

THE CRIMMIGRATORS

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Crimmigration employs seemingly ordinary powers to accomplish extraordinary things—mass deportation, surveillance, policing, detention, and incarceration—in ways that globally change the contours of migration. Crimmigration scholars have unpacked its elements and critiqued its consequences. Who is tasked to use crimmigration’s legal and policymaking powers has received far less attention. This Article fills that void, arguing that the choice of who will decide an immigration issue can predetermine its resolution.

Several U.S. case studies show how changing the decision-maker changed not only how a legal issue was decided, but how it was defined and determined. These case studies include immigration detainers, sanctuary jurisdictions and sensitive locations, the tensions between asylum and expedited removal, the Deferred Action for Child Arrivals (DACA) program, administrative closure, and driver’s licenses. In each example, the relevant substantive legal rule remains constant. Only the decision-maker changes, shifting from an official or agency that implements crimmigration policies—such as a police officer or border control agency—to one that does not, such as an asylum officer. Even when the governing law is the same, changing the decision-maker may place a legal issue within the crimmigration arena, or remove it altogether. The Article concludes that deciding who decides can predetermine

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on a large scale who to include, exclude, or expel, with consequences for the nature of belonging.

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INTRODUCTION

In 2011, the United States was faced with a pressing immigration problem. The United States had not updated its registry law,¹ which had periodically permitted undocumented residents

1. Immigration and Nationality Act, 8 U.S.C. § 1259 (also known as section 249). *See also* ANDORRA BRUNO, CONG. RSCH. SERV., RL30578, IMMIGRATION: REGISTRY AS MEANS OF OBTAINING LAWFUL PERMANENT RESIDENCE 1 (2001) ("An immigration provision known as registry provides a mechanism for certain unauthorized [noncitizens] in the United States to acquire lawful permanent resident status. [It] grants the Attorney General the discretionary authority to create a record of lawful admission for permanent residence for [a noncitizen] who lacks such

to become lawful permanent residents. Regularly updating the registry law had enabled the nation to avoid the problem of a generation of children residing in the United States from reaching adulthood without immigration status.² In 1986, Congress used the registry provision to legalize long-term residents who had settled in the United States and had lived in irregular status since before 1972.³

With no updates to the registry laws in the decades to follow, by 2011 millions of young people who grew up in America, but arrived in the United States too late to benefit from the registry, lacked stable immigration status. As immigration policing increased, these youth faced expulsion to countries they hardly knew.⁴ They also faced barriers to obtaining driver's licenses and other documents needed for working, enrolling in college, starting a profession, or otherwise conducting the affairs of everyday life in U.S. society.⁵ Many were unaware of their immigration status until they reached the milestones of the typical American teenager and applied for a driver's license, a first job, or admission to college.⁶

Confronting a shadowy existence at the margins of society, these undocumented youth organized. Dubbed "DREAMers," they spoke out, outing themselves on social media and in public fora, demonstrating in the streets, and even occupying the offices of U.S. senators.⁷ In 2011, a Pulitzer Prize-winning

a record, has continuously resided in the United States since before January 1, 1972, and meets other specified requirements . . .").

2. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007).

3. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (setting the registry date in Immigration and Nationality Act § 249 as January 1, 1972).

4. See JENNIFER M. CHACÓN ET AL., *LEGAL PHANTOMS: EXECUTIVE ACTION AND THE HAUNTING FAILURES OF IMMIGRATION LAW* 31–32 (2024).

5. Roberto G. Gonzales et al., *Becoming DACAmented: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 AM. BEHAV. SCI. 1852, 1854–55 (2014); Heather Fathali, *The American DREAM: DACA, DREAMers, and Comprehensive Immigration Reform*, 37 SEATTLE U. L. REV. 221, 223 (2013).

6. See, e.g., Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG. (June 22, 2011), <https://nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html> [perma.cc/F3HG-YDMX]; David Martinez, *I Didn't Know I Was Undocumented*, CNN (Dec. 30, 2014), <https://www.cnn.com/2014/06/25/living/david-martinez-undocumented-immigrant-irpt> [https://perma.cc/FX58-V223].

7. Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIA. L. REV. 556, 570–71 (2016); ABC News, *Immigrant Students Face Deportation*

journalist with the *Washington Post*, Jose Antonio Vargas, revealed in an article in *The New York Times Magazine* that he was undocumented, having learned this at age sixteen.⁸ Vargas and other undocumented organizers urged Congress to pass legislation—the DREAM Act—that would recognize that young residents without immigration status belonged in U.S. society and immunize them from deportation.⁹ Critics warned that providing legal status to immigrant youth would spur unauthorized entries.¹⁰ But broad public support buoyed hopes, with a majority of voters indicating that they supported the DREAM Act.¹¹

When Congress failed to pass the DREAM Act, which would have created permanent lawful status for these youth,¹² the Obama Administration agreed to respond. The Administration made several attempts to protect undocumented youth from deportation, turning from one immigration agency to another. Success depended on which agency or official was tasked with implementing the goal. Outcomes varied significantly between U.S. Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services (USCIS).

After Protest at McCain Arizona Office (May 19, 2010), <https://abcnews.go.com/Politics/undocumented-student-immigrants-face-deportation-mccain-office-protest/story?id=10689042> [<https://perma.cc/V5UX-N986>].

8. Vargas, *supra* note 6.

9. Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES (Nov. 30, 2012), <https://www.nytimes.com/2012/12/01/us/dream-act-gives-young-immigrants-a-political-voice.html> [<https://perma.cc/V5D9-6RFD>].

10. Marshall Fitz, *Myth vs. Fact: The DREAM Act*, CTR. AM. PROGRESS (Dec. 7, 2010), <https://www.americanprogress.org/article/myth-vs-fact-the-dream-act> [<https://perma.cc/33V2-SH5Y>]; Brian Naylor, *Democrats Push DREAM Act; Critics Call It Amnesty*, NPR (Dec. 6, 2010, at 12:10 AM), <https://www.npr.org/2010/12/06/131796206/democrats-push-dream-act-critics-call-it-amnesty> [<https://perma.cc/89Z4-GV8T>]; see also *An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2014) (collecting witness and congressional committee member comments opining that DACA created a perception of an immigration amnesty).

11. FIRST FOCUS, PUBLIC SUPPORT FOR THE DREAM ACT (2010), <https://firstfocus.org/wp-content/uploads/2014/06/DREAM-Poll-2010.pdf> [<https://perma.cc/YHP3-VJBS>]; see Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), <https://www.pewresearch.org/short-reads/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children> [<https://perma.cc/PT5Z-6RV5>] (finding that three-quarters of American adults supported a pathway to undocumented youth).

12. Tim Gaynor, *"Dream Act" Failure Kills Immigration Reform Hopes*, REUTERS (Dec. 18, 2010), <https://www.reuters.com/article/world/us-politics/dream-act-failure-kills-immigration-reform-hopes-idUSTRE6BH1Q7> [<https://perma.cc/Q46Q-QS3J>].

The first attempt was to order ICE, a federal agency under the Department of Homeland Security (DHS) tasked with policing interior immigration violations, to exercise discretion not to deport resident undocumented youth.¹³ This attempt failed when ICE agents misapplied or ignored the directive.¹⁴

The Administration then turned to another agency within DHS: USCIS. In contrast to ICE, USCIS' core responsibility was to adjudicate applications for immigration status.¹⁵ In 2012, the Obama Administration created the Deferred Action for Childhood Arrivals (DACA) program, which enabled undocumented youth to apply for protection from deportation. USCIS became responsible for processing those applications.¹⁶ DACA prevented hundreds of thousands of deportations and enabled countless individuals to find other pathways to stable lawful status in the United States.¹⁷ As a result, by September 2017, it covered over 800,000 youth.¹⁸

Only when the responsibility for implementing DACA shifted from ICE, an agency with a deportation mission, to

13. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enft, to ICE Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/TR9N-M6WS>] (detailing "civil immigration enforcement priorities"); Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enft, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter *Morton*, Exercising Prosecutorial Discretion], <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/MZ6W-QPQW>] (providing guidance to ICE on exercising prosecutorial discretion).

14. David Leopold, *The Morton Memo: Supplemental Guidance for ICE Agents*, AM. IMMIGR. L. ASSOC. (Sep. 21, 2011), <https://www.aila.org/the-morton-memo-supplemental-guidance-for-ice-agents> [<https://perma.cc/2NM2-MP82>].

15. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

16. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERV. (2025), <https://www.uscis.gov/DACA> [<https://perma.cc/UU85-6MUJ>].

17. See ANDORRA BRUNO, CONG. RSCH. SERV., R48590, FREQUENTLY ASKED QUESTIONS ON DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (2025), <https://www.congress.gov/crs-product/R48590> [<https://perma.cc/EYZ9-JM2V>] ("The most recent data are as of December 31, 2024 . . . there were 533,280 active DACA recipients.").

18. U.S. CITIZENSHIP & IMMIGR. SERVS., APPROXIMATE ACTIVE DACA RECIPIENTS: COUNTRY OF BIRTH (2017), https://www.uscis.gov/sites/default/files/document/data/daca_population_data.pdf [<https://perma.cc/8S9S-JL7M>]; Press Release, Dep't of Homeland Sec., DHS Issues Regulation to Preserve and Fortify DACA (Aug. 24, 2022), <https://www.dhs.gov/archive/news/2022/08/24/dhs-issues-regulation-preserve-and-fortify-daca> [<https://perma.cc/RR3Y-XJN4>].

USCIS, an agency with a more inclusionary mission, did the substantive rule requiring forbearance from deportation and recognition of membership within the American community succeed. DACA's creation illustrates how a substantive legal rule may succeed or fail not because of its content, but because of who—which agency or official—is tasked with implementing it. DACA illustrates that moving the implementation of a legal rule from a “crimmigrator”—an agency or individual charged with implementing some aspect of crimmigration—to another agency or actor without a crimmigration role can determine the impact of that legal rule.

This Article investigates the difference it makes to shift implementation of a legal rule from an official or agency that is a crimmigrator to one that is not. Immigration law reflects both inclusionary and exclusionary impulses, facilitating both membership in society and expulsion from it. When those impulses conflict, the immigration system needs to choose between them.

For example, when noncitizens cross into the United States without undergoing immigration inspection and formal admission, they may trigger two legal frameworks in tension with one another. The unauthorized crossing points toward deportation.¹⁹ If, however, a noncitizen has come to the United States to seek asylum, they have also triggered a legal process that leads toward inclusion.²⁰ A properly functioning immigration system must accurately and fairly resolve this tension.

Resolving the tension between immigration law's inclusionary and exclusionary impulses is not just about applying the proper legal rule. Choosing the actor or institution that navigates this tension is at least as important. Traditionally, these inclusionary and exclusionary decisions are made by administrators and judges. For example, immigration officials at USCIS determine whether applicants for admission in the United States meet eligibility criteria to adjust their status to permanent residence.²¹ U.S. Customs and Border Patrol (CBP) and ICE officials are largely exclusionary agents, charged with enforcing civil deportation laws such as unlawful presence in the

19. See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6).

20. See *id.* §§ 1101(a)(42), 1158.

21. See *id.* § 1255.

United States.²² Immigration judges, in contrast, have both exclusionary and inclusionary powers when they preside over removal proceedings. They issue orders of removal but also grant entitlements to relief from removal, including asylum.²³

The introduction of a different sort of decision-maker—a crimmigrator—has tended to resolve this tension in favor of exclusion rather than inclusion. I coined the term “crimmigration” nearly two decades ago to describe a disturbing turn in U.S. immigration policy and practices.²⁴ U.S. immigration law regulates immigration largely through administrative statutes and regulations. When immigration law combines with criminal law and policing, however, immigrants (especially immigrants of color) are cast as criminals.²⁵

Crimmigration scholarship tends to address what powers crimmigration employs, the impacts of those powers, and who is affected.²⁶ Yet this scholarship has not yet addressed a central question: How does deciding who is tasked to use those powers impact how the decision is made? This is not just about delegating tasks to appropriate or inappropriate actors. The decision about who will decide an immigration issue can shape the decision itself, and confine or define its resolution.

Choosing a crimmigrator—a person or institution who implements crimmigration, such as police, border patrol, or ICE agents—can block post-entry inclusionary pathways that take advantage of the information society has about the desirability of the noncitizen and their circumstances.²⁷ And because crimmigration draws from policing systems known to rely on racial profiling, the decision to employ a crimmigrator has profound racial impacts.²⁸

22. Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 756, 794 (2020) (describing these officials as “front-line bureaucrats”).

23. EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL, ch. 1, § 4.

24. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

25. *See id.* at 410–16.

26. *See infra* Section I.B (describing the rise of crimmigration and citing foundational scholarship).

27. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 845–46 (2007).

28. Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 629–30 (2012).

This Article sets forth several case studies to illustrate how changing the decision-maker changes not just how a legal issue is analyzed, but how it may determine the ultimate outcome. These case studies include immigration detainers,²⁹ sanctuary jurisdictions and sensitive locations,³⁰ the tensions between asylum and expedited removal,³¹ the DACA program,³² administrative closure,³³ and driver's licenses.³⁴ Each case study examines a corresponding legal issue: whether and where to arrest and detain, whether to hear a claim for asylum, whether to permit a young person to remain in the United States, whether to deport an individual, and whether to authorize an individual to drive.

These legal issues translate into larger questions about whether to include, exclude, or expel. In each example, the relevant substantive legal rule remains constant. Only the decision-maker changes, shifting from an official or agency that implements crimmigration policies—such as a police officer or ICE—to one that does not, like USCIS, or vice versa. Even when the governing law is the same, changing the decision-maker may place a legal issue within the crimmigration arena, or remove it altogether.³⁵

29. See *infra* Section II.A.

30. See *infra* Sections II.A and II.B.

31. See *infra* Section III.A.

32. See *infra* Section III.B.

33. See *infra* Section III.C; see also 8 C.F.R. § 1003.1(d)(1)(ii) (2025); *id.* § 1003.10(b) (stating that Executive Office of Immigration Review (EOIR) adjudicators “may take any action consistent with their authorities under the [Immigration and Nationality Act] and the regulations as is appropriate and necessary for the disposition” of a case). Federal courts and the Board of Immigration Appeals (BIA) have interpreted this regulation as conferring authority on immigration judges to administratively close a case. See, e.g., *Romero v. Barr*, 937 F.3d 282, 292 (4th Cir. 2019); *Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020).

34. See *infra* Section III.D.

35. This focus on the crimmigrator has valence that extends beyond the borders of the United States and outside of legal scholarship as well. Since the long summer of migration in 2015, Europe has ramped up crimmigration measures, closed borders, instituted pushbacks of asylum seekers, and taken other measures to stem migration. See PROTECTING RIGHTS AT BORDERS, PUSHBACKS AT EUROPE'S BORDERS: A CONTINUOUSLY IGNORED CRISIS (2024), <https://interwencja-prawna.pl/wp-content/uploads/2021/01/PRAB-Report-September-to-December-2023--final.pdf> [<https://perma.cc/BHL6-MNZZ>]; Benedetta Zocchi, *Contesting the EU Border: Lessons and Challenges from the Bosnian Frontier*, 26 POSTCOLONIAL STUD. 165 (2023); Maurice Stierl, *Reimagining EUrope Through the Governance of Migration*, 14 INT'L POL. SOCIO. 252, 256–60 (2020). Groundbreaking research on the Dutch military border police illustrates how internal border control practices that rely on crimmigration have similarly shifted administrative immigration questions from administrators to crimmigrators, resulting in racially inflected

Part I of this Article introduces crimmigration and the crimmigrator. Section I.A traces the rise of crimmigration and its propensity to create crimmigrators. Section I.B then defines the crimmigrator as an individual or entity empowered to use crimmigration's tools. Part II explores the consequences of changing the decision-maker charged with carrying out a legal rule. It examines three contexts to explore how changing the decision-maker can influence how a legal issue is addressed, defined, and resolved: immigration detainers, immigration arrests in sensitive locations, and the rise of sanctuary jurisdictions. Part II concludes that choosing a crimmigrator tends to expand the impacts of crimmigration, while choosing a different authority, one without crimmigration motives or responsibilities, does not. In some cases choosing a non-crimmigrator to apply a legal rule even limits crimmigration.

Part III examines how the choice of decision-maker affects tensions between two substantive legal rules. This Part employs four case studies to excavate this question: conflict between asylum law and expedited removal procedures, the extraction of a class of DACA recipients from the risk of deportation, the fortunes and misfortunes of the administrative closure doctrine, and the adoption of the driver's license as an immigration enforcement tool. Part IV concludes that choosing a crimmigrator, rather than different authority, may submerge one substantive legal rule in favor of another. The Conclusion discusses the implications of the thesis for other areas of law and makes cautionary recommendations for institutional policymaking.

I. INTRODUCING THE CRIMMIGRATOR

Crimmigration scholarship has made great strides in documenting the development of crimmigration, describing how it has shaped immigration and criminal legal doctrine, and examining how it perpetuates the social control of racial groups.³⁶

discretionary decision-making that produces racialized outcomes. *See generally* Maartje van der Woude & Joanne van der Leun, *Crimmigration Checks in the Internal Border Areas of the EU: Finding the Discretion That Matters*, 14 EUR. J. CRIMINOLOGY 27 (2017); Bernd Kasperek & Marc Speer, *Of Hope. Hungary and the Long Summer of Migration*, BORDERMONITORING.EU (Sep. 9, 2015), <https://border-monitoring.eu/ungarn/2015/09/of-hope-en> [<https://perma.cc/YN9P-YP2U>].

36. *See, e.g.*, Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control after Sept. 11th*, 25 B.C. THIRD WORLD L.J. 81, 123 (2005); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L.

Transnationally, crimmigration scholars have described, quantified, and theorized the use of seemingly ordinary criminal and immigration powers to accomplish extraordinary things: mass deportation, mass detention, and high rates of incarceration, which disproportionately affect communities of color.³⁷

This Part sketches the origins of crimmigration to provide a foundation for understanding the powers, motivations, and tools of crimmigrators. Section I.A traces the rise of crimmigration and the groundwork it laid to create the modern corps of crimmigrators. Section I.B then introduces the crimmigrator and distinguishes crimmigrators from other authorities that create or implement legal rules.

A. *Crimmigrators in Historical Perspective*

The rise of crimmigration transformed the largely administrative arena of immigration law into a hybrid of immigration and criminal law. Crimmigration was intricately tied to the racialization of immigration enforcement.³⁸ In the United States,

REV. 197 (2018); Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955; Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015).

37. See, e.g., José A. Brandariz, *Criminalization or Instrumentalism? New Trends in the Field of Border Criminology*, 26 THEORETICAL CRIMINOLOGY 285, 285–87 (2022); Mary Bosworth, *Immigration Detention, Punishment and the Transformation of Justice*, 28 SOC. & L. STUD. 81, 81–82 (2019); Roberto Dufraix-Tapia et al., *The Criminalization of Migration in Chile*, in BORDER CRIMINOLOGIES FROM THE PERIPHERY 199, 199–202 (2025); César Cuauhtémoc García Hernández, *Crimmigration Realities & Possibilities*, 16 OHIO ST. J. CRIM. L. 1, 1–2 (2018); Rocío Lorca et al., *Extreme Indifference: Foreigners in Chilean Prisons*, OÑATI SOCIO-LEGAL SERIES 328, 339–44 (2022); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 645–58 (2003); Miller, *supra* note 36, at 81–86; Alpa Parmar, *Arresting (non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalization*, 24 THEORETICAL CRIMINOLOGY 28, 29–30 (2020); van der Woude & van der Leun, *supra* note 35.

38. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1485 (“[L]awmakers concerned about the civil rights era’s elimination of cultural and legal mechanisms used to subordinate entire racial groups turned to the government’s criminal law power to stigmatize and punish . . . [and] reproduced the racial hierarchies of decades past.”); Chacón, *supra* note 28, at 650 (“Because immigration status is impossible to determine at a glance, officials who are enforcing immigration laws without knowledge of a particular individual’s status are necessarily relying on profiling—and particularly the racial profiling of those of ‘Mexican appearance’ that courts have judicially sanctioned in immigration enforcement—to make stops and arrests for immigration violations.”); Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L.

crimmigration rose from the embers of the Jim Crow laws that had formalized racial segregation.³⁹ As Michelle Alexander has described, the overt racial subordination of the Jim Crow laws gave way to a new form of facially neutral laws through the War on Drugs that resulted in the mass criminalization and incarceration of Black men.⁴⁰

The War on Drugs had similar effects on immigrants. Criminalizing drug use or sale was not a new tactic for singling out racial groups. The original drug-related deportation grounds of 1922 targeted disfavored racialized groups by criminalizing substances most heavily used by that group. For example, making convictions related to opium, coca leaves, and cocaine reasons for deportation had predictable criminalizing impacts on Chinese, Latine, and Black communities in the United States.⁴¹

The War on Drugs inflated this impact of laws that criminalized controlled substances. Beginning in 1986, Congress significantly expanded the link between the criminal and immigration systems by making almost all controlled substance offenses (except a single incident of possession of thirty grams or less of marijuana) grounds for deportation.⁴² These laws thus accelerated the reliance of the deportation system on the products of the criminal law system.⁴³ By doing so, the War on Drugs

REV. 1093, 1141 (2017) (“For the last forty years, the policing of immigration offenses has repeatedly allowed race to play an overt and dominant role.”).

39. Tremaine Hemans, *The Intersection of Race, Bond, and “Crimmigration” in the United States Immigration Detention System*, 22 UDC L. REV. 69, 83 (2019); see KELLY LYTLE HERNANDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965, at 93 (2017).

40. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 136–42 (10th anniversary ed. 2010).

41. See Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST. 1, 16–22 (2016) (tracing the racial impact of the history of U.S. drug laws); see also Narcotic Drugs Import and Export Act, Pub. L. No. 227, ch. 202, § 2(e), 42 Stat. 596, 597 (1922) (repealed 1990).

42. Anti-Drug Abuse Act of 1986 § 1751; 8 U.S.C. § 1182(d) (inadmissibility for violation of laws related to controlled substances); see also 8 U.S.C. § 1182(h) (waiver for single offense of possession of thirty grams or less of marijuana).

43. See Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 640–41 (2011); Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 10 (2018); see also Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 147–48 (2013).

allowed race-based criminal arrests and convictions in the criminal law system to infect the deportation system.⁴⁴

In 1988 and 1996, Congress created and then expanded a new category of removal grounds that would almost certainly lead to deportation—aggravated felonies.⁴⁵ Congress also broadened a long-standing crime-based deportation category: the crime involving moral turpitude.⁴⁶ This category of crimes included not only sexual assault and murder but also many more, including theft, prostitution, perjury, and driving while intoxicated, among others.⁴⁷ At the same time, convictions for drug crimes and aggravated felonies became almost automatic grounds for deportation.⁴⁸ In this way, the largely administrative business of immigration law became intertwined with the processes and outcomes of criminal law.

The emphasis on criminal history to expand the reasons for removal meant that racial disparities in surveillance, arrest,

44. See sources cited *supra* note 43.

45. Anti-Drug Abuse Act of 1988 § 7342, 8 U.S.C. § 1101(a)(43) (defining “aggravated felony”); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546, 627–28; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78.

46. Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889.

47. Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i); *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 704 (AG 2008) (indecency with a child); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1458 n.6 (11th Cir. 1994) (murder); *Gouveia v. INS*, 980 F.2d 814, 815–16 (1st Cir. 1992) (rape); *Okoro v. INS*, 125 F.3d 920, 926 (5th Cir. 1997) (theft); *United States ex rel. Alvarez y Flores v. Savoretti*, 205 F.2d 544, 548 (5th Cir. 1953) (perjury); *In Re W*, 4 I. & N. Dec. 401, 402 (B.I.A. 1951) (prostitution); *Lopez-Meza*, 22 I. & N. Dec. 1188, 1196 (B.I.A. 1999) (driving under the influence); see also Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1845–46 (2007); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 133–34 (2007); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 57–65 (2015).

48. See Immigration Act of 1990, Pub. L. No. 101-649, § 505(a), 104 Stat. 4978, 5050 (“Elimination of Judicial Recommendations Against Deportation”); see also Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. 36, 38–39 (2015) (discussing the end of JRAD or “judicial recommendation against deportation” after nearly a century of its use to “avert unjust deportations”); see 8 U.S.C. § 1254a (1994) (repealed Sep. 30, 1996) (providing for suspension of deportation for non-LPRs based on a balancing of positive and negative equities); Kevin R. Johnson, *Crimmigration: Keynote Address: Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 92 DENV. L. REV. 701, 706 (2015). The deportation ground for crimes involving moral turpitude, though containing some exceptions, similarly became a common vehicle for removal. See Melissa London, *Renewing the Vagueness Challenge to Crimes Involving Moral Turpitude*, 97 WASH. L. REV. 581, 590–92 (2022).

prosecutorial discretion, and sentencing in the criminal law system flowed into the immigration removal system.⁴⁹ The Supreme Court's decision to condone immigration agents' use of "Mexican appearance" as a factor to justify immigration stops further perpetuated the racialization of immigration detention and deportation.⁵⁰

Prosecution of immigration-related crimes such as illegal entry and illegal reentry soared.⁵¹ As used in this Article, immigration-related crimes are those that only noncitizens can be convicted of or involve illegal conduct related to a noncitizen's migration. The work of federal prosecutors along the southern border shifted from mainstream criminal law to a primary focus on the prosecution of unauthorized migration.⁵² Illegal entry and illegal reentry crimes became the bulk of the federal crime docket and almost exclusively convicted Latine defendants.⁵³

The consequences of criminalizing and then pursuing mass enforcement of unauthorized movement, along with other aspects of crimmigration, has had clear racial impacts.⁵⁴ Immigration detention provides one metric of the racial impact of these

49. See Jennifer Chacón, *Criminalizing Immigration*, in REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 205, 213–14 (Erik Luna ed., 2017); GARCÍA HERNÁNDEZ, *supra* note 47, at 218–37; Vázquez, *supra* note 36, at 625–50.

50. United States v. Brignoni-Ponce, 422 U.S. 873, 885–87 (1975).

51. See 8 U.S.C. § 1325 (illegal entry); *id.* § 1326 (illegal reentry); MARK MOTIVANS, IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998–2018, at 2 (2019).

52. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1330 (2010).

53. *Id.*; see also GARCÍA HERNÁNDEZ, *supra* note 47, at 147; *Immigration Prosecutions Jump in March 2025*, TRAC (June 3, 2025), <https://tracreports.org/reports/761> [<https://perma.cc/B33J-BX7B>] ("Immigration convictions also made up the majority of all federal court criminal convictions. Out of a total of 10,965 federal convictions for all types of offenses in March 2025, federal convictions for immigration offenses made up 57.5 percent."). These crimes became law in the 1920s due to the efforts of a self-avowed white supremacist and several eugenicists to target Mexican migrants living and working in the United States. See BENJAMIN GONZALEZ O'BRIEN, HANDCUFFS AND CHAIN LINK: CRIMINALIZING THE UNDOCUMENTED IN AMERICA 4 (2018). See generally Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. HIST. Q. 431 (2006) (describing the origins of the criminalization of unauthorized entry and reentry into the United States and the overtly racial motivations behind these laws); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2003) (examining the influence of nativism, racial prejudice, and eugenicist thought on the development of laws criminalizing illegal entry and reentry).

54. See Ingrid Eagly, *The Racism of Immigration Crime Prosecution*, 109 IOWA L. REV. ONLINE 27 (2023).

laws, manifesting a highly disproportionate racial distribution. Over 90 percent of detainees are Latine, and Latines are the largest group prosecuted under federal immigration criminal laws.⁵⁵ Yet at 81 percent of the unauthorized immigrant population, Latines make up a comparatively smaller segment than their numbers in detention.⁵⁶ Similarly, while Black immigrants make up a much smaller share of the unauthorized immigrant population, they experience deportation at disproportionately higher rates.⁵⁷ As well, crimmigration increased surveillance of Latine drivers, as demonstrated by a study that found heightened traffic stop rates of Latine drivers in areas surrounding counties that had deputized police officers as immigration agents.⁵⁸

These developments further transformed immigration control into a matter of criminal enforcement rather than purely civil regulation.⁵⁹ They produced a cadre of federal prosecutors repurposed to pursue immigration crimes, federal prisons inhabited by migrant inmates almost exclusively from Latin America,⁶⁰ and detention centers disproportionately populated by noncitizens of color.⁶¹

B. What is a Crimmigrator?

The rise of crimmigration inevitably created crimmigrators. A crimmigrator, as used in this Article, is an individual, agency, or entity with authority to implement an aspect of crimmigration law or policy. A crimmigrator is usually a public official such as

55. Altaf Saadi et al., *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH AND HUM. RTS. J. 187, 190 (“[N]early 90% of detained individuals are men, and more than 97% are Latin American or Caribbean.”).

56. Vázquez, *supra* note 36, at 603–04.

57. See KARLA MCANDERS, *THE CRIMINALIZATION AND DEPORTATION OF AFRICAN AND AFRICAN-DESCENDANT MIGRANTS IN THE UNITED STATES* 10 (2025) (reporting that “Black immigrants face deportation at a disproportionate rate, even though they are less likely to be in the United States without authorization compared to other U.S. immigrants, because they are at higher risk of interacting with the criminal legal system”) (citing Elana Fogel & Kate Evans, *The Road to Slow Deportation*, 74 DUKE L.J. 1389, 1397 (2025)).

58. Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L. REV. 463, 465–66 (2022).

59. *Id.* at 1339.

60. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 7–8 (2019).

61. Vázquez, *supra* note 36, at 602–04.

a police officer or immigration agent, or a public agency such as a police department or immigration agency like ICE or CBP. This Section sets out a definition of crimmigrators and describes the roles they play. It explains that crimmigrators can be federal frontline bureaucrats such as ICE and CBP officials who pursue immigration law violations,⁶² state or local police or jailers making arrests or detaining noncitizens in pursuit of immigration policing (as well as or in lieu of criminal law enforcement goals), or any other authority or entity that takes on crimmigration functions.

At its core, immigration law, including immigration enforcement, is a creature of administrative law.⁶³ The Supreme Court has held that neither deportation nor immigration detention constitute criminal punishment and so do not trigger criminal procedural protections; instead, they are consequences of violating civil immigration rules.⁶⁴ Being present in the United States without a valid visa or other authorization, or entering without inspection, are civil violations of immigration law with removal as an administrative consequence.⁶⁵ Most of the federal officials that enforce civil immigration law, therefore, are administrators addressing administrative violations.⁶⁶

A crimmigrator employs the tools of crimmigration—including surveillance, arrest, prosecution, or detention—to effect exclusion, incarceration, or deportation.⁶⁷ Pathbreaking

62. See Knowles & Heeren, *supra* note 22, at 754–55.

63. See Emily R. Chertoff, *Violence in the Administrative State*, 112 CAL. L. REV. 1941, 1974 (2024) (explaining that immigration law is administrative law and the government officials that enforce it are “front line administrators”).

64. See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)) (concluding that deportation is not a punishment for a crime but rather “a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend”).

65. See, e.g., Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(A), 1182(a)(7), 1227(a)(1) (rendering removable noncitizens present in the United States without being admitted or paroled, who entered without authorization, are not in possession of valid documents, are unlawfully present, or violated their status or conditions of entry).

66. See Chertoff, *supra* note 63.

67. See, e.g., Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 UNIV. PA. L. REV. 1463, 1482, 1484–85 (2018) (describing how various state actors use surveillance, arrest, and reporting to conduct immigration enforcement); García Hernández, *supra* note 38, at 1509, 1511 (discussing immigration agents’ increasing collaboration with military forces and domestic law enforcement,

scholarship has empirically examined who wields crimmigration powers, delineating the powers and limitations of specific crimmigrators including border patrol agents,⁶⁸ prosecutors,⁶⁹ and police,⁷⁰ among others.⁷¹

As crimmigration developed, it set the stage for a proliferation of crimmigrators and an expansion of their roles. Crimmigration shifted immigration enforcement from a primarily administrative arena to an immigration and criminal law enforcement project that employed a cadre of crimmigrators. Implementing these changes required personnel, resources, and procedural and physical structures. Crimmigrators became necessary to accomplish the vision of exclusion, incarceration, and expulsion that these crimmigration laws invoked. For the most part, state and local criminal law authorities such as police, jailers, and prosecutors could, in the ordinary course of their work, make the arrests or obtain the convictions that immigration detention and deportation had come to rely on.⁷² Immigration agents, detention officers, and immigration law prosecutors could, on the immigration side, use those criminal outcomes to arrest, detain, and deport.

including the adoption of surveillance and detention as methods of immigration enforcement).

68. Irene I. Vega & Maartje van der Woude, *Colourblindness Across Borders: The De-Racialized Logics of Dutch and American Border Agents*, 28 THEORETICAL CRIMINOLOGY 309 (2024); MAARTJE VAN DER WOUDE, CHAIN REACTIONS IN CRIMINAL JUSTICE: DISCRETION AND THE NECESSITY OF INTERDISCIPLINARY RESEARCH (2017) (Dutch border police); MAARTJE VAN DER WOUDE, *The Mobility Control Apparatus: Getting to the Core of Crimmigration in the Schengen Area*, in ROUTLEDGE STUDIES IN CRIMINAL JUSTICE, BORDERS, AND CITIZENSHIP (José A. Brandariz et al., eds., 2025) (comparing Dutch and U.S. border patrol officials); Irene I. Vega, *Empathy, Morality, and Criminality: The Legitimation Narratives of U.S. Border Patrol Agents*, 44 J. ETHNIC & MIGRATION STUD. 2544 (2018); Irene I. Vega, *Toward a Cultural Sociology of Immigration Control: A Call for Research*, 63 AM. BEHAV. SCIENTIST 1172 (2019).

69. Eagly, *supra* note 52, at 1327–30, 1343, 1350, 1358 (studying federal prosecutors of immigration crimes and the role of border patrol agents).

70. Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 55 SOCIO. RACE & ETHNICITY 308 (2020); AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT (2017).

71. See Kati L. Griffith, *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement*, in THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES 94 (Alissa R. Ackerman & Rich Furman eds., 2014) (describing employers as immigration enforcers).

72. Juliet Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 87–89 (2014).

Crimmigrators drive the engines of crimmigration, pursuing criminal law enforcement goals that overlap with immigration policing, immigration enforcement related to criminal law, or other crimmigration functions such as surveillance or deterrence.⁷³ Federal prosecutors act as crimmigrators when they prosecute people for illegal entry and reentry.⁷⁴ CBP officials operate as crimmigrators when staffing the extensive system of border checks that lead to arrest, detention, and expulsion. ICE officials function as crimmigrators when they investigate, arrest, detain, and deport noncitizens or prosecute them for immigration crimes.⁷⁵ Government attorneys who seek removal of noncitizens in immigration court for crime-based deportation grounds fulfill crimmigration goals.⁷⁶

Finally, crimmigrators may mix enforcement of administrative immigration violations or immigration policies with the tools and apparatus of policing. For example, ICE agents have authority to make arrests identical to criminal arrests, except that they are for administrative violations of law such as unlawful presence⁷⁷ and have adopted military-style fatigues or gear emblazoned with the word “POLICE.”⁷⁸

The role of the crimmigrator, however, is not confined to federal prosecutors or administrative officials: Any individual or entity that engages in crimmigration law or policy may assume the

73. See, e.g., Jain, *supra* note 67, at 1484–85 (describing immigration surveillance); García Hernández, *supra* note 38, at 1509, 1511 (describing the rise of surveillance and detention).

74. See Immigration and Nationality Act, 8 U.S.C. §§ 1325, 1326. This is particularly evident in programs like Operation Streamline that implement mass prosecution of dozens of noncitizens simultaneously. See OFFICE OF INSPECTOR GEN., U.S. DEPT OF HOMELAND SEC., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING (May 15, 2015); Eagly, *supra* note 52, at 1327–30; see also Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, N.Y. TIMES (Feb. 11, 2024), <https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html> [<https://perma.cc/92NJ-58B3>].

75. HILLEL R. SMITH, IMMIGRATION ARRESTS IN THE INTERIOR OF THE UNITED STATES: A PRIMER (2025), <https://www.congress.gov/crs-product/LSB10362> [<https://perma.cc/B4WF-P8SW>].

76. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2) (listing crime-based inadmissibility grounds); *id.* § 1227(a)(2) (listing crime-based deportability grounds).

77. Immigration and Nationality Act § 287(a)(2), 8 U.S.C. § 1357(a)(2).

78. See Bora Erden, *How to Make Sense of the Federal Forces on the Streets*, N.Y. TIMES (Jan. 15, 2026), <https://nytimes.com/interactive/2025/10/24/us/us-federal-agents-national-guard-ice-fbi.html> [<https://perma.cc/8E4W-ZMD9>]; see also *ICE Ruses*, IMMIGR. DEF. PROJECT, <https://www.immigrantdefenseproject.org/ice-ruses> [<https://perma.cc/4MVH-83G3>].

role of a crimmigrator. The primary role of police departments and sheriffs is to enforce criminal law. But state and local police departments, police officers, or sheriffs may also act as crimmigrators. ICE can formally endow police officers with the powers of a federal immigration official if the police department agrees and a civil law enforcement role for police officers complies with state law.⁷⁹ Police may assume a crimmigrator role when they stop or arrest noncitizens for deportable crimes.⁸⁰

More informally, federal policies that shuttle noncitizens from state and local criminal custody into immigration detention for removal proceedings put state and local police in roles as crimmigrators.⁸¹ Police also act informally as immigration agents when they detain individuals suspected of civil immigration violations, such as unlawful presence, on their own or pursuant to an ICE request for administrative detention (called a “detainer”).⁸²

Along with state and local authorities, private entities that fill federal immigration enforcement roles can also be crimmigrators. Corporations and their employees who operate immigration detention facilities are performing crimmigration roles.⁸³ Like deportation, the Supreme Court categorized immigration detention as administrative custody rather than criminal incarceration when the purpose of detention is to facilitate deportation rather than impose criminal punishment.⁸⁴ Yet detention is indistinguishable from criminal incarceration or

79. Immigration and Nationality Act, 8 U.S.C. § 1357(g) (commonly referred to as section 287(g) agreements).

80. See Pham & Hoang Van, *supra* note 58, at 465–66.

81. E.g., *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFT, <https://www.ice.gov/identify-and-arrest/criminal-alien-program> [<https://perma.cc/X4RL-NCHK>].

82. See Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 634 (2013); *infra* notes 101–123 (describing police involvement with detainers through the Secure Communities program); see also 8 U.S.C. § 1182(a)(9) (defining accrual of unlawful presence as an inadmissibility ground).

83. Meg Anderson, *Private Prisons and Local Jails are Ramping Up as ICE Detention Exceeds Capacity*, NPR (June 4, 2025), <https://www.npr.org/2025/06/04/nx-s1-5417980/private-prisons-and-local-jails-are-ramping-up-as-ice-detention-exceeds-capacity> [<https://perma.cc/69XZ-FWFN>] (“Nearly 90% of people in ICE custody are held in facilities run by for-profit, private companies.”).

84. See *Demore v. Kim*, 538 U.S. 510, 523 (2003) (citing *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)) (declaring that detention as an adjunct to removal proceedings is constitutionally valid and is not criminal punishment); see also Stumpf, *supra* note 72, at 57.

pretrial detention, and in fact often uses the same facilities: space rented in jails and prisons.⁸⁵ The federal government also contracts with privately run detention centers that were formerly operated as prisons or built by private prison companies on the same model.⁸⁶ These companies and their employees are carrying out the work of crimmigration, functioning as jailers in a formally administrative context.⁸⁷

Still further afield, crimmigrators may be engaged in activities without a direct relationship to immigration or criminal law but that serve crimmigration ends, such as expanding surveillance or broadening efforts to deter noncitizens from arriving or remaining in the nation.⁸⁸ That means crimmigrators exist outside the core of crimmigration, in seemingly unlikely places such as employment or driver licensing. Private individuals or entities, such as employers and landlords, can be crimmigrators when they provide information to police or immigration agency officials about an employee's or tenant's birthplace or citizenship status.⁸⁹

As an example of this type of crimmigrator, one of the earliest modern crimmigration statutes created a cadre of crimmigrators in the form of employers, who were tasked for the first time as frontline immigration enforcers.⁹⁰ When Congress legalized millions of undocumented residents in 1986,⁹¹ it also for the first time prohibited unauthorized employment⁹² and imposed

85. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 252–55 (2017).

86. *Id.* at 255–56.

87. *See supra* notes 36–39 and accompanying text.

88. *See* James P. Walsh, *Watchful Citizens: Immigration Control, Surveillance and Societal Participation*, 23 SOC. & LEGAL STUD. 237 (2014) (exploring how civilians are deputized to surveil and report on immigrant community members).

89. *See, e.g.,* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (striking down a law that required tenants to prove lawful residency or citizenship); *Chamber of Com. v. Whiting*, 563 U.S. 582 (2011) (upholding Arizona law allowing for business's licenses to be revoked if they employed undocumented workers).

90. *See* Kati L. Griffith, *Discovering "Immemployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 394–97 (2011).

91. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); *see also* *Immigration Reform and Control Act of 1986 (IRCA)*, in A LATINX RESOURCE GUIDE: CIVIL RIGHTS CASES AND EVENTS IN THE UNITED STATES, LIBR. OF CONG., <https://guides.loc.gov/latinx-civil-rights/irca> [<https://perma.cc/LP53-RTUE>].

92. 8 U.S.C. § 1324(a)(1)(A) (making the hiring of undocumented immigrants unlawful).

criminal and civil sanctions on employers who repeatedly hired undocumented immigrants.⁹³

As a result, employers assume the duties of a crimmigrator when they exclude unauthorized noncitizens from working and also when they fulfill the data-gathering role of immigration surveillance. Employers document not just their own efforts to avoid civil and criminal penalties for hiring undocumented workers, but also efforts to find work by noncitizens without immigration status or with precarious status.⁹⁴ Employers thus act as crimmigrators when they document and store information about immigration status and work authorization with the purpose of providing that information to ICE in the event of a workplace immigration raid or investigation.⁹⁵

II. THE ROLE OF THE CRIMMIGRATOR

Having defined the crimmigrator and provided a basic taxonomy, this Part explores how selecting which individual or entity implements a substantive legal rule may impact how and even whether that rule is enforced. Ultimately, determining the decision-maker can determine whether an issue falls within or outside of the boundaries of crimmigration. This Part argues that choosing a crimmigrator affects how a legal rule is carried out, and even whether it is followed.

Why does it matter which agency or official carries out the dictates of a legal rule, so long as the rule is reasonably clear? Even the clearest rules require interpretation, so implementing any rule requires an exercise of discretion. If an official or agency interprets exclusionary rules broadly and inclusionary rules

93. *Id.* § 1324(f)(1) (imposing on employers with a pattern or practice of unauthorized hiring fines of up to \$3000 per undocumented immigrant hired and potential imprisonment); *see also id.* § 1325(c) (providing for imprisonment of up to five years, or a fine of up to \$250,000, or both, for committing marriage fraud).

94. *Id.*; Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009); Stephen Lee, *Deportable Labor and the Limits of Immigration Law*, 31 BERKELEY J. EMP. & LAB. L. 179 (2010); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723 (2010); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007).

95. *See* 8 C.F.R. § 274a.2(b)(2)(ii) (2025) (providing that employers have at least three business days to produce I-9 employment verification forms upon request).

narrowly, or implements one but not the other, choosing a crimmigrator in place of another decision-maker will tend to skew decisions in favor of exclusion.

Maartje van der Woude's seminal work on discretion in crimmigration reveals the importance of the discretion that frontline immigration officials and police exercise when applying immigration law.⁹⁶ She explains that the discretionary decisions of street-level immigration officials can be more important than the law on the books because officials shape the law as they exercise discretion in carrying it out. In that way, the street-level bureaucrat is "*the* locus of power" and "the 'true' policymaker."⁹⁷

This explains why crimmigrators may exercise great power in implementing the law but it doesn't explain why that discretionary power manifests in exclusionary ways. Van der Woude's work offers two lenses through which to see the relationship between discretion and crimmigrators.

First, collecting studies, she argues that delegations of discretion from top-level policymakers (such as legislatures) to street-level crimmigrators are imbued with a racial anxiety about migrants that contributes to racially inflected decision-making on the street level and an association of heightened risk with control of migration.⁹⁸ Second, a comparative study of Dutch and U.S. border control agents illustrates "how street level decision-making by border agents is unconsciously racialized and exclusionary, relying on a decision-maker's vision of who belongs."⁹⁹ In sum, discretion is what explains why choosing a crimmigrator makes an exclusionary result more likely.

This Part first examines how the immigration detainer created a cadre of crimmigrators by drafting state and local police into immigration law enforcement. It then turns to how sanctuary jurisdictions and the protection of sensitive locations cabined the discretionary power of the crimmigrator.

96. MAARTJE VAN DER WOUDE, *THE MOBILITY CONTROL APPARATUS: GETTING TO THE CORE OF CRIMMIGRATION IN THE SCHENGEN AREA* 148–49 (2025) (citing MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY* (1980)).

97. *Id.* at 148.

98. *Id.* at 148–49.

99. *Id.* at 148 (citing Vega & van der Woude, *supra* note 68).

A. *Creating the Crimmigrator: Immigration Detainers*

In 2008, an administrative request from ICE to police and sheriffs to detain arrested noncitizens, called a “detainer,” became the engine of an immigration enforcement program called Secure Communities. This program vastly expanded the number of officials who could deliver noncitizens into detention and deportation proceedings.¹⁰⁰ The large-scale use of detainers in the Secure Communities program reveals how creating a mass force of crimmigrators can magnify detention and deportation. At the same time, it can cut the corners of constitutional law and exacerbate the criminalization of communities of color.

Secure Communities sought to take into federal custody noncitizens who local police had arrested and ICE suspected might be deportable.¹⁰¹ To do this, ICE first flagged a noncitizen identified through nationwide arrest databases and then issued a detainer directing the law enforcement agency that had the noncitizen in custody to keep the individual under arrest until ICE could arrive.¹⁰² The immigration detainer itself resembled a criminal warrant but was instead an administrative document signed by an immigration official rather than a judge.¹⁰³ The detainer directed police to hold the noncitizen until ICE could take custody.¹⁰⁴

Secure Communities precipitated a tremendous rise in detention and deportation rates.¹⁰⁵ The Secure Communities

100. IMMIGR. & CUSTOMS ENFT, SECURE COMMUNITIES, <https://www.ice.gov/secure-communities> [<https://perma.cc/5CS6-VGTD>].

101. See Juliet P. Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1280 (2015); see also IMMIGR. & CUSTOMS ENFT, SECURE COMMUNITIES - STANDARD OPERATING PROCEDURES 3, <https://www.ice.gov/doclib/foia/securecommunities/securecommunitiesops93009.pdf> [<https://perma.cc/F6TV-JR7F>].

102. See Stumpf, *supra* note 101, at 1280.

103. See 8 U.S.C. § 1357(d) (2006) (authorizing a “Federal, State, or local law enforcement official” who has arrested a noncitizen “for a violation of any law relating to controlled substances” and who has reason to believe that the noncitizen is not lawfully present in the United States to request the immigration agency “to determine promptly whether or not to issue a detainer to detain” the noncitizen); see also Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 205–09 (2013) (describing and analyzing iterations of the detainer form); *ICE Detainers: Strategies & Considerations for Criminal Defense Counsel*, IMMIGRANT LEGAL RES. CTR. (2021), https://www.ilrc.org/sites/default/files/resources/note_5a_ice_detainers_2021_final.pdf [<https://perma.cc/47HM-VZSE>].

104. See 8 C.F.R. § 287.7(a) (2011).

105. E.g., *Deportations Under ICE’s Secure Communities Program*, TRAC (Apr. 25, 2018), <https://tracreports.org/immigration/reports/509> [<https://perma.cc/N7D5->

program was reported to be “the largest expansion of local involvement in immigration enforcement in the nation’s history” because it screened every person arrested by a state or local law enforcement officer for immigration violations.¹⁰⁶ As a result, ICE could use police departments and jails across the nation to escalate detention of noncitizens.¹⁰⁷ ICE had used detainers prior to the launch of Secure Communities,¹⁰⁸ but once the program began, ICE issued detainers in the thousands and then tens of thousands.¹⁰⁹ The immigration detainer maximized detention and deportation by multiplying the number of decision-makers that determined who would enter the pipeline into the deportation system.

Secure Communities’ effectiveness relied on imposing immigration duties on police and sheriffs across the nation.¹¹⁰ Since every arrest meant a potential ICE hold, every arresting officer became a frontline crimmigrator.¹¹¹ Detainers blurred the lines between the administrative immigration powers of detention and deportation and criminal law enforcement powers.¹¹² Secure Communities communicated to police that

SYNE] (showing an increase in deportations during the years Secure Communities was in place compared to the years when it was not); DEP’T OF HOMELAND SEC., THE 2016 YEARBOOK OF IMMIGRATION STATISTICS 103, tbl. 39 (Nov. 30, 2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table39> [<https://perma.cc/B6WA-K25Z>] (showing an increase of 12.6 percent in deportations from 2007 to 2008).

106. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013).

107. See *ICE Now Issuing 14,000 Detainers Each Month - Number Honored Unclear*, TRAC (Apr. 30, 2018) [hereinafter *ICE Monthly Detainers*] <https://tracereports.org/immigration/reports/511> [<https://perma.cc/GK4F-Y8XL>].

108. The detainer had had limited use prior to the Secure Communities program. The statutory authority for the immigration detainer seemed to limit it to arrests for controlled substances when the arresting official requested immigration officials to consider issuing a detainer. See 8 U.S.C. § 1357(d). Under Secure Communities, however, the detainer power went beyond the scope of the regulation, which had limited the function of the detainer to serving “to advise another law enforcement agency” that DHS sought custody of an arrested noncitizen and to “request that such agency advise” DHS prior to releasing the noncitizen from custody so that DHS could “arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.” See 8 C.F.R. § 287.7(a) (2011).

109. See *ICE Monthly Detainers*, *supra* note 107.

110. See, e.g., Stumpf, *supra* note 101, at 1280.

111. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

112. Juliet P. Stumpf & Stephen Manning, *Liminal Immigration Law*, 108 IOWA L. REV. 1531, 1550–51 (2023).

immigration detention and deportation was police work, that it was integral to their role as law enforcement officials, and that they were fundamentally crimmigrators.

Casting state and local police as crimmigrators through Secure Communities had significant racial impacts. Most of those arrested, detained, and deported under the program were Latine and Black immigrants.¹¹³ Two reasons for this stand out.

First, Secure Communities was publicized as a program that would target immigrants with criminal histories.¹¹⁴ But during the program's rollout, it tended to be activated first in communities with larger Latine populations rather than those with high crime rates or large numbers of noncitizens. Proximity to the southern border also strongly correlated with early implementation of Secure Communities.¹¹⁵

Second, reliance on the criminal justice system to identify deportable noncitizens meant that racially disproportionate stops, arrests, prosecution, or sentencing within the criminal law system translated directly to the immigration system.¹¹⁶ This is particularly true of discriminatory arrest because the initial decision to arrest was the trigger for the ICE detainer, not any later criminal conviction.¹¹⁷ Thus, the arrest shunted into the detention system any racial impacts of discretionary police practices such as disproportionately stopping drivers of color.¹¹⁸

113. See Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, C. J. EARL WARREN INST. ON L. & SOC. POL'Y, Oct. 2011, at 2 (finding that 93 percent of individuals arrested through Secure Communities were Latine even though Latines make up only 77 percent of undocumented population); N.Y.U. L. IMMIGRANT RIGHTS CLINIC, *THE STATE OF BLACK IMMIGRANTS* 5 (2022) (finding that 20 percent of immigrants facing deportation on criminal grounds are Black and that Black immigrants are more likely to be detained for criminal convictions than the general immigrant population).

114. Secure Communities triggered critiques that the program neither furthered security nor supported communities and failed in its stated mission to target noncitizens with criminal histories. See Kohli et al., *supra* note 113; see also Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703 (2018) (connecting the Secure Communities program to the rise of sanctuary jurisdictions); Lasch, *supra* note 82, at 634; Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1148–49, 1212–15 (2013) (describing the operation of Secure Communities and its effect on federal immigration enforcement outcomes); Jain, *supra* note 111 (describing how criminal arrests lead to immigration consequences including deportation).

115. Cox & Miles, *supra* note 106, at 119–22.

116. Motomura, *supra* note 111; Jain, *supra* note 111.

117. See Jain, *supra* note 111, at 811, 829, 833.

118. See generally Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016); Vázquez, *supra* note 36, at 644–46. But see Elina Treyger et al.,

And, as discussed above, the racial impact of crime-based deportation grounds meant that arrests and detainers would predictably lead to a rise in deportation rates for noncitizens of color.¹¹⁹

B. Challenging the Crimmigrator: Sanctuary Jurisdictions

Two developments impeded Secure Communities' runaway expansion of the corps of state and local crimmigrators: the Constitution and the rise of sanctuary jurisdictions. First, repurposing police as crimmigrators stood on shaky constitutional grounds.¹²⁰ The legal authority for detainers was precarious because ICE issued them without probable cause that an immigration violation had occurred.¹²¹ Litigation successfully challenged imposing detainers on state and local police departments and jails as a violation of the Tenth Amendment's prohibition on federal commandeering of state resources.¹²² Courts also concluded that under the Fourth Amendment, police lacked authority to continue to incarcerate noncitizens once the reason for the

Immigration Enforcement, Policing, and Crime: Evidence from the Secure Communities Program, 13 CRIMINOLOGY & PUB. POL'Y 285, 306–08 (2014) (finding no significant impact from the Secure Communities program on arrest rates by ethnicity, although the study encountered challenges in distinguishing arrest rates of whites and Latines). *See also* NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 5–17 (2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf [<https://perma.cc/G7SH-GEQ6>] (examining the impact of police involvement in immigration enforcement and concluding that it affected Latines' perceptions about their safety and decreased willingness to contact the police).

119. *See supra* notes 42–44 and accompanying text.

120. Stumpf & Manning, *supra* note 112, at 1565–66.

121. *See* Lasch, *supra* note 82, at 697; Jain, *supra* note 67, at 1482–83; *see also* Gonzalez v. U.S. Immigr. & Customs Enft, 975 F.3d 788 (9th Cir. 2020) (requiring probable cause for ICE detainers); Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317, 2014 WL 1414305 *1, *11 (D. Or. Apr. 11, 2014) (holding that ICE detainers are not mandatory and that the plaintiff's Fourth Amendment rights were violated when local law enforcement held her without probable cause after her release from state charges).

122. At issue was whether federal immigration officials could coerce state and local police to comply with the immigration detainer without raising a serious question of violation of the Tenth Amendment's prohibition on federal commandeering of state and local personnel. *Miranda-Olivares*, 2014 WL 1414305, at *6; *see also* Galarza v. Szalczyk, 745 F.3d 634, 644–45 (3d Cir. 2014) (holding that immigration detainers by local law enforcement were not mandatory).

criminal arrest expired, questioning whether police could lawfully keep individuals in administrative immigration custody.¹²³

These constitutional law issues undermined the legitimacy of enrolling police officers as crimmigrators. The Tenth Amendment challenge to the immigration detainer as unconstitutionally commandeering state and local police to perform federal immigration law duties distinguished the police officers' role in the criminal justice system from their repurposed role as administrators of immigration law.¹²⁴ The Fourth Amendment challenge to police officers detaining noncitizens for administrative immigration violations similarly highlighted that police obeying detainers were acting outside of the scope of criminal law.¹²⁵

Controversy over widespread detainer use, however, went beyond constitutional constraints. This controversy addressed the core issue of whether police should be crimmigrators rather than criminal law enforcers. One view maintained that engaging police in immigration control had the advantage of creating "force multipliers" for immigration law.¹²⁶ Force multiplication would expand the nation's ability to deport noncitizens with criminal histories and those without authorization to remain in the United States.¹²⁷ Those who saw Secure Communities as ridding the nation of noncitizen criminals, however, would inevitably be disappointed when the program failed to prioritize counties with high crime rates¹²⁸ and ultimately failed to reduce crime rates.¹²⁹

123. See Stumpf & Manning, *supra* note 112, at 1566; *Miranda-Olivares*, 2014 WL 1414305, at *1, *11.

124. Congress provided a pathway for police to formally take on immigration enforcement duties through explicit agreement with the police department after training and under ICE supervision, 8 U.S.C. § 1357(g), but the detainer issuance does not rely on that provision.

125. See *supra* notes 121–123.

126. See generally Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179 (2006).

127. *Id.* at 181.

128. See Cox & Miles, *supra* note 106, at 114–15 (finding that while high crime rate showed a small correlation with early activation of Secure Communities, "the selection of counties appears more consistent with the desire to target immigration violators generally—rather than just those engaged in serious criminal activity—because early activations targeted counties close to the border and counties with a high proportion of noncitizen and Hispanic persons in the population").

129. E.g., Annie Laurie Hines & Giovanni Peri, *Immigrants' Deportations, Local Crime and Police Effectiveness*, 2009 IZA INST. LAB. ECON. 1, 22.

Casting local law enforcement as crimmigrants also reimagined who rightfully belonged in the communities around participating police precincts. ICE's expansion of detainer use meant that lawful permanent residents and undocumented residents disappeared.¹³⁰ Concerns arose that involving police in federal immigration duties shunted them away from their central goal of addressing local crime.¹³¹ Studies indicated that shifting police resources away from local crime to immigration enforcement decreased community safety by deterring undocumented immigrants from contacting the police, thereby reducing crime reporting or willingness to serve as witnesses.¹³²

The institution of policing independently faced pressure from policing critics, including those founded in racial suppression of Black communities, among others.¹³³ Shifting police further into the crimmigrant role expanded the racialization of policing, casting a haze of criminality especially on Latine communities.¹³⁴

Many localities objected to the use of their police and local resources for immigration enforcement purposes.¹³⁵ As detention and deportation rates climbed, residents disappeared from communities, and the racial consequences of the Secure Communities program became clear, pressure mounted on state and

130. See NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT*, CHI., IL: DEPT OF URBAN PLANNING & POL'Y, U. OF IL. AT CHI. 11, 16 (May 2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf [<https://perma.cc/K2MW-KC45>].

131. See *The "Mass Influx" Declaration: Potentially Tapping State and Local Police to Carry Out Immigration Law*, AM. IMMIGR. COUNCIL (Jan. 27, 2025), <https://www.americanimmigrationcouncil.org/fact-sheet/mass-influx-declaration> [<https://perma.cc/3YVS-6ZBG>] (arguing that reallocating police resources toward immigration law competes with investigation and prevention of violent crime and undermines community trust and public safety).

132. See Tom K. Wong et al., *How Interior Immigration Enforcement Affects Trust in Law Enforcement*, 19 *PERSP. ON POL.* 357, 363–66 (2021); see also Lasch et al., *supra* note 114, at 1761.

133. See Nikole Hannah-Jones, *Yes, Black America Fears the Police. Here's Why.*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/yes-black-america-fears-the-police-heres-why> [<https://perma.cc/M47L-75QK>].

134. See Pham & Hoang Van, *supra* note 58, at 465–66.

135. MICHAEL J. GARCIA & KATE M. MANUEL, *CONG. RSCH. SERV.*, R43457, *STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT* (2015); Serin Houston & Anastasia Tucker, *Mapping U.S. Sanctuary Policies*, ARCGIS STORYMAPS (2024), <https://storymaps.arcgis.com/stories/cdc77fd8d6674a44b60c1a941d2f509d> [<https://perma.cc/D2MF-7VWT>].

local officials to take ameliorative action.¹³⁶ So-called “sanctuary cities” emerged around the nation.

The rise of “sanctuary jurisdictions” undermined the Secure Communities program. Once the courts clarified that state and local police were not required to respond to detainers, state and local governments proliferated policies that required police and sheriffs to focus efforts on criminal law enforcement and compliance with constitutional limitations on search and seizure.¹³⁷

The constitutional challenges and the proliferation of sanctuary jurisdictions together illustrate how changes in laws and policies can shift officials out of crimmigrator roles. In 2014, these obstacles that the Constitution and sanctuary jurisdictions posed spelled the end of the Secure Communities program.¹³⁸ As a result, the precipitous increase in deportation rates leveled off and then fell.¹³⁹

The rise and fall of Secure Communities exposed how blurred the line had become between administrative immigration governance and crime policing.¹⁴⁰ Taking state and local criminal law enforcement officials out of their roles as crimmigrators changed who made the decision to arrest noncitizens and retain them in custody for immigration law purposes by preventing police from assuming roles as crimmigrators.¹⁴¹ The substantive law did not change: The statutory removal grounds remained the same as they had been. What changed was the role of police and sheriffs from crimmigrators back to crime control officers. In doing so, sanctuary jurisdictions traded out federal immigration deportation goals in favor of substantive legal rules and policy considerations such as the Tenth Amendment’s

136. Lasch et al., *supra* note 114, at 1752.

137. *Id.* (categorizing and analyzing sanctuary policies).

138. See Memorandum from Jeh Charles Johnson, Sec’y of Dep’t of Homeland Sec., Secure Communities (Nov. 20, 2014) (terminating Secure Communities and noting that it “has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation . . . its very name has become a symbol for general hostility toward the enforcement of our immigration laws”); see also *Obama Ends Secure Communities Program That Helped Hike Deportations*, NBC NEWS (Nov. 21, 2014), <https://www.nbcnews.com/storyline/immigration-reform/obama-ends-secure-communities-program-helped-hike-deportations-n253541> [<https://perma.cc/62T3-496Z>]; Exec. Order No. 13,993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021).

139. DEP’T OF HOMELAND SEC., *supra* note 105.

140. See *supra* notes 131–132 and accompanying text.

141. ALEJANDRA ARAMAYO ET AL., CONG. RSCH. SERV., IF11438, “SANCTUARY” JURISDICTIONS: POLICY OVERVIEW (2025).

protection of local control of state and local law resources and the Fourth Amendment's concern with lawful search and seizure.

Immigration detainers continued to create crimmigrators after Secure Communities ended, but in a diminished capacity.¹⁴² Both Trump Administrations sought to revive Secure Communities and compel states and localities to harness their law enforcement personnel to carry out immigration duties at ICE's behest. These revival efforts met the stumbling blocks of entrenched sanctuary jurisdictions and the questionable constitutionality of forced acquiescence to detainers, resulting in significant limits on their use.¹⁴³

C. Controlling the Crimmigrator: Sensitive Locations

The Tenth and Fourth Amendment inroads on Secure Communities' creation of crimmigrators serve as a powerful example of constraining the expansion of the crimmigrator. Federal policies may similarly constrain the crimmigrator by limiting front-line officers' discretion to take immigration enforcement actions. This Section explains how limitations on immigration enforcement in sensitive places such as schools can cabin crimmigrators' discretion to pursue crimmigration goals.

A longstanding "sensitive locations" policy placed important limitations on where immigration policing may occur. Until 2025, DHS prohibited immigration officials from enforcing immigration law in or around locations deemed sensitive to enforcement activity such as schools, churches, hospitals, shelters,

142. ICE continued to use detainers, issuing just under 300,000 detainers between 2021 and early 2024, and averaging about 10,000 per month in early 2023, to more than 4,300 law enforcement agencies in all fifty states. *See Targeting of ICE Detainers: Biden and Trump Administrations*, TRAC (Sep. 13, 2024), <https://tracreports.org/reports/748> [<https://perma.cc/5698-JNHS>] (also reporting that detainer usage under the Biden Administration rose during 2023, although ICE issued 50 percent more detainers during the Trump presidency).

143. Julia Boseman, *Trump Administration Sues Illinois Leaders Over Immigration Enforcement*, N.Y. TIMES (Feb. 6, 2025), <https://www.nytimes.com/2025/02/06/us/politics/trump-immigration-chicago-sanctuary.html> [<https://perma.cc/A3P2-NMDK>]; Eileen Sullivan, *San Francisco Is Latest City to Sue Trump Over Immigration Policies*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/politics/san-francisco-sues-trump-sanctuary-cities.html> [<https://perma.cc/VGQ2-E3AF>]; *see also* Alicia Bannon, *State Challenges to Immigration Enforcement Practices*, STATE CT. REP. (Nov. 20, 2025), <https://state-courtreport.org/our-work/analysis-opinion/state-challenges-immigration-enforcement-practices> [<https://perma.cc/MAR4-3PXU>] (collecting cases).

weddings and funerals, parades, and rallies.¹⁴⁴ Arrests, interviews, searches, and immigration surveillance were off-limits at these locations absent exigent circumstances or approval from a high-level supervisor.¹⁴⁵ The sensitive locations policy put geographic and practical constraints on the discretionary actions of crimmigrators. In other words, the sensitive locations prohibition constrained crimmigration by exiling the crimmigrator from those spaces.

Controlling the crimmigrator in this way allowed other legal rules and policy considerations to surface. For example, most state constitutions guarantee a right to a free education to schoolchildren.¹⁴⁶ The First Amendment protects various freedoms to worship without government interference,¹⁴⁷ and a right of access to courthouses has been recognized in common law for centuries.¹⁴⁸ The sensitive locations policy averted direct conflict between these individual rights and deportation goals. It also addressed the tension between humanitarian and practical considerations. Restricting immigration agents from enforcing immigration actions and arrests at playgrounds, shelters, weddings, and funerals—even in the absence of a conflicting legal rule—ameliorated humanitarian concerns about limiting children’s access to school and play or victims’ access to shelter from harm.¹⁴⁹

Critics, however, asserted that the policy slowed the pursuit of deportable noncitizens by limiting enforcement actions within those spaces unless a higher-level immigration official approved

144. Memorandum from Alejandro Mayorkas, Sec’y of Dep’t of Homeland Sec., Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021); Memorandum from James A. Puleo, Acting Assoc. Comm’r of Immigr. & Naturalization Serv., Enforcement Activities at Schools, Places of Worship, or at Funerals or Other Religious Ceremonies (May 17, 1993).

145. See sources cited *supra* note 144.

146. Josh Kagan, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241, 2241 (2003).

147. U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb et seq.); see also Complaint at ¶¶ 51–53, *Mennonite Church USA v. U.S. Dep’t of Homeland Sec.*, 778 F. Supp. 3d 1 (D.D.C. 2025) (No. 1:25-cv-00403), 2025 WL 486767; *Philadelphia Yearly Meeting of the Religious Soc’y of Friends v. U.S. Dep’t of Homeland Sec.*, 767 F. Supp. 3d 293, 321–27 (D. Md. 2025).

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

149. See Mayorkas, *supra* note 144, at 2–3.

it.¹⁵⁰ In January 2025, the Trump Administration rescinded this policy, opening the way for immigration officials to pursue immigration actions in these locations.¹⁵¹

After the rescission of the sensitive locations policy, many states and localities tried to put new constraints on this expansion of crimmigrator discretion. They responded by educating public officials, school administrators, teachers, and communities about constitutional limitations on federal immigration officials' conduct, such as the Fourth Amendment requirement of a judicial warrant for entry and restrictions on entry into nonpublic spaces.¹⁵² These efforts sought to replace the guardrails on immigration officials' discretion that the sensitive locations policy had imposed.¹⁵³

As examples, in 2020 Colorado passed a law codifying the common law privilege to access courthouses in direct response to ICE arrests in and around state and local courthouses.¹⁵⁴ In 2026, Minnesota schools responded to an unprecedented influx of ICE and CBP officials in Minneapolis and the arrests of parents, school employees, and students in and around school buildings. One school district filed a lawsuit challenging the revocation of the sensitive locations memos, and schools and neighborhoods organized rapid response programs to protect

150. See DEP'T OF HOMELAND SEC., STATEMENT FROM A DHS SPOKESPERSON ON DIRECTIVES EXPANDING LAW ENFORCEMENT AND ENDING THE ABUSE OF HUMANITARIAN PAROLE (Jan. 21, 2025), <https://www.dhs.gov/news/2025/01/21/statement-dhs-spokesperson-directives-expanding-law-enforcement-and-ending-abuse> [https://perma.cc/2PWX-NYUK].

151. Memorandum from Benjamin C. Huffman, Acting Sec'y of Dep't of Homeland Sec., Enforcement Actions in or Near Protected Areas (Jan. 20, 2025).

152. See Caitlin McTiernan, *Protected No More – How States Are Responding to Immigration Enforcement in Sensitive Locations*, AM. IMMIGR. COUNCIL (Apr. 11, 2025), <https://www.americanimmigrationcouncil.org/blog/how-states-respond-immigration-enforcement-in-sensitive-locations> [https://perma.cc/TSY7-9YGG].

153. Sanctuary jurisdictions also curb the capacity of immigration authorities to pursue crimmigration goals by imposing geographic restrictions similar to those in the sensitive locations policy, such as adopting rules prohibiting civil immigration arrests inside or near courthouses without a judicial warrant. *E.g.*, S.B. 20-083, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020); H.B. 3265, 2021 Leg., Reg. Sess. (Or. 2021); Assemb. B. 668, 2019 Cal. Stat. ch. 183; *see also* Douglas Keith, *States Push Back Against ICE Courthouse Arrests*, BRENNAN CENTER FOR JUST. (Nov. 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests> [https://perma.cc/W6KD-VYNN].

154. See COLO. REV. STAT. § 13-1-401 (2020) (prohibiting civil arrests, including by immigration officials, within, around, or during travel to and from Colorado courthouses). *See generally* Lasch, *supra* note 148 (outlining the historical and doctrinal basis of the privilege).

immigrant students and citizens of color from immigration policing in and around school buildings.¹⁵⁵

The adoption and rescission of the sensitive locations policy, and the subsequent public response, holds important lessons about constraining the crimmigrator. Controlling the discretion of line-level agents often means shifting the decision-maker from the crimmigrator to another official, individual, or institution. To illustrate, when school staff exercise their discretion to assert Fourth Amendment limitations on entering a school, when a judge uses her discretion to determine whether or how immigration enforcement may occur in the courtroom, or when a religious leader asserts constitutional claims or community norms to limit immigration enforcement within a worship space, some or all of the decision-making about immigration enforcement passes from the crimmigrator to a new decision-maker. That new decision-maker, such as the school or church official, operates outside of crimmigration altogether. By protecting those competing legal and policy considerations—such as First Amendment freedoms of association or worship,¹⁵⁶ the value of universal education,¹⁵⁷ and access to justice¹⁵⁸—these non-crimmigrator decision-makers introduce legal and policy considerations that compete fiercely with efforts to maximize deportation.

D. Closing Out the Crimmigrator: Administrative Closure

This question of whether the decision-maker is a crimmigrator extends to procedural practices in immigration court. Immigration court has a peculiarly dual nature in that immigration judges make removal determinations and also adjudicate petitions for relief from removal that confer permanent residence, forbearance from removal, or in-between statuses such as

155. See Complaint, *Fridley Pub. Sch. Dist. v. Noem*, No. 0:26-cv-01023 (D. Minn. filed Feb. 4, 2026); see also Sarah Mervosh, *Educators Sue to Keep Immigration Agents From Schools and Bus Stops*, N.Y. TIMES (Feb. 4, 2026), <https://nytimes.com/2026/02/04/us/minnesota-educators-immigration-agents-lawsuit-schools-bus-stops.html> [<https://perma.cc/C3KT-4CGG>] (describing arrests); Sarah Mervosh, *A Minnesota School District Guards Against ICE, From Dawn to Dusk*, N.Y. TIMES (Jan. 31, 2026), <https://www.nytimes.com/2026/01/31/minneapolis-school-district-ice-agents.html> [<https://perma.cc/87Q8-7XBT>].

156. U.S. CONST. amend. I.

157. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (upholding equal access to education regardless of immigration status).

158. See Lasch, *supra* note 148, at 423–31 (describing the justifications for the common law privilege of access to courthouses).

withholding of removal.¹⁵⁹ Nevertheless, as this Section explains, the crimmigrator has broad power to pursue removal, exercise discretion to dismiss cases, or pause proceedings. Immigration judges, however, have traditionally held a trump card over this exercise of discretion in the form of administrative closure.

In immigration court, although the immigration judge may appear to have broad discretion to detain, deport, or grant lawful status, that power is contingent on the discretionary decisions of others. The decision to deport is often initiated by a state or local police officer deciding whom to arrest¹⁶⁰ and later by the federal ICE attorney who exercises discretion to decide whether to bring the case, what removal ground(s) to charge, and whether it is in the interests of justice to pursue deportation to its end.¹⁶¹ In most removal cases when the noncitizen is detained or unrepresented, the government succeeds.¹⁶² Many immigrants concede that they are deportable and pursue forms of relief from deportation instead.¹⁶³

This dynamic between the immigration judge and the ICE attorney becomes particularly important when a noncitizen in removal proceedings has a basis for lawful admission, such as an approved petition for admission as a relative of a U.S. citizen or lawful permanent resident.¹⁶⁴ In that circumstance, the government's decision to prioritize removal over a bona fide admission application can result in a removal order that bars that pathway to admission.

Immigration judges can shift the decision to pursue removal away from ICE by using a procedural device called administrative closure that temporarily closes a removal case until one

159. See Immigration and Nationality Act § 240A (governing cancellation of removal and conferral of lawful permanent resident status); *id.* § 241(b)(3) (establishing withholding of removal).

160. See Motomura, *supra* note 111.

161. See Eisha Jain, *Prosecutorial Discretion and Immigration Arrest: How Criminal Arrests Set Immigration Enforcement Priorities*, 37 MD. J. INT'L L. 10 (2022).

162. See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court, Revisited*, 111 IOWA L. REV. 1, 43 (2025) (reporting that between 2013 and 2024, “immigrants were overall 4.6 times more likely to succeed if they had counsel (14% versus 64%)”); Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 31 (2018); *Immigration Prosecutions Jump in March 2025*, *supra* note 53.

163. See Eagly & Shafer, *supra* note 162, at 11.

164. See Immigration and Nationality Act, 8 U.S.C. § 1153(a) (setting out the family preference categories).

party moves to reopen it.¹⁶⁵ Immigration judges might use administrative closure in cases where a noncitizen is in a twilight status, such as if the noncitizen applied to regularize their status with USCIS.¹⁶⁶ When an immigration judge uses administrative closure, removal cases that might have resulted in deportation are closed or paused to prevent the issuance of a removal order that would otherwise block USCIS from granting that immigration benefit.¹⁶⁷ In essence, an immigration judge employing administrative closure is deciding not to decide, setting the case outside of the removal process, and putting it on hold.¹⁶⁸ Administrative closure thus enables an immigration judge to redirect the legal determination about removal or admission away from the prosecutor to the agency that makes decisions about immigration benefits—USCIS.

Administrative closure turns immigration judges into meta-decision-makers, giving them the power to decide who will decide. The immigration judge either chooses the crimmigrator—the prosecutor in the immigration courtroom—or plucks the decision out of crimmigration and plants it in the benefits-granting agency of USCIS.

In 2018, the Attorney General declared that immigration judges had no authority to administratively close their cases.¹⁶⁹ In revoking immigration judges' discretion to use this administrative tool, the Trump Administration did not change the substantive law governing deportation. Instead, the Administration removed the power to choose the decision-maker, replacing it with a default rule that removal was always the priority.

Ordering immigration judges not to use administrative closure did not just deprive judges of a docket management tool.

165. See Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J. F. 567, 567–68 (2020) (describing administrative closure as used by immigration judges to “temporarily remove a case from their active docket” while not granting any status or permanent relief to the noncitizen).

166. See Cruz-Valdez, 28 I. & N. Dec. 326, 327 (A.G. 2021) (summarizing its uses); see also Montano, *supra* note 165, at 580 (discussing administrative closure as a tool used by immigration judges to stop removal while an application for relief was pending before USCIS).

167. See Montano, *supra* note 165, at 568.

168. See Gianna Borroto, *New Memo to Immigration Judges Reaffirms Availability of Administrative Closure*, AM. IMMIGR. COUNCIL (Dec. 17, 2021), <https://www.americanimmigrationcouncil.org/blog/eoir-memo-administrative-closure-2021> [<https://perma.cc/8CJG-KEZV>].

169. Castro-Tum, 27 I. & N. Dec. 271, 271 (A.G. 2018) (holding that immigration judges and the BIA do not have the general authority to administratively close cases) (overturned by *In re Cruz-Valdez*, 28 I. & N. Dec. 326 (A.G. 2021)).

The Administration chose a blanket exclusionary deportation rule over continuing to allow immigration judges the discretion to apply inclusionary admissions rules. And it prioritized deportation just when the noncitizen would have benefited most from administrative closure: once the noncitizen had the ties to family or employer that met the statutory criteria for permanent residence or other lawful status.¹⁷⁰ One study of administrative closure revealed that when administratively closed cases were revived via “recalendaring,” six out of ten cases resulted in favorable outcomes for the noncitizen.¹⁷¹

The Trump Administration shifted the decision about removal from the immigration judge and USCIS back to the immigration prosecutor, and then ordered those prosecutors to pursue removal in all nonfrivolous cases.¹⁷² It put the crimmigrator in the driver’s seat.

In 2021, the Attorney General overturned the 2018 decision shutting down administrative closure, and in 2024 a federal regulation codified it, reviving immigration judges’ discretion to administratively close cases deemed to merit dismissal or delay.¹⁷³

III. CHOOSING THE LAW, DETERMINING THE OUTCOME

Sometimes substantive legal rules are at cross-purposes with one another, requiring a decision about which to prioritize under the circumstances. Choosing a decision-maker who is a crimmigrator, rather than one outside of crimmigration, can determine which legal rule takes precedence and may result in the suppression of one of the competing rules.

This becomes particularly important when the rules that are in tension are exclusionary and inclusionary. Exclusionary rules, like the grounds for removing noncitizens from the United States,¹⁷⁴ define who may be arrested, detained, or expelled

170. Compare Immigration and Nationality Act § 203(a) (family-based admissions grounds), and *id.* § 203(b) (employment-based admissions grounds), with *id.* § 237(a) (listing deportability grounds). See also Montano, *supra* note 165.

171. See *The Life and Death of Administrative Closure*, TRAC (Sep. 10, 2020), <https://tracreports.org/whatsnew/email.200910.html> [<https://perma.cc/7R5W-HHZQ>] (“[F]or those cases in which the government was seeking removal orders, six out of ten (60.1%) immigrants met the high legal threshold of remaining in the country.”).

172. See *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

173. See 8 C.F.R. § 1003.18 (2024).

174. See generally Immigration and Nationality Act, 8 U.S.C. § 1182 (listing inadmissibility grounds); *id.* § 1227 (listing deportability grounds).

from the nation. Inclusionary rules enable even removable noncitizens to remain in the United States and gain formal or informal membership through lawful immigration status.¹⁷⁵ Inclusionary rules include admissions policies that establish permanent residence for family members of U.S. citizens or lawful permanent residents and laws that allow noncitizens with certain ties to the United States to overcome removal grounds. In sum, exclusionary rules like removal grounds exclude individuals from the local or national community, whereas inclusionary rules like immigrant admissions criteria provide formal or informal entrée into society.

Thus, immigration law offers, on the one hand, potential pathways to lawful status and, on the other, the threat of expulsion. Immigration law is not always clear about when or whether one rule should trump the other. Even when it is clear, that substantive rule still requires implementation. Deciding who to task with resolving this conflict can determine the outcome of that tension. Depending on who the decision-maker is, choosing an exclusionary over an inclusionary approach can narrow or block these lawful pathways to recognized immigration status.

Until now, this Article has described the proliferation of crimmigrators in crimmigration law and efforts to challenge or control them. Part II evaluated how the implementation of a legal rule changes based on whether the decision-maker is a crimmigrator. This Part III examines how the choice of decision-maker can determine the outcome of a conflict between two conflicting legal rules. It first describes how legal rules, like grounds for admitting noncitizens and grounds for deportation, are sometimes in tension with one another. It then evaluates the consequences of choosing a crimmigrator to prioritize one rule over another by analyzing two case studies: the relationship between expedited removal and asylum law, and the story of DACA.

A. Choosing the Rule: Expedited Removal and Access to Asylum

The relationship between a method for rapid deportation called “expedited removal” and access to asylum illustrates this

175. See, e.g., *id.* § 1151(b)(2)(A)(i) (providing for admission of “immediate relatives” of U.S. citizens).

tension between an exclusionary and inclusionary rule and the consequences of delegating the discretion to choose between them to a crimmigrator.¹⁷⁶ Expedited removal and access to asylum raise a tension between, on the one hand, the human right to seek protection from persecution and, on the other, rapid deportation of recent undocumented arrivals with minimal process.¹⁷⁷ This Section describes the tension between the two policies and the introduction of a cadre of crimmigrators into asylum law. It then narrates the role of family detention in limiting crimmigrator discretion, and finally the shift to a new set of crimmigrators with discretion to choose exclusion.

1. Crimmigrators as Choosers: Introducing Expedited Removal

The expedited removal provision is a quintessential crimmigration statute that crafted new powers for a corps of crimmigrators.¹⁷⁸ Created in 1996, expedited removal provides for summary deportation when an immigration official concludes that a noncitizen seeking admission to the United States is not admissible because she has no valid immigration documents or her documents are fraudulent.¹⁷⁹

Prior to the creation of expedited removal, noncitizens within the United States were usually able to contest deportation charges before an immigration judge.¹⁸⁰ Now, the expedited removal statute authorizes immigration enforcement officials to bypass immigration court. When immigration officials encounter a noncitizen at or near the border whose entry documents are missing or believed to be fraudulent, the statute endows these

176. *See id.* § 1158 (defining asylum); *see also id.* § 1225(b) (codifying expedited removal).

177. *Compare* G.A. Res. 217 (III) A, art. 14, Universal Declaration of Human Rights (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”), *with* H.R. Rep. No. 104-828, at 33 (1996), *and* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

178. Immigration and Nationality Act § 212(a)(7), 8 U.S.C. § 1182(a)(7).

179. 8 U.S.C. § 1225(b)(1)(A)(i) (“If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”).

180. *See id.* § 1229a.

officials with broad discretion to summarily deport the noncitizen without the approval of an immigration judge.¹⁸¹

Expedited removal is a form of crimmigration because it mixes the administrative deportation power with quasi-criminal law powers to arrest, detain, and forcibly eject individuals beyond the border.¹⁸² Expedited removal doubles down on crimmigration by expanding the discretion of the crimmigrator—the administrative agency and immigration officials implementing expedited removal—to impose detention and summary deportation without a check from an immigration judge, leaving only crimmigrators to determine whether to detain and deport.¹⁸³

Expedited removal's expansion of crimmigrator discretion posed a danger of deporting refugees to countries where they would be persecuted.¹⁸⁴ The summary proceedings of expedited removal was in tension with the United States' international obligations to provide refuge to people threatened with persecution and prevent *refoulement*, or forcibly returning people to a country where they may be persecuted.¹⁸⁵ The Refugee Act of 1980 and related laws carried out these human rights obligations by establishing asylum protections and a process for seeking asylum and other humanitarian protections.¹⁸⁶ Summarily removing people whom an official believed lacked proof of lawful presence in the United States threatened to breach the prohibition

181. *Id.* § 1225(b)(1)(A)(i).

182. *See id.* at § 1225(b)(1)(A)(iii)(II) (providing that “[a]n alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.”).

183. *See id.* § 1225(b)(1)(A)(i).

184. *See* Erin M. O’Callaghan, *Expedited Removal and Discrimination in the Asylum Process: The Use of Humanitarian Aid as a Political Tool*, 43 WM. & MARY L. REV. 1747, 1748, 1774 (2001–2002). *See also* Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267. The United States has never ratified the 1951 Refugee Convention, but when it ratified the Protocol Relating to the Status of Refugees in 1968, it took on core obligations of the Convention. OFFICE OF THE UN HIGH COMM’R FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 4 (2010) (“Apart from expanding the definition of a refugee, the [1968] Protocol obliges States to comply with the substantive provisions of the 1951 Convention to all persons covered by the refugee definition in Article I . . .”).

185. *See* sources *supra* note 184 and accompanying text.

186. *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822 (1998) (implementing the United States’ obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

against *refoulement*, since many people fleeing persecution are not able to obtain valid immigration documents in advance.¹⁸⁷

To resolve this tension, Congress interposed an official from outside of crimmigration: the asylum officer. The expedited removal statute prohibited immediate removal of a noncitizen able to establish a credible fear of persecution as determined by an asylum officer.¹⁸⁸ Border control officials were to play only a small part in this process, limited to identifying noncitizens who might be eligible for humanitarian protection.¹⁸⁹ To carry out that screening role, the law tasked CBP officers with determining whether a noncitizen was seeking asylum or feared returning to their country of origin.¹⁹⁰ If the answer was yes, the CBP official was to direct the noncitizen to an asylum officer to conduct a credible fear interview.¹⁹¹

In tasking asylum officers with the credible fear interview, Congress inserted an additional decision-maker—one who was not a crimmigrator—into the rapid deportation apparatus of expedited removal. The credible fear interview was a truncated process that served as a threshold step to humanitarian relief or, upon failure to establish credible fear, to the crimmigration process of summary deportation.¹⁹² Noncitizens who established to an asylum officer that they had a credible fear of returning to their country of origin gained access to a full asylum hearing before an immigration judge.¹⁹³ Those who could not make this showing could be expelled by immigration agents under the expedited removal statute.¹⁹⁴

187. See generally REBECCA GENDELMAN ET AL., “THIS IS AN ORDER FROM TRUMP”: ABUSE, EXPULSIONS, AND REFOULEMENT OF PEOPLE SEEKING ASYLUM (Eleanor Acer et al. eds., 2025), <https://humanrightsfirst.org/library/this-is-an-order-from-trump-abuse-expulsions-and-refoulement-of-people-seeking-asylum> [https://perma.cc/2XEW-JPZ8] (documenting numerous *refoulment* cases in which the Trump Administration systematically violated asylum law and human rights at the U.S. southern border in early 2025); James E. Crowe III, Note, *Running Afoul of the Principle of Non-Refoulement: Expedited Removal Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 18 ST. LOUIS U. PUB. L. REV. 291 (1999) (critiquing the expedited removal procedure’s limitation on access to asylum).

188. Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(A)(i).

189. See *id.* § 1225(b)(1).

190. *Id.* § 1225(b)(1)(B).

191. *Id.* § 1225(b)(1)(A)(ii).

192. See *id.* § 1225(b)(1)(B)(i)–(ii).

193. *Id.* § 1225(b)(1)(A)(ii).

194. *Id.* § 1225(b)(1)(A)(i).

Tasking asylum officers with the credible fear determination introduced into the expulsion process a corps of decision-makers trained to make inclusionary decisions.¹⁹⁵ Expedited removal entailed detaining noncitizens, but the credible fear process placed asylum officers at the detention facility—the site of border control.¹⁹⁶ By writing asylum officers into the expedited removal statute, Congress inserted a non-crimmigrator who could open a gateway to a full asylum hearing with the potential for permanent inclusion in the national community. The asylum officer had the discretion to shunt the decision to include or exclude away from a crimmigrator to another official outside of the core of crimmigration: the immigration judge. In this way, the tension between the exclusionary rule of summary deportation and the inclusionary rule of asylum was resolved by choosing a decision-maker who was not a crimmigrator.

2. Constraining the Crimmigrator: Family Detention

The next chapter in the tension between expedited removal and access to asylum traces how advocates constrained crimmigrator discretion. The rise and fall of family detention provides a striking example of the crimmigrator caught in the tension between exclusionary and inclusionary rules.

In 2014, the federal government began detaining Central American mothers and children en masse to facilitate quickly deporting them and to deter others from arriving at U.S. borders.¹⁹⁷ ICE detained most of these families in a Texas facility far from any urban center and immigration representation.¹⁹⁸

195. See *id.* § 1225(b)(1)(B)(i)–(ii).

196. *Id.* § 1125(b)(1)(B)(i).

197. E.g., Muzaffar Chishti & Faye Hipsman, *Fierce Opposition, Court Rulings Place Future of Family Immigration Detention in Doubt*, MIGRATION POL'Y INST. (Sep. 15, 2015), <https://www.migrationpolicy.org/article/fierce-opposition-court-rulings-place-future-family-immigration-detention-doubt> [<https://perma.cc/G2BL-3W48>] (describing family detention as a response to an influx of “tens of thousands of Central American mothers with children—many fleeing for humanitarian reasons”).

198. Ryo & Peacock, *supra* note 162, at 51; EMILY RYO & IAN PEACOCK, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* 15–16 (2018), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_landscape_of_immigration_detention_in_the_united_states.pdf [<https://perma.cc/UHC9-D5A4>] (noting that “about 50 percent of all facilities were located outside of major urban areas,” and “about 58 percent of individuals were detained . . . in a facility that was more than 30 miles away . . . from the nearest nonprofit immigration attorney who practice removal defense”).

The government's plan was to quickly deport the families using expedited removal.¹⁹⁹

This plan relied on crimmigrators—detention and deportation officials exercising expedited removal—to avoid immigration court and impose summary removal. The remoteness of the detention facility, the large number of families detained, and the speed of summary removal promised to deter effective representation and thereby cut off access to asylum claims. Even if ICE or CBP officials inquired about asylum or fear of returning, the conditions of confinement for mothers and children in custody, the speed at which the government sought to deport, and the absence of attorneys to prepare detainees for the legal questions in the credible fear interview still boded poorly for fair and accurate adjudication of asylum claims.²⁰⁰

Expedited removal might have succeeded but for a movement that insisted on unseating the crimmigrator. In response to family detention, U.S. immigration lawyers and advocates organized a massive collaborative representation project to bring a revolving brigade of lawyers, law students, and staff to the detention center. They came with knowledge of the removal system and the existence of credible fear review and asylum, and they provided representation.²⁰¹ Many detained families turned out to have legitimate asylum claims based on political opinion, religious persecution, gender, and other grounds.²⁰² The circumstances that had uprooted hundreds of Central American women and led them to travel to the U.S. border with young children tended to fit the criteria for asylum under U.S. law.²⁰³

The transformation of the family detention center occurred because advocates successfully collaborated to prevent a cadre

199. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html> [https://perma.cc/GST5-LJFT] (“It will now be more likely that you will be detained and sent back.”).

200. See Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407, 419 (2018).

201. See *id.* at 420–27.

202. See Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 855–56 (2018) (finding “that over the fifteen years of [the] study immigration judges reversed negative credible fear findings 48% of the time and reversed negative fear findings 58% of the time”).

203. *Id.* at 848; Julia Preston, *In Remote Detention Center, a Battle on Fast Deportations*, N.Y. TIMES (Sep. 5, 2014), <https://www.nytimes.com/2014/09/06/us/in-remote-detention-center-a-battle-on-fast-deportations.html> [https://perma.cc/2Q5K-2SEW].

of crimmigrators from summarily deporting families. The steady success of the credible fear reviews and asylum claims undermined the justification for holding the families in detention, and deportations slowed.²⁰⁴ The result was to repurpose the detention center from a deportation center to a sort of carceral airlock before families were released to await their asylum hearings.

The story of family detention illustrates how expanding the discretionary authority of the crimmigrator—here, DHS—over asylum claims came close to nullifying access to asylum in favor of mass deportation. It also reveals that successful efforts to shift the decision-maker to a non-crimmigrator—here, asylum officers and immigration judges—revived access to asylum. The substantive legal rule did not change: Noncitizens arriving at a port of entry without documents or entering the country without inspection are immediately deportable, unless eligible for an asylum hearing.²⁰⁵ But by providing legal knowledge and advice about the credible fear interview and representing families in bond hearings before immigration judges, the advocates shifted decision-making power to asylum officers and immigration judges who could open the gateway to asylum.²⁰⁶

3. Choosing the Crimmigrator: Remain in Mexico

The last chapter in the story of family detention illustrates the effect of expanding crimmigrators' discretion to deport by barricading access to asylum. The first Trump Administration removed authority from asylum officers and judges to adjudicate asylum claims, and it did so by changing the decision-maker.

204. See Eagly et al., *supra* note 202, at 832 (“By 2016, 58% of appealed [credible fear and reasonable fear] denials were reversed by immigration judges.”). That rate of success dropped in 2020 due to policy changes under the Trump and Biden Administrations. See HOLLY STRAUT-EPPSTEINER ET AL., CONG. RSCH. SERV., R48078, CREDIBLE FEAR AND DEFENSIVE ASYLUM PROCESSES: FREQUENTLY ASKED QUESTIONS 16 TBL.1 (2024).

205. Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1).

206. See Eagly et al., *supra* note 202, at 816. In 2024, the government closed the largest of the family detention centers in Dilley, Texas, but then reopened it less than a year later. See Ted Hesson, *US to Close Costly Texas Immigration Detention Center and Reroute Funds*, REUTERS (June 10, 2024, at 3:29 PM), <https://www.reuters.com/world/us/us-close-costly-texas-immigration-detention-center-reroute-funds-2024-06-10> [<https://perma.cc/X3F5-XJET>]; CoreCivic Announces Resumption of Operations at South Texas Family Residential Center in Dilley, Texas, CORECIVIC, INC. (Mar. 5, 2025), <https://ir.corecivic.com/news-releases/news-release-details/corecivic-announces-resumption-operations-south-texas-family> [<https://perma.cc/RT7P-577A>].

In the expedited removal process, the border patrol official traditionally makes the earliest determination about which legal rule—summary removal or access to asylum—takes precedence. That is, border patrol officials are tasked with a duty outside of crimmigration: When a noncitizen at the border intends to apply for asylum or has a fear of returning to their country, border patrol officials must refer the noncitizen to an asylum officer to make a credible fear determination.²⁰⁷ As such, these immigration officials take a small part in the operation of the inclusionary rule that recognizes asylum claims.

Fulfilling Donald Trump’s promises to institute mass deportation and close the border²⁰⁸ required removing even this narrow entryway into the asylum process. The Administration had to ensure that border patrol officials never have the encounter with a noncitizen that could trigger the statutory requirement that the immigration official refer the noncitizen for an assessment of fear of return.

DHS put this into practice by preventing noncitizens from reaching the U.S. border at all. Mexican authorities were persuaded to “meter” the number of noncitizens per day who would be allowed to approach the border and address U.S. border officials.²⁰⁹ CBP officers informed Mexican authorities when the small quota of asylum seekers could come to the border for inspection and processing. An informal “waiting list” governed which noncitizens filled the daily quota.²¹⁰ The result was to narrowly restrict the number of asylum seekers who could express fear to a CBP official.²¹¹ Asylum officers had no chance to determine the credible fear of noncitizens who were metered out.

207. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 208.20(b).

208. See, e.g., *PROMISES MADE, PROMISES KEPT: Border Security Achieved in Fewer Than 100 Days*, WHITE HOUSE (Apr. 28, 2025), <https://www.whitehouse.gov/articles/2025/04/promises-made-promises-kept-border-security-achieved-in-fewer-than-100-days> [<https://perma.cc/86Y8-6SHJ>].

209. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY’S “METERING” POLICY: LEGAL ISSUES 2 (Mar. 8, 2022), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10295/LSB10295.6.pdf [<https://perma.cc/4ALK-2E5S>] (discussing how “CBP officers informed Mexican authorities when the asylum seekers could be sent on to ports of entry for inspection and processing”).

210. Kirk Semple, *What is ‘La Lista,’ Which Controls Migrants’ Fates in Tijuana?*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/world/americas/caravan-migrants-tijuana-mexico.html> [<https://perma.cc/L9ZJ-5AKU>].

211. *Id.* (“Nongovernmental organizations and Mexican authorities created and maintained ‘waiting lists’ identifying the asylum seekers awaiting processing.”).

In sum, DHS circumvented decision-makers within the United States who could make inclusionary decisions—border control officials, asylum officers, and judges. These actions preempted the pathway to asylum proceedings, relocating the decision from the border control official and the asylum officer to beyond the border where the legal rule authorizing asylum claims had no traction. The United States had exported crimmigration.

B. Reversing the Crimmigrator: DACA

DACA provides a second example of how empowering a crimmigrator to choose among two rules in tension with one another will tend to prioritize the exclusionary rule, and vice versa. The story of DACA, where this Article began, illustrates how choosing an agency or official that is not a crimmigrator enables an inclusionary rule that protects noncitizens from deportation even when that rule competes with an exclusionary rule that favors deportation.

DACA essentially defined a category of noncitizens who would no longer be subject to crimmigration policies and recognized that group as belonging, at least liminally.²¹² The DACA program protected undocumented youth residing in the United States from removal.²¹³ By the end of 2024, over 800,000 people had benefited from DACA.²¹⁴ The rule protecting these resident youth worked, however, only when the right decision-maker was in place. Before DACA was formally enacted, the first attempt

New policies also expanded the role of border patrol officers to take on the credible fear duties of asylum officers. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-144, DHS AND DOJ HAVE IMPLEMENTED CREDIBLE FEAR SCREENING PILOT PROGRAMS, BUT SHOULD ENSURE TIMELY DATA ENTRY 2–3, 16 & n.13 (2020), <https://www.gao.gov/assets/gao-21-144.pdf> [<https://perma.cc/TZ8N-KP7T>] (discussing how under the Prompt Asylum Claim Review and Humanitarian Asylum Review Process programs, CBP Border Patrol agents conducted credible fear interviews of individuals identified for the expedited removal process).

212. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. L. REV. 709, 726 (2015).

213. See U.S. CITIZENSHIP & IMMIGR. SERVS., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), <https://www.uscis.gov/DACA> [<https://perma.cc/7CV9-3TH9>].

214. U.S. CITIZENSHIP & IMMIGR. SERVS., DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) QUARTERLY REPORT (FISCAL YEAR 2024, QUARTER 4) (Dec. 16, 2024), <https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data> [<https://perma.cc/SCW3-YGUB>] (reporting approved DACA requests from August 15, 2012, to September 30, 2024 when filtered for December 2024).

to stop deporting young undocumented residents began with ICE.²¹⁵ The head of ICE issued a memo that protected undocumented youth by placing them at the very bottom of the enforcement priorities list.²¹⁶

This should have worked, but it failed. ICE agents continued to deport the youth.²¹⁷ The attempt failed because it put the decision to withhold deportation in the hands of the wrong decision-maker: immigration enforcement agents endowed with administrative arrest powers, garbed in police-like uniforms, and charged with crimmigration duties. Relying on an administrative agency to prioritize an inclusionary rule when that agency held itself out as enforcing exclusionary rules was primed for failure.

The DACA program powerfully illustrates that changing *who* decides can fundamentally alter how legal rules in tension with one another are treated. USCIS, which decides DACA cases, is tasked with implementing inclusionary immigration rules, in contrast to ICE's mission of exclusion and expulsion.²¹⁸ The substantive rule restricting deportation of undocumented youth existed only as political will until DACA shifted the decision-maker from an actor within the crimmigration paradigm to an actor outside of it. DACA reallocated the decision about who was low priority for deportation from an agency responsible for

215. *Morton*, Exercising Prosecutorial Discretion, *supra* note 13 (directing ICE to exercise prosecutorial discretion for certain factors, including whether an immigrant came to the United States as a young child).

216. *Id.*

217. *See, e.g.*, Press Release, Am. Immigr. Lawyer's Ass'n & Am. Immigr. Council, AILA/AIC Survey Reveals ICE Officials' Sporadic Exercise of Prosecutorial Discretion (Nov. 9, 2011), <https://www.aila.org/library/aila-aic-survey-reveals-sporadic-prosecutorial-discretion> [<https://perma.cc/DQQ2-SJ4X>] (describing a survey of immigration attorneys who found that in most ICE offices the priorities of the Morton Memo had not been followed); Julián Aguilar, *Policy Shift Hasn't Reached Border Control*, TEX. TRIB. (Sep. 7, 2011), <https://www.texastribune.org/2011/09/07/despite-policy-shift-deportations-proceedings-cont> [<https://perma.cc/NP2P-7KYW>] (reporting that despite the Morton Memo, ICE continued to detain immigrants in categories deemed non-priorities, including those who had been in the country for a long time).

218. *Contrast* U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS ANNOUNCES NEW AGENCY MISSION STATEMENT (Feb. 9, 2022), <https://www.uscis.gov/archive/uscis-announces-new-agency-mission-statement> [<https://perma.cc/S3LK-7KXX>] ("This new mission statement reflects the inclusive character of both our country and this agency. The United States is and will remain a welcoming nation that embraces people from across the world who seek family reunification, employment or professional opportunities, and humanitarian protection."), *with* U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/mission> [<https://perma.cc/S9FU-P753>] ("Mission: Protect America through criminal investigations and enforcing immigration laws to preserve national security and public safety.").

determining questions of detention and expulsion (ICE) to the agency responsible for determining questions of admission (USCIS).²¹⁹

President Donald Trump unsuccessfully attempted in his first term to rescind DACA, asserting that the executive branch did not have the authority to create the program.²²⁰ In 2025, after a trip to the Supreme Court, the Fifth Circuit upheld DACA's forbearance from deportation but struck down its provision for work authorization, though it limited the scope of the injunction against work authorization to Texas.²²¹

President Donald Trump's effort to terminate DACA²²² can be understood as an attempt to change the decision-maker once again.²²³ Rescinding DACA does not lead to automatic deportation of the population of undocumented youth. It means that group becomes, in the eyes of the law, indistinguishable from other undocumented immigrants.²²⁴ Terminating DACA and leaving no guidance in place about how to prioritize enforcement discretion merely pushes the decision to pursue deporting any particular individual or group to the lowest level rank-and-file immigration official. In place of immigration administrators following a set of established criteria, the decision about whether to deport resident youth is ceded to the unguided discretion of the individual ICE or CBP agent.

219. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Protection et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/8KHY-SUYC>].

220. The attempt failed when the Supreme Court held that the rescission was flawed. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020).

221. *Id.* at 9–10; *Texas v. United States*, 126 F.4th 392, 418–21 (5th Cir. 2025).

222. Memorandum from Elaine C. Duke, Sec'y of Dep't of Homeland Sec., to James W. McCament, Acting Dir. U.S. Citizenship & Immigr. Servs. et al., Recession of the June 15, 2012, Memoranda Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," (Sep. 5, 2017), <https://www.dhs.gov/archive/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/F8G7-UMTP>].

223. See *Regents of the Univ. of Cal.*, 591 U.S. at 28 (holding that the Trump Administration's rescission of DACA was arbitrary and capricious).

224. See *Frequently Asked Questions: Recission of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEPT OF HOMELAND SEC. (Sep. 5, 2017), <https://www.dhs.gov/archive/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/F7ED-FMQX>] (observing that when DACA recipients' "period of deferred action expires or is terminated, their removal will no longer be deferred and they will no longer be eligible for lawful employment").

IV. CREATING AND DEFLATING CRIMMIGRATORS: DRIVER'S LICENSES AND THE REAL ID ACT

The Department of Motor Vehicles (DMV) seems an unlikely place to find crimmigrators. The REAL ID Act illustrates, however, how a state agency can play a major part in expanding or limiting crimmigrator discretion. Unlike the case studies in Parts II and III, which addressed the proliferation of crimmigrators and crimmigrator discretion to choose exclusionary rather than inclusionary rules, the REAL ID Act allows states to either widen or narrow the discretion of non-crimmigrator agency officials to include or exclude.

The substantive legal question here is straightforward: whether an applicant for a driver's license is eligible. In the United States, this decision is made by state or local administrative agencies, the DMVs peppered throughout communities.²²⁵ These agencies typically check for state residence and a minimum level of driving skill.²²⁶ Getting a driver's license has traditionally been a rite of passage for teenagers in many states. It connects the new driver to the U.S. romance with the road²²⁷ and, more practically, opens opportunities to work, go to school, and be part of a community.²²⁸ For some, it is also often the first encounter with the rules, processes, and documentation associated with a government bureaucracy, however local.

After the terrorist events of September 11, 2001, Congress employed the DMV as a crimmigrator by passing the REAL ID Act.²²⁹ The Act invited state agencies into the apparatus of

225. *State Departments of Motor Vehicles*, NHTSA (2024), https://www.nhtsa.gov/sites/nhtsa.gov/files/2024-01/States-Dept-of-MV_011224_v4a-tag.pdf [<https://perma.cc/W3PZ-WZN7>].

226. See Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. L. REV. 879, 889 (2015) (reporting that the first state driver's license laws set standards for driving fitness, focusing on public safety considerations related to age, physical capacity, driving competency, and knowledge of traffic laws); see, e.g., OR. REV. STAT. § 807.062 (setting forth requirements for proof of residency).

227. See generally JACK KEROUAC, *ON THE ROAD* (1957) (iconically narrating a cross-country road trip and its representation of American male freedom).

228. See Lai, *supra* note 226, at 892; Kevin R. Johnson, *Drivers Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L. J. 213, 221 (2004) (observing that driver's licenses often substitute as a national identification card, and are often "necessary for full access to U.S. society, from opening a bank account to renting an apartment . . ." and that "a driver's license means the ability to live in a way that most Americans take for granted").

229. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, §§ 201–07, 119 Stat. 231, 311–16 (2005).

excluding undocumented immigrants by requiring DMV clerks to demand documents showing lawful status in order to get a driver's license that would allow for air travel and access to federal buildings.²³⁰ Under the REAL ID Act, a state driver's license agency was no longer checking only for state residence and driving skill. DMV clerks were now required to both assess driving talent and screen for immigration violations.

The decision to issue a driver's license incorporated, and was changed by, the requirement to check for immigration violations.²³¹ REAL ID brought these state agencies, through the decision about who can lawfully drive, into a decision about who may be arrested, detained, and expelled.

The result was to turn the local DMV into a piece of the crimmigration apparatus and to push undocumented immigrants into a criminalized space.²³² By refusing a license to those who could not establish that they were lawfully present, the REAL ID Act created a population of drivers without licenses who needed to drive for work, school, and other reasons. It also denied that group a common form of identification. The REAL ID Act thus centralized the police in immigration enforcement when police officers arrested those without a license.²³³ This made immigrants accessible to immigration officials by making it easier for federal agents to identify and deport them.

Incorporating state and local driver's licensing agencies as crimmigrators had implications for membership in the community. The REAL ID Act drove immigrant communities underground, unable to drive lawfully.²³⁴ It also meant that they lacked a key piece of identification needed to open bank

230. *Id.* § 202, 119 Stat. at 313; *Real ID Frequently Asked Questions: Are All States Issuing REAL ID Compliant Cards?*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/real-id/real-id-faqs> [<https://perma.cc/2HBU-RZCX>] (listed under "Are all states issuing Real ID compliant cards?").

231. *See* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, §§ 202(c)(2)(b), 119 Stat. 231, 313 (2005).

232. *See* Lai, *supra* note 226, at 892–93 (observing that state and local police have taken advantage of the obstacles to obtaining licenses to "investigate, arrest, and detain undocumented immigrants," and that "driver's license schemes became an immigration enforcement tool of choice for police agencies and sheriff's offices around the country interested in exacting retribution from undocumented immigrants, allowing racially motivated traffic stops to flourish"); *see also* NSCL, *States Offering Driver's Licenses to Immigrants* (2023), <https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants> [<https://perma.cc/H4EV-WQYG>].

233. *See* Lai, *supra* note 226, at 892.

234. *See id.*

accounts, cash checks, enter many public places, and otherwise participate in many of the public, social, and economic spheres of society.

The consequence was that the DMV became part of the crimmigration pipeline, with the clerk a sort of mini-crimmigrator, newly endowed with authority to deny a license for immigration enforcement reasons. DMV rejections of driver's licenses pushed noncitizens closer to other crimmigrators, including police and sheriffs who partnered with federal immigration officials, and immigration officials who could identify and detain noncitizens arrested for driving without a license. REAL ID plugged DMVs into a national pipeline that took undocumented drivers from the road to removal proceedings.

Overcoming this barrier to lawful driving and making the driver's license accessible to those who needed that important piece of identification required changing the decision-maker. In 2019, Oregon joined a handful of states in creating an alternative driver's license under a provision of the REAL ID allowing for such an option.²³⁵ That change removed the decision about who belongs and who remains from the police officer making an arrest for driving without a license. It refocused DMV bureaucrats on their core function: to decide whether teenagers and adults live in Oregon and are likely to succeed in driving a car without crashing.

Changing the criteria from lawful immigration status to state residence also changed the scope of who belonged.²³⁶ So long as the DMV clerk determined that an individual lived in Oregon and could drive capably, that individual had the freedom to travel, freedom from arrest, and an imprimatur of belonging: a document that provides the kind of identification that opens doors to local institutions and recognizes the holder as a resident of that state.

235. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, §§ 202(d)(11), 119 Stat. 231, 315 (2005) (providing guidance for driver's licenses or identification cards that do not satisfy the requirements of the ACT); *see also* OR. REV. STAT. § 807.021 (2021) (allowing driver's licenses to be issued to applicants who provide a "written statement that the person has not been assigned a Social Security number").

236. *See, e.g.*, OR. REV. STAT. § 807.021 (2021) (allowing driver's licenses to be issued to applicants who provide a "written statement that the person has not been assigned a Social Security number").

CONCLUSION

The significance of who decides resonates in both the immigration and criminal arenas and in the space where they overlap. This Article identifies some ways in which shifts in who is responsible for crimmigration issues changes how those issues are framed and decided. It suggests that attention to who decides is at least as important as what issues or reforms must be made.

One of the animating notions in police reform is that the police in our society have become the default institution for response to all manner of social issues, from mental health to domestic violence to managing school disruptions.²³⁷ Rather than asking what individuals may have done to trigger a policing response, the new focus is on questioning who the decision-maker is, and pressing to change that assignment of authority. If the default decision-maker for social ills up to now has been the police, should it instead be a social worker? Or the school principal? Stripping away policing as the default response makes room for considering whether changing the decision-maker can undo the racialized institutional structures that are intertwined with policing.

Rethinking policing as the default response to social disruption has intriguing implications for crimmigration. Understanding crimmigration and pursuing its reform requires deliberate choices about who will implement those reforms and the scope of their discretion. In making change, deciding what must change is only the first question. Implementing that change means deciding who will carry it out. Reforming public policy and institutions to change or enlarge the cast of actors and decision-makers might have potential to change not just the outcome but the very framing of the issue.

Moreover, immigration decisions are not just determinations of who may enter and who will be expelled. They are, at bottom, decisions about who belongs.

237. See Nicholas Turner, *Society's Problems Call for More Than Police*, VERA INST. JUST. (May 18, 2023), <https://www.vera.org/news/societys-problems-call-for-more-than-police> [<https://perma.cc/8LRG-XRGG>].