



The Legal Snarls Between Criminal & Immigration Law: Tackling Crimmigration in the 21st Century

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Many aspects of the immigration enforcement system were modeled after the criminal justice system and created in response to perceived threats raised by immigrants arriving in the U.S. While immigration enforcement has historically focused on locking certain groups out of the country, in recent decades, attention has turned to punishing immigrants residing in the U.S., particularly as a deterrent measure.

These policies have subjected immigrants to a system that impacts their ability to pursue liberty, happiness, and freedom in the U.S.— the **crimmigration** system. Room for debate exists about the origins and development of “crimmigration law.” Still, there is wide acknowledgment that the intersection of the two areas of law — immigration and criminal law — is inextricably bound in today’s society.

The U.S. has an imitable history of restricting large groups of immigrants into the country. Historically, America’s disdain for and fear of certain immigrants during war, depression, and disease resulted in the passage of now-illegal exclusionary laws, the internment of Americans and immigrants, and rampant, violent discrimination.

In the 1980s, the U.S. began using the criminal justice system to exclude immigrants based on their criminal background and focused on interior enforcement of immigration laws. As a result, criminal convictions for offenses committed within the U.S. resulted in removals and deportations increased, resulting in more focus on interior enforcement. In a 2013 BYU Law Review article, *Creating Crimmigration*, author and immigration attorney César Cuatémoc García Hernández wrote:

Crimmigration law, this Article explains, developed in the closing decades of the twentieth century due to a shift in the perception of criminal law’s proper place in society combined with a reinvigorated fear of noncitizens that occurred in the aftermath of the civil rights movement. Specifically, in the aftermath of the civil rights

movement, overt racism became culturally disdained and facially racist laws impermissible. Derision of people of color, however, did not cease. Instead, it found a new outlet in facially neutral rhetoric and laws penalizing criminal activity. When immigration became a national political concern for the first time since the civil rights era, policymakers turned to criminal law and procedure to do what race had done in earlier generations: sort the desirable newcomers from the undesirable.

Following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in the mid-1990s, the scope of criminal activity that impacts immigration exploded from drug and violent offenses to include arguably minor crimes like participating in the false preparation of an immigration application. According to Hernández in his **2021 Crimmigration Law 2nd Edition book** citing 2010 Federal Justice Statistics:

Arrests for immigration crimes doubled from 1994 to 1998, doubled again from 1998 to 2004, and yet again from 2004 to 2008[...] In 2010 a full 46 percent of individuals arrested and booked by the United States Marshals Service for suspicion of any federal crime found themselves in that predicament because of an immigration offense. Just about all of the increase in federal arrest rates—95 percent—from 1998 to 2018 can be attributed to immigration crime cases.

Given these statistics, one could believe that immigrants commit crimes at disproportionately higher rates than citizens, but it is not the case. As noted in a Cato Institute study **published** in 2019, “With few exceptions, immigrants are less crime-prone than natives or have no effect on crime rates....the research is fairly one-sided.” The study **concludes**, “All immigrants have a lower criminal incarceration rate, and there are lower crime rates in the neighborhoods where they live, according to the near-unanimous findings of the peer-reviewed evidence.”

There has been an increasing focus on why we see higher incarceration rates for individuals of color and lower socioeconomic status in the U.S. This has ultimately led to the recent **passage** of incarceration and sentencing reforms in the past several years.

In a new series at the Niskanen Center, we will explore how the criminal justice system overlaps with the immigration system. From initial encounters with immigration enforcement agencies to detention to the need for an independent immigration court system, this series lays out an evidence-based approach to analyze and provide policy solutions to these complex issues.

Similarly, we will explore crimmigration, including the facets that seem — at face value — antiquated, unfair, and ineffective. The impacts of criminal and immigration law, for instance, both have life-altering impacts on an individual’s freedom. Accordingly, the Fourth (search and seizure), Fifth (due process), and Sixth Amendments (right to counsel) are keystones of our criminal justice system. However, in immigration law, Fourth and Fifth Amendment protections are loosely applied — at best — and the Sixth Amendment has been deemed *not* to apply to immigration law. The lack of these protections becomes increasingly poignant given the murky nature and complexity of immigration law.