THE WAR ON IMMIGRANTS

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ABSTRACT

An alarming resurgence of discourse equating border crossing with invasion and migrants with criminality dominates national and state politics, fueling an unprecedented wave of state criminal immigration legislation. Although scholars have extensively critiqued crimmigration—the decades-long fusion of immigration enforcement and criminal law—this Article identifies a novel and more extreme phenomenon. Drawing on dehumanizing notions of "illegality," states are directly criminalizing undocumented presence and targeting noncitizens for unprecedented punishments. This new crimmigration regime destabilizes immigration federalism, distorts criminal law, and erodes individual rights.

This Article is the first to critically examine and evaluate this emerging legislative trend. It offers a typology of four new legislative models that collapse the lines between criminal and immigration law. Through distinctive mechanisms, each model converts undocumented presence into a state criminal offense punishable by actual or effective banishment. The Article argues that these new statutes distort the traditional crimmigration framework and imperil fundamental constitutional principles. By criminalizing immigration status and authorizing discriminatory enforcement, they erode foundational protections for criminal defendants, legitimize racialized profiling for immigration status, and impose draconian punishments grossly disproportionate to any underlying conduct. Moreover, by embedding civil immigration violations into state criminal law, these statutes fragment federal immigration policy and flout established international legal norms.

In exposing how these new state-level offenses amplify the existing dangers of crimmigration, this Article challenges the constitutionality and efficacy of intertwining migration regulation with the criminal processes. It argues that decoupling immigration and criminal law is essential to restoring constitutional safeguards, urging repeal of statutes that criminalize border-crossing and permit state involvement in immigration enforcement. Ultimately, it emphasizes the imperative of preserving constitutional protections for all who call this country home.

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INTRODUCTION

The intersection of state criminal law and federal immigration enforcement—part of a phenomenon termed "crimmigration"— has entered a new and contentious phase.[1] Traditionally, the federal government has held

[1] *See* Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (first using the term "crimmigration" to describe the intertwining of criminal and immigration law enforcement, a topic immigration scholars increasingly addressed prior to Professor Stumpf labeling the phenomenon); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1890–91 (2000); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law*," 29 N.C. J. INT'L L. & COM. REG. 639, 651–52 (2004); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–85 (2005); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for*

exclusive authority to set immigration policy and enforce immigration law.[2] Yet state criminal law has increasingly influenced who is subjected to federal removal proceedings, through local arrests, state court convictions, and referrals to federal law enforcement.[3] While these developments blur jurisdictional lines between federal and state enforcement authority, the Supreme Court has continued to demarcate immigration regulation as federal civil law.[4] Now, a surge of state legislation is radically challenging this paradigm. These new state laws criminalize mere immigration status and authorize criminal courts to impose unprecedented punishments that neither the federal nor state criminal systems had previously sanctioned.[5] This shift towards state criminal enforcement raises profound constitutional concerns.[6]

Consider the following scenarios. In Oklahoma, Jane was pulled over for driving with a broken taillight. Officers arrested her for "impermissible occupation," a new state offense that criminalizes mere presence without formal immigration status.[7] After months in pre-trial detention separated from her family, Jane was sentenced to a year in prison and ordered to leave the state within 72 hours of release. Jane is unsure if Immigration and Customs Enforcement (ICE) officers will be there waiting to arrest her. Jane now faces effective banishment from the community she calls home. In Texas, John was arrested while at a work site and charged with "illegal entry."[8] The arrest separated John from his spouse, a lawful permanent resident, and their three children. If convicted, state law mandates his removal from the United States even though, under federal immigration law,

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Citizens and Noncitizens, 28 ST. MARY'S L. J. 833, 838–43 (1997); Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 742–43 n. 165 (2015) (for a survey of different waves of crimmigration theory), and Part I, *infra*.

[2] *See generally* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–90 (2004) (discussing the longstanding acceptance of the federal government's exclusive power to regulate immigration).

[3] *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 1 (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

[4] Arizona v. United States, 567 U.S. 387, 395 (2012) ("The federal power to determine immigration policy is well settled"); Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty,'; but it is not, in a strict sense, a criminal sanction." (citations omitted)).

[5] *See* Part II, *infra* (articulating taxonomy of new state laws with examples of legislation in each category).

[6] *See* Part III, *infra.*

[7] H.B. 4156 (Oklahoma 2024), https://legiscan.com/OK/text/HB4156/id/2986692.

[8] S.B. 4, 88th Leg. (Tex. 2024), enacted as Tex. Pen. Code §§ 51.01-.04, Tex. Code Crim. Pro Arts. 5B.001-.003, 42A.059, Tex. Gov. Code § 508.149(a). *available at* https://capitol.texas.gov/tlodocs/884/billtext/pdf/SB00004F.pdf#navpanes=0.

he could qualify for cancellation of removal and potentially obtain a green card.[9] These federal protections are not available in state criminal court. In Tennessee, after a DUI arrest, Jay was charged with driving under the influence and reckless endangerment with a deadly weapon (Jay's car).[10] The arresting officer had noted Jay's foreign license and accent, and the prosecutor escalated the charges by charging Jay as an "illegal alien."[11] This new charge authorizes the judge to impose a life sentence without parole—a significant sentence enhancement—solely based on Jay's lack of formal immigration status.[12] These three scenarios highlight a troubling trend in immigration federalism, where multiple states are now using state criminal law to enforce their own immigration policies.[13] This Article is the first to identify and systematically examine how state criminal enforcement of these newly enacted immigration crimes destabilizes immigration federalism, distorts criminal law, and erodes individual rights.[14]

Since the late nineteenth century, the Court has consistently struck down state efforts to directly regulate immigration, deeming it an

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[9] INA § 240A(b), 8 U.S.C. § 1229b(b).

[10] State v. Barr, No. M2023-00581-CCA-R3-CD, 2024 WL 2845491, at *9 (Tenn. Crim. App. June 5, 2024) (noting that defendant who was alleged to be intoxicated when they crashed their car was indicted for, *inter alia*, reckless endangerment with a deadly weapon); State v. Hyberger, No. M201901391CCAR3CD, 2020 WL 1493941, at *1 (Tenn. Crim. App. Mar. 26, 2020) (same)

[11] *See* TN Code § 39-13-103(b)(2) (reckless endangerment with a deadly weapon a Class E felony); TN Code § 40-35-111 (setting out punishments for various classes of offenses, including Class E felony); S.B. 2770, 113th Leg. (Tenn. 2023-2024), enacted as TN Code § 40-35- (not yet numbered), available at https://legiscan.com/TN/text/SB2770/id/2910377 (escalating maximum punishment for crime committed with a "deadly weapon" to life without parole when the defendant is in the state after entering the United States without formal immigration status).

[12] *Id.*

[13] *See supra* note 5.

[14] Scholars have long explored the inverse question of how state law enforcement indirectly impacts federal immigration enforcement. *See, e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 57–61 (2014); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L. J. 251, 253–55 (2011); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1129–31 (2013); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 (2013); Legomsky, *supra* note 3 at 471–72; Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 901–03 (2011); David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L. J. 1, 1 (2006); Miller, *supra* note 1; Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1373 (2006); Wishnie, *supra* note 2.

impermissible overreach into federal authority.[15] Just over a decade ago, in *Arizona v. United States*, the Court reaffirmed that the federal regulatory framework preempts states from creating state crimes for federal immigration law violations, or policing those violations without federal authorization.[16] Despite this well-established precedent—and perhaps emboldened by recent shifts in the Court's composition[17]— several states have begun to directly regulate immigration though their criminal legal systems.[18] By enacting new criminal laws that impose harsher penalties than federal law authorizes, these states challenge the federal government's long-standing authority over the admission, exclusion, and deportation of noncitizens. In transforming past violations of federal civil law into state criminal offenses, the laws single out immigrants for unprecedented and disproportionate penalties.

This Article is the first to unpack the emerging new crimmigration regime by identifying four legislative models that each uses criminal law to formally or effectively control immigration and exile noncitizens. First, the "Crimmigration Loop," criminalizes immigration status itself, using prosecution for immigration crimes to trigger federal enforcement. For instance, Oklahoma's House Bill 4156 criminalizes "impermissible occupation"—presence without federal immigration authorization—and imposes incarceration followed by banishment from the state.[19] Second, "Short-Circuiting Crimmigration" bypasses federal authority, with states enforcing their own immigration policies. Texas's Senate Bill 4, for example, requires state courts to issue removal orders against undocumented

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[15] *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); De Canas v. Bica, 424 U.S. 351, 354 (1976), superseded by statute, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, as recognized in Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011) ("Power to regulate immigration is unquestionably exclusively a federal power.").

[16] 567 U.S. 387 (2012).

[17] *Public Hearing Before the S. Comm. on Border Sec.*, 2023 Leg., 88th Sess. (Tex. 2023) (statement of Ken Paxton, Att'y Gen. of Texas starting at 9:06), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=53&clip_id=17395 ("I have been saying this for two years that we should do what we can to try and overturn that decision. We've got a different court and the best chance we've ever had to overturn that and give the states the ability to protect their citizens."); see also Wayne A. Logan, "The Alito Hypothesis" in an Era of Emboldened One-Party State Rule (September 30, 2024), available at http://dx.doi.org/10.2139/ssrn.4989488 ("[R]ather than being dissuaded from enacting contrarian laws . . . emboldened states enacting facially unconstitutional laws could well spearhead a major overhaul of the nation's federal constitutional rights infrastructure.").

[18] *See* Part II, *infra* (identifying as examples legislation from Florida, Idaho, Iowa, Louisiana, Oklahoma, Tennessee, and Texas).

[19] Ok. H.B. 4156.

noncitizens independent of federal action.[20] Third, "Collapsing Crimmigration" enhances penalties for non-immigration crimes based solely on immigration status, as seen in Tennessee's Senate Bill 2770, which imposes the state's second harshest sentence on undocumented individuals, leading to de facto banishment through incarceration.[21] Finally, "Muscular Proxy Criminalization," targets offenses disproportionately committed by undocumented immigrants. Florida's House Bill 1589, for example, imposes heightened penalties for second or subsequent convictions for driving without a license in a state where undocumented noncitizens cannot obtain one. [22]

This Article demonstrates, first, that each legislative model poses a direct challenge to federal supremacy in immigration law. What began in the 1990s with federal legislation authorizing state cooperation with federal enforcement—through screening for civil immigration violations during arrest and post-conviction—[23] has evolved into states asserting independent criminal authority over immigration. By authorizing enforcement outside of or even contrary to federal law, these state laws challenge federal authority to a greater degree than the laws the Court struck down in *Arizona v. United States*.[24] Many of these laws go beyond "mirroring" federal immigration crimes,[25] imposing criminal penalties where federal law does not.[26] They also prevent noncitizens from accessing federal protections, including those

[20] Tex. S.B. 4 at Tex. Crim. Code §§ 51.01-03.

[21] *See* Chacón, *supra* note 1 at 749–50 (characterizing incarceration in prisons as a form of banishment, the threat of which imposes a legal liminality on those targeted for incarceration, like individuals on parole, akin to the liminality imposed by the threat of deportation on undocumented noncitizens).

[22] H. B. 1589, (Fla. 2024), enacted as § 322.03(b), *available at* https://www.flsenate.gov/Session/Bill/2024/1589/BillText/er/PDF.

[23] *See* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58. UCLA L. REV. 1819, 1850 (2011) (discussing §287g agreements).

[24] 567 U.S. 387 (2012).

[25] *See* Lucas Guttentag*, Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. & C.L. 1 (2013) (discussing Arizona's reliance on a "mirror image" theory of immigration regulation, which the Court rejected in *Arizona v. U.S.*). Professors Chin and Miller advance a persuasive argument that, even where states purport to "mirror" federal law, states lack constitutional or statutory authority to regulate immigration by prosecuting "mirror image" crimes. *See* Gabriel J. Chin & Marc L. Miller, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L. J. 251, 280-92 (2011).

[26] *See* Arizona v. U.S.*,* 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable [noncitizen] to remain present in the United States.").

enshrined in international obligations like asylum and protections under the Convention Against Torture.[27]

Second, and beyond federalism concerns, these laws undermine core constitutional and criminal law principles by legalizing discrimination and imposing punitive measures that contravene constitutional protections. Although the Court has ruled that entering the country without permission is not an ongoing federal crime,[28] states have criminalized mere presence in their jurisdiction after crossing borders without federal authorization.[29] By making undocumented presence a crime, these laws violate Eighth and Fourteenth Amendment constitutional prohibitions against imposing criminal liability for status offenses, and run afoul of the principle of concurrence.[30] Their penalty structures also depart from existing sentencing frameworks, imposing actual or de facto banishment—through state removal orders and extreme sentences—where state law would otherwise be more lenient.[31]

Third, enforcing these laws transfers alienage discrimination to state prosecutors and judges,[32] sanctioning racialized law enforcement as a matter of law and practice.[33] These prosecutions thus violate defendants' equal

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[27] INA § 208, 8 U.S.C. § 1158 (setting forth asylum eligibility criteria); INA § 241(b), 8 U.S.C. § 1231(b) (providing for nonrefoulment protections through withholding of removal); Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681-822 (codified as Note to 8 U.S.C. § 1231) (congressional ratification of the Convention Against Torture).

[28] Arizona v. U.S.*,* 567 U.S. 387, 407 (2012).

[29] *See* Ok. H.B. 4156; Tex. S.B. 4 at Tex. Pen. Code § 51.02.

[30] *See* Robinson v. California, 370 U.S. 660, 666 (1962) (cruel and unusual punishment to criminalize being addicted to narcotics); City of Grants Pass, Oregon, 144 S. Ct. 2202 (2024) (recognizing *Robinson*'s reputation of status offenses but declining to extend); Morissette v. United States, 342 U.S. 246, 251–252 (1952) (emphasizing that criminal liability generally may only be imposed for concurrence of guilty mind and guilty act).

[31] For laws that impose banishment as part of the punishment, see Ok. H.B. 4156; Tex. S.B. 4, S.F. 2340, 90th Leg. (Iowa 2024), enacted as Iowa Code § 718C. For laws that enact effective banishment through lengthy criminal sentences, see Tenn. S.B. 2770; S.B. 1036 (Fla. 2024), enacted as Fla. Stat. § 775.0848.

[32] *See* Wong Wing v. United States, 163 U.S. 228, 229 (1895) (holding that the Fifth and Sixth Amendments protect "even aliens"); Ingrid V. Eagly, *Prosecuting Immigration*, NW. U. L. REV., 1281, 1291–94 (2010) (discussing the development of formal doctrinal equality between noncitizen and citizen defendants in criminal proceedings); Legomsky, *supra* note 3 at 472 (contrasting regulatory model of immigration system with criminal legal system's "criminal justice model," which is governed by "stringent constitutional and subconstitutional constraints" that apply regardless of citizenship status).

[33] *See, e.g.,* Eisha Jain, *Policing the Polity*, 131 YALE L. J., 1794, 1804, 1829–30 (2022) (arguing that Court's authorization of immigration-status-checks of Chinese "paved the way for people who fit a racial stereotype to be treated as foreign" and analogizing with recent decisions "linking Latino residents to unauthorized migration" in upholding restrictive housing ordinances).

protection rights,[34] while policing these offenses threatens the Fourth Amendment rights of entire communities.[35]

Overall, this new war on immigrants marks a stark departure from established legal norms and poses serious threats to constitutional principles. By framing migration as a legitimate basis for state criminal enforcement, it shifts the traditional balance between federal immigration authority and state criminal law and emboldens state criminal enforcement. By targeting noncitizens for prosecution and punishment, these statutes undermine defendants' constitutional protections, finding parallels in other realms where states are increasingly constraining individual rights.[36] As states continue to push the boundaries of their authority to criminalize and punish, it becomes critical to identify, unpack, and rigorously examine this expanding crimmigration frontier.

This Article takes up that challenge in three parts. Part I traces the federal immigration system's increasing reliance on the criminal legal system as a gateway to civil immigration enforcement. As states were given a larger role in screening for immigration enforcement, they began leveraging their criminal legal systems to shape federal immigration outcomes. Still, *Arizona v. United States* curtailed more direct attempts by states to control immigration policy through criminal law, limiting their role in immigration

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[34] Plyler v. Doe, 457 U.S. 202, 215 (1982) (holding that Equal Protection Clause protects undocumented noncitizens); *see* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1614 (2008) (urging courts to "impose heightened barriers to subnational attempts to use criminal law to regulate noncitizens apart from U.S. citizens", and arguing that allowing states to enact such laws "is particularly troubling when invidious purposes underlie the state or local interest in immigration law).

[35] *See, e.g.,* Chacón, *supra* note 1 (arguing that dehumanizing political discourse has spillover effects, including immigration policing that "brings a broader ambit of both noncitizens and citizens into situations of legal precarity."); Devon W. Carbado & Cheryl L. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1547–50 (2011) (arguing that immigration officials "are racially constructing all Latinos as presumptively 'illegal'—which is to say, these race-conscious practices participate in constructing the racial category itself" and as a result, "all Latinos live under a cloud of this suspicion."); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 280 (2012) (addressing how "entire neighborhoods of racial minorities are labeled as high crime," which, in turn, "allow[s] officers to view nonwhite neighborhoods as hotbeds of criminal activity").

[36] Center for Reproductive Rights, *After Roe Fell: Abortion Laws State by States*, https://reproductiverights.org/maps/abortion-laws-by-state/ (providing state-by-state analysis of abortion restrictions and identifying states where abortions and related conduct are criminalized); Movement Advancement Project, Bans on Best Practice Medical Care for Transgender Youth, https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans (cataloguing laws governing healthcare for trans youth by state, and identifying category of state laws that "make it a felony crime to provide certain forms of best practice medical care for transgender youth").

enforcement.[37] Part II argues that the new wave of state criminal laws demands a rethinking of this framework. It categorizes four legislative models that usher in a new crimmigration regime, using state criminal law to more directly effectuate removal of noncitizens. Each model turns immigration status into a basis for criminal liability and introduces new forms of punishment that differentially burden noncitizens. Part III critically examines how this new war on immigrants violates constitutional principles that limit state authority and vitiates protections under federal law and state constitutional law. It raises concerns under the Eight Amendment, Fourteenth Amendment, and Fourth Amendment regarding the criminalization of status, differential liability for noncitizens, disproportionate punishments, and the sanctioning of discriminatory policing.

I. IMMIGRATION LAW'S SLIPPAGE INTO CRIMINALIZING MIGRATION

To reverse the harms caused by expansive state police power over immigration, it's essential to examine the policies that have transformed federal cross-border movement into a matter of criminal law. This Part offers a framework for understanding the shifts in immigration doctrine and discourse that paved the way for the recent rise in state crimmigration laws. It traces how the federal government increasingly relied on criminal law to expand its removal powers and to channel noncitizens into deportation proceedings.[38] While states have previously sought to leverage this overlap between immigration and criminal law to assert greater authority in enforcing federal immigration violations, the Court limited these efforts in *Arizona v. United States*. As a result, states' influence on immigration policy had remained relatively indirect. Still, even these indirect actions have perpetuated the harmful narrative that frames immigration as an "invasion" and reinforced racialized stigmas of "illegality," laying the groundwork for this new war on immigrants.

A. Immigration Law's Increased Reliance on Criminal Enforcement

Since the late 1800s, the Court has decreed immigration law as the province of the federal government.[39] Invoking principles of national

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[37] 567 U.S. 387 (2012).

[38] *See* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 159 (2012) ("Immigration enforcement and criminal justice are now so thoroughly entangled it is impossible to say where one starts and the other leaves off.").

[39] *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 51 (1996) (addressing immigration during the Reconstruction period and positing that the "uncoupling of migration from slavery as a result

sovereignty, federal supremacy, and the constitutional mandate to set foreign policy, the Court has ascribed to the federal government exclusive authority to set immigration policy and make determinations about admission, exclusion, [40] and deportation.[41] Many scholars have emphasized the racialized principles motivating these doctrinal developments.[42] Others have challenged the constitutional underpinnings of this federal exclusivity, arguing that the constitutional framework envisions a role for state and local

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of the Civil War made federal regulation possible."); Stumpf, *supra* note 34 at 1566-71 (discussing colonial and early state regulation excluding entry into its borders, and a period of joint regulation between the state and federal government); Gerald L. Neuman, *The Lost Century of American Immigration Law,* 93 COLUM. L. REV. 1833 (1993); Kanstroom *Deportation, supra* note 1 at 1908 (analyzing the distinction between early state exclusionary regimes and the current system of deportation).

[40] While the Immigration and Nationality Act (INA) of 1952 initially separated exclusion and removal proceedings, all immigration enforcement proceedings are labeled "removal" proceedings as of April 1, 1997. Despite the change in terminology, the INA retains many of the important distinctions between "removal" of a person already within the country (formerly "deportation") and "removal" of a person who has not entered (formerly "exclusion"), and the INA includes separate substantive grounds of deportability and inadmissibility. The grounds of deportability are found in INA § 237(a), while the grounds of inadmissibility are set forth in INA § 212(a). This Article will use the term deportation to refer to the physical exile of noncitizens, whether they are ordered removed based on charges of deportability or inadmissibility.

[41] *See, e.g.,* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone."); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) ("[Congress] has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government."); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (stating, "[t]he right to exclude or to expel all aliens, or any class of aliens ... [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare").

[42] *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (characterizing the plenary power doctrine as product of judicial efforts to further racial separation); Stumpf, *supra* note 34 at 1572 (addressing the role of anti- Chinese xenophobia in the Court's determination that the inherent sovereignty of the United States conferred "profound discretion unrestrained by constitutional limitations—in the areas of national security, foreign affairs, and immigration."); *compare* Adam Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L. J. 329, 428–29 (2024) (positing that Court's discrimination against Chinese immigrants was not unique to its consideration of immigration law, but reflected the racist ideology permeating Supreme Court jurisprudence at that time, citing the example of *Plessy v. Ferguson*.).

governments in immigration policy.[43] Yet, the Court has long invoked this doctrine to strike down state-level immigration policies as preempted, concluding that the state schemes conflict with federal law or impose burdens that undermine the federal regulatory scheme.[44] With regards to federal enforcement authority wielded against individuals, the Court has invoked federal authority over immigration to insulate the federal government's immigration decisions.[45] In rejecting constitutional challenges, the Court has insisted that immigration regulation is a matter of civil law not subject to heightened protections, and that an order of deportation is not punishment, despite the violence of family separation, deportation, and exile.[46]

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[43] *See, e.g.,* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792, 811 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

[44] *Compare* Hines v. Davidowitz, 312 U.S. 52 (1941) (striking down as preempted state "alien registration" scheme, and declaring "the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing power of state and nation, but whatever power a state may have is subordinate to supreme national law") *and Arizona v.* United States, 567 U.S. 387 (2012) (holding that Arizona's provisions criminalizing undocumented employment were an obstacle to the comprehensive federal statutory framework) *with* De Canas v. Bica, 424 U.S. 351, 354 (1976) (recognizing that the "[p]ower to regulate immigration is unquestionably exclusively a federal power" but declining to hold that "all state regulation of aliens was ipso facto regulation of immigration" and instead remanding to the state court to interpret the state law in the first instance after concluding that Congress had not yet occupied the field of immigration labor regulation) *and* Kansas v. Garcia, 589 U.S. 191, 202 (2020) (upholding Kansas prosecutions for identity theft based on use of false social security numbers on tax withholding forms by concluding that these forms are "fundamentally unrelated" to federal employment verification schemes).

[45] *See, e.g.*, Harisiades v. Shaughnessy, 342 U. S. 580, 588–591 (1952) (holding congressional delegation of authority to executive over admissions decisions "immune from judicial inquiry or interference."); Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) ((in limiting role of judicial review over admissions decisions, characterizing power to set immigration admissions policy as a "fundamental sovereign attribute exercised by the Government's political departments"); Dep't of State v. Munoz, 144 S. Ct. 1812, 1820 (2024) (quoting Trump v. Hawaii's characterization of admission and exclusion of foreign nationals as fundamental sovereign attribute in holding U.S. citizen does not have fundamental interest in noncitizen spouse being admitted). In a recent article, Professor Adam Cox documents how it was the Court's Cold War jurisprudence that lay the foundation for the Roberts Court's entrenchment of an "immigration plenary power" uniquely insulated from judicial review. *See* Cox, *supra* note 42.

[46] *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want."); *see also* Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1070–82 (2021) (arguing that the goal of immigration enforcement is to enact and expand the power to do violence through deportation and that this goal is illegitimate).

While immigration law retains a formal classification as federal civil law, in practice it increasingly ties policies of exclusion to state and federal criminal law enforcement. Scholars of crimmigration have extensively documented the manifestations of this policy shift, which include imposing immigration consequences for criminal convictions,[47] increasing federal prosecutions for violations of immigration law,[48] amplifying the role states play in determining against whom immigration law is enforced,[49] and reproducing racialized policing in immigration enforcement.[50]

Connecting crimmigration law's developments over the last fifty years to historical policies of exclusion, scholars have emphasized that immigration law has always been a project of excluding and deporting those deemed "undesirable" by the dominant discourse.[51] Beginning around the

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[47] *See, e.g.,* CÉSAR CUAHTÉMOC GARCIA HERNANDEZ, WELCOME THE WRETCHED 1 (2024); Kanstroom, *supra* note 3 at 10–12 (2007); Legomsky, *supra* note 3; Miller, *supra* note 3; Stumpf, *supra* note 1; Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 563 (2017).

[48] *See* Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L. J., 1884, 1896–1931 (2024); Ingrid v. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1976–77 (2020); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Eagly, *supra* note 32 at 1353 fig.4 (2010); Kanstroom *Criminalizing, supra* note 1 at 654–55; *see also* Donald J. Trump, Protecting the American People Against Invasion, Executive Order, January 20, 2025 (directing Attorney General to take "all appropriate action to prioritize the prosecution of criminal offenses related to the unauthorized entry or continued unauthorized presence" of noncitizens)

[49] *See* Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 728–29 (2016) (detailing local law enforcement's participation in immigration enforcement as part of the "jail-to-deportation pipeline."); Chacón, *supra* note 48 at 137–39 (detailing state efforts to use criminal legal system to target undocumented noncitizens for enforcement); David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L. J. 1 (2006); Miller, *supra* note 1; Stumpf, *supra* note 34; Wishnie, *supra* note 2.

[50] *See* Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.C J. 599, 626–27 (2015); Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1000 (2016); Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018); Jain, *supra* note 33 at 1816.

[51] *See* Sharpless, *supra* note 49 at 701–03 (tracing Supreme Court's demonization of Chinese immigrants in the late 1880s to the construction of a threat of Mexican migration to mass detentions of immigrants from Haiti and Central America for purported national security reasons.); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT'L L. J. 141, 148 (2015) (discussing the "Mexican-as-criminal narrative"); Kanstroom, *supra* note 3 at 115 (documenting how a 1891 congressional panel made its project "separate[ing] the desirable from the undesirable

1980s, the political rhetoric that fueled the War on Drugs and the War on Crime increasingly defined "undesirability" in immigration law through a racialized construction of "criminality."[52] In response to the constructed threats of migrants trafficking in drugs and importing crime, policymakers framed migration regulation as crime control. A series of statutes concretized this intertwining of criminal and immigration law.

First, the Anti-Drug Abuse Act of 1988 introduced the term "aggravated felony" into immigration law. Individuals convicted of an offense that qualified as an "aggravated felony" were subject to mandatory immigration detention.[53] Initially, the category of aggravated felonies was limited to murder, drug trafficking, and illicit trafficking in firearms.[54] Just two years later, with the Immigration Act of 1990, Congress expanded the definition of "aggravated felony" to include money laundering and "crimes of violence" for which a sentence of at least five years was imposed.[55]

In 1996, Congress passed two laws that further entrenched the ties between crime control and immigration enforcement.[56] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) significantly expanded the list of crimes classified as aggravated felonies—and thus the bases for mandatory immigration detention—and made a single crime of "moral turpitude" a deportable offense.[57] It also broadened mandatory detention's

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immigrants"); Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 316–17 (2009) (discussing how U.S. immigration law been constructed "as a way to keep in desirables and keep out undesirables," then listing multiple categories of people who have been negatively impacted by immigration law); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L. J. 79, 86 (1998) ("The process of problematizing, demonizing, dehumanizing, and criminalizing renders punishment of aliens a part of the American psyche.").

[52] *See* Garcia Hernandez, *supra* note 47 (addressing how policymakers blamed Haitian, Cuban, and Jamaican migrants for drug trafficking, and how the resulting statues that "increased prison time for involvement with drugs also made it easier to fall into the prison and deportation pipeline.").

[53] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–7349, 102 Stat. 4469, 4469–73 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii), 1228, 1252(a)(2)(C) (2012 & Supp. II 2015)).

[54] *Id.*

[55] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C).

[56] *See* Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE LAW REV. 105, 109-28 (1999) (detailing the three immigration laws passed 1996 in response to anti-immigrant animus, and explicating the harms these laws wrought to individuals, families, and the broader fabric of society).

[57] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43); *see also* Nancy

reach: now anyone convicted of a controlled substance offense, or a firearms offense also faced detention for the duration of their removal proceedings.[58] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) further broadened the definition of aggravated felony by adding new offenses and lowering the sentencing thresholds for existing offenses.[59] It, too, mandated detention for additional categories of crimes.[60] With the PATRIOT Act, Congress further expanded mandatory detention to include those suspected of terrorism.[61]

Congress buttressed the framework for enforcing immigration law through criminal enforcement by authorizing the federal government to leverage resources of state and local enforcement agents. IIRIRA authorized local authorities to carry out specific immigration enforcement actions with federal training and supervision pursuant to express agreements with the federal government, referred to as 287(g) agreements.[62] It further permitted states to communicate with the federal government "regarding the immigration status of any individual" and "otherwise cooperate" with the federal government in "identification, detention, or removal. . ."[63] AEDPA, for its part, authorized state and local law enforcement officers to arrest and detain unlawfully present noncitizens who had been previously convicted of an aggravated felony in the United States, and who thus would likely face deportation under these new laws.

Finally, the federal government increasingly treated border-crossing as a federal criminal offense. While federal law makes the regulation of border-crossing a civil matter, it contains two notable exceptions. In provisions dating back to 1929, borne from racism and xenophobia towards

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Morawetz, *Understanding the Impact of the 1996 Immigration Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-40 (2000) (criticizing the "Alice-in-Wonderland-like definition of the term 'aggravated felony'").

[58] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43).

[59] *Id.*

[60] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, §§ 321–34, 110 Stat. 3009-627 to -635 (codified as amended in scattered sections of 8 U.S.C.).

[61] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, §§ 411-12 Pub. L. No. 107-56, 115 Stat. 272, 345-52 (codified at 8 U.S.C. §§ 1182, 1189, 1226(a)) (providing terrorism-related definitions and mandating detention for suspected terrorists).

[62] 8 U.S.C. § 1357(g); *See* Sharpless, *supra* note 49 at 728-29 (discussing how local police participation in immigration enforcement has fueled "a vast jail-to-deportation pipeline.").

[63] 8 U.S.C. § 1357(g)(10).

immigrants from Mexico,[64] the United States's criminal code makes "illegal entry" a petty federal misdemeanor offense,[65] and "illegal reentry" a federal felony offense.[66] While the federal government had not enforced these provisions for almost a century, federal prosecutions began to surge after Congress turned criminal enforcement into a selection mechanism for civil immigration enforcement.[67]

In prosecuting movement across national borders through the federal criminal system, the federal government has effectively collapsed the divide between civil regulation of migration and criminal law enforcement at the border.[68] It has justified this move through the racialized tropes of "illegality" and "criminal aliens," while further entrenching these categories through criminal immigration enforcement.[69] Still, in contrast to the state criminal laws that are the subject of this Article, federal law insists that, "[a]s a general rule, it is not a crime for a removable [noncitizen] to remain present in the United States."[70] Yet this federal framework laid the statutory and political groundwork for the ensuing state-level criminalization of immigration.

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[64] *See* Garcia Hernandez, *supra* note 47 at 44–66 (chronicling the legislative machinations that created the bills aimed at controlling immigrants and workers from countries in the Western Hemisphere, and in particular Mexico, without constraining the moneyed labor interests that relied on these workers for low-wage labor); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1837 (2007) (discussing xenophobic interests motivating enactment); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1098 (2022) (arguing that these were motivated by racial animus in violation of the Equal Protection Clause).

[65] *See* 8 U.S. Code § 1325 (a).

[66] *See* Act of Mar. 4, 1929, Publ. L. No. 70-1018, sec. 2, 45 Stat. 1551, 155; 8 U.S. Code § 1325 (a); 8 U.S.C. § 1326.

[67] *See* Eagly, *supra* note 32 at 1300-08; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 635-640 (2013).

[68] *See* Eagly, *supra* note 32 at 1300 (demonstrating how these prosecutions challenge the assumptions of doctrinal equity between citizens and non-citizens and institutional autonomy of federal criminal enforcement and federal immigration enforcement); Eric Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L. J., 1884, 1932 (2024) (discussing how federal prosecutors take advantage of lesser protections in civil immigration system to bring greater force to bear on defendants, and immigration authorities use the criminal legal system to promote immigration objectives).

[69] *See* Part II.A, *infra.*

[70] Arizona v. U.S.*,* 567 U.S. 387, 407 (2012).

B. Immigration Enforcement through State Criminal Law: A Pipeline to Deportation

Working under these statutory frameworks, the federal government has increasingly weaponized its enforcement authority over noncitizens.[71] To fuel this growth, Congress responded to the events and aftermath of September 11, 2001, with a new enforcement agency, the Department of Homeland Security (DHS),[72] and has since appropriated large sums to that agency and its components, including Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE).[73]

Even with the growth of federal enforcement power, there is an outer limit to the federal government's capacity (and in some cases its appetite) to initiate removal proceedings. With many people potentially subject to charges of inadmissibility or deportability, convictions and even mere arrests by state and local law enforcement play an outsized role in actual immigration enforcement.[74] These statutory developments have meant that an individual caught in this state criminal system is more likely to be deported through federal removal proceedings.[75] State criminal convictions may render someone deportable under the federal framework, and state law enforcement officers may contact immigration agents over suspected undocumented status, regardless of whether the state initiates prosecution for the state crime

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[71] *See* César Cuahtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1470 (2014). Scholars have documented how the War on Terror brought further force to immigration enforcement through the racialized association between immigration terrorism, and the convergence of immigration enforcement and national security. *See* Legomsky, *supra* note 3 at 508–10; Chacón, *supra* note 64 at 1855; Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism*, 51 EMORY L. J. 1059, 1059 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–79 (2002).

[72] *See* Homeland Security Act of 2002, Pub. L. 107-296, § 441, 116 Stat. 2135, 2192 (2002).

[73] American Immigration Council, The Cost of Immigration Enforcement and Border Security, Aug. 2024, t https://www.americanimmigrationcouncil.org/sites/default/files/research/cost_of_immigration_enforcement_factsheet_2024.pdf ("[T]he annual budget of the U.S. Border Patrol has increased nearly twenty-fold, rising from $400 million to over $7.3 billion in FY 2024. . . Since the creation of DHS in 2003, ICE spending has nearly tripled from $3.3 billion to $9.6 billion in FY 2024").

[74] *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1139 (2013) (discussing how convictions and arrests at a state level function as a selection mechanism for immigration enforcement agents, with the result that suspected "criminal" status triggers deportations); Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1330 (2019) (describing state and local law enforcement officers as "the most numerous frontline agents in the U.S. system of immigration enforcement.").

[75] *See* Motomura, *supra* note 2323 at 1841 fig.2 2 (studying rates of immigration enforcement actions and removals for the year 2009 and finding a high proportion of those individuals).

for which that person was arrested.[76] By 2010, the Court had already recognized that the "changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offender."[77]

This pathway from state criminal law enforcement to immigration enforcement represents a key element in the phenomenon of crimmigration as we currently understand it.[78] A few examples help illustrate this process:[79] First, a lawful permanent resident pleads guilty to possession of cocaine in Orlando and is sentenced to probation. Because the Florida statute criminalizing possession of cocaine imposes liability for conduct that falls within the definition of a "controlled substance offense" under federal immigration law,[80] the government can initiate removal proceedings against her.[81] When she goes to her probation office for her appointment, an ICE officer is waiting to arrest her and take her custody. The state cocaine conviction makes her ineligible to request release on bond,[82] and she is detained in a rural county jail for the duration of her removal proceedings and appeal. She must petition for permission to remain in this country from detention, hundreds of miles away from her family and community.

As another example, an undocumented noncitizen shows up at his work site. The project manager begins to berate him, and when he ignores the harassment, the project manager calls the police. When the police arrive, he protests that he is innocent, and the officer arrests him for the offense of resisting an officer without violence.[83] Hearing this individual's accent, the police officer contacts the local ICE office. ICE issues a detainer, and twelve hours later, ICE comes to pick him up from the police station. While he has lived in the United States for 15 years and supports his three children, all of

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[76] *See* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 675–80 (2013) (tracing the history of federal directives to local law enforcement and the growing use of federal immigration detainers as part of immigration enforcement beginning in 2008). . With the passage of the Laken Riley Act in 2025, a mere arrest for a theft related offense triggers mandatory immigration detention for noncitizens. Laken Riley Act. S. 5. 119th Cong., 1st sess., Engrossed in Senate January 20, 2025 [Laken Riley Act].

[77] Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

[78] *See, e.g.*, Kanstroom, *supra* note 3 at 10-12; Sharpless, *supra* note 49 at 728-29; Chacón, *supra* note 48 at 137–39; Legomsky, *supra* note 3; Stumpf, *supra* note 1; Miller, *supra* note 3.

[79] Examples are based on actual experiences of individuals against whom the federal government brought removal proceedings with details altered to preserve anonymity.

[80] *Compare* § 893.13(6)(a), Fla. Stat, *with*; 21 U.S.C. § 802(6) (defining controlled substance offense).

[81] INA § 237(a)(2)(B)(i), 8 U.S.C. §1227(a)(2)(B)(i) (making conviction for a controlled substance offense, as defined in section 802 of title 21, grounds for removal).

[82] INA 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B).

[83] Fla. Stat.§ 843.02.

whom were born here, he worries that a conviction on those charges will jeopardize the good moral character he must show to receive cancellation of removal.[84] He also fears that the judge will rely on this pending charge to refuse bond, or to order an amount of bond his family cannot afford.

Finally, an individual who overstayed her visa is being subjected to abuse by her partner. She is working to prepare her asylum application but has faced obstacles in finding an attorney to help her with her case. While she is afraid for her safety, she fears that if she goes court to seek a restraining order, the local authorities will refer her to ICE, or ICE will arrest her at the courthouse,[85] and she will be placed into removal proceedings. While the second proceeding in each case—the federal removal proceeding—is classified as a civil proceeding with purportedly civil penalties, scholars have drawn attention to,[86] and the Court has recognized,[87] the harms done to individuals who have already paid any price imposed under state criminal law yet face detention and potential banishment through deportation.[88]

As federal immigration law gave state criminal law this new power to indirectly influence immigration enforcement, states began to enact laws that criminalized conduct *because* of its association with undocumented migrants,

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[84] INA § 240A(a), 8 U.S.C. § 1229b(a).

[85] *See* Acting Director Caleb Vitello, *Interim Guidance: Civil Immigration Enforcement Actions in or near Courthouses Policy No. 11072.3*, Immigration and Customs Enforcement, Jan. 22, 2025 (setting forth policy for ICE to conduct civil enforcement actions within courthouses).

[86] *See* Kanstroom *Criminalizing, supra* note 1 at 655 (arguing that "deportation of non-citizens, particularly of lawful permanent residents for post-entry criminal conduct is punishment" and identifying the "illogic and injustice deeply ingrained" in a system that initiates proceedings that can result in such punitive consequences after individuals have served the full term of the sentence the criminal law imposed); Kanstroom *Deportation, supra* note 1 at 1893-94 (positing that overlapping justifications for deportation and criminal punishment, including incapacitation, deterrence, and retribution, support classifying deportation of legal permanent residents as punishment and requiring substantive constitutional protections in removal proceedings); Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment,* 34 CARDOZO L. REV. 2261 (2013); Gabriel J. Chin*, Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009).

[87] Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (recognizing that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty").

[88] Here, I follow Jennifer Chacón's insights in using the term "banishment" to also describe the substance of forced removal of individuals from their social and political communities, despite the Court's insistence that deportation is a civil regulatory measure. *See* Chacón, *supra* note 1at 714 n.5.

with the intent to trigger the federal immigration enforcement.[89] One category of laws attempted to influence immigration enforcement by transforming acts tied to entering the United States without formal federal immigration status into criminal conduct under *state* law. For example, states passed laws that made it a crime to fail to carry an "alien registration document."[90] Professor Ingrid Eagly has extensively analyzed how a county in Arizona transformed the Arizona smuggling statute into such a tool for targeted enforcement by prosecuting individuals who were smuggled under a theory of conspiracy with the smuggler.[91] Prosecutors pursued this novel theory as a tool to initiate federal enforcement actions and deter further migration into the county.[92]

States also targeted immigrants by criminalizing generalized conduct that the state regulatory system prevents undocumented noncitizens from performing in accordance with the law.[93] Professor Annie Lai identifies such laws as a form of proxy criminalization, defined as criminalizing conduct

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[89] Many scholars are engaged in debates over whether and to what extent the constitution authorizes states to enact policies that differentially regulate immigrants to further state-level immigration policy. *Compare* Guttentag, *supra* note 24; Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM.& MARY BILL RTS. J. 577, 598–606 (2012); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1161–65 (2008); Wishnie, *supra* note 2 at 1085-88, *with* Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087 (2014); Cristina M. Rodríguez, *Toward Détente in Immigration Federalism*, 30 J.L. & POL. 505 (2015); Rodríguez, *supra* note 43. This paper engages with strands of this work that discuss specifically state efforts to enact immigration policies through substantive state criminal law.

[90] Ariz. Rev. Stat. Ann. § 13–1509.

[91] *See* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1771-73 (2011); *see also see also* United States v. South Carolina, 840 F. Supp. 2d 898, 918-19 (D.S.C. 2011) (preliminarily enjoining South Carolina Act 69 (2011), making it a crime for an undocumented person to transport or "harbor" themselves on preemption grounds); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 627-28 (2013) (discussing how states have enacted human trafficking laws expansive enough to police immigration indirectly); Chin & Miller, *supra* note 25 at 272-78 (arguing that states lack inherent authority and are preempted from imposing sanctions that are tantamount to deportation, and identifying state efforts to mirror federal smuggling and trafficking laws as such impermissible enforcement) .

[92] Eagly, *supra* note 91; *but* Chacón, *supra* note 74 at 1352-1355 (discussing how same states have sought to limit collateral consequences of criminal contact by reducing maximum sentences to below the threshold required for removability charges).

[93] Scholars have also documented how states and localities have relied on regulatory frameworks, as opposed to criminal law, to differentially deprive noncitizens of the means of survival and exclude them from civic participation. *See, e.g.,* Chacón, *supra* note 91 at 621 (discussing example of Hazelton Ordinance prohibiting landlords from renting to undocumented noncitizens); Jain, *supra* note 33 at 1835-38 (similarly analyzing restrictive residency ordinances and concluding that polities use these ordinances as a means to enforce racial segregation).

"that, by virtue of their status, undocumented immigrants as a group engage in."[94] Lai unpacks this concept in the context of prosecutions for driving without a license in states that prohibit undocumented people from accessing the licensing process that applies to those with formal status.[95] As another example, states have used prosecutions for identity theft to target noncitizens who use false names or social security numbers in seeking employment and in filing taxes.[96] In 2012, a challenge to the first category of state crimmigration laws made it to the Court in *Arizona v. United States*.[97]

C. The New Frontier of Crimmigration

In *Arizona v. United States*,[98] the Court sustained a federal preemption challenge to an Arizona statute criminalizing conduct that was only "criminal" when a defendant lacked formal immigration status.[99] That Arizona legislation statute required noncitizens to comply with certain "alien registration" rules set forth in federal immigration law, criminalized work by immigrants who did not have work permits under federal law, granted state officers authority to arrest based on suspicion of the federal immigration status of "removability," and authorized local law enforcement to refer individuals they "reasonably believed" to be undocumented noncitizens to federal authorities.[100]

The Court largely agreed with the federal government's pre-enforcement challenge, holding that three of the four provisions were preempted. The provision making it a misdemeanor not to carry "an alien registration document" was preempted because the federal government occupied the field of registration;[101] the provision making it a misdemeanor to apply for or perform work while undocumented was an obstacle to the federal regulation of unauthorized employment;[102] and the provision authorizing a state officer to make a warrantless arrest based on probable cause for a "removable" offense was an obstacle to the federal system, which

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[94] Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 888 (2015).
[95] *See id.* at 888-892; Chacón, *supra* note 48 at 138-39 (discussing how states deployed anti-loitering laws and modified identity theft laws to target noncitizens for criminal enforcement).
[96] *See* Kansas v. Garcia*,* 589 U.S. 191, 202 (2020) (upholding local prosecutions for identity theft brought against undocumented workers based on information in tax withholding documents).
[97] 567 U.S. 387 (2012).
[98] *Id.*
[99] *Id.*; *see also* Guttentag*, supra* note 24 (authoring comprehensive analysis of the majority's opinion as refuting prior conceptions of state sovereignty to regulate immigration).
[100] Arizona v. U.S., 567 U.S. 387, 393 (2012).
[101] *Id.* at 400–403.
[102] *Id.* at 403–407.

defined the more limited set of circumstances under which federal officers may make warrantless arrests "based on possible removability."[103] Professor Lucas Guttentag has characterized the majority opinion as a rejection of Arizona's assertion of inherent authority to regulate immigration,[104] though the Court has since taken pains to raise the threshold for a viable immigration preemption claim.[105]

Of the five justices who joined the *Arizona* majority, only two are still on the Court.[106] Justices Scalia, Thomas, and Alito each wrote separately to partially dissent.[107] Justice Scalia's dissent bears further attention, as it reveals theories of state power that likely animate the recent state legislation

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[103] *Id.* at 407–410. On the facial challenge, the Court upheld the provision that required state officers to "make a reasonable attempt" to determine the immigration status in law enforcement actions initiated on some legitimate basis when they have "reasonable suspicion" that the person does not have formal immigration status. *Id.* at 11-15. The Court relied on statutory provisions providing for cooperation between state and federal law enforcement. *Id.* at 411–13. It also emphasized that the statute required an initial legitimate basis for the stop or seizure and required only a reasonable attempt to determine status. *Id.* at 413-15. On a facial challenge those provisions assuaged potential concerns about unconstitutional enforcement.

[104] *See* Guttentag, *supra* note 24 at 34 ("If, as is now the case under Arizona, a state's purported inherent authority can be overcome by such an equivocal federal scheme, the inherent authority theory effectively does no work."); *see also* Chin & Miller, *supra* note 25 at 258 ("A plain reading of a long line of Supreme Court cases suggests that states have no intrinsic sovereign authority to impose criminal sanctions for what they regard as misconduct involving immigration, nor do they have the authority to induce the self-deportation of noncitizens they deem undesirable.").

[105] *See Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (relying on a formalistic distinction between employment authorization forms and tax forms to hold that Kansas was not preempted from prosecuting noncitizens for identity theft when those prosecutions relied on information supplied in tax documents whereas federal immigration statute regulated employment forms).

[106] Justices Sotomayor, Roberts, Breyer, and Ginsberg joined Justice Kennedy's opinion. Arizona v. U.S., 567 U.S. 387, 391–92 (2012). Justice Kagan took no part in the consideration or decision in the case. *Id.* at 416.

[107] All dissenting Justices agreed with the majority as to the provision of the Arizona law the Court upheld, though for differing reasons. Justice Thomas agreed with Justice Scalia's reasoning that, in limiting federal arrest authority, Congress did not remove the states' inherent authority to conduct arrests for violations of federal law. Arizona v. U.S., 567 U.S. at 437-440 (Thomas, J., dissenting). He also disagreed with the majority's reading of 1357(g)(10), writing that the express statutory provision for state "cooperat[ion] with the Attorney General" does not require a prior request from the federal government for enforcement assistance. *Id.* at 438 (Thomas, J., dissenting). Justice Alito also would have held the provision for warrantless arrest based on probable cause of "removable" offense as consistent with federal law, relying in part on an expansive reading of the term "cooperation" in 1357(g)(10), and echoing Scalia's argument that a congressional grant or limit on federal arrest authority under federal law does not deny or limit state authority, respectively. *Id.* at 454-59 (Alito, J., dissenting in part).

of the new crimmigration regime addressed in the next Part. According to Justice Scalia, states' power to exclude was at "the core of state sovereignty."[108] Justice Scalia posited that Congress was granted naturalization power only to vindicate this preexisting state power to exclude.[109] Considering the provision of Arizona law permitting state officers to arrest based on probable cause of a removable offense, Justice Scalia opined that the state had extensive independent authority to criminalize immigration status: Arizona was free to make its own immigration policy, so long as it was not "prohibited by a valid federal law," and did not "conflict[] with federal regulation."[110] Concluding neither exception applied, Justice Scalia found "no reason Arizona cannot make it a state crime for a removable alien (or any illegal alien, for that matter) to remain present in Arizona."[111] He did not address whether he would permit the state not only to exclude or punish, but also to deport those convicted under such a law.

Perhaps influenced by the current composition of the Court, state legislators across the country have recently enacted new laws that convert presence as an undocumented noncitizen into a state criminal offense or a sentencing aggravator.[112] As legislative sessions begin again in many states, lawmakers continue to push bills that would criminalize migration.[113] In the next Part, this Article argues that these laws complicate the existing crimmigration enforcement model. In making immigration status a state crime or justification for enhanced punishment, each state makes itself a dual criminal and immigration law enforcer: the state can enforce its own immigration policy when the federal government won't (or can't) initiate removal proceedings, while also feeding a retributive drive to punish those it casts as "illegal" through criminal law. It can also intensify the arsenal of a retributive federal government threatening mass deportations. With the power to prosecute immigration "crimes," states increase the sites and

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[108] *Id.* at 423 (Scalia, J., dissenting in part).

[109] *Id.* at 418 (Scalia, J., dissenting in part); *but see* Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020) (rejecting "state's first" theories of statehood as perpetuating inaccurate myths about pre-constitutional statehood).

[110] Arizona v. U.S., 567 U.S. at 422 (Scalia, J., dissenting in part).

[111] *Id.* at 426 (Scalia, J., dissenting in part).

[112] *See Public Hearing Before the S. Comm. on Border Sec.*, 2023 Leg., 88th Sess. (Tex. 2023) (statement of Ken Paxton, Att'y Gen. of Texas starting at 9:06), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=53&clip_id=17395.

[113] *See e.g., See* H.B. 1484 (Mississippi 2025), https://billstatus.ls.state.ms.us/documents/2025/pdf/HB/1400-1499/HB1484IN.pdf; Executive Office of the Governor, *Governor Ron DeSantis Announces Proposals for Immigration Special* Session, Jan. 15, 2025, https://www.flgov.com/eog/news/press/2025/governor-ron-desantis-announces-proposals-immigration-special-session.

severities of discriminatory punishment and direct or facilitate *de facto* and *de jure* banishment.

II. THE NEW CRIMMIGRATION

This Part of the Article argues that the federal government's reliance on criminal law to control migration has created the conditions for a new and expansive crimmigration regime. It identifies four new legislative models, each embedding often-racialized tropes of "illegality" into state criminal law. These models challenge the traditional view that states only have an indirect role in immigration enforcement. Instead, states now assert the authority to punish individuals solely for lacking formal federal immigration status. Each model amplifies the severity of existing state punishment frameworks and extends the scope of migration control.

A. Constructing Illegality as a Proxy for Racialized Immigration Enforcement

This new crimmigration represents the latest iteration of a racialized political discourse of "illegality" that links border-crossing with invasion and immigration with crime.[114] Understanding this discursive trope's development provides an important context for the ongoing waves of state criminal legislation. Over the last 50 years, the political discourse has deployed racism, particularly against immigrants from Latin America and the Caribbean, to militarize immigration enforcement.[115] Casting immigrants

[114] *See* Chacón, *supra* note 64 at 1840-50 (summarizing political and public discourse from the 1980s to the early 2000s, creating a "relentless drum beat of rhetoric that equates immigrants —and —"illegal immigrant" status in particular—with criminality" which logically presents immigration control as a means of controlling crime" despite the "flawed" underlying premise of immigrant crime.); García Hernández, *supra* note 71 at 1496-1498 (explaining how policymakers shifted away from explicit race-based marginalization towards a purportedly colorblind "War on Crime," which allowed politicians to express the same "'racially charged fears and antagonisms" by describing policed individuals as "lawbreakers."); Matthew Boaz, *The Migration of Abolition Theory*, 103 N.C. L. REV, 385, 437 (2025) ("Despite study after study that eschew any connection between noncitizens and the propensity to commit criminalized acts in a particular location, policy continues to be driven by some imagined connection between the two."). .

[115] *See* Garcia Hernandez, *supra* note 47 at 84; LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION (2013); Abel Rodríguez, Lethal Immigration Enforcement, 109 CORNELL L. REV. 465, 497 (2024) ("Particularly since the 1980s, immigration policy has reified racialized notions of immigrant criminality through criminal and immigration enforcement. By conflating migrants with criminality, immigration enforcement may be used to exclude, detain, remove, and even end the lives of noncitizens of color."); Laura Enriquez, *Border Hopping Mexicans, Law-Abiding*

from these regions as a source of crime threatening the nation, policymakers have converted border-crossing itself into a crime, and undocumented presence into "illegality."[116] Rhetoric surrounding the "criminal alien"—a purported target of increased immigration enforcement efforts—further weaponizes a racialized trope of criminality to justify immigration control through crime control.[117] Legislators have perennially invoked this trope to dehumanize Black migrants, in particular.[118] Racial stigmas have further fueled increased immigration enforcement, including immigration detention and deportation.[119]

The growth in federal immigration detention also perpetuates the framing of immigrants as social deviants. Twenty years after the passage of AEDPA and IIRIRA, about five times as many people were subjected to immigration detention as before.[120] Rates of detention will likely rise in the coming years, through a confluence of executive action and congressional

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Asians, and Racialized Illegality: Analyzing Undocumented College Students' Experiences through a Relational Lens, in RELATIONAL FORMATIONS OF RACE: THEORY, METHOD AND PRACTICE 258-60 (2019) (addressing linkage of Latinx individuals with undocumented immigration status through process of "radicalized illegalization"); García Hernández, *supra* note 71 at 1457 (tracing how rhetorical positioning of migration as an "invasion" to justify a militarized southern border).

[116] *See* Garcia Hernandez, *supra* note 47 at 79-82 (quoting policymakers describing Haitian migrants as sources of crime and disease and Cuban migrants as deported criminals to justify prolonged immigration detention); Vázquez, *supra* note 50 at 606-07; Jennifer M. Chacón, *Whose Community Shield? Examining the Removal of the "Criminal Street Gang Member*," 2007 U. CHI. LEGAL F. 317, 321–23 (2007); Ian F. Haney Lopez, *Post-racial Racism*, 98 CALIF. L. REV. 1023, 1033 (2010); Carbado & Harris, *supra* note 35 at 1600.

[117] Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016).

[118] *See* Garcia Hernandez, *supra* note 47 at 79-82 (citing to government actors framing Black migrants as drug traffickers in the lead-up to AEDPA and IIRIRA); Chacón, *supra* note 74 at 1352-1355 ("Many of the tools of overpolicing and mass incarceration practiced in the immigration enforcement realm grew out of anti-Black practices in the realm of criminal enforcement, where they have long disproportionately targeted Black residents. . . [and] continue to generate far reaching harms in Black immigrant communities").

[119] *See* Sharpless, *supra* note 49 at 732-35 (arguing that the hyper-incarceration of people of color produces social stigmatization, fueling targeted policing that disproportionately funnels people of color into a criminal legal system where racial stigmatization reproduces hyper-incarceration).

[120] *See* Emily Ryo and Ian Peacock, *The Landscape of Immigration Detention in the United States,* American Immigration Council, Dec. 2018 https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf (reporting on the rise in rates of detention from 1994-2017); TRAC, *Immigration, ICE Detainees*, https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html (reporting a similar number of individuals detained across 2024 as compared to 2017).

legislation.[121] By detaining noncitizens in facilities indistinguishable from jails and prisons, the immigration enforcement system transforms this rhetoric of deviant other into a physical reality. These widespread and extreme liberty deprivations in turn rely upon the continued dehumanization of immigrants.[122]

This pervasive discourse, casting crossing borders as "illegality" and "illegality" as criminality, has laid the groundwork for new waves of state legislation that punish presence without formal immigration status as a violation of state criminal law.[123] These laws push the boundaries of the existing crimmigration framework, asserting a new state authority to target noncitizens for criminal and immigration enforcement.

B. The Four New Crimmigration Models

As discussed in Part I of this Article, the intertwining of criminal and immigration law has created a system where state criminal enforcement against a noncitizen triggers immigration enforcement, increasing the likelihood of federal deportation.[124] Yet this Article identifies new models of state lawmaking that complicate this sequence by turning immigration status into the starting point for state criminal enforcement, often resulting in deportation. These new mechanisms fall into four crimmigration models. In each, alienage and immigration status become grounds for differential

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[121] Donald J. Trump, *Protecting the American People Against Invasion*, Jan. 21, 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion/ (directing DHS Secretary to "promptly take all appropriate action and allocate all legally available resources or establish contracts to construct, operate, control, or use facilities to detain removable aliens" and to "ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings"); Laken Riley Act (expanding mandatory detention to individuals with mere arrests for certain theft-related offenses).

[122] *See* Chacón, *supra* note 48 at 146 (arguing that "browning" of federal prisons through prosecutions of federal immigration crime "ironically feeds the erroneous but rampant perception that immigrants have a higher propensity to commit crimes," generating a feedback loop that spurs more aggressive enforcement); 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, 655–60 (2011) (same).

[123] *See* Hing, *supra* note 51 ("The process of criminalizing the immigrant and her dreams is multi-stepped. First the immigrant is labeled a problem through demonization, then she is dehumanized, until at last her actions or conditions are criminalized."); Lai & Lasch, *supra* note 47 at 566 ("Since it has often been associated with Latinx identity, the trope of immigrant criminality has also furthered racial salience and exacerbated racial hierarchy").

[124] Scholars have persuasively argued that immigration status impacts the criminal process and outcomes, even when the state officers are ostensibly enforcing traditional, non-immigration crimes. *See* Eagly, *supra* note 74 (identifying three distinct approaches to criminal investigation and adjudication of non-citizen defendants: the "alienage neutral," the "illegal alien punishment model," and the "immigration enforcement model.").

policing and punishment of noncitizens. Each model begins by criminalizing immigration status, then uses criminal law enforcement to control presence, often culminating in deportation.

The following sections explore the models in this new crimmigration regime in greater detail, providing examples of specific state laws that illustrate each model. While some state laws are currently enjoined or partially enjoined by district courts on preemption grounds,[125] the new Trump administration's Department of Justice (DOJ) may retreat from the prior DOJ's position that these laws violate federal supremacy. In any event, the broader new crimmigration context remains significant. The ongoing state efforts to criminalize migration, the explicit intent to challenge *Arizona v. United States*,[126] the numerous state appeals pending in federal circuit courts, and the ways people are likely altering their behavior in response to these laws—whether or not they are enjoined[127]— underscore the importance of understanding each model and mapping its potential consequences.

1. The Crimmigration Loop

The first category of these new legislative models makes immigration status the entry point into the pipeline from state criminal law enforcement to deportation from the United States. In the existing crimmigration model, a conviction, or even an arrest, triggers selection for immigration

[125] *See* United States v. Texas, 97 F.4th 268 (5th Cir. 2024) (denying Texas's motion to stay preliminary injunction of SB4 pending appeal, concluding *inter alia* the plaintiffs likely to succeed on the merits of their preemption claims); *but see id.* at 298–99 (Oldham, J., dissenting) ("[I]t is hard to see how every application of every provision of S.B. 4 interferes with some other purportedly 'exclusive' aspect of the Federal Government's power over immigration."); United States v. Texas et al, No. 1:24-cv-00008 (W.D. Tex. Feb 3, 2025) (finding that federal executive order authorizing cooperation in border enforcement qualified as changed circumstances that required modification of preliminary injunction to allow for Texas law enforcement "to cooperate with and act under the direction of Federal authorities in the apprehension, arrest, and detention of undocumented persons found within the borders of [] Texas without legal [federal] authorization"); *see also* United States v. Iowa, No. 24-2265, 2025 WL 287401, at *1 (8th Cir. Jan. 24, 2025) (affirming preliminary injunction of Iowa Senate File 2340 including because likelihood of meritorious preemption claims); United States v. Oklahoma, No. CIV-24-511-J, 2024 WL 3449197 (W.D. Okla. June 28, 2024), *appeal filed by* United States, et al v. State of Oklahoma, et al, 10th Cir., July 17, 2024 (granting preliminary injunction of HB 4156 on same grounds).

[126] 567 U.S. 387 (2012).

[127] *See* K-Sue Park, Self-Deportation Nation, 132 HARV. L. REV. 1878, 1924 (2019) (noting that, even where subfederal legislation struck down as preempted, laws achieved goal self-deportations).

enforcement.[128] But in effectuating the arrest, a police officer would be required to show some basis to believe the defendant committed a traditional state crime even if the arrest itself was pretext for investigating immigration status.[129] By converting presence without prior federal permission to enter the country into a crime, laws in this model of the new crimmigration regime make immigration status into a new formal entry point into the criminal law to deportation pipeline. Thus, states following this model now use immigration status to justify both criminal punishment and referral to immigration authorities. The new interplay between criminal law and immigration law resembles a loop, where state immigration enforcement leads to federal immigration enforcement through the state criminal legal system.

Oklahoma's House Bill 4156 (HB 4156) illustrates this legislative model. It grants state authorities power to investigate and prosecute individuals for being present without having received federal authorization to enter the United States under the new crime of "impermissible occupation."[130] HB 4156 defines "impermissible occupation" as when "an alien willfully and without permission enters and remains in the State of Oklahoma without having first obtained legal authorization to enter the United States."[131] In setting forth affirmative defenses, the law fails to account for many forms of federal immigration relief that an individual may apply for and may have already received from federal immigration courts and agencies after entering the country without authorization.[132]

The new crime is a misdemeanor subject to arrest and, upon conviction, a maximum of 1 year imprisonment and $500 in fines. In contrast to other misdemeanor offenses under Oklahoma law, HB 4156 mandates exile from the state within 72 hours after conviction or, if incarcerated, after

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[128] *See* Motomura, *supra* note 2323 at 850; Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 230 (2014).

[129] *See* Whren v. United States, 517 U.S. 806 (1996).

[130] *See* Ok. H.B. 4156.

[131] *Id.* at § 2(C); *see also* Fl. S.B. 4C, *enacted as* Fla. Stat. § 811.102 (1) (making it a Class One misdemeanor to "knowingly enter[] or attempt[] to enter th[e] state [of Florida] after entering the United States by eluding or avoiding examination or inspection by immigration officers").

[132] Ok. H.B. 4156§ 4(l). Many discretionary forms of relief, including asylum, cancellation of removal, waivers of inadmissibility, and adjustment of status to lawful permanent residency exclude individuals with certain criminal convictions, and contact the criminal legal system a basis for an immigration judge to deny relief as a matter of discretion. Criminal convictions may trigger mandatory detention, or factor into denying bond. *See* INA § 236 (c), 8 U.S.C. §1226(c) (mandatory detention during removal proceedings); INA § 236 (a), 8 U.S.C. §1226(a) (permissive detention with exclusive executive discretionary authority to set bond).

release from custody.[133] Immigration status also serves as a basis for enhanced penalties when charged with another offense.[134] Being liable for impermissible occupation during the commission of another offense results in re-grading impermissible occupation to a felony.[135] In addition, individuals convicted of this offense are not eligible for alternatives to incarceration, including probation.[136]

HB 4156 illustrates how criminalizing undocumented status augments the state's role in both immigration enforcement and criminal prosecution. Even when the state is unable to prove that a defendant lacks formal legal status under federal law, a jurisdiction that cooperates with ICE will likely hold that individual on a detainer for subsequent federal immigration enforcement.[137] If the state does prosecute, it can impose criminal punishment for immigration status.[138] The state further discriminates against noncitizens in sentencing by treating this status offense as an aggravating factor for other criminal offenses.[139] Finally, the state can impact immigration proceedings, as the label of "criminal alien" makes it more likely an individual will be subject to immigration enforcement and immigration detention, and less likely to receive humanitarian relief in removal proceedings.[140]

2. Short-Circuiting Crimmigration

In the Short-Circuiting Crimmigration Model, as in the Crimmigration Loop, state law enforcement agents screen for new immigration status-based "crimes," but instead of relying on federal immigration officials to impose immigration consequences (or federal

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[133] *Id.* at § 2(B).
[134] *Id.* at § 2(C)(1).
[135] *Id.* at § 2(C)(2).
[136] *Id.*; *see also* Fla. Stat. § 811.102 (5)-(6) (providing presumption against bail for individuals charged with Florida's "illegal entry" offense and barring these individuals access to civil citations or diversion programs). Mississippi recently considered a more draconian version of criminalized presence. HB 1418 proposed to create a "bounty hunter" program authorizing bounty hunters to arrest a person who is not lawfully present under federal immigration law and has entered and remains in Mississippi. Anyone who provided an anonymous tip about resulting in the arrest of an undocumented person would be eligible to receive a $1,000 reward for informing on their neighbor. Undocumented individuals prosecuted under this proposed law could have faced life imprisonment. *See* Miss. H.B. 1484.
[137] *See* Lasch, *supra* note 76.
[138] *See* Ok. H.B. 4156 at § 2(C)(1).
[139] *See* Tenn. S.B. 2770; Fla. S.B. 1036 at Fla. Stat. § 775.0848.
[140] For example, convictions may impact a court's assessment of "good moral character" in determining whether an individual is eligible for non-LPR cancellation of removal.

criminal consequences), the state prosecutor acts as both criminal and immigration enforcer. These state laws authorize removal as a criminal penalty, even where the federal government has regularized someone's presence, or when humanitarian protections would be available in federal civil removal proceedings. Whereas in the Crimmigration Loop Model, state prosecution of immigration status triggers federal immigration enforcement, the Short-Circuiting Model can impose immigration consequences as punishment in state proceedings, without relying on federal authorities, and often in violation of federal policy.

Texas was the first state to legislate under this model through Senate Bill 4 (SB4), and other states have since enacted similar laws.[141] Texas's SB4 makes it a Class B misdemeanor for "an alien" to "enter or attempt to enter th[e] state directly" from outside the country, and a Class A misdemeanor to enter or be present in the state when circumstances would establish liability under the federal reentry crime.[142] Like SB 4, Iowa's Senate File 2340 (SF 2340) also makes it a crime to enter or be present in the state under circumstances that track the elements of the federal reentry crime, but likely for geographical reasons, does not address entry into the state directly from a foreign nation.[143] The statutes define the term "alien" with reference to the Immigration and Nationality Act (INA). Like the federal reentry crime, SB 4 and SF 2340 increase the grade of the offense based on prior convictions.[144]

These statutes also mandate harsher penalties than are otherwise authorized under their criminal codes for similarly-graded offenses, requiring judges to order the deportation of a convicted defendant to the country "from which the person entered" the United States.[145] Defendants may also agree to this order of exile before conviction in exchange for release from criminal liability.[146] SB 4 further expands the types of prior removal orders that can lead to criminal liability to include state-issued removal orders, and "any other agreement in which an alien stipulates to removal pursuant to a criminal

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[141] *See* Iowa S.F. 2340; H.B. 753, 67th Leg. (Idaho, 2024), *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2024/legislation/H0753.pdf. Florida is also considering a similar criminal mechanism for the 2025 legislative session. *See* Executive Office of the Governor, *Governor Ron DeSantis Announces Proposals for Immigration Special* Session, Jan. 15, 2025, https://www.flgov.com/eog/news/press/2025/governor-ron-desantis-announces-proposals-immigration-special-session.

[142] Tex. Crim. Code § 51.02. *Cp.* 8 U.S.C. § 1326 (federal reentry crime).

[143] Iowa Code § 718C.

[144] *See* Tex. Pen. Code § 51.03(b); Iowa Code § 718C.2(2).

[145] *See* Texas Code Crim. Pro. Art. 5B.002.

[146] *Id.* at Art. B.002(a)-(c).

proceeding under either federal or state law."[147] Like HB 4156, SB 4 prohibits alternatives to incarceration—options typically available to defendants in non-immigration related crimes.[148]

These new laws envision a greater role for the state in deporting noncitizens, regardless of the federal government's immigration policies. If the executive is focused on deportation, these laws make the state a more formidable ally. A local law enforcement agent could already make referrals to ICE upon arrest or conviction for a state criminal offense. With these new statutes, they can also investigate immigration status in coordination with federal authorities. They can further multiply the force of the federal government by coercing individuals to accept state deportation orders or by seeking deportation as part of a state sentence. As strands of political discourse rally around a commitment to identify and deport all individuals who are present without status, this increased state power adds teeth to these threats.[149]

Should the federal government adopt a policy of prosecutorial discretion against widespread enforcement, these laws transfer power to the states to contravene federal policy, seemingly violating the Court's holding in *Arizona*. Jurisdictions that initiate prosecutions under these laws are likely the jurisdictions that already communicate with ICE upon arrest. Should ICE decline to take enforcement action when the state otherwise would not be able sustain charges for a traditional state crime, these state laws ascribe a new authority to impose state criminal and immigration consequences for what would otherwise be federal civil law violations.[150] Wielding the threat of criminal punishment and immigration enforcement, states can also coerce noncitizens into self-deporting with only probable cause that they violated civil immigration law. These truncated proceedings thus create a state version of voluntary departure[151] without many of the rights and remedies available in state criminal prosecutions or federal removal proceedings, but with the threat of enforcement under both regimes.

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[147] *See* Tex. Pen. Code § 51.03(c).

[148] *See* Tex. Code Crim. Pro. Art. 42A.059; Tex. Gov. Code § 508.149(a-1).

[149] *See* Jasmine Garsd, *Trump has promised deportations on an unprecedented scale*, NPR, Jul. 19, 2024, https://www.npr.org/2024/07/19/nx-s1-5044582/trump-has-promised-deportations-on-an-unprecedented-scale.

[150] *See* Chin & Miller, *supra* note 25 at 279 (distinguishing between authorities authorizing state assistance from immigration arrests and state legislation regulating immigration, emphasizing that [t]he power to assist through arrest does not imply the power to legislate or prosecute").

[151] *See* INA § 240B, 8 U.S.C. § 1229c (providing that before, during, or at the conclusion of removal proceedings, a non-citizen may, under certain circumstances, agree to depart voluntarily at her own expense, thereby avoiding a removal order and the resulting bars to admission).

3. Collapsing Crimmigration

In the Collapsing Crimmigration Model, states make immigration status an aggravating factor for non-immigration related crimes, turning violations of federal civil law into a justification for more severe state punishment. By differentially subjecting certain undocumented noncitizens to long terms of incarceration, the state asserts a power to remove these individuals from their communities—sometimes permanently—regardless of whether ICE initiates removal proceedings. Such extended incarceration, like deportation, enacts a form of exile.[152] By authorizing draconian sentences, these laws thus threaten to impose de facto banishment on noncitizens.

Two recent state statutes illustrate this legislative model. Tennessee's Senate Bill 2770 (SB 2770) authorizes a sentencing court to enhance a statutory penalty to life imprisonment without the possibility of parole when a defendant is "an illegal alien" at the time of committing a "violent crime" or a crime that involves use or display of a "deadly weapon." "Illegal alien" is defined as someone whose presence is not authorized under federal immigration law.[153] A "violent crime" is defined with reference to the Tennessee Victim's Bill of Rights,[154] and ranges from a Class A misdemeanor (stalking),[155] to Class E felonies (statutory rape),[156] Class D felonies (vehicular assault),[157] and each subsequent grade of offenses up to death-eligible offenses (first degree murder).[158] A deadly weapon includes firearms, "or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury" as well "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury[.]"[159] Courts have found the latter category of "deadly weapon" to include cars.[160]

Florida's Senate Bill 1036 (SB1036) makes a prior conviction for the federal reentry offense an aggravating factor for any Florida felony

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[152] *See,* Cházaro, *supra* note 46 at 1094 (describing forced exile from communities into prisons and jails as part and parcel of the mass incarceration system).
[153] Tenn. S.B. 2770.
[154] TN Code § 40-38-111(9)(g).
[155] *Id.* § 39-17-315. A Class A misdemeanor carries a maximum sentence of eleven months and 29 days and a fine not to exceed $2,500. *Id.* 40-35-11.
[156] *Id.* § 39-13-506.
[157] *Id.* § 39-13-106.
[158] *Id.* § 39-13-202.
[159] *Id.* § 39-11-106(a)(6).
[160] State v. Barr, No. M2023-00581-CCA-R3-CD, 2024 WL 2845491 (Tenn. Crim. App. June 5, 2024); State v. Hyberger, No. M201901391CCAR3CD, 2020 WL 1493941 (Tenn. Crim. App. Mar. 26, 2020)

offense.[161] Under SB 1036, when a defendant has a prior conviction for illegal reentry under federal law, a third-degree felony becomes a second-degree felony, a second-degree felony a first-degree felony, and a first-degree felony becomes a life-eligible felony. Through this regrading, an individual with a prior reentry conviction who would have been sentenced to a maximum of five years' incarceration now faces a maximum sentence of 15 years,[162] that 15-year maximum would become a 30-year maximum,[163] and a 30-year maximum sentence becomes a life sentence.[164]

By increasing the severity of penalties imposed on noncitizens who are convicted of non-immigration crimes, the state can target noncitizens for removal from communities, even if the federal government does not target these individuals for removal from the country. Tennessee's newly enacted statute provides perhaps the starkest example of this phenomenon. An individual who is convicted of a Class A misdemeanor "crime of violence" subject to less than a year of incarceration can be sentenced to life without parole simply because they are undocumented. Consider another scenario: An individual convicted of reckless endangerment with a "deadly weapon" would face a maximum of six years' incarceration, with the possibility of earlier release on parole. But if the state can prove that individual did not have formal permission from the federal government to enter the United States, that person now faces life without the possibility of parole, even though the aggravating factor (being undocumented) is not in itself a crime under federal law or state law.[165]

In imposing such harsh penalties, the state can also augment the federal government's power to deport by disincentivizing the alternative of trying to remain in the United States for the remainder of a sentence and subsequent removal proceedings. The state penalty scheme further imposes immigration consequences into the future. Should a defendant accept removal to escape a life sentence in Tennessee, and then attempt to return to the United States, they would be subject to incarceration for the remainder of that sentence[166]—the rest of their life.

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[161] Fla. Stat. § 775.0848.
[162] *Compare* Fla. Stat. § 775.082 (6)(e) (5-year maximum for third-degree felony) *with id.* § (6)(d) (15-year maximum for second-degree felony)
[163] *See id*. § 775.082 (6)(b)(1) (30-year maximum for non-aggravated first-degree felony).
[164] *See id.* § 775.082 (6)(b)(1) (30 year maximum for first-degree felony or, when specifically provided by statute life imprisonment.").
[165] *See also* Miss. H.B. 1484 (bill introduced in Mississippi in 2025 that would have authorized life imprisonment without parole for undocumented individuals convicted of entering the state without federal permission, redefined as a trespass crime).
[166] *See* 8 USC § 1326.

4. Muscular Proxy Criminalization

The last scheme of immigration enforcement through the criminal system predates recent state efforts to challenge the existing preemption rules. But some recently enacted statutes increase this model's criminal and immigration enforcement power. As discussed in Part I, Proxy Criminalization criminalizes conduct that undocumented noncitizens engage in either in the process of crossing borders or because the state prevents them from conforming with regulatory requirements. Scholars have identified various state offenses that exemplify this model, including driving without a license and fraud and identity theft prosecutions against individuals who use false documents to work.[167] These state crimes generally predate their use for proxy criminalization, but their statutory text or its interpretation has been altered to facilitate selective enforcement against noncitizens. Thus, while traditional state criminal law provides a justification for criminal liability, states turned these laws into a tool for triggering federal immigration consequences of state arrests and convictions.

Florida House Bill 1589 (HB 1589) treads familiar ground in focusing on the proxy crime of driving without a license. Yet HB 1589 adds new muscle to the traditional proxy criminalization model by enhancing the punishment for a second or subsequent offense. Under HB 1589, a second offense is reclassified from a second-degree misdemeanor (maximum sixty days incarceration) to a first-degree misdemeanor (maximum one year incarceration), and a third offense retains this heightened classification and requires a minimum sentence of ten-days incarceration.[168] As Florida has invalidated driver's licenses issued in jurisdictions that license undocumented migrants,[169] and only allows individuals to use foreign licenses for the first month of their state residency,[170] this provision disproportionately punishes undocumented migrants. By increasing penalties only for repeated violations, the law lessens the risk that citizens and lawful permanent residents will be subjected to the heightened penalties that indirectly target undocumented individuals.

Louisiana's House Bill 639 (HB 639) uses a different offense to target a similar circumstance. HB 639 redefines "obstruction of justice" to criminalize when an individual who is operating a motor vehicle cannot

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[167] *See* Lai, *supra* note 94.

[168] Fla. Stat. § 322.03(b).

[169] *See* S.B. 1718 (Fla. 2023), enacted as Fla. Stat. § 322.033, *available at* https://www.flsenate.gov/Session/Bill/2023/1718/BillText/er/PDF.

[170] *See* Florida Highway, Safety, Motor Vehicles, *What to Bring*—Immigrant, https://www.flhsmv.gov/driver-licenses-id-cards/what-to-bring/immigrant/; Florida Highway, Safety, Motor Vehicles, *Frequently Asked Questions*, https://www.flhsmv.gov/driver-licenses-id-cards/visiting-florida-faqs/.

provide a law enforcement officer with a driver's license.[171] HB 639 shoehorns this conduct into the concept of obstruction of justice by framing the inability to provide a state-issued license as a refusal to do so, and imposing liability once the officer "has exhausted all resources at his disposal to verify the identity of the person."[172] This latter process likely contemplates that the officer would communicate with ICE regarding the individual's immigration status.

Finally, while not a legislative act, Texas Governor Greg Abbott has used state executive powers to authorize increased penalties against undocumented immigrants charged under Texas's criminal trespass statute. In May 2021, Governor Abbott declared that "the ongoing surge of individuals unlawfully crossing the Texas-Mexico border poses an ongoing and imminent threat of widespread and severe damage, injury, and loss of life and property" justifying executive action under the Texas Disaster Act.[173] Through his executive powers, the Governor deployed the Texas Department of Public Safety to the border, and directed that agency "to enforce all applicable federal and state laws to prevent criminal activity along the border, including criminal trespassing[.]"[174] The Governor emphasized that the declaration of a disaster triggered increased penalties, including for trespass, under the Texas Penal Code.[175] While criminal trespass is a Class B misdemeanor, prosecution under the disaster declaration would result in regrading it to a Class A misdemeanor.[176] Thus, Texas too, can single out noncitizens for harsher punishments.

These new policies continue in the vein of proxy criminalization while increasing its scope and severity. Louisiana's HB 639 makes a new substantive criminal offense, obstruction of justice, into an entry point for immigration screening. Florida's HB 1589 allows aggressive prosecutors to secure longer sentences for driving without a license, while constraining discretion to resolve these charges without incarceration. Adding mandatory jail time also triggers contact with immigration enforcement under the state's

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[171] Act No. 276 (La. 2024 Regular Session), enacted as La. R.S. § 14:108(B)(1)(f), *available at* https://www.legis.la.gov/legis/ViewDocument.aspx?d=1380479.

[172] *Id.*

[173] Governor Greg Abbott, May 31, 2021, Proclamation, *available at* https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf; Tex. Gov. Code § 418.011.

[174] Abbott May 2021 Proclamation, at 3.

[175] *Id.* at 2.

[176] Tex. Pen. Code § 12.50(a) (providing that punishment for certain offenses increased to the punishment prescribed for next higher offense category if state establishes that offense committed in disaster area), *id.* § 12.50(b) (including criminal trespass in list of offenses); *id.* § 30.05(d) (designating criminal trespass as Class B misdemeanor).

mandatory detainer statute.[177] Whereas HB 1589 and HB 639 target driving while undocumented, the Texas Executive Order contemplates that undocumented presence alone will trigger criminal liability.

In summary, the new crimmigration regime, which these four legislative models represent, destabilizes the relationship between federal authority over immigration policy and state police power. By allowing state criminal law to consider immigration status, these laws grant states unprecedented power to differentially punish noncitizens. The resulting landscape of fractured state crimmigration regimes challenges the legitimacy of linking immigration regulation to crime control and authorizing state and local law enforcement to police immigration. Part III scrutinizes how these laws undermine existing doctrinal frameworks and argues that this disruption underscores the urgent need to decouple immigration from criminal law.

III. THE WAR ON IMMIGRANTS

This Part argues that the new crimmigration regime poses serious threats to constitutional norms. By treating migration as a crime and framing migrants as criminal threats, the new legislative efforts grant states unprecedented police power to punish noncitizens waging a war on immigrants. This section examines how these laws violate principles of criminal law and constitutional law and undermine federal immigration law. While questions remain about how these laws will be enforced, their immediate harms make it essential to reconsider this new criminalization of immigration.

A. Vitiating Constitutional Rights

The Constitution imposes a substantive limit on what the state can criminalize and with what punishments, and prohibits discriminatory criminal enforcement. In imposing differential liability on individuals who lack formal legal status, including draconian punishments like banishment and life without parole, the new crimmigration regime vitiates these constitutional protections.

1. Criminalized Presence

The laws of this new crimmigration regime impose criminal liability based on a person's immigration status, in violation of the Constitution. The Due Process Clause prohibits states from displacing settled principles of criminal liability,[178] and the Eighth Amendment "imposes a substantive limit

[177] Fla. Stat. § 908.105(1).
[178] Kahler v. Kansas, 589 U.S. 271, 279 (2020).

on what can be made criminal and punished as such" before crossing into cruel and unusual punishment.[179] Some of these laws cross this threshold, punishing mere presence in the state in violation of federal civil law, or entry in violation of a federal order that the state lacks authority to enforce. While the trope of "illegal" and "criminal" aliens obscures the status-based justifications for these new crimes, further analysis reveals serious constitutional infirmities.

In *Robinson v. California*, the Court held that a California law criminalizing "addict[ion] to the use of narcotics" crossed this substantive limit under the Eighth Amendment because it criminalized a person's status as an addict.[180] The Court found it cruel and unusual to hold someone continuously criminally liable for having an addiction without requiring any further criminal act, contrasting this status-based liability to laws criminalizing possession or use of narcotics.[181] Six years later, in *Powell v. Texas*, the Court held that the Eighth Amendment did not prevent Texas from imposing criminal liability for "get[ting] drunk or be[ing] found in a state of intoxication in any public place, or at any private house except [the defendant's] own."[182] The Court reasoned that Texas did not criminalize the *status* of being addicted to alcohol, but instead attached liability to becoming intoxicated in public, or becoming intoxicated and proceeding to a public place.[183] The Court also emphasized that the law imposed liability for intoxication only when a person left their home, whereas *Robinson*'s statute criminalized addicts at all times and in all contexts.[184]

Just last term, the Court adopted a formalistic reading of this jurisprudence in *City of Grants Pass, Oregon v. Johnson*, upholding ordinances criminalizing sleeping in public, including in one's car.[185] The Court recognized the long-held principle that a crime traditionally requires "proof of some act (or *actus reus*) undertaken with some measure of volition (*mens rea*),"[186] but reasoned that the ordinances at issue did require an act (sleeping on public property or in one's car) with a requisite mental state (maintaining a temporary place to live).[187] It characterized the plaintiffs'

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[179] Rhodes v. Chapman, 452 U.S. 337, 346, n. 12 (1981).
[180] 370 U.S. 660, 666 (1962).
[181] *Id.*; *see also* City of Grants Pass, Oregon, 144 S. Ct. 2202 (2024) (recognizing Robinson's holding, though rejecting respondents' claim that ordinances that effectively make it unlawful to sleep anywhere in public, including in a car, criminalize the conduct that defines homelessness, and thus impermissibly criminalize the status of being homeless).
[182] 392 U.S. 514 (1968).
[183] *Id.* at 532.
[184] *Id.*
[185] 144 S. Ct. 2202 (2024).
[186] *Id.* at 2217.
[187] *Id.* at 2218.

argument as an unsupported extension of *Robinson* to laws "that don't proscribe status as such but that proscribe acts, even acts undertaken with some required mental state, [that] the defendant cannot help but undertake."[188] Despite recognizing that sleeping in a park or in one's car "might 'in some sense' qualify as 'involuntary'" for individuals without another place to sleep,[189] the Court insisted that the ordinances did not criminalize the status of being homeless because the defendant must "engag[e] in certain acts."[190]

Some of the legislative models of the new crimmigration regime mirror the statute the Court struck down in *Robinson*, instead of the offenses in *Grants Pass* and *Powell*, by imposing criminal liability based on undocumented status. For instance, Oklahoma's HB 4156 criminalizes when a noncitizen "willfully and without permission enters *and remains* in the State of Oklahoma without having first obtained legal authorization to enter the United States."[191] Being present within the state without formal immigration status is criminalized, while the presence of individuals with a different status is not.[192] Once present within Oklahoma, an undocumented individual need not "engag[e] in certain acts" to be continuously liable for impermissible occupation.[193] Also unlike *Grants Pass*'s ordinance criminalizing camping in public, or *Powell*'s statute attaching liability to public intoxication, these laws make no distinction between public and private spaces.

Like the status of addiction in *Robinson*, undocumented status becomes a continuous criminal offense independent of any additional conduct. When immigration status is criminalized, individuals cannot change their behavior to avoid criminal liability: their mere existence in the state is a

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[188] *Id.* at 2219.

[189] *Id.* at 2220 (quoting the *Powell* Court's consideration of Mr. Powell's contention that that statute criminalized an "involuntary" byproduct of alcoholism).

[190] *Id.* at 2219.

[191] Ok. H.B. 4156 (emphasis added). The Texas legislature may be attempting to skirt the constitutional problems with status-based offenses by tying liability to entering the state from another country. *See* Tex. Pen. Code § 51.02. It remains to be seen how Texas courts will interpret the offense, and how applicable statutes of limitation will apply. But the legislature's decision to turn presence in the state after entering the country without lawful federal immigration status into criminal offense creates the risk that prosecutors will collapse the element of entry into presence.

[192] While the statute criminalizes entering and remaining in the state, Oklahoma does not border foreign nations and does not appear to patrol who enters from other states. While the statute is currently enjoined, if courts interpret the "entry" prong as requiring only proof that someone is in the state without lawful status, such an interpretation would further support a conclusion that the state offense is a status-based offense. *See* Chin & Miller, *supra* note 25 at 275 ("[A] law making it a criminal offense for a noncitizen to use a public street or sidewalk, to drink state-regulated water, or to breathe state regulated air would be tantamount to criminalizing the noncitizen's mere presence in the state.").

[193] City of Grants Pass, Oregon, 144 S. Ct. 2202, 2219 (2024)

crime.[194] This liability contrasts with liability for acts like public intoxication or sleeping in public spaces, which involve some additional conduct—albeit conduct that an individual may not have actual power to change, because they are addicted to alcohol or are homeless.[195] The argument that these new state laws impermissibly criminalize status is even stronger because federal law makes clear that remaining in the United States without formal permission to enter is not a criminal act under federal criminal law.[196]

Many of the statutes in the Crimmigration Loop and Short-Circuiting Crimmigration legislative models also omit an explicit minimum *mens rea* element.[197] While criminal law "recognizes gradations of *mens rea*, "to subject a presumptively free individual to serious punishments for acts undertaken without proof of any [mens rea requirement] would be 'the badge of tyranny, the plainest illustration of injustice.'"[198] The Court's jurisprudence has carved out a narrow exception to this principle for strict liability offenses. However, strict liability is generally reserved for conduct that is heavily regulated because of its inherent dangerousness, and punished

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[194] *Cp.* United States v. South Carolina, 840 F. Supp. 2d 898, 919 n.6 (D.S.C. 2011) (enjoining South Carolina law criminalizing allowing oneself to be "transported or moved" within the state or "harbored or sheltered to avoid apprehension or detection," characterizing provisions as the "legal and practical equivalent to criminalizing unlawful presence," as one would "necessarily be required to move or shelter himself as incident to living"); *see also* Lambert v. People of the State of California, 355 U.S. 225, 229 (1957) (overturning criminal conviction for unknowing failure to register as a felon on due process grounds and opining that the law's "severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.").

[195] Professor Annie Lai has argued that driving should be considered *"*sufficiently integral to immigrants' livelihoods" that criminalizing driving without a license criminalizes status through conduct, the Supreme Court's recent decision in *City of Grants Pass* likely undermines arguments focused on conduct's functional equivalence to status. *Compare* Lai, *supra* note 94 at 901-02 *with* City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2219.

[196] Arizona v. United States, 567 U.S. 387, 407 (2012)

[197] *See, e.g.,* Tex. Pen. Code § 51.02 ("A person who is an alien commits an offense if the person enters or attempts to enter this state directly from a foreign nation at any location other than a lawful port of entry."); Iowa Code § 718C.2 ("A person who is an alien commits an offense if the person enters, attempts to enter, or is at any time found in this state under any of the following circumstances: a. the person has been denied admission to or has been excluded, deported, or removed from the United States."). *See* Staples v. United States, 511 U.S. 600, 607 (1994).

[198] Diaz v. United States, 602 U.S. 526, 543–44 (2024) (Gorsuch, J., dissenting) (citations omitted); Rehaif v. United States, 588 U.S. 225, 231 (2019) ("As this Court has explained, the understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" (citations omitted)).

with minor penalties.[199] Despite state rhetoric to the contrary, there is a negative correlation between undocumented migrants and criminal conduct,[200] and crossing borders does not bear resemblance to the types of "potentially dangerous conduct" that has historically been closely regulated.[201] Because the justifications for imposing strict liability don't apply to these state statutes, their silence as to *mens rea* vitiates the general due process principle that criminal liability attaches only to the "concurrence of an evil-meaning mind with an evil-doing hand."[202]

In individual cases, defendants can challenge this infirmity and argue that the Due Process Clause requires the state to prove some level of scienter as to each element. As federal courts have generally read a knowledge requirement into the federal entry and reentry immigration crimes,[203] common law criminal courts may presume a default culpable mental state when none is specified or track the mental state provided in the related federal offenses.

2. Disproportionate Punishments

The new crimmigration laws also augments the state's criminal punishment arsenal. Relying on the construction of migration as a criminal threat and unlawful presence as illegality, states have asserted the authority to exile migrants through criminal law. In the Short-Circuiting Model, that authority manifests as formal banishment, a punishment the enacting states had generally renounced. In the Collapsing Crimmigration Model, it takes the form of effective banishment through differentially harsh sentences for

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[199] *See* Staples v. United States, 511 U.S. 600, 607 (1994) (opining that liability without mens rea permitted where defendant "knows that he is dealing with a dangerous device" and such knowledge would alert defendant to a duty of care and the likelihood that this conduct is regulated).

[200] *See* Nat'l Institute of Justice, Undocumented Immigrant Offending Rate Lower than U.S.-Born Citizen Rate, Sept. 12, 2024, https://nij.ojp.gov/topics/articles/undocumented-immigrant-offending-rate-lower-us-born-citizen-rate.

[201] *See* Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 522 (1994) (recognizing strict liability permitted in limited circumstances where defendant on notice of likelihood of strict regulation); United States v. Launder, 743 F.2d 686, 689 (9th Cir. 1984) (describing public welfare offenses as "statutes whose purpose is regulation of 'industries, trades, properties or activities that affect public health, safety or welfare.'" (citations omitted)).

[202] City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2242 (2024) (Sotomayor, J., dissenting); *see also id.* at 2215 (majority opinion) (recognizing Due Process Clause prohibits "displac[ing] certain rules associated with criminal liability that are so old and venerable, so rooted in the traditions and conscience of our people[,] as to be ranked as fundamental.") (quotations omitted).

[203] *See* U.S. v. Rea-Beltran, 457 F.3d 695, 702 (7th Cir. 2006); U.S. v. Trevino-Martinez, 86 F.3d 65, 69 (5th Cir. 1996); *see also* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 300-01 (2010) (arguing illegal entry crime should be repealed because criminalized conduct of border-crossing lacks element of specific intent).

noncitizen defendants. Both mechanisms legalize discrimination against noncitizens. This subsection addresses each punishment system in turn.

a. Legalizing Exile

The Short-Circuiting Model adds a new power to the modern state's criminal law enforcement arsenal: the power to banish someone from the country. This punishment had generally not been authorized under state criminal law prior to these statutes.[204] Instead, traditional justifications for punishment, at least as a matter of theory,[205] have approached the defendant as a continuous member of society. Retribution requires an individual to pay back society for the harm caused, rehabilitation prepares the individual to act in accordance with social codes upon reentry, and deterrence reduces the risk that the defendant and others will engage in the same conduct in the future.[206] While state legislators have invoked some of these justifications in enacting these new laws,[207] the punishments these laws impose position the defendant in a different relationship to society: The noncitizen defendant is permanently expelled from society, without regard to the ties that bind them to it and it to them. The state deploys the trope of immigrant criminality to justify punishments that would be impermissible for citizen defendants. Whereas misdemeanors typically result in limited incarceration and minor fines,[208] these new misdemeanors result in banishment for undocumented defendants.

This punishment likely violates the rights of noncitizens, and its incorporation into state criminal law threatens constitutional principles more broadly. The Court has long recognized banishment "a fate universally decried by civilized people."[209] Applying this principle, the Ninth Circuit, in *Dear Wing Jung v. United States*, held as unconstitutional a sentence that made the noncitizen defendant's release from incarceration contingent upon leaving the country.[210] Recognizing that the defendant's departure "would leave him without any right to return to this country," the court concluded that "the condition is equivalent to a 'banishment' from this country and from his wife and children, who will presumably remain here."[211] Such

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[204] *See* note 215, *infra*.
[205] *See* Chacón, *supra* note 1.
[206] WAYNE R. LAFAVE, CRIMINAL LAW, SIXTH EDITION, 32-39.
[207] *See* Ok. H.B. 4156 at §1 A-B; Tenn. S.B.; Robyn Opsahl, *Gov. Kim Reynolds signs law making illegal immigration a state crime in Iowa*, Iowa Capital Dispatch, Apr. 10, 2024, https://iowacapitaldispatch.com/2024/04/10/gov-kim-reynolds-signs-law-making-illegal-immigration-a-state-crime-in-iowa/.
[208] ISSA KOHLER-HAUSMANN, MISDIMEANORLAND (2018)
[209] *See* Trop v. Dulles, 356 U.S. 86, 102 (1958).
[210] 312 F.2d 73, (9th Cir. 1962).
[211] *Id.* at 75–76.

banishment was "either a 'cruel and unusual' punishment or a denial of due process of law."[212]

The Court has since sanctioned federal deportations only as an exercise of civil regulatory power over immigration,[213] though scholars have recognized the functional equivalence between civil removal orders and banishment under criminal law.[214] As a matter of state criminal law, many states, including states that have enacted these new crimmigration laws, prohibit imposing banishment from the state.[215] Because these new state laws formally invoke criminal enforcement authority to impose banishment from the state and from the nation as punishment, they violate federal and state constitutional protections.

Multiplying the constitutional infirmities, these new laws impose banishment in addition to the punishments otherwise permitted for an equally graded offense under state criminal law. As discussed in the following section, this discriminatory scheme violates the principal of doctrinal equality between citizens and noncitizen criminal defendants. Only noncitizen defendants can be subjected to exile as punishment for a misdemeanor, or low-grade felony offense. Many of these laws also make these defendants ineligible for alternatives to adjudication of guilt or incarceration as punishment.[216] Whereas withheld adjudication or diversion programs

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[212] *Id.* at 76.

[213] *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); *but see* Boutilier v. INS, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting) ("We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation.").

[214] *See* Kanstroom, *supra* note 3 (recognizing the throughline between imperial forms of power and contemporary deportation, describing deportation "as a living legacy of historical episodes marked by ideas about race, imperialism, and government power that we have largely rejected in other realms."); Chin, *supra* note 86 at 1454 ("At bottom, then, deportation is virtually identical to the historical punishments of banishment or exile"); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'"); Fiswick v. United States, 329 U.S. 211, 222 n.8 (1946) ("Although deportation is not technically a criminal punishment, it may visit great hardship on the alien.").

[215] *See* Ala. Const. art. I, § 30; Ark. Const. art. II, § 21; Ga. Const. art. I, § 1, para. 21; Ill. Const. art I, § 11; Kan. Const. § 12Kan. Const. § 12 (amended 1972); Md. Const. art. XXIV; Mass. Const. part 1, art. XII; Neb. Const. art. I, § 15; NH. Const part 1, art. XIV; N.C. Const. art. I, § 19; Ohio Const. art. I, § 12; Okla. Const. art. II, § 29; Tenn. Const. art. I, § 8; Tex. Const. art. I, § 20; Vt. Const. ch. I, art. XXI; W. Va. Const. art. III, § 5; *see generally* William. G. Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM.& CIV. CONFINEMENT 455, 455 (1998).

[216] *See* Tex. S.B. 4 at Tex. Pen. Code § 51.03(b); S.F. 2340 at Iowa Code § 718C.2(2).

typically involve community service or payment of fines, these laws impose coerced exile as the condition precedent to avoiding conviction.[217]

Finally, in constructing a framework for effectuating these new punishments, these laws threaten to make the criminal legal system more punitive for other defendants through a banishment slippery slope. For example, Texas's SB 4 incorporates a process for ordering removal into its rules of criminal procedure.[218] Should SB 4 go into effect, enforcement will require the state to build its capacity to deport individuals. Investment in the legal framework and physical infrastructure for banishment may make it more likely that states will subject other criminal offenses and other criminal defendants to this punishment, as we are seeing now in the federal criminal system.[219] State legislatures could use this new regime to target the conduct or status of other vulnerable social groups designated as socially undesirable.

b. De Facto Exile

Other statutes, primarily in the Collapsed Crimmigration Model, use traditional punishments to remove noncitizens from their communities.[220] Instead of banishing a defendant from the country, these laws effectively exile noncitizen defendants to carceral settings through differentially harsh terms of incarceration. To justify this punishment, these states trade in the stigmatizing discourse of "illegality." Their harsh penalty structures concretize this discursive equalizing of irregular migration and violent crime.

Under traditional punishment and sentencing frameworks, states often treat prior criminal conduct as a basis for increased penalties. For example, a crime may become aggravated if the defendant has a prior conviction for the same or a similar crime.[221] States justify these harsh punishments under a theory that a prior conviction evinces increased dangerousness and a greater likelihood of recidivism.[222] Drawing on a similar frame of dangerousness, legislatures often also make possession of a weapon an aggravating factor for criminal conduct, or a basis for liability when the defendant has a prior felony conviction.[223] The new state laws in

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[217] *See, e.g.,* Texas Code Crim. Pro. Art. 42A.059; *See* Ok. H.B. 4156 at § 3.
[218] *See* Texas Code Crim. Pro. Art. 5B.002.
[219] Stefano Pozzebon, Jessie Yong, Marlon Sorto, and Lex Harvey, *El Salvador offers to house violent US criminals and deportees of any nationality in unprecedented* deal, CNN, Feb. 4, 2025, https://www.cnn.com/2025/02/03/americas/el-salvador-migrant-deal-marco-rubio-intl-hnk/index.html.
[220] *See* Tenn. S.B. 2770; Fla. S.B. 1036 at Fla. Stat. § 775.0848; Fla. H. B. 1589, at Fla. Stat. § 322.03(b).
[221] JOSHUA DRESSLER, GEORGE C. THOMAS II, DANIEL S. MEDWED, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES, Seventh Edition, 1373-75.
[222] *Id.*
[223] *Id.* at 1375-77.

the Collapsed Crimmigration Model follow a similar logic, but instead of augmenting penalties based on prior criminal history, it is violations of federal immigration law that trigger increased punishment. Under Tennessee's SB 2770, presence without lawful status alone performs the function of a prior felony conviction under the existing criminal law framework.[224] Under Florida's SB1036, a defendant's prior conviction for federal reentry triggers a similar consequence.[225]

While these new laws follow existing frameworks for classifying aggravated offenses, they impose harsher punishments for an individual present in violation of federal immigration law than would be permitted for similarly situated citizen defendants. Take Tennessee: The state's reckless endangerment statute makes reckless endangerment with a deadly weapon a Class E felony, one grade higher than reckless endangerment without a deadly weapon, a Class A misdemeanor.[226] The presence of a weapon under this provision justifies increasing the maximum sentence from about one year to six years for citizens and lawful permanent residents.[227] But when someone who is undocumented commits this offense, the maximum penalty increases to life without the possibility of parole.[228]

By treating undocumented presence as evidence of dangerousness, these laws draw upon stigmas against undocumented immigrants to justify draconian sentences which, in turn reinforce the association between migration and crime.[229] In Tennessee, life without the possibility of parole is the second harshest punishment (second only to a death sentence), reserved for aggravated Class A felonies.[230] These aggravated Class A felonies are treated as so morally blameworthy, and those convicted as so dangerous, that the sentencing court effectively rules out the possibility of rehabilitation. For the state to justify this punishment for those who have crossed the border outside of the federal immigration system, it must transform the act of crossing borders without permission into a dangerous crime, and those who remain as presumed violent criminals. If courts adopt this construction of

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[224] *See* TN Code § 40-35-112 (providing three sentencing ranges of sentences for each class of felony); *id.* § 40-35-106 (setting forth basis for Range II sentence); *id.* § 40-35-107 (same for Range III); *id.* § 40-35-108 (requiring imposition of maximum sentence within Range III for certain career offenders).
[225] Fla. Stat. § 775.0848.
[226] *See* TN Code § 39-13-103.
[227] *Id.* § 40-35-111.
[228] Tenn. S.B. 2770.
[229] Opsahl, *supra* note 207
[230] *See* TN Code § 40-35-112 (setting forth Range I-III categories under which the Range III highest class of felony (A) sentencing range is not less than 40 nor more than 60 years); *id.* § 40-35-50 (release and parole conditions); *id.* § 39-13-206 (setting forth procedures when death sentence imposed).

criminality and accept this disproportionate punishment as constitutional, the individuals they sentence will never be able to return to their communities. While technically still present in the country, they will be effectively banished and exceptionally punished.

3. Discriminatory Enforcement

These new laws make one's status aggravating and one's conduct criminal only when the defendant is a noncitizen. Yet constitutional doctrine requires equal rights for citizens and noncitizens in criminal proceedings.[231] While scholars have argued that this assumption of doctrinal equality does not account for the de facto realities of criminal enforcement against noncitizens,[232] these new state laws enact discrimination into the criminal code itself. Scholars have criticized prior state efforts to import the expansive federal power over entry and removal into the state's police power.[233] Their appeals to nondiscrimination principles apply with similar force here.[234]

The Equal Protection Clause protects immigrants, including undocumented noncitizens, from discrimination.[235] When states discriminate based on alienage, courts typically employ strict scrutiny, requiring the state to show that the law is narrowly tailored to achieve a compelling government interest.[236] The new state-level crimmigration regime discriminates against noncitizens by 1) criminalizing a status that can only apply to noncitizens; 2) making this status a uniquely harsh aggravating factor that extends the sentences of noncitizens only; or 3) criminalizing conduct when engaged in by noncitizens differentially than when engaged in by citizens. Because these laws deploy these alienage classifications, they should be subject to strict scrutiny.[237] Even assuming, *arguendo*, that addressing the increasing rates of

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[231] *See* Legomsky, *supra* note 3 at 472; Eagly, *supra* note 32 at 1294.
[232] Eagly, *supra* note 32 at 1320-36.
[233] *See e.g.,* Stumpf, *supra* note 34 at 1614 (persuasively arguing that courts should be particularly concerned with subnational efforts to criminally regulate noncitizens differentially from citizens where the Court has relied on the civil nature immigration law to authorize vast federal powers to exclude and deport); Lai, *supra* note 94 at 882-83; Fish, *supra* note 64.
[234] *See* Sweeney, *supra* note 128 at 242; *see also* Fish, *supra* note 64 (arguing that The Undesirable Aliens Act of 1929 creating the federal unlawful entry and reentry crimes violates equal protection).
[235] U.S. Const. amend. XIV, § 1; Plyer v. Doe, 457 U.S. 202, 215 (1982); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948).
[236] Graham v. Richardson, 403 U.S. 365, 371-72 (1971). Federal alienage classifications generally must only satisfy rational basis review. *See* Matthew v. Diaz, 426 U.S. 67 (1976).
[237] *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (recognizing that a facially neutral policy that adversely affects a suspect class

unauthorized immigration into the United States presents a compelling state interest,[238] states cannot show that imposing each of these discriminatory criminal punishment schemes is the least restrictive means of addressing this interest.[239] For example, policies could address any externalities of unauthorized immigration without imposing incarceration and state removal orders on broad groups of noncitizens,[240] and without criminalizing conduct far attenuated to crossing borders, like driving with a foreign license.[241] Even were a court to require only a rational justification for differential criminal liability and punishment,[242] the absence of any correlation between immigration status and criminal conduct[243]— despite the persistence of a racialized discourse of immigrant criminality— undermines any asserted state interest in subjecting noncitizens to additional criminal sanctions because they are undocumented.[244]

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and was motivated by animus triggers strict scrutiny); Brown v. City of Oneonta, New York, 221 F.3d 329, 337 (2d Cir. 2000) (strict scrutiny is triggered where a plaintiff could point to a law or policy that "expressly classifies persons on the basis of race.").

[238] *See* Graham v. Richardson, 403 U.S. 365, 374–75 (1971) (concluding that state laws barring only noncitizens from receiving public assistance violated equal protection where the state's interest in preserving physical integrity was not a compelling basis for invidious discrimination).

[239] *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984); *see also* Deide v. Day, 676 F. Supp. 3d 196, 224–25 (S.D.N.Y. 2023) (concluding that, even were the interest in preserving county fiscal resources compelling, executive orders barring housing facilities from contracting with migrants were likely not narrowly tailored, where the orders "broadly bar transport and housing for any migrant or asylum seekers regardless of whether those individuals will stay . . . and regardless of whether the migrants or asylum seekers actually anticipate seeking social services.").

[240] *See* Britain Eakin, *How Denver Made Migrant Bussing Work in Its Favor*, Law360, Oct. 18, 2024 (describing program Denver implemented in response to states bussing asylum seekers into the city whereby migrants who applied for asylum and work permits with assistance of local legal non-profit received city's assistance with necessities for 6 months).

[241] *See* Fla. State Conf. of Branches & Youth Units of the NAACP v. Byrd, 680 F. Supp. 3d 1291, 1313–14 (N.D. Fla. 2023).

[242] *See* Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right *nor targets a suspect class*, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (emphasis added). *Compare* Plyler, v. Doe, 457 U.S. 202, *223* ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'") *with* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (concluding that classifications based on alienage are suspect and subject to close judicial scrutiny, reasoning that "aliens are a 'discrete and insular minority,' and holing unconstitutional state welfare laws conditioning benefits on citizenship and imposing durational residency requirement on lawful permanent residents).

[243] *See supra* note 200.

[244] *See e.g.,* Jain, *supra* note 33 at 1836-37 (arguing that courts should not accept local government's claims to be exercising their police power in enacting exclusionary zoning

By broadening the substantive criminal law, these new laws also give police the power to detain, investigate, and arrest based on immigration status. Without these laws, police would need reasonable suspicion[245] or probable cause[246] that an individual committed a non-immigration crime to stop or arrest that person. While the Court has sanctioned the use of pretextual stops,[247] an officer would still have to articulate some objective basis for the stop, independent of immigration enforcement, to withstand a Fourth Amendment challenge.[248] By turning mere presence while undocumented or after receiving a federal immigration order into a criminal offense, these laws give state and local officers new powers to stop, arrest, and search because of suspected immigration status.[249]

Turning immigration status into a crime begs the question of what "conduct" can supply sufficient cause for law enforcement to stop individuals

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ordinances, but should scrutinize whether laws that exclude and discriminate based on race can be in furtherance of public safety and health); Plyler v. Doe, 457 U.S. 202, 215 (1982) (opining that, "to justify [immigration status] as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.'").

[245] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[246] *See* Beck v. Ohio, 379 US 89 (1964).

[247] *See* Whren v. United States, 517 U.S. 806 (1996); Nadia Banteka, *Unconstitutional Police Pretexts*, 2023 WIS. L. REV. 1871, 1882 (2023) (discussing the treatment of police pretexts by the Court and lower courts); Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L. J. 129, 145 (2010) (arguing that the Court's jurisprudence permitting race to be considered in federal immigration enforcement and its Court's unwillingness look beyond pretext "allows for virtually unbridled racial profiling, not only in roving border inspections, but in immigration enforcement more generally.").

[248] *See e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 644–45 (2021); Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 898-99 (2015); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997). Note, however, that generally, the exclusionary rule does not apply in removal proceedings. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[249] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354–55 (2001) (finding a state law allowing for a custodial arrest based on a minor "fine only" traffic violation was constitutionally reasonable); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche to Arrest*, 77 INDIANA L.J. 419, 432-34 (2002) (emphasizing the human costs of an arrest, including, inter alia, search incident to arrest, detention, separation from family, and intrusiveness of government seizure, in analyzing the magnitude of warrantless arrests for misdemeanors that do not involve a breach of the peace post *Atwater*); William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 509 (2001) ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.").

suspected of these offenses.[250] Being present without lawful immigration status or after having once crossed the border in violation of a federal order does not involve any observable acts.[251] Instead, racist and xenophobic constructs of "illegality" provide a stereotype of what it looks like to be undocumented, contributing to patterns of profiling.[252]

Giving law enforcement additional permission to profile and now actively police based on race and national origin further increases the vulnerability of entire communities.[253] Drawing from a study documenting increased stops of individuals not on parole in a neighborhood with a disproportionate number of individuals who were, Professor Jennifer Chacón persuasively argues that immigration policing extends legal liminality to citizens, immigrants, and nonimmigrants with lawful status.[254] This new war on immigrants will likewise likely further dilute the Fourth Amendment rights of broad segments of communities,[255] while unleashing a particular

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[250] For critiques of the doctrine permitting federal immigration officers to consider an individual's race in enforcement decisions, *see* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Muslims and Arabs*, 58 ANN. SURV. AM. L. 295, 295 (2002) (describing race-based targeting of Arabs and Muslims in name of counterterrorism post-September 11); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 675 (2000) (arguing equal protection principles should preclude reliance on race as factor in immigration enforcement); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 871 (2003) (applying critical race theory to question of relevance of race to immigration enforcement).

[251] *See* Jain, *supra* note 33 at 1813 (defining immigration as a legal status, not based on conduct, and arguing that to "'police immigration status' necessarily requires believing that police can identify through visual inspection who belongs in the United States.").

[252] *See* Kevin R. Johnson, *Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, ARIZ. ST. L.J. SOC. JUST. 3, 3 (2011); Chacón, *supra* note 91 (2012) ("[I]in combination with the toxic rhetoric of the contemporary immigration debate, it is unsurprising that some law enforcement officers feel that it is their duty to more vigorously police populations that they identify as potentially 'illegal.'"); Motomura, *supra* note 2323 at 1857 ("This tag [of unauthorized migrants as criminals targeted by state law enforcement] makes it easy to forget that a state or local decision to base any arrest or prosecution on race or ethnicity would be reprehensible even if those targeted were concededly guilty of very serious crimes.").

[253] *See* Eagly, *supra* note 91 at 1776-82; Lai, *supra* note 94 at 896 (2015); *see also* Aya Gruber, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 873 (2021) (defining police "bluelining" as "maintaining raced and classed spatial and social segregation through the threat and application of violence"); Richardson, *supra* note 35 (addressing how "entire neighborhoods of racial minorities are labeled as high crime," which, in turn, "allow[s] officers to view nonwhite neighborhoods as hotbeds of criminal activity").

[254] Chacón, *supra* note 1 at 750.

[255] *See* Jain, *supra* note 33 at 1829-30; Vázquez, *supra* note 50 at 654-55; Carbado & Harris, *supra* note 35 at 1547-50; Akram & Johnson, *supra* note 250.

violence on undocumented individuals through the constant threat of arrest, prosecution, and state-mandated exile.[256]

As states increasingly implement these laws, they multiply the potential for discrimination in enforcement. Approximately eleven million individuals are living in the United States without formal immigration status.[257] Whereas the Court has granted the federal government power to discriminate based on citizenship and alienage in determining whom to admit and deport,[258] various states are enacting discrimination into their criminal codes.[259] States then disburse this discrimination to local police and prosecutors tasked with enforcing these laws. Police may assert authority to arrest based on suspected immigration status alone, while prosecutors can consider immigration status in charging decisions, introduce this information at sentencing, or use consequences tied to immigration status as a bargaining chip in plea negotiations

By fracturing federal immigration policy into a plurality of state criminal codes, these laws make individuals vulnerable to the directives of state officials who scapegoat migrants and frame criminalizing migration as the solution to social ills.[260] Along each step in this chain of delegation, the sites of discrimination multiply exponentially.[261] With so many sites of

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[256] *See* Cházaro, *supra* note 46 at 1070-82 (identifying both deportation and threat of deportation as forms of state violence); Rodríguez, *supra* note 115 at 494 (recognizing that fear of deportation causes harm and death for migrants, citing the example of undocumented workers who are afraid to report dangerous working conditions or crime).

[257] Jeffrey S. Passel and Jens Manuel Krogstad, *What we know about unauthorized immigrants living in the U.S.*, Pew Research Center (July 22, 2024), https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us/.

[258] For a critique of the plenary power doctrine's sanction of discrimination, see Chin, *supra* note 42 (critiquing plenary power doctrine as product of judiciary's commitment to enforcing racial separation). *Compare* Cox, *supra* note 42 (positing that Court's discrimination against Chinese immigrants in Chinese Exclusion Cases in keeping with racist ideology permeating Supreme Court jurisprudence at that time, and not unique to consideration of immigration law and policy).

[259] Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1475 (2019) (describing a law enforcement pyramid, where "removal numbers capture the tip of the iceberg [deportation], but they do not begin to capture the impact of immigration enforcement on those at the bottom, who remain present and aware of the possibility of removal").

[260] *See* Chacón, *supra* note 67 at 629 (positing legislators enact anti-immigrant laws because the public discourse scapegoats migrants for a "litany of problems," while resulting enforcement is used to validate the "unjustified assumptions" of this same discourse).

[261] *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005); *see also* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1264 (2015) (describing how Secure Communities transferred

enforcement, and with enforcement so bound up with profiling, anti-discrimination principles will likely become harder to enforce.[262]

B. Conflicts with Federal Immigration Policy and International Law

The new crimmigration regime also undermines federal immigration policy and thwarts protections under federal and international law. New laws in the first two models criminalizing individuals who entered the United States without status do not account for the fact that someone who did not have lawful status at the time they entered the country may later become lawfully present or may be eligible for humanitarian protections under federal law.[263] For example, the provisions for asylum, withholding of removal, and protection under the Convention Against Torture codify humanitarian obligations under international law and may provide a pathway to lawful permanent residency.[264] With the Violence Against Women Act, Congress introduced a self-petition so that noncitizens in certain abusive relationships can receive permanent residency regardless of how they entered the country.[265] Through the Victims of Trafficking and Violence Protection Act and the William Wilberforce Trafficking Victims Protection Reauthorization Act, survivors of trafficking, victims of crime, and vulnerable youth can also regularize their immigration status.[266] By defining criminal liability without

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discretionary immigration enforcement decisions to local law enforcement agents); Jain, *supra* note 259at 1468 (positing that the risk that routine interactions with police and other institutional actors will trigger detention, deportation, and other penalties disincentivizes noncitizens from reporting crime or unsafe workplace conditions); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1934-35 (2019) (arguing that the expansion of federal immigration enforcement capacity through delegation to states creates conditions for indirect immigration enforcement through self-deportation).

[262] *See* Johnson, *supra* note 252; Sweeney, *supra* note 128 at 248–49; Wishnie, *supra* note 2 at 1114.

[263] *See* SB 4; HB 4156.

[264] *See* INA § 208, 8 U.S.C. § 1158 (setting forth asylum eligibility criteria); INA § 241(b), 8 U.S.C. § 1231(b) (providing for nonrefoulment protections through withholding of removal); Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681-822 (codified as Note to 8 U.S.C. § 1231) (congressional ratification of the Convention Against Torture).

[265] Violent Crime Control and Law Enforcement Act of 1994 Pub. L. No. 103-322, 108 Stat. 1796 (1994) (containing Title IV, the Violence Against Women Act); INA § 101(a)(51), 8 U.S.C. § 1101(a)(51) (defining criteria for VAWA self-petition e); *see also* INA § 245, 8 U.S.C. § 1255(m) (providing for adjustment for individuals with VAWA protections).

[266] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (defining eligibility for Special Immigrant Juvenile Status); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (providing for visas for sex and labor trafficking survivors (T-visas) and for victims of certain

regard for these provisions of federal immigration law, these state laws may criminalize noncitizens who are lawfully present or eligible for lawful status. Taking it one step further, the Short-Circuiting Model also imposes state removal orders without regard for the federal government's interests in civil removal proceedings or the individual's rights to seek relief in those proceedings.[267] Where these defendants are asylum-seekers, state removal orders enact state-sanction deaths.[268]

Other statutes in the new crimmigration attach criminal liability to violations of a prior federal administrative order, using language that mimics the federal criminal code's definition of illegal reentry under Section 1326.[269] This language criminalizes presence if the defendant "has been denied admission to or has been excluded, deported, or removed from the United States."[270] Thus, under the state and federal statutes, what makes presence criminal is the existence of a prior federal administrative order.[271] Yet, these new statutes purport to grant states authority to deport individuals who may have received a favorable exercise of discretion from federal immigration authorities,[272] or who may be eligible for humanitarian protections in federal removal proceedings, despite a prior removal order.[273] None of these federal protections are recognized as potential defenses to prosecution under state criminal law.[274]

State laws attaching liability to prior violations of a federal civil order also aggrandize the states in disruption of federal enforcement schemes. A federal immigration judge or enforcement agent would have normally been required to provide notice of the federal immigration consequences of

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crimes who cooperate with law enforcement (U-Visas)); INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (defining T-visa eligibility); INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (same for U-visa); *see also* 8 U.S.C. § 1255(l) (provisions for adjustment to lawful permanent residency).

[267] *Id.*

[268] Rodríguez, *supra* note 115 at 491-92 (cataloguing how deportation enacts state-sanctioned death, including removal without access to the asylum process, and doctrinal interpretation that disclaims a legal obligation to protect asylum-seekers despite proven danger).

[269] *See* 8 U.S.C. § 1326(a).

[270] *See* S.B. 4 at Tex. Pen. Code § 51.03; S.F. 2340 Iowa Code § 718C.2.

[271] *Id.*

[272] *See* INA § 212(d)(5)(A), 8 U.S.C. § 1158 (d)(5)(A). For parole provisions for TPS, see 8 CFR § 244.15, and USCIS, Rescission of Matter of Z-R-Z-C- as an Adopted Decision, PM-602-0188 (July 1, 2022), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf.

[273] INA § 241(b), 8 U.S.C. § 1231(b); 8 C.F.R. §§ 208.16-.18 (prior order of removal does not bar certain nonrefoulment protections).

[274] *See* Ok. H.B. 4156 at § F; Tex. S.B. 4 at Tex. Pen. Code § 51.02(c).

violating the federal administrative order when issuing it.[275] Federal law does not give states the authority to enter that order, nor to enforce it through punitive deportations.[276] By tying this new form of criminal liability to the violation of another sovereign's civil order, these state laws exceed the scope of the states' police power.[277]

The laws following the second model, Short Circuiting Crimmigration, also use the threat of criminal punishment to coerce defendants to accept state orders of removal and waive their rights to full criminal and immigration proceedings.[278] These frameworks resemble voluntary departure in federal removal proceedings,[279] but accomplish self-deportation through the threat of state criminal enforcement. With voluntary departure under federal law, a respondent gives up their right to seek relief from removal, and, in exchange, avoids the immigration consequences that attach to a final order of removal.[280] In the state analogue, the state system levies the threat of state prosecution and the threat of future immigration enforcement together. If convicted, a defendant will face incarceration in state prisons and a state order of removal upon completion of that state sentence. The state thus may be able to coerce a defendant into accepting a state order of removal without the (admittedly limited) advisal required in federal removal proceedings.

The statutes in the Collapsing Crimmigration Model, thwart federal immigration protections through a different mechanism. Individuals who are punished under statutes that impose harsh sentences, including life without the possibility of parole, may still be eligible for relief from removal under immigration law, for example through withholding of removal or protection under the Convention Against Torture.[281] An individual sentenced to a state

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[275] *See 8* C.F.R. § 1240.13(d); *id.* § 1003.23.

[276] *See* 8 U.S. Code § 1326.

[277] *See* Chin & Miller, *supra* note 25 at 279 ("The power to assist through arrest does not imply the power to legislate or to prosecute, because arrests leave crucial decision-making power in the hands of the federal government, which is free to choose among the criminal, civil, and administrative sanctions and remedies authorized by the INA"); *But see* Kris W. Kobach, *Reinforcing the Rule of Law*, 22 GEO. IMMIGR. L.J. 459, 476 (2008) (arguing prior to the Court's decision in *Arizona v. U.S.*, that, "[a]s long as state statutes mirror federal statutory language and defer to the federal government's determination of the legal status of any alien question, they will be on secure constitutional footing.").

[278] S.F. 2340 at Iowa Code § 718C.4; S.B. 4 at Texas Code Crim. Pro. Art. A5B.002.

[279] *See* INA § 240B, 8 U.S.C. § 1229c; ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON, STUMPF, AND GULASEKARAM'S IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 820–26.

[280] See *Id.*

[281] *See, e.g.,* INA § 241(b), 8 U.S.C. § 1231(b) (fewer criminal bars to eligibility than asylum); 8 C.F.R. §§ 208.16-.18 (no criminal bars to eligibility for protection under the Convention Against Torture).

crime prior to these laws could apply for this protection at the conclusion of their state sentence upon referral to immigration authorities. Aggravating sentences defer—in some cases indefinitely—the conclusion of that state sentence. Should a defendant be given the choice of deportation as an alternative to life without parole, they would forfeit any rights to seek humanitarian relief through regular removal proceedings.[282] The laws thus impede access to the limited humanitarian options otherwise available in federal removal proceedings for individuals with certain criminal convictions, further thwarting the federal statutory framework.[283]

Because some of these laws are currently enjoined or partially enjoined on preemption grounds,[284] others have only recently gone into effect,[285] and legislators are continuing to introduce new crimmigration bills,[286] it may be too early to fully assess implementation. Yet many pressing questions bear further analysis. Will states continue to refer cases to local ICE officers before prosecution, or will they attempt to enforce their own version of immigration law through criminal convictions? How will federal prosecutors respond to these state-level actions? What evidence will judges require to assess probable cause for prosecution? What about proof beyond a reasonable doubt of guilt? How will defense attorneys navigate the complexities of advising clients on the immigration consequences of pleas and convictions, particularly when federal law might offer paths to legal status? What strategies will prosecutors adopt in plea bargaining with undocumented individuals? This Article provides a critical framework for addressing these questions, offering a foundation for future scholarship to engage with the evolving intersection of state criminal law and immigration enforcement.

C. Rewinding the Loop

To address some of the harms these policies inflict, policymakers could scrutinize the pathways through which immigration law has become the project of the criminal system. Decades of equating border-crossing with

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[282] *See* 8 U.S. Code § 1326 (c); *see also* 8 U.S.C. § 1182(a)(9) (defining certain prior orders of removal as grounds for inadmissibility).

[283] *See* Arizona v. U.S., 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, [noncitizens] may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal.").

[284] *See supra* note 125 (cataloguing cases on appeal).

[285] *See, e.g.*, Tenn. S.B. 2770; Fla. S.B. 1036 (providing that law shall take effect on October 1, 2024)

[286] *See e.g.*, Miss. H.B. 1484.

invasion and stigmatizing "criminal aliens" as deportable have created the conditions for decreeing migration as a criminal threat. As Professor García Hernández writes of federal law, immigration crime is constituted "by legislative decisions to regulate cross-border movement through the criminal justice system" and through "policy decisions to devote substantial personnel and financial resources to ferreting out some migrants who enter the United States without the federal government's permission."[287]

Policymakers now must work in reverse. They can demarcate immigration law as a matter of civil enforcement, beginning by repealing the federal entry and reentry crimes born of racism a century ago.[288] Doing so would nullify state claims that their criminal laws merely "mirror" federal criminal law.[289] Legislators can further unwind the cooperation between local police and federal immigration agents, including by repealing or cabining the statute authorizing agreements that deputize federal authority to local law enforcement.[290] Finally, immigration law can move away from relying on criminal law as the basis for immigration enforcement, recognizing that individuals who serve a criminal sentence have already paid the price the criminal system requires of them.

Beyond these structural changes, changes to the language we use to talk about immigration can also transform the way we think about immigration.[291] To this end, we should decouple crossing borders and

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[287] *See* HARSHA WALIA, BORDER & RULE, GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 83 (2021) ("Innocence is a limiting political stance since criminality, like illegality, is a political construction. Criminality is made through shifting definitions of crime and policed as a race-making and property-protecting regime."); César Cuauhtémoc García Hernández, *Deconstructing Crimmigration,* 52 U.C. DAVIS L. REV. 197, 242 (2018).

[288] *See* Eagly, *supra* note 48 at 2012-13, 2015-2018 (discussing advocates' work to repeal these laws and the genesis of proposed New Way Forward Act in 2019 aimed at repealing Sections 1325 and 1326).

[289] *Compare* Brief of Def's in Opp. To Pltfs.' Mot. for Prelim. Inj., U.S. v Texas et al, Case No. 1:24-CV-00008-DAE, W.D. Tex. (Feb. 7, 2024), pgs. 11-13, 17-18 (arguing that SB4 neither field preempted nor conflict preempted because it tracks the federal entry and reentry crimes and furthers federal immigration objectives) *with* Eagly, *supra* note 91 at 1809 (arguing that prosecutorial discretion and particularities of state enforcement structure "would distinguish the practice" of federal and state criminal immigration prosecutions for "mirror" offenses).

[290] *See* Motomura, *supra* note 2323.

[291] Erica Bryant, *No Person Is Illegal—the Language We Use for Immigration Matters*, Vera, Apr. 4, 2023, https://www.vera.org/news/no-person-is-illegal-the-language-we-use-for-immigration-matters; *see also* Cristian Burgers and Camiel J. Beukeboom, *How Language Contributes to Stereotype Formation: Combined Effects of Label Types and Negation Use in Behavior Descriptions,* 39(4) Journal of Language and Social Psychology 438-456, https://www.researchgate.net/publication/342447174_How_Language_Contributes_to_Ster

invasion, immigration and danger, immigrants and crime. We can begin by recognizing that presence in violation of federal civil law does not make a person "illegal."[292] We can also reject the term "criminal alien" as an overgeneralized label that correlates more closely with race and nationality than with "dangerousness."

CONCLUSION

The new war on immigrants challenges established constitutional principles defining the federal government's authority to regulate immigration and the limitations on state police power. Despite the Court's rejection of state efforts to directly enforce federal immigration laws, a new wave of state legislatures is testing these boundaries. By enacting laws that criminalize immigration status and impose unprecedented and disproportionate punishments on noncitizens, these state laws undermine fundamental constitutional rights and fracture immigration policy. This Article has articulated four legislative models—the Crimmigration Loop, Short-Circuiting Crimmigration, Collapsing Crimmigration, and Muscular Proxy Criminalization—that collectively demonstrate how states are reshaping both criminal law and immigration enforcement through a new crimmigration regime.

This new crimmigration threatens the constitutional rights of individuals subjected to prosecution by criminalizing status itself. The punishments authorized—including de jure and de facto banishment—contravene the Eight Amendment's prohibition against cruel and unusual punishment and erode the principle of proportionality in sentencing. Despite the promises of Equal Protection under the law, the new crimmigration embeds discrimination into the criminal code and sanctions discriminatory policing practices. This targeted enforcement disproportionately impacts people of color, exacerbates existing inequalities, and threatens the Fourth Amendment rights of entire communities. It also undermines the coherence of federal immigration law by fracturing immigration policy across state and county lines. The resulting patchwork of state enforcement mechanisms

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eotype_Formation_Combined_Effects_of_Label_Types_and_Negation_Use_in_Behavior_Descriptions.

[292] *See e.g.*, Cecilia Menjivar & Daniel Kanstroom, Introduction, in CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 2 (Cecilia Menjivar & Daniel Kanstroom eds., 2014) ("In most other legal arenas, illegality is not generally understood as an existential condition .... The reasons for this are deep and fundamental. To accept the idea of 'illegal' people is inevitably to risk accepting problematic and dangerous forms of castes."); *see also* Stumpf, *supra* note 34 at 1612 (identifying how the criminalization of migration at a federal level has undermined judicial scrutiny of state laws that discriminate against migrants, citing opinions that reject equal protection challenges to civil laws by invoking the state's asserted interest in protecting public safety against alleged immigrant criminality).

often conflicts with federal protections, including protections designed to advance humanitarian values and fulfill international obligations. Finaly, the new crimmigration empowers state law enforcement to levy both state criminal punishment and state immigration enforcement against noncitizens prosecuted under the new crimmigration statutes.

These constitutional and human costs compel a critical reevaluation of crimmigration law. In some sense, the war on immigrants is the natural consequence of decades of policymaking framing immigration regulation as necessary for national security and public safety. To address this latest manifestation of that stigmatizing discourse, policymakers should work towards decoupling immigration enforcement from criminal law. Efforts could include repealing the federal statutes that criminalize border-crossing and limiting state and local participation in immigration enforcement. These changes must be accompanied by a deliberate shift in the discourse surrounding immigration—challenging narratives that dehumanize migrants, acknowledging the complex factors driving migration, and recognizing that those without formal status are members of communities throughout the country. Only by dismantling the conditions that have given rise to the war on immigrants can we hope to protect the rights of all individuals within our borders through a coherent, just approach to immigration policy.