CRIMMIGRATION AND THE LEGITIMACY OF IMMIGRATION LAW

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Crimmigration law—the intersection of immigration and criminal law—with its emphasis on immigration enforcement, has been central in discussions over political compromise on immigration reform. Yet crimmigration law's singular approach to interior immigration and criminal law enforcement threatens to undermine public faith in the legitimacy of immigration law.

This Article explores the significance of crimmigration for the procedural legitimacy of immigration law. Seminal scholars of psychological jurisprudence have concluded that perceptions about procedural justice—whether the law and legal authorities treat people fairly—are often more important than a favorable outcome, such as winning a case or avoiding arrest. Crimmigration introduces procedural deficiencies into immigration law that may undermine people's perceptions of its legitimacy. These deficiencies, seen through the lens of psychological jurisprudence, mean that individuals and institutions are less likely to trust immigration law and cooperate with immigration authorities.

This Article applies specific criteria that jurisprudential psychologists have shown influence perceptions about justice. It predicts that the core procedural deficiencies of crimmigration—which bar access to immigration benefits, undermine procedural safeguards for fair and accurate outcomes, and embed racialization into immigration enforcement—will undermine perceptions about the legitimacy of immigration law. This has important implications for immigration reform. If

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immigration enforcement lacks procedural justice, any compromise struck with crimmigration at its core will exacerbate public distrust of immigration law.

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INTRODUCTION

In 2018, the spectacle of immigration enforcement officials at the border forcibly separating Central American children from their parents gripped the nation's attention.[1] Family separation was a flash point in an ongoing controversy over the role of crimmigration—the merging of immigration and criminal law[2]—in immigration policy. Crimmigration was central to family separation, grounding the decision to separate families on a "zero tolerance" policy that required criminal

1. *Attorney General Announces Zero Tolerance Policy for Criminal Illegal Entry*, OFF. OF PUB. AFFS., DEP'T OF JUST. (April 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/7KKJ-Q436]; Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html [https://perma.cc/3VHD-TN4N].

2. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006) (mapping the points of intersection of criminal law and immigration law and introducing the term "crimmigration law"); *infra* note 20 and accompanying text.

prosecution of all adults who crossed the border without permission, including adults traveling with children.[3]

Family separation centralized crimmigration in efforts to heighten immigration policing and sharpened the controversy around it. Even before the 2018 family separation episode, the nation had been embroiled in debate about the content of its immigration laws, the means of enforcing those laws, and the relationship between immigration policing and communities of color associated with immigration. Concerns about immigration enforcement have consternated presidential policymakers,[4] consumed copious congressional energies,[5] and driven the legislative and enforcement priorities of states and localities.[6] In 2008, an

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3. OFF. OF PUB. AFFS., DEP'T OF JUST., *supra* note 1; Davis & Shear, *supra*, note 1.

4. Richard Cowan, *House Republicans Try to Chip Away at Immigration Reform*, REUTERS (Feb. 5, 2013), http://www.reuters.com/article/2013/02/06/us-usa-immigration-idUSBRE9130V620130206 [https://perma.cc/W5ZX-6Q3J]; Lucia Mutikani, *White House Drafts Backup Immigration Plan, Republicans Balk*, REUTERS (Feb. 17, 2013), http://www.reuters.com/article/2013/02/17/us-obama-immigration-idUSBRE91G01O20130217 [https://perma.cc/9CRJ-MERS].

5. *See* 168 CONG. REC. S10,062-65 (daily ed. Dec. 22, 2022) (failed vote for amendments 6621–52 to the Consolidated Appropriations Act of 2023, which would have provided immigration benefits, including a pathway to citizenship for Dreamers, in exchange for bolstered border security); Consolidated Appropriations Act of 2023, Pub. L. No. 117-328 (2022) (passing without immigration-related amendments); Andrea Castillo, *Immigration Reformers' Hopes Dashed as Senate Fails to Act*, L.A. TIMES (Dec. 22, 2022), https://www.latimes.com/politics/story/2022-12-22/immigration-reform-hopes-all-but-dashed-as-congress-nears-end-of-session [https://perma.cc/9YQR-UDD4]; Securing America's Future Act of 2018, H.R. 4760, 115th Cong. (2018) (immigration reform bill that failed to pass); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); Ashley Parker, *Senators Call Their Bipartisan Immigration Plan a 'Breakthrough'*, N.Y. TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html; *see generally* The Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007) (introduced in the Senate in May 2007 but never voted on); Security Through Regularized Immigration and a Vibrant Economy Act of 2007 ("STRIVE Act"), H.R. 1645, 110th Cong. (2007) (introduced in the House in March 2007 but never voted on; several border security provisions added to a later appropriations bill); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (passed in the Senate in May 2006 but failed in the House); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) (passed by the House in December 2005 but not by the Senate).

6. *See, e.g.*, ARIZ. REV. STAT. §§ 1-501, 1-502, 11-1051, 13-1509, 13-2928, 13-2829, 13-3883, 28-3511 (2010), *as amended by* SB 1070, http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf [https://perma.cc/D37C-U65E], H.B. 2162, http://www.azleg.gov/legtext/49leg/2r/bills/hb2162c.pdf [https://perma.cc/LBU5-PCAY]. These state and local efforts have been vulnerable to challenges that federal immigration law preempts them. *See* Arizona v. United States, 567 U.S. 387, 416 (2012) (emphasizing, while invalidating parts of Arizona's S.B. 1070, that "[t]he National Government has significant power to regulate immigration" and that "the States may not pursue policies that undermine federal law"). *See also* Cristina M. Rodríguez,

immigration raid and federal prosecution of almost 400 Latino, noncitizen assembly-line workers led to prolonged public debate—including a congressional investigation—about whether criminal prosecution and deportation of immigrant workers was an appropriate use of federal government power.[7] In 2010, a 5–4 decision of the U.S. Supreme Court declared unconstitutionally infirm the plea agreement of Jose Padilla, a long-term lawful permanent resident of the United States, because he had not been advised that the conviction meant almost certain deportation.[8]

This national dilemma about the expansion of crimmigration operated at the state level as well. The same year that *Padilla v. Kentucky* was decided, Arizona passed SB 1070, a bill designed to use the state's criminal laws and enforcement arms to pursue a policy of "attrition" of unauthorized noncitizens.[9] The severity of the law roused a national outcry,[10] as well as copycat laws in other states.[11] In 2016,

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The Significance of the Local in Immigration Regulation, 106 MICH. L. REV. 567, 593–94 (2008) (discussing the reasons for state and local interest in regulating immigration law); *2012 Immigration-Related Laws and Resolutions in the States (Jan.1 – Dec. 31, 2012)*, NAT'L CONF. OF STATE LEGS. (Jan. 2013), http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-jan-december-2012.aspx [https://perma.cc/Y8JX-8GEH].

7. Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES (Aug. 8, 2008), http://www.nytimes.com/2008/08/09/us/09immig.html. *See also Immigration Raids: Postville and Beyond: Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l L. of the H. Comm. on the Judiciary*, 110th Cong. (2008); Antonio Olivo, *Immigration Raid Leaves Damaging Mark on Postville, Iowa*, L.A. TIMES (May 12, 2009), http://articles.latimes.com/2009/may/12/nation/na-postville-iowa12 [https://perma.cc/7JA2-H2S9].

8. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

9. The Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), 2010 Ariz. Sess. Laws 1 (codified as amended in scattered sections of ARIZ. REV. STAT. Tits. 11, 13, 23, 28, and 41). *See* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1766–67, 1814 (2011).

10. *See* Randal C. Archibold & Ana Facio Contreras, *First Legal Challenges to New Arizona Law*, N.Y. TIMES (Apr. 29, 2010), https://www.nytimes.com/2010/04/30/us/30reaction.html?smid=url-share; Randal C. Archibold, *In Wake of Immigration Law, Calls for an Economic Boycott of Arizona*, N.Y. TIMES (Apr. 29, 2010), https://www.nytimes.com/2010/04/27/us/27arizona.html?smid=url-share; Robert Faturechi et al., *Thousands Gather for Immigrant Rights March in Downtown L.A.*, L.A. TIMES (May 1, 2010), http://www.latimes.com/news/la-mew-immigration-rally-20100502,0,1978748.story [https://perma.cc/8T56-B8HZ]; Becky Schlikerman, *Demonstrators Rally Inside City Hall Against Arizona Immigration Law*, CHI. TRIB. (July 28, 2010), http://articles.chicagotribune.com/2010-07-29/news/ct-met-city-hall-immigration-rally-0720100729_1_arizona-sb-immigration-law-arizona-businesses [https://perma.cc/3R5C-BHXS].

11. *See, e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535 (codified at ALA. CODE §§ 31-13-1 to 31-13-30, § 32-6-9); Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 252 (H.B. 87) (codified in scattered sections of GA. CODE.); Senate Enrolled Act No. 590, 2011 Ind. Legis. Serv. 171 (codified in scattered sections of IND. CODE); Act 69, 2011 S.C. Acts 69 (codified in scattered sections of S.C. CODE); Illegal Immigration Enforcement Act, 2011 Utah Laws Ch. 21 (codified as amended at UTAH CODE §§ 76-9-1001 to 76-9-1009). Before Arizona passed S.B.

the election of Donald Trump similarly triggered a proliferation of "sanctuary" cities and states vowing to resist the criminalization and mass deportation of immigrants,[12] while other jurisdictions doubled down on police collaboration with immigration officials.[13] The election of President Joseph Biden in 2020 reawakened the potential for a major update of statutory immigration law and revived the tug-of-war between inclusive and restrictive immigration policies.[14]

This controversy over immigration enforcement has been a major stumbling block to comprehensive immigration reform.[15] Some contend that

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1070, other states had enacted similar legislation. *See, e.g.*, Act of July 7, 2008, 2008 Mo. Legis. Serv. (H.B. 2366) (codified in scattered sections of MO. REV. STAT.); Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. 112 (codified in scattered sections of OKLA. STAT.).

12. *See generally* Christopher N. Lasch et al., *Understanding 'Sanctuary Cities,'* 59 B.C. L. REV. 1703 (2018) (providing a history and taxonomy of sanctuary policies). *See also* Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125 (2019); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 14–15 (2016).

13. *See What's a Sanctuary Policy? FAQ on Federal, State and Local Action on Immigration Enforcement*, NAT'L CONF. OF STATE LEGS. (June 20, 2019), https://www.ncsl.org/documents/immig/Sanctuary_Policy_FAQ_April2019.pdf [https://perma.cc/3UV6-AD9V] (reporting that in 2017, 33 states considered proposals that would have prohibited sanctuary policies, while proposals in 15 states and the District of Columbia would have supported them).

14. Nicholas Fandos & Zolan Kanno-Youngs, *House Tackles Biden's Immigration Plans Amid Migrant Influx*, N.Y. TIMES (Mar. 15, 2021), https://www.nytimes.com/2021/03/15/us/politics/biden-immigration-plan-bill.html https://perma.cc/52UV-M8NE] (describing the variety of political responses to President Biden's 2021 immigration plan).

15. *See* U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021) (as of this writing, the Act has been with the Subcommittee on Immigration and Citizenship since April 28, 2021); *Biden Administration Continues Efforts to Change Immigration Policy Amidst Surges of Migrants and Court Losses*, 116 AM. J. INT'L L. 197, 201–02 (2022) [hereinafter *Biden Administration Continues Efforts*] (discussing Republican governors' disparagement of enforcement at the border and lawsuits that Texas and eight other states brought to overturn DACA); *Immigration Reforms Through Budget Reconciliation*, AM. IMMIGR. L. ASS'N (Aug. 8, 2022), https://www.aila.org/advo-media/issues/featured-issue-immigration-reforms-through-budget [https://perma.cc/M429-S6FU] (discussing the Senate parliamentarian's removal of immigration provisions from the Build Back Better Act, the precursor to the Inflation Reduction Act of 2022); Brian Bennett, *Border Security 'Never Stronger,' Napolitano Tells Senators*, L.A. TIMES (Feb. 13, 2013), http://www.latimes.com/news/nationworld/nation/la-na-immigration-napolitano-20130214,0,558836.story [https://perma.cc/4ZZ7-WNTZ]; Michael D. Shear & Julia Preston, *Obama's Plan Sees 8-Year Wait for Illegal Immigrants*, N.Y. TIMES (Feb. 17, 2013), http://www.nytimes.com/2013/02/18/us/politics/white-house-continues-work-on-its-own-immigration-bill.html; Rachelle Younglai, *Majority of U.S. Citizens Say Illegal Immigrants Should Be Deported*, REUTERS (Feb. 20, 2013), http://www.reuters.com/article/2013/02/21/us-usa-immigration-idUSBRE91K01A20130221 [https://perma.cc/P3ZK-5C7S]. *See also* David P. Weber, *Halting the Deportation of*

immigration enforcement officials are either unwilling or unable to stem undocumented immigration[16] and argue that until immigration enforcement officials deport the current population of unauthorized immigrants and deter others, immigration law reform is doomed to failure.[17] Reform efforts thus have tended to

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Businesses: A Pragmatic Paradigm for Dealing with Success, 23 GEO. IMMIGR. L.J. 765, 791 (2009) (noting that "as a precondition for even considering a comprehensive legalization provision, opponents of comprehensive reform have advocated for additional preventative measures such as increased border fencing, stricter employer sanctions, a guest worker program, and stricter enforcement of current immigration laws").

16. *Biden Administration Continues Efforts*, *supra* note 15; Adam Serwer, *The Real Border Crisis*, THE ATLANTIC (Mar. 26, 2021), https://www.theatlantic.com/ideas/archive/2021/03/which-border-crisis/618420/ [https://perma.cc/CD4Z-QMXH] (discussing conservatives' contention that an increase in migrants resulted from "permissive, open-borders immigration policies"); Press Release, U.S. Sen. Ted Cruz, In Letter, Sens. Cruz, Graham Raise Prospect of Impeachment for DHS Secretary Mayorkas (Oct. 6, 2022), https://www.cruz.senate.gov/newsroom/press-releases/in-letter-sens-cruz-graham-raise-prospect-of-impeachment-for-dhs-secretary-mayorkas [https://perma.cc/Z49P-6JHH] (accusing Department of Homeland Security ("DHS") Secretary Mayorkas of a "failure to enforce immigration law"); Richard Cowan, *Senate Republicans Cast Doubt on Broad Immigration Bill*, REUTERS (Feb. 13, 2013), https://www.reuters.com/article/us-usa-immigration-congress/senate-republicans-cast-doubt-on-broad-immigration-bill-idUSBRE91C1BE20130213 [https://perma.cc/X2UK-UVGS]; Julia Preston, *Napolitano Defends Administration on Border Enforcement*, N.Y. TIMES (Apr. 1, 2011), http://thecaucus.blogs.nytimes.com/2011/04/01/napolitano-defends-administration-on-border-enforcement/?ref=borderpatrolus; David Schwartz, *Arizona Sues Government on Mexico Border Security*, REUTERS (Feb. 11, 2011), http://www.reuters.com/article/2011/02/11/us-arizona-immigration-idUSTRE7197GY20110211 [https://perma.cc/QC7J-TDX8]. *See also* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 805 (2008) (noting state and local frustration with perceived failure of federal immigration enforcement); Kris W. Kobach, *Arizona's S.B. 1070 Explained*, 79 UMKC L. REV. 815, 822–25 (2011); Kris Kobach, *The Fiscal and Legal Foundation of State Laws on Illegal Immigration*, 51 WASHBURN L.J. 201, 201 (2012) [hereinafter Kobach, *The Fiscal and Legal Foundation*]. *See also* Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007) (evaluating federal immigration enforcement); Rodríguez, *supra* note 6, at 570 (2008) (crediting legislative inaction). *But see* Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1387–89 (2013) (noting that "state enforcement mandates have, if anything, been more interested in prompting more federal enforcement action, not in telling the federal government to back off and let states take over").

17. *See* Rafael Bernal & Mike Lillis, *GOP Bill Highlights Republican Rift on Immigration*, THE HILL (Feb. 10, 2022), https://thehill.com/latino/593577-gop-bill-highlights-republican-rift-on-immigration/ [https://perma.cc/32TY-DB47] (discussing conservative lawmakers' resistance to immigration reform unless the border is secured first). One outspoken politician has published his strong opinions on this: Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1328–33 (2008) (advocating state and local immigration enforcement efforts as means of addressing immigration enforcement and criticizing the legalization of unauthorized immigrants as "expensive at every level of government" and "no solution at all"); Kris W. Kobach, *A Response to Margaret Stock*, 23 REGENT U. L. REV. 375, 376 (2011) [hereinafter

seek compromise by trading more expansive grounds of admission and legalization of current unauthorized residents for harsher criminal deportation grounds and enforcement methods.

This logic holds that legalizing unauthorized noncitizens must be in lockstep with expanding crimmigration law. Such an expansion would employ criminal law and enforcement tools to increase exclusion and deportation, while using immigration policing to expand criminal arrest and prosecution of noncitizens. Failing to expand enforcement in both the deportation and criminal law sectors will, in this view, undermine the legitimacy of immigration law itself. Reform provisions that would regularize the immigration status of current residents are possible, then, only when paired with expanding crimmigration law.[18]

This tradeoff between expanding crimmigration methods in exchange for legalization is illusory, however, if one side of the bargain undermines the other. This Article concludes that far from legitimizing immigration law, expanding crimmigration law has a strong potential to undermine immigration law by degrading its procedural legitimacy.[19]

Kobach, *Response to Margaret Stock*] (opining that "[b]efore embarking on widespread legal reforms, the government should simply enforce the current laws thoroughly and systematically across the country. . . . Any dysfunction in the system stems chiefly from a failure to enforce the law as written."). *See also* Press Release, U.S. Sen. Marco Rubio, Rubio Statement on Senate Immigration Proposals (Feb. 15, 2018), https://www.rubio.senate.gov/public/index.cfm/2018/2/rubio-statement-on-senate-immigration-proposals [https://perma.cc/JHX4-E9SH] (supporting limited immigration reform that includes "meaningful border security and enforcement measures"); Press Release, U.S. Sen. Marco Rubio, Rubio Says President's Immigration Plan Would Be "Dead on Arrival" (Feb. 16, 2013), http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=d4fde88b-eaa1-4bd8-8ff1-8b79b689c86d [https://perma.cc/8TE2-SSH9] (arguing that proposed immigration reform "fails to follow through on previously broken promises to secure our borders, creates a special pathway that puts those who broke our immigration laws at an advantage over those who chose to do things the right way and come here legally, and does nothing to address guest workers or future flow").

18. Scholarship addressing the intersections of criminal and immigration law has burgeoned. *See, e.g.*, CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2022); Stumpf, *supra* note 2, at 376–77; *see also* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 742 n.165 (2015) (cataloguing scholarship); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS (2019); Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOCIO. RACE & ETHNICITY 82 (2016); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127 (2016); Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663 (2018); Katie Dingeman et al., *Neglected, Protected, Ejected: Latin American Women Caught by Crimmigration*, 12 FEMINIST CRIMINOLOGY 293 (2017).

19. *See supra* note 17 and accompanying text.

My prior work coined the term "crimmigration," described its anatomy and racial impact, and sought to explain its influence in diverse legal arenas such as criminal law, constitutional law, and federalism.[20] This Article uses psychological jurisprudence research to explore how crimmigration law affects perceptions of the legitimacy of immigration law.

Tom Tyler, writing in the intersection of law and psychology, pioneered psychological jurisprudence research. His pathbreaking work has shone a spotlight on the importance of procedural justice in legal policymaking and interpretation, particularly in criminal law. He established that perceptions of the legitimacy of the law and of legal authorities are strengthened when people perceive those laws as fairly made and legal officials as treating them fairly.[21] Those perceptions of procedural justice—of fair decision-making and fair treatment—are often more important than a favorable outcome, such as winning the case or avoiding arrest.[22]

One of the contributions this Article makes is to locate the psychological jurisprudence literature within the landscape of crimmigration law scholarship. On the one hand, procedural justice research seeks to explore why people obey the law, concluding that greater procedural fairness leads people and institutions to a greater willingness to cooperate with legal authorities.[23] This does not mean, however, that if noncitizens experience procedural fairness, they will be more likely to cooperate with their own detention or deportation. For people who migrate across national boundaries without authorization, whether immigration authorities treat them fairly

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20. *See e.g.*, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011) [hereinafter Stumpf, *Doing Time*]; Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) [hereinafter Stumpf, *Fitting Punishment*]; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008); Stumpf, *supra* note 2, at 376–77.

21. *E.g.*, Tom Tyler, *Reimagining American Policing*, 11 U.C. IRVINE L. REV. 1387, 1407–10 (2021) (collecting and summarizing procedural justice research and concluding that procedural justice shapes legitimacy and impacts people's willingness to comply with law, cooperate with the police, and engage in their communities); Tom R. Tyler, *Can the Police Enhance Their Popular Legitimacy Through Their Conduct?: Using Empirical Research to Inform Law*, 2017 U. ILL. L. REV. 1971, 1977 (2017) (reporting that "the primary antecedent of public judgments about police legitimacy is an evaluation of the procedural justice of police conduct. This is true both when people have personal interactions with police officers and when people are making evaluations of the overall actions of police departments"); Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL F. 579, 586 (2016) ("When people evaluate the police either in personal encounters with officers or when considering the general policies and practices of the police in their neighborhood, their central focus is not on the crime rate or the lawfulness of the police, but on whether or not the police exercise their authority in just ways.").

22. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 56–57 (2002); Tracey L. Meares et al., *Lawful or Fair—How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 311 (2015).

23. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

may play only a minor role in the decision to attempt a border crossing, with other economic, moral, or situational factors having much more sway.[24]

This Article relies on this social science research to reveal how core procedural deficiencies of crimmigration law decrease perceptions of the legitimacy of immigration law that those subject to immigration law, other affected individuals, and institutions hold. Lack of legitimacy has implications for genuine public assessment of the effectiveness of immigration law, the direction and shape of immigration reform, and the extent of cooperation by institutions as diverse as police, local governments, employers, advocates, and communities, including communities of color. If legitimacy depends on procedural justice, then creating procedural justice is a necessary ingredient in reforming immigration law and making that reform stick. Psychological jurisprudence can thus inform policy choices, legal theories, and judicial precedent at the intersection of immigration and criminal law.

Other scholars, particularly Emily Ryo and Ming Chen, have extended psychological jurisprudence research to immigration law in different and pathbreaking ways. Ryo's empirical studies have shed light on noncitizens' perceptions of the procedural legitimacy of immigration law and immigration authorities.[25] Ryo has stressed the importance, given the growing convergence of

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24. *See* Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOCIO. REV. 574, 585, 590–92 (2013) (analyzing unique survey data on unauthorized labor migration and concluding that perceptions of certainty of apprehension and severity of punishment are not significant determinants of intent to migrate without authorization and that economic and individual values, and views about the legitimacy of U.S. authority are significant determinants of unauthorized crossing). Justice Tankebe has questioned the strength of the link between obedience and procedural justice, suggesting that obedience to law may be influenced by a myriad of factors other than perceptions of fairness, including "prudential or self-interested calculations, trust, habit, and even fear." *See* Justice Tankebe, *Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy*, 51 CRIMINOLOGY 103, 127 (2013).

25. *E.g.*, Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1023–25 (2017) [hereinafter Ryo, *Fostering Legal Cynicism*] (exploring how immigration detention might function to embed legal cynicism among immigrant detainees, based on a belief in the immigration system as punitive, inscrutable, and arbitrary); Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 LAW & SOC'Y REV. 99, 120 (2017) (analyzing the legal attitudes of immigrant detainees and concluding that most detainees expressed a felt obligation to obey the law and at levels that exceeded other sample U.S. populations, that the perceived obligation to obey immigration authorities is positively related to their assessments of fair treatment while in detention, and that the treatment of other detainees was as important to procedural justice evaluations as personal experiences of fair or unfair treatment); Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. C.R. & C.L. 95, 125 (2017) (concluding from a controlled laboratory study that exposure to an anti-immigration law was associated with increased perceptions among study participants that Latinos are unintelligent and lawbreaking but finding no evidence that exposure to pro-immigration laws promoted positive attitudes toward Latinos). Emily Ryo, *The Promise of a Subject-Centered Approach to Understanding Immigration Noncompliance*, 5 J. ON MIGRATION & HUM. SEC. 285, 296 (2017) [hereinafter Ryo, *Understanding Immigration Noncompliance*] (study concluding that immigrants viewed the U.S. immigration system as

the criminal law system with immigration enforcement, of further research to better understand how the immigration and criminal enforcement systems might work in tandem to shape procedural justice perceptions and legal attitudes of noncitizens.[26] Chen has applied psychological jurisprudence research to the willingness of institutions like state agencies to cooperate with immigration officials and federal agencies to support immigration policies.[27] She concludes that procedural legitimacy is critical to persuading states, localities, and agencies to cooperate with immigration policies when they are not required to.[28]

This Article builds on these scholars' foundational work to explore how the procedural deficiencies of crimmigration law impact the legitimacy of immigration law as a whole. Part I presents the procedural justice research, locating it in theoretical opposition to the deterrence model of law enforcement. It then sketches the contours of crimmigration law, highlighting its procedural anatomy. Part II lays out the criteria that influence people when they make assessments about procedural justice. It concludes that the procedural deficiencies that crimmigration law

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out of line with their moral values and not legitimate because it violated notions of equality and fairness by operating in biased, hypocritical, and arbitrary ways lacking in system transparency, predictability, and rule-based qualities, and that these singular aspects of immigration law meant that noncompliance with immigration law was distinct from noncompliance with other laws); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 625, 670 (2015) [hereinafter Ryo, *Less Enforcement, More Compliance*] (examining migrants' perceptions of themselves and their view of immigration law as illegitimate to explain non-compliance with immigration law); Ryo, *supra* note 24, at 593.

26. Ryo, *Fostering Legal Cynicism*, *supra* note 25, at 1053.

27. Ming H. Chen, *Administrator-In-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 351–52 (2017) [hereinafter Chen, *Administrator-In-Chief*] (examining the conditions under which presidential immigration policies elicit cooperation from federal agencies using the lens of procedural justice and extending to institutions the research-based insights that "individuals cooperate with rules based on their belief that the procedures used to enact the rules are trustworthy and fair-in other words, procedurally legitimate-even when the rules disfavor their self-interest and substantive preferences"); Ming H. Chen, *Leveraging Social Science Expertise in Immigration Policymaking*, 112 NW. U. L. REV. ONLINE 281, 298–300 (2018) [hereinafter Chen, *Leveraging Social Science Expertise*] (concluding based on procedural justice research that threatening to sanction sanctuary cities would be ineffective in forcing these jurisdictions to cooperate with federal immigration officials); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 155 (2016) [hereinafter Chen, *Beyond Legality*] (using DACA as a case study, concluding based on procedural justice research that executive orders on immigration must be fair in both outcome and procedure to convince states and localities to assist in enforcement when they are not required to do so). *See also* Ming H. Chen, *The Political (Mis)Representation of Immigrants in the Census*, 96 N.Y.U. L. REV. 901, 936 (2021) (noting, based on Tom Tyler's procedural justice research, that "lack of trust in decisionmakers can lead to noncompliance or a lack of social cooperation"); Chen, *supra* note 12, at 14–15; *infra* notes 213–16.

28. Chen, *Beyond Legality*, *supra* note 27, at 154–55. Another important gloss on the application of legitimacy research to crimmigration is Irene Vega's provocation that legitimacy is an important outcome in and of itself, and not only a means to achieving legal compliance. Irene I. Vega, *Empathy, Morality, and Criminality: The Legitimation Narratives of U.S. Border Patrol Agents*, 44 J. Of Ethnic & Migration Studies 2544, 2557 (2018).

introduces into immigration law match the factors that social scientists have determined lead to a lack of trust in the law.

Part III addresses potential problems with applying psychological jurisprudence research to crimmigration law. It then examines the consequences if people and institutions perceive crimmigration law as undermining procedural justice, including the potential for undermining the broader public's perceptions of legitimate immigration laws and methods of enforcement.[29] Looking ahead to immigration reform, it concludes that any compromise struck with crimmigration at its core will embed distrust more deeply into the public discourse around immigration law.

I. CRIMMIGRATION LAW AND THE ANATOMY OF LEGITIMACY

Scholars of human perception have confirmed something that will surprise no one: people are more likely to perceive law as legitimate (in other words, they are more likely to support and comply with it) when law is aligned with people's substantive values.[30] People evaluate fairness in part by whether the outcome of an encounter with law enforcement was favorable to them, such as whether they were arrested. Less intuitively, however, people's perceptions about the legitimacy of authority are more heavily influenced by the fairness of the process than by their perceptions of the fairness of the outcome.[31]

Crimmigration law implicates both of these substantive and procedural aspects of psychological jurisprudence. This Part introduces the question of how people assess the legitimacy of law and legal authorities, and the significance of psychological jurisprudence in assessing legitimacy. It then sketches the structure of crimmigration law, identifying its singular procedural shortcuts.

A. *When are Law and Legal Authorities Legitimate?*

Determining whether law and legal authorities are legitimate opens a Pandora's box.[32] Legitimacy rests on internalized acceptance that "it is part of a

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29. As Ming Chen has observed, "Procedural legitimacy operates above the threshold of due process to improve processes presumed legal." Chen, *Administrator-In-Chief*, *supra* note 27, at 358–62, 410, 412 (applying procedural legitimacy research to the President's role as Administrator-in-Chief and noting that "procedural failures undermined [DHS's] substantive goals of efficient and well-functioning agency adjudication").

30. *See infra* notes 41–44.

31. Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 724 (2000); TYLER & HUO, *supra* note 22, at 57; Meares et al., *supra* note 22, at 333–37.

32. Perhaps the most contested question in legitimacy scholarship is how to measure legitimacy. *See* Devon Johnson et al., *Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean*, 48 L. & SOC'Y REV. 947, 948–49 (2014) (noting that "legitimacy has been conceptualized and measured in numerous ways, suggesting that there is not yet a clear consensus among scholars about what exactly constitutes legitimacy"). Seeking measurable attributes of legitimacy, scholars have pointed to seven subscales to measure people's perceptions of the legitimacy of the law: trust in institutions, obligation to obey, cynicism about the law, whether officials act respectfully,

person's duty as a citizen to accept legal rules and to obey the directives of legal authorities."[33] The meaning of legitimacy itself is a contested concept, however, because it is difficult to say whether people obey the law because they view law and legal authorities as deserving of obedience, or because they fear the consequences of failing to obey.[34] When people support the law because they see it as legitimate, social control is both more effective and less costly than using force or other means of coercion to instill obedience and garner cooperation or acquiescence to authority.[35]

As a result, fostering perceptions that law is legitimate rather than relying wholly on coercion is a necessity for legal authorities seeking to govern through means other than naked power.[36] Scholars have described a "dialogue of legitimacy" between legal authority and the public, in which those in power seek to demonstrate the legitimacy of their institutions. The governed public then responds, and the power-holders adjust the nature of their claim to legitimacy in light of that response.[37] Legitimacy is thus a "perpetual discussion" in which the audience's response affects the later claims of legitimacy that power-holders make, and so on. This dialogue of legitimacy is especially important in legal contexts where the state has imbued certain authorities, such as police or immigration agents, with extraordinary powers: powers to investigate, detain, and use force.[38]

Effective law enforcement relies on public acquiescence to authority "in the form of public compliance, cooperation, and support."[39] Central to this acquiescence to law and authority is passive public support for the institutions of

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whether decisions are seen as resulting from fair & neutral process, police effectiveness, and distributive justice. *See id.* at 960. Two of these subscales are measures of procedural justice. *Id.* at 950, 960.

33. Tyler & Darley, *supra* note 31, at 716.

34. *See* Tankebe, *supra* note 24, at 106 (offering multiple motivations to obey the law and authority).

35. Joseph A. Hamm et al., *(Re)Organizing Legitimacy Theory*, 27 LEGAL & CRIMINOLOGICAL PSYCH. 129, 132 (2022) (summarizing scholarship and observing that "although instrumental approaches to social influence can facilitate some level of effectiveness in the absence of a consenting public, it is widely understood that optimal relationships between the police and public are only possible when police authority is met with public acquiescence").

36. Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 128–29 (2012) (citing MAX WEBER, ECONOMY & SOCIETY (1978)).

37. *Id.*

38. *See* Hamm et al., *supra* note 35, at 131.

39. *Id.* at 136–37 (citing Wesley G. Skogan, *Dimensions of the Dark Figure of Unreported Crime*, 23 CRIME & DELINQUENCY 41 (1977)); Heike Goudriaan et al., *Reporting to the Police in Western Nations: A Theoretical Analysis of the Effects of Social Context*, 21 JUST. Q. 933, 934 (2004); Peter W. Greenwood & Joan R. Petersilia, THE CRIMINAL INVESTIGATION PROCESS: VOLUME I: SUMMARY AND POLICY IMPLICATIONS (1975), https://www.rand.org/pubs/reports/R1776.html [https://perma.cc/7KQ5-PZVD].

modern law enforcement, such as the police or immigration agencies.[40] Scholarship in psychological jurisprudence reveals that people view a legal rule or official action as legitimate and therefore entitled to deference if they believe that prohibiting the conduct is consistent with their social values.[41] Scholars Anthony Bottoms and Justice Tankebe have explained that legitimacy relies on whether the law and the manner of its enforcement express the "shared values" of the community in which the law operates, in addition to the procedural fairness of the law and actions of authorities.[42] When law lines up with the shared social values of a community, what follows is acquiescence by individuals and the public to the legitimacy of an authority's claim to power. Cooperation and deference to legal authorities decrease, however, when people perceive that law enforcement has acted unfairly.[43]

The first basis for assessing legitimacy, whether the law lines up with people's social values, affects perceptions of legitimacy by focusing on whether people believe that an authority's action led to a substantively fair outcome.[44] To

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40. Social scientist Joseph Hamm and his co-authors have proposed that legitimacy rests on five theoretical foundations. *See generally* Hamm et al., *supra* note 35. At the core is the dialogue of legitimacy, which results in an ongoing negotiation of the empowerment of powerholders and the reaction of their audience. Second is organizational support for authority through the grant of authority and power, which influences how officers do their job, with better trained officers feeling they are more able to navigate their own authority. Third is the influence of public approval on how powerholders structure their authority. When public opinion is negative towards authorities like police, officials tend to use authority negatively. For example, when law enforcement perceives that the community they police is unsupportive of them, they tend to resort to use of force more frequently. *Id.* at 131–35. The fifth explores how perceptions of legitimacy may vary between individuals based on individual social context. That is, "some individuals cooperate, comply, and support for reasons that have little or nothing to do with actions of the police themselves," such as guilt or morality. *Id.* at 137–38 (citing Grazyna Kochanska, *Socialization and Temperament in the Development of Guilt and Conscience*, 62 CHILD DEV. 1379 (1991); Jasmine R. Silver, *Moral Foundations, Intuitions of Justice, and the Intricacies of Punitive Sentiment*, 51 L. & SOC'Y REV. 413 (2017)).

41. *See* Tyler & Darley, *supra* note 31, at 713 (citing Raymond Paternoster & Lee Ann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 768–69 (1986); Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCH. BULL. 497, 501 (1993); Daniel S. Nagin & Raymond Paternoster, *The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Conception of Deterrence*, 29 CRIMINOLOGY 561, 580–81 (1991); Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 JUST. Q. 173, 211 (1987)).

42. *See* Bottoms & Tankebe, *supra* note 36, at 137. *See also* Tankebe, *supra* note 24, at 107 (testing these attributes).

43. *See* Luis E. Chiesa, *Outsiders Looking In: The American Legal Discourse of Exclusion*, 5 RUTGERS J.L. & PUB. POL'Y 283, 309 (2008) (summarizing legitimacy discourse); *see also* Chen, *Administrator-In-Chief*, *supra* note 27, at 352 (speaking to the converse and "examining the conditions under which presidential policies on immigration elicit cooperation from the federal agencies. . . .").

44. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 214 (2012) (comparing the "'legitimacy'" that derives from fair

take a general example, if one person forces another person to pay a substantial sum to a third person, people are likely to see that action as legitimate if the one requiring the transfer is a judge, and there is proof that the person required to pay the money broke an important promise to the third person—that she breached a contract between them. People will tend to see the court's judgment as fair because the outcome appears accurate and has moral credibility. It lines up with their social values.[45]

In contrast, when unequal bargaining power or differing conceptions of property are in play, such as the notorious land-sale agreements between the U.S. government and Native American tribes,[46] there may be little consensus about what is fair as a substantive matter. The perception that a substantive outcome is legitimate relies, then, on a consensus that requiring people to keep that sort of promise is fair.[47]

Crimmigration raises peculiar challenges for assessing whether modern immigration law lines up with people's shared social values around immigration law because crimmigration law evokes competing substantive social values. One powerful norm asserts that, as outsiders, noncitizens who violate the law deserve special punishment and that those present without explicit permission must leave.[48] The substantive social value here is the value of ensuring that those who join the U.S. community merit such membership and do not pose a danger to the national community and its members.

This norm supports the criminalization of migration-related actions. It views noncitizens who commit traditional crimes as having breached an implied contract with the United States that makes continuing to stay contingent on obeying the law.[49] This contractual norm overpowers considerations stemming from other circumstances such as length of residence in the United States or family ties.[50] For some, this means crimmigration law is necessary to bolster people's perceptions that

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adjudication and professional enforcement and the 'moral credibility' that derives from just results").

45. *Id.*

46. *See generally* ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 1–2, 96–97, 157–59, 168–69 (2006).

47. A barrier to examining immigration law's conflict with substantive social values is that noncitizens come from a variety of social and cultural backgrounds that inculcate equally varying social values. Social science research (and common sense) emphasizes that social values, those that result in the internalization of moral norms, arise primarily from childhood experiences and socialization. *See* Tyler & Darley, *supra* note 31, at 721 (explaining that "the literature on political socialization suggests that basic orientations toward law and legal authorities develop early in life").

48. *E.g.*, Kobach, *Response to Margaret Stock*, *supra* note 17, at 376.

49. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 15–62 (2006) (introducing the notion of immigration as contract).

50. *See id.*

immigration law is legitimate.[51] Imposing criminal sanctions for failure to obey immigration laws and augmenting enforcement of the intersecting criminal and immigration laws will, in this view, boost public confidence in immigration law generally.[52]

For others, crimmigration law does not line up with social values, undermining perceptions that immigration law is legitimate. A competing norm offers a view that the law should preserve the integrity of families and communities and should avoid disturbing settled expectations by uprooting people whose presence has accrued gravity through the passage of time.[53] And law should avoid exacerbating race-based policing or other disproportionate racial impacts. When crimmigration laws destroy family unity by deporting lawful permanent residents based on criminal convictions, or when crimmigration officials make race-based arrests, they conflict with these social values.[54]

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51. *See* Kobach, *The Fiscal and Legal Foundation*, *supra* note 16, at 203–04 (opining that states that pass restrictive immigration laws seek to bolster the effectiveness of immigration enforcement).

52. *See, e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 107–10 (2014) (describing an understanding of immigration as contract in which "obeying the law is a condition of admission").

53. Statutes of limitation in other areas of the law, such as tort law and criminal law, exemplify a similar norm, permitting the passage of time to foreclose otherwise valid causes of action or criminal charges in order to give repose to civil and criminal defendants. *See* DANIEL KANSTROOM, DEPORTATION NATION 125–26 (2007); Stumpf, *Doing Time*, *supra* note 20, at 1738–48.

54. This conflict between two strong social values may explain the inconsistency of widespread popular criticism of undocumented immigration alongside critiques of the outcome of immigration adjudication on an individual level. Viewing immigration from the bird's eye view of the larger population arguably triggers the social value emphasizing the protection and furthering of U.S. society as a whole. Viewing the consequences to individuals, such as the deportation of the family members of a U.S. citizen or lawful permanent resident, tends to trigger the social value of family unity. *See* Leah Asmelash, *Arizona Will Now Give Undocumented Students In-State Tuition Rates. Here's Why That Matters*, CNN (Nov. 17, 2022), https://www.cnn.com/2022/11/17/us/arizona-prop-308-undocumented-students-cec/index.html [https://perma.cc/U6GF-AWL6] (indicating a "change in the hearts and minds of people in Arizona" from the 2010 anti-immigrant law S.B. 1070 which allowed law enforcement to demand proof of citizenship from anyone suspected of being undocumented, to passing Prop. 308 in 2022, granting in-state tuition and state financial aid to undocumented college students); Mark Krikorian, *No Amnesty – Now or in Two Years*, CTR. FOR IMMIGR. STUD. (Oct. 31, 2008), http://www.cis.org/node/872 [https://perma.cc/DRK8-SS6F] (anticipating disastrous effects as a result of such provisions); Damien Cave, *Big-City Police Chiefs Urge Overhaul of Immigration Policy*, N.Y. TIMES (July 1, 2009), http://www.nytimes.com/2009/07/02/us/02florida.html?scp=7&sq=illegal%20aliens%202009&st=cse (reporting that more than 50 urban police chiefs have advocated for issuing drivers' licenses to undocumented immigrants and eliminating local law enforcement from immigration enforcement in an effort to "bring[] illegal immigrants out of the shadows"); Martin Ricard, *Undocumented Students Stage Mock Graduation Ceremony in Support of Dream Act*, WASH. POST (Jun. 24, 2009), http://www.washingtonpost.com/wpdyn/content/article/2009/06/23/AR2009062303406.html [https://perma.cc/M5BN-XKYS] (documenting the demonstration on behalf of 65,000 undocumented high school graduates unable to attend college due to their status).

Assessing the legitimacy of immigration law, therefore, must go beyond whether it comports with social values. Rather, it requires understanding whether immigration law comports with procedural justice. As explored further below, public acquiescence to legal authority relies on procedural justice.[55] Scholars widely recognize the significance of Tyler's process-based model of legitimacy, positing that when legal authorities make decisions and treat people in a procedurally fair way, people tend to perceive the law and legal institutions as legitimate.[56]

Procedural justice research has provided an invaluable framework to evaluate some of the most tenacious problems in criminal law.[57] One of its most important contributions has been to challenge the deterrence model of criminal law enforcement that has been in ascendance since the 1980s.[58] The deterrence model of law enforcement, also called the rational-choice model of compliance through social control, attempts to motivate people to obey by attaching punitive consequences to lawbreaking conduct.[59]

Classic deterrence strategies draw from law and economics and seek to increase both the risk of apprehension and the cost of violating the law. Deterrence models assume that people weigh costs and benefits when deciding whether to commit an unauthorized act like a crime.[60] The idea is that individuals calculate the expected gains from lawbreaking and weigh them against expected losses from punishment. They discount the result of this cost-benefit calculation by the degree

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55. *See* Hamm et al., *supra* note 35, at 136 ("It is . . . generally understood that in order for law enforcement to effectively leverage its power to address social harm, the public must recognize and respond positively to this authority") (citing Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. IN THE PUB. INT. 75 (2015)).

56. *See* Johnson et al., *supra* note 32, at 949–50 (asserting that the work of Tyler and his colleagues is "arguably the most influential scholarship on procedural justice and legitimacy" in criminology and sociolegal studies).

57. *E.g.*, JOHN D. MCCLUSKEY, POLICE REQUESTS FOR COMPLIANCE 171 (2003) (noting that "[p]olice respect enhances compliance, and police disrespect diminishes compliance"). *See generally* Tyler, *supra* note 21; Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement?*, 17 PSYCH. PUB. POL'Y & L. 419 (2011); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011) (discussing the implications of procedural justice research for policy measures in conventional policing and domestic counterterrorism policing); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Tyler & Darley, *supra* note 31; Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

58. *See* TYLER & HUO, *supra* note 22, at 19–24.

59. Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008) (explaining that "deterrence theory holds that there is an effective relationship between specific qualities of punishment (for example, its certainty or severity), and the likelihood that a punishable offense will be committed").

60. *Id.*

of risk of being caught.[61] In other words, individuals will break the law when they believe that they are likely to gain more from lawbreaking than they would lose if caught and punished.[62]

The solution the deterrence model offers is to establish a sanction that will cost an individual more to break the law than to comply with it and direct sufficient resources to enforcement so that apprehending violators is likely. If the risk of being caught is low, the sanction should be set correspondingly higher.[63]

Deterrence strategies in criminal law tend to increase the costs of committing unlawful acts by increasing both punishment and risk. These strategies may create the perception that apprehension or harsh punishment are imminent through, for example, police officers' conspicuous display of their weapons or the "Broken Windows" approach to crime control using high rates of arrest and detention for minor violations.[64] To the extent, however, that people are influenced less by fear of arrest or punishment than by other factors, or are unaware of the consequences of taking the unlawful act, the deterrence model will lose effectiveness.[65]

Psychological jurisprudence research challenges the deterrence model, providing empirical evidence that people's decisions are not in fact as guided by cost-benefit analysis as the deterrence model assumes.[66] Procedural justice

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61. Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 L. & SOC'Y REV. 7, 10 (1989). *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 46 (David Young ed., 1986) (asserting that "[i]n order for a penalty to achieve its objective, all that is required is that the harm of the punishment should exceed the benefit resulting from the crime"); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968) (calculating that a person will commit a crime if its expected utility, discounted by the probability of punishment, exceeds the utility of alternative activities); Jeremy Bentham, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 396 (1843) (explaining that "[i]f the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it"). *See also* J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) (positing that people tend to act according to their self-interest and are more satisfied and more willing to comply with decisions that benefit them).

62. Fagan & Meares, *supra* note 59, at 181.

63. *See* Paternoster, *supra* note 61; Fagan & Meares, *supra* note 59, at 181 (describing deterrence theory: "increasing the penalty for an offense will decrease its frequency because deterrence theory conceives potential criminals as rational, econometrically grounded actors who weigh the qualities and probabilities of punishment before acting"); Irving Piliavin et al., *Crime, Deterrence and Rational Choice*, 51 AM. SOCIO. REV. 101, 102 (1986) (concluding that variations in crime rates result from competition between the benefit of committing crimes and the risk of sanctions).

64. *See generally* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Misdemeanor Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 292 (2009) (applying procedural justice research to Broken Windows policing approaches).

65. *See, e.g.*, Paternoster, *supra* note 61, at 23–24, 27–30.

66. *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

scholarship also suggests that there are collateral costs to deterrence strategies if those strategies lead to perceptions of the law as less legitimate, thereby reducing people's motivation to cooperate with the authorities to enforce the law.

B. *Crimmigration and the Role of Deterrence*

The notion that crimmigration can bolster the legitimacy of immigration law relies on the deterrence model. This Section sketches the rise of crimmigration law and its features and then applies the deterrence model to crimmigration. It concludes that crimmigration is often justified as having deterrent effects on immigration violations, despite reasons to doubt that actual deterrence will result.

Crimmigration law marks the intersection between immigration and criminal law.[67] Crimmigration law is a relatively recent field with a long historical tail. While deportation laws based on crimes have existed for centuries and immigration law has always had thick tendrils in criminal law, crimmigration law was embryonic before 1986.[68]

With the passage of a series of laws beginning in 1986 and throughout the 1990s, criminal law began to permeate immigration law and vice versa.[69] Knowingly hiring unauthorized immigrants became a criminal offense. Deportation statutes expanded to include misdemeanors and to retroactively include crimes committed when those crimes were not deportation grounds. Criminal enforcement of border-crossing offenses rose.[70] New legislation amplified the consequences of crimes,

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67. *See* Chacón, *supra* note 18; Stumpf, *supra* note 2.

68. Stumpf, *supra* note 2, at 381–84.

69. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 476–79 (2007); *see also supra* notes 18, 20.

70. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3365–68 (codified at 8 U.S.C. § 1324a(e), (f) (2000)) (imposing civil and criminal penalties for employers who knowingly hire undocumented employees); § 275, 8 U.S.C. § 1325 (a), (b) (2005) (setting civil and criminal penalties for working without authorization); Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 101, 110 Stat. 3009-553 (increasing size of border patrol); *id.* § 301, 110 Stat. at 3009–575 (codified at 8 U.S.C. § 1101(a)(13)) (expanding excludability grounds); *id.* § 321, 110 Stat. at 3009–628 (codified at 8 U.S.C. § 1101(a)(43)) (expanding "aggravated felony" definition); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (defining "aggravated felony" deportation grounds to include crimes of murder, drug trafficking, and firearms trafficking); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (amending definition of "aggravated felony" to include a "crime of violence"); 18 U.S.C. § 16 (2000) (defining "crime of violence" to include any crime in which the use of some physical force is used against the person or property of another or, for felonies, the "substantial risk" of such force); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320–22 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (expanding "aggravated felony" definition to include certain lesser crimes); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (expanding "aggravated felony" to include certain non-violent crimes). *See* Stumpf, *supra* note 2, at 379–96 (mapping the intersection of criminal and immigration law).

adding criminal grounds to exclusion from admission to the United States, disqualifying lawful permanent residents from naturalizing, and effectively preventing resident noncitizens from traveling abroad.[71]

On a parallel trajectory, criminal law marched toward greater severity, imposing more punitive consequences and trending toward more intensive policing of minor acts: "disorder, incivilities, and misdemeanors."[72] In combination, these changes in criminal and immigration law swept larger numbers into the danger zone of criminal prosecution, detention, and deportation.[73]

At the same time that these substantive crimmigration measures came into play, federal immigration authorities and state and local law enforcement officers channeled resources toward criminal enforcement of immigration violations. Prosecution of immigration-related criminal offenses climbed, becoming the most widely charged type of crime in the federal criminal justice system.[74] The number of noncitizens in civil detention—in prisons, jails, and federal detention centers—skyrocketed for several reasons: (1) federal legislation expanded mandatory and discretionary reasons for detention; (2) cooperation between criminal law enforcement and immigration officials increased; and (3) immigration detainers turned state and local criminal arrests into passthroughs to immigration detention.[75]

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71. *See* Stumpf, *supra* note 2, at 371–96; Immigration Act of 1990, Pub. L. No. 101-649, § 509 (establishing conviction of an "aggravated felony" as a complete bar to meeting the "good moral character" requirement for citizenship); IIRIRA, 110 Stat. 3009-546 (further broadening the definition of "aggravated felony" to include more minor crimes, expanding the definition of a "conviction" for immigration law, and restricting access to relief from removal and judicial review); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1573 (2012) (noting that "[s]ince 1990, Congress has added hundreds of permanent, irrebuttable statutory bars to a good moral character finding triggered by criminal conduct."); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939–43 (2000). IIRIRA also rendered noncitizens returning from abroad removable from the United States if they had a prior conviction of a crime involving moral turpitude. IIRIRA, 110 Stat. 3009-546.

72. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 168–69 (2001).

73. *See generally supra* notes 11–12.

74. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICS REPORT: FISCAL YEAR 2012 10–11 (2012). Immigration crimes represented 41.8% of federal prosecutions in 2011 and 40.6% in 2012. *Id.*

75. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–46 (2010). *See* DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POL'Y INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (Sep. 2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf [https://perma.cc/W6BN-TBCP] (noting that "[s]ince 1994, the immigration detention system has expanded six-fold … due to legislation that "increased the crimes for which noncitizens could be removed and expanded the categories of persons subject to mandatory detention."); Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008) (providing an overview of detention policies and critiquing "the

The severity of these strategies and sanctions appear to arise as much from punitive impulses as deterrence of immigration law violations. They also seem to draw on the expressive function of law to send strong social signals that immigration-related lawbreaking calls for extraordinary measures.[76]

Yet even as punishment and the expression of condemnation animate efforts to expand crimmigration, contemporary crimmigration strategies have also relied heavily on the deterrence model.[77] The recent trend toward heavier civil and criminal sanctions for immigration violations and broader authority and resources for immigration enforcement relies on deterrence strategies that increase the risk of being caught and punished.[78] The formula is straightforward: stronger legal proscriptions and heavier penalties will, in theory, result in greater deterrence of immigration violations.[79] In immigration law and policy, this translates into more funding for enforcement to increase the likelihood of apprehending and punishing immigration violators, and heightened civil and criminal sanctions for noncompliance.[80]

The deterrence approach, then, depends not only on whether it is effective but also on whether it is efficient—whether it imposes costs that are greater than the benefits of violating the law. The effectiveness of the deterrence model for immigration and criminal law enforcement is in question if measured by a decrease

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placing of detainers, which aim to transfer local, state, and federal prisoners to Department of Homeland Security (DHS) custody for 'removal' proceedings"); DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 9–13 (Oct. 6, 2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/2229-HMB9] (providing statistics on detention facilities and detainees).

76. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (explaining that the expressive function of law functions by "'making statements' as opposed to controlling behavior directly"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520 (2001) (clarifying that the "expressive potential of criminal law. . . [is] not primarily to make and carry out threats, but to send signals").

77. *See supra* notes 58–62 and accompanying text (describing the deterrence model of social control).

78. *See* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651–52 (2004); Legomsky, *supra* note 69, at 476; Stumpf, *supra* note 2, at 384.

79. *See supra* notes 58–62 and accompanying text (describing the deterrence model's cost-benefit analysis).

80. *See* Kanstroom, *supra* note 78, at 640, 652 (describing increased criminal penalties for illegal entry and failure to depart as a convergence of two flawed systems (civil and criminal) and expansion of local, rather than federal, enforcement); Legomsky, *supra* note 69 (explaining that immigration violations, which would previously receive civil penalties, are also now subject to criminal penalties with an increased "range, severity, and frequency" of criminal prosecutions); Michael A. Olivas, *supra* note 16, at 35 (concluding that there is no benefit to granting state and local governments enforcement powers over immigration); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) (arguing that requiring local governments to participate in immigration enforcement harms federalism); Stumpf, *supra* note 2, at 378 (noting that previous civil immigration violations now carry additional criminal penalties).

in immigration violations. On the one hand, immigration policing has greatly expanded. The past decades saw a jump in the number of annual removals of noncitizens from the United States, from over 165,000 in 2002[81] to nearly 360,000 in 2019.[82] On the other, most noncitizens are apprehended at or near the border, suggesting that border crossing continues at a high rate,[83] and estimates of the current population of unauthorized noncitizens remain at over 11 million.[84]

Additionally, the deterrence model assumes that immigration law violators make cost-benefit calculations when deciding whether to comply with the law. Psychologists have shown that people do take into account the risk of getting caught and punished and the severity of the punishment in deciding whether to break laws against excessive noise, drunk driving, shoplifting, littering, parking illegally, and similar crimes.[85]

But does this hold true when justifications for violating the law are more compelling from the individual's standpoint? Weighing the costs and benefits of shoplifting or parking illegally does not seem comparable to deciding whether to unlawfully cross the border or remain without authorization, particularly when the reasons for crossing or remaining are based on economic opportunity, family unity, or need for humanitarian protection. Assuming that noncitizens undertake the kind of cost-benefit analysis that the deterrence approach assumes, the risk of getting caught and punished may be hard to calculate. Even if the risk and sanction are foreseeable, the cost of obeying the law may override the risk.

If a cost-benefit analysis of the risk of sanctions does not actually motivate individuals to obey immigration law, and even if is unclear that it does, then policymaking under the deterrence model has downsides. First, it has the potential to impose harsh sanctions on individual violators unlucky enough to be caught, without the desired increase in deterrence of others. Second, it imposes high enforcement costs on society without the expected benefit of widespread

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81. OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2011, Table 39 (Sep. 2012), https://www.dhs.gov/sites/default/files/publications/ois_yb_2011.pdf [https://perma.cc/33B5-RMRP].

82. OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2020, Table 39 (Apr. 2022), https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf [https://perma.cc/B29G-MLBA]. These numbers dropped to close to 240,000 in 2020 after the COVID pandemic began. *Id.*

83. *Id.* at Table 35.

84. *See* Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015-January 2018*, OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC. 1 (Jan. 2021) https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf [https://perma.cc/4BAW-WTSK].

85. *See* TYLER, *supra* note 23, at 44–45 (concluding that certainty of punishment is correlated with self-reported behavioral compliance with the law, along with morality and peer disapproval).

compliance.[86] If the relative harshness of punishment does not deter unlawful migration, then increasing sanctions merely imposes higher costs upon the sanctioned individual and the institutions that underwrite those sanctions.[87] Deterrence strategies in immigration law are expensive: the cost of immigration enforcement has risen steadily since the 1990s, and legislative reform efforts seem likely to continue that trend.[88]

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86. *See* Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 21–22 (2000) (stating that "[s]ocial norms have the advantages of flexibility and low transaction costs, whereas law has the advantage of precision and the disadvantage of high transaction costs").

87. Empirical research in other civil and criminal contexts has shown that the level of sanctions and the risk of apprehension is a factor in motivating people to comply with the law. *See* ALFRED BLUMSTEIN ET AL., NAT'L ACAD. OF SCIENCES, DETERRENCE AND INCAPACITATION 16 (1978) (noting that "individual behavior is at least somewhat rational and responds to incentives"); CHARLES R. TITTLE, SANCTIONS AND SOCIAL DEVIANCE 187–93 (1980) (describing survey study finding that "perceived severity of sanctions" was a predominant factor in deterrence). The effect, however, is merely modest. Paternoster & Iovanni, *supra* note 41, at 769–70. *See also* JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 21–22 (1975) (critiquing the idea that punishment acts as a deterrent); MacCoun, *supra* note 41, at 501 (concluding that fear of punishment has little impact on decisions to use illegal drugs). Empirical research on willingness to comply with police directives found merely weak links between police effectiveness, the risk of punishment, and compliance or cooperation. *See* ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 45–48 (1999) (surveying empirical literature and noting that statistical associations between severity of punishment and crime rates were much weaker than the evidence supporting a correlation between certainty of punishment and deterrence of crime); Tom Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 371–72 (2010) (collecting cites).

88. *See The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Jan. 20, 2021), https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security [https://perma.cc/YAM2-JHQ7] (showing a ten-fold increase in spending for the U.S. Border Patrol from 1993 to 2021, and a nearly three-fold increase in spending for both DHS and U.S. Customs and Border Protection ("CBP")/ Immigration and Customs Enforcement ("ICE") from 2003 to 2021); Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL'Y INST. 2 (Jan. 2013), http://www.migrationpolicy.org/pubs/enforcementpillars.pdf [https://perma.cc/79JK-L3GT] (observing that spending for CBP and ICE and related enforcement technologies surpassed $17.9 billion in fiscal year 2012, "nearly 15 times the spending level of the US Immigration and Naturalization Service (INS) when IRCA was enacted"). The Congressional Budget Office has estimated that the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) would result in an increase in federal direct spending of $262 billion from 2014 to 2023. However, "[t]he bill also would boost revenues by . . . $459 billion" over the 2014 to 2023 period, resulting in a reduction in federal budget deficits of $197 billion from 2014 to 2023. *See* CONG. BUDGET OFF. COST ESTIMATE: S. 744 BORDER SEC., ECON. OPPORTUNITY, AND IMMIGR. MODERNIZATION ACT, 11 (Jun. 18, 2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/s744.pdf [https://perma.cc/5QUU-UHCM].

C. *The Procedural Structure of Crimmigration*

Even if crimmigration can be described as grounded in the deterrence model, the question remains whether crimmigration affects perceptions of procedural justice in immigration law in ways that counter deterrence. If Tyler's critique of the deterrence model in the criminal justice system applies to crimmigration strategies, then addressing procedural justice in crimmigration measures is critical to the project of shoring up the legitimacy of the law.

Crimmigration introduces particular procedural deficits into immigration law that threaten to undermine perceptions of the legitimacy of immigration law. These deficiencies fall into five main categories.[89] First, procedural shortcuts created by the confluence of the two enforcement systems have undermined procedural rights and protections. Procedural pathways between the two systems permit law enforcement authorities to pursue both immigration and criminal law enforcement goals in ways that bypass well-established procedural rights. As one example, prosecutors in criminal cases have been able to avoid Fifth and Sixth Amendment protections by using information that immigration agents obtained without *Miranda* warnings when interrogating noncitizens about civil immigration violations.[90]

Procedures unique to crimmigration have similarly impacted defendants' right to a voluntary criminal plea. The Department of Homeland Security's Operation Streamline, a "zero-tolerance" policy for unauthorized border-crossing along a designated stretch of the U.S.–Mexico border, required criminal prosecution of almost all border-crossing offenses.[91] Due to the sheer volume of the cases, the federal district court adopted en masse plea-taking proceedings that allowed immigration agents to operate as federal prosecutors and magistrate judges to

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89. Jennifer Lee Koh has usefully suggested five deficiencies associated specifically with immigration court adjudication, but that have resonance for crimmigration more generally. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 187–88 (2017) (offering these deficiencies: "(1) the coercive effects of immigration detention, (2) the absence of counsel, (3) limitations on administrative and judicial review, (4) access to relief and discretion, and (5) the simplification of removability assessments").

90. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1308–12 ("When immigration questioning conducted without *Miranda* is characterized as 'administrative' or 'noncustodial,' in practice such statements may be used against the criminal defendant.").

91. *See id.* at 1327–29. Similarly, a worksite raid in Postville, Iowa, generated criticism that noncitizen employees were unfairly pressured to sign criminal plea agreements waiving the right to tell their story to an immigration judge. *See Immigration Raids: Postville and Beyond, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigr., Citizenship, Refugees, Border Security and Int'l Law*, 109th Cong. 77–80, 115–17 (2008) (statements of Dr. Erik Camayd-Freixas, Federally Certified Interpreter and Professor Robert R. Rigg, Assoc. Prof. of Law and Dir. of the Criminal Def. Program, Drake Univ. L. Sch.). *See also* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651, 671–81 (2009) (evaluating arguments that the plea agreements were coerced).

sentence 50 to 100 defendants in one hearing.[92] The Ninth Circuit declared parts of this practice unlawful, reasoning that the en masse nature of the proceeding threatened the right to a knowing and voluntary waiver of criminal constitutional protections.[93]

Procedural shortcuts in crimmigration have also affected Fourth Amendment protections against unreasonable search and seizure. The Secure Communities program, unveiled in 2008, engaged state and local police in immigration enforcement but relied on constitutionally questionable immigration "detainers." Immigration agents issued these detainers, which resemble police warrants, to police departments and sheriffs, instructing them to hold noncitizens in jail for prolonged periods for administrative immigration enforcement purposes.[94] In 2014, Fourth Amendment challenges to the detainer led the Secretary of Homeland Security to shut down Secure Communities and impose limits on indiscriminate detainer use.[95]

The second core procedural deficiency of crimmigration is the narrowing or elimination of judicial or administrative court review of immigration claims or defenses. An example is Congress's decision in 1996 to severely restrict the

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92. *See* Eagly, *supra* note 90, at 1327–29; *Secretary Janet Napolitano, Before the Senate Committee on Homeland Security and Governmental Affairs: "Securing the Border, Progress at the Federal Level"* (May 3, 2011), *available at* http://www.dhs.gov/news/2011/05/03/secretary-janet-napolitano-senate-committee-homeland-security-and-governmental [https://perma.cc/R3F9-XMJ3] (testimony of Janet Napolitano, Secretary of Homeland Security, calling Operation Streamline "a geographically focused operation that aims to increase the consequences for illegally crossing the border by criminally prosecuting illegal border-crossers" and noting that between April 2010 and March 2011, there were more than 30,000 prosecutions under Operation Streamline).

93. United States v. Roblero-Solis, 588 F.3d 692 (9th Cir. 2009). *Cf.* United States v. Diaz-Ramirez, 646 F.3d 653, 657 (9th Cir. 2011) (holding that the en masse hearing did not violate due process). *See also* Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1–2 (Jan. 2010) (describing Operation Streamline and the effect on procedural justice in prosecution and sentencing of unlawful entry misdemeanor cases).

94. *See* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154–63 (2014) (describing the origins and components of the Secure Communities program); Juliet P. Stumpf, *D(e)volving Discretion, Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015).

95. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't; Megan Mack, Officer, Off. of Civil Rights & Civil Liberties; Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs 1–2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/2GQ3-AKGR] (commenting that Secure Communities "is embroiled in litigation;" and that "its very name has become a symbol for general hostility toward the enforcement of our immigration laws") (citing Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (holding that prolonged detention pursuant to a detainer violated the Fourth Amendment); Galarza v. Szalczyk, 745 F.3d 634, 640–42, 645 (3d Cir. 2014).

jurisdiction of the federal courts to review immigration cases.[96] In constricting the power of immigration judges and federal courts to grant relief from deportation, the law barred individuals from obtaining court review of agency decisions to deny or strip lawful permanent residence status from individuals. Expanding the crime-based grounds for deportation exacerbated this constraint on the power of judges to grant relief from deportation because most of the criminal deportation grounds became nondiscretionary and removal decisions became nonreviewable.[97]

Other crimmigration measures went further, entirely eliminating access to both judicial and administrative courts through fast-track or summary proceedings. "Administrative removal" applies to noncitizens who are not lawful permanent residents and who are convicted of crimes categorized under immigration law as an "aggravated felony."[98] This measure empowered immigration officers to bypass the immigration court and, with the acquiescence of another immigration agent, make a summary determination to deport the noncitizen.[99]

Similarly, criminal prosecutors may bypass judicial determinations of whether a noncitizen is deportable or eligible for relief. Structuring plea deals that require noncitizens to waive immigration defenses in exchange for a more favorable plea occurs not just in individual cases but also during en masse proceedings such as Operation Streamline. Notoriously, a Postville, Iowa workplace raid enabled prosecutors to require hundreds of employees of a meatpacking plant to agree in plea deals to summary deportation in exchange for lesser charges and shorter sentences.[100]

The third core procedural deficiency is closely related to the diminution and elimination of access to courts. Contracting judicial review expanded the discretion of both criminal and immigration authorities to impose deportation as a consequence of a criminal conviction or immigration proceeding.[101] The growth of

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96. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). *See also* I.N.S. v. St. Cyr, 533 U.S. 289, 310–15 (2001) (describing the legislative narrowing of judicial review); REAL ID Act, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)).

97. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996). *See also* Nancy Morawetz, *The Perils of Supreme Court Intervention in Previously Technical Immigration Cases*, 64 ARIZ. L. REV. 767, 783 (2022) (concluding that the post-Kennedy Supreme Court "greatly shut down the critical safety valve of relief from deportation through individualized hearings that examine the equities of each individual case").

98. 8 U.S.C. § 1228(b)(1). *See* Lee Koh, *supra* note 89, at 187 (describing these proceedings as "shadow proceedings," and including expedited removal and reinstatement of removal of individuals with a prior formal removal who subsequently re-enter).

99. *See* 8 C.F.R. § 238.1.

100. *See* Eric Camayd-Freixas, *Interpreting After the Largest ICE Raid in U.S. History: A Personal Account* 6–11 (June 13, 2008), http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf [https://perma.cc/7Y5B-LKQ5] (describing the plea bargains offered to individuals detained in the raid).

101. *See* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 165–66 (2006)

criminal law in general,[102] combined with the expanded grounds for deportation based on immigration-related criminal offenses and other crimes, increased the discretion of immigration enforcement officials and state and local police. With such a wide range of crimes to enforce, and both the immigration and criminal justice systems at their disposal, these crimmigration authorities became primary determinants of which laws are enforced and against whom.[103] Criminal cases involving noncitizen defendants tended to end with plea agreements and removal.[104] As a result, a police officer or immigration agent's choice of whom to arrest largely determined whether a noncitizen would face deportation.[105]

Fourth, the unprecedented expansion of authority to impose detention on noncitizens[106] perpetuates existing procedural deficiencies. Detention is justified as a procedural adjunct to detention, but it operates to coerce people to waive claims to immigration status or to relief from deportation. As examples, detention may deter people from exercising the right to seek immigration status such as asylum.[107] People in detention are less likely to have access to immigration counsel and so less likely to be aware of their right to relief from deportation or to pursue such relief.[108]

("Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion. This is particularly true of deportation law."); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1754 (2010) (describing the statutory discretionary authority of executive branch officials to consider the interests of U.S. citizen children when determining whether to deport noncitizen parents); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006) (labeling deportation "a rule-governed sanction with enforcement discretion").

102. GARLAND, *supra* note 72, at 168–69.

103. *See* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1826–27 (2011) (noting that "the enforcement discretion that matters in immigration law has been in deciding who will be arrested – not in deciding who, among those arrested, will be prosecuted . . . [and] arrests for criminal violations of federal immigration law open up the possibility not only of criminal prosecutions, but also of civil removal proceedings"). *See also* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 829 (2015) (documenting the "significant role" that arrests play in deportation, with close to 300,000 people removed after arrest through the Secure Communities program in 2014).

104. *See* Eagly, *supra* note 90.

105. *See* Motomura, *supra* note 103, at 1826–27.

106. *See* Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATL. Q. 621 (2014); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1350 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010).

107. *See* Lee Koh, *supra* note 89, at 222–23 (describing the role of detention in coercing summary removals); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1452 n.11 (2015) (concluding that the current immigration detention scheme has amassed the "largest civil immigration detention population in modern times").

108. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) (reporting study results showing that "only 14% of detained respondents were represented, whereas 66% of the nondetained were represented" so that "nondetained respondents were almost five times more likely to obtain counsel than detained respondents").

And detention is especially procedurally truncated where it meets up with criminal law. Congress has mandated detention without bond when a noncitizen is charged with deportability based on a wide range of crimes.[109]

Fifth and finally, crimmigration embeds racial impacts into immigration enforcement and the distribution of immigration benefits. Crimmigration enabled criminal law enforcement agencies to participate in immigration enforcement programs that resulted in participating police using Hispanic appearance in making stops and arrests.[110] A study of the federal government's phased rollout of the nationwide crimmigration program, Secure Communities, showed that early activation in the program correlated strongly with whether a county had a large Hispanic population, and not at all with the stated goal of the program, which was to reduce crime rates.[111] Scholars have established that disproportionately high rates of Latinos are subject to crimmigration practices, such as the use of detention and crime-based removal.[112] These procedural deficiencies carry the potential to imprint perceptions of procedural unfairness not just on noncitizens who are subject to them, but on other impacted individuals and entities, and the larger public as well.

II. CRIMMIGRATION AND THE HALLMARKS OF PROCEDURAL LEGITIMACY

How does crimmigration law, with its procedural deficiencies, affect people's perceptions of the legitimacy of immigration law? This Part examines the factors that people take into account when assessing procedural fairness and predicts how those factors will play out in crimmigration law.

In a seminal chapter, Gerald Leventhal identified six criteria that strongly influence people's judgments about procedural justice: (1) consistency across people; (2) bias suppression; (3) accuracy; (4) ethicality; (5) representativeness; and

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109. 8 U.S.C. § 1226(c).

110. *See* Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L. REV. 463, 466, 475–77 (2022) (concluding, based on a study of 18 million traffic stops, that a program deputizing police as immigration agents led to racial profiling of Hispanic drivers not just by the deputized officers but also by state troopers who were not signatories to the program).

111. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 88–89 (2013).

112. *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, 666 (2011) (Latinos accounted for approximately 94% of removals "as well as the total number of noncitizens removed for criminal violations"); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 74 (2019) (most detained migrants are Latinx); Kelly Lytle Hernández et. al., *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18 (June 2015) (Black and Latinx inmates make up 72% of the federal prison population and most state prison populations).

(6) correctability.[113] Empirical evidence suggests that the first four of these criteria are particularly influential.[114]

The six criteria in the Leventhal model of procedural justice hold promise for assessing whether people will perceive crimmigration enforcement as procedurally fair. Whether criminal and immigration authorities act consistently across persons and over time, whether bias is absent from their decisions and procedures, whether they use accurate information and make informed opinions, and whether their processes are fundamentally moral and ethical, may influence people's perceptions of the legitimacy of crimmigration law.[115]

Synthesizing Leventhal's model with several others, Steven Blader and Tom Tyler divided procedural fairness into perceptions of fair decision-making processes and perceptions of fair treatment.[116] Procedural information about decision-making informs people's assessments of whether outcomes are deserved, that is, whether they are fair.[117] Information about fair treatment enables people to assess the social atmosphere of a group or situation, especially the social status that a system or a particular authority accords them.[118] Thus, perceptions of procedural fairness may apply at the level of particular authorities or at an institutional or systemic level.

In sum, procedural legitimacy has two components: whether an authority figure acts respectfully and politely, and whether that official's decisions result from a fair and neutral process.[119] Social science researchers have dubbed "interpersonal justice" the level of respect and dignity an official accords to an individual, and designated authorities' use of fair procedures as the core of procedural justice.[120] Because this Article analyzes the systemic implications for immigration, it focuses

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113. *See* Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, *in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 39–46 (1980). *See also* TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 90–93 (1997) (surveying the literature and empirical studies confirming and explicating the Leventhal criteria). Tom Tyler and others identified a significant seventh factor: the trustworthiness of the enforcement authority. *Id.* at 92. *See also* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 L. & SOC'Y REV. 163, 167–68 (1997).

114. TYLER ET AL., *supra* note 113, at 91.

115. Leventhal, *supra* note 113, at 39–40.

116. Blader and Tyler have offered a four-component model of the types of concerns that people have when assessing procedural fairness. These are: (a) evaluations of formal rules and policies related to how decisions are made in the group (formal decision making); (b) evaluations of formal rules and policies that influence how group members are treated (formal quality of treatment); (c) evaluations of how particular group authorities make decisions (informal decision making); and (d) evaluations of how particular group authorities treat group members (informal quality of treatment). Steven L. Blader & Tom R. Tyler, 29 PERSONALITY & SOC. PSYCH. BULL. 747, 749 (2003).

117. *Id.* at 748.

118. *Id.*

119. *See* Johnson, *supra* note 32, at 950.

120. *See* Juan Liang et al., *Beyond Justice Perceptions: The Role of Interpersonal Justice Trajectories and Social Class in Perceived Legitimacy of Authority Figures*, 12 FRONTIERS IN PSYCH. 1, 1–2 (2021).

primarily on the use of fair procedures and less on interpersonal justice in applying the Leventhal criteria to crimmigration law's procedural deficits.

A. *Consistency*

Lack of consistency in procedure may undermine people's belief in the fairness of a process. Procedural justice perceptions are sensitive to whether authorities act consistently across people and over time.[121] Consistency across people means applying similar procedures to all affected parties, in the same way that a soccer referee does by giving a red card to any player who commits the same kind of foul.[122] Consistency over time refers to the necessity to keep procedures stable so that they follow the same rules and are carried out in the same way each time they are used.[123] Leventhal likens the consistency rule to the notion of equality of opportunity.[124]

1. Across People

The criteria of consistency across people implicates one of the most significant consequences of the crimmigration trend—the expansion of criminal grounds for deportation and its effect on long-term residents including lawful permanent residents.[125] In crimmigration law, the same conduct produces different consequences in the criminal justice system depending on whether the defendant is a noncitizen. For traditional crimes like theft, noncitizen defendants but not U.S. citizens may be subject to deportation and mandatory detention in addition to any criminal sentence imposed. This is true even when both groups reside permanently in the United States and are comparable in every other way.[126] Broadening the crime-based grounds for deportation may lead to a perception that the law treats people inconsistently because, by detaining and deporting noncitizens, authorities treat two people who commit the same crime differently depending solely on whether one is a noncitizen.

Some may perceive no inconsistency in this state of affairs, even for lawful permanent residents. Adding deportation to a noncitizen's criminal sentence may seem perfectly consistent if justified as a response to a breach of a higher duty noncitizens owe to the country that permitted them entry.[127] For immigrants and U.S. citizens on whom detention and deportation impose heavy costs, such as family separation, however, paying a heavier price than a citizen for the same conduct may undermine the perception that the law treats people consistently.

This aspect of crimmigration law may trouble expectations about a core tenet of criminal law. Crimmigration draws distinctions based on citizenship status in an area of law—criminal law—that traditionally focuses on conduct, and not on

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121. *Id.* at 40–41.
122. *Id.* at 40.
123. *Id. See also* TYLER, *supra* note 23, at 118–19.
124. Leventhal, *supra* note 113, at 40.
125. *See supra* notes 69–71 and accompanying text.
126. *See* Stumpf, *supra* note 2, at 382–84.
127. *See* MOTOMURA, *supra* note 49, at 36 (positing the theory of "citizenship as contract").

status.[128] In theory at least, whether a person is part of a particular class or race should not affect how the criminal justice system treats them. The criminal justice system would act inconsistently if it treated people differently because of their status by, for example, providing lawyers at government expense for white defendants but not for Asian ones.

This sort of breach of doctrinal equality[129] sets up the conditions for people to perceive that there is inconsistent treatment by the law. For example, some criminal law judges have denied bail or increased sentences for people because they do not have lawful status in the United States.[130] Even when these decisions stem from the judges' beliefs that noncitizens might flee to avoid criminal prosecution or deportation, people may view the judge's actions as inconsistent with the idea that the criminal justice system treats the same act in the same way, regardless of the defendant's status.

The procedural deficiencies described in Part I similarly illustrate Leventhal's lack of consistency across people. Crimmigration's procedural shortcuts exacerbate this inconsistency within criminal law of different treatment based on status, not conduct. The hollowing out of the *Miranda* right for noncitizens, in which prosecutors use statements from a prior immigration interrogation conducted without *Miranda* warnings, means that criminal law operates with one set of Fifth Amendment rights for U.S. citizens and a weaker set for noncitizens.[131]

Similarly, the en masse plea-taking for noncitizens caught up in Operation Streamline means that noncitizens in one criminal court hold lesser Sixth Amendment protections than U.S. citizens in another.[132] And the widespread use of the immigration detainer in jails and police precincts nationwide means that an arrest for a U.S. citizen has far different consequences than for a noncitizen.[133] Together, these procedural deficiencies construct a larger inconsistency: a criminal justice system premised on punishing conduct, not status, but operating as a dual system in which status—citizenship status—determines the strength of procedural protections and the severity of the outcome.

2. Across Time

The criterion of consistency across time arises when crimmigration law operates retroactively to permit the removal of a noncitizen on the basis of a crime that was not a ground for removal when it was committed.[134] Similarly, crimmigration law may prohibit citizenship for an otherwise eligible noncitizen on the basis of a past crime, even though at the time the crime was committed, that bar

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128. *See* Wong Wing v. United States, 163 U.S. 228, 229 (1895); Eagly, *supra* note 90, at 1291 (noting that "[a]ccording to the core concept of doctrinal equality, criminal defendants are to be accorded the full panoply of criminal rights and protections regardless of their alienage").

129. *See* Eagly, *supra* note 90, at 1286 (introducing the concept of "doctrinal equality" in criminal law).

130. *Id.* at 1291.

131. *See supra* note 90 and accompanying text.

132. *See supra* note 91–93 and accompanying text.

133. *See supra* note 94–95 and accompanying text.

134. *See* Lapp, *supra* note 71, at 1573.

to naturalization did not exist. For example, the "aggravated felony"[135] ground for removal, which was created in 1988[136] and then significantly expanded to incorporate a multitude of crimes, applies to crimes committed long before 1988, even though removal and prohibition from naturalization were not a consequence of a conviction or plea agreement when the crime was committed.

B. *Bias Suppression*

The second criterion for perceptions of procedural justice, bias suppression, evaluates "the ability of a procedure to prevent favoritism or external biases."[137] A process that permits self-interest or narrow preconceptions to affect the process implicates this criterion.[138] It assesses impartiality, honesty, and efforts to make decisions fairly.[139] Psychological jurisprudence research has focused on two of many types of bias: self-interest, and reliance on prior beliefs rather than on the evidence.[140]

1. Self-Interest Bias

First, when an authority figure has a vested interest in the outcome of the decision, it undermines faith in the fairness of the decision, as a referee might if she bet on one of the competitors.[141] In assessing bias suppression, people focus on whether the decision-maker appears to be neutral with respect to the parties and not motivated by self-interest.[142] At first blush, crimmigration law seems an unlikely candidate for self-interested decision-making because the stakes are usually not financial but rather loss of liberty—detention, deportation, conviction, and incarceration.

Self-interest in crimmigration law arises in a different way, through incentives to achieve law enforcement quotas and goals. This arises both at the policy level and on an individual scale. On the policy level, successive presidential administrations have placed expectations on the immigration enforcement agencies—and, by extension, immigration enforcement agents—to ramp up the number of removals of unauthorized immigrants and noncitizens with criminal convictions.[143]

At first, this ramp-up seems unremarkably oriented toward improving the effectiveness of a government agency. The heavy emphasis on using the statistics of

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135. Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (listing grounds for deportation of an alien who is convicted of an aggravated felony).

136. Anti-Drug Abuse Act of 1988, § 101(a)(43), 102 Stat. at 4469.

137. *See* TYLER, *supra* note 23, at 119.

138. *See* Leventhal, *supra* note 113, at 41.

139. TOM R. TYLER & E. ALLEN LIND, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 108 (1988).

140. *See* TYLER, *supra* note 23, at 119.

141. *Id.* (raising a similar referee analogy).

142. TYLER & LIND, *supra* note 139, at 108.

143. *See* Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 42 (2007) (noting that "[d]espite—or perhaps because of—the gap between amassing numbers and achieving aims, there is currently a fierce propitiatory attachment to high immigration prosecutions statistics as a proxy for the aims of 'border security' and immigration control").

deportation to assess the agency's performance, however, undermines qualitative efforts the agency might make toward its security and border enforcement aims.[144] The focus on statistics—from those with the power to determine agency funding and influence the public's perceptions of the agency—fosters a particular kind of self-interest. It creates an incentive to make arrests, prosecute criminal immigration violations, and pursue removals that will net the greatest number, in the least time, with the least cost to the agency or its agents.[145]

This kind of incentive becomes especially salient when combined with the procedural deficit discussed in Part I of the enormous expansion of discretion to immigration officials and police.[146] When a police officer or immigration agent's arrest decision determines whether a noncitizen will face deportation, performance metrics—or even informal approbation—that incentivize removals are likely to achieve measurable results.

If a noncitizen removed after a home or workplace raid contributes identically to the immigration agency's statistics as would a human smuggler convicted and removed after intensive investigation and prosecution, then the agency is more likely to engage in home and workplace raids that result in numerous removals than pursue more sophisticated immigration and criminal violations.[147] The interest of the agency and its agents in increasing the number of arrests thus biases decision-making toward quantity instead of considered choices about how best to reach the agency's immigration policy goals.[148]

A concrete example of this manifestation of self-interest bias arising from quotas and statistics is the structure of the National Fugitive Operations Program, an immigration enforcement initiative established to find and remove "fugitive

144. *Id.*

145. *Id.* at 43–44 (explaining that "prosecutors may wield discretion to serve self-interest rather than the public interest, for example, by leveraging charging and plea bargaining power to induce defendants to relinquish rights and enter guilty pleas to increase their conviction statistics at the sacrifice of sentence severity and to avoid the ardors and possible damage to win-loss statistics posed by trial"). *See also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471–72 (2004) (concluding that for prosecutors the "statistic of conviction" matters much more than the sentence so that "prosecutors may prefer the certainty of plea bargains even if the resulting sentence is much lighter than it would have been after trial").

146. *See supra* notes 101–05 and accompanying text.

147. *See id. See also* Margot Mendelson, Shayna Strom & Michael Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program*, MIGRATION POL'Y INST. 19 (2009), http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf [https://perma.cc/G3W8-5HC4] (noting that "the arrest of an unauthorized mother who has no criminal history or outstanding removal order counts as much as the arrest of a fugitive alien who deliberately disregarded his removal order and who poses a risk to national security"); Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 610–11 (2009) (describing home raids and discussing their effects).

148. *See* Mendelson, *supra* note 147, at 19.

aliens."[149] A "fugitive," according to the Program, is a person with an outstanding removal order or who has violated an order of supervision, failed to appear for a hearing, or reentered the United States after having been previously removed.[150] In 2006, the Fugitive Operations Program set an annual quota of 1,000 arrests per team, at the same time dropping a requirement to focus on noncitizens with criminal records.[151] By the following year, the percentage of arrestees with criminal records had plummeted, and the number of "collateral" arrests—arrests of noncitizens with questionable legal status but who were not "fugitive aliens"—had increased markedly.[152]

The question of which noncitizens the Fugitive Operations Program should pursue is less important to this analysis than how the quotas may affect perceptions about bias suppression in immigration enforcement. Quotas are considered poor practice in law enforcement because they are seen "as an inaccurate way of gauging performance and a perverse incentive distracting officers from doing important, time-consuming work."[153] Arrest quotas set numerical rather than qualitative performance requirements for enforcement officers, which impact job evaluations and advancement opportunities.[154] Immigration scholar Mary Fan has described the dismissal of a U.S. Attorney who allocated her enforcement resources toward investigating the leaders of immigration smuggling organizations and prosecuting corrupt Border Patrol officers rather than racking up favorable statistics by arresting undocumented workers.[155] Importantly for perceptions of procedural justice, quotas send a message that immigration enforcement officers have structural incentives to act in their own interest by arresting individuals rather than in the public's interest by dismantling larger criminal smuggling and trafficking organizations or pursuing the agency's goal of arresting individuals with serious criminal backgrounds.

2. Preconceptions

The second type of bias, reliance on preconceived views instead of the evidence, arises most clearly when race or ethnicity influences a process. When racial considerations lead to selectively targeting a group of people without apparent justification, or when decisions are seemingly patternless, procedural legitimacy falters.[156] This kind of selective targeting risks alienating "a substantial portion of the targeted population."[157] Selective targeting also "diminishes the probability that

149. U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012: DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 2–8 (2003).

150. *Id.* at G-3.

151. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 8–9 (2007).

152. Mendelson, *supra* note 147, at 1–2.

153. *See* Fan, *supra* note 143, at 26; *see also id.* at 25 n.122 (listing state laws prohibiting the use of quotas for traffic tickets and other offenses).

154. *See id.* at 27.

155. *Id.* at 49–56.

156. *See* TYLER ET AL., *supra* note 113, at 90–92.

157. Chiesa, *supra* note 43, at 309.

members of the alienated group will cooperate with the police and other law enforcement agencies."[158]

The racial impacts of crimmigration, discussed in Part I, are a core procedural deficiency of the interaction between the immigration and criminal law systems.[159] Sociological analysis of the impact on Latinos of criminalizing immigration, and on Latino perceptions of the legitimacy of local police who profile based on suspicion of citizenship status, have brought valuable insight into the racial impact of crimmigration on procedural legitimacy.[160] Immigration enforcement decisions that use ethnicity as a factor in making stops or targeting workplaces increase perceptions that immigration authorities are acting unfairly.[161] Singling out Muslim and Arab men for more intense immigration-related scrutiny raises concerns that authorities are acting based on preconceptions about the dangerousness of members of those ethnic or religious groups.[162]

The Secure Communities program, which relied on police arrests to identify unauthorized migrants with criminal backgrounds, provided empirical evidence of the structural issue of bias suppression. Immigration and Customs Enforcement ("ICE"), the agency charged with interior immigration enforcement, rolled the program out on a county-by-county basis.[163] Tracking this rollout, scholars Adam Cox and Thomas Miles discovered that the rollout was not correlated with high-crime areas, as would be expected if the purpose of the program was to combat

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158. *See id.*; David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 79 (2012).

159. *See supra* notes 110-12 and accompanying text.

160. *See* Maria Cristina Morales & Theodore R. Curry, *Citizenship Profiling and Diminishing Procedural Justice: Local Immigration Enforcement and the Reduction of Police Legitimacy Among Individuals and in Latina/o Neighborhoods*, ETHNIC AND RACIAL STUDIES (Feb. 2020); Rodolfo D. Saenz, *Another Sort of Wall-Building: How Crimmigration Affects Latino Perceptions of Immigration Law*, 28 GEO. IMMIGR. L.J. 477, 477–78 (2014) (applying racial macroaggression theory and concluding that criminalization of immigration law impedes Latinos' "sense of belonging, an important antecedent to compliance with immigration law").

161. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885–87 (1975) (permitting immigration agents to rely on Mexican ethnicity as one factor in making Fourth Amendment stops for immigration purposes).

162. *See* Tom R. Tyler et al., *supra* note 87, at 6. *See also* 8 C.F.R. § 264.1(f) (2006) (describing the National Security Entry-Exit Registration System ("NSEERS") which placed special registration requirements on noncitizen men from certain countries with Muslim and Arab majorities); Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94231-01 (Dec. 23, 2016) (describing the history and function of NSEERS, its singling out of nationals from certain countries, and its dissolution). *See also* Memorandum from Larry Thompson, Comm'r, Immigr. & Nat. Serv. et al., FBI Dir., U.S. Marshals Serv. Dir., & U.S. Att'ys, § A, at 1 (Jan. 25, 2002) (describing the DHS Absconder Apprehension Initiative which singled out for interrogation and deportation noncitizens "from countries in which there has been Al Qaeda terrorist presence or activity" and who had criminal convictions or immigration violations).

163. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 88 (2013) (describing the Secure Communities program).

immigration-related crime.[164] Rather, the rollout more closely tracked counties with large Hispanic populations.[165] This disconnect between the purpose of the program and the ethnicity-associated rollout exposes federal authorities to perceptions that immigration policies and programs are driven by preconceptions about ethnic groups.

C. *Accuracy*

Whether authorities base decisions on accurate and comprehensive information is another factor that people use to gauge the fairness of procedures. This factor focuses on "using good, accurate information and informed opinions" to make decisions.[166]

Crimmigration processes that reduce opportunities for fact-finding and bypass adjudication predictably undermine perceptions that those processes are fair. Several of crimmigration's procedural deficiencies implicate this factor. Procedural shortcuts that eliminate or limit access to federal or immigration courts, such as administrative removal, go to the heart of this element. Administrative removal allows immigration officials to summarily remove a noncitizen they determine has committed an aggravated felony,[167] bypassing a proceeding in which accurate information can be presented and adjudicated.

Relatedly, the absence of counsel has been shown to reduce accurate outcomes. Counsel may be lacking either because the removal occurs summarily or because of lack of availability and the cost barriers to obtaining counsel.[168] The link between representation and accuracy of outcome is especially strong for individuals who are detained.[169]

Finally, one of crimmigration's procedural deficiencies, employing procedural shortcuts to facilitate arrest, conviction, and removal, implicates this aspect of procedural legitimacy.[170] The en masse plea proceedings in Operation Streamline, criminal plea agreements, and waivers of the right to immigration proceedings condition noncitizens' physical liberty on the requirement that they waive the right to contest deportation in immigration court.[171]

Perceptions about the accuracy of the government's deportability procedures were particularly challenged by a study revealing that ICE had deported significant numbers of U.S. citizens, far more than the few U.S. citizen removals the agency had previously acknowledged.[172] Many of these deportations occurred even after courts had confirmed the U.S. citizenship of the deportees, or because the

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164. *See id.* at 89.

165. *Id.*

166. *See* TYLER ET AL., *supra* note 113, at 91.

167. Immigration and Nationality Act ("INA") § 238, 8 U.S.C. § 1228; *see* Lee Koh, *supra* note 89 and accompanying text.

168. *See* Eagly & Shafer, *supra* note 108 and accompanying text.

169. *Id.*

170. *See supra* note 90-94 and accompanying text.

171. *See supra* notes 91–93 and accompanying text.

172. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608–09 (2011).

agency had not followed up as required on evidence supporting the claim of U.S. citizenship.[173]

D. *Ethicality*

Finally, the ethicality of the process is important to evaluations of procedural justice.[174] Ethicality refers to whether the process is consistent with fundamental moral and ethical values, whether rights are upheld, and whether people are treated with respect.[175]

The focus here is on the ethical value of the process rather than on whether the outcome of an interaction with an authority is ethical.[176] That is, ethicality in procedural justice is not about whether an outcome like deportation is itself ethical on a universal or an individual level, but rather about whether the process leading to that outcome meets moral and ethical standards, violates rights, or treats people disrespectfully.

The notorious family separation policy of the Trump Administration, described in the Introduction, is a prime example of procedural ethicality. According

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173. *See id.* Immigration adjudication also suffers from a perception of inaccuracy. The reversal rate of immigration agency decisions is contested, but Judge Richard Posner cited a "staggering" rate of 40% in the Seventh Circuit in 2005. *See* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). The U.S. Department of Justice contended it is between 8.5% and 14%. *See Immigration Litigation Reduction: Hearing Before the Comm. on the Judiciary*, 109th Cong. 27–28 (2006) (statement of Jonathan Cohn, Deputy Asst. Att'y Gen.). Looking beyond the numbers, a string of cases reveals criticism of the accuracy and thoroughness of factfinding in immigration courts. *See Benslimane*, 430 F.3d at 829 ("[T]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case") (citing Ssali v. Gonzales, 424 F.3d 556, 563 (7th Cir. 2005); Soumahoro v. Gonzales, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (the immigration judge's factual conclusion is "totally unsupported by the record"); Grupee v. Gonzales, 400 F.3d 1026, 1028 (7th Cir. 2005) (the immigration judge's unexplained conclusion is "hard to take seriously"); Kourski v. Ashcroft, 355 F.3d 1038, 1039 (7th Cir. 2004) ("There is a gaping hole in the reasoning of the board and the immigration judge."); Chen v. U.S. Dep't of Just., 426 F.3d 104, 115 (2d Cir. 2005) (the immigration judge's finding is "grounded solely on speculation and conjecture"); Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005) ("it is the [immigration judge's] conclusion, not [the petitioner's] testimony, that 'strains credulity'").

174. *See* TYLER & LIND, *supra* note 139, at 109.

175. *See id.* Here too, immigration adjudication encounters critique. At least one scholar has suggested that the current state of immigration adjudication raises questions of judicial ethics. *See* Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 469 (2008). Immigration judges have been rebuked for disrespectful treatment of the noncitizens before them. *See Benslimane*, 430 F.3d at 829 ("The [immigration judge's] opinion is riddled with inappropriate and extraneous comments." (citing Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005))); Sosnovskaia v. Gonzales, 421 F.3d 589, 594 (7th Cir. 2005) ("the procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard"); Wang v. Att'y Gen., 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); Fiadjoe v. Att'y Gen., 411 F.3d 135, 154–55 (3d Cir. 2005) (the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding")).

176. *See supra* note 115.

to administration officials, family separation was part of the process of criminally prosecuting parents for entering or re-entering the country without authorization.[177] DHS Secretary Kirstjen Nielsen asserted that family separation was inherent in the process of criminal prosecution, stating: "[I]f an American were to commit a crime anywhere in the United States, they would go to jail and they would be separated from their family. This is not a controversial idea."[178]

The resulting nationwide condemnation of the separation policy[179] was not about the substantive decision to prosecute parents, nor about the outcome of the prosecution or later deportation. It was instead about the ethicality of embedding the separation of children and parents into this crimmigration proceeding. Family separation implicated each of the aspects of ethicality: the morality of separating young children from parents, the potential for rights violations, and the treatment of individuals with respect.

Ethicality in the processes of crimmigration law arises inherently when authorities make choices about whether and how to deprive a noncitizen of liberty through arrest or detention. Arrest and detention are both clear contexts in which enforcement authorities have the capacity to violate constitutional rights and treat people in ways that convey disrespect, so how they carry out enforcement operations can have a major effect on perceptions of the ethicality of their conduct.

The increase since 2006 in arrests and detention due to home raids stemming from the Fugitive Operations Program and Trump-era enforcement initiatives triggered numerous allegations of Fourth Amendment violations and breaches of ICE's own regulatory constraints on home entries.[180] Scholars and news reports have documented warrantless, nonconsensual entries into homes, in apparent violation of the limited authority that immigration agents have to make forcible entries.[181] In 2012, the federal government agreed to pay $350,000 to settle a lawsuit

177. Richard Gonzales, *Sessions Says 'Zero Tolerance' for Illegal Border Crossers, Vows to Divide Families*, NPR (May 7, 2018, 8:17 PM), https://www.npr.org/sections/thetwo-way/2018/05/07/609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families [https://perma.cc/AZM3-PYK7] (reporting Attorney General Jeff Sessions' statement that family separation was a consequence of a zero-tolerance border prosecution policy).

178. *See Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript*, N.Y. TIMES (June 18, 2020), https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html.

179. *See supra* notes 1–3 and accompanying text (describing the family separation policy and public reaction to it).

180. *See generally* Bess Chiu et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, CARDOZO IMMIGR. JUST. CLINIC (2009), https://larc.cardozo.yu.edu/faculty-articles/110/ [https://perma.cc/78MK-H7ZZ] (drawing on ICE records and other sources to document allegations of noncompliance with constitutional and administrative standards); Adam Harris, *When ICE Raids Homes*, THE ATLANTIC (July 17, 2019) (reporting a shift from workplace raids to homes, and allegations of Fourth Amendment violations).

181. *See* Chiu et al., *supra* note 180 at 9–16. Administrative warrants for immigration violations are not a substitute for a judicial warrant that an impartial magistrate

alleging that a series of pre-dawn ICE home raids in New Haven, Connecticut involved numerous egregious violations of residents' constitutional rights.[182]

Home raids also highlight the ethicality criterion's concern with perceptions about respect. Pre-dawn home raids seek to maximize the element of surprise and feature uniformed, armed officers breaking through doors and rousting people from sleep.[183] Raids are designed to take advantage of the most vulnerable period of the day. As a result, officers encounter people in various states of dress and consciousness and expose people to interrogation and arrest before other members of the household, including children.[184] While law enforcement does not generally follow rules of etiquette, these home raid tactics send powerful messages about the agents' regard for the rights and dignity of the targeted individual and others in the household.

E. *Representativeness*

The fifth element that plays a role in assessments of procedural justice is representativeness. Representativeness signifies giving a voice to all participants so that the decision-maker has the chance to consider everyone's concerns.[185] It reflects a basic due process concern with the opportunity to be heard.[186] Empirical studies have revealed that giving people the opportunity to express their views resulted in more favorable assessments of the fairness of the process.[187]

Representativeness comes into play in crimmigration law when the process of adjudication of immigration violations fails to give noncitizens a voice in processes that determine their immigration status or criminalize their actions. As with the element of accuracy, crimmigration's procedural deficiencies that arise when procedural shortcuts are taken may fail to provide an adequate opportunity to be heard by the decisionmaker.[188] With Operation Streamline and later on with family separation, the Department of Homeland Security's implementation of a "zero-tolerance" policy for unauthorized border-crossing thereby removed the procedural check of prosecutorial discretion. The decision to resolve cases through en masse plea-taking[189] meant that the individual defendants lost the opportunity to

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issues, and therefore immigration agents usually must have consent for entry or questioning in the home. *See* Payton v. New York, 445 U.S. 573, 585 (1980); Chiu et al., *supra* note 180, at 6.

182. *See* Kirk Semple, *U.S. to Pay Immigrants over Raids*, N.Y. TIMES (Feb. 14, 2012), http://www.nytimes.com/2012/02/15/nyregion/us-to-pay-immigrants-over-raids.html?_r=0.

183. *See* Chiu et al., *supra* note 180, at 16–17.

184. *See id.* at 14–22 (documenting accounts of home raids nationally).

185. *See* TYLER ET AL., *supra* note 113, at 91.

186. *See* U.S. CONST. amends. V, XIV. *See also* Chris Scaperlanda, *Approximating Due Process*, 28 REV. LITIG. 983, 985–86 (2009) (arguing that the immigration system does not provide adequate due process protection for non-citizens).

187. *See* TYLER ET AL., *supra* note 113, at 90. This is true even after an unfavorable decision is reached. *Id.*

188. *See supra* notes 91-93 and accompanying text (describing the procedural shortcuts in Operation Streamline).

189. *Id.*

speak and be heard by the judge.[190] It was the impossibility for an individual defendant to voice disagreement during this en masse proceeding that led the Ninth Circuit to declare the practice unconstitutional.[191]

Without empirical research, one cannot say for sure whether the lack of an opportunity to voice concerns or objections would impact perceptions of fairness here. It may be that the substantive question of whether a criminal sentence is a legitimate outcome for unlawful border-crossing will overshadow any procedural legitimacy issues. Others may perceive the plea-bargaining process as providing sufficient opportunity to voice concerns so as not to substantially affect perceptions of procedural justice.

Nevertheless, while en masse proceedings may save time, they do not meet with the kind of representativeness that social science suggests bolsters legitimacy. If noncitizens in immigrant-heavy neighborhoods tend to have more positive perceptions about the legitimacy of law and law enforcement, as procedural justice research concluded,[192] then proceedings that employ en masse plea-taking may shake that support.

F. *Correctability*

Correctability inquires whether there are means for reviewing the decision and correcting erroneous results.[193] In immigration law, this is usually accomplished through appellate review by the Board of Immigration Appeals and petitions to the federal circuit courts.

Correctability implicates the final procedural deficiency of crimmigration law: the statutory stripping of judicial review by federal courts and immigration judges of the actions of immigration officials.[194] The exceptionally limited review that federal courts now have over immigration judges and agents' decisions likely decreases the perception of accuracy in decision-making that is critical to perceptions of procedural fairness.[195]

As a practical matter, correctability may not have much effect on perceptions about crimmigration law because many cases are straightforward. After

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190. *See* United States v. Roblero-Solis, 588 F.3d 692, 693–94 (9th Cir. 2009).

191. *See id.* at 700; *see also* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1–2 (2010) (describing Operation Streamline and the effect on procedural justice in prosecution and sentencing of unlawful entry misdemeanor cases).

192. *See supra* note 21.

193. *See* TYLER ET AL., *supra* note 113, at 91.

194. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). These steps were slowed when the Supreme Court decided *INS v. St. Cyr*, which upheld a limited statutory right to habeas review. *See* INS v. St. Cyr, 533 U.S. 289, 297 & n. 7 (2001) (noting that recent legislation had "reduced the size of the class of aliens eligible for . . . discretionary relief"); REAL ID Act, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (2005).

195. *See* Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES (Aug. 8, 2008), https://www.nytimes.com/2008/08/09/us/09immig.html [https://perma.cc/2SNF-LQLT].

Congress did away with most of the reasons for relief from deportation based on crimes, adjudication of deportation is often relatively clear.[196] Although one might take issue with the substantive outcome of a decision to deport without consideration of family ties or value to the community, if the law and facts have been correctly adjudicated then there is no room for correction.

The result, however, is that arrest by a law enforcement officer has become the major determinant of whether a noncitizen would be deported because of the array of reasons that an individual can be arrested and the expansion of criminal grounds for deportation.[197] Arrest decisions are highly discretionary and less subject to review for error than the recorded fact-finding and legal decision-making of an adjudicator.[198] Thus, the constriction of judicial review in combination with the increased significance of the arrest decision largely screens officials' erroneous decisions from correction.

III. THE SIGNIFICANCE OF THE PROCEDURAL JUSTICE MODEL FOR IMMIGRATION LAW

Taken together, the six criteria that influence people's perceptions about procedural justice suggest that crimmigration law undermines the legitimacy of immigration law and immigration authorities. These criteria illustrate that the procedural deficiencies that crimmigration law introduces into immigration outcomes and enforcement decisions threaten to lead people to perceive immigration law as unfair.

These insights from procedural justice research confirm prior critiques of crimmigration. Scholars have roundly critiqued the asymmetrical importation of criminal justice norms without fortifying the procedural rights of noncitizens in removal proceedings by providing criminal constitutional protections.[199] The consequence of an immigration violation—deportation—is often harsher than the punishment for a criminal conviction.[200] In essence, by establishing an adjudication

196. *See* Padilla v. Kentucky, 559 U.S. 356, 368 (2010) (setting out the burden on defense counsel when immigration consequences are clear).

197. *See* Motomura, *supra* note 103, at 1826–27 (stating that "the enforcement discretion that matters in immigration law has been in deciding who will be arrested").

198. *See id.*

199. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893–94 (2000) (arguing that deportation of legal permanent residents should be seen as punishment, and, therefore, substantive constitutional protections should apply to deportation proceedings); Legomsky, *supra* note 69, at 482 (explaining that even minimal procedural protections are waived in plea agreements); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 337–44 (2000) (arguing that deportations on certain grounds should be regarded as punishment within the meaning of certain constitutional provisions); Stumpf, *supra* note 2, at 390–95 (comparing and contrasting the procedural protections between criminal law and immigration law).

200. *See* Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) (stating that "deportation is a drastic sanction, one which can destroy lives and disrupt families"); Restrepo

procedure that at least on the surface offers weaker procedural protection than adjudication in other contexts, such as an Article III federal court or a criminal trial, Congress and immigration authorities risk undermining perceptions that immigration-related outcomes are legitimate.

Two main issues arise in using the procedural justice model to assess perceptions of the legitimacy of immigration law. The first is whether the procedural justice model can be applied to immigration law. Second, what are the consequences if immigration law or immigration authorities are not perceived as legitimate?

First, procedural justice research matters here only if it can be effectively applied to immigration law. The procedural justice model developed primarily through study of people's perceptions of the legitimacy of police. Scholars have applied it, however, to areas as diverse as the legitimacy of courts,[201] employer/employee relationships,[202] negotiation,[203] politics,[204] and organizational contexts[205] among others.[206] The consistent finding is that people's perceptions of the legitimacy of law and legal authority depend heavily on whether procedural justice has been done.[207]

But procedural justice perceptions may vary depending on the vantage point of the subject. The perspectives of people experiencing the questionable procedure or official action may differ from the perspective of the general public or

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v. McElroy, 369 F.3d 627, 635 n.16 (2d Cir. 2004) (cautioning that "deportation, like some other kinds of civil sanctions, combines an unmistakable punitive aspect with non-punitive aspects"); San Pedro v. United States, 79 F.3d 1065, 1074 (11th Cir. 1996) (Goettel, J., dissenting) (explaining that "deportation involves the imposition of a specific sanction—expulsion from the country"). *See also* Stumpf, *Fitting Punishment*, *supra* note 20, at 1690 & n. 30 (citing cases providing support for conclusion that the deportation sanction is often at least as harsh as criminal punishment).

201. *See* Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 722–23 (2015) (collecting research).

202. *See* E. Allan Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful Termination Claims*, 45 ADMIN. SCI. Q. 557, 580–82 (2000).

203. *See* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 409–12 (2011).

204. *See* Jojanneke van der Toorn et al., *More Than Fair: Outcome Dependence, System Justification, and the Perceived Legitimacy of Authority Figures*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 127, 127–138 (2011).

205. *See, e.g.*, Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 291 (2014).

206. Most of this research, however, has taken place in Global North countries, leaving open the question of its application in other contexts. *See* Johnson et al., *supra* note 32, at 949; Justice Tankebe et al., *A Multidimensional Model of Police Legitimacy: A Cross-Cultural Assessment*, 40 L. & HUM. BEHAV. 11, 19–20 (2016) (comparing the United States, United Kingdom, and Ghana and questioning "whether there is an understanding or construction of police legitimacy that is peculiar to social, political, and legal contexts").

207. Tyler & Darley, *supra* note 31, at 724; TYLER & HUO, *supra* note 22, at 56–57.

a group that stands to benefit from the enforcement action.[208] For example, those subjected to *Terry* stop-and-frisks and order-maintenance policing have more conflicted perceptions of procedural legitimacy than the general public.[209]

Moreover, focusing on procedural justice to the exclusion of substantive social values risks elevating polite treatment and elaborate process in immigration decision-making over whether the outcome serves justice.[210] If, for example, deporting a noncitizen for a minor crime is inconsistent with widely held social values, the kindness with which authorities treat the deportee and the quality of the procedural pathway to deportation may still fail to foster a perception of legitimacy for immigration law. Similarly, a study showing that noncitizens are more likely than citizens to have positive perceptions about law and legal authorities[211] indicates that noncitizens will be more likely to cooperate with police in combating traditional crime in the absence of immigration policing. It would not, however, necessarily support the conclusion that immigrant neighborhoods will cooperate with immigration enforcement efforts.

Procedural justice matters in immigration law for a variety of reasons. At the broadest level, procedural justice engenders the kind of passive public support for law that is required for effective policing.[212] If crimmigration's procedural

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208. *See* Ryo, *Understanding Immigration Noncompliance*, *supra* note 25, at 286 (applying procedural legitimacy research to undocumented immigrants and concluding that a developmental strategy "that promotes job opportunities in key sending communities is more likely to reduce noncompliance than expending the same resources to produce threats of criminal punishment or to build a physical barrier along the US–Mexico border"); Ryo, *Less Enforcement, More Compliance*, *supra* note 25, at 669 (investigating migrant's perceptions of themselves and their view of immigration law as illegitimate to explain non-compliance with immigration law).

209. *See* Bowers & Robinson, *supra* note 44, at 230–31 (noting that "most people approve of Terry stops and frisks," but that "residents of high-crime neighborhoods would seem to be more conflicted" because they "internalize directly both the costs and benefits of policing and crime, and they appear to harbor anxieties about each") (comparing David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381, 386 (2004) (regarding the political popularity of order-maintenance policing) with Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 266–67 (2010) (supporting the conclusion that "suspects, arrestees, and defendants seem to more squarely disapprove of the aggressive approaches")).

210. *See* Bowers & Robinson, *supra* note 44, at 246–47 (warning that "the emphasis on perception raises three potential problems. First, a fair procedure or just rule may be misconstrued as unfair or unjust (false negatives). Second, an unfair procedure or unjust rule may be misconstrued as fair or just (false positives). Finally, a questionable but nontransparent procedure or rule may not be perceived at all.").

211. *See* Kirk et al., *supra* note 158, at 89 (concluding that "neighborhoods characterized by a high concentration of foreign-born residents are less likely to be cynical of the law than in neighborhoods with lesser concentrations").

212. *See* Hamm et al., *supra* note 35, at 136 (concluding that "the very existence of the institution of modern policing requires at least the passive support of the majority of the public").

deficiencies undermine the legitimacy of immigration law in the eyes of the public, this kind of passive public support for law can evaporate.

This means that procedural justice has particular significance for immigration law reform. If people rely heavily on perceptions of procedural injustice in assessing the legitimacy of law, then reforming the law requires attention not just to substantive changes but also to procedural fairness. Immigration reform measures that exacerbate crimmigration's procedural deficiencies may paradoxically lead to undermining public acquiescence in immigration law.

Crimmigration law's procedural deficiencies can also have consequences for decisions by other government agencies and by states and localities to support immigration measures. Pathbreaking work has pointed to the importance of procedural justice in achieving effective cooperation between federal immigration officials and state and local law enforcement officials.[213] Legal scholar Ming Chen's extensive work applying procedural justice to sanctuary cities concludes that immigration measures must be fair in both outcome and procedure to convince states and localities to assist in enforcement.[214] Without both substantive and procedural justice, reluctant jurisdictions are unwilling to support immigration enforcement.[215]

The downfall of the Secure Communities program during the Obama Administration is illustrative. Once the detainer that was a keystone of the program was exposed as violating the procedural requirements of the Fourth Amendment, a wave of states and localities adopted policies forbidding police cooperation with the detainer.[216] Faced with widespread perceptions that the Secure Communities program was illegitimate, the Secretary of the Department of Homeland Security was forced to retract it, commenting that "its very name has become a symbol for general hostility toward the enforcement of our immigration laws."[217]

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213. *See* Chen, *Beyond Legality*, *supra* note 27, at 152 (recasting the controversy over Deferred Action for Childhood Arrivals (DACA) as about legitimacy rather than legality and positing that high rates of state compliance with DACA reflected trust in the integrity of institutions that enacted DACA); Chen, *supra* note 12 (highlighting the need for executive orders on immigration to be fair in both outcome and procedure in order to convince states and localities to assist in immigration enforcement). *See also* Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 485–488 (2018) (concluding that sanctuary jurisdictions inject normative and sometimes legal accuracy into immigration enforcement decision-making). *Cf.* Natashia Tidwell, *Fragmenting the Community: Immigration Enforcement and the Unintended Consequences of Local Police Non-Cooperation Policies*, 88 ST. JOHN'S L. REV. 105, 142 (2014) (arguing that police cooperation with federal immigration authorities enhances public perceptions of police legitimacy).

214. *See* Chen, *Leveraging Social Science Expertise*, *supra* note 27, at 298; Chen, *Beyond Legality*, *supra* note 27, at 156.

215. *See* Chen, *Leveraging Social Science Expertise*, *supra* note 27, at 298.

216. *See* Chen, *supra* note 12, at 13–14.

217. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, Megan Mack, Officer, Off. of Civil Rights & Civil Liberties, Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs 1–2 (Nov. 20, 2014),

At the individual level, crimmigration's procedural deficiencies can deepen cynicism about the law. A 2012 study of immigrants in New York City found that immigrant communities harbored *less* cynicism about the law and were *more* cooperative with legal authorities like police than neighborhoods populated predominantly by native-born citizens.[218] The authors predicted that when state and local authorities employ harsher immigration enforcement methods, they may trigger cynicism in immigrant populations about the law. That cynicism can undermine the willingness of immigrants to cooperate with police in reducing crime.[219]

Emily Ryo's work supports that prediction. She employed a procedural legitimacy lens in her empirical investigations into detention, a core procedural component of crimmigration. She concluded that immigration detention functions to promote or reinforce widespread legal cynicism among immigrant detainees.[220]

Crimmigration may also impede the willingness of victims and witnesses to cooperate with criminal law enforcement. Ryo's research revealed that noncitizens' perceptions of procedural justice may affect the likelihood of cooperation with police considering increases in police enforcement of immigration law.[221] Procedural fairness has also diminished the perceptions of fairness of noncitizens subject to remote adjudication of immigration proceedings.[222]

Getting procedural justice right is at least as important in immigration law as for other areas of law. Enforcement of immigration law plays out in highly racialized ways and disproportionately impacts communities of color.[223] It involves the high stakes of exclusion or deportation from the United States.

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http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/W4G7-ZCNF].

218. Kirk et al., *supra* note 158, at 94.

219. *See id.* at 94–96 (warning that "because cynicism of the law is such a powerful predictor of cooperation with the police, the cooperative, amiable relations found in many immigrant communities between police and residents can easily erode if the perceived fairness and legitimacy of the U.S. justice system decay.").

220. *See* Ryo, *Fostering Legal Cynicism*, *supra* note 25, at 1023–25 (reporting that legal cynicism among immigrant detainees is characterized by a belief in the immigration system as punitive, inscrutable, and arbitrary). In light of Ryo's findings that immigrant detainees express an obligation to obey the law, their perceptions of the fairness of the U.S. immigration system are related to their assessments of the fairness with which they and others are treated in detention. *See* Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 L. & SOC'Y REV. 99, 99 (2017). *See also* García Hernández, *supra* note 107, at 1513–14 (concluding that incarceration weakens the legitimacy of the law when its impact is not perceived as fair); Arjen Leerkes & Mieke Kox, *Pressured into a Preference to Leave? A Study on the "Specific" Deterrent Effects and Perceived Legitimacy of Immigration Detention*, 51 L. & SOC'Y REV. 895, 895–99 (2017) (evaluating immigration detention and legitimacy in the Netherlands).

221. *See* Ryo, *supra* note 204, at 1023–25.

222. *See* Eagly, *supra* note 90, at 1000.

223. *See, e.g.*, Jennifer M. Chacón & Susan Bibler Coutin, *Racialization through Enforcement*, *in* RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE

An important question, then, is whether procedural fairness is significant across racial, ethnic, religious, and cultural lines. This shared value of fair process is not a foregone conclusion.[224] Different cultures vary in the ways in which they resolve disputes.[225] Cultures that rely on cooperative or collaborative means of dispute resolution may find an adversarial adjudication process off-putting.[226] Noncitizens from cultures with fewer procedural protections than the United States may perceive U.S. immigration processes as fairer than noncitizens accustomed to more procedure-oriented systems.[227] Some immigrants, most notably asylees and refugees, may harbor suspicions about the trustworthiness of government officials and therefore be less willing to seek help or have faith in the decisions of those authorities.[228]

Nonetheless, the importance of procedural justice to perceptions of legitimacy does appear to cross ethnic and cultural lines. A groundbreaking study in 2000 of interactions with police and courts compared perceptions of procedural fairness among whites, African Americans, and Latinos in Los Angeles and Oakland.[229] Over half of the Latino respondents (62.7%) were foreign-born.[230] The

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BOUNDARIES OF BELONGING 159, 159 (Mary Bosworth et al. eds., 2018); Pham & Van, *supra* note 110, at 490 (2022) (discussing the disproportionate impact of section 287(g) agreements and enforcement against Hispanic and Black drivers).

224. *See* Tyler et al., *supra* note 87, at 367, 373 (raising the concern that "in some societies the procedural justice-legitimacy-cooperation model may not hold"); *id.* at 373 (stating that "it is not safe to assume that legitimacy and procedural justice effects persist across different national cultures, or between a dominant national culture and immigrant sub-groups"). *See also* YUEN HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY 3 (2000). Huo and Tyler posit that diversity raises two potential problems for legal institutions. The first is flexibility: the U.S. legal system assumes a shared set of values regarding justice and fairness, raising the question whether and how much institutions should adapt "to meet the needs and concerns of people who may differ widely in terms of their values, beliefs, and expectations of authorities." *Id.* The second is the effect of perceptions "that minorities receive worse treatment at the hands of legal authorities than do whites." Huo and Tyler advise that legal authorities "will have to find ways to address this perception if they are to continue to function effectively." *Id.*

225. *See generally* LAURA NADER & HARRY F. TODD, THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (1978).

226. TYLER & HUO, *supra* note 22, at 3.

227. *See* Tyler et al., *supra* note 87, at 367 (hypothesizing that communities in the United States comprised of "relatively recent immigrants from non-democratic countries" might have "different attitudes toward authority and might not be affected in the same way by perceptions about fairness and nondiscrimination").

228. *See* Justice Tankebe, *Public Cooperation with the Police in Ghana: Does Procedural Fairness Matter?*, 47 CRIMINOLOGY 1265, 1265, 1283 (2009) (positing that in societies such as Ghana where a legacy of colonialism has shaped the dynamic between the public and the police, instrumental concerns may surpass procedural justice in driving perceptions of legitimacy and cooperation).

229. *See* TYLER & HUO, *supra* note 22, at 11. The study did not cover Asian Americans because of methodological and cost barriers. *Id.* at 13.

230. *See id.* at 17. The report noted that this percentage was consistent with a prior survey of Los Angeles residents. *Id.* at 17 & n.2 (citing a 1994 Los Angeles County Survey finding that 75% of Latino Los Angeles respondents reported being foreign-born).

study examined each group's level of satisfaction with their experiences with authority and their willingness to follow the directives of the authority.[231]

First, perhaps surprisingly, there was no evidence that different ethnic groups perceived differences in how favorable the substantive outcome of the authority's decision was (that is, whether the authority ultimately granted or denied a benefit, or imposed or refrained from imposing a sanction).[232] The three groups reported receiving similar outcomes.

In contrast, the authors found significant differences in perceptions of procedural justice across ethnic groups. African Americans and Latinos reported higher levels of unfair treatment by police than whites did, regardless of whether the interaction involved being stopped by police or calling police for help.[233] This pattern did not hold true for courts; there was no reported difference in perception of procedural fairness between minorities and whites among those who reported going to court.[234]

For interactions with both police and courts, this difference in perceptions of procedural fairness had implications for legitimacy. Minorities were less satisfied with their experience with police and correspondingly less willing to comply with police directives.[235] In contrast, there were no differences among ethnicities with respect to levels of satisfaction or compliance with court directives.[236]

Another factor, in addition to the favorability of the outcome, influenced both satisfaction with the interaction with authority and likelihood of compliance: the respondent's belief that authorities discriminate.[237] The 2000 study concluded that "minorities feel less fairly treated by legal authorities than do whites" and this difference "best explains why minorities are less satisfied with their experiences and less willing than whites to comply with legal decisions."[238]

Ten years later, these findings re-emerged in a 2010 study of the willingness of members of Muslim communities in the United States to voluntarily

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231. *Id.* at 21.

232. *Id.* at 31.

233. *Id.*

234. *Id.*

235. *Id.* at 24 (reporting that "among those who reported being stopped by the police, minorities are less satisfied with their experience and less willing to go along with the directives of the authority. A similar pattern emerged for those who reported initiating contact by calling the police. Again, minorities were less satisfied and less compliant.") The authors concluded that "group differences in perceived procedural fairness may lead to group differences in compliance with legal directives. Because African Americans and Latinos report less fair treatment than whites, their behavior in the legal system may also reflect this difference." *Id.* at 61–62.

236. *Id.* at 59. The authors noted that "minorities who went to court reported slightly higher levels of procedural fairness than whites," although this difference was not statistically reliable." *Id.* at 30–31.

237. *Id.* at 37–38 (reporting that "[t]hose who strongly endorsed the likelihood of discrimination by legal authorities were more likely to say that they were less satisfied with the encounter").

238. *Id.* at 36–37.

cooperate with anti-terrorism activities of local police.[239] Researchers found robust correlations between perceptions of procedural justice and an individual's perception of legitimacy and willingness to cooperate with police.[240] As with the racial minorities in the prior study, one factor that lessened the Muslim subjects' willingness to cooperate was the strength of their perceptions of social discrimination due to ethnicity or religion.[241] Nevertheless, the perception of procedural fairness was stronger than either outcome favorability or perceptions of discrimination as predictors of the respondent's satisfaction with the encounter.[242] In sum, there was striking consistency across all of the ethnic groups studied regarding the strength of procedural fairness in predicting voluntary compliance with legal authority.

The findings that procedural fairness considerations are "the main basis on which people form their responses to authority directives"—across ethnicities, and even in the absence of shared common ethnic group membership with the authority[243]—are also significant for U.S. immigration policy. These findings suggest that the existence of cultural diversity in the U.S. immigrant population and noncitizens' pre-entry experiences with procedural standards in other countries have, at best, only a minor influence on perceptions of procedural fairness in encounters with authorities in the United States. The research supports the conclusion that institutional changes in crimmigration law that increase procedural fairness are also likely to strengthen perceptions about the legitimacy of immigration law.

IV. CONCLUSION

Advances in psychological jurisprudence raise a fresh opportunity for scholars and others to assess policy choices, legal theories, and the rationales in court decisions surrounding the deepening confluence of immigration and criminal law. Exploration in legal scholarship of the application of this empirical research to immigration and crimmigration law is critical to enriching the often polarized discussion about the direction of immigration policy and informing legal theories about crimmigration law.

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239. *See* Tyler et al., *supra* note 87, at 365.

240. *Id.* at 368–69.

241. *See id.* at 381.

242. *See id.* at 385–87.

243. TYLER & HUO, *supra* note 22, at 46–47. Cross-ethnic interaction did have an impact on compliance, though this impact did not change the emphasis on procedural justice. The study reported:

> "[E]thnicity has no effect on whether people are satisfied with their experiences with legal authorities. The findings for voluntary compliance, however, are in line with previous research. . . . When people deal with authorities from a different ethnic group, they care more about outcomes than when they deal with authorities from their own ethnic group. . . . [W]hen individuals deal with a same-ethnicity authority, they assign more weight to procedural fairness than when they deal with an authority of different ethnicity."

Id. at 44–45.

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