

# Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future

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*The flow of information from local police to federal immigration officials forms a central element of the contemporary phenomenon known as “crimmigration”—the convergence of immigration enforcement and criminal law enforcement. This Essay provides the first historical account of the early roots of this information flow and a new perspective on its contemporary significance.*

*Previous scholarship locates crimmigration's origins in the 1980s and '90s. Drawing on extensive archival research on day-to-day interactions between local police and federal immigration officials, this Essay explores a lost chapter in the development of crimmigration: the pipeline that brought men arrested by vice squads in gay cruising areas into the deportation system in the 1950s and '60s. This history demonstrates that the contemporary crimmigration*

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*system is best understood not as the merging of two enforcement systems that were formerly separate, but rather as the product of shifts within both policing and the deportation systems that have rendered many more people vulnerable to the intersection of the two. Drawing parallels between the use of vice squad arrest records by the Immigration and Naturalization Service in the 1950s and the use of police data by the Department of Homeland Security today, this Essay argues that a symbiotic relationship has developed in recent years between “broken windows” policing and the deportation system. The deportation system has come to depend on the existence of an expansive criminal justice system that subjects low-income communities of color to regular monitoring through frequent stops and arrests for minor offenses. At the same time, programs that promote police-immigration cooperation have themselves become drivers of over-policing.*

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## INTRODUCTION

Collaboration between local police and federal immigration authorities has emerged as one of the most controversial public policy issues of the past decade. From challenges to the constitutionality of Arizona's "show me your papers" law<sup>1</sup> to the termination of the federal Secure Communities program,<sup>2</sup> questions relating to the sharing of information between local police and federal immigration authorities have occupied the attention of policy makers and courts. These information flows form a central element of the broader phenomenon that many have come to call "crimmigration"—the convergence of immigration enforcement and criminal law enforcement evident in recent decades.<sup>3</sup> While some state and local governments have aggressively pursued the integration of immigration enforcement and local policing, others have distanced themselves from such efforts.<sup>4</sup> Critics have raised numerous concerns

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1. See *Arizona v. United States*, 132 S. Ct. 2492, 2507–510 (2012) (rejecting facial challenge to Arizona law requiring police officers to “make a ‘reasonable attempt . . . to determine the immigration status’ of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exists that the person is an alien and is unlawfully present in the United States’”); Fernanda Santos, *Arizona Immigration Law Survives Ruling*, N.Y. TIMES (Sept. 6, 2012), <http://www.nytimes.com/2012/09/07/us/key-element-of-arizona-immigration-law-survives-ruling.html> [perma.cc/9BL9-SVEA] (noting that the Arizona law is “commonly referred to as ‘show me your papers’”).

2. Rebranding might be a more accurate word than termination, in light of the continuation of many aspects of Secure Communities through the Priority Enforcement Program. See *infra* notes 235–46 and associated text.

3. Commentators have identified several interrelated phenomena that comprise crimmigration: the dramatic expansion of the immigration consequences of crimes, the increasing criminalization of immigration law violations, the growing use of immigration detention and other harsh enforcement techniques, and the growing involvement of state and local police in enforcing federal immigration laws. For a concise summary of federal efforts to target “criminal aliens,” see Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 166–73 (2008). See generally Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (arguing that “immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model” while simultaneously declining to adopt the procedural safeguards that apply within criminal adjudication); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 614–20 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

4. See Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–55 (2011) (listing states with recent laws aimed at increasing state-federal cooperation on immigration); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 109 (2013) (discussing range of state and local responses to Secure Communities); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1596–1600 (2008) (describing range of responses among localities within North Carolina); Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html> [http://perma.cc/HA65-3AFB] (noting opposition to the program by governors of Massachusetts and New York, and arguments by opponents that the program was “an overly wide dragnet that was deporting many illegal immigrants with no criminal histories who were arrested for minor offenses and that it encouraged racial profiling and eroded trust in law enforcement among immigrants”).

about such cooperation, arguing that it deters immigrants from seeking help from the police, undermines the goals of community policing, and leads to racial profiling, pretextual arrests, and prolonged detention.<sup>5</sup>

A growing body of scholarship analyzes and critiques the dramatic changes that comprise crimmigration.<sup>6</sup> Much of this literature focuses on the lasting effects of two sweeping immigration laws enacted by Congress in 1996,<sup>7</sup> and on the transformation of immigration enforcement in the wake of the attacks of September 11, 2001.<sup>8</sup> A subset of this work has begun to explore the deeper origins of crimmigration, arguing that its roots can be traced to the 1980s and that its trajectory is closely tied to developments in criminal law enforcement, in particular the War on Drugs.<sup>9</sup>

This Essay makes two contributions to the literature on crimmigration. First, it provides a history of the early evolution of information sharing between local police and federal immigration officials. In contrast to other accounts, which begin in the 1980s, this account explores the nature of day-to-day interactions between local police and federal immigration officials in the early- and mid-twentieth century, drawing on extensive archival research to uncover the roots of the information flows that have become so central to contemporary immigration enforcement efforts. This perspective significantly

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5. See, e.g., Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 105–111 (2014) (arguing that Secure Communities has led to racial profiling and other civil rights violations); Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 384–88 (2012) (describing negative effects of post-9/11 immigration enforcement on people who are transgender or gender nonconforming); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (linking increased participation of state and local police in federal immigration enforcement to an increase in selective enforcement and racial profiling).

6. The literature on crimmigration in the United States is vast. A few key works include DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, (2014); Legomsky, *supra* note 3; Stumpf, *The Crimmigration Crisis*, *supra* note 3; see also SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia et al. eds., 2013) (multidisciplinary collection examining the convergence of immigration law and criminal law enforcement in the United States, Canada, and Europe).

7. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 22, 40, 42, and 50 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546. On the 1996 immigration laws, see generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

8. See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (examining the increasing use of criminal prosecution to address migration-related offenses); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010) (same); Wishnie, *supra* note 5, at 1084–88 (tracing increase in participation of state and local police in federal immigration enforcement).

9. See, e.g., Miller, *supra* note 3, at 620–31; García Hernández, *Creating Crimmigration*, *supra* note 6, at 1460–61 (2014); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360–82 (2014); Juliet P. Stumpf, *Civil Detention and Other Oxymerons*, 40 QUEEN'S L.J. 55, 68–72 (2014).

complicates crimmigration's timeline by locating a key turning point in the 1950s, decades before the 1980s shifts that many have recognized as the start of the crimmigration era.

Second, this Essay offers a new perspective on the contemporary crimmigration system. It argues that the transformation we have witnessed over the past three decades is best understood not as the merging of two formerly separate enforcement systems but rather as shifts within both the policing and deportation systems that have rendered far more people vulnerable to the intersection of the two. Expanding on recent scholarship that has explored crimmigration's relationship to the emergence of mass incarceration within the United States, this Essay highlights crimmigration's reliance on over-policing as a form of surveillance. Drawing parallels between the use of vice squad arrest records by federal administrative agencies in the 1950s and the use of arrest data by the Department of Homeland Security (DHS)<sup>10</sup> today, it argues that a symbiotic relationship has developed between over-policing and mass deportation. Our deportation system has come to depend on the existence of an expansive criminal justice system that subjects low-income communities of color to regular monitoring through frequent stops and arrests for minor offenses, an approach known as "broken windows" policing. At the same time, programs that promote police-immigration cooperation have themselves become drivers of over-policing.<sup>11</sup> The historical account provided here also highlights the key role that the policing of sexuality has played in the forging of links between criminal and immigration enforcement efforts, unearthing a lost chapter in the development of crimmigration: the pipeline that brought men arrested by vice squads in gay cruising areas in the 1950s and '60s into the deportation system.

This Essay revolves around the 1963 case *Rosenberg v. Fleuti*,<sup>12</sup> in which the Supreme Court held that George Fleuti, a lawful permanent resident living in California, was entitled to return home from a brief visit to Mexico without being subject to the admission criteria that would apply to a newly arriving immigrant.<sup>13</sup> This holding saved Fleuti, who had a history of sexual relationships with other men, from being deported on the basis of his sexual

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10. Over the period of time discussed in this Essay, a variety of agencies and departments have enforced the immigration laws, including the Bureau of Immigration from 1895 to 1933 and the Immigration and Naturalization Service (INS) from 1933 to 2003. See *Our History*, U.S. CITIZENSHIP & IMMIGRATION SERV. (May 25, 2011), <http://www.uscis.gov/about-us/our-history> [<http://perma.cc/U8R3-TALW>]. Since 2003, immigration enforcement has been divided between two agencies within the Department of Homeland Security (DHS): Immigration and Customs Enforcement (ICE), which enforces immigration laws in the interior, and U.S. Customs and Border Protection (CBP), which enforces immigration laws at U.S. borders and ports of entry. 6 U.S.C. §§ 252, 271, 291 (2012).

11. See *infra* Part III.

12. 374 U.S. 449 (1963).

13. *Id.* at 462–63.

orientation.<sup>14</sup> I argue here that while *Fleuti* is known as a case about entry controls at the border (i.e., about the system for admitting new and returning immigrants), it also tells an important story about changes in the 1950s to *interior* immigration enforcement (the deportation system) and in particular about the evolving relationship between federal immigration enforcement and local policing. Recasting *Fleuti* as a (proto)crimmigration case entails looking beyond the words of the Supreme Court's decision and considering the facts buried within Fleuti's nearly 1600-page Alien File (A-File), obtained through a Freedom of Information Act request.<sup>15</sup> Fleuti was not in fact apprehended upon his return from Mexico. Rather, he faced deportation almost three years later, after being arrested for engaging in a sexual act with another man in a park restroom.<sup>16</sup> Moreover, *Fleuti* is one of a number of cases from the era in which the Immigration and Naturalization Service (INS) sought to deport men who had been arrested in police crackdowns in such cruising areas.<sup>17</sup> These cases, I argue, provide a window into a largely overlooked chapter in the history of collaboration between state and local law enforcement agencies and federal immigration officials.

The Essay proceeds as follows. Part I provides the traditional reading of *Fleuti* and then offers a new perspective on the case, arguing that it should be viewed within the broader context of the pipeline that brought men arrested for sodomy and related offenses into the deportation system. Part II traces the evolution of police-immigration collaboration in the first half of the twentieth century. It argues that a new form of interaction between local police and federal immigration authorities emerged in the 1950s, exemplified by the investigation of George Fleuti in 1959. While early attempts to link deportation to criminal law enforcement focused primarily on prisons, by the 1950s such efforts had begun to forge connections directly between federal immigration officials and local police. Numerically, deportations linked to criminal conduct remained quite low in this period, especially when compared to the massive

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14. See *infra* Section I.A.

15. I received Fleuti's A-file through two responses to a Freedom of Information Act (FOIA) request. The first response, from USCIS, contained 1,365 pages released in full and 21 pages released in part. See Response to Request for Alien File No. A8382428, U.S. Citizenship & Immigration Servs. (Jan. 14, 2014) [hereinafter USCIS Fleuti FOIA] (on file with author). Twenty-eight pages were withheld in full and the remainder of the file was referred to ICE for review. ICE subsequently released an additional 188 pages. See Response to Request for Alien File No. A8382428, Immigration & Customs Enf't (June 5, 2014) (on file with author) [hereinafter ICE Fleuti FOIA].

16. See *infra* Section II.C.

17. See *infra* Section I.B. Women were also excluded at the border on the basis of sexual orientation. See, e.g., *Quiroz v. Neelly*, 291 F.2d 906 (5th Cir. 1961). See generally EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 77–102 (2002). However, known cases regarding deportation proceedings initiated after arrests all involve men. See MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 218–27 (2009).

number of such deportations today.<sup>18</sup> But conceptually, they represented something new: the notion that the arrest records of local police departments might serve federal immigration officials as a screening device for catching deportable immigrants, including legal residents who were not deportable for any reason beyond the actions that led to their arrest. These collaborations were often clumsy and ad hoc. However, they were far more extensive than the literature on crimmigration has generally acknowledged.

Part III argues that this history invites a new understanding of the contemporary crimmigration system. Most accounts of crimmigration posit a dramatic transformation in immigration enforcement beginning in the 1980s. The INS investigation of George Fleuti disrupts this timeline by offering an early example of what has come to be the dominant paradigm of interior immigration enforcement: the use of local police arrest records as a screening device to net deportable noncitizens. Viewing crimmigration through the prism of *Fleuti* yields several insights about immigration enforcement today.

First, *Fleuti* provides a way of understanding the contemporary dependence of immigration enforcement on over-policing as a form of surveillance. George Fleuti was an anomaly in his time, unusually vulnerable to the effects of new links between local policing and federal immigration enforcement due to a confluence of factors: the high degree of police surveillance directed at men who sought sex with other men; the exceptionally broad immigration consequences that applied to those considered sexual deviants; and the lack of discretionary relief available to those facing deportation on such grounds.<sup>19</sup> One way to understand the rise of crimmigration is as a massive expansion of this state of vulnerability. Changes in the criminal justice system, embodied in broken windows policing, have subjected large segments of the population to extremely high levels of police monitoring.<sup>20</sup> At the same time, amendments to the immigration laws have made many of the criminal grounds of deportability as broad as the ground of exclusion that applied to homosexuality in the 1950s, and have drastically narrowed the possibilities for discretionary relief from deportation.<sup>21</sup>

Second, *Fleuti* provides a new angle on crimmigration's role in perpetuating a highly racialized system of mass deportation. As a white, Western European immigrant, Fleuti was not subject to the informal and coercive enforcement practices commonly directed at Mexican immigrants in the 1950s—practices exemplified by the massive, quasi-military initiative known as Operation Wetback, which resulted in large numbers of deportations

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18. See KANSTROOM, *supra* note 6, at 12–13 (describing growth of the deportation system since 1961); García Hernández, *Creating Crimmigration*, *supra* note 9, at 1470 (comparing pre- and post-1980s statistics regarding deportation on criminal grounds).

19. See *infra* Section III.A.

20. See *infra* Section III.B.

21. See *id.*

with little formal administrative process.<sup>22</sup> I argue that the rise of crimmigration can be understood not just as a broadening of vulnerability to police-immigration collaboration but also as a form of mass deportation designed for an era in which formal deportation procedures have become the norm.

Finally, *Fleuti* serves as a reminder that the policing of sexuality has played a key role in the evolution of crimmigration. *Fleuti* and similar cases must be understood within the context of the midcentury sex panics that gave rise to them. While much has changed since the 1950s, the convergence of immigration enforcement and local policing continues to impact LGBTQ immigrants today. This is an issue that has been largely overlooked in crimmigration scholarship and merits further attention.

The Essay concludes with a brief Epilogue that recounts the previously untold history of George Fleuti's ongoing battle to remain in the United States after his Supreme Court victory. Fleuti, an iconic figure to immigration law scholars, has gone down in the history books as a victor. However, documents in Fleuti's file reveal that the government continued its efforts to deport him for several more years. These documents reveal that, in the end, Fleuti was able to secure the right to remain in the United States not on the basis of the Supreme Court doctrine that bears his name, but rather because changing social attitudes about homosexuality were beginning to filter into the immigration adjudication system.

## I.

### A WINDOW INTO CRIMMIGRATION'S PAST

#### A. Rosenberg v. Fleuti as a Crimmigration Case

*Fleuti* is known as a case about the exclusion of immigrants at the border, and more specifically about the statutory meaning of the term "entry" under the Immigration and Nationality Act (INA).<sup>23</sup> However, viewing *Fleuti* in its broader context reveals that it is also very much a case about interior immigration enforcement, and in particular about the police-to-immigration pipeline that has in recent years come to play such a prominent role in immigration enforcement.

George Fleuti was born in Switzerland in 1912 and arrived in the United States on an immigrant visa in 1952.<sup>24</sup> He settled in Ojai, California, where he

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22. See *infra* Section III.C.

23. *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963) (describing the question of whether Fleuti's return to the United States in 1956 constituted an "entry" as "a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether § 212(a)(4) is constitutional as applied to respondent").

24. *Id.* at 450; Immigration & Naturalization Serv., U.S. Dep't of Justice, Affidavit of George Ernst Marcel Fleuti 1 (March 25, 1959), in USCIS Fleuti FOIA, *supra* note 15, at 1281 [hereinafter Fleuti March 25 Affidavit].

worked as a manager at an upscale resort, the Ojai Valley Inn.<sup>25</sup> According to his neighbors, who were later interviewed by an INS investigator, Fleuti lived “a quiet life, enjoying his hi-fi records, reading, and occasional limited garden work.”<sup>26</sup> He took “rather frequent trips to Los Angeles, speaking of concerts he ha[d] enjoyed upon his return.”<sup>27</sup>

In 1956, Fleuti went on a brief excursion to Ensenada, Mexico, returning home to California the same day.<sup>28</sup> Fleuti was subsequently ordered deported on the ground that he was afflicted with a “psychopathic personality” disorder due to his history of sexual relationships with other men.<sup>29</sup> This ground of exclusion,<sup>30</sup> commonly interpreted to encompass homosexuality,<sup>31</sup> had not existed in the INA at the time of Fleuti’s initial arrival to the United States in 1952, and thus his deportation order hinged on his return from the day trip to Mexico.

Fleuti challenged the ground of exclusion as void for vagueness and prevailed on that argument before the Ninth Circuit Court of Appeals.<sup>32</sup> The

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25. *Fleuti*, 374 U.S. at 450; see also JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 89 (2001).

26. Immigration & Naturalization Serv., Report of Investigation 3 (Dec. 4, 1964), in ICE Fleuti FOIA, *supra* note 15, at 134.

27. *Id.*

28. *Fleuti*, 374 U.S. at 450.

29. *Id.* at 451.

30. *Fleuti* highlights the interplay between immigration law’s two principal filtering devices: grounds of exclusion (or, in the post-1996 nomenclature, inadmissibility) and grounds of deportability. Exclusion/inadmissibility grounds, contained in section 212 of the Immigration & Nationality Act, determine whether a foreign national may be admitted to the United States. See Immigration & Nationality Act (INA) § 212(a), 8 U.S.C. § 1182(a) (2012). The list is broad, encompassing health conditions, criminal conduct, lack of financial resources, ties to organizations deemed to engage in terrorism, and many other grounds. Deportability grounds, contained in INA section 237, determine whether someone previously admitted to the United States may be expelled. See INA § 237(a), 8 U.S.C. § 1227(a). There is considerable overlap between grounds of deportability and grounds of inadmissibility, but the two lists are not identical. Although Fleuti was in deportation rather than exclusion proceedings, his deportation order rested on a charge that he had been excludable at the time of entry. See *infra* notes 40–47 and associated text.

31. This ground of exclusion entered the statute with the passage of the McCarran-Walter Act of 1952. See Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (codified as amended under 8 U.S.C. ch. 12). As originally introduced in the Senate, the bill also barred “aliens who are homosexuals or sex perverts.” See *Boutilier v. INS*, 387 U.S. 118, 134 n.6 (1967). These words were omitted in the final version. *Id.* However, a Judiciary Committee report noted that “[t]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.” *Id.* at 121. On the basis of this report and other aspects of the legislative history, the Supreme Court concluded in 1967 that Congress intended the provision to apply to homosexuals. *Id.* at 122. The language of this provision was changed to “sexual deviancy” in 1965 and ultimately repealed in 1990. For detailed accounts of the history of this provision, see LUIBHÉID, *supra* note 17; Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT’L L.J. 771, 775–80 (1993).

32. *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *vacated*, 374 U.S. 449 (1963).

case then proceeded to the Supreme Court, where *Fleuti* ultimately won, but on different grounds.<sup>33</sup> Avoiding the constitutional question, the Court held as a matter of statutory interpretation that *Fleuti*, as a lawful permanent resident returning from an “innocent, casual, and brief” trip abroad, had not made an “entry” upon his return from Mexico, and thus was not subject to any grounds of exclusion.<sup>34</sup> This holding, which has been hailed as a “milestone in . . . recognizing a returning resident alien’s stake” in remaining in the United States,<sup>35</sup> became known as the *Fleuti* Doctrine.<sup>36</sup> The Court reasoned that it was not the intention of Congress “to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in ‘about a couple of hours.’”<sup>37</sup> In other words, *Fleuti* won the right to remain in the United States through the Court’s adoption of the legal fiction that he had never left.<sup>38</sup> Congress eventually codified the *Fleuti* Doctrine in 1996, albeit in a much reduced form.<sup>39</sup>

There is little in the text of the *Fleuti* decision to mark it as a case about the interface between criminal law enforcement and immigration enforcement. *Fleuti* was charged with having been “excludable at the time of his 1956 return

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33. *Fleuti*, 374 U.S. at 451–52. Journalists Joyce Murdoch and Deb Price have recounted the story behind the *Fleuti* decision. See MURDOCH & PRICE, *supra* note 25, at 93–97. Initially, the Justices split 5 to 4 in favor of reversing the Ninth Circuit, and Justice Goldberg was assigned to write the majority opinion. *Id.* at 95. Two months later, Goldberg switched sides, proposing to affirm the Ninth Circuit’s opinion not on the constitutional grounds but on the grounds that *Fleuti* had not made an entry upon his return from Mexico—an issue that had not been argued in the case. *Id.* The four Justices who had been set to affirm the Ninth Circuit on constitutional grounds agreed to join with Goldberg on the statutory interpretation question. *Id.* at 96.

34. *Fleuti*, 374 U.S. at 462.

35. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 576 (1990).

36. See *Vartelas v. Holder*, 132 S. Ct. 1479, 1485 (2012); *Camins v. Gonzales*, 500 F.3d 872, 875–76 (9th Cir. 2007).

37. *Fleuti*, 374 U.S. at 461.

38. *Id.* at 462–63. *Fleuti* has garnered attention from scholars as one of a number of midcentury cases in which the Court grappled with the meaning of entry under the INA. These cases include *Delgado v. Carmichael*, 332 U.S. 388 (1947), *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In several of these cases, including *Fleuti*, the Court went to considerable lengths to interpret statutory and regulatory language in such a way as to protect the rights of returning permanent residents. See, e.g., *Delgado*, 332 U.S. at 390–91; *Kwong Hai Chew*, 344 U.S. at 478–80. For commentary on these cases, see Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 813–17 (1997); Motomura, *supra* note 35, at 567–73; Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 166–68 (2010).

39. See INA § 101(a)(13)(C), 8 U.S.C. § 1101(c)(13)(C) (2012) (providing, subject to enumerated exceptions, that those previously admitted for permanent residence “shall not be regarded as seeking an admission into the United States”). Lawful permanent residents (LPRs) who have committed a criminal offense that falls within the grounds of inadmissibility are excluded from this provision. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(c)(13)(C)(v). Litigation over the 1996 statute has kept the *Fleuti* doctrine in the courts, culminating in a 2012 Supreme Court decision deeming the 1996 amendment not to be retroactive, thus preserving *Fleuti* for those with criminal convictions that predate the effective date of the amendment. See *Vartelas*, 132 S. Ct. 1479.

as an alien ‘afflicted with psychopathic personality’ by reason of the fact that he was a homosexual,”<sup>40</sup> a ground that fell not within the criminal provisions but rather within the health-related provisions, requiring a certification from a United States Public Health Service (PHS) physician.<sup>41</sup> There is, however, a backstory to *Fleuti* that casts it in an entirely new light. Two small clues to this backstory appear in the procedural history recounted in the Supreme Court’s decision. The first is that *Fleuti* was initially ordered deported based on having committed a crime involving moral turpitude, an order that was subsequently vacated.<sup>42</sup> The second is that *Fleuti* was in *deportation* proceedings rather than *exclusion* proceedings;<sup>43</sup> this procedural distinction marked the difference between the expulsion of a person apprehended in the interior and the turning back of a person apprehended at the border.<sup>44</sup> *Fleuti* in fact encountered no problems at the border upon his August 1956 return from his afternoon in Mexico.<sup>45</sup> Rather, it was not until March 1959 that he was placed in deportation proceedings.<sup>46</sup> At that point, he was not seeking to enter the United States but simply going about his daily life.

The specter of the border hovered over *Fleuti*’s proceedings—and, ultimately, determined the outcome of his case at the Supreme Court—because

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40. *Fleuti*, 374 U.S. at 450–51.

41. The procedure for certifying someone as excludable under this ground was set forth in the McCarran-Walter Act. See Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (codified as amended under 8 U.S.C. ch. 12). As summarized by Shannon Minter, it was as follows: “[T]he INS referred any person suspected of homosexuality, or any other excludable mental or physical condition, to a PHS official for an examination. The PHS official diagnosed the individual, certified the existence of a psychopathic personality or other condition, and issued a ‘Class A certificate’ to the INS officer. This certificate subsequently constituted the sole evidence for exclusion or deportation at the exclusion or deportation hearing.” Minter, *supra* note 31, at 778 (footnotes omitted). Procedures for PHS certification for medical grounds of inadmissibility are currently codified at INA §§ 232, 234, 8 USC §§ 1222, 1224 (2012).

42. *Fleuti*, 374 U.S. at 450. The initial deportation order was vacated upon a finding that the conviction was too minor to trigger the relevant grounds. *Id.* at 451. Crimes involving moral turpitude (CIMTs) have been a ground of exclusion since 1891. See Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 649–53 (2012) (recounting history of CIMT ground of exclusion). In *Fleuti*’s case, this charge was based on a conviction for “sex perversion” in 1956 in Los Angeles County under section 288a of the California Penal Code. Transcript of Record at 31, *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (No. 248).

43. *Fleuti*, 374 U.S. at 450.

44. At the time that *Fleuti* was placed in proceedings, the INA set forth two distinct types of procedures: exclusion, which governed criteria for admitting someone to the United States, and deportation, which governed the expulsion of a noncitizen apprehended within the interior of the country. In 1996, Congress consolidated these two procedures and renamed them “removal.” See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, div. C, 110 Stat. 3009–546, § 304(a)(3).

45. See *Fleuti* March 25 Affidavit, *supra* note 24 (stating that *Fleuti* showed his “green Alien Registration Card” upon return and was permitted to enter the United States); Immigration & Naturalization Serv., Transcript of Deportation Proceedings of George Ernst Marcel *Fleuti* 39 (Apr. 22, 1964), in USCIS *Fleuti* FOIA, *supra* note 15, at 1112 (stating that *Fleuti* came across the border at San Ysidro without any questioning from an immigration inspector).

46. See *infra* Section II.C.

his deportation order rested on a ground of deportability that referred back to the circumstances of his arrival, covering “[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time . . . .”<sup>47</sup> Yet, despite *Fleuti*’s reputation as a case about the border, there is no question that it is a case about interior enforcement. While the Supreme Court’s decision does not address the question of how and why the INS decided to commence deportation proceedings against Fleuti, Fleuti’s A-File reveals that the INS investigation was triggered by his arrest in Oxnard, California, on November 5, 1958, on charges of being a “lewd vagrant” under a California statute frequently invoked against same-sex sexual activity.<sup>48</sup> The Oxnard incident was Fleuti’s third arrest for sexual encounters with other men.<sup>49</sup> As described in more detail below in Section II.C, the INS began investigating Fleuti for deportation just days after he was arrested. Fleuti had no other contact with the INS that would have triggered scrutiny, such as a naturalization petition or a border crossing.<sup>50</sup> Indeed, his only contact with immigration authorities between his 1952 arrival and the 1958 investigation was his 1956 return from Mexico through the San Ysidro border crossing, which was without incident.<sup>51</sup>

*B. The Policing of Homosexuality and Its Connections to the 1950s  
Deportation System*

Fleuti’s arrest occurred at 1:25 a.m. on November 5, 1958, in the men’s restroom at the City Plaza, a public park in Oxnard, California.<sup>52</sup> A detailed sketch of the restroom’s floor plan appears in Fleuti’s A-File, indicating the “approximate position of the subject when arresting officers turned on their flashlights immediately after entering the darkened rest room.”<sup>53</sup>

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47. Former INA § 241(a)(1), now codified at INA § 237(a)(1)(A), 8 U.S.C. § 1227 (2012); see DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 5–6 (2007) (explaining difference between deportability grounds that function as forms of extended border control and those aimed at controlling post-entry conduct).

48. See *infra* Section II.C.

49. See Fed. Bureau of Investigation, U.S. Dep’t of Justice, Identity History Summary of George M. Fleuti (Nov. 19, 1958), in USCIS Fleuti FOIA, *supra* note 15, at 379 [hereinafter Fed. Bureau of Investigation, Identity History Summary of George M. Fleuti].

50. *Boutilier v. INS* provides an example of a situation in which an arrest on a sodomy charge came to light when an applicant applied for naturalization. 387 U.S. 118 (1967).

51. See *supra* note 45.

52. Memorandum to File (For Information of Trial Attorney in Re-Opened Hearing) by INS Investigator (Dec. 1, 1964), in ICE Fleuti FOIA, *supra* note 15, at 137 [hereinafter Memorandum to File by INS Investigator]; Oxnard Police Dep’t, Arrest Report of George Marcel Fleuti (Nov. 5, 1958), in USCIS Fleuti FOIA, *supra* note 15, at 1064.

53. Memorandum to File by INS Investigator, *supra* note 52.

Public restrooms, often called “tearooms” in the slang of the day, were a key site of sex between men in 1950s America,<sup>54</sup> and the object of extensive police surveillance and undercover operations.<sup>55</sup> George Fleuti was one of thousands of men arrested in such spaces in the middle decades of the twentieth century,<sup>56</sup> and he was far from the only immigrant who faced the threat of deportation following such an arrest. There are several other published deportation cases from the era (and likely many others that were not published),<sup>57</sup> manifesting a similar pattern: arrests for same-sex sexual activity followed soon afterward by the initiation of deportation proceedings.

For instance, Jack LaRochelle, a lawful permanent resident (LPR) from Canada, was arrested in Michigan in 1960 for “soliciting for an immoral act.”<sup>58</sup> Although initially convicted, he was later found not guilty upon a new trial.<sup>59</sup> The arrest, however, was all that was needed to put LaRochelle on the path to deportation: “Following the arrest, [LaRochelle] was questioned by the [Immigration and Naturalization] Service and examined by a United States Public Health Service psychiatric consultant.”<sup>60</sup> On the basis of this examination, the INS “instituted deportation proceedings on the ground that the respondent was a homosexual and had been excludable as a psychopathic personality at the time of his [most recent] return in 1960.”<sup>61</sup>

Another case, also involving a Canadian LPR in Detroit, recounts a similar narrative:

On April 12, 1958, respondent was arrested in Detroit for “accosting and soliciting” a male police officer to perform an unnatural sex act

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54. See JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 11–12 (2d ed. 1998) (describing emergence of homosexual subcultures and cruising areas in urban centers within the United States).

55. On police surveillance of public restrooms, see generally David Alan Sklansky, “*One Train May Hide Another*”: Katz, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875 (2008).

56. See D’EMILIO, *supra* note 54, at 49–50 (describing arrests of over one thousand people per year in some cities in gay bars and cruising areas).

57. See CANADAY, *supra* note 17, at 223 (noting that “because aliens who were formally deported were barred from ever again emigrating legally, many of those ensnared were easily convinced to quietly disappear, slipping out of both the country and the historian’s grasp”). Fleuti himself told the immigration judge at his first hearing that he had no attorney because he was too embarrassed by the charges to hire one. Immigration & Naturalization Serv., U.S. Dep’t of Justice, Hearing in Deportation Proceedings of George Ernst Marcel Fleuti 2 (April 14, 1959), in USCIS Fleuti FOIA, *supra* note 15, at 1074 (“The main reason [I don’t have an attorney is that] I didn’t want anybody to know about my case, if possible.”). Hiram Kwan, the attorney who eventually represented Fleuti, later stated that most attorneys in the Los Angeles area would not take the case. See MURDOCH & PRICE, *supra* note 25, at 92 (quoting Kwan recalling “getting ‘a lot of flak’ from fellow attorneys and INS investigators for ‘helping a faggot,’ as they put it”).

58. Matter of LaRochelle, 11 I. & N. Dec. 436, 437 (B.I.A. 1965).

59. *Id.*

60. *Id.* Because psychopathic personality disorder was included in the medical grounds of exclusion, an examination by the Public Health Service was a necessary element of any charge that related to that ground of exclusion. See *supra* note 41 and accompanying text.

61. *LaRochelle*, 11 I. & N. Dec. at 437.

(oral perversion), in violation of section 448, Michigan Penal Code. On his plea of guilty, he was convicted and sentenced to pay a fine in lieu of a jail term. Thereafter on June 19, 1958, respondent made a sworn statement to an immigration investigator . . . . It is this statement . . . which forms the basis for the lodged [deportation] charge.<sup>62</sup>

Gerard Lavoie, yet another Canadian LPR, was arrested in San Francisco on June 2, 1961, for “being a party to a lewd, obscene and indecent act.”<sup>63</sup> The incident soon “came to the attention” of the INS, and on August 30, Lavoie “made a sworn statement before an investigator employed by the Service, from which statement it appeared that he had engaged in numerous homosexual acts during the years 1945 to 1961.”<sup>64</sup>

Another case that fits this pattern of criminal arrests leading to deportation proceedings involved an immigrant identified only as “P” who was arrested by Detroit police in connection with a larceny charge on December 13, 1954.<sup>65</sup> The charge was subsequently dropped, but in the course of the police interrogation, P admitted that he “consorted with homosexuals.”<sup>66</sup> When P was questioned by the INS three days later, he made a statement in which he “denied being a homosexual, but admitted that he had homosexual tendencies which began at the age of 23 years (or 1951); he admitted having sexual relations with a man or men on several occasions.”<sup>67</sup> These statements were used as the basis for his deportation.<sup>68</sup>

It would not be accurate to refer to these cases as “gay” deportation cases.<sup>69</sup> As David Sklansky has written, “using a term like ‘gay’ or ‘queer’ in connection with debates over sexuality in the mid-twentieth century can misleadingly transfer modern sensibilities to an earlier time.”<sup>70</sup> While Fleuti

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62. Matter of S---, 8 I. & N. Dec. 409, 410 (B.I.A. 1959).

63. Lavoie v. INS, 418 F.2d 732, 733 (9th Cir. 1969).

64. *Id.*

65. Matter of P---, 7 I. & N. Dec. 258, 258–59 (B.I.A. 1956).

66. *Id.* at 259.

67. *Id.*

68. *Id.* at 263.

69. Over the last several decades, a burgeoning literature on the history of sexuality has persuasively established that the heterosexual-homosexual binary did not become cemented until the modern gay rights movement emerged in the late 1960s. See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940*, at 13–23 (1994). In midcentury America, the term homosexual, often used interchangeably with terms such as “sex pervert” and “sexual psychopath,” was often used to identify a person who fell prey to a vice that anyone might engage in. See CANADAY, *supra* note 17, at 10–13; William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 744–45 (1997). In *The Straight State*, Margot Canaday explores the regulatory state’s production of homosexuality in the period following World War II, and argues that the emergence of the homosexual-heterosexual binary was “one of the organizing categories of federal policy in the postwar United States.” CANADAY, *supra* note 17, at 4.

70. Sklansky, *supra* note 55, at 881.

himself seems to have been primarily attracted to men,<sup>71</sup> we know little about the other men whose cases have come to light, beyond the circumstances of their arrests as recounted in their deportation proceedings. As sociologist Laud Humphreys noted in a well-known ethnography published in 1970, participants in what was known as the “tearoom trade” were “married and unmarried, those with heterosexual identities and those whose self-image [was] a homosexual one.”<sup>72</sup>

Whatever way one describes these cases, however, there is no doubt that they reveal a direct pipeline from local vice squads to the deportation system. What makes *Fleuti* and these other cases significant within the history of crimmigration is not the nature of the deportation charges but rather the mechanics of the enforcement that led to them. Cases involving “morals” charges such as homosexuality or adultery can be found from the earliest days of the deportation system.<sup>73</sup> Yet, typically, such early cases did not reflect a close working relationship between immigration officials and local police. Rather, many of the early morals cases involved people (disproportionately women) who were the subjects of personal denunciations.<sup>74</sup> Historian Mae Ngai has noted that “deportation cases involving aliens accused of adultery and other crimes of immorality [in the early twentieth century] came to the attention of authorities almost always because they were reported by angry relatives or jealous suitors.”<sup>75</sup> Other morals cases came about through collaborations between the Bureau of Investigation (later to become the Federal Bureau of Investigation (FBI)) and immigration officials aimed at breaking up prostitution rings, but these efforts generally bypassed local police.<sup>76</sup>

In contrast, most of the cases involving men facing deportation on grounds of “psychopathic personality” in the 1950s and early ’60s indicate that INS investigations followed directly on the heels of minor criminal arrests in cruising areas such as public parks and restrooms. Historian Margot Canaday has described such cases as forming a deportation pipeline linking “bathrooms and borders.”<sup>77</sup> These cases exhibit a new paradigm that emerged at midcentury: the minor arrest as prelude to deportation.

Viewing *Fleuti* in this context provides a new way of understanding the case’s significance within the history of immigration enforcement. Although

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71. See *Fleuti* March 25 Affidavit, *supra* note 24 (describing numerous sexual relationships with men).

72. LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 1–2 (1970).

73. CANADAY, *supra* note 17, at 39–44; MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 79 (2004).

74. NGAI, *supra* note 73, at 79.

75. *Id.*; see also DEIRDRE M. MOLONEY, *NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882*, 39–44 (2012) (describing several cases in which women were placed in deportation proceedings on the basis of complaints from family members).

76. See JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 75–76 (2014).

77. CANADAY, *supra* note 17, at 221.

*Fleuti* is known as a case about the border, George Fleuti was not apprehended at a border. Nor was he apprehended during a routine interaction with immigration officials within the United States, such as a naturalization application, or on the basis of a tip from a neighbor or family member. As a lawful permanent resident, Fleuti had a seemingly secure immigration status. Yet a relatively minor run-in with the police, which resulted in no time in prison, was sufficient to put him on the path to deportation.<sup>78</sup> Viewed from this perspective, *Fleuti* emerges as a forerunner of the crimmigration era.

## II.

### THE EVOLUTION OF INFORMATION SHARING IN INTERIOR IMMIGRATION ENFORCEMENT

A growing body of scholarship explores the nuances of contemporary “immigration policing,” a term that refers to local policing that incorporates immigration enforcement.<sup>79</sup> However, our understanding of past practices is very limited. Historians and legal scholars have insightfully explored the evolution of the grounds of inadmissibility and deportability linked to criminal conduct<sup>80</sup> and the exercise of administrative discretion by agency adjudicators in various eras.<sup>81</sup> We also have detailed accounts of how immigration enforcement and the criminal justice system converged in a few high-profile cases.<sup>82</sup> Yet, we have little understanding of the day-to-day workings of this convergence in less celebrated cases in the pre-1980 era. To what extent, for example, did local police track the immigration status of individuals apprehended, or share that information with immigration authorities? What sorts of institutional interests drove such collaborations? Accounts of crimmigration tend to mention the period prior to 1980 only insofar as it provides a contrast to the current era, a “before” in which criminal law

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78. See *infra* Section II.C.

79. See, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013) (presenting an empirical study of how local criminal process in three counties is organized around immigration enforcement and citizenship status); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105 (2013) (arguing that the increasing use of technology has led to the advent of “automated immigration policing”).

80. See, e.g., KANSTROOM, *DEPORTATION NATION*, *supra* note 47; Holper, *supra* note 42 (reviewing history of CIMT ground); Sarah Koteen Barr, *C Is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 LEWIS & CLARK L. REV. 725, 729–34 (2008) (reviewing history of relief under INA Section 212(c)); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 107–14 (1998) (reviewing pre- and post-1996 grounds of deportability).

81. See, e.g., NGAI, *supra* note 73, at 84–89; Kanstroom, *Surrounding the Hole in the Doughnut*, *supra* note 38, at 767–71.

82. See, e.g., KANSTROOM, *supra* note 47, at 167–86 (recounting efforts to deport mafia figure Carlos Marcello).

enforcement and immigration law enforcement were relatively separate.<sup>83</sup> *Fleuti* significantly complicates that picture and provides insights into the nature of such collaboration.

One of the most intriguing aspects of *Fleuti*'s case is *Fleuti*'s own perception of what led the INS to him. When questioned by an INS investigator in March 1959, *Fleuti* declared: "Ever since that second arrest in Los Angeles, I have felt that the United States Immigration might be looking for me because I heard that such things were reported to Washington, so I have been very careful."<sup>84</sup> Such a concern would be unsurprising today, in an era in which the FBI facilitates the widespread, systematic transfer of information from local police to federal immigration authorities.<sup>85</sup> Yet, it is startling to come across it in a statement written in 1959.

Did the INS investigate *Fleuti* because information about him had been "reported to Washington"? The most detailed existing account of *Fleuti*'s story, written by journalists Joyce Murdoch and Deb Price, speculates that the Oxnard police sent *Fleuti*'s fingerprints to the FBI, which in turn sent them to the INS.<sup>86</sup> My conclusion here—based on a review of *Fleuti*'s A-file, on archival research regarding investigations practices in the 1950s, and on consultation with former INS investigators familiar with practices during that era<sup>87</sup>—is that the path that the information traveled was in fact a local one, from an officer in the Oxnard Police Department directly to an investigator in the Los Angeles INS office.<sup>88</sup> *Fleuti*'s fear of a centralized transfer of such information to the INS through Washington thus appears unfounded. However, the fact that the information was transmitted at all renders *Fleuti* an important landmark in the evolution of police-immigration cooperation.

This Part traces the development of information sharing between law enforcement agencies and immigration officials from the beginning of the

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83. This narrative has been widely adopted among crimmigration scholars and appears in the introductory pages of many articles published about crimmigration in recent years. One representative example is the statement that "[a]s a formal matter . . . immigration law and criminal law used to be entirely separate . . . . Today that world is gone. Immigration law and criminal law continued to operate largely independently for much of the twentieth century, but over the past three decades the two fields have become increasingly intertwined." David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 158 (2012). Another recent analysis pinpoints a narrower area of contrast, asserting that "[w]hile the connection between criminal convictions and immigration consequences is nearly as old as federal immigration law itself, over the last few decades a new sort of connection has developed between immigration law and criminal law. This new linkage concerns the *enforcement bureaucracies* of criminal and immigration law, rather than the *primary rules of conduct* that regulate noncitizens." Cox & Miles, *supra* note 4, at 91.

84. See *Fleuti* March 25 Affidavit, *supra* note 24, at 2.

85. See *infra* Section III.B.

86. See MURDOCH & PRICE, *supra* note 25, at 89–90; see also CANADAY, *supra* note 17, at 235 n.92 (speculating that the police sent *Fleuti*'s fingerprints to the FBI).

87. I am especially grateful to Joseph Greene for sharing his firsthand knowledge of investigations practices in the early 1970s and his understanding of how such practices evolved in 1950s and '60s.

88. See *infra* notes 173–84 and associated text.

deportation era up through the 1950s. Section II.A examines the flow of information from state and local police and prisons to federal immigration officials in the early twentieth century. Section II.B explores what had changed by the time the INS launched its investigation of George Fleuti in 1959. Section II.C considers *Fleuti* as a case study of the effects of these changes.

A. *Immigration Enforcement and Policing in the Early Twentieth Century*

As legal scholar Daniel Kanstroom and historian Mae Ngai have chronicled, interior immigration enforcement did not begin in earnest until the twentieth century, lagging behind the development of enforcement efforts at ports of entry.<sup>89</sup> The federal government began to restrict the entry of foreign nationals in 1875.<sup>90</sup> In 1891, Congress for the first time provided for the expulsion of those already physically present within the United States but only within a one-year statute of limitations (extended to three years in 1903).<sup>91</sup> Kanstroom has traced the emergence of deportation as a distinct system of post-entry social control—as opposed to simply a system for apprehending those who managed to elude border controls—to the 1917 Immigration Act, which provided for the deportation of those who committed crimes after arrival in the United States.<sup>92</sup> Ngai has detailed the transformations in interior enforcement that occurred in the wake of the first general numerical restrictions on immigration in 1924, arguing that “[d]eportation was not invented in the 1920s, but it was then that it came of age.”<sup>93</sup>

Yet, even before the deportation system was truly up and running as a system of post-entry social control, Congress was already seeking to forge ties between immigration-control efforts and the criminal justice system. These efforts focused largely on prisons, with only limited outreach to police.

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89. See KANSTROOM, *supra* note 47, at 91–130 (discussing the transition from a system focused on exclusion to a system focused on both exclusion and expulsion); NGAI, *supra* note 73, at 56–90 (tracing the advent of the “illegal immigrant” and the growth of the deportation system in the wake of the Johnson-Reed Immigration Act of 1924).

90. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); see also Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

91. Immigration Act of 1891, ch. 551, 26 Stat. 1084; Act of 1903, ch. 1012, § 21, 32 Stat. 1213, 1218; see KANSTROOM, *supra* note 47, at 115 (discussing 1891 Act). The 1891 Act provided for the deportation of those who were excludable upon entry and apprehended within one year of arrival. Immigration Act of 1891, ch. 551, § 11, 26 Stat. 1084, 1086. It also, for the first time, included criminal history as a ground of exclusion, barring those who had been convicted of a crime involving moral turpitude. *Id.* § 1, 26 Stat. 1084, 1084. The following year, the Geary Act authorized the deportation of Chinese laborers who were found within the United States and could not prove, by the testimony of a white witness, that they had been present since before the passage of the legislation. Geary Act, ch. 60, § 6, 27 Stat. 25 (1892) (repealed 1943).

92. KANSTROOM, *supra* note 47, at 133–34.

93. NGAI, *supra* note 73, at 58.

### 1. *Collaboration with Prisons*

In 1903, Congress charged the Commissioner-General of Immigration with “detail[ing] officers of the immigration service from time to time as may be necessary, in his judgment, to secure information as to the number of aliens detained in the penal, reformatory, and charitable institutions (public and private) of the several States and Territories, the District of Columbia, and other territory of the United States” and with “inform[ing] the officers of such institutions of the provisions of law in relation to the deportation of aliens who have become public charges.”<sup>94</sup> Thus began a trickle of information from state and local institutions to federal immigration authorities, with the first statistics on “alien inmates” reported in the Commission-General’s Annual Report for 1904.<sup>95</sup> In 1908, the Commissioner conducted a census of state and local prisons, hospitals, mental health facilities, and almshouses.<sup>96</sup> As part of this census, immigration officers visited a variety of institutions throughout the United States “for the purpose of compiling statistics as to the number of alien inmates of such institutions who were subject to deportation, and to acquaint the Superintendents and other officials in charge with the provisions of the immigration law relating to deportation.”<sup>97</sup> From the perspective of the agency, this effort was a success, resulting in the deportation of “a large number of aliens” and in reports being received from the institutions “for some time thereafter” regarding potential deportees.<sup>98</sup>

Local practices varied, however. In 1923, when the Commissioner requested updates from immigration officials all over the country regarding collaboration between their offices and local penal and charitable institutions, some reported more success than others. The office in Portland, Maine, described its close cooperation with jails, reformatories, and the State Board of Charities,<sup>99</sup> while Boston reported more limited success, noting that “[w]hile . . . a great many more aliens are deportable which do not come to our attention, the fact remains that we have neither sufficient funds nor employees

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94. Act of 1903, ch. 1012, § 21, 32 Stat. 1213, 1219. A similar provision appears in the Act of February 20, 1907, § 22, 34 Stat. 898, and in the Act of February 5, 1917, § 23, 39 Stat. 874.

95. U.S. DEP’T OF COMMERCE & LABOR, ANNUAL REPORT OF THE COMMISSIONER-GENERAL OF IMMIGRATION 48–51 (1904) [hereinafter U.S. DEP’T OF COMMERCE & LABOR, 1904 ANNUAL REPORT].

96. U.S. Dep’t of Labor, In re Co-operation Received from Officials of States, Cities, Municipalities, Etc. in Connection with the Enforcement of the Immigration Laws 1 (October 8, 1923), Nat’l Archives & Records Admin., RG 86, File No. 54951/000 [hereinafter Cooperation Received].

97. *Id.*

98. *Id.*

99. Letter from Inspector in Charge, Office of Immigration Inspector, Portland, Me. to Comm’r-Gen. of Immigration (Oct. 4, 1923), Nat’l Archives & Records Admin., RG 86, File No. 54951/000.

to carry out this work.”<sup>100</sup> Chicago reported varying levels of cooperation from nearby prisons and reformatories, and added that “[o]ccasionally the police bring to our attention a deportation matter, but they do not follow any systematic plan in making these reported.”<sup>101</sup> The Chicago report went on to suggest that “the deportation of aliens from public institutions in this district could be greatly increased if additional men and money were available for the following up of this line of work.”<sup>102</sup>

During this same period, some state legislatures began to take an active interest in strengthening the cooperation of state officials with immigration authorities. A New York statute, for example, directed the agent and warden of each state prison to investigate the “prison record and past history” of every “alien convict” and to “cause the prison record of such alien convict, together with all facts disclosed by such investigation, and his recommendations as to deportation, to be forwarded to the department of justice at Washington.”<sup>103</sup> Yet, despite the stated desire of both federal and state legislators to strengthen ties, cooperation from such institutions was uneven. In 1923, the Commissioner of Immigration complained that the leadership of state institutions was constantly changing due to political patronage, and that with changes in leadership, reporting procedures had a tendency to fall into disuse.<sup>104</sup>

To the modern observer accustomed to recent calls from state and local officials for increased immigration enforcement,<sup>105</sup> there is a familiar ring to the tensions documented in early agency records. A 1923 letter from the Medical Superintendent at the Southern California State Hospital implored Charles Waymire, the California “deportation agent” (a state position housed within the California Department of Institutions), to press Washington for

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100. Cooperation Received, *supra* note 96, at 4 (quoting letter from Inspector in Charge, Boston).

101. *Id.* at 10 (quoting letter from Inspector in Charge, Chicago).

102. *Id.* Chicago appears to have been ahead of other cities in tracking the immigration status of those arrested. The Dillingham Commission noted in its 1911 survey of data on immigrants and crime that “[o]f the police reports obtained from the principal cities of the United States, only those of Chicago contained records of arrests admitting of the statistical analysis of the relations of immigrants to crime . . . . The reports of the Chicago police department for the 10 years from 1897 to 1908 were obtained, but it was found that only those for the four years from 1905 to 1908 contained tabular statements of arrests by crime and nationality.” U.S. IMMIGRATION COMM’N, REPORT ON IMMIGRATION AND CRIME, S. Doc. No. 61-747, at 133 (3d Sess. 1910).

103. 1923 N.Y. Laws ch. 47, § 161. The law was originally enacted in 1922, and amended in 1923. Act of April 13, 1922, ch. 644, 1922 N.Y. Laws 1780; Act of May 21, 1923, ch. 492, 1923 N.Y. Laws 776.

104. Cooperation Received, *supra* note 96, at 1.

105. Calls from state and local lawmakers for tougher immigration enforcement have become a familiar element of the contemporary political landscape. *See, e.g.*, David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html> [<http://perma.cc/WA48-NCKX>] (describing lawsuit by states to block executive action on immigration that would temporarily shield some undocumented immigrants from deportation and provide them with temporary work authorizations).

quicker action on those amenable to deportation: "On your visit to Washington, we would like to have you take up with the Commissioner of Immigration the matter of the intolerable delay that we are having with the deportation of insane aliens."<sup>106</sup> The letter stressed that the hospital promptly reported cases to the Department of Institutions and responded to all requests for information. It noted that the hospital housed several individuals upon whom warrants had been served, "yet there seems to be no effort made to return them."<sup>107</sup>

A recurring refrain from the immigration officials, in their own defense, was the agency's lack of resources. The 1923 agency report on cooperation with penal and charitable institutions noted that an attempt had been made in 1920 to reestablish connections with state and local institutions, but that:

the appropriations under which the Bureau of Immigration has been compelled to operate during the past several years has made it imperative that its operations be practically limited to an enforcement of the laws at the various ports of entry, and have prevented any extensive operations in the way of attempting to deport alien inmates of charitable and penal institutions, or others who have effected illegal entry to the United States.<sup>108</sup>

The Commissioner's annual report to Congress that year described an agency struggling to keep up with the new border control responsibilities engendered by the imposition of limits on immigration from Europe<sup>109</sup> and unable to devote much time to interior enforcement:

The bureau would be glad it if could detail officers to make a systematic canvass of penal and other public institutions throughout the country with a view to the deportation of alien inmates who may be unlawfully in the country. The law provides, and even directs, that such an inquiry shall be made from time to time, but this has not been feasible for the reason stated. Immigration officers visiting such institutions in the course of their regular duties are able in many instances to make rather cursory investigations as to foreign-born inmates, but otherwise the service has to depend very largely upon officials of such institutions for information as to possible deportation cases confined therein.<sup>110</sup>

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106. Letter from Jno. A. Reilly, Medical Superintendent, S. Cal. State Hosp., to Charles F. Waymire, Deportation Agent, Dep't of Institutions, Sacramento, Cal. 1 (Aug. 23, 1923), Nat'l Archives & Records Admin., RG 86, File No. 54951/005.

107. *Id.*

108. Cooperation Received, *supra* note 96, at 2.

109. In 1921, Congress passed an emergency measure imposing temporary across-the-board numerical restrictions on immigration for the first time. Emergency Immigration Act of 1921, 42 Stat. 5. Congress enacted permanent restrictions in 1924. Immigration Act of 1924, 43 Stat. 153.

110. U.S. DEP'T OF LABOR, BUREAU OF IMMIGRATION, ANNUAL REPORT OF THE COMMISSIONER GENERAL OF IMMIGRATION TO THE SECRETARY OF LABOR 15 (1923), <http://archive.org/stream/annualreportofco1923unit#page/14/mode/2up> [<http://perma.cc/LB2Q-DHHH>].

A new round of criticism of the Bureau of Immigration arose in 1934 with the publication of a report by the Special Committee on Immigration and Alien Insane of the New York State Department of Commerce.<sup>111</sup> The report, authored by prominent eugenicist Harry Laughlin, argued stridently for increased enforcement to keep “degenerates” out of the United States.<sup>112</sup> It presented data from a survey of 246 prisons and mental health facilities nationwide regarding foreign-born inmates and patients.<sup>113</sup> The majority of institutions that responded stated that they reported all foreign-born individuals to immigration authorities upon discharge.<sup>114</sup> Laughlin faulted the federal government for failing to pursue such cases, complaining that federal law “does not place any duty on the part of the [agency] to stand like a ‘watch dog’ at the gates of the custodial institutions, and take over deportable aliens in a businesslike manner for immediate deportation.”<sup>115</sup> He identified the lack of coordination between such institutions and federal immigration authorities as “one of the biggest loopholes in deportation procedure, and consequently in the whole matter of alien-management in the United States.”<sup>116</sup>

In response to Laughlin’s accusations, INS Deputy Commissioner Edward J. Shaughnessy launched another survey of district offices to assess the extent of their cooperation with prisons and charitable institutions.<sup>117</sup> Many districts reported periodic monitoring, particularly of prisons.<sup>118</sup> And in contrast to earlier reports, some districts reported that their officers visited city and county jails and even local line-ups.<sup>119</sup> A 1936 agency memorandum summarized the

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111. HARRY H. LAUGHLIN, CHAMBER OF COMMERCE OF THE STATE OF N.Y., A REPORT OF THE SPECIAL COMMITTEE ON IMMIGRATION AND ALIEN INSANE: SUBMITTING A STUDY ON IMMIGRATION-CONTROL (1934).

112. *Id.* at 28.

113. *Id.* at 30–31.

114. *Id.* (stating that 128 of the institutions had a procedure for reporting inmates upon discharge. Of the 246, sixty-six did not answer and forty-two responded that the issue had not arisen; only two responded that they did nothing.).

115. *Id.* at 31.

116. *Id.* at 32.

117. Circular from Edward J. Shaughnessy, Deputy Comm’r, to All Dist. Dirs. of Immigration & Naturalization (Aug. 7, 1934), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A.

118. *See, e.g.*, Letter from Eugene Kessler, Dist. Dir., New Orleans, La. to Comm’r of Immigration & Naturalization, Dep’t of Labor (Aug. 16, 1934), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A (reporting that district maintained “a complete alphabetical list of the names of every alien detained in each institution in this District” and that officers visited each institution “at least semi-annually”); Letter from William A. Whalen, Dist. Dir., Galveston, Tex., to Comm’r of Immigration & Naturalization, Dep’t of Labor (Aug. 17, 1934), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A (reporting that “penal, reformatory, and charitable institutions in this district are periodically and methodically checked”).

119. *See, e.g.*, Letter from Franklin Davis, Assistant Inspector in Charge, to Dist. Dir., Immigration & Naturalization Serv., Los Angeles, Cal. (Aug. 15, 1934), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A (reporting that “the Orange County jail . . . is visited regularly . . . and the daily bookings inspected personally”); Letter from Fred J. Schlotfeldt, Dist. Dir., Chi., Ill., to Comm’r of Immigration & Naturalization (Sept. 1, 1934), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A (reporting that “[a]t certain institutions, such as the House of

results of this survey in an attempt to respond to “the impression [created by Laughlin’s report] that our Service is lacking in initiative in checking criminal institutions with a view to instituting deportation proceedings in the cases of criminal aliens who are deportable under the law.”<sup>120</sup>

Collectively, these early records reveal an agency that approached prison inmates primarily as “public charges” who were unable to support themselves financially.<sup>121</sup> These reports make very little distinction between prisoners and patients; a given report may discuss the state penitentiary in one sentence and the local asylum in the next. Immigration officials were interested in prisoners in large part because, like patients at hospitals and residents of almshouses, they were living at public expense.<sup>122</sup> It is not surprising that this framework dominated prior to 1917, when the likelihood of becoming a public charge was by far the most common ground of deportation, and post-entry criminal conduct had not yet entered the grounds of deportability.<sup>123</sup> However, even in later years, despite the prominence of notions of immigrant criminality within Progressive Era political and social science discourses,<sup>124</sup> agency files regarding collaboration with the criminal justice system exhibit little sign of

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Correction in Chicago and the Cook County Jail, which are close at hand and where the number of alien inmates is large, officers have been detailed whenever available for daily duty”).

120. Memorandum of W.W. Brown in re: Report of the Committee on Immigration and Alien Insane 1 (March 13, 1936), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A.

121. In 1882, Congress added to the grounds of exclusion “any person unable to take care of himself or herself without becoming a public charge.” Act of 1882, ch. 376, § 2, 22 Stat. 214, § 2. In 1891, being a “public charge” due to causes existing before arrival in the United States became a ground of deportability. Immigration Act of 1891, ch. 551, § 11, 26 Stat. 1084, 1086. The public charge ground is currently codified at Immigration and Nationality Act (INA) § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2012).

122. For example, the Commissioner-General’s 1904 Annual Report, which presented data on the agency’s first survey of institutionalized noncitizens, manifested more concern about those who were mentally ill than about criminal offenders, noting that of the total number of those institutionalized (44,985), almost half were “insane” and that “[t]he 20,485 insane are virtually all burdens for life.” U.S. DEP’T OF COMMERCE & LABOR, 1904 ANNUAL REPORT, *supra* note 95, at 51. In contrast, the report listed only 339 noncitizens serving life sentences in prison. *Id.* at 50 tbl.1. The report of the Dillingham Commission, a congressional commission convened from 1907 to 1910, included an entire volume on immigrants and crime. U.S. IMMIGRATION COMM’N, REPORT ON IMMIGRATION AND CRIME, *supra* note 102, at 61–747. However, the Commission conceded that “[n]o satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population. Such comparable statistics of crime and population as it has been possible to obtain indicate that immigrants are less prone to commit crime than are native Americans.” *Id.* at 1.

123. See CANADAY, *supra* note 17, at 34–43 (describing the use of the public charge bar against those deemed to deviate from acceptable sexual or gender norms); KANSTROOM, *supra* note 47, at 133–36; MOLONEY, *supra* note 75, at 82 (noting that in 1915, 64 percent of removals were on the basis of likelihood of becoming a public charge). *But c.f.* Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L.J. 18, 20–22 (1939) (analyzing disagreement among federal courts in the 1920s and ’30s about whether a person who was incarcerated was properly deemed a public charge).

124. See KANSTROOM, *supra* note 47, at 133–36.

concern with actual dangerousness.<sup>125</sup> While federal officials expressed concerns about “dangerous” immigrants during this period,<sup>126</sup> these concerns generally focused not on those who committed ordinary crimes but rather on anarchists and others considered politically subversive.<sup>127</sup>

## 2. *Collaboration with Police*

In the early years of the deportation system, the most prominent intersection of immigration enforcement and criminal law enforcement occurred within the national crusade against sex trafficking. The Bureau of Investigation, founded by executive order in 1908, owed much of its early growth to its role enforcing the 1910 White-Slave Traffic Act, more commonly known as the Mann Act.<sup>128</sup> Many of the investigators hired by the Bureau were former employees of the Bureau of Immigration, which had up to that point been the only federal agency engaged in policing commercial sex work.<sup>129</sup> While the two agencies frequently collaborated, however, such cooperation rarely involved local police. In her history of the enforcement of the Mann Act, Jessica Pliley provides insight into this dynamic, describing the travails of Marcus Braun, a special investigator commissioned by the Bureau of Immigration to investigate “white slavery” in a number of U.S. cities in 1908.<sup>130</sup> Braun quickly learned to avoid collaboration with local police, as he had “discovered that local police officers would inform brothels to hide any foreign-born inmates before he could investigate.”<sup>131</sup>

To the extent that local police were involved in immigration enforcement, their efforts generally focused on apprehending individuals suspected of having entered the United States without authorization rather than on facilitating the deportation of those whose criminal acts rendered them deportable.<sup>132</sup> In some

125. A typical document from the era is a 1934 letter from District Commissioner Mary H. Ward in the Boston office. Ward notes in the letter that she “had in mind for some time . . . getting in touch with the Governors of the six New England states and asking them to issue an order to the heads of all institutions in their jurisdiction that they cooperate with the Federal authorities in reporting the presence of aliens in these institutions. I intended to explain to the Governors the beneficial reaction this move would have upon the states’ finances as well as the aid it would be to our Department.” Letter from Mary H. Ward, Dist. Comm’r of Naturalization & Immigration, Bos., Mass., to Edward J. Shaughnessy, Deputy Comm’r of Immigration & Naturalization, U.S. Dep’t of Labor (Aug. 16, 1934), Nat’l Archives & Records Admin., RG 86, File No. 55598/568A.

126. See KANSTROOM, *supra* note 47, at 136–41, 145–55 (discussing agency concerns about anarchists and other radicals); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833, 844 (1997) (same).

127. See KANSTROOM, *supra* note 47, at 136–41, 145–55.

128. See PLILEY, *supra* note 76, at 75–76.

129. *Id.* at 92.

130. *Id.* at 35–51.

131. *Id.* at 38.

132. For example, the Inspector in Winnipeg, Manitoba, reported in 1923 that police officers in a variety of locations on the U.S.-Canada border “have cooperated with our officers to the fullest extent in the apprehension of illegal entries.” Cooperation Received, *supra* note 96, at 13. For a

locations, such cooperation was quite elaborate. For example, one report to headquarters from the Albuquerque office of the Bureau of Immigration described a system of pretextual arrests that brought together federal immigration officers, local police, and employees of the railway:

If European aliens are seen by any of the officers, or trainment [sic], between here and El Paso . . . [t]wo Special Officers of the AT&SF Ry [Atchison, Topeka, and Santa Fe Railway] examine them and they also cooperate with this Service. On several occasions they have placed in jail persons that they suspected of being aliens illegally in this country on the charge of vagrancy for my investigation in the morning. On investigation, if the person proved to be an alien illegally in this country the vagrancy charge was withdrawn, and the alien taken into custody by this Service.<sup>133</sup>

Local police continued to be involved in immigration enforcement in later decades, including playing roles in the mass “repatriation” of Mexican immigrants and Mexican Americans during the Great Depression<sup>134</sup> and in the mass deportations that the INS carried out through Operation Wetback in 1954.<sup>135</sup>

### B. *The Midcentury Shift*

As the previous Section describes, it was well established, by the time George Fleuti found himself the target of an INS investigation, that immigrants who served time in prison might end up on the radar of federal immigration officials, even if the agency had a spotty track record of following through on enforcement. It was also clear that the FBI sometimes teamed up with immigration agents on joint initiatives, and that local police sometimes cooperated with immigration officials with regard to those suspected of lacking valid immigration status. Fleuti, however, did not fit into any of these categories. He had been arrested three times and convicted twice, but only on

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discussion of the early involvement of local police in immigration enforcement, see WILLIAM F. McDONALD, *STATE AND LOCAL LAW ENFORCEMENT, TRANSNATIONAL CRIMINALITY, AND ILLEGAL IMMIGRATION: THE CHANGING BOUNDARIES OF LAW ENFORCEMENT* 16 (2001), <http://www.ncjrs.gov/pdffiles1/nij/grants/188876.pdf> [<http://perma.cc/L7ND-9BSN>].

133. Letter from John F. Harn, Immigrant Inspector, Albuquerque, N.M., to Inspector in Charge, El Paso, Tex. (Oct. 3, 1923), Nat'l Archives & Records Admin., RG 86, File No. 54951/000. Immigration enforcement at the U.S.-Mexico border in these years focused largely on keeping out Chinese and European immigrants. See PATRICK ETTINGER, *IMAGINARY LINES: BORDER ENFORCEMENT AND THE ORIGINS OF UNDOCUMENTED IMMIGRATION, 1882-1930*, at 93-95 (2009).

134. See FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 119-59 (rev. ed. 2006); NGAI, *supra* note 73, at 72-75; Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 4-14 (2005).

135. See JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 183-202 (1980).

minor offenses that had not resulted in any time in prison.<sup>136</sup> He was a lawful permanent resident, and thus his papers were in order.<sup>137</sup>

And yet, when summoned to appear before an INS investigator, Fleuti stated that he was not surprised to find himself there.<sup>138</sup> What are we to make of Fleuti's expectation that the INS would investigate him because his arrest records had been "reported to Washington"? Fleuti's assumption was correct on one level: his A-File reveals that the Oxnard Police Department sent information about his 1958 arrest to the FBI's Identification Bureau, where the FBI added it to a rap sheet that already contained information about his previous arrests on similar charges in 1953 and 1956.<sup>139</sup> Fleuti almost certainly meant more than that, though, when he stated to the investigator that he assumed that his prints had been sent to Washington. The implication of his statement is that he not only thought that his prints had been sent to the FBI (a routine practice by that time), but that the FBI had then shared them with the INS.

The most likely explanation for Fleuti's anxiety is that it stemmed from knowledge of the well-publicized 1950s purge of federal government employees, known at the time as the "pervert purge"<sup>140</sup> and now known as the Lavender Scare.<sup>141</sup> The FBI, which performed background checks on federal employees for the Civil Service Commission, established liaisons with police departments throughout the country in the early 1950s and combed through vice squad arrests in an effort to identify homosexuals working in government agencies.<sup>142</sup> Scholarship on the Lavender Scare reveals that the FBI was zealous in its collection of information about those arrested for same-sex sexual activity;<sup>143</sup> that the Bureau used this information in the security checks that it performed on government employees for the Civil Service Commission;<sup>144</sup> and that a broad array of federal agencies made use of this data for purposes of monitoring their own personnel.<sup>145</sup> But did the FBI systematically pass this information along to the INS for use in immigration control efforts? INS investigations records from the 1950s do not indicate any such transfer of

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136. See Fed. Bureau of Investigation, Identity History Summary of George M. Fleuti, *supra* note 49.

137. *Rosenberg v. Fleuti*, 374 U.S. 449, 450 (1963) (noting that Fleuti had been admitted for permanent residence).

138. Fleuti March 25 Affidavit, *supra* note 24, at 2.

139. See Fed. Bureau of Investigation, Identity History Summary of George M. Fleuti, *supra* note 49.

140. Randolph W. Baxter, "Homo-Hunting" in *the Early Cold War: Senator Kenneth Wherry and the Homophobic Side of McCarthyism*, 84 NEB. HIST. 119, 119 (2003).

141. See generally DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004).

142. See *infra* notes 230–34 and associated text.

143. See JOHN D'EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* 62–63 (1992).

144. See *id.* at 60–61; JOHNSON, *supra* note 141, at 117.

145. JOHNSON, *supra* note 141, at 98.

information from the FBI.<sup>146</sup> What these records do show, however, is a nascent practice of information sharing on a local level directly between police departments and INS investigators, without the facilitation of the FBI.

The roots of this strategy can be traced to earlier in the century. For example, the New York City Police Department (NYPD) established a Bureau of Criminal Alien Investigation in 1930.<sup>147</sup> The purpose of the bureau was “to round up and investigate all aliens with criminal records to establish possible grounds for deportation.”<sup>148</sup> An article announcing the founding of the bureau noted that the NYPD arrested about twelve hundred immigrants annually, but that “[u]ntil yesterday there was no special police detail to look into the records of these men so far as immigration laws are concerned.”<sup>149</sup> Where investigation by the newly founded bureau revealed any ground of deportability, the article noted, the information would be turned over to federal immigration authorities.<sup>150</sup>

By the early 1950s, establishing such linkages became an agency priority nationwide. An increasing focus on national security during World War II had led to the establishment of an Investigations Section—later renamed the Investigations Division—within the INS.<sup>151</sup> The 1953 INS Annual Report noted a “comprehensive and vigorous” new program to expel “notorious subversives, racketeers, and other criminal aliens.”<sup>152</sup> It also notes that information from INS investigations “ha[d] been correlated with other information furnished by government intelligence agencies, legislative investigating committees, and other sources accessible to the [INS] Central Office.”<sup>153</sup> The 1953 report also evinced a new ambition, similar to that evident in the NYPD’s earlier initiative, to use deportation as a tool to extend the reach of criminal law enforcement:

Especially in relation to deportation, the cases of all racketeers and other criminals have been closely investigated and the investigative

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146. The relevant FBI files are, unfortunately, unavailable. The FBI destroyed the records of the Sex Deviants program, comprised of over three hundred thousand pages, in 1977–78. See ATHAN THEOHARIS, J. EDGAR HOOVER, SEX, AND CRIME: AN HISTORICAL ANTIDOTE 104 (1995).

147. MCDONALD, *supra* note 132, at 16; *Police to Round Up Criminal Aliens Here; New Bureau to Get Evidence for Mulrooney*, N.Y. TIMES, Dec. 20, 1930 [hereinafter *Police to Round Up Criminal Aliens Here*]. While the 1930 media reports suggest that the unit was new, it appears to have had links to earlier units dating back to an “Italian Squad” formed in 1904. See Sam Roberts, *Keeping Tabs, Just In Case*, N.Y. TIMES (Apr. 4, 2014), <http://www.nytimes.com/2014/04/06/nyregion/keeping-tabs-just-in-case.html> [<http://perma.cc/P46X-JCB8>] (describing the Criminal Alien Squad as a “re-brand[ing]” of a succession of earlier intelligence-gathering squads beginning with the Italian Squad).

148. *Police to Round Up Criminal Aliens Here*, *supra* note 147.

149. *Id.*

150. *Id.*

151. MIRIAM OTTENBERG, THE FEDERAL INVESTIGATORS 214 (1962).

152. U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 57 (1953).

153. *Id.*

results carefully studied with a view to determining whether these undesirable aliens may be amenable to Service action on any ground which would enable the country to rid itself of their presence. In many of these cases, while the reputed racketeer or criminal may have been successful in avoiding criminal prosecution and conviction for his nefarious activities, he may have brought himself within reach of the Service's deportation process by effecting unlawful entry, or by failing to comply with other requirements of the immigration laws.<sup>154</sup>

This approach was primarily directed at high-level figures in organized crime. However, it also had broader implications in that it reframed deportation as a means of ridding the country of those who had committed crimes but had eluded prosecution.

In 1955, the district offices began to submit monthly reports on investigative activities to the INS Central Office.<sup>155</sup> One of the notable features of these reports is their frequent mention of new outreach efforts to enlist collaboration from state and local law enforcement agencies. For example, a 1955 report from the Chicago District Office notes that “[i]n the Omaha area, Investigator Francis Gill on a recent road trip contacted several heads of police and sheriff organizations who were quite receptive to a suggestion that this Service be allowed to appear and present our program at their various meetings and schools.”<sup>156</sup> The Buffalo District Office sent an investigator on a two-week road trip to Utica and surrounding areas to establish contacts with law enforcement officers.<sup>157</sup> A report describing this trip suggests that these links were forged from scratch: it notes that “some of [these officers] couldn't remember when they had last talked to an immigration officer and [that they reported] that the matter of immigration wasn't even considered in their police work.”<sup>158</sup> A report from St. Albans, Vermont, describes the mechanics of one such outreach campaign:

The initial step consists of an individually typed letter to each Chief of Police and County Sheriff in this State as well as to the Commissioner of Public Safety (State Police). Before the letter was sent out, a talk was had with the Chief Patrol Inspector at Rouses Point as to the canvass and it was agreed that it would be handled as a joint proposition with one letter going to all law enforcement agencies

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154. *Id.* at 59.

155. *See generally* Investigations Activities Reports (1955), Nat'l Archives & Records Admin., RG 86, File No. 56364/53.1.

156. Memorandum from Robert H. Robinson, Dist. Dir. of Immigration & Naturalization, Chi., Ill., to Regional Comm'r, N.W. Region, St. Paul, Minn., Re: Investigations Activity Report for Period November 1, 1955 to December 15, 1955, Inclusive 3 (Dec. 20, 1955), Nat'l Archives & Records Admin., RG 86, File No. 56364/53.1.

157. Memorandum from Investigators Alfred J. Portale & James H. Crossman to Willis F. Cole, Re: Investigative Search Operation (Apr. 27, 1955), *attachment to* Willis F. Cole, Dist. Chief of Investigations, Buffalo, N.Y., Investigations Activity Report, Month of April, 1955 (May 4, 1955), Nat'l Archives & Records Admin., RG 86, File No. 56364/53.1.

158. *Id.* at 1.

stating that this office, in conjunction with the Border Patrol, was responsible for the enforcement of the Immigration and Nationality laws in the State of Vermont and that we needed the help of every law enforcement officer in the State to apprehend illegal entrants, those who settle here, criminal aliens, etc.<sup>159</sup>

These outreach efforts included persistent attempts to forge personal connections to local law enforcement at the most basic level. For example, one immigration investigator reported that in the course of his outreach efforts to the police department in Hamburg, New York, he was able to assist two local police officers in apprehending “three teen-age car-strippers” by driving the officers to the scene when no police car was available: “For this action Lieutenant Hoffman expressed the appreciation of his entire department and stated that the facilities of his department were at the disposal of this Service at any time and in any manner possible.”<sup>160</sup> The investigator also described a situation in which he and a colleague came upon a car accident in Oneida, New York, and, as the first people on the scene, took it upon themselves to direct traffic with a flashlight until the arrival of the State Police.<sup>161</sup> The next day, they paid a courtesy call to the Inspector in Charge, who “had already heard of the accident on the preceding evening and stated that the facilities of his Bureau of Criminal Investigation office were completely at our disposal and that of the Service at any time.”<sup>162</sup>

The INS measured the success of these outreach efforts in the receipt of information from local law enforcement. A report from Buffalo noted that police officers who were contacted

indicated that in the future they would be considerate of the possibility of any person being in the United States illegally and whether any person arrested by them might possibly be amenable to any action by our Service and if so, would report the matter to us. They promised also to alert their informants and in the event they received any information of interest to our Service, they would advise us of the same.<sup>163</sup>

Even in the case of a tip that did not pan out (regarding an “apparent ship-jumping Danish seaman” in East Aurora, New York, who turned out instead to be an in-status Danish exchange student), an INS report emphasized that the

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159. Memorandum of J.S. Kershner, Officer in Charge, St. Albans, Vt. (Jul. 26, 1955), to Willis F. Cole, Dist. Chief of Investigations, Buffalo, N.Y., Re: Investigations Activity Report, Month of July, 1955 (Aug. 8, 1955), Nat'l Archives & Records Admin., RG 86, File No. 56364/53.1.

160. Memorandum from Robert A. Earl, Investigator, Buffalo, N.Y., to Willis F. Cole, Dist. Chief of Investigations, Buffalo, N.Y., Re: Liaison Program Between This Service and Other Law Enforcement Agencies 2 (Aug. 2, 1955), *attachment to* Investigations Activity Report, Buffalo Dist. (July 1955), Nat'l Archives & Records Admin., RG 86, File No. 56364/53.1.

161. *Id.* at 2.

162. *Id.*

163. Memorandum from Investigators Alfred J. Portale and James H. Crossman, *supra* note 157, at 1.

receipt of the tip “did indicate that the liaison program is paying dividends.”<sup>164</sup> In March 1955, the Buffalo District Chief of Investigations noted that “[t]he Buffalo Police Department has installed in this Branch a direct telephone extension from the police switchboard, which gives us direct contact with all police divisions and Sheriff and County Jail[.]”<sup>165</sup>

Another perceived benefit of cultivating such relationships with local law enforcement was the shared use of equipment. One report notes that Sergeant Gerald Schusler of the Painted Post State Police Barracks in upstate New York “not only graciously offered the available space [in the barracks] but also the use of their typewriters and fingerprint equipment and assisted the writer in locating two of the persons who were called in for alien registration, their call-in letters having been returned marked undelivered and unknown.”<sup>166</sup> Another report describes the use of police equipment to do FBI background checks, noting that the police department in Columbus, Ohio, had made available to the Columbus INS office the use of their “Transceiver Photo News apparatus” and that this equipment had made an appreciable difference in the work of the INS:

In three recent cases of aliens who, during preliminary investigation claimed they had not been deported, their fingerprints were forwarded by use of the Transceiver Photo News apparatus to the FBI. Within one hour thereafter the FBI telephoned Columbus, giving complete criminal records of the aliens involved. As a result of the use of this machine, it was ascertained that all three had been previously deported. They were subsequently arraigned on the same day before the U.S. Commissioner and taken into custody by the U.S. Marshal, thereby eliminating detention at the expense of this Service. The only expense for the use of this service is the cost of a telephone call simultaneous with the forwarding of the fingerprint classifications to the FBI in Washington, and the cost of the FBI’s collect return call advising as to what their records contain.<sup>167</sup>

The report further notes that “[s]uch a machine is available for the use of the Detroit Office in the Detroit Police Department if, after review of this portion of the report, [it is believed that] such action would be advisable in certain cases.”<sup>168</sup>

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164. Memorandum from Robert A. Earl, *supra* note 160, at 3.

165. Memorandum from Raymond F. Farrell, Assistant Comm’r, Investigations Div., to Regional Chiefs of Investigation re: Monthly Reports, January 1955 through April 1955, at 3 (Jun. 16, 1955), Nat’l Archives & Records Admin., RG 86, File No. 56364/53.1.

166. Memorandum from Charles R. Vail, Investigator, Buffalo, N.Y., to Willis F. Cole, Dist. Chief of Investigations, Buffalo, N.Y., re: Special Liason [sic] Program with Policing Agencies (May 3, 1955), *attachment to* Investigations Activity Report, Buffalo Dist., Month of April, 1955 (May 4, 1955), Nat’l Archives & Records Admin., RG 86, File No. 56364/53.1.

167. T.R. Martinez, Chief, Investigations Branch, Detroit, Investigative Activity Report, Month of April, 1955, at 3 (May 4, 1955), Nat’l Archives & Records Admin, RG 86, File No. 56364/53.1 0800.

168. *Id.*

In sum, on a concrete, infrastructural level, the foundations of crimmigration began to emerge in the 1950s. Radicals, high-profile mafia figures, and unauthorized entrants remained the primary focus of investigative efforts,<sup>169</sup> but a marked change was underway. The “criminal alien” had become a distinct focus of investigative efforts, rather than merely a category of those living at public expense. The INS was now devoting considerable resources to forging ties not just with penal institutions but with state and local law enforcement agencies, many of which seemed to have had no contact with immigration officials before this period. The primary aim of this initiative was to increase the flow of information.

### C. Fleuti as a Case Study in Information Sharing

Without these changes in INS investigations practices in the 1950s, it is unlikely that George Fleuti would have found himself facing deportation in the spring of 1959. Fleuti was arrested by the Los Angeles Police Department (LAPD) in 1953 and found guilty of being a “lewd and dissolute person.”<sup>170</sup> He was again arrested by the LAPD in 1956 and pleaded guilty to a charge of sex perversion.<sup>171</sup> On both occasions, the LAPD reported the charges to the FBI’s Identification Division.<sup>172</sup> However, Fleuti’s A-File does not contain any indication that either incident resulted in an INS investigation.

Fleuti’s third arrest played out differently. On Wednesday, November 5, 1958, Fleuti was arrested in Oxnard, California, and charged once again under the lewd vagrancy statute.<sup>173</sup> The charge was dismissed,<sup>174</sup> but Fleuti’s legal troubles were just beginning. On the following Monday, the INS opened an

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169. The Detroit office, for instance, reported having fourteen investigators in October 1955, of which only one was dedicated to “CIN” (criminal, immoral, narcotics) work. Memorandum of John F. Mulcahey, Acting Dist. Dir., Detroit, Mich., to Chief Regional Investigator, N.W. Region, St. Paul, Minn., re: Investigations Activity Report, Month of August, 1955, at 1–2 (Sept. 7, 1955), Nat’l Archives & Records Admin., RG 86, File No. 56364/53.1. In the Cleveland sub-office there were thirteen investigators assigned to special investigations work, of which “[t]en investigators [were] devote[d] full time to subversive work, two investigators devote[d] approximately 25% of their time on subversive cases, and the remaining 75% on cases involving criminal, immoral and narcotics.” *Id.* at 3.

170. See Immigration & Naturalization Serv., U.S. Dep’t of Justice, Motion to Special Inquiry Office to Reopen Proceedings, in USCIS Fleuti FOIA, *supra* note 15, at 181; Transcript of Docket, Municipal Court of Los Angeles, California v. Fleuti, No. 178942 (L.A. Super. Ct. July 6, 1959), in USCIS Fleuti FOIA, *supra* note 15, at 1591.

171. See Fed. Bureau of Investigation, Identity History Summary of George M. Fleuti, *supra* note 49; Minutes, Los Angeles County Superior Court, California v. Fleuti, No. 178942 (L.A. Super. Ct. March 9, 1956), in USCIS Fleuti FOIA, *supra* note 15, at 1580. Fleuti paid fines on both occasions but served no time in jail. Transcript of Docket, Municipal Court of Los Angeles, *supra* note 170; Minutes, Los Angeles County Superior Court, *supra*.

172. See Fed. Bureau of Investigation, Identity History Summary of George M. Fleuti, *supra* note 49.

173. Oxnard Police Dep’t, Arrest Report of George Marcel Fleuti, *supra* note 52.

174. See Transcript of Oral Decision of the Special Inquiry Officer, In the Matter of George Ernst Marcel Fleuti 9 (March 30, 1965), in USCIS Fleuti FOIA, *supra* note 15, at 1058.

investigation into whether Fleuti was deportable.<sup>175</sup> The paperwork in Fleuti's A-file does not document the receipt of a tip from the Oxnard Police Department. However, the timing of the investigation relative to the arrest—five days later—strongly suggests that the arrest was the precipitating factor, and there is no indication in the file of any other way that Fleuti could have ended up in the sights of the INS, such as an interaction with the agency or a tip from a neighbor.<sup>176</sup> Moreover, markings on the rap sheet in Fleuti's A-File indicate that the document was passed along to the INS by the Oxnard Police Department, rather than obtained directly from the FBI.<sup>177</sup>

Armed with the rap sheet, the INS undertook an investigation of Fleuti's prior arrests, requesting Fleuti's records from the LAPD and visiting the Los Angeles Municipal Court and the Los Angeles County Superior Court to obtain certified dispositions of the 1953 and 1956 charges.<sup>178</sup> INS investigator Herbert Perkins then interviewed Fleuti on March 25, 1959.<sup>179</sup> Fleuti signed a sworn statement that day attesting to various facts regarding his sex life, his arrests and convictions, and his immigration history.<sup>180</sup> A few days later, he signed another statement with additional facts relating to his travel to Mexico in 1956.<sup>181</sup> In April, Fleuti appeared at a hearing and was ordered deported based on a finding that he had been excludable, upon his return from Mexico in 1956, for having committed a crime involving moral turpitude.<sup>182</sup> This order was subsequently vacated, and a new order was issued on the "psychopathic personality" ground.<sup>183</sup> It was only at this point that the INS forged a direct link to the FBI, sending information to the Bureau about Fleuti's deportation

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175. Immigration & Naturalization Serv. Form G-600 (Nov. 10, 1968), in ICE Fleuti FOIA, *supra* note 15, at 98.

176. Joseph Greene, a retired ICE official who began working for the INS in 1971 and went on to hold a variety of high-level enforcement positions within both INS and ICE over the course of several decades, concluded upon reviewing Fleuti's A-file that it contains a clear inference that the investigation resulted from a tip from the Oxnard police. Email from Joseph Greene to author (June 17, 2014) (on file with author).

177. See Fed. Bureau of Investigation, Identity History Summary of George M. Fleuti, *supra* note 49 (stamped as received by Oxnard Police Department on November 21, 1958).

178. Certified Disposition, Los Angeles County Superior Court, California v. Fleuti, No. 178942 (L.A. Super. Ct. Jan. 28, 1959), in USCIS Fleuti FOIA, *supra* note 15, at 1579; Certified Disposition, Los Angeles Municipal Court, California v. Fleuti, No. 178942 (L.A. Super. Ct. Jan. 28, 1959), in USCIS Fleuti FOIA, *supra* note 15, at 1591.

179. See Fleuti March 25 Affidavit, *supra* note 24.

180. *Id.*

181. See Immigration & Naturalization Serv., U.S. Dep't of Justice, Affidavit of George Ernst Marcel Fleuti (April 1, 1959), in USCIS Fleuti FOIA, *supra* note 15, at 366–67.

182. *Rosenberg v. Fleuti*, 374 U.S. 449, 450 (1963).

183. *Id.* at 450–51. The original deportation order was vacated based upon a finding that Fleuti's conviction fell within a petty offense exception to the ground relating to crimes involving moral turpitude. *Id.*

proceeding and subsequently seeking information about Fleuti from the FBI's Identification Bureau.<sup>184</sup>

Fleuti's victories at the Ninth Circuit and the Supreme Court would eventually set his case apart from other cases in which men caught in the tearoom trade<sup>185</sup> were funneled into the deportation system. However, the initial stages of Fleuti's case—the LAPD arrest followed by the INS investigation followed by the deportation proceeding—appear to be typical, lining up closely with the emerging practices described within Section II.B and with other cases from these years involving men arrested in similar circumstances.

### III.

#### LESSONS FROM *FLEUTI*

The dominant narrative of crimmigration posits a transformation, beginning in the 1980s, from a time when criminal law enforcement and immigration enforcement were distinct to a time in which they have merged.<sup>186</sup> This notion that we are living in an era of crimmigration, a new and unprecedented convergence of immigration control and criminal law enforcement, is not without merit: by any measure—detentions,<sup>187</sup> deportations,<sup>188</sup> prosecutions for immigration-related offenses,<sup>189</sup> staffing,<sup>190</sup> expenditures<sup>191</sup>—U.S. immigration enforcement has reached unprecedented

184. Disposition Sheet, George Ernst Marcel Fleuti, Mar. 25, 1959 Arrest (undated), in USCIS Fleuti FOIA, *supra* note 15, at 150–51.

185. *See supra* note 72 and associated text.

186. *See supra* note 83.

187. *See* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<http://perma.cc/93H6-V8L9>] (recording an increase in detention beds from 7,500 in 1993 to 30,000 by 2009).

188. Annual deportations increased more than twentyfold over a thirty-year period, from 17,379 in 1981 to 391,953 in 2011. *See* OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39, [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2013\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf) [<http://perma.cc/JM9R-2L8V>]. *See generally* KANSTROOM, *supra* note 6, at 3–18 (tracing growth of the deportation system); *The Growth of the U.S. Deportation Machine*, AM. IMMIGRATION COUNCIL (Apr. 9, 2014), <http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine> [<http://perma.cc/EXK6-5MKN>].

189. Prosecution of immigration-related crimes, such as illegal entry or reentry, has increased tenfold since 1980. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 21 (2012); *see also* *At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013*, TRAC IMMIGRATION (Nov. 25, 2013), <http://trac.syr.edu/immigration/reports/336/> [<http://perma.cc/97R8-VAXF>].

190. *See The Growth of the U.S. Deportation Machine*, *supra* note 188 (reporting that “the number of ICE agents devoted to Enforcement and Removal Operations more than doubled from 2,710 to 6,338” between FY 2003 and FY 2012).

191. From 2004 to 2013, federal spending on interior immigration enforcement increased from \$960 million to nearly \$2.7 billion. MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 24 (2012). Federal funding for programs for the removal of noncitizens arrested or convicted of

levels, and collaboration between local police and federal immigration officials has been a central feature of this expansion. However, the concept of a clearly delineated “cimmigration era” can also obscure important aspects of cimmigration’s development. *Fleuti* is a reminder that the police-immigration convergence that characterizes the cimmigration era did not arise all at once.

Viewed from one angle, *Fleuti* and similar cases from the 1950s and early ’60s present a number of contrasts to the contemporary police-to-deportation pipeline. They date from an era in which the INS issued fewer than twenty thousand formal orders of deportation or exclusion per year,<sup>192</sup> a small fraction of the hundreds of thousands of formal removals that now occur annually.<sup>193</sup> None of the published midcentury cases that resemble *Fleuti* appear to involve a person who was detained while in deportation proceedings, and all involve immigrants from Canada and Western Europe.<sup>194</sup> Thus, the key hallmarks of the contemporary cimmigration system—its vast scale, its frequent use of immigration detention,<sup>195</sup> and its disproportionate impact on immigrants from Latin America and the Caribbean<sup>196</sup>—are absent. It is also worth noting that, with the rise of the modern LGBTQ rights movement, a present-day *Fleuti* might not find himself in police custody in the first place.<sup>197</sup>

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criminal offenses increased *thirtyfold* between 2004 and 2011—from \$23 million to \$690 million—before dropping slightly to \$608 million by 2013. *Id.* Due to this rapid funding increase, the federal government now spends more on the various immigration enforcement agencies than on all other federal criminal law enforcement agencies combined. See DORIS MEISSNER ET. AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 12 (2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> [<http://perma.cc/8LQB-DNJK>] (reporting that the U.S. government spent \$18 billion on immigration enforcement in 2013, compared to the combined \$14.4 billion it spent on the Federal Bureau of Investigation, the Drug Enforcement Agency, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, and Firearms combined).

192. In the years 1955–1964, the highest annual total of formal removals was 17,695, in 1955. See OFFICE OF IMMIGRATION STATISTICS, *supra* note 188, at 103 tbl.39.

193. In FY 2013, DHS issued 438,421 formal orders of removal. JOHN F. SIMANSKI, OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 tbl.8, [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf) [<http://perma.cc/Z4J3-898B>].

194. See *supra* notes 57–68 and associated text. There are two published cases involving Cuban citizens who were arrested in New York City on charges relating to loitering with the intention of soliciting men for sex. See *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956); *Ganduxe y Marino v. Murff*, 183 F. Supp. 565 (S.D.N.Y. 1959), *aff’d without opinion sub nom.* *Ganduxe y Marino v. Esperdy*, 278 F.2d 330 (2d Cir. 1960). However, neither involved a deportation proceeding that followed close on the heels of a criminal arrest. See *Ganduxe y Marino*, 183 F. Supp. 565; *Flores-Rodriguez*, 237 F.2d 405.

195. On widespread use of detention, see generally García Hernández, *Immigration Detention As Punishment*, *supra* note 9; Stumpf, *supra* note 9.

196. See Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666 (2011) (discussing the impact of deportation on Latinos, who in 2009 comprised 94 percent of all those deported).

197. Many LGBTQ and gender nonconforming people continue to be subject to high levels of policing. See generally JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF*

Despite these contrasts, however, *Fleuti* presents intriguing parallels to more recent police-immigration cooperation. One would be hard pressed, looking at Fleuti's experience, to claim that the deportation system and the criminal law enforcement system were completely, or even largely, separate in 1958. The long history of information sharing between local police and federal immigration officials suggests that some key conceptual elements of crimmigration were already in place when legislative changes and increases in federal funding created the infrastructure that we now recognize as the crimmigration system. A full consideration of *Fleuti* thus complicates the "before" and "after" narrative that often dominates discussions of crimmigration and provides a new perspective on the current crimmigration era.

This Part explores what *Fleuti* can tell us about the contemporary crimmigration convergence, highlighting crimmigration's reliance on over-policing as a form of surveillance, the role that crimmigration plays in perpetuating a highly racialized system of mass deportation, and the connections between crimmigration and the policing of sexuality.

#### A. *Immigration Enforcement and Over-Policing, Then and Now*

The term "over-policing" denotes an approach that targets particular segments of the population for high levels of investigations, arrests, and prosecutions, often for minor offenses. In its contemporary manifestation in the United States, over-policing is inextricably tied to race.<sup>198</sup> Professor Kenneth Nunn has described the phenomenon as follows:

To the extent that the concentration of investigation and arrests in African American communities exceeds that in white communities, without reason to believe that African Americans offend at a greater rate than whites, then such practices amount to unjustified "over-policing." Over-policing may also occur when the police concentrate their efforts not on illegal activity, but on *legitimate* citizen behavior with the hope that in the process of investigation some evidence of crime may be uncovered. This kind of over-policing is what occurs when police conduct drug sweeps in Black neighborhoods and detain African American motorists for "driving while Black."<sup>199</sup>

At the center of contemporary, race-based over-policing is the approach often referred to as broken windows policing. The broken windows theory,

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LGBT PEOPLE IN THE UNITED STATES (2011) (describing the policing of LGBTQ and gender nonconforming people, particularly those who are low-income and of color). However, someone in Fleuti's circumstances—a white, middle-class gay man—would be far less likely to come into contact with the police today than Fleuti was in the 1950s.

198. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

199. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was A "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 400–01 (2002) (footnotes omitted).

proposed by political scientist William Q. Wilson and criminologist George L. Kelling in 1982, holds that aggressive policing of minor crimes such as vandalism and public drinking will deter the commission of more serious crimes by creating an atmosphere of order.<sup>200</sup> Broken windows policing strategies are heavily concentrated in low-income communities of color<sup>201</sup> and “affect millions of people in the United States each year, resulting in more convictions than for more serious crimes and constituting the most common point of contact between the public and the criminal justice system.”<sup>202</sup>

A number of commentators have linked the advent of crimmigration to rising rates of incarceration.<sup>203</sup> *Fleuti* adds to this analysis by highlighting crimmigration’s dependence on over-policing as a form of surveillance.<sup>204</sup> The system of mass deportation that we have today depends on the existence of an expansive criminal justice system that subjects communities of color to regular monitoring through frequent stops and arrests. At the same time, programs that promote police-immigration cooperation have themselves become drivers of over-policing.

### 1. *Over-Policing and Deportation at Midcentury*

Even at midcentury, when criminal law enforcement took place on a much smaller scale than it does today,<sup>205</sup> over-policing was a key aspect of the U.S. criminal justice system. The era’s most prominent example of over-policing was no doubt the use of vagrancy laws and other criminal statutes to maintain white supremacy in the Jim Crow South.<sup>206</sup> That system, directed at African

200. George J. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982.

201. For example, recent litigation challenging New York City’s stop-and-frisk practices has led to the release of statistics showing not only the stunning levels of interaction with the police that exist within urban areas but also the disproportionate effects on African Americans and Latinos. For example, over an eight-and-a-half-year period, the New York City Police Department made 4.4 million pedestrian stops, and 83 percent of those stopped were African American or Latino. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013).

202. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 273–74 (2009) (footnotes omitted).

203. César García Hernández and Juliet Stumpf have both tied the expansion of immigration detention to the rise of the War on Drugs. García Hernández, *Immigration Detention As Punishment*, *supra* note 9; Stumpf, *supra* note 9; see also Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 647–49 (2012) (arguing that immigration enforcement has become a site of overcriminalization).

204. The connection between crimmigration and surveillance has only recently begun to receive attention. See Kalhan, *supra* note 79.

205. See ALEXANDER, *supra* note 198, at 72–74 (discussing massive increases in federal funding for local law enforcement as part of the War on Drugs beginning in the 1980s); *id.* at 78–80 (discussing changes in civil forfeiture laws that significantly increased the budgets of local police departments).

206. On Black Codes, see generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (1988). The Supreme Court struck down vagrancy laws as void for vagueness in 1972. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

Americans and operating in communities that contained few foreign nationals, did not intersect extensively with immigration enforcement.<sup>207</sup> There was, however, another form of midcentury over-policing that regularly impacted noncitizens: the dragnet directed at “sex perverts” in cities across the country.

When George Fleuti immigrated to the United States in 1952, he arrived in a country that was in the grips of a sex panic.<sup>208</sup> Beginning in the mid-1940s, FBI Director J. Edgar Hoover and police chiefs around the country regularly warned upstanding citizens about the threats posed by the “perverts” and “sexual psychopaths” in their midst.<sup>209</sup> Fifteen states set up commissions to study the problem of “sex deviation.”<sup>210</sup> Although this hysteria was ostensibly directed at sexual offenses broadly defined, its most concrete result was a massive increase in police surveillance of areas in public parks and restrooms used by men in search of sexual liaisons with other men. For example, in 1947, the U.S. Park Police began a “Pervert Elimination Campaign” in Washington, D.C. “Under this program . . . hundreds of men were arrested and charged with disorderly conduct, loitering, indecency, or some other violation . . . [and] approximately four times as many men were apprehended, questioned, and released without arrest.”<sup>211</sup> Those who were not arrested were fingerprinted and photographed, and their names and occupations were recorded.<sup>212</sup> The police then entered this information into a “pervert file.”<sup>213</sup>

The policing of same-sex erotic activity was not new,<sup>214</sup> but such policing escalated significantly in the 1950s.<sup>215</sup> Local police departments devoted extensive resources to the surveillance of restrooms and other cruising areas,

207. Vagrancy laws were also commonly used in the Southwest in the early twentieth century to compel the labor of Mexican workers. See EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR* 157 (2002) (describing use of vagrancy laws in Texas “at the beginning of each cotton-picking season to round up Mexicans to work in the fields”). Deirdre Moloney has described the ways in which the use of vagrancy laws against Mexicans in Denver in the 1920s intersected with the deportation system. MOLONEY, *supra* note 75, at 87–89 (describing a raid “on the Mexicans” in 1920 that resulted in 289 arrests, of which 16 arrestees were held for deportation, while 130 others were “sent to court and given hours to leave town”). Such incidents are in keeping with the well-documented role of police in deporting Mexican immigrants in the early twentieth century. See *supra* notes 134–35 and associated text. Such efforts generally targeted groups of immigrants and involved little formal administrative process; in that respect they provide a contrast to a case like *Fleuti*, in which an arrest became the basis for a lengthy individual investigation.

208. See generally D’EMILIO, *supra* note 54, at 40–47, 176–95; Eskridge, *supra* note 69, at 708 (tracing pre-World War II roots of this panic and its intensification in the postwar period).

209. Sklansky, *supra* note 55, at 900–01.

210. JOHNSON, *supra* note 141, at 56.

211. *Id.* at 59.

212. *Id.*

213. *Id.*

214. See generally NAYAN SHAH, *STRANGER INTIMACY: CONTESTING RACE, SEXUALITY, AND THE LAW IN THE NORTH AMERICAN WEST* 131–52 (2012) (discussing the use of sodomy laws and other laws relating to sexual conduct against Asian immigrants in the late nineteenth and early twentieth century).

215. See D’EMILIO, *supra* note 54, at 40–53.

posting undercover police officers to pose as decoys and constructing elaborate systems to covertly observe bathroom stalls and other ostensibly private areas.<sup>216</sup> The police were thus a pervasive presence in the lives of men like George Fleuti. One study of 550 white males “with extensive histories of homosexuality,” interviewed between 1940 and 1956, found that between 20 and 25 percent reported encountering trouble with the police.<sup>217</sup>

Over-policing was just one part of the equation, however. In addition to the pervasive policing of homosexuality in this era, the provisions of the immigration laws relating to homosexuality were also, by the standards of the day, unusually severe. The “psychopathic personality” ground of exclusion, enacted as part of the McCarran-Walter Act of 1952, was itself a manifestation of the same sex panic that fueled the rise in bathroom sting operations.<sup>218</sup> It barred anyone deemed afflicted with a “psychopathic personality” from entering the United States, and Congress quite clearly intended to include homosexuality within its scope.<sup>219</sup> Contained within the health grounds of exclusion, this ground required no particular length of sentence or even a conviction.<sup>220</sup>

While a person facing many other grounds of exclusion or deportation might have a chance of obtaining a waiver, discretionary relief was rarely available for those “afflicted” with homosexuality.<sup>221</sup> A person who had committed a minor or long-ago crime could argue that the wrongdoing was outweighed by positive attributes.<sup>222</sup> Psychopathic personality disorder,

216. Professor David Sklansky has argued that the type of restroom surveillance that led to Fleuti’s arrests was a hidden subtext to criminal procedure doctrine as it developed during the Warren Court. *See* Sklansky, *supra* note 55.

217. JOHN H. GAGNON & WILLIAM SIMON, *SEXUAL CONDUCT* 103 (2d ed. 2005).

218. *See* Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 345, 352–53 (2007) (discussing relationship of language in McCarran-Walter Act to 1950s sex panics). Similar language—“constitutional psychopathic inferiority”—appeared within the grounds of exclusion in the Immigration Act of 1917, prior to the passage of the INA. Act of 1917, 39 Stat. 874, ch. 29, § 3. In the 1950s and ’60s, the INS sometimes sought to invoke this provision in seeking to deport individuals who had entered prior to the change in terminology. *See infra* notes 280–86 and associated text (describing use of this strategy on Fleuti following his Supreme Court victory). Margot Canaday has argued, however, that the provision was rarely invoked in the early twentieth century against homosexuals, who were far more likely to be excluded or deported on public charge grounds. *See* CANADAY, *supra* note 17, at 229 n.70.

219. *See* *Boutilier v. INS*, 387 U.S. 118, 120–23 (1967) (reviewing legislative history of provision); CANADAY, *supra* note 17, at 219–20.

220. All that was required was a medical certificate. *See supra* note 41 and associated text.

221. At the time of his reentry in 1956, Fleuti would not have met the criteria for the chief form of relief available to a returning legal resident, section 212(c), because he had not resided in the United States for seven years. *See* former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).

222. Section 212(c) was the successor to the Seventh Proviso to section 3 of the Immigration Act of 1917. Discretionary factors taken into account in the exercise of discretion under the Seventh Proviso, and later under section 212(c), included ties to the United States, work history, community involvement, military service, and other such positive factors, to be weighed against the applicant’s undesirability. *See* *Matter of M-----*, 3 I. & N. Dec. 804 (B.I.A. 1949).

however, was viewed as a perpetual, ongoing condition, and a person suffering from it had little chance of persuading an adjudicator that it could be outweighed by other factors.

The sex panic that fueled these developments in both criminal law and immigration law was linked to a national security panic. The Lavender Scare, which unfolded alongside the Red Scare, conceived of homosexuals as security risks not only because they were thought to be vulnerable to blackmail but also because they were thought to have subversive tendencies.<sup>223</sup> In the late 1940s, politicians began voicing concerns about the supposed security risks posed by homosexuals within the State Department and other federal agencies, and there was a strong homophobic undercurrent to the espionage investigation and trials of former State Department Advisor Alger Hiss in 1949.<sup>224</sup> In 1950, in the midst of Senator Joseph McCarthy's campaign to rid the federal government of Communists, Senator George Wherry held hearings on the employment of "moral perverts" in the federal government.<sup>225</sup> Historian David K. Johnson has noted in his history of the Lavender Scare that "[i]n 1950, many politicians, journalists, and citizens thought that homosexuals posed more of a threat to national security than Communists."<sup>226</sup> Lieutenant Roy Blick, head of the Metropolitan Police vice squad, testified that the District of Columbia had as many as five thousand homosexuals, which was presented as an alarming figure.<sup>227</sup> Blick testified before a Senate committee in 1950 that there was "a need in this country for a central bureau for records of homosexuals and perverts of all types" and suggested that such files should be available to all government agencies.<sup>228</sup> Johnson notes that the subcommittee, in its report, praised Blick's work, recommended increased appropriations for his squad, and "proposed the establishment of a special Washington police squad to 'work exclusively on connections between Communists and sex perverts' and 'sufficient police personnel for the adequate policing of crimes involving homosexuality.'"<sup>229</sup>

As noted in Part II, Fleuti's fear that information about his arrests had been "reported to Washington" was probably the result of publicity surrounding the Lavender Scare.<sup>230</sup> Historian John D'Emilio has described the dynamic that gave rise to the formation of this system: "Once the government assumed the position that homosexuals and lesbians threatened the welfare of the country, it had to devise methods to cope with the problem that gay people

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223. JOHNSON, *supra* note 141; Baxter, *supra* note 140.

224. Baxter, *supra* note 140, at 122.

225. D'EMILIO, *supra* note 54, at 42; *see id.* at 40–44.

226. JOHNSON, *supra* note 141, at 2.

227. *Id.* at 86.

228. *Id.* at 87.

229. *Id.*

230. *See supra* notes 140–46.

could conceal their identity.”<sup>231</sup> As D’Emilio has detailed, the FBI’s solution to this problem was to establish connections to local police departments: “Not content with acting only on requests to screen particular individuals, it adopted a preventative strategy that justified widespread surveillance. The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued.”<sup>232</sup> While it does not appear that the FBI systematically shared this information with the INS, the Civil Service Commission relied on it extensively. Between April and November 1950, for example, the government purged 382 federal employees as suspected homosexuals, many of whom “were men who had been arrested on sex charges in the postwar years, but whose arrests went unnoticed until the public scandal [generated by congressional hearings] inaugurated a regular reporting system between local police, the FBI, and the Civil Service Commission.”<sup>233</sup> In turn, the high value that the federal government placed on arrest data spurred higher levels of policing. D’Emilio has noted that “[t]he highly publicized labeling of lesbians and homosexuals as moral perverts and national security risks, and the antigay policy of the federal government, gave local police forces across the country free rein in harassing them.”<sup>234</sup>

Thus, by the time the INS began building ties with local police departments in the mid-1950s, these police departments were already well accustomed to passing along vice squad arrest data to federal agencies. “Homosexuals” and “sex perverts” were not a specific priority of immigration enforcement either nationally or locally in the late 1950s, and there was no coordinated national effort to deport men arrested in public restrooms (a fact that may explain the regional variation in such cases, with a particularly high number originating in Detroit). Nevertheless, Fleuti found himself under investigation by the INS because he fell at the intersection of three different forces: first, the increased police surveillance, indirectly fueled by a national security panic, of men who congregated in known cruising areas; second, an extremely broad ground of exclusion that made immigrants arrested in such places easy targets for deportation; and third, a lack of availability of discretionary relief. Because of this confluence, Fleuti and others in his circumstances were hit exceptionally hard by the newly forged relationships between federal immigration officials and local police.

The use of arrest data by the Civil Service Commission during the Lavender Scare may well represent the first systematic use of arrest data by a federal administrative agency. Police surveillance of public parks and restrooms was not undertaken for the purpose of catching spies or subversives. Rather, it was the *pervasiveness* of police surveillance of cruising areas that

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231. D’EMILIO, *supra* note 54, at 46.

232. *Id.*

233. JOHNSON, *supra* note 141, at 117.

234. D’EMILIO, *supra* note 143, at 62.

made vice squad arrest records a valuable source of information to the FBI and the Civil Service Commission in purging homosexual employees from the federal government.

## 2. *Over-Policing and the Contemporary Crimmigration System*

The Secure Communities Program, launched by DHS in 2008, and the Priority Enforcement Program (PEP), which replaced Secure Communities in 2015,<sup>235</sup> make J. Edgar Hoover's use of vice squad data look like child's play. The key innovation of Secure Communities was the establishment of interoperability between FBI and DHS databases.<sup>236</sup> This interoperability continues under PEP: each time a state or local law enforcement officer submits information about an individual to the FBI in order to obtain a criminal background check, the FBI automatically transmits that information to Immigration and Customs Enforcement (ICE), which checks the information against its own databases and then determines whether to take enforcement action against individuals who appear to be removable.<sup>237</sup> Secure Communities has been described as "the largest expansion of local involvement in immigration enforcement in the nation's history," designed to screen "every single person arrested by a local law enforcement official anywhere in the country" for immigration violations.<sup>238</sup> As of February 2015, Secure Communities had led to the submission of over forty-seven million sets of fingerprints to ICE and resulted in over four hundred thousand removals.<sup>239</sup>

Although the rhetoric of Secure Communities and PEP has emphasized dangerousness, the statistics tell a different story. An analysis of data from 2012–13 reveals that 47.7 percent of those taken into ICE custody through Secure Communities had no convictions at all.<sup>240</sup> Many of the remaining detainees issued through the program were for individuals with convictions for

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235. The termination of Secure Communities was announced on November 20, 2014. Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) [<http://perma.cc/45B4-8LAA>]. While the creation of the Priority Enforcement Program was announced on the same date, the program did not officially become operational until July 2015. See *id.*; *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENF'T, <http://www.ice.gov/secure-communities> [<http://perma.cc/Z8NC-9KYE>] (last visited Dec. 20, 2015).

236. For detailed descriptions of Secure Communities, see Cimini, *supra* note 5; Cox & Miles, *supra* note 4; Kalhan, *supra* note 79.

237. See Cimini, *supra* note 5, at 120–21.

238. Cox & Miles, *supra* note 4, at 93.

239. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE'S USE OF IDENT/IAFIS INTEROPERABILITY: MONTHLY STATISTICS THROUGH FEBRUARY 28, 2015, at 2, 6 (2015), [https://www.ice.gov/sites/default/files/documents/FOIA/2015/sc\\_stats\\_YTD2015.pdf](https://www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf) [<https://perma.cc/4EW6-M9CX>].

240. *Few ICE Detainers Target Serious Criminals*, TRAC IMMIGRATION (Sept. 17, 2013), <http://trac.syr.edu/immigration/reports/330> [<http://perma.cc/AW9G-4XED>] (analyzing data from FY 2012 and first four months of FY 2013); see also Cimini, *supra* note 5, at 131.

minor or nonviolent offenses.<sup>241</sup> As with the vice squad arrest records that the FBI mined in the 1950s, contemporary police data appears to be useful to ICE not so much because it identifies dangerous criminals but because it sweeps so broadly, bringing vast segments of the population under surveillance.

In November 2014, DHS Secretary Jeh Johnson announced the termination of Secure Communities, acknowledging that the program “has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws.”<sup>242</sup> In its place, DHS launched PEP, under which ICE initiates removal proceedings against only those individuals who have been convicted of serious crimes or who present a threat to national security.<sup>243</sup> Under PEP, ICE no longer issues detainers, which are requests to local authorities to hold an individual in custody pending transfer to ICE custody; instead, ICE requests notification from state or local law enforcement agencies of an individual’s pending release.<sup>244</sup>

These changes may prove significant.<sup>245</sup> However, PEP notably retains Secure Communities’ information-sharing mechanisms in their entirety.<sup>246</sup> In essence, DHS has answered the concerns of Secure Communities’ critics with a promise to exercise restraint in *acting* on the information it gathers from police, rather than with any substantive reduction in the information gathering itself. The transition to PEP reflects a broader trend within immigration enforcement during the Obama Administration: a steady expansion of enforcement systems combined with promises to exercise greater discretion in determining who will actually be deported.<sup>247</sup> The underlying message is that even amid promises to reform the deportation system, information gathering will continue.

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241. See Cimini, *supra* note 5, at 131.

242. Memorandum from Jeh Charles Johnson, *supra* note 235.

243. *Id.* at 2.

244. *Id.*

245. Much of the commentary on PEP from advocacy organizations has emphasized its similarities to Secure Communities. See, e.g., NAT’L IMMIGRATION LAW CTR., WHY ‘PEP’ DOESN’T FIX S-COMM’S FAILINGS (June 2015), <http://www.nilc.org/PEPnotafix.html> [<http://perma.cc/6LU3-YHQZ>] (arguing that PEP “does not comply with the Fourth Amendment’s requirements, thus exposing local law enforcement agencies to legal liability” and “like S-Comm before it, threatens to erode trust in local law enforcement, making all communities less safe”). Professor Juliet Stumpf has argued that PEP “takes a new and significant step” in restoring agency discretion at the macro level regarding priorities for deportation, but notes that it is too early to tell whether PEP will succeed in recapturing such discretion from front-line officers. See Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1282–84 (2015); see also César Cuauhtémoc García Hernández, *PEP vs. Secure Communities*, CRIMMIGRATION (July 7, 2015), <http://crimmigration.com/2015/07/07/pep-vs-secure-communities> [<http://perma.cc/RCE4-SQEU>] (expressing skepticism about whether PEP represents a significant change from Secure Communities but noting that PEP contains stricter guidelines regarding enforcement priorities).

246. NAT’L IMMIGRATION LAW CTR., *supra* note 245, at 2–3.

247. See generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

In 1959, Fleuti was an anomaly, subject to an exceptionally high level of policing and an exceptionally broad ground of exclusion, with little chance of obtaining discretionary relief from deportation. From the vantage point of the contemporary crimmigration system, however, Fleuti looks like the canary in the coal mine: the particular combination of factors that rendered him so vulnerable to the growing collaboration between the police and the INS can today be said to characterize large numbers of immigrants.

The first element of this shift is that over-policing has become the norm. Over the past three decades, new approaches to criminal law enforcement have led to an astounding rise in police stops, arrests, prosecutions, and convictions. As legal scholar Michelle Alexander has chronicled, the War on Drugs and “three strikes” sentencing laws have led to an astronomical rise in prison populations.<sup>248</sup> Meanwhile, broken windows policing has led to equally dramatic rises in arrest rates for minor offenses in low-income communities of color across the country. For example, over a twelve-year period in New York City, marijuana arrests rose by 882 percent.<sup>249</sup> Immigration law scholar Nancy Morawetz has argued that the breadth of current drug laws and the discretion wielded by police in enforcing them have rendered such laws the modern day equivalent of vagrancy laws.<sup>250</sup>

The second element of this shift is that the immigration consequences of even minor convictions have become far more severe than they were in Fleuti’s era. Amendments to the INA over the past few decades, most significantly in 1996, have rendered many criminal grounds of removal as broad as the psychopathic personality ground was in 1959; even long-term legal residents can be deported for offenses for which they served no time in prison.<sup>251</sup> These

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248. On the War on Drugs, see generally ALEXANDER, *supra* note 198, at 49–139. Alexander notes that the prison admissions for African Americans reached a level in 2000 that was “*more than twenty-six times* the level in 1983. The number of 2000 drug admissions for Latinos was twenty-two times the 1983 admissions.” *Id.* at 98 (footnote omitted).

249. See Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 190–91 (2008) (discussing rise in arrest rates from 1990 to 2002) (citing Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 1, 3 (2006)).

250. *Id.* at 191 (citing MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USES AND ABUSES OF VICTIMS’ RIGHTS 47–70 (2002)).

251. On the immigration consequences of crimes, see generally HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 6 (2007), [http://www.hrw.org/sites/default/files/reports/us0707\\_web.pdf](http://www.hrw.org/sites/default/files/reports/us0707_web.pdf) [<http://perma.cc/9A79-H4X6>] (describing 1996 changes to laws governing immigration consequences of convictions). The immigration consequences of controlled substance offenses are particularly harsh. Any drug conviction, with the exception of simple possession of small amounts of marijuana, constitutes grounds for deportation. Immigration and Nationality Act (INA) § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2012). A conviction for sale of a controlled substance, no matter how minor, constitutes an “aggravated felony” and thus results, in almost all cases, in mandatory deportation. See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (classing illicit trafficking in a controlled substance as an aggravated felony); 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony ground of

amendments have also severely curtailed the availability of discretionary relief, leaving many immigrants who trigger grounds of deportability with no possibility of remaining in the United States unless, like Fleuti, they pursue novel constitutional or statutory arguments in federal court.<sup>252</sup> Even the *Fleuti* Doctrine itself has been curtailed, no longer permitting lawful permanent residents with criminal convictions to bypass the grounds of inadmissibility when returning from a brief trip abroad.<sup>253</sup>

National security panics have fueled these developments in immigration enforcement.<sup>254</sup> Proponents of an escalation in enforcement have frequently drawn on national security justifications to argue for closer collaboration with local police. For example, prominent restrictionist Kris Kobach has argued that widespread immigration screening by police could have prevented the September 11 attacks.<sup>255</sup>

Kobach's description of police-immigration cooperation is instructive. He suggests that such assistance "need only be occasional, passive, voluntary, and pursued during the course of normal law enforcement activity" because "[t]he net that is cast daily by local law enforcement during routine encounters with members of the public is so immense that it is inevitable illegal aliens will be identified."<sup>256</sup> Kobach's statement reveals the dependence of such an enforcement strategy on a criminal law enforcement system that maintains an "immense" scale. While Kobach's aim of achieving the complete integration of

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deportation). Drug-related inadmissibility grounds are even broader. *See* Morawetz, *Rethinking Drug Inadmissibility*, *supra* note 249, at 167.

252. A noncitizen who is found deportable may seek to avoid deportation through an application for asylum, cancellation of removal, or another form of relief. *See generally* STEEL ON IMMIGRATION LAW, ch. 14 §§ 21–34 (2d ed. 2015). In 1996, Congress drastically curtailed the ability of those with criminal convictions to apply for relief. *See* HUMAN RIGHTS WATCH, *supra* note 251, at 25–30. However, the Supreme Court has issued a number of decisions in recent years adopting narrow readings of the 1996 amendments and thus preserving eligibility for relief for some applicants. *See, e.g.,* Lopez v. Gonzales, 549 U.S. 47 (2006) (narrowly construing provision relating to classification of certain drug offenses); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (narrowly construing provision relating to crimes of violence); *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that those who pleaded guilty to charges prior to the effective date of the 1996 amendments continue to be eligible for relief from removal under former section 212(c) of the INA, which was repealed in 1996).

253. *See supra* note 39.

254. *See* HUMAN RIGHTS WATCH, *supra* note 251, at 6 (discussing influence of 1993 World Trade Center bombing and 1995 Oklahoma City Federal Building bombing on passage of 1996 immigration laws). As Jennifer Chacón has observed, the term "national security" has been deployed within immigration law "in a nebulous manner that blurs the boundary between freedom from crime—or personal 'security'—and national security. As a consequence, the removals of non-citizens on the grounds of criminal violations can be, and frequently are, depicted as national security policy." Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1853 (2007).

255. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 191 (2005).

256. *Id.* at 181.

immigration enforcement with local policing has met resistance in the courts<sup>257</sup> as well as within law enforcement,<sup>258</sup> his vision of harnessing the immense amount of data generated by current criminal law enforcement practices has to a large extent been realized in Secure Communities and PEP.

*B. Race, Crimmigration, and the Changing Face of Mass Deportation*

In addition to revealing the connections between crimmigration and over-policing, *Fleuti* also sheds light on crimmigration's role in perpetuating a highly racialized immigration enforcement system that has shifted over the past half century from a largely informal system operating mostly in the Southwest to a system that operates nationwide through ostensibly formal deportation proceedings.

One of the striking aspects of *Fleuti* and similar midcentury cases is that they all involve Canadians and Western Europeans.<sup>259</sup> One must be cautious about generalizing from such a small number of cases, and it is likely that the skew evident in published cases in part reflects the demographics of those who had the resources to pursue administrative and in some cases judicial appeals.<sup>260</sup> Nevertheless, the composition of this group is significant, not only in contrast to today's crimmigration system, but in contrast to the deportation

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257. See *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (“As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.” (internal citations omitted)).

258. See MAJOR CITIES CHIEFS IMMIGRATION COMM., RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 5–6 (2006), [https://www.majorcitieschiefs.com/pdf/MCC\\_Position\\_Statement.pdf](https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf) [<https://perma.cc/J3D7-SAUQ>] (expressing concern of police chiefs that immigration enforcement by local police would “negatively effect [sic] and undermine the level of trust and cooperation between local police and immigrant communities”); Craig E. Ferrell, Jr., *Immigration Enforcement: Is It a Local Issue?*, POLICE CHIEF (Feb. 2004), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=224&issue\\_id=22004](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=224&issue_id=22004) [<http://perma.cc/3WQA-KGUB>] (“Local police agencies depend on the cooperation of immigrants, legal and illegal, in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families. Because many families with undocumented family members also include legal immigrant members, this would drive a potential wedge between police and huge portions of the legal immigrant community as well.”).

259. See *supra* notes 57–68 and associated text. Although there are two published cases from this period involving Cuban nationals arrested in similar circumstances, these cases do not indicate a direct link between the arrests and the deportation proceedings. See *supra* note 194.

260. It is likely that the vast majority of those threatened with deportation on grounds of homosexuality opted to voluntarily depart rather than to be formally deported, and thus the small number of published cases may not be representative. See *supra* note 57. Even *Fleuti* himself initially declined to hire an attorney because he was embarrassed to tell anyone about the charges against him and only later decided to fight his case. See *id.* Moreover, Mexican immigrants were often deported without being given the option of a formal deportation hearing. See *infra* notes 268–71 and associated text.

system of the 1950s. In both eras, Latinos—particularly Mexicans—have been the prime targets of immigration enforcement.<sup>261</sup>

Fleuti was put into deportation proceedings just a few years after the INS carried out Operation Wetback,<sup>262</sup> a massive, quasi-military operation that resulted in over a million deportations to Mexico under egregious conditions that often bypassed formal administrative proceedings.<sup>263</sup> Those rounded up in Operation Wetback were deported en masse with little opportunity to raise defenses to deportation or claims for relief.<sup>264</sup> Describing a 1950 raid that was part of the lead up to Operation Wetback, Mae Ngai cites a description by a South Texan of the deportation of Mexican families with American-born children:

Their home life was [abruptly] broken, they were compelled to sell homes [and] possessions at a great sacrifice; their incomes ended and they were picked up by the Border Patrol at night and ‘dumped’ on the other side of the river in numbers so great [that] Mexico’s railways and bus lines could not move them into the interior fast enough. . . . [T]housands of these families were stranded along the border destitute without food or funds or employment.<sup>265</sup>

Some of the Operation Wetback deportees were returned to Mexico on a ship that a later congressional investigation “likened . . . to an ‘eighteenth century slave ship’ and a ‘penal hell ship.’”<sup>266</sup>

European immigrants were not subject to the informal and coercive enforcement practices that the INS used in programs such as Operation Wetback.<sup>267</sup> Collaboration with the police provided the INS with a way to pursue someone like George Fleuti: an “undesirable” due to his sexual orientation, yet someone who, due to his race, was accorded a high degree of formal process before being ordered deported.<sup>268</sup>

261. See NGAI, *supra* note 73; Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Vázquez, *supra* note 196, at 652–53.

262. See generally GARCÍA, *supra* note 135; see also Vázquez, *supra* note 196, at 652–53.

263. While deportation statistics from the 1950s reflect low numbers of formal orders, they also document very high levels of “returns,” defined as “the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.” OFFICE OF IMMIGRATION STATISTICS, *supra* note 188, at 103 tbl.39. Between 1950 and 1954, the INS issued 104,398 formal orders of deportation or exclusion. *Id.* During that same five-year period, there were a total of 3,909,092 returns. *Id.*

264. See GARCÍA, *supra* note 135, at 194–98 (discussing abuses during Operation Wetback).

265. NGAI, *supra* note 73, at 160 (alterations in original).

266. *Id.* at 156.

267. See *id.* at 75–90 (describing legislative and administrative measures adopted in the 1920s and ’30s to shield European immigrants from the harsh effects of deportation laws).

268. It has long been established that individuals facing deportation have the right to notice and an opportunity to be heard. *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903). However, in practice this right has often been ignored, in ways that are highly racialized. See generally Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013) (describing erroneous deportations of U.S. citizens racially profiled as immigrants).

Immigration scholar César García Hernández has argued that the advent of crimmigration parallels a transition that occurred within criminal law in the wake of the civil rights movement, from de jure to de facto racism.<sup>269</sup> The transformation within criminal law enforcement entailed the replacement of openly racist rhetoric and laws with facially neutral regimes that have disproportionately impacted people of color: “[L]awmakers concerned about the civil rights era’s elimination of cultural and legal mechanisms used to subordinate entire racial groups turned to the government’s criminal law power to stigmatize and punish.”<sup>270</sup> García Hernández links the rise of crimmigration to this broader phenomenon, arguing that in the 1980s and ’90s “[w]hen immigration became a national political concern for the first time since the civil rights era, policymakers turned to criminal law and procedure to do what race had done in earlier generations: sort the desirable newcomers from the undesirable.”<sup>271</sup>

*Fleuti* provides a new angle on this insight. As Section IV.A argues, the number of people who share *Fleuti*’s vulnerability to police-immigration cooperation has vastly expanded in recent decades due to the advent of broken windows policing and to the increasingly harsh and inflexible nature of the deportation laws. During this same era, however, the rise of the civil rights and immigrants’ rights movements and a changing political discourse have led to the demise of truly informal deportation practices of the sort used in Operation Wetback. In place of such practices we now have a system that provides a veneer of formal and race-neutral process: rather than being run out of town in the middle of the night, deportees are now put through fast-track procedures that include the issuance of a formal order yet often provide no opportunity for an individualized determination.<sup>272</sup>

Crimmigration can be seen as a system of mass deportation designed for an era in which Operation Wetback-style deportation campaigns are no longer politically palatable.<sup>273</sup> *Fleuti* belonged to a relatively small demographic in the

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269. García Hernández, *Creating Crimmigration*, *supra* note 6, at 1485–1503.

270. *Id.* at 1485.

271. *Id.* at 1459.

272. As I have argued elsewhere, procedural safeguards within the contemporary immigration adjudication system are grossly inadequate. See Rosenbloom, *supra* note 268, 1981–89; see also Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014); Miller, *supra* note 3, at 614 (arguing that “we have moved from an era in which courts and Congress showed a willingness to afford non-U.S. citizens limited procedural and substantive rights to an era in which the rights of non-citizens have been sharply curtailed”). My point here is that deportations today overwhelmingly take place through formal proceedings (albeit fast-track ones, in many cases), in contrast to many cases in the 1950s that bypassed administrative procedures entirely.

273. Calls to revive such tactics have generally been found only on the fringes of the restrictionist movement. See Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111, 117 (1996) (describing the calls to bring back Operation Wetback-style tactics by restrictionist Alan Brimlow). However, presidential candidate Donald Trump has recently brought new prominence to such arguments. See Jill Colvin, *Trump Touts Eisenhower-*

1950s: those who were undesirable enough to be hounded for deportation, but who were privileged enough to be accorded a formal deportation proceeding. With regard to this particular combination that Fleuti embodied—the vulnerability on the one hand, and the entitlement to a formal proceeding, on the other—the demographic has broadly expanded since the *Fleuti* era.

### C. Crimmigration and the Policing of Sexuality and Gender Identity

Finally, *Fleuti* provides a reminder that the policing of sexuality and gender identity has been a key part of the development of crimmigration. While there is a growing literature on crimmigration and a substantial literature on LGBTQ immigration issues, the two inquiries have rarely intersected. LGBTQ immigration scholarship has, for the most part, been confined to two issues: asylum claims based on sexual orientation and gender identity, on the one hand, and immigration benefits for same-sex couples on the other.<sup>274</sup> Crimmigration scholarship, meanwhile, has tended to sidestep LGBTQ issues except with regard to detention conditions.<sup>275</sup>

One notable exception to the siloing of these two inquiries is an article by Pooja Gehi. Drawing on her experience as an attorney at the Sylvia Rivera Law Project, Gehi describes the impact of contemporary crimmigration policies on the LGBTQ community and in particular on transgender and gender nonconforming immigrants.<sup>276</sup> Gehi notes that “[a]lthough little statistical data exists, advocates who work at the intersection of LGBTQ and immigrant

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*Era Program with Dark History as a Model for Deportation of Immigrants*, U.S. NEWS (Nov. 11, 2015, 11:18 PM), <http://www.usnews.com/news/politics/articles/2015/11/11/trump-touts-program-with-dark-history-as-deportation-model> [perma.cc/MK8H-QBSV].

274. On LGBTQ asylum claims see, e.g., Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT’L L.J. 605 (1993); Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 83 (2008); Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135 (2006); Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J. 265 (2005); Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y.C. L. REV. 233 (2005). On same-sex binational partners, see, e.g., Lena Ayoub & Shin-Ming Wong, *Separated and Unequal*, 32 WM. MITCHELL L. REV. 559 (2006); Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100 (2013). The issues facing binational couples have been rendered moot by the Supreme Court’s recent decisions on same-sex marriage. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that same-sex couples have a constitutional right to marry); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act on Fifth Amendment grounds).

275. See, e.g., Annette De La Torre, *Is Ze an American or a Foreigner? Male or Female? Ze’s Trapped!*, 17 CARDOZO J.L. & GENDER 389 (2011); Shana Tabak & Rachel Levitan, *LGBTI Migrants in Immigration Detention: A Global Perspective*, 37 HARV. J.L. & GENDER 1 (2014); C.T. Turney, *Give Me Your Tired, Your Poor, and Your Queer: The Need and Potential for Advocacy for LGBTQ Immigrant Detainees*, 58 UCLA L. REV. 1343 (2011).

276. Gehi, *supra* note 5, at 357–58, 362–63.

justice understand that LGBTQ immigrants, especially transgender and gender-nonconforming immigrants, are particularly vulnerable to profiling and anti-immigrant bias, and are likely to experience particularly harmful consequences of the merger of criminal and immigration enforcement.”<sup>277</sup> She describes police stops as “almost inevitable” for low-income transgender people of color, a phenomenon known as “walking while trans.”<sup>278</sup> In addition, due to high levels of violence directed at transgender and gender nonconforming defendants in jails and prisons, such defendants are “often willing to take a guilty plea for a crime that they did not commit so that they can minimize jail time—even if this results in known or unknown future immigration repercussions.”<sup>279</sup>

*Fleuti* demonstrates the deep roots of this phenomenon. While Gehi’s article represents an important start to mapping the contemporary intersection of sexuality, gender identity, and crimmigration, this is an area that warrants further attention from crimmigration scholars.

#### CONCLUSION

The nature of police-immigration collaboration has changed a great deal since *Fleuti*’s day, transformed by funding and technological advances from a system that was local and ad hoc to one that is national, automated, and comprehensive. At the same time, though, *Fleuti* is a reminder that what has been so significant about the crimmigration era is not so much the linkage of two systems that had previously been separate, but the substantive changes within both systems that have occurred concurrently over the past several decades. These substantive changes include the emergence of a criminal justice system of mass surveillance and mass incarceration, and a set of deportation laws that are radically different from what they were in 1959, with regard to both grounds of deportability and opportunities for discretionary relief.

#### *Epilogue: The Ballad of George Fleuti*

The aspects of *Fleuti*’s case that are particularly relevant to rethinking the origins of crimmigration pertain to his November 1958 arrest and the opening of an INS investigation soon thereafter. Because *Fleuti* is a figure of considerable interest to immigration scholars, however, I am including here an account of the events that unfolded following *Fleuti*’s victory at the Supreme Court. This history, documented in *Fleuti*’s A-file, has not been recounted anywhere before.

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277. *Id.* at 362–63 (footnotes omitted).

278. *Id.* at 369 (noting that two-thirds of Sylvia Rivera Law Project clients report having been arrested).

279. *Id.* at 375–76.

Fleuti has gone down in the history books as a victor, prevailing before both the Ninth Circuit and the Supreme Court. But the Supreme Court victory did not put an end to Fleuti's immigration problems. As soon as Fleuti's case had concluded its journey through the federal courts, an INS attorney within the Los Angeles office wrote a memorandum to the Assistant Director for Investigations conveying to him the advice of the INS Regional Counsel to pursue a new theory of deportation.<sup>280</sup> The district office launched a new investigation of Fleuti that very day.<sup>281</sup>

The new theory advanced by the Regional Counsel was that Fleuti had been excludable at the time of his *initial* arrival in the United States in 1952.<sup>282</sup> In accord with this strategy, INS District Director George Rosenberg wrote to the PHS two months after the new investigation began, requesting that the PHS amend its previous finding that Fleuti had been suffering from "'Psychopathic Personality' (homosexuality-sexual deviation)" in 1956, at the time of his return from Mexico.<sup>283</sup> Instead, Rosenberg proposed, the PHS could find that Fleuti had been suffering from "'Constitutional Psychopathic Inferiority (homosexuality-sexual deviation)" prior to his initial arrival in the United States in October 1952.<sup>284</sup> The change in timing was designed to get around the doctrine that the Supreme Court had just announced in *Fleuti*; with Fleuti's homosexuality dated back to 1952, the case would now concern his inadmissibility upon first arrival rather than his later return from his trip to Mexico in 1956.<sup>285</sup> The change in terminology, from "psychopathic personality" to "constitutional psychopathic inferiority" was aimed at bringing Fleuti under the exclusion grounds contained in the 1917 Immigration Act, which was still in effect at the time of Fleuti's first arrival in October 1952.<sup>286</sup>

PHS obliged, and in the spring of 1964, Fleuti found himself once again in deportation proceedings.<sup>287</sup> In March 1965, an INS adjudicator once again found Fleuti deportable, rejecting Fleuti's argument that the language of the

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280. Memorandum from Trial Attorney [name redacted] to Assistant Dir. for Investigations [name redacted] (Aug. 27, 1963), in ICE Fleuti FOIA, *supra* note 15, at 6.

281. Immigration & Naturalization Serv. Form G-600A, Investigations Control Card (Aug. 27, 1963), in USCIS Fleuti FOIA, *supra* note 15, at 22.

282. Memorandum from Trial Attorney [name redacted], *supra* note 280.

283. Letter from George K. Rosenberg, Dist. Dir., Immigration & Naturalization Serv., to Dr. Arthur R. Dahlgren, Deputy Med. Dir. in Charge (Oct. 28, 1963), in USCIS Fleuti FOIA, *supra* note 15, at 15.

284. *Id.* at 15–16.

285. See *supra* notes 34–38 and associated text.

286. See *supra* note 218. The language was changed a few months later when the McCarran-Walter Act went into effect in December 1952. See *id.* The Supreme Court noted in its decision that Fleuti had entered the United States prior to the effective date of the McCarran-Walter Act and opined in dicta that "respondent's homosexuality did not make him excludable by any law existing at the time of his 1952 entry," a fact which made it "critical to determine whether his return from a few hours in Mexico in 1956 was an 'entry' in the statutory sense." *Rosenberg v. Fleuti*, 374 U.S. 449, 453 n.2 (1963).

287. Transcript of Oral Decision of the Special Inquiry Officer, *supra* note 174.

1917 Act did not encompass homosexuality.<sup>288</sup> However, the adjudicator granted suspension of deportation, a form of discretionary relief that required a finding that Fleuti had been continuously present in the United States for seven years, had been a person of good moral character during that period, and would suffer extreme hardship as a result of deportation.<sup>289</sup> The adjudicator noted that Fleuti had “been in difficulties with the law in 1953 and 1956 . . . because of his homosexual condition” but concluded, based on affidavits from Fleuti’s employer and others and on Fleuti’s lack of arrests during the prior seven years, that “it does not appear that that condition has been of a nature during the recent years to cause any reflection upon [Fleuti’s] good moral character.”<sup>290</sup> Such a finding would have been almost inconceivable in 1959, with the Lavender Scare still a recent memory. However, much had changed between Fleuti’s first hearing in 1959 and his hearing in 1965. It would be four more years before the birth of the modern gay rights movement, but by 1965, early gay rights groups had formed in several cities, and legal and medical attitudes were beginning to shift.<sup>291</sup>

Even after Fleuti prevailed before the INS adjudicator, the government persisted in seeking Fleuti’s deportation, appealing the decision to the Board of Immigration Appeals and then seeking reconsideration when the Board ruled in Fleuti’s favor.<sup>292</sup> Finally, in July 1967, the Board denied the government’s motion to reconsider, and Fleuti won the right to retain his permanent resident status.<sup>293</sup> A few weeks later, Fleuti applied for naturalization, and on June 6, 1969, after yet another investigation by the INS into his moral character, Fleuti became a U.S. citizen.<sup>294</sup>

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288. *Id.*

289. *Id.* at 8–12.

290. *Id.* at 9.

291. *See generally* D’EMILIO, *supra* note 54, at 57–219.

292. The BIA’s decision rested not on upholding the grant of discretionary relief to Fleuti but rather on reversing the Special Inquiry Officer’s finding of deportability. *In re* George Ernst Marcel Fleuti, A-8382428 (B.I.A. Dec. 27, 1965), *in* USCIS Fleuti FOIA, *supra* note 15, at 516–20. The Board found that the government had not met its burden to show that Fleuti had been a homosexual prior to his initial entry in 1952. *Id.*

293. *In re* George Ernst Marcel Fleuti, A-8382428 (B.I.A. Jul. 10, 1967), *in* USCIS Fleuti FOIA, *supra* note 15, at 1041–42.

294. Naturalization Certificate of George Ernst Marcel Fleuti (June 6, 1969), *in* USCIS Fleuti FOIA, *supra* note 15, at 806.

