prisoners,” the Court announced, “retain the essence of human dignity inherent in all persons.”³⁰¹ Importantly, the Court came to this conclusion without ever mentioning the crimes committed by any member of the plaintiff class. Taking a more strident approach, the three-judge district court decision that precipitated Supreme Court intervention declared that California is constitutionally obligated to meet prisoners’ “life’s necessities.”³⁰²

Both decisions build on a larger body of law interpreting the Eighth Amendment’s Cruel and Unusual Punishments Clause.³⁰³ In a set of foundational cases,³⁰⁴ the Supreme Court has tied dignity to the Clause. In finding the capital punishment regime from the early 1970s unconstitutional, the Court explained, “[a] punishment is ‘cruel and unusual’ . . . if it does not comport with human dignity.”³⁰⁵ Infliction of severe pain is not needed to violate human dignity. Rather, governmental action is “degrading to the dignity of human beings” if it “treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded.”³⁰⁶

Fourteen years earlier, in *Trop v. Dulles*, a 1958 decision striking denationalization as punishment for a crime, the Court wrote that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”³⁰⁷ The Court noted that this “firmly established” principle comes directly from the English Declaration of

²⁹⁸ *Id.*

²⁹⁹ See *Brown v. Plata*, 131 S. Ct. 1910, 1925-28 (2011); *Furman*, 408 U.S. at 270.

³⁰⁰ See *Plata*, 131 S. Ct. at 1928.

³⁰¹ *Id.*

³⁰² *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 887 (N.D. Cal. 2009).

³⁰³ U.S. CONST. amend. VIII.

³⁰⁴ *Furman*, 408 U.S. at 270 (1972); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

³⁰⁵ *Furman*, 408 U.S. at 270.

³⁰⁶ *Id.* at 272-73.

³⁰⁷ *Trop*, 356 U.S. at 100.

Rights of 1688 but arises from the still older thirteenth century Magna Carta.³⁰⁸ Perhaps because of its ancient lineage, the Cruel and Unusual Punishments Clause that today ingrains the value of dignity into United States constitutional law “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁰⁹ Measured against that standard, denationalization of a person who obtained citizenship at birth violates innate human dignity because it represents “the total destruction of the individual’s status in the organized society.”³¹⁰

On the other end of the crimmigration spectrum, dignity is also an important part of immigration law, though largely outside the United States. In their assessment of the core crimmigration tactic of confining migrants, Stephanie Silverman and Amy Nethery note that various tenets of international law attempt to constrain governmental use of detention from who can be detained to how they must be cared for.³¹¹ These mechanisms are how “international law endeavors to ensure that states respect the human dignity and basic and procedural rights of immigration detainees.”³¹²

Though Silverman and Nethery do not mention it, the Supreme Court of Papua New Guinea deployed dignity as a motivating concern in a monumental decision about immigration imprisonment.³¹³ Faced with a legal challenge to the Manus Island Processing Centre (“MIPC”), an immigration prison in northern Papua New Guinea, the court grappled with this core crimmigration tactic’s effect on the “dignity of mankind.”³¹⁴ Under a bilateral agreement between Australia and Papua New Guinea:

[M]en, women and children [are brought] by an Australian Federal Police escort and . . . held at the MIPC against their will. The MIPC is enclosed with razor wire and manned by

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 101.

³¹⁰ *Id.*

³¹¹ See Stephanie J. Silverman & Amy Nethery, *Understanding Immigration Detention and Its Human Impact*, in *IMMIGRATION DETENTION: THE MIGRATION OF A POLICY AND ITS HUMAN IMPACT* 1, 9 (Amy Nethery & Stephanie J. Silverman eds., 2015).

³¹² *Id.*

³¹³ See *Namah v. Pato*, SCA. No. 84 of 2013, SC1497, ¶ 54 (Papua N.G. Sup. Ct. Apr. 26, 2016).

³¹⁴ *Id.*

security officers to prevent the asylum seekers from leaving the centre. All costs are paid by the Australian government.³¹⁵

Under these circumstances, one judge in the majority concluded that the law authorizing confinement at the MIPC violated the constitutional requirement that all laws must be “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.”³¹⁶ Another added that the protection of human dignity is a right that cannot be qualified.³¹⁷ The judge concluded that being treated like a prisoner without receiving the benefit of criminal procedures, “damages the rights and dignity of the detainees.”³¹⁸

Applying a dignity principle to crimmigration law and policy could begin the long road toward displacing the securitized lens that currently dominates legal regulation of migrants and migration. In his study of the California prison conditions litigation, Jonathan Simon introduced the “dignity cascade,” a concept of enormous relevance to a legal framework of migration devoid of crimmigration. In Simon’s formulation, a dignity cascade consists of slow, incremental shifts in perception among the public and judges that eventually makes room to acknowledge the inherent dignity of human beings. “A dignity cascade can lead long-rigid legal meanings to become fluid and long-tolerated practices to be recognized as unlawful.”³¹⁹ Without question, Simon’s dignity cascade entails a radical transition. He does not shy away from that. On the contrary, he explains that a dignity cascade is possible only in “moments when a society recognizes that it has profoundly violated human dignity and in response expands its very understanding of what humanity includes and requires of the law.”³²⁰ Formulated as such, a dignity cascade involves two instances of radical change: once when public consciousness takes a profound embrace of

³¹⁵ *Id.* ¶ 20.

³¹⁶ *Id.* ¶¶ 54, 65.

³¹⁷ *Id.* ¶ 98.

³¹⁸ *Id.* ¶ 118. In October 2017, the Papua New Guinea officials attempted to close the MIPC, requiring remaining detainees to relocate to a nearby city. Australia refused to accept any detainees. Approximately 600 detainees refused to leave MIPC due to fears of violence resulting from an earlier attack by locals on the MIPC. See Helen Davidson, *Manus Navy Will Remove Detainees by Force if Necessary, Base Commander Says*, GUARDIAN (U.K.) (Nov. 1, 2017, 11:09 PM), <https://www.theguardian.com/australia-news/2017/nov/02/manus-navy-will-remove-detainees-by-force-if-necessary-base-commander-says>; Hilary Whiteman, *Court Rejects Call to Reinstate Food, Water to Manus Island Refugees*, CNN (Nov. 7, 2017, 8:24 AM), <http://edition.cnn.com/2017/11/06/asia/manus-island-png-court-ruling/index.html>.

³¹⁹ SIMON, *supra* note 228, at 137.

³²⁰ *Id.*

human dignity as its moral center, and secondly, when the polity becomes willing to let its newfound embrace of human dignity drive law and policy.³²¹

Approaching migration law and policy through the lens of an inviolate human dignity challenges core features of the crimmigration regime. It would, for instance, reject a recent trend of using children to identify and locate parents who are in the United States in violation of immigration law.³²² Most egregiously, news reports suggest that ICE is using successful reunification of children, who recently arrived without authorization, to identify parents and other adult relatives to charge with federal immigration crimes, including human smuggling.³²³ A dignity-imbued morality of migration would review this practice for its potential to “degrad[e] the dignity of human beings.”³²⁴ United States law is far from alone in treating the family unit as a fundamental feature of human existence. Prosecutorial choices to target parents for attempting to reunite with their children do not simply pose a hindrance to a basic component of human life: the desire to enjoy the company of one’s offspring and see to their upbringing. Rather, using information gleaned during one government agency’s humanitarian mission as the basis for another governmental arm to criminally prosecute parents directly clashes with the imperative to recognize that migrant parents are “members of the human race.”³²⁵ What does it mean to be human if one’s offspring can be turned into bait by prosecution-bent government agents? By exploiting the wholesome parental desire to reunite with their children, the policy of criminally prosecuting parents treats them as if they lack emotion and normal human desires. In effect, they are treated “as objects to be toyed with and discarded.”³²⁶

Similarly, crimmigration law treats migrants as atomized actors who are penalized for possessing traits that characterize ordinary people. Statutes imposing civil immigration detention and removal on people

³²¹ See *id.*

³²² See Uriel J. Garcia, *ICE Arrests Young Immigrant’s Sponsor Months After Feds Assured Him He’d Be Safe*, NEW MEXICAN (Sept. 9, 2017), http://santafenewmexican.com/news/local_news/ice-arrests-young-immigrant-s-sponsor-months-after-feds-assured/article_428366f5-6d03-552c-a277-93b83d3005e2.html; Ron Nixon & Caitlin Dickerson, *Immigration Officials Taking New Steps to Discourage Smuggling of Children*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/us/politics/parents-illegal-immigrants-human-smuggling.html>.

³²³ See Nixon & Dickerson, *supra* note 322; Garcia, *supra* note 322.

³²⁴ See *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972).

³²⁵ *Id.*

³²⁶ *Id.*

who are convicted of a sweepingly broad array of crimes turns on a moral assessment that the marker of conviction is properly stigmatized.³²⁷ Embracing a conviction as a marker of undesirability presumes that people without a conviction are morally superior. Attaching moral worth to the outcome of criminal justice processes, however, requires accepting or ignoring the deep-seated racial and economic biases of criminal policing and substantive criminal law.³²⁸ Piling immigration detention and removal on top of indefensible punitive practices does not make it any more defensible.

Furthermore, the long list of categories of crimes that Congress has deemed worthy of immigration detention and removal, with few escape valves,³²⁹ ignores the reality that criminality is a feature of life in the United States in the late twentieth and early twenty-first centuries. State courts oversee approximately forty-five million new criminal prosecutions and their federal counterparts see another 100,000 annually.³³⁰ Defined so broadly, criminality has become commonplace in the United States. Despite the large number of criminal prosecutions filed yearly, immigration law demands that migrants avoid ordinariness to receive the federal government's authorization to remain in the United States. Instead, they are required to be extraordinary. To demand that migrants remain free of criminal blemish when so many others do not is to treat migrants as if they are possessed of alien superpowers. It is to treat them as "nonhumans."³³¹ Arendt's insight that Jews of pre-war Europe were treated "as a special clique" precisely because they were subject "to special discrimination and to special favor," helps illustrate the precarity of expecting migrants to be better than citizens.³³² Rather than require migrant exceptionalism, we should expect that migrants will err as ordinary, fallible human beings. When they do err, a dignity principle would

³²⁷ See INA § 236(c), 8 U.S.C. § 1226(c) (2018).

³²⁸ For a detailed account of racial bias in criminal policing, see MICHELLE ALEXANDER, *THE NEW JIM CROW* 1-19 (2010). For an account of race and class bias, see DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 1-13 (1999).

³²⁹ See *Padilla v. Kentucky*, 559 U.S. 356, 363-64 (2010).

³³⁰ See ADMIN. OFFICE, *supra* note 83, at tbl.M-4 (reporting that federal magistrates heard 29,438 guilty plea proceedings); COURT STATISTICS PROJECT, *CRIMINAL CASE UNIT OF COUNT USED BY STATE TRIAL COURTS, 2010* (2012) [http://www.courtstatistics.org/~media/Microsites/Files/CSP/SCCS/2010/Criminal-Unit_of_Count.ashx](http://www.courtstatistics.org/~/media/Microsites/Files/CSP/SCCS/2010/Criminal-Unit_of_Count.ashx) (using data provided to conclude that approximately forty-five million new cases were filed in state courts in 2010).

³³¹ See *Furman*, 408 U.S. at 272-73.

³³² See ARENDT, *supra* note 289, at 55.

enmesh a redemptive quality into law and policy. It would eschew crimmigration's willingness to mark migrants as dangerous undesirables upon involvement with wide swaths of the criminal justice system. As Hing suggests, centering migrants' inherent dignity forcefully requires incorporating migrants into productive social activity even when they fall short of being their best selves.³³³ "As they become part of our neighborhoods and communities, some may make mistakes, but we do well to remember that supporting rehabilitation, giving a second chance, and providing ways for individuals to mature are essential elements of a civil society."³³⁴

A dignity-driven morality of migration similarly subverts the immigration imprisonment practice. Focusing on mandatory detention,³³⁵ one of the most egregious components of the law authorizing civil immigration detention, dignity requires an appreciation of the mandatory detention statute's troubling features. Rather than gauge whether any given individual presents a flight risk or public safety threat, the mandatory detention statutory provision demands a categorical assessment of risk divorced from an individual's peculiarities.³³⁶ Neither an ICE officer nor immigration judge can review the equities and transgressions in a person's past and assess the need to deprive them of their liberty. Instead, mandatory detention marks people as threatening based on categorical determinations adopted by Congress.³³⁷ Even individuals who are not formally subject to the INA's mandatory detention statute are effectively subjected to a practice of detaining everyone who comes into ICE's custody. Since 2013, ICE has used a secret risk-classification assessment algorithm to guide its officers' decisions about who to keep confined during removal proceedings and who to release.³³⁸ External audits of the agency's use of the algorithm have found that it recommends detention of almost everyone.³³⁹ Jonathan Simon argues that stripping people of their freedom to move about without any concern for their

³³³ Hing, *supra* note 297, at 1894.

³³⁴ *Id.*

³³⁵ INA § 236(c), 8 U.S.C. § 1226(c) (2018).

³³⁶ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 844-46 (2018) (upholding prolonged detention of broad categories of migrants without an opportunity for individualized review before an immigration judge).

³³⁷ See INA § 236(c), 8 U.S.C. § 1226(c) (2018) (requiring mandatory detention of people who have committed or been convicted of a large number of crimes or categories of crimes).

³³⁸ See *Noferi & Koulisch*, *supra* note 146, at 48.

³³⁹ *Id.* at 50.

individual circumstances “denies their humanity.”³⁴⁰ “A prison system organized on that basis cannot preserve the human dignity of its prisoners.”³⁴¹

Or perhaps it can. Simon’s study of California prison litigation represents an important milestone in judicial recognition of the value of prisoners’ lives. People cannot be confined under what are among the most egregious circumstances known to exist in recent decades, but no one doubts that they can be confined under extreme conditions. California’s prisons — where more than 130,000 people remain locked up six years after the Supreme Court recognized their inherent dignity³⁴² — continue operating over the capacity for which they were designed.³⁴³ Strikingly, this appears to be in line with the judicial limitations that Simon analyzes; the courts require prison officials to stay within 137.5 percent of capacity. Seen through the prism of hindsight, human dignity is revealed as a malleable concept that is not only capable of permitting large-scale incarceration; it embraces the unprecedented practice of contemporary imprisonment in the United States. Worse, the judicial construction of human dignity risks reifying what Loic Wacquant refers to as “hyperincarceration” — the confinement of “lower-class African American men trapped in the crumbling ghetto, while leaving the rest of society . . . practically untouched.”³⁴⁴

C. Limits

The stagnation of California’s decarceration process illustrates the limits of judicially palatable theories. Membership theory and the evolving recognition of the importance of human dignity are powerful tools, but neither extant theory nor legal doctrine will end crimmigration’s hold on the modern legal regime. In the United States and elsewhere, governments have become dependent on restrictions

³⁴⁰ See SIMON, *supra* note 228, at 71.

³⁴¹ *Id.*

³⁴² CAL. DEP’T OF CORRS. & REHAB., OFFENDER DATA POINTS 4 (2017), <https://sites.cdcr.ca.gov/research/wp-content/uploads/sites/9/2018/07/Offender-Data-Points-as-of-December-31-2017-1.pdf> (reporting that in December 2017, there were 130,263 people in custody across the California prison system, an increase of 0.7 percent from December 2016).

³⁴³ E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2016, at 21 tbl.16 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

³⁴⁴ Loic Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DÆDALUS 74, 78 (2010).

on migrants' legal rights.³⁴⁵ Crimmigration's denigration of migrants and its securitization of governmental relations with migrants "denudes" them of rights by stripping them of legal status, legal identity, and perhaps even a legally cognizable existence.³⁴⁶ In this light, migrants remain far from acknowledged members of the polity. Their marginalization bleeds onto their United States citizen family members and friends whose desire for basic features of human life, including freedom from governmental restraints on their ability to live freely with their loved ones, is relegated doctrinally to an afterthought or banished entirely from consideration.³⁴⁷ For their part, "courts have confirmed that a deep Teflon coating protects a government's sovereign powers in relation to borders and nationality, a coating that is usually sufficiently impermeable to ward off most challenges, even those founded on concern for human dignity."³⁴⁸

To dream of displacing crimmigration is to dream of no minor adjustment. In the United States, a dignity cascade affecting crimmigration law would necessarily entail radically reformulating law, policy, and policing. That is the easy part because it consists entirely of legislating and executive policy-making.³⁴⁹ The fundamental conceptual shift required is more difficult. A dignity cascade in United States crimmigration law would require a willingness to reinvent migration law and policy discourse to stop seeing migrants as future citizens, possibly, but only if they can successfully jump through whatever hoops the current citizenry demands.³⁵⁰ It would stop trying to measure who is worthy of membership in the political community — and who is worthless.

Instead of straining to glimpse the future citizen in the present-day alien, migration law and policy would benefit from seeing the present-day alien in the present-day citizen. "The point is . . . not to recognize ourselves in strangers, not to gloat in the comforting falsity that 'they are like us', but to recognize a stranger in ourselves," the Slovenian

³⁴⁵ See DANIEL WILSHER, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* 170 (2012).

³⁴⁶ *Id.*

³⁴⁷ See *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 470-73 (BIA 2002) (noting that a mother's removal could be avoided only if her United States citizen children would suffer "exceptional and extremely unusual hardship").

³⁴⁸ Donald Galloway, *Noncitizens and Discrimination: Redefining Human Rights in the Face of Complexity*, in *OF STATES, RIGHTS, AND SOCIAL CLOSURE* 37, 40 (Oliver Schmidtke & Saime Ozcurumez eds., 2008).

³⁴⁹ See SIMON, *supra* note 228, at 137 (explaining that a dignity cascade expands what people require of the law).

³⁵⁰ See *id.* (claiming a dignity cascade shifts "long-rigid legal meanings").

philosopher Slavoj Žižek writes, “a recognition that we are all, each in our own way, strange lunatics.”³⁵¹ Searching for the stranger in ourselves forces reckoning with those parts of ourselves which individually we frequently ignore and collectively we depict as someone else’s failures: the reality that many of us without criminal records have nonetheless committed criminal acts;³⁵² physical violence is commonplace and intimate;³⁵³ poverty is routine;³⁵⁴ and social isolation a defining feature of twenty-first century life in the United States.³⁵⁵ In sum, forced introspection opens the possibility of a critical embrace of the failings that make us whole.

Structurally, recognizing our own strangeness requires displacing citizenship’s moralizing dimension. Despite being “enveloped in the glow of moral virtue,” citizenship, both its presence or lack thereof, does not reflect or even inform morality.³⁵⁶ In one dimension, citizenship is juridical. In another, it is relational, framing interactions

³⁵¹ Slavoj Žižek, *Terrorists with a Human Face*, in *THE FINAL COUNTDOWN: EUROPE, REFUGEES AND THE LEFT* 187, 199 (Jela Krečič ed., 2017).

³⁵² See Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 *NOTRE DAME L. REV.* 221, 252 (2003) (reporting that, from 1994 to 2000, federal prosecutors declined to proceed with approximately one-quarter to one-third of criminal matters that they spent at least one hour investigating).

³⁵³ See EMILY CUDDY & RICHARD V. REEVES, *BROOKINGS, HITTING KIDS: AMERICAN PARENTING AND PHYSICAL PUNISHMENT* (Nov. 6, 2014), <https://www.brookings.edu/research/hitting-kids-american-parenting-and-physical-punishment/> (reporting that, in a 2012 survey, seventy percent of United States respondents agreed with the statement, “It is sometimes necessary to discipline a child with a good, hard spanking” and “[n]early two-thirds of mothers reported spanking their children at least once in the two-week [reporting] period”); ELIZABETH T. GERSHOFF, *REPORT ON PHYSICAL PUNISHMENT IN THE UNITED STATES: WHAT RESEARCH TELLS US ABOUT ITS EFFECTS ON CHILDREN* 10 (2008), <http://www.nospank.net/gershoff.pdf> (“Nearly two-thirds of parents of very young children (1- and 2-year-olds) reported using physical punishment. By the time children reached 5th grade, 80 percent have been physically punished. By high school, 85 percent of adolescents report that they have been physically punished . . .”).

³⁵⁴ See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 295 (2016) (“The persistence and brutality of American poverty can be disheartening, leaving us cynical about solutions.”); JESSICA L. SEMEGA ET AL., *U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016*, at 12 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf> (reporting that there were 40.6 million people in poverty in the United States in 2016).

³⁵⁵ CIGNA, *U.S. LONELINESS INDEX 3* (2018) (noting that forty-six percent of respondents in the United States said they feel alone sometimes or always and forty-three percent said they feel “isolated from others”).

³⁵⁶ NIRAJA GOPAL JAYAL, *CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY* 2 (2013).

between the state and the individual or among individuals. As Niraja Gopal Jayal writes of citizenship in India, it is “perceived and understood, claimed and asserted, surrendered and abrogated, abridged and violated.”³⁵⁷ By placing citizenship on a moral pedestal, we lose sight of the fact that moving is neither new nor unusual. Humans have traveled the face of the earth since long before the Westphalian order tied geopolitics to the nation-state.³⁵⁸ Some of us have been migrants, some of us are still migrants, and, in Thomas Nail’s estimation, “we are all becoming migrants,” whether or not we know or care to admit it.³⁵⁹ Like the recognition of territorially-defined sovereign jurisdictions, citizenship, in effect, is always political.³⁶⁰ It is the politics of citizenship, the politics of human mobility turned modern migration, the politics of insider-group membership, and the politics of the contemporary fetishization of security that churn in the same cauldron to create crimmigration law and policy.

Without doubt, there is a hopelessness that develops from identifying limits. But there is also hope in the contestation occurring within membership theory and the doctrine of dignity. The unsettled state of affairs promises an unknown future to be shaped by the tides of politics, economics, culture, law, and more. Moreover, crimmigration’s past suggests that radical shifts are possible, even in relatively short periods of time. Four decades ago, the legal reforms and policy initiatives that constitute crimmigration law were largely unknown.³⁶¹ Today, they have become commonplace as seemingly natural features of a sovereign’s attempt to functionally regulate cross-border movement.³⁶² In 1980, it would have been near impossible to imagine security becoming such a dominant component of legal regulation of migrants. Had anyone dared to do so, surely it would have been considered an unrealistic revolution too attenuated from contemporary affairs. Likewise, it is near impossible to imagine what legal regulation of migrants will dominate four decades into the future.

³⁵⁷ *Id.*

³⁵⁸ In the Christian tradition, migration begins with the firstborn child of the first family. See *Genesis* 4:16 (King James) (“And Cain went out from the presence of the Lord, and dwelt in the land of Nod, on the east of Eden.”).

³⁵⁹ THOMAS NAIL, *THE FIGURE OF THE MIGRANT* 1 (2015).

³⁶⁰ See ANNE MCNEVIN, *CONTESTING CITIZENSHIP: IRREGULAR MIGRANTS AND NEW FRONTIERS OF THE POLITICAL* 16 (2011) (noting that citizenship creates insiders and outsiders, and positions outsiders as the cost of recognizing insiders).

³⁶¹ See GARCÍA HERNÁNDEZ, *supra* note 77, at 3 (describing crimmigration law as having “emerged in the last three decades”).

³⁶² See generally *Naturalizing Immigration Imprisonment*, *supra* note 150.

Lack of precision, like risk, is no reason not to begin the long process of reimagining a post-crimmigration legal regime. Dignity cascades, after all, take time.³⁶³ In the opening page of his classic *The Common Law*, Oliver Wendell Holmes, wrote, “[t]he life of the law has not been logic: it has been experience.” For that reason, he counseled, “to know what it is, we must know what it has been, and what it tends to become.”³⁶⁴

CONCLUSION

Let the long walk toward deconstructing crimmigration begin. Born of the racist anti-drug fervor of the 1980s and blown by the winds of every moral panic since then, crimmigration law and policy responds to fear with the state’s heavy-handed security apparatus. In the process, it replicates well-known but troubling hierarchies of power spun on axes of race, class, and gender masked by the demon of criminality. Central to the project of naming crimmigration and identifying its contours, scholars have also pushed back at its worst excesses. Decades into the United States’ experiment with crimmigration, scholars should set their intellectual sights on its foundations. “It is time to turn to something new,” declares Amna Akbar about scholarly calls for law reform.³⁶⁵ It is “time for a radical reimagination of the state.”³⁶⁶

³⁶³ See SIMON, *supra* note 228, at 137.

³⁶⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover ed. 1991) (1881).

³⁶⁵ Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018).

³⁶⁶ *Id.*