

# What is Crimmigration Law?

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Historically, criminal law and immigration law have operated as separate spheres. On the one hand, people who are not United States citizens were subjected to federal laws determining who is admitted into the country and who is excluded. If the government learns that a migrant who is in the United States has violated some provision of immigration law, federal immigration officials initiate the process of forcible removal from the United States. On the other hand, anyone accused of having committed a crime is apprehended by police officers, put through the criminal justice system, and, if convicted, punished. This is true of United States citizens as it is of people who are not United States citizens. For most of the nation's history, people were punished according to the laws enacted by legislatures, but they were punished identically regardless of citizenship status.

Beginning in the mid-1980s, the stark separation between criminal law and immigration law shifted quickly and dramatically. Two centuries into the nation's life, the gap between these areas of law began to blur. Today, it is often hard to explain where the criminal justice system ends and the immigration process begins. The single most common type of crime prosecuted in federal courts is about immigration. Meanwhile, people facing the possibility of removal from the United States are frequently locked behind steel doors and surrounded by barbed wire.

This is crimmigration law. In the groundbreaking article coining the term, Juliet Stumpf, a professor at Lewis & Clark University Law School, noted that the division between criminal law and immigration law "has grown indistinct" such that the two "are merely nominally separate." Since the 2006 publication of Stumpf's article, crimmigration law has expanded. Today, it can be thought of as having three features. First, it is easier than ever for the federal government to exclude or deport (legally referred to as "removal") a migrant from the United States. Second, the criminal justice system has increasingly become focused on immigration activity. Third, law enforcement agencies and prosecutors have tailored their enforcement tactics to raise the stakes of a person's status as a migrant.

### **Immigration-related Consequences of Conviction**

Legal proceedings in which removal is decided are treated by law as nothing more than administrative hearings in which a federal government employee decides whether a particular person merits permission to enter into or remain in the United States. These hearings take place in immigration courts operated by the Justice Department. They are presided over by immigration judges who work for the attorney general, not the federal judiciary. Time and again, the United States Supreme Court has concluded that forcible removal from the country is not punishment. These conclusions about the legal character of immigration law mean that there is no right to appointed counsel in immigration court. Other features associated with legal proceedings in the United States are also absent. There is no right to confront witnesses, no protection against self-incrimination, no presumption of innocence, and only an exceedingly limited ability to toss out evidence obtained by illegal law enforcement activity.

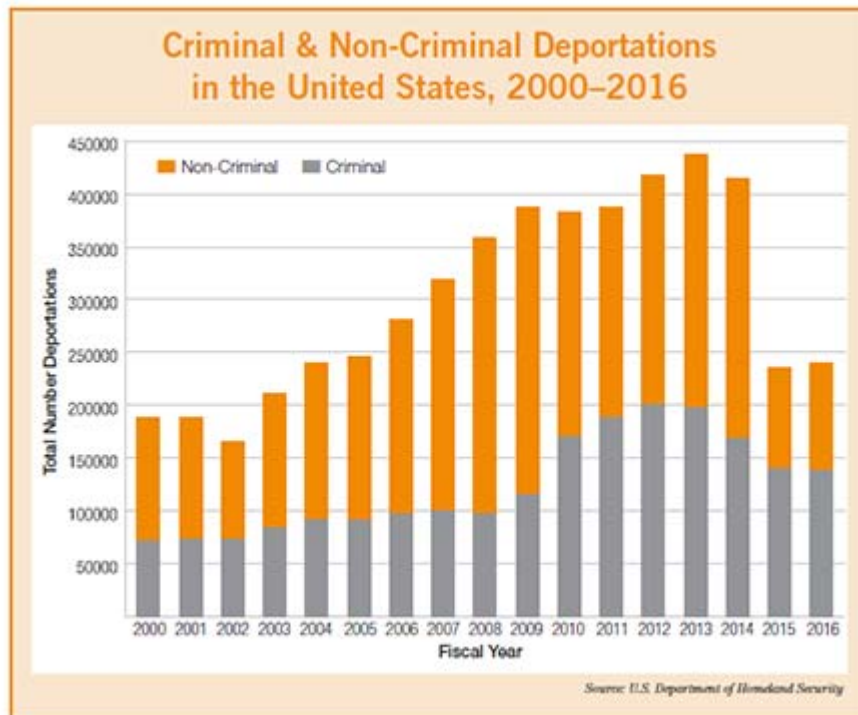
Until the last decades of the twentieth century, few people were removed from the United States due to involvement in criminal activity. For the 92 years from 1892 to 1984, only 14,287 people were excluded from the country because of criminal activity. During that same period, 56,669 were deported for that reason. In total, 70,956 people experienced some immigration consequence during this span because of criminal activity. By contrast, in 2013 alone, the Immigration and Customs Enforcement agency (ICE) reported removing 216,810 people with a criminal conviction on their record. Put another way, there were more than three times as many people removed from the United States due to criminal activity in 2013 alone than in most of the twentieth century combined.

The quarter-million people removed annually due to a criminal activity are a diverse bunch. Some are lawful permanent residents. As people who are entitled to live and work in the United States indefinitely so long as they comply with immigration law requirements, they are the most privileged type of migrant. Others are people with permission to come here temporarily—say students enrolled in an academic program. Still others lack the federal government's authorization to be here.

More significantly, the type of crime these individuals commit varies dramatically. To be sure, some commit the most heinous of actions. Most, however, do not. In 2013, for example, fully 31% of the 216,810 people removed with a criminal record had been convicted of nothing worse than a federal immigration crime (usually entering the United States without the federal government's permission, one of two commonly prosecuted federal crimes). Another 16% had been convicted of drug crimes. Though some of these include major drug trafficking offenses, most involve simple possession of small amounts of drugs. In effect, most involved the kind of drug activity that is now legal in 26 states plus the District of Columbia. The next most common category of crime that got people into immigration law troubles in 2013 was motor-vehicle traffic offenses. Clocking in at 15% of the total, traffic offenses still outnumbered assault crimes, which accounted for 10% of criminal removals.

## Migrants in the Criminal Justice System

By linking removal to criminal convictions, modern immigration law turns the criminal courtroom into the most important scene for determining whether a person is likely to be allowed to remain in the United States. In a groundbreaking 2010 decision, *Padilla v. Kentucky*, the United States Supreme Court acknowledged the changed landscape of immigration law. “[R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.”



The Supreme Court’s *Padilla* decision launched a vigorous evolution within the criminal justice system. The Sixth Amendment to the United States Constitution ensures that anyone charged with a jailable offense who is too poor to hire an attorney be provided with one at the government’s expense. The idea behind what has become a foundational feature of the United States’ conceptualization of justice is that no person should lose their liberty or life out of sheer poverty. As the Supreme Court put it in an earlier landmark decision about the right-to-counsel, *Gideon v. Wainwright*, “in our adversary system of criminal justice, any person [hailed] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

With an attorney by their side guaranteed and with modern immigration law’s emphasis on criminal conduct to decide removal, criminal defense attorneys play an outsized role in determining the fate of their migrant clients. For that reason, the *Padilla* Court concluded that the Sixth Amendment requires that criminal defense attorneys advise their clients who are not United States citizens about the immigration-related consequences of conviction. This is true no matter what criminal accusation a defendant faces and regardless whether the criminal proceeding involves state or federal law.

While some criminal defense attorneys find themselves obligated to consider the immigration consequences of a client’s predicament, others find themselves defending migrants who are facing criminal charges for immigration-related activity. Indeed, the vast majority of new criminal cases filed in federal courts nationwide target people who commit immigration crimes. In 2012, for example, federal courts completed 92,345 immigration crime prosecutions. The next most often prosecuted category of crime that year, drug offenses, numbered fewer than 40,000 prosecutions. Four years later, both numbers had dropped, but the trend had not shifted. There were 68,314 immigration crime prosecutions and less than 24,000 drug crime prosecutions in 2016. The bulk of federal immigration crime prosecutions are for illegal entry and illegal reentry. The former punishes those entering the United States without the federal government’s permission. The latter targets doing that after having previously been removed. Though both crimes have been part of federal law since 1929, neither was used frequently until the last years of President George W. Bush’s second term. Federal prosecutors continued this trend under President Obama.

The federal government has not been alone in ratcheting up the consequences for migrants caught up in the criminal justice system. Several states have done their part as well. None has been more prominent than Arizona. In 2010, Arizona’s attempts to increase the consequences of immigration law violations nudged it into international prominence when Governor Jan Brewer signed into law Senate Bill 1070, commonly described as the “show-me-your-papers” act. Protracted litigation quickly ensued, leading the federal government to take the unusual step of suing the state. Eventually the United States Supreme Court weighed in, concluding that much of S.B. 1070 violates the U.S. Constitution. The sole challenged provision left standing, however, was the much-derided section authorizing police officers to investigate the immigration status of any person lawfully detained, stopped, or arrested. The Court warned

that though the law is not necessarily unconstitutional, it could easily be applied unconstitutionally if, for example, it served as an excuse to detain solely to ask about immigration status or if it were applied discriminatorily.

In a variety of ways, numerous states followed Arizona's lead, thrusting their criminal law enforcement powers directly into immigration law policing. Alabama, for example, created a state agency charged with overseeing immigration law enforcement efforts. California criminalizes the use of fraudulent citizenship documents. In recent months, legislators in approximately two dozen states have introduced legislation to expand the role of local police in detaining people on behalf of federal officials.

### **Enforcement Tactics**

Criminal immigration law's final feature concerns the unique or uniquely harsh law enforcement methods used against migrants. With so many people being prosecuted for immigration-related crimes, it should come as no surprise that the number of migrants imprisoned is also substantial. Every year, roughly half-a-million people are imprisoned due to an immigration law violation. ICE alone detains approximately 400,000 migrants annually who are waiting to learn whether they will be allowed to remain in the United States. Another division of the federal government, the Justice Department's United States Marshals Service, detains tens of thousands more people who are awaiting prosecution for an immigration crime. As the agency responsible for detaining everyone facing a federal criminal prosecution and unable to get released on bail, in 2013 the Marshals Service took into its custody 97,982 suspected immigration crime offenders. That year, it held 28,323 people charged with a federal drug crime, the next most common reason for pretrial detention. Almost all immigration crime defendants will be convicted. When that occurs, they are transferred into the custody of the Bureau of Prisons, another Justice Department wing. In recent years, the BOP has held approximately 20,000 convicted immigration offenders every day.

Often, migrants pushed through the criminal justice system are stripped of procedural protections that emblemize traditional criminal proceedings. The notion that every defendant is entitled to a day in court, for example, presumes an opportunity to receive a judge's full attention. Indeed, Rule 11 of the Federal Rules of Criminal Procedure, a set of mandatory instructions by which federal criminal cases function, demands that a judge "must address the defendant personally in open court" before accepting a guilty plea. For many migrants facing immigration crime accusations, that requirement has been severely undercut by a quick-adjudication mechanism called Operation Streamline. Under that initiative, federal prosecutors work with federal courts to quickly process large numbers of immigration crime cases. Dozens of defendants are presented to a federal judge simultaneously. Some reports indicate that as many as 100 immigration crime defendants will be brought before a federal judge at the same time. Judges then review the criminal process with defendants, asking them a series of questions intended to gauge whether they understand what is happening. Though federal judges are required to engage in this colloquy with all defendants (state judges follow similar routines), it is unheard of outside of the context of federal immigration crimes for judges to regularly engage in en masse plea hearings.

Anyone who speaks to large audiences can guess the downside of en masse hearings. A speaker who presents a question to a room full of people is likely to receive some response. Understanding who said what and who said nothing, however, is next to impossible. As the United States Court of Appeals for the Ninth Circuit explained when reviewing a legal challenge to Operation Streamline, all a judge is likely to hear is "an indistinct murmur or medley of yeses." This is poor practice in most public-speaking contexts. When it comes to criminal proceedings, however, the questions that a judge asks can form the foundation for a conviction and punishment. For that reason, to be labeled a federal convict requires more precision when it comes to all crimes except those related to immigration.

### **Criminal Immigration Law's Future**

As deeply as criminal immigration law has become embedded in contemporary law and law enforcement, it remains in its infancy. Only three decades into its evolution, it is difficult to know whether criminal immigration law will remain a standard feature of the United States legal system. Without question, signs suggest that criminal immigration law is likely to expand, not contract, in the immediate future. Early into the Trump administration, top officials have repeatedly expressed a desire to focus the immigration court system's focus on people with criminal histories, prosecute more federal immigration crimes, expand the federal government's detention capacity, and enlarge federal cooperation with state and local governments interested in helping identify and apprehend suspected immigration law violators.