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The Legitimacy of Crimmigration Law

Juliet P Stumpf

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Crimmigration law—the intersection of immigration and criminal law—with its emphasis on immigration enforcement, has been hailed as the lynchpin for successful political compromise on immigration reform. Yet crimmigration law's unprecedented approach to interior immigration and criminal law enforcement threatens to undermine public belief in the fairness of immigration law.

This Article uses pioneering social science research to explore people's perceptions of the legitimacy of crimmigration law. According to Tom Tyler and other compliance scholars, perceptions about procedural justice—whether people perceive authorities as acting fairly—are often more important than a favorable outcome such as winning the case or avoiding arrest. Legal scholarship has all but overlooked the import of psychological jurisprudence studies for crimmigration law.

This Article applies specific criteria that jurisprudential psychologists have shown influence people's perceptions about justice. It predicts that the current approach to immigration enforcement, with its heavy and expensive reliance on sanctions, heightened enforcement, and slim procedural protections, may over time undermine perceptions about the legitimacy of immigration law.

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Introduction

In 2010, a 5-4 decision of the U.S. Supreme Court declared unconstitutionally infirm the plea agreement of a long-term lawful permanent resident of the United States convicting him of a crime without informing him that the conviction meant almost certain

deportation.[1] In 2008, an immigration raid and federal prosecution of almost 400 noncitizen assembly-line workers led to prolonged public debate, including a congressional investigation, about whether criminal prosecution of immigrant workers was an appropriate use of federal government power.[2] In 2010, 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 through state enforcement of immigration law.[3] The result was a national outcry against the law[4] as well as a series of copycat laws in other states.[5] These events, acts, and

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[1] Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

[2] Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES, Aug. 8, 2008, at A12, http://www.nytimes.com/2008/08/09/us/09immig.html. *See also Immigration Raids: Postville and Beyond: Hearing Before the Subcomm. on Immigration, 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.

[3] Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), 2010 Ariz, Sess. Laws 450 (codified as amended in scattered sections of Ariz. Rev. Stat. Ann. 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).

[4] *See* Randal C. Archibold, *First Legal Challenges to New Arizona Law*, N.Y. TIMES, Apr. 29, 2010, at A15, http://www.nytimes.com/2010/04/30/us/30reaction.html?ref=arizonaimmigrationlawsb1070; Randal C. Archibold, *In Wake of Immigration Law, Calls for an Economic Boycott of Arizona*, N.Y. TIMES, Apr. 26, 2010, at A13, http://www.nytimes.com/2010/04/27/us/27arizona.html?ref=arizonaimmigrationlawsb1070; 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; Becky Schlikerman, *Demonstrators Rally Inside City Hall Against Arizona Immigration Law*, CHI. TRIB., July 29, 2010, http://articles.chicagotribune.com/2010-07-29/news/ct-met-city-hall-immigration-rally-0720100729_1_arizona-sb-immigration-law-arizona-businesses.

[5] *E.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 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. ANN.); Senate Enrolled Act No. 590, 2011 Ind. Legis. Serv. P.L. 171-2011 (West) (codified in scattered sections of IND. CODE); Act 69, 2011 S.C. Acts 69 (codified in scattered sections of S.C. CODE ANN.); Illegal Immigration Enforcement Act, 2011 Utah Laws Ch. 21 (codified as amended at UTAH CODE ANN. §§ 76-9-1001 to -1009). Before Arizona passed S.B. 1070, other states had considered and enacted similar legislation. *See, e.g.*, Act of July 7, 2008, 2008 Mo. Legis. Serv. (H.B. 2366) (West) (codified in scattered sections of MO. REV. STAT.); Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112 (West) (codified in scattered sections of OKLA. STAT.).

holdings reflect a nation caught in indecision about not just the content of its immigration law, but also the means of enforcing those laws.

In the tug-of-war between more inclusive and more restrictive immigration policies, enforcement of immigration law has become a battleground. Disagreement about immigration enforcement has been a major stumbling block to comprehensive immigration reform.[6] Criticism is legion that immigration enforcement officials are either unwilling or unable to stem the current levels of undocumented immigration.[7] Some argue that until immigration enforcement officials find effective

[6] *See* 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; Michael D. Shear & Julia Preston, *Obama's Plan Sets Long Line for Citizenship*, N.Y. TIMES, Feb. 17, 2013, at A1, 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, *available at* http://www.reuters.com/article/2013/02/21/us-usa-immigration-idUSBRE91K01A20130221. *See also* David P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 792 (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").

[7] Richard Cowan, *Senate Republicans Cast Doubt on Broad Immigration Bill*, REUTERS, Feb. 13, 2013, *available at* http://www.reuters.com/article/2013/02/13/us-usa-immigration-congress-idUSBRE91C1BE20130213; 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, *available at* http://www.reuters.com/article/2011/02/11/us-arizona-immigration-idUSTRE7197GY20110211. *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 (2012); 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); Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 U. MICH. L. REV. 567, 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").

strategies to deport the current population of unauthorized immigrants and deter others, immigration law is doomed to failure.[8]

Efforts to enact immigration law reform tend to seek compromise by trading more expansive grounds of admission and legalization of current unauthorized residents for harsher criminal deportation grounds and enforcement methods. Concerns about immigration enforcement have consternated presidential policymakers,[9] consumed copious congressional energies,[10] and driven the legislative and enforcement priorities of states and localities.[11]

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[8] *See* Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1328–33 (2008) (hailing 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) ("Before 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, United States Senator Ted Cruz, U.S. Sen. Ted Cruz Statement on Immigration Reform Proposal (Jan. 28, 2013), *available at* http://www.cruz.senate.gov/record.cfm?id=339434; Press Release, United States Senator Chuck Grassley, Grassley Statement at Comprehensive Immigration Reform Hearing (Feb. 13, 2013), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=44598; Press Release, United States Senator Marco Rubio, Rubio Says President's Immigration Plan Would Be "Dead on Arrival" (Feb. 16, 2013), *available at* http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=d4fde88b-eaa1-4bd8-8ff1-8b79b689c86d (arguing that the President's proposed immigration reform plan "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").

[9] Richard Cowan, *House Republicans Try to Chip Away at Immigration Reform*, REUTERS, Feb. 5, 2013, *available at* http://www.reuters.com/article/2013/02/06/us-usa-immigration-idUSBRE9130V620130206; Lucia Mutikani, *White House Drafts Backup Immigration Plan, Republicans Balk*, REUTERS, Feb. 17, 2013, *available at* http://www.reuters.com/article/2013/02/17/us-obama-immigration-idUSBRE91G01O20130217.

[10] *See* 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; The Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007) (introduced in Senate in May 2007 but never voted on); Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007) (introduced in House in March 2007 but never

Underlying this debate is a view that legalizing unauthorized noncitizens is legitimate only when immigration law fully embraces criminal law. This view in turn relies on the premise that crimmigration law, the merging of immigration and criminal law,[12] is itself legitimate.

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voted on); 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, Anti-terrorism, and Illegal Control Act of 2005, H.R. 4437, 109th Cong. (2005) (passed by the House in December 2005 but not by the Senate); Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005) (introduced in the Senate in July 2005 but never voted on); Secure America and Orderly Immigration Act, S. 1033, 108th Cong. (2005) (introduced in the Senate in May 2005 but never voted on).

[11] *See e.g.*, AZ Revised Stat. §§ 1-501, 1-502, 11-1051, 13-1509, 13-2928, 13-2829, 13-3883, 28-3511, *as amended by* SB 1070, http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf, HB 2162, http://www.azleg.gov/legtext/49leg/2r/bills/hb2162c.pdf. These state and local efforts may be vulnerable to challenges that federal immigration law preempts them. Arizona v. United States, 567 U.S. __, 132 S. Ct. 2492, 2510 (2012) (emphasizing, while invalidating parts of Arizona's SB 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* Rodríguez, *supra* note 7, at 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)*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-jan-december-2012.aspx.

[12] Scholarship addressing intersections of criminal and immigration law is burgeoning. *See, e.g.*, Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1827–32 (2007) (discussing the "origins and consequences of the blurred boundaries between immigration control, crime control, and national security"); Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L. J. 47, 50–62 (2010) (analyzing the new immigration-related state crimes created by S.B. 1070); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (laying out a functional analysis of crimmigration law); Mary Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 WASH. U. L. REV. 1269, 1273 (2012) (discussing the effect of state crimmigration enforcement on federal foreign affairs concerns and questioning its constitutionality); César Cuauhtémoc García Hernández, *When State Courts Meet* Padilla*: A Concerted Effort is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299 (2011) (discussing the difficulties that state courts face in determining the immigration consequences that may follow from a criminal conviction); 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, 640 (2004) (describing a "convergence between the immigration and criminal justice systems"); Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65 (2012) (offering a study and critique of the government's prosecution of illegal entry and re-entry); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–72 (2007) (exploring the "growing convergence" of criminal justice and immigration control and the absence of procedural protections); Teresa A.

The consequences of crimmigration law, however, have forced policymakers and the public to assess its effectiveness and confront its consequences.[13] If crimmigration law does not seem legitimate in the eyes of those whom it regulates, that perceived illegitimacy threatens to undermine beneficial cooperation with law enforcement and compliance with law.[14] Perceptions about the legitimacy of immigration law and those who enforce it have been largely overlooked in the immigration arena.[15] It is, however, a question that should influence reform efforts

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Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 224 (2010) (arguing that "the conflation of civil and criminal processes and standards undermines the rationale and objectives of both systems"); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 161 (2012) (describing crimmigration law in terms of "ad hoc instrumentalism"); 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"); 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, 644 (2011) (finding that "crimmigration has become the modern day apparatus for extending a historical and shameful history of Latino exclusion, discrimination, and marginalization").

[13] *See supra* note 2; *see also* Cassie L. Peterson, Note, *An Iowa Immigration Raid Leads to Unprecedented Criminal Consequences: Why ICE Should Rethink the Postville Model*, 95 IOWA L. REV. 323, 346 (2009) (advising that "ICE should abandon [the Postville model] and return to administratively removing immigration violators [to] avoid[] statutory and constitutional dilemmas that are unacceptable to citizens and noncitizens alike."); Lydia Waddington, *Postville Anniversary Rally Smaller, but More Focused*, IOWA INDEPENDENT , May 13, 2009, http://iowaindependent.com/15097/postville-anniversary-rally-smaller-but-more-focused; Press Release, United States Rep. Luis V. Gutierrez, One Year Anniversary of Postville Raid is a Painful Reminder of the Urgent Need for Comprehensive Immigration Reform (May 12, 2009), http://gutierrez.house.gov/press-release/one-year-anniversary-postville-raid-painful-reminder-urgent-need-comprehensive.

[14] *See infra* notes 16–142 and accompanying text.

[15] Early forays applying this research to immigration law have begun in the fields of law and sociology. S*ee* Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 FORDHAM L. REV. 2475 (2009) (applying procedural justice research to the issue of temporary immigrant workers); Ian Long, *"Have You Been an Un-American?": Personal Identification and Americanizing the Noncitizen Self-Concept*, 81 TEMP. L. REV. 571, 602 (2008) (stating that compliance research "provides significant support for one of the most oft-cited justifications for adopting inclusionary immigration policies: an increased level of cooperation with law enforcement"); Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 313 (2008) (warning that the "government's use of untested secret evidence against non-citizens will likely lead to

for immigration law, closely guide institutional design questions, and inform judges seeking to carry out the legislative intent behind federal immigration laws.

This Article uses psychological jurisprudence research to explore perceptions of the legitimacy of crimmigration law. Tom Tyler's pioneering studies have shone a spotlight on the importance of procedural justice in legal policymaking and interpretation, particularly in criminal law. People are more likely to comply with law and obey authority when people perceive those laws or official conduct as legitimate. According to Tyler, perceptions of legitimacy strengthen when people perceive those laws and official actions as treating them fairly. Those perceptions of procedural justice – the perception of fair treatment – is often more important than a favorable outcome such as winning the case or avoiding arrest.[16]

My prior work coined the term "crimmigration," explored its anatomy, and sought to explain its influence in diverse legal arenas such as criminal law, constitutional law, and federalism.[17] This Article charts a new path, using social science to assess crimmigration law and to shed new light on how people's perceptions of crimmigration law affect their views of its legitimacy. It reflects on how those perceptions can inform policy choices, legal theories, and the rationales in legal opinions about the merging of immigration and criminal law.

One of the contributions this Article makes is to locate the psychological compliance literature within the landscape of immigration law scholarship. On the one hand, procedural justice research seeks to explore why people obey the law, concluding that greater procedural fairness leads to greater willingness to obey the law.[18] For people who migrate across national boundaries without authorization, however,

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diminished compliance with the immigration process and possibly the justice system more generally"); Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOC. INQUIRY 109, 114, 140 (2006) (summarizing psychological jurisprudence research and positing that "the probability of noncompliance with immigration law is likely a function of instrumental reasons, normative values, and opportunity structures for evasion").

[16] TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 56–57 (2002).

[17] *E.g.*, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705 (2011); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006).

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

whether immigration authorities treat them fairly may play only a minor role in the decision to attempt a border-crossing, with other economic or personal factors having much more sway.

On the other hand, procedural justice research suggests that the current approach to immigration enforcement, with its heavy and expensive reliance on sanctions, heightened enforcement, and slim procedural protections,[19] may actually undermine perceptions of legitimacy of immigration law. while at the same time increasing enforcement costs.[20]

While crimmigration law lies open to challenge based on its substantive outcomes, this Article assesses whether crimmigration law has also failed to implement procedural justice. Part I sketches the contours of crimmigration law, focusing on its procedural anatomy. It then presents the procedural justice research, locating it in theoretical opposition to the deterrence model of law enforcement. Part II lays out the criteria that research has shown influences people when they make assessments about procedural justice. It uses those criteria to make predictions about how people will perceive the unique procedural aspects of crimmigration law.

Part III addresses potential objections to the application of psychological jurisprudence research to crimmigration law, and examines the larger implications if people perceive crimmigration law as undermining procedural justice. The Article concludes by raising the potential that crimmigration law may precipitate a decline in public perceptions of legitimate laws and methods of enforcement. If statutory and administrative immigration reform tends toward expanding crimmigration law, and in ways that impress upon the public the human and financial costs of that trend, perceptions of the legitimacy of crimmigration law may suffer, undermining the legitimacy of the larger structure of immigration law.

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[19] *See* Legomsky, *supra* note 12 (describing the one-sided way in which crimmigration law adopts the harsher components of the two areas of criminal and immigration law while declining most procedural protections).

[20] *See* 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).

I. Crimmigration Law and the Geography of Legitimacy

A. The Procedural Anatomy of Crimmigration Law

Scholars of human perception have confirmed something that will surprise no one: that people are more likely to perceive law as legitimate—to support and comply with it—when law is aligned with people's substantive values.[21] Less intuitively, psychological jurisprudence research reveals that perceptions about the fairness of the process more heavily influence people's evaluation of the legitimacy of an authority's action than their perceptions of the fairness of the outcome.

People tend to assess the legitimacy of authority through a substantive lens, evaluating fairness by the favorability of the outcome of an encounter with law enforcement, such whether they were arrested. But they also employ a procedural lens, through which the fairness of the decisionmaking procedures and of the way the authority treats people loom larger than the fairness of the outcome.[22] Crimmigration law implicates both the substantive and procedural aspects of psychological jurisprudence.

This section sketches the anatomy of crimmigration law. It emphasizes the singular procedural frameworks within crimmigration law in preparation for discussion in Part II.B of the procedural justice scholarship and in Part III of its application to crimmigration law.

Crimmigration law marks the intersection between immigration and criminal law.[23] It is a relatively recent trend with a long historical tail. While deportation laws based on crimes have existed for centuries and immigration law has always cast a long shadow in criminal law, crimmigration law was embryonic before 1986.[24] 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.[25] Blatant hiring of unauthorized immigrants became a criminal offense, grounds for deportation expanded to include misdemeanors and crimes committed

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[21] *See infra* notes 59-62.

[22] 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 16.

[23] *See* Chacón, Legomsky, Stumpf and others cited *supra* note 12.

[24] Stumpf, *supra* note 12, at 381–84.

[25] *See* Legomsky, *supra* note 12, at 476–79; *see also supra* notes 23–24.

long before, and criminal enforcement of border-crossing offenses rose.[26] New legislation amplified the consequences of crimes, 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.[27]

On a parallel trajectory, criminal law continued its march toward greater severity, imposing more punitive consequences and trending

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[26] 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 3009-627 (codified at 8 U.S.C. § 1101(a)(43)) (expanding "aggravated felony" definition); Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), 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 12, at 379-96 (mapping the intersection of criminal and immigration law).

[27] *See* Stumpf, *supra* note 12, at 379-96; 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). *See* 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. *See also* Vartelas v. Holder, 132 S.Ct. 1479, 1483–84 (2012) **(**holding that this provision of IIRIRA is not retroactive).

toward more intensive policing of minor acts: "disorder, incivilities, and misdemeanors."[28] In combination, these changes in criminal and immigration law swept larger numbers into the pool of noncitizens subject to criminal prosecution, detention and deportation.[29] Legislators and others justified this progressively harsher evolution of crimmigration law as necessary to deter violations of immigration and criminal law.[30]

At the same time that these substantive crimmigration measures came into play, federal immigration authorities and state and local law enforcement officers channeled resources towards 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.[31] The number of noncitizens in civil detention—in prisons, jails and federal detention centers—skyrocketed due to federal legislation expanding mandatory and discretionary reasons for detention, increased cooperation between criminal law enforcement and immigration officials, and immigration detainers which turned state and local law enforcement stops into civil detention in local jails and prisons.[32]

Greater interaction between the criminal and immigration law systems has created procedural pathways between the two systems that

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

[29] *See supra* note 12.

[30] *See generally* Kris Kobach, *The Fiscal and Legal Foundation of State Laws on Illegal Immigration*, 51 WASHBURN L.J. 201 (2012).

[31] *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.*

[32] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–46 (2010). *See* DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf (noting that "[s]ince 1994, the immigration detention system has expanded six-fold, from 6.785 beds per night to 33,400 [in 2008]" 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 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 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (providing statistics on detention facilities and detainees).

permit law enforcement authorities to pursue both immigration and criminal enforcement goals in ways that sometimes bypass well-established protections for individual rights. For example, prosecutors have sought to use in criminal cases information that was obtained without Miranda warnings in immigration agent interrogations about civil immigration violations.[33] Prosecutors have also structured plea deals that encourage noncitizens to waive immigration defenses in exchange for a more favorable plea.[34] Immigration agents carrying out "Operation Streamline" have structured criminal prosecutions of immigration crimes so that dozens of noncitizens plead guilty at once, threatening the right to a knowing waiver of criminal constitutional protections.[35]

Meanwhile, the discretion that both criminal and immigration authorities have to impose deportation as a consequence of a criminal conviction or immigration proceeding has expanded, while judicial discretion to waive deportation or defer it has generally narrowed.[36] The growth of criminal law in general, combined with the expanding grounds

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[33] *See* Eagly, *supra* note 12, at 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.").

[34] Eric Camayd-Freixas, *Interpreting after the Largest ICE Raid in U.S. History: A Personal Account*, 6–11 (June 13, 2008), *available at* http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf (describing the plea bargains offered to individuals detained in the Postville Raid of May 12, 2008).

[35] *See* Ingrid V. Eagly, *supra* note 12, at 1327–29 (describing "Operation Streamline"); *Securing the Border, Progress at the Federal Level: Hearing before the S. Comm. on Homeland Sec. and Gov't Affairs*, (May 3, 2011), *available at* http://www.dhs.gov/news/2011/05/03/secretary-janet-napolitano-senate-committee-homeland-security-and-governmental (Testimony of Janet Napolitano, Sec'y 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).

[36] *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) ("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").

for deportation based on immigration-related criminal offenses and other crimes, had the effect of expanding the discretion of both 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 have become primary determinants of which laws are enforced and against whom.[37]

On the other hand, when Congress constricted the power of immigration judges and federal courts to grant relief from deportation, the law largely turned away from individualized determinations about whether a particular noncitizen's circumstances merited granting or retaining permanent residence status in the United States. 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 mandatory.[38] With so little to litigate, most cases settled through plea arrangements.[39] As a result, a police officer's choice of whom to arrest and an immigration agent or criminal prosecutor's decision to pursue the case largely determined whether a noncitizen would face deportation.[40]

B. The Geography of Legitimacy

This subsection explores the legitimacy of crimmigration law with the compass of psychological jurisprudence. Psychological jurisprudence has provided an invaluable framework to evaluate some of the most tenacious problems in criminal law.[41] One of its most

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[37] *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 procedings.").

[38] *See supra* note 27 and accompanying text.

[39] *See Eagly*, *supra* note 12.

[40] *See* Motomura, *supra* note 37, at 1826–27.

[41] *E.g.*, JOHN D. MCCLUSKEY, POLICE REQUESTS FOR COMPLIANCE 171 (2003) (noting that "[p]olice respect enhances compliance, and police disrespect diminishes compliance"); TYLER, *supra* note 18; TYLER & HUO, *supra* note 16; Aziz Z. Huq et al., *Why Does the Public Cooperate With Law Enforcement?: The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. 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

important contributions has been to challenge the deterrence model of criminal law enforcement that has been in ascendance since the 1980s.[42] 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 law-breaking conduct.[43]

1. Deterrence Strategies and Legitimacy

Classic deterrence strategies draw from law and economics in seeking to increase both the risk of apprehension and the cost of violating the law. The idea is that individuals calculate the expected gains from law-breaking and weigh them against expected losses from punishment, discounted by the degree of risk of being caught.[44] In other words, individuals will break the law when they believe that they are likely to gain more from law-breaking than they would lose if caught and punished.[45]

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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 22; 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).

[42] *See* TYLER & HUO, *supra* note 16, at 19-24.

[43] 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 (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").

[44] 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).

[45] Fagan & Meares, *supra* note 43, at 181.

The solution the deterrence model offers is to set the sanction for the violation and the resources expended on enforcement at such a level that it will cost the individual more to break the law than to comply with it. Deterrence models assume that people weigh costs and benefits when deciding whether to commit an unauthorized act like a crime.[46] The prescription for policymakers employing this model to achieve social control of immigration law is to calculate the desired level of compliance in light of the cost of enforcement and the imposition of the sanction. If the risk of being caught is low, the sanction should be set correspondingly higher.[47] 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 becomes less effective.

Contemporary immigration enforcement strategies have relied heavily on the deterrence model. Deterrence strategies in criminal law increase the costs of committing unlawful acts through harsher punishment, through increasing the likelihood of apprehension, or by creating 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.[48]

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.[49] The formula is straightforward: stronger legal proscriptions and heavier penalties will result in greater deterrence of immigration violations.

In immigration law and policy, this translates into more funding for enforcement to increase the likelihood of apprehending and punishing

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[46] *Id.*

[47] *See* Paternoster, *supra* note 44; Fagan & Meares, *supra* note 43, 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. SOC. REV. 101 (1986) (concluding that variations in crime rates result from competition between the benefit of committing crimes and the risk of sanctions).

[48] *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).

[49] *See* Kanstroom, *supra* note 12, at 652; Legomsky, *supra* note 12, at 476; Stumpf, *supra* note 12, at 384.

immigration violators, and heightened civil and criminal sanctions for noncompliance.[50] This approach also implicitly draws on the expressive function of law to define the boundaries of lawful conduct surrounding immigration and communicate disapproval of law-breaking.

The value of a deterrence approach, then, stands or falls on whether it is effective, but also whether it impose costs that are greater than the benefits it confers. The effectiveness of the deterrence model for immigration and criminal law enforcement is in question. On the one hand, the past few years have seen a jump in the number of annual removals of noncitizens from the United States, from 165,168 in 2002[51] to 400,000 in 2012.[52] On the other hand, most of those removals occurred at or near the border[53] and estimates of the current population of unauthorized noncitizens remain over 11 million. [54]

As well, the success of the deterrence model depends on the accuracy of the assumption that immigration law violators make these kinds of calculations when deciding whether to comply with the law. If a cost-benefit analysis of the risk of sanctions does not actually motivate

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[50] *See* Kanstroom, *supra* note 12, 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); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority Of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179, 205 (2005) (citing a 500 percent increase in immigration arrests by state and local police officers in some areas); Legomsky, *supra* note 12 (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 7 (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 12 (noting that previous civil immigration violations now carry additional criminal penalties).

[51] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., YEARBOOK OF IMMIGRATION STATISTICS: 2011, Table 39 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

[52] ICE reports removing 409,849 noncitizens in 2012. *See* http://www.ice.gov/removal-statistics.

[53] 2011 IMMIGRATION YEARBOOK, *supra* note 51, Table 39 (reporting over 475,000 returns in 2010 and 385,100 removals).

[54] *See* Michael Hoefer et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* (March 2012) *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

individuals to obey immigration law, then policymaking under the rational choice 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 compliance.[55] 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. [56]

Deterrence strategies in immigration law are also expensive: the cost of immigration enforcement has risen steadily since the 1980s and legislative reform efforts seem likely to continue that trend. [57]

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[55] *See* Robert D. Cooter, *Three Effects Of Social Norms On Law: Expression, Deterrence, And Internalization*, 79 OREGON 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").

[56] 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 law. *See* ALFRED BLUMSTEIN ET AL., NATIONAL ACADEMY 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 (1980) (describing survey study finding that "perceived severity of sanctions" was a predominant factor in deterrence); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE 75 (1973) (citing a Minneapolis study that found mandatory arrest for domestic violence was a deterrent; noting, however, that the result was not replicated in an Omaha study). The effect, however, is merely modest. Raymond Paternoster & Lee Ann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 769–70 (1986). *See also* JACK P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975) (critiquing the idea that punishment acts as a deterrent); Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCH. BULL. 497, 501 (1993) (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 (2010) (collecting cites).

[57] *See* Doris MEISSNER, ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2, (2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (explaining that spending for U.S. Customs and Border Protection (CBP) and ICE and related enforcement technologies surpassed $17.9 billion in fiscal year 2012, "nearly 15 times the spending

Psychological jurisprudence research challenges the deterrence model, providing empirical evidence that people are not in fact as motivated by cost-benefit analysis as the deterrence model assumes. Procedural justice 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 authority in enforcing the law.

2. Crimmigration Law and Legitimacy

Crimmigration raises peculiar challenges for the procedural justice model. For some groups, crimmigration law is a means toward elevating people's perceptions that crimmigration law is legitimate. Imposing criminal sanctions for failure to obey migration laws and augmenting enforcement of the intersecting criminal and immigration laws will, in this view, boost public respect for immigration law generally.

For others, crimmigration law undermines perceptions that immigration law and criminal law are legitimate. People's perceptions of the legitimacy of immigration law are shaken when crimmigration law contradicts their social values and when authorities carry it out in ways that people perceive as unfair. The "characteristic feature of a claim of illegitimacy is the assertion that, as a moral matter, full obedience … is not required."[58] Scholarship in psychological jurisprudence reveals that people base their assessments of the legitimacy of a legal rule or official action on their belief that (1) prohibiting the conduct is consistent with their social values, and (2) that the law and legal authorities are legitimate and therefore entitled to deference.[59] This second belief rests

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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 OFFICE COST ESTIMATE: S. 744 BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT, 11(2013), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/s744.pdf.

[58] David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1861 (2005).

[59] Tyler & Darley, *supra* note 22, at 713 (citing Paternoster & Iovanni, *supra* note 56, at 768–69); Robert J. MacCoun, *supra* note 56, at 501; Daniel S. Nagin & Raymond

on internalized acceptance that "it is part of a person's duty as a citizen to accept legal rules and to obey the directives of legal authorities." [60] Cooperation and deference to legal authorities decrease when people perceive that law enforcement has acted unfairly.[61]

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 believed an authority's action led to a substantively fair outcome.[62] To 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.[63] In contexts involving unequal bargaining power or differing cultural understandings of property, such as the notorious land-sale agreements between the U.S. government and Native American tribes,[64] 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. [65]

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).

[60] Tyler & Darley, *supra* note 22, at 716.

[61] *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).

[62] *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 (2012) (comparing the "'legitimacy'" that derives from fair adjudication and professional enforcement and the 'moral credibility' that derives from just results").

[63] *Id*.

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

[65] A barrier to examining the 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) emphasize that social values, those that result in the internalization of moral norms, arise primarily from childhood experiences and socialization. *See* TYLER & HUO, *supra* note 16, at 401–

Crimmigration law sits at the crux of two substantive norms. One powerful norm asserts that, as outsiders, noncitizens who violate the law deserve special punishment and that those present without explicit permission must leave.[66] The substantive norm in play 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 takes very seriously the criminalization of migration-related actions. It views noncitizens who commit traditional crimes as having breached an implied contract with United States that makes continuing to stay contingent on obeying the law.[67] This contractual norm overpowers considerations stemming from other circumstances such as length of residence in the United States or family ties.[68]

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.[69] When crimmigration laws restrict family unity by deporting lawful permanent resident based on criminal convictions or by sentencing unauthorized border-crossers, they conflict with these social values. [70]

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02 (explaining that "[t]he literature on political socialization suggests that basic orientations toward law and legal authorities … develop early in life").

[66] *E.g.*, Kobach, *supra* note 50, at 190-93.

[67] *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).

[68] *Id.*

[69] Statutes of limitations in other areas of the law such as tort law and criminal law exemplify a similar norm, permitting the passage of time to rub out 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); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1738–48 (2011).

[70] 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* Mark Krikorian, *No Amnesty – Now or in Two Years*, CENTER FOR IMMIGRATION STUDIES (Oct. 2008), *available at* http://www.cis.org/node/872 (anticipating disastrous effects as a result of any amnesty provisions); Damien Cave, *Big-City Police Chiefs Urge Overhaul*

A full assessment of the legitimacy of crimmigration law, however, requires predicting how people will perceive whether crimmigration law comports with procedural justice. A threshold question is whether psychological jurisprudence research is a productive way to assess crimmigration law.

There are pitfalls to applying this empirical research to crimmigration law. The first is the danger of overreaching – of using the data to support particular policy prescriptions when in fact the data is inconclusive. For example, a study showing that noncitizens are more likely than citizens to have positive perceptions about law and legal authorities[71] may support the conclusion that noncitizens are more likely to cooperate with police in combating traditional crime. It would not, however, necessarily support the conclusion that immigrant neighborhoods will cooperate with crime-based immigration enforcement efforts.

The potential for overreaching is exacerbated by the lack of social science data pertaining to crimmigration law. I found no studies specifically assessing the perceptions that noncitizens have about immigration procedures or immigration officials. While one study of noncitizens assessed how noncitizens' perceptions about procedural justice may affect the likelihood of cooperation with police in light of increases in police enforcement of immigration law, the study focused on cooperation with traditional criminal enforcement, not on perceptions of legitimacy of immigration enforcement or federal immigration officials.[72]

Second, whose perceptions of legitimacy should we pay attention to? Procedural justice perceptions may change depending on the vantage point of the subject. The perspective of the people

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of Immigration Policy, N.Y. TIMES, July 1, 2009, at A13, 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, *Students Stage Mock Graduation to Advocate for Undocumented*, WASH. POST, Jun. 24, 2009, http://www.washingtonpost.com/wpdyn/content/article/2009/06/23/AR2009062303406.html (documenting the demonstration on behalf of 65,000 undocumented high school graduates unable to attend college due to their status).

[71] *See* Kirk et al., *supra* note 142, 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").

[72] *Id.*

experiencing the questionable procedure or official action may differ from the perspective of the general public or a group who stands to benefit from the enforcement action. For example, those subjected to Terry stop-and-frisks and order-maintenance policing have more conflicted perceptions of procedural legitimacy than the general public.[73] Those affected by crimmigration law include noncitizens, of course, but they also include the victims of a noncitizen's crime and the ways in which immigration law serves the general public.

Finally, focusing on procedural justice to the exclusion of substantive social values risks elevating polite treatment and elaborate process over whether the outcome serves justice.[74] 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 will still fall short of legitimacy.

These pitfalls demand caution in drawing policy prescription from the research. Still, there is value in using what psychological jurisprudence teaches about how people evaluate procedural justice to make some predictions and raise relevant questions. The section that follows employs six criteria drawn from psychological jurisprudence studies as a framework for assessing the procedural justice of elements of crimmigration law.

II. The Hallmarks of Procedural Legitimacy

[73] *See* Bowers & Robinson, *supra* note 62, 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")).

[74] *See* Bowers & Robinson, *supra* note 62, at 247–48 (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.").

This Part examines the factors that people take into account in assessing procedural fairness and attempts to predict 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 (6) correctability.[75] Empirical evidence suggests that the first four of these elements are particularly important to people evaluating procedural justice.[76]

The six criteria in the Leventhal model of procedural justice hold promise for assessing whether people will perceive crimmigration enforcement as procedurally fair. Whether crimmigration 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, hold particular importance for people's perceptions of the legitimacy of crimmigration law.[77]

1. 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.[78] Consistency across people requires 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.[79] 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

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[75] *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 (K. Gergen et al. eds.. 1980). *See also* TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH, YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY 90–93 (1997) (surveying the literature and empirical studies confirming and explicating the Leventhal criteria). More recent research by Tom Tyler and others identified a significant seventh factor: the trustworthiness of the enforcement authority. TYLER ET AL., *supra*, at 92; Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 167–68 (1997).

[76] TYLER ET AL., *supra* note 75, at 91.

[77] Leventhal, *supra* note 75, at 39-40.

[78] *Id.* at 40–41.

[79] *Id.* at 40.

are used.[80] Leventhal likens the consistency rule to the notion of equality of opportunity.[81]

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.[82] 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 robbery, noncitizen defendants, but not U.S. citizens, are subject to deportation and mandatory detention in addition to any criminal sentence imposed.[83]

In this way, crimmigration law draws distinctions based on citizenship status in an area of law—criminal law—that traditionally focuses on conduct, and not on status.[84] 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. So the criminal justice system acts inconsistently if it treats people differently because of their status by, for example, providing lawyers at government expense for white defendants but not for Asian defendants.

The effect on perceptions of legitimacy of this uneven application of criminal law consequences across citizenship groups is unstudied, but there are several possibilities. On the one hand, adding deportation to a noncitizen's criminal sentence may seem perfectly consistent if justified as a breach of a higher duty noncitizens owe to the country that permitted them entry.

On the other hand, for immigrants and citizens for whom detention and deportation have heavier costs, such as family separation, paying a heavier price than a citizen for the same conduct may undermine the perception that the law treats people consistently. People may perceive broadening the crime-based reasons for deportation as treating people inconsistently because, by detaining and deporting long-term residents, authorities treat two residents of the same community

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[80] *Id. See also* TYLER, *supra* note 18, at 118–19.
[81] Leventhal, *supra* note 75, at 40.
[82] *See supra* notes 23–26 and accompanying text.
[83] *See* Stumpf, *supra* note 12.
[84] *See* Wong Wing v. United States, 163 U.S. 228, 229 (1895); Eagly, *supra* note 12, at 1359 (noting that "According 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.").

who commit the same crime differently depending on whether one is a noncitizen.

This sort of breach of doctrinal equality[85] sets up the conditions for people to perceive that there is inconsistent treatment by the law. For example, some criminal law judges deny bail or increase sentences for people because they do not have lawful status in the United States.[86] Even when these decisions stem from the judges' belief 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 criterion of consistency across time arises when crimmigration law operates retroactivity to permit the removal of a noncitizen on the basis of a crime that was not a reason for removal when it was committed.[87] 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 to naturalization did not exist. For example, the "aggravated felony"[88] ground for removal, which was created in 1988[89] and then significantly expanded to incorporate a multitude of crimes, applied to crimes committed long before 1988, even though removal and prohibition from naturalization were not a consequence of a conviction or plea agreement then.

2. Bias Suppression

The second criterion for perceptions of procedural justice, bias suppression, evaluates "the ability of a procedure to prevent favoritism or external biases." A process that permits self-interest or narrow preconceptions to affect the process implicates this criterion.[90] It

[85] *See* Eagly, *supra* note 12, at 1286 (introducing the concept of "doctrinal equality" in criminal law).

[86] LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 53 (2006) (describing *Wong Wing* as establishing the core separation of criminal and immigration law).

[87] *See* Lapp, *supra* note 27, at 1573.

[88] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (setting forth grounds for deportation of an alien who is convicted of an aggravated felony).

[89] Drug Kingpin Act of 1999, § 101(a)(43), 102 Stat. at 4469.

[90] *See* Leventhal, *supra* note 75, at 41.

assesses impartiality, honesty, and efforts to make decisions fairly.[91] Psychological jurisprudence research has focused on two of many types of bias: self-interest and reliance on prior beliefs rather than on the evidence.[92]

a. Self-interest Bias

First, when an authority 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 players.[93] In assessing bias suppression, people focus on whether the decisionmaker appears to be neutral with respect to the parties and not motivated by self-interest.[94] At first blush, crimmigration law seems an unlikely candidate for self-interested decisionmaking because the stakes are usually not financial but rather loss of liberty – detention, deportation, conviction and incarceration. Only in the rarest case will immigration agents, judges, police, or prosecutors enjoy personal gain from any of these outcomes.

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 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 as a way toward controlling unauthorized migration and increasing national security.[95]

At first, this ramp-up seems unremarkably oriented toward improving the effectiveness of a government agency. The heavy emphasis on using the statistics of deportation to assess the agency's performance, however, undermines qualitative efforts the agency might

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

[92] *See* TYLER, *supra* note 18, at 119.

[93] *Id.* (raising a similar referee analogy).

[94] TYLER & LIND, *supra* note 91, at 108.

[95] *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.)

make toward its security and border enforcement aims.[96] The focus on statistics—from those with the power to determine the funding and influence the public's regard 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.

If the removal of a noncitizen caught in a home or workplace raid contributes identically to the immigration agency's statistics as a human smuggler convicted and removed after intensive investigation and prosecution, then the agency receives more reinforcement for home and workplace raids that result in numerous removals than for the detection and pursuit of more sophisticated immigration and criminal violations.[97] The interest of the agency and its agents in increasing the number of arrests thus biases decisionmaking toward quantity instead of toward considered choices about how best to reach the agency's immigration control goals.[98]

A concrete example of this manifestation of self-interest bias arising from quotas and statistics is the structure of the National Fugitive Operations Program ("Fugitive Operations"), an immigration enforcement initiative established to find and remove dangerous "fugitive aliens."[99] 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.[100] 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

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[96] *Id.*

[97] *See id. See also* Margot Mendelson, Shayna Strom & Michael Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program*, MIGRATION POLICY INST. 19 (2009), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf. (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, 611 (2009) (describing home raids and discussing their effects).

[98] *See* Mendelson, *supra* note 97, at 19.

[99] U.S. DEPARTMENT OF HOMELAND SECURITY, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003 – 2012: DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND (JUNE 27, 2003).

[100] *Id.* at G-3.

records.[101] 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.[102]

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."[103] Arrest quotas set numerical rather than qualitative performance requirements for enforcement officers that impact job evaluations and advancement opportunities.[104] Mary Fan has described the dismissal of a U.S. Attorney who allocated her enforcement resources towards investigating the leaders of immigration smuggling organizations and prosecuting corrupt Border Patrol officers rather than racking up favorable statistics by arresting undocumented workers.[105] 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 the smaller fish rather than in the public's interest in dismantling larger criminal smuggling and trafficking organizations or arresting individuals with serious criminal backgrounds.

b. Preconceptions

The second type of bias, reliance on preconceived views instead of the evidence, arises most clearly when race or ethnicity seemingly influenced the process. Decisions that appear to be influenced by racial considerations or otherwise selectively target a group of people without apparent justification, or are seemingly patternless, will undermine perceived procedural fairness.[106] "Selectively targeting a group of people

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[101] OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HOMELAND SECURITY, AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS (MAR. 4, 2007), at 8-9.
[102] Mendelson, *supra* note 97.
[103] *See* Fan, *supra* note 95, at 26; *see also id.* n. 122 (listing state laws prohibiting the use of quotas for traffic tickets and other offenses).
[104] *Id.* at 49-56.
[105] *Id.* at 27.
[106] *See* TYLER, ET AL., *supra* note 75, at 90-92.

will almost inevitably alienate a substantial portion of the targeted population."[107] Selective targeting also "diminishes the probability that members of the alienated group will cooperate with the police and other law enforcement agencies."[108]

Immigration enforcement decisions that use ethnicity as a factor in making stops or targeting workplaces also increase perceptions that immigration authorities are acting unfairly.[109] For example, 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.[110]

The Secure Communities program, which relies on police arrests to identify unauthorized migrants with criminal backgrounds, raises a 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. Tracking this rollout, 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 immigration-driven crime. Rather, the rollout tracked counties with large Hispanic populations.[111] This disconnect between the purpose of the program and the ethnicity-associated rollout exposes federal authorities to perceptions that policy decisions succumb to preconceptions about ethnic groups.

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[107] Chiesa, *supra* note 61, at 309.

[108] *See* Kirk, et al., *supra* note 142; Chiesa, *supra* note 61, at 309.

[109] *See* Brignoni-Ponce v. INS, 422 U.S. 873 (1975) (permitting immigration agents to rely on Mexican ethnicity as one factor in making Fourth Amendment stops for immigration purposes).

[110] *See* Tom Tyler, Stephen J. Schulhofer, & Aziz Z. Hug, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365 (2010). *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 Muslim and Arab countries); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 FED. REG. 77, 642 (Dec. 18, 2002) (modifying and clarifying registration requirements and specifying which countries are "designated countries"). *See also* Mem. from the Dep'y Att'y Gen. to Comm'r, Immigr. & Nat. Serv. et al., (Jan. 25, 2002), *available at* news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf (describing the DHS Absconder Apprehension Initiative which singled out for detention and deportation noncitizen men of Muslim faith and Arab ethnicity who had criminal convictions or immigration violations).

[111] *See* Adam J. Cox & Thomas B. Miles, *Policing Immigration*, 80 CHI. L. REV. 87, 89 (2013).

3. Accuracy

The perception that authorities reach accurate decisions is another factor that people use to gauge the fairness of procedures. This factor focuses on "the use of accurate information and thorough fact-finding to reach informed opinions."[112]

Crimmigration processes that reduce opportunities for fact-finding and bypass adjudication predictably undermine perceptions that those processes are fair. The *en masse* plea proceedings in Operation Streamline implicate this aspect of procedural legitimacy, as do criminal plea agreements and immigration waivers that condition noncitizens' physical liberty on the requirement that they waive the right to contest deportation in immigration court.

One challenge to perceptions of the government's ability to accurately determine deportability was a 2011 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.[113] Many of these deportations occurred because the agency had failed to act on previous court adjudications of the U.S. citizenship status of the deportee, or because the agency had not followed up as required on information supporting the claim of U.S. citizenship.[114]

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[112] *See* TYLER, ET AL., *supra* note 75, at 91.

[113] Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011).

[114] *See id.* Immigration adjudication, too, suffers from a perception of inaccuracy. The reversal rate of immigration agency decisions is contested, but Judge Richard Posner has cited a "staggering" rate of 40% in the Seventh Circuit in 2005. 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 S. Comm. on the Judiciary*, 109th Cong. 27–28 (2006) (statement of Jonathan Cohn, Dep'y 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, *citing* Ssali v. Gonzales, 424 F.3d 556, 563 (7th Cir. 2005) ("this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); 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 Justice, 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]

4. Ethicality

Finally, the ethicality of the process is important to evaluations of procedural justice.[115] 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.[116]

Ethicality here is concerned with the ethical value of the process rather than with whether the outcome of an interaction with an authority is ethical, which this Article has already briefly addressed.[117] Ethicality in the processes of crimmigration law arises most sharply 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 National Fugitive Operations Program and other enforcement initiatives have triggered numerous allegations of Fourth Amendment violations and breaches of ICE's own regulatory constraints on home entries.[118] Scholars and news reports have documented

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conclusion, not [the petitioner's] testimony, that 'strains credulity"') (alterations in original).

[115] *See* TYLER & LIND, *supra* note 91, at 109.

[116] *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* Michelle Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467 (2008). Immigration judges have been rebuked for disrespectful treatment of the noncitizens before them. *See Benslimane*, 430 F. 3d at 829 (citing Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005) ("the [immigration judge's] opinion is riddled with inappropriate and extraneous comments"); 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. Attorney General, 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. Attorney General, 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") (alterations in original)).

[117] *See supra* notes 62—**Error! Bookmark not defined.**.

[118] *See generally* Bess Chiu, Lynly Egyes, Peter L. Markowitz, & Jaya Vasandani, *Constitution on ICE: A Report on Immigration Home Raid Operations* (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/

warrantless, nonconsensual entries into homes, in apparent violation of the limited authority that immigration agents have to make forcible entries.[119] In 2012, the federal government agreed to pay $350,000 to settle a lawsuit alleging that a series of pre-dawn ICE home raids in New Haven, Connecticut involved numerous egregious violations of residents' constitutional rights.[120]

Aside from the legality of the search and arrest, home raids 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.[121] They are designed to take advantage of the most vulnerable period of the day, and as a result officers encounter people in various states of dress and of consciousness, and expose people to interrogation and arrest before other members of the household, including children.[122] While law enforcement does not generally follow rules of etiquette, the home raid tactics documented since the imposition of quotas and statistical performance metrics seem likely to send distinctive messages about the agents' regard for their targets' rights or their dignity.

5. 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 decisionmaker has the chance to consider everyone's concerns.[123] It reflects a basic due process concern with the

immigrationlaw-741/IJC_ ICEflome-Raid-Report%20Updated.pdf (drawing on ICE records and other sources to document allegations of noncompliance with constitutional and administrative standards).

[119] *See id.*, at 9-16. Administrative warrants for immigration violations are not a substitute for a judicial warrant that an impartial magistrate 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 118, at 6.

[120] *See* Kirk Semple, *U.S. to Pay Immigrants over Raids*, N.Y. TIMES, at A22 (Feb. 14, 2012), *available at* http://www.nytimes.com/2012/02/15/nyregion/us-to-pay-immigrants-over-raids.html?_r=0.

[121] *See* Chiu et al., *supra* note 118, at 14-22.

[122] *See id.* at 14-22 (documenting accounts of home raids nationally).

[123] *See* TYLER, ET AL., *supra* note 75, at 90.

opportunity to be heard.[124] In empirical studies, procedural justice scholars found that giving people the opportunity to express their views resulted in more favorable assessments of the fairness of the process.[125]

Representativeness comes into play in crimmigration law when the process of adjudication of immigration violations fails to give noncitizens a voice when determining their immigration status or criminalizing their actions. With Operation Streamline, for example, the Department of Homeland Security implemented a "zero-tolerance" policy for unauthorized border crossing along a particular stretch of the U.S.-Mexico border, prosecuting almost all violations as criminal offenses.[126] Procedurally, the government resolved the cases through plea bargaining, resulting in *en masse* plea-taking proceedings in which magistrate judges sentenced up to 80 defendants in one hearing. The Ninth Circuit declared parts of this practice unconstitutional, reasoning that the *en masse* nature of the proceeding made it impossible for individual defendants to voice disagreement.[127]

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 larger substantive question 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

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[124] *See* U.S. Const. amend. V, XIV. *See also* Chris Scaperlanda, *Approximating Due Process*, 28 REV. LITIG. 983 (2009) (arguing that the immigration system does not provide adequate due process protection for non-citizens).

[125] *See* TYLER, ET AL., *supra* note 75, at 90. This is true even after an unfavorable decision is reached. *Id.*

[126] *See supra* note 35 and accompanying text (describing Operation Streamline). 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. 4-6 (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).

[127] *See* United States v. Roblero-Solis, 588 F.3d 692 (9th Cir. 2009). *See also* Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, WARREN INSTITUTE 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).

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 Kirk, Tyler, and their colleagues concluded,[128] the *en masse* plea-taking proceeding may shake that support. This kind of consequentialist concern has relevance to policymakers considering extending Operation Streamline and courts considering the consequences of upholding it.

6. Correctability

Correctability inquires whether there is a means for review of the decision and for correcting erroneous results.[129] In immigration law, this is usually accomplished through appellate review by the Board of Immigration Appeals and petitions to the federal circuit courts.

Congress, however, took steps to strip the federal courts of jurisdiction to review the immigration court's removal decisions.[130] The exceptionally limited review that federal courts now have over immigration judges' decisions likely decreases the perception of accuracy in decisionmaking that is critical to perceptions of procedural fairness.[131]

As a practical matter, correctability may not have much effect on perceptions about crimmigration law because many cases are straightforward. After Congress did away with most of the reasons for

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[128] *See supra* note 20.

[129] *See* TYLER, ET AL., *supra* note 75, at 90.

[130] 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.); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 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. 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 (May 11, 2005) (codified at 8 U.S.C. § 1252(a)(2)(D)).

[131] *See* Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES (Aug. 8, 2008).

relief from deportation based on crimes, adjudication of deportation is often relatively clear.[132]

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.[133] Arrest decisions are highly discretionary and less accessible to review for error than the recorded fact-finding decisionmaking of an adjudicator.[134] Thus, the constriction of judicial review in combination with the increased significance of the arrest decision largely screens officials from correction of erroneous decisions.

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The criteria that psychological jurisprudence research has shown to influence people's perceptions about procedural justice suggest that crimmigration law stands on shaky footing. Each of the criteria point toward weaknesses in the way that crimmigration law affects people's evaluations of the legitimacy of the law and the authorities who enforce it.

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.[135] The consequence of an immigration violation – deportation – is often harsher than the punishment for a criminal conviction.[136] In essence, by erecting an adjudication procedure that at

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[132] *See* Padilla v. United States, 559 U.S. 356, 368 (2010) (setting out the burden on defense counsel when immigration consequences are clear).

[133] *See* Motomura, *supra* note 37, at 1826–27 (2011) (stating that "the enforcement discretion that matters in immigration law has been in deciding who will be arrested").

[134] *Id.*

[135] *See* Chacón, *supra* note 12, at 1870; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws*, 113 HARV. L. REV. 1889, 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 12, 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 12, at 390–93 (comparing and contrasting the procedural protections between criminal law and immigration law).

[136] *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");

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 have undermined the perception that immigration-related outcomes are legitimate.

III. Assessing the Procedural Justice Model for Crimmigration Law

The social science research on procedural justice and the analysis of the predictors for how people will perceive the legitimacy of an area of law are useful only if the model actually applies to crimmigration law. This section addresses whether the unique characteristics of immigration enforcement cast doubt on the previous Part's conclusions.

Two questions are salient. First, if the variables of immigration status, ethnicity and cultural diversity result in unpredictable or weaker links between procedural fairness and perceptions of legitimacy, then improving procedural fairness may not inspire perceptions that immigration law is legitimate.[137] Different cultures vary in the ways in

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Restrepo v. McElroy, 369 F.3d 627, 635 n. 16 (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) (explaining that "deportation involves the imposition of a specific sanction – expulsion from the country"). *See also* Stumpf, *supra* note 17, at 1690 & n. 30 (citing cases providing support for conclusion that the deportation sanction is often at least as harsh as criminal punishment).

[137] *See* Tyler, Schulhofer, & Huq, *supra* note 110, at 367 (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 TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY 3 (2002). Huo & 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.*

which they resolve disputes.[138] Cultures that rely on cooperative or collaborative means of dispute resolution may find the adversarial adjudication process off-putting.[139] Noncitizens from cultures with fewer procedural protections than the process that the United States provides may perceive U.S. immigration process as fairer than other noncitizens from more procedure-oriented societies.[140] 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.[141]

Second, when the outcomes of immigration determinations affect liberty interests as weighty as exclusion or deportation, perceptions of procedural fairness simply may be irrelevant to people's feelings that the law lacks legitimacy. Empirical research sheds light on both of these questions.

A. Does the Procedural Justice Effect Apply in Immigration Law?

Social scientists have not yet empirically studied whether the procedural justice research holds up in the specific contexts of immigration enforcement and adjudication. The question arises whether this area of law is *sui generis* when it comes to the effect of procedural justice. Enforcement of immigration law plays out in contexts that are rich in ethnic and cultural diversity, and involves the high stakes of exclusion or deportation from the United States.

The most relevant work in this area, inspired by the trend toward state and local immigration policing, is a study of immigrants in New York City that David Kirk authored with Tom Tyler and other colleagues.[142] The study found that immigrant communities harbored *less* cynicism about the law and were *more* cooperative with legal

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[138] LAURA NADER & HARRY TODD, THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (1978).

[139] HUO & TYLER, *supra* note 137, at 3.

[140] *See* Tyler, Schulhofer, & Huq, *supra* note 110, 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").

[141] *See* Justice Tankebe, *Public Cooperation with the Police in Ghana: Does Procedural Fairness Matter?*, 47 CRIMINOLOGY 1265, 1293 (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 rise above procedural justice in driving perceptions of legitimacy and cooperation).

[142] *Id.*

authorities like police than neighborhoods populated predominantly by native-born citizens, are *less* cynical of the law and *more* cooperative with legal authority.[143] The authors of the study concluded that when state and local authorities employ harsher immigration enforcement methods, they may trigger cynicism about the law in immigrant populations that is likely to undermine the willingness of immigrants to cooperate with police in reducing crime.[144]

B. Ethnic and Cultural Diversity and Perceptions of Procedural Justice

Two studies conducted in 2000 and 2010 strongly support the conclusion that perceptions of fairness cross ethnic and cultural lines. A ground-breaking 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.[145] Over half of the Latino respondents (62.7%) were foreign-born.[146] The study examined each group's level of satisfaction with their experiences with authority and their willingness to follow the directives of the authority.[147] The researchers distinguished satisfaction with the substantive outcome of the encounter (that is, whether the authority ultimately granted or denied a benefit or imposed or refrained from imposing a sanction) from perceptions of the fairness with which the authority treated members of the group.

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. The three groups reported receiving similar outcomes.[148]

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[143] *Id.*

[144] *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.").

[145] *See* HUO & TYLER, *supra* note 137.

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

[147] *Id.*

[148] *Id.* at 31.

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 from police than whites did, regardless of whether the interaction involved being stopped by police or calling police for help.[149] 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.[150]

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.[151] In contrast, there were no differences among ethnicities with respect to levels of satisfaction or compliance with court directives.[152]

Two other factors influenced both satisfaction with the interaction with authority and likelihood of compliance: the favorability of the outcome and the respondent's belief that authorities discriminate.[153] 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."[154]

This was also true for the 2010 study of the willingness of members of Muslim American communities to voluntarily cooperate with anti-terrorism activities of local police. Researchers found robust correlations between perceptions of procedural justice and an individual's perception of legitimacy as well as willingness to cooperate

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[149] *Id.*

[150] *Id.*

[151] *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.

[152] *Id.* at 24. 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.

[153] *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").

[154] *Id.* at 36-37.

with police.[155] One factor that lessened the Muslim American subjects' willingness to cooperate was the strength of their perceptions of social discrimination due to ethnicity or religion.[156]

Nevertheless, the perception of procedural fairness was stronger than either outcome favorability or discrimination beliefs as predictors of the respondent's satisfaction with the encounter. Significantly, the same was true of the respondent's voluntary compliance with the authority. The feeling that an individual was treated fairly was a stronger predictor of willingness to comply with an authority's directive than either the favorability of the outcome or beliefs that authorities discriminate.[157]

While this study focused on perceptions of fairness for Muslim Americans rather than comparing disparate ethnic, religious or cultural communities, its findings are significant for immigration law because of the high percentage (81%) of foreign-born respondents, among other reasons. Religiosity, cultural differences, and political background correlated only weakly with willingness to cooperate with authorities.[158] Instrumental concerns, such as an individual's evaluation of the severity of terrorist threats or of police effectiveness did not have a significant influence in determining her willingness to cooperate.[159]

Analyzing these results, the authors of the study suggested that if people perceive fair treatment by authorities as a measure of their status and membership within the community, unfair treatment sends the signal that they hold merely marginal status.[160] Thus, "if authorities want to elevate levels of satisfaction and compliance, they need to pay particular attention to issues of procedural fairness."[161]

C. Applicability to Crimmigration Law

This research does not squarely address the situation that crimmigration law presents. In contrast to police authority, authority

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[155] *See* Tyler, Schulhofer, & Huq, *supra* note 110, at 368-69.
[156] *Id.* at 381.
[157] *See* HUO & TYLER, *supra* note 137, at 37-38. Interestingly, compared to whites, Latinos assign slightly less weight to both outcome and procedural concerns. *See id.* at 41. For all groups, however, "both factors were important in forming judgments of satisfaction, with procedural fairness being given more weight than outcome favorability." *Id.*
[158] *Id.* at 18.
[159] *Id.* at 17.
[160] *See id.* at 34.
[161] *Id.* at 37.

over immigration law is split between immigration authorities who respond to requests for help with immigration benefits (the U.S. Citizenship and Immigration Services) and those who enforce violations of immigration law (U.S. Customs and Border Patrol and Immigration and Customs Enforcement). The 2000 study focused on only three ethnicities, and only one that had a high percentage of foreign-born respondents.[162] Generalizing the results of the study to the wide variety of ethnicities and cultures that encounter immigration authorities is fraught with pitfalls. These factors counsel caution in seeking to apply the results of these studies wholesale to immigration law.

Still, two findings suggest that this empirical research holds important insights for immigration law. The first is the striking consistency across all of the ethnic groups studied of the strength of procedural fairness in predicting voluntary compliance with legal authority. This finding held true for Latinos, the ethnic group with the highest proportion of foreign-born respondents, and within Muslim American communities. The procedural justice effect continued even in cross-ethnic interactions, when the ethnicity of the authority and the respondent differed.[163]

The second is a subsidiary finding that individuals' level of attachment to American society affected how willing people were to comply with legal authorities. All three ethnic groups reported high levels of attachment to America, with Latinos reporting slightly higher levels.[164] Those who reported strong identification with American society relied more on procedural fairness to assess their willingness to comply with authorities than those with a weaker attachment to America, who relied more on assessment of the favorability of the outcome.[165] In the Muslim American community, perceptions of legitimacy and willingness to cooperate with police, including the willingness to report a terrorist threat or terrorist act, was strongly influenced by the respondent's identification with America.[166]

One possibility is that stronger identification with America at least partially eclipsed ethnic identity, so that legal authorities were "viewed as part of the larger group of Americans, regardless of their

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[162] The study did not cover Asian Americans because of methodological and cost barriers. *Id.* at 13.
[163] *Id.*
[164] *Id.* at 49-50. All three groups also reported strong attachment to their ethnic identity. *Id.*
[165] *Id.* at 51-52.
[166] Tyler, Schulhofer, & Huq, *supra* note 110, at 13, 18.

ethnicity."[167] These findings suggest that "effective governance and law enforcement do not require that people forgo their ethnic loyalties," however, "they do require attachments to the larger society."[168]

Conclusion

The 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.

Crimmigration law's heavy reliance on the deterrence approach is likely to have negative effects on people's perceptions of the fairness of law enforcement, thereby undermining perceptions of the legitimacy of immigration law and of criminal law as applied to noncitizens.

Unlike criminal law, where there is broad consensus that people should not commit crimes, there is little consensus that the current structure of substantive immigration law is legitimate, and therefore widespread disagreement about the legitimacy of laws prohibiting or criminalizing unauthorized migration. The successive intensive efforts to reform the immigration laws bear this out.

In the face of this ongoing debate about the legitimacy of the substantive law, the empirical lens of the procedural justice research becomes significantly more useful. If people rely heavily on perceptions of procedural injustice in assessing the legitimacy of law, then reforming the law requires attention to both substantive and procedural fairness. Crimmigration law, with its emphasis on procedural avenues and shortcuts to enforcement, carries a potential to damage perceptions of the legitimacy of immigration law that calls for more than substantive changes to the law.

The empirical findings of psychological jurisprudence scholars have important implications especially for aspects of immigration law that affect permanent immigration, including lawful permanent residents

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[167] HUO & TYLER, *supra* note 137, at 51-52.
[168] *Id.* at 51-52.

and refugees and asylees. Immigration-related measures that tend to marginalize resident immigrants, either on the basis of characteristics such as ethnicity or gender, or by sending the message that their immigration status is precarious and easily withdrawn, will undermine the kind of attachment to the United States that fosters compliance with everyday law.

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[169] 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 immigration law that increase procedural fairness are also likely to strengthen perceptions about the legitimacy of the law.

[169] *Id.* 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 that: "[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.