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## On Teaching Crimmigration Law

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## ON TEACHING CRIMMIGRATION LAW

PHILIP L. TORREY\*

### ABSTRACT

*Law school faculty interested in teaching crimmigration law—a relatively new and exciting area of law concerning the intersection of criminal law and immigration law—should lean into the law’s fluidity and ground their teaching in advocacy. Crimmigration law offers a rich space to teach students how to advance creative legal arguments, while also providing fertile ground to teach students some of the core tenants of statutory interpretation, administrative law, and constitutional law. This article provides guidance on developing a crimmigration law course, including a simulation that can be adapted to teach students about stakeholder mapping. In the article, I draw on my own experience teaching crimmigration law at Harvard Law School for over ten years.*

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## INTRODUCTION

Teaching crimmigration law is both challenging and exciting.<sup>1</sup> Although I have taught a course entitled *Crimmigration: The Intersection of Criminal Law and Immigration Law* at Harvard Law School for nearly a decade, the topics discussed and materials covered within the course are in constant flux because the doctrine is relatively new and exceptionally fluid.<sup>2</sup> Crimmigration law's dynamism can be daunting. Some law school faculty may be apprehensive about teaching such a course because the contours of the law are always shifting. The substance of the course can look radically different from semester to semester. While crimmigration law's ever-changing nature can make teaching the subject taxing, it also offers opportunity. There is space for students to think through creative litigation strategies to influence the law—strategies that are not foreclosed by an abundance of precedent. Consequently, crimmigration law should be taught in a manner that covers both legal doctrine as well as strategies for shaping the doctrine going forward.

The goal of this article is to explain how I have used crimmigration law's variability as an asset to create a dynamic law school course that teaches students both legal doctrine and strategic advocacy. I will begin by first explaining the complex nature of crimmigration law. That description will elucidate why the doctrine is in constant flux and foreshadow the ways in which advocacy strategies can capitalize on crimmigration law's lack of development. I will then discuss the genesis of my own crimmigration law course, including how I developed the course's curriculum. Finally, I will discuss how crimmigration can be taught to include discussions of both doctrine and advocacy strategies. My hope is that this article will inspire other law school faculty to develop their own crimmigration course.

## CRIMMIGRATION LAW AND ITS FLUIDITY

Crimmigration law is the intersection or conflation of criminal law and immigration law. But as Teresa Miller has aptly noted, "it is purely neither."<sup>3</sup> The blending of these two legal systems has created a relatively new and unique field of law that operates quite differently than either criminal law or immigration law. For example, crimmigration law has its own unique constitutional foundation that stretches the bounds of the United States' system

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1. The term "crimmigration" was first used by Juliet Stumpf in her seminal article, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). The term has since been widely adopted and its definition as the intersection of criminal law and immigration law is more commonly known.

2. See César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 198–200 (2018).

3. Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 618 (2003).

of dual sovereignty.<sup>4</sup> To identify individuals for deportation who have markers of criminality, the immigration system, which is crafted by Congress and enforced by federal agencies, heavily relies on the criminal law system, which is largely crafted and enforced by states.<sup>5</sup> That reliance of one sovereign on another can create tension that frustrates federalism principles—especially when state policies and federal policies seemingly conflict.<sup>6</sup>

The messiness of crimmigration law is in large part due to the inherent tension caused by the convergence of criminal law and immigration law, but it is also a product of the law's relatively nascent stage. César Cuauhtémoc García Hernández points to the 1980s as crimmigration law's birth.<sup>7</sup> He explains that crimmigration law birthed from congressional acts that embraced the anti-immigrant rhetoric of the 1980s along with tough-on-crime policies of that period like the War on Drugs.<sup>8</sup> The result was a series of federal immigration laws that explicitly imported criminality into the immigration system, including a robust immigration detention scheme, new crime-based grounds of removal, criminal bars to various forms of immigration relief, curtailed judicial review when a criminal charge is involved, and the inability of adjudicators to consider positive equities when considering the exercise of discretion if a crime was involved.<sup>9</sup> The contours of those laws are still being determined today by federal courts around the country.

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4. For a discussion on how the state and the federal government play a role in immigration-related policies and enforcement, see Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 703 (2013).

5. For a discussion about how a state's criminal law policy can be leveraged by the federal immigration enforcement system, see Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1819 (2011).

6. See Philip L. Torrey, *Principles of Federalism and Convictions for Immigration Purposes*, 36 IMMIGR. & NAT'Y L. REV. 3, 9–17 (2015). The friction caused by the criminal law and immigration law systems intersecting has sparked significant litigation. See, e.g., *Beyond Roldan and Pickering: Litigation Resource & Sample Briefing*, IMMIGRANT DEF. PROJECT (2022), <https://www.immigrantdefenseproject.org/wp-content/uploads/Beyond-Roldan-and-Pickering.pdf> [<https://perma.cc/8HX2-JWE9>].

7. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2013).

8. See *id.* at 1460.

9. See *id.* at 1468 (describing the increased criminalization of immigration law, including the broadening of deportability grounds triggered by criminal offenses); Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14-02 IMMIGR. BRIEFINGS 1 (2014) (analyzing legislation that stripped immigration adjudicators of the ability to exercise discretion in crime-based removal proceedings and limited the availability of certain forms of immigration relief); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014) (noting that today's immigration detention system began in the 1980s and 1990s); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616, 1623–24 (2000) (discussing the congressional acts in the 1990s that limited the availability of judicial review in removal proceedings).

When explaining crimmigration law, I often use the analogy of a busy superhighway. Imagine a superhighway on which many vehicles are traveling together, but in separate lanes. We can label one lane “immigration law” and the other lane “criminal law.” The vehicles in those two lanes represent the individuals being systematically ushered through the criminal law and immigration law systems. Each lane has its own unique rules of the road. Now imagine a junction at which the two lanes are suddenly required to merge, but with little direction on how to do so. Let’s label the single lane that forms from that junction “crimmigration law.” When vehicles from the two lanes merge into one, the process is confusing, erratic, and sometimes even illogical. Without clear rules of the road, the process is messy. Should vehicles adhere to the rules of the immigration law lane or the rules of criminal law lane when trying to merge? The merger of the two lanes mirrors the reality of crimmigration law’s current doctrine. It’s under-developed. The rules are still being meted out. It can be frustrating for those navigating the crimmigration process, but it also provides fertile ground for shaping the law.

#### DEVELOPING A CRIMMIGRATION LAW COURSE FOR STUDENTS

I recently learned that the crimmigration law course I developed many years ago was the first of its kind in the country. To be clear, many well-taught immigration law courses have dipped their toes in the subject of crimmigration, but until recently few schools offered a stand-alone course dedicated to the field. When it was first suggested that I develop such a course there were very few teaching materials from which to draw. Both criminal and immigration law casebooks frequently contained a unit on crimmigration law, but neither had enough material to fully cover the subject over the course of a twelve-week seminar.<sup>10</sup> Similarly, colleagues’ syllabi from immigration law and criminal law courses only offered materials covering pieces of crimmigration law. I quickly learned that I would need to develop my crimmigration law course from scratch.

Without existing teaching materials, I drew from my own experience as a legal services attorney representing individuals directly impacted by the crimmigration system. At that time, many of my clients were in removal proceedings because of a prior encounter with the criminal law system. To zealously advocate on my clients’ behalf, I needed to quickly learn crimmigration law. I first turned to other legal services attorneys for guidance, but quickly discovered that many of them were unfamiliar with the law. They were often focused on other relatively new and shifting areas of law like asylum law. It was simply infeasible for them to also make crimmigration law a regular

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10. In 2010, the U.S. Supreme Court held that criminal defense counsel is constitutionally obligated to advise their noncitizen clients of the potential immigration consequences of criminal charges. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010). Consequently, criminal law courses typically include a unit related to providing immigration advice pursuant to *Padilla*.

part of their practice. Luckily, I found a couple of well-drafted treatises and practice advisories covering crimmigration law's basics.<sup>11</sup> I spent countless hours poring over those resources and reviewing the statutes and judicial opinions they cited. From that research, I started drafting my own outlines and checklists to have readily available as new crimmigration-related cases came in. Unbeknownst to me at that time, the materials I developed to help me effectively represent my clients would become the blueprint for my first crimmigration law seminar.

Teaching myself crimmigration law doctrine proved valuable when crafting a course to teach others. Like many areas of law, crimmigration law is layered. A course with proper scaffolding is therefore critically important.<sup>12</sup> Scaffolding provides a teaching structure in which foundational concepts are covered first with more complex topics conceptually layered on top of the foundational concepts. Many commonly taught law school courses effectively use scaffolding. For example, it is hard to teach the concept of tort liability without first teaching the element of duty. Similarly, it is difficult to teach crimmigration law's complicated "categorical analysis" without first covering immigration law's "conviction" definition.<sup>13</sup> I could not have fully appreciated how the key concepts of crimmigration law build upon one another if I was not first required to learn crimmigration law as a legal advocate.

In addition to developing a course that covered the necessary legal doctrine, I wanted to build a course that provided students with the tools necessary to interrogate and question the doctrine itself. The nuts and bolts of crimmigration law are important for any lawyer interested in practicing criminal law or immigration law, but to critically analyze the doctrine one must understand the historical context in which the law has been shaped. When doing so, advocacy strategies emerge. For example, federal public defenders across the country are challenging the illegal re-entry felony statute on equal protection grounds

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11. One of the best crimmigration resources I have used includes IMMIGRATION LAW AND CRIMES by Dan Kesselbrenner and Lory D. Rosenberg. It is published by Thomson Reuters and updated annually by the National Immigration Project of the National Lawyers Guild members. Norton Tooby and J.J. Rollin also produce a fantastic treatise called CRIMINAL DEFENSE OF IMMIGRANTS. That treatise is also regularly updated.

12. Scaffolding is a method through which an instructor teaches complex subject matter only after more foundational concepts are taught. Shaun Archer et al., *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. LEGAL EDUC. 258, 265 (2014) ("At its most essential, psychological scaffolding is the idea that people integrate new information into existing frameworks of knowledge.").

13. The categorical analysis is the tool used by adjudicators to determine when a criminal conviction triggers an immigration consequence. But the conviction definition itself is complex and encompasses state criminal dispositions that states themselves do not consider to be convictions. See Immigration and Nationality Act (INA) § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (stating that even where a final adjudication of guilt has been withheld by a criminal court, the disposition may still be considered a conviction for immigration purposes).

because it was drafted due to Congress' racial animus toward Mexican nationals and other Latinx communities.<sup>14</sup> The language of the federal statute may appear benign, but its history is rife with racism.<sup>15</sup> Without a firm understanding of Congress' insidious purpose for creating the law, successful challenges to it would not have been possible.<sup>16</sup>

Drawing again from the superhighway analogy, the crimmigration law course I have designed endeavors to: (1) teach students the lane merger rules concerning crimmigration law doctrine that have been developed, (2) push students to craft creative advocacy strategies to implement new lane merger rules, and (3) encourage students to interrogate why the "immigration law" lane and the "criminal law" lane are merging in the first place. The course includes three units. The first unit provides a cursory overview of the criminal law process and deportation process, significant legislative milestones in crimmigration law, and the foundational tools for deciphering when a criminal offense might trigger an immigration consequence. The second unit covers many of the crime-based grounds of removal and the immigration detention scheme. Throughout the second unit, students are reminded of how legislation highlighted in the first unit have been interpreted by courts and enforced by federal agencies.

After covering much of crimmigration law's doctrine, the third unit creates space for students to step back and consider the advantages and disadvantages of the crimmigration law system. The unit also covers current issues that relate to crimmigration law, including sanctuary jurisdictions and immigration detention's private prison industry.<sup>17</sup> This final unit is also designed to deliberately connect the historical context in which crimmigration law was created and its current impact on affected communities. In the final unit of the course, students are pushed to creatively develop new policy and litigation strategies in collaboration with classmates. In these collaborations I specifically

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14. See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1000 (D. Nev. 2021) (holding that "Section 1326 was enacted with a discriminatory purpose and that the law has a disparate impact on Latinx persons . . .").

15. For a thorough discussion of the racist origins of the illegal re-entry statute and the racial animus that prompted Congress to enact the provision, see *id.* at 1008–17.

16. Robert Burnson, *Law Used to Prosecute Migrants in U.S. Struck Down as Racist*, BLOOMBERG (Aug. 18, 2021), <https://www.bloomberg.com/news/articles/2021-08-18/law-used-to-prosecute-migrants-in-u-s-struck-down-as-racist> [<https://perma.cc/DFA3-NZJS>] ("An almost century-old federal law that makes it a crime for deported migrants to re-enter the U.S. was found unconstitutional by a judge who said its passage in 1929 was motivated, in part, by prejudice against Mexicans and other Latinos.").

17. See Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 159–61 (2016) (explaining how sanctuary cities, in part, arose in response to the increase in "crimmigration" enforcement); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 U. MICH. J.L. REFORM 879, 896–906 (2015) (explaining how the private prison industry profited from the implementation of the mandatory detention regime in the mid-1990s).

direct students to interrogate the aspects of crimmigration law that are not yet fully developed and may therefore be ripe for shaping with creative advocacy.

#### COMBINING DOCTRINE AND ADVOCACY

In this section I will explain how to teach students the strategical advocacy skills necessary to shape crimmigration law doctrine. As discussed above, leaning into the constantly evolving legal landscape of crimmigration law opens space for students to engage in creative advocacy strategies. Compared to more well-established areas of law like property, contracts, and even criminal law, crimmigration law is a relatively new area of law that remains underdeveloped.<sup>18</sup> Consequently, there is often space to advance the law without the constraint of well-established precedent. Doing so requires students to consider how to leverage jurisprudence from both the immigration and criminal law spaces.

Encouraging students to think critically about crimmigration law's doctrine is particularly rewarding as a teacher. The crimmigration law course I teach is a pre-requisite or co-requisite for the crimmigration clinic I direct. In that clinic, students put strategic advocacy into practice. Students in the crimmigration clinic work on a range of cases and projects, including appellate litigation in federal courts, affirmative federal district court litigation, direct representation in immigration proceedings, and policy advocacy. In the clinical setting, students further develop the skills necessary to advocate on behalf of an individual or organization using the tools students learned from the crimmigration law course. But developing strategic advocacy skills starts in the classroom—not the clinic.

Below I describe a classroom simulation that I have found to be incredibly transformative in bridging the doctrine and theory discussed in class and legal practice. The in-class simulation is based on policy advocacy projects the crimmigration clinic pursued in jurisdictions around the United States, as well as a hackathon developed by me and my colleague Sabrineh Ardan. <sup>19</sup> The hackathon brought together a range of stakeholders tasked with thinking creatively about different welcoming policies jurisdictions could adopt to ensure immigrant communities felt safe when accessing local services like healthcare and emergency response. I have chosen this particular simulation because it

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18. This is not to suggest that other areas of law, including property, contracts, and criminal law are without fertile space for innovative arguments to further develop legal doctrine. My point here is that crimmigration is uniquely situated given its birth from the intersection of two distinct areas of law and the relatively nascent stage at which it is currently operating.

19. Brett Milano, *Blue Sky Thinking and Beyond at Harvard Law Hackathons*, HARV. L. TODAY (May 2, 2018), <https://hls.harvard.edu/today/blue-sky-thinking-beyond-harvard-law-hackathons/> [<https://perma.cc/5EYH-EE5P>].

offers a glimpse into advocacy strategies that are not strictly focused on litigation, which is often the primary emphasis in law school.

#### *SANCTUARY CITY SIMULATION*

The goal of the Sanctuary City Simulation is to teach students the importance of stakeholder-mapping and how to identify key leverage points for those stakeholders. To begin, students are randomly assigned to one of four stakeholder groups before class begins: (1) town council; (2) U.S. Immigration and Customs Enforcement (“ICE”); (3) local law enforcement; or (4) immigrant-led organizing coalition. Each group is then provided a one-page description of their stakeholder group and its immigration-related priorities. Students do not have access to the one-page descriptions of other stakeholder groups.

At the beginning of class, I explain to all four stakeholder groups that the town council is considering a new ordinance that will effectively end local law enforcement’s ability to detain an individual based solely on an “ICE detainer” or “ICE request.” At the end of class, the town council will hold a public hearing at which each of the other three stakeholder groups will present testimony and answer questions from the town council. Each stakeholder group must also create a visual aid to supplement their oral testimony.

Students then have a specified amount of time to begin brainstorming within their own stakeholder groups about how the prospective ordinance implicates the group’s immigration-related priorities. In those brainstorming sessions, individuals must first identify whether they support the new ordinance, oppose it, or want to propose an amendment to the ordinance. The stakeholder groups must also consider whether and how they want to convince one or more other stakeholder groups to support their position. In doing so, they are reminded that it is helpful to identify other groups who may have similar positions on the prospective ordinance. To successfully consensus-build, students must identify the key levers of influence for the other stakeholder groups. During these group strategy discussions, the town council must also consider stakeholders’ immigration-related priorities and the town council can create consensus for the proposed ordinance. They must also brainstorm questions they anticipate asking each stakeholder group during the hearing.

Next, I ask the stakeholder groups to cross-pollinate. One individual from each group other than the town council must leave their stakeholder group and join another stakeholder group for about ten minutes. The stakeholder group accepting the newcomer must explain the group’s position on the new ordinance and how that position is informed by the group’s immigration-related priorities. The newcomer must then offer questions to the stakeholder group to help the group identify the leverage points of the newcomer’s stakeholder group. For example, if an individual from the local law enforcement group cross-pollinates with the ICE group, then the local law enforcement group member may ask the ICE group if they have thought about how holding someone on an ICE detainer

may impact local law enforcement's budget, or local law enforcement's ability to gain the trust of the local immigrant community. This phase of the simulation helps stakeholder groups refine their consensus-building strategy. When the ten minutes are over, the cross-pollinators return to their original stakeholder group and bring back what they have learned to their own stakeholder group.

After some additional time to fine tune testimony and prepare the visual aid, each group must present to the town council. Each group is given a limited amount of time to present and explain their visual aid while answering questions from the town council. After testimony is complete, members of the town council deliberate and then return to announce their vote on the ordinance, including any potential amendments.

At the conclusion of the exercise, I ask students to think about why they made certain strategic decisions. We discuss what they may have done differently and what parts of the exercise they found most challenging. Inevitably, students identify the importance of the cross-pollination phase. Learning about the levers of influence that may shift the positions of both allies and adversaries is important in any strategic advocacy space. We also talk about the importance of the visual aid, which is usually a simple graphic with some limited text on a large sheet of paper. Students often observe that the visual aid helped them focus their argument for an audience with limited time and limited knowledge of the stakeholder group's priorities. Ultimately, students find the simulation incredibly useful for brainstorming creative advocacy strategies. They learn the importance of stakeholder mapping and consensus building around a complex legal issue. Those are critical thinking skills that will serve them well in crimmigration law or any area of law they ultimately practice.

#### CONCLUSION

Teaching crimmigration law has been immensely rewarding and I would encourage other law school faculty to consider teaching such a course. Crimmigration law has become increasingly important for any immigration or criminal law practitioner to understand. Criminal defense counsel of immigration law practitioners who are well-versed in the law can effectively advocate on behalf of individuals while shaping crimmigration law doctrine. Conversely, prosecutors and ICE attorneys who understand crimmigration law are positioned to exercise discretion in a manner that fairly represents the interests of the state or general public. Although my goal with this article is to spark an interest among other law school faculty to consider offering a crimmigration law course, I hope that some of the lessons and pedagogical decisions I have made in developing and teaching a crimmigration course resonate with all law school faculty.

