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## The Life of Crimmigration Law

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## The Life of Crimmigration Law

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# THE LIFE OF CRIMMIGRATION LAW

CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ<sup>†</sup>

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

— Oliver Wendell Holmes, Jr., *The Common Law*<sup>1</sup>

## INTRODUCTION

In 2006, Juliet Stumpf took an enormous intellectual leap. Two areas of law, she realized, had wrapped themselves together so tightly that it was hard to know where one ended and the other began. Criminal law and immigration law were fast becoming the new creature of legal imagination and policing reality that she termed crimmigration law.<sup>2</sup>

In the years since then, a growing group of scholars and advocates have followed in Stumpf's intellectual footsteps. Ranging across disciplines and oceans, they have begun to give an identifiable form to crimmigration law.<sup>3</sup> The *Denver University Law Review*'s 2015 symposium, "CrImmigration: Crossing the Border Between Criminal Law and Immigration Law," gathered a preeminent subset of this pioneering group. Collectively, the symposium speakers and panelists have devoted themselves to carving the contours of crimmigration law. During their day and a half at the University of Denver, they brought to bear that expertise on many of crimmigration law's most pressing questions: the effects of multijurisdictional law enforcement policies that blend criminal and civil law norms; examples of the basest of our cultural practices, racism, infecting legislating and constitutional interpretation; the complications of hugely important technical analyses obscured by the mundane term "categorical approach"; and distressing tales of children in detention. Not to focus only on the many ways in which criminal law and immigration law are increasingly interwoven, panelists also spoke about rare but important moments of disentangling: the much criticized Secure Communities pro-

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications 1991).

2. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (describing crimmigration law's origins and identifying some defining features).

3. For a sample of cross-disciplinary, multinational collections, see generally SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia et al. eds., 2013).

gram repealed and the use of immigration detainers derailed by litigation and political pressure.

The story of change that the panelists collectively told reminds me of the passage that begins this Introduction. In it, the towering jurist Oliver Wendell Holmes reminds us that law is not static. It is a winding path through history, a dizzying foray into the vagaries of human nature, an adventure in the unpredictability of legislating, a maddening glimpse into the complexities of policing, and a test of faith in the righteousness of judicial interpretation. “The life of the law,” he wrote a few sentences before the quoted lines, “has not been logic: it has been experience.”<sup>4</sup>

Crimmigration law encapsulates Holmes’ vision. It is a product of human experience, a testament to the United States’ greatest moments and its most visceral fears. The nation’s well-earned self-image of welcoming migrants has been dotted by consistent efforts to demonize those same migrants through the power of criminal law.<sup>5</sup> Despite attempts to penalize migration-related activity, legal advocates trained in the promises of equality and justice have resisted the worst excesses of the state’s coercive powers.

“Crimmigration: Crossing the Border Between Criminal Law and Immigration Law” captured the story of life that has birthed crimmigration law in the United States. It tracked the use of immigration law to sanction for a second time migrants who have engaged in criminal activity. It detailed the criminal justice system’s increasing concern about migration. And it explored the many enforcement tentacles that comprise the crimmigration law regime.

For all its detail, the picture that this symposium painted is necessarily incomplete. Crimmigration law, as Holmes suggests, is alive. And as with all living creatures, it is constantly changing. It will evolve with every day, propelled by perceptions of security or danger, comfort or unfamiliarity. It will move in the direction of further entangling the worlds of criminal law and immigration law if the community from which it has arisen so desires. It will move in the opposite direction—a direction more reflective of law’s past—only if the fears of migrant criminality subside. The last three decades suggest that the former is much more likely than the latter.

If crimmigration law’s creation and expansion shows anything, however, it is that law is perpetually malleable. Legislators, lawyers, and judges can and will continue to shape crimmigration law’s reach. Only time will tell where this infant area of law leads. The only thing certain, as the panelists at the symposium illustrated, is that there will be much

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4. HOLMES, *supra* note 1.

5. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1513–15 (2013).

room for contestation as some legislators, lawyers, and courts expand crimmigration law, while others push back.