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Confronting Proxy Criminalization

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ABSTRACT

Though state laws that directly criminalize unlawful presence have been struck down in the wake of the Supreme Court's decision in *Arizona v. United States*, the criminalization of immigrants continues unabated. This Article examines one form of criminalization, criminalization by "proxy," by which state and local governments are punishing conduct by undocumented immigrants linked closely to their social and economic survival. More ubiquitous than previously understood, such measures have eluded constitutional scrutiny, confounding the legally constructed line between "civil" and "criminal" and the legally constructed distinction between "immigration crimes" and "other crimes." But, as this Article observes, they are no less pernicious than direct criminalization as a vessel for antipathy towards immigrants and their impact on communities no less profound.

Using state driver's license schemes as a paradigmatic example of subfederal proxy criminalization of migration, the Article argues that states should not be permitted to use their police powers to punish undocumented status simply because the laws they use are focused as a formal matter on conduct rather than status and tend to be rules of general applicability. The Article looks to the experience of another group that has long been subject to proxy criminalization at the local level—poor people who fall into homelessness—and courts' analysis of local ordinances to limit their use of public space under the Eighth Amendment's cruel and unusual punishment clause, to reveal transsubstantive lessons. It concludes by discussing the implications of a more nuanced conception of states' role in the management of migration.

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INTRODUCTION

In 2010, undocumented college student Jessica Colotl was stopped by campus police in Kennesaw, Georgia, and later taken to the Etowah Detention Center in Alabama to await deportation.[1] A longtime resident who had immigrated to the United States from Mexico with her family as a child, Ms. Colotl did not fit many people's notions of the type of person who should be banished from the country.[2] Her arrest sparked a national discussion about the dangers of entrusting local police with immigration enforcement powers at a time when the nation was still grappling with the implications of Arizona's then-new stringent immigration law, S.B. 1070.[3] Fellow students, advocacy groups, and even her university president lobbied on her behalf, and eventually U.S. Immigration and Customs Enforcement (ICE) granted the young DREAMer one year of "deferred action."[4]

It has been five years since Ms. Colotl's arrest, and a great deal has changed. Several key programs to deputize state and local law enforcement agents as immigration police have been partially dismantled as a

1. Robbie Brown, *Student's Arrest Tests Immigration Policy*, N.Y. TIMES, May 15, 2010, at A14.

2. *Id.*

3. The Support Our Law Enforcement and Safe Neighborhoods Act of 2010, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (Among other things, the omnibus measure imposed obligations on local law enforcement to enforce federal immigration law and attempted to create new immigration-based crimes and powers at the local level.).

4. *Id.* Deferred action is a discretionary, temporary deferral of deportation that authorizes an individual to remain in the United States and apply for work authorization.

result of public scrutiny.[5] The Supreme Court invalidated substantial portions of S.B. 1070 in *Arizona v. United States*.[6] And thanks to the political activism of DREAMer and others, young people like Ms. Colotl can now apply for deferred action prior to arrest through the Deferred Action for Childhood Arrivals (DACA) program.[7] But in other ways, things have remained the same. Ms. Colotl was initially taken into custody for driving without a license because her undocumented status precluded her from obtaining a driver's license under Georgia law.[8] Like the great majority of other states, Georgia treated operating a motor vehicle without a license as a criminal misdemeanor offense.[9] Even today, the majority of states continue to effectively punish undocumented immigrants for driving.

A full-throated critique of the indirect criminalization of immigrants through state laws such as Georgia's driver's license scheme is long overdue. Attaching criminal sanctions to conduct that immigrants must engage in as a result of their status is no less a perversion of state criminal justice systems than making their status itself a crime, and states should not be permitted to do indirectly what courts have already said they cannot do directly. Nevertheless, as Juliet Stumpf has noted, such indirect schemes to punish immigrants present a "harder case[]" for doctrinal analysis because they tend to evoke generally applicable criminal law.[10] Indeed, it is a well-established principle of preemption law that state laws are not preempted merely because they may have an incidental

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5. *See, e.g.*, News Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 20, 2012), *available at* http://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and (announcing that ICE would stop renewing 287(g) task force agreements with state and local agencies); Memorandum from Jeh Charles Johnson, Sec'y U.S. Dep't of Homeland Security, to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Megan Mack, Officer, Office of Civil Rights & Civil Liberties, Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs, on Secure Cmtys. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [hereinafter Johnson Memorandum] (announcing certain changes to immigration detainers in response to widespread resistance to the Secure Communities program).

6. 132 S. Ct. 2492, 2501–05 (2012) (upholding injunction of Sections 3 and 5(C) of S.B. 1070, which created a new state misdemeanor for failing to comply with federal registration laws and for performing or soliciting work as an unauthorized immigrant, respectively).

7. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., John Morton, Dir., U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (Jun. 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (establishing the Deferred Action for Childhood Arrivals (DACA) program).

8. *See* GA. CODE ANN. § 40-5-21.2 (2010); Brown, *supra* note 1.

9. *See infra* note 70 and accompanying text.

10. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1610–12 (2008) (explaining that courts have been inclined to view measures that have a parallel to generally applicable criminal statutes as touching not on the prohibited field of immigration but on the traditionally state-regulated field of criminal law).

effect on immigrants living in the interior of the country.[11] But what about criminal laws that, while ostensibly neutral, have a profound and harmful effect on the immigrant community? Preemption law alone does not provide a satisfying answer, and the existing scholarly literature does not offer a framework to assess their legal validity.

This Article seeks to add to the literature by locating a form of indirect criminalization of immigrants' undocumented status that I will describe as criminalization by "proxy." Proxy criminalization, as I use the term, refers to state and local governments' use of their police powers to punish undocumented communities for activities linked to their social and economic survival rather than directly based on status.[12] Though proxy criminalization is focused as a formal matter on conduct rather than status, and tends to rely on laws of general applicability, it should be no less tolerated by policymakers and courts. I draw on the experience of another group that has long been subject to its own form of proxy criminalization at the local level—the homeless—to illustrate the limits of the conduct/status distinction as a measure for the legitimacy of criminal laws, especially where the state has a role in forcing the conduct onto a discrete group based on status.

The remainder of this Article will proceed in three parts. Part II traces the development of subfederal proxy criminalization in the immigration context, a phenomenon that is more ubiquitous than previously understood. It summarizes current doctrine disapproving direct attempts by states to punish immigrants and presents state driver's license schemes as a paradigmatic example of an effort to criminalize immigrants by proxy. As part of this analysis, I catalogue state laws that impose criminal punishment for driving without a license and further expound on the harms of proxy criminalization. Part III then turns to other areas of the law where proxy criminalization occurs to reveal transsubstantive lessons. Specifically, I analogize proxy criminalization of immigrants to municipalities' use of local ordinances to limit the use of public space by homeless residents and courts' analysis of those ordinances under the Eighth Amendment's cruel and unusual punishment clause. Part IV previews the implications of a more nuanced conception of prohibited state uses of criminal law in the management of migration.

I. SUBFEDERAL PROXY CRIMINALIZATION OF MIGRATION

Juliet Stumpf has observed that a state acts at the height of its power when it joins criminal lawmaking authority with the plenary powers as-

11. *See, e.g.*, DeCanas v. Bica, 424 U.S. 351, 355 (1976).

12. Examples include state driver's license laws that criminalize driving without a license as well as laws that punish undocumented immigrants for the use of false documents to work. *See infra* Parts II.B, IV.

sociated with immigration law.[13] Plenary power grants federal officials the ability to make distinctions between citizens and non-citizens, and between groups of non-citizens.[14] When exercised jointly with criminal law, it exacts substantial deprivations of liberty at a lower procedural price tag.[15] Indeed, enforcement of criminal laws is increasingly linked to deportation—either because contact with the criminal justice system will lead to detection by federal authorities[16] or because a criminal conviction can itself trigger immigration consequences.[17] Perhaps for these reasons, courts deciding Supremacy Clause claims have shown increasing intolerance for state laws that criminally punish unlawful presence directly.[18]

Nevertheless, states' participation in less visible *proxy* criminalization that likewise exacts a high human cost continues largely unabated. In this section, I review the rationales put forth for limiting state involvement in the punishment of immigrants, trace the history and structure of state driver's license schemes to show how they have become a paradigmatic form of proxy criminalization, and chart some additional harms associated with proxy criminalization illuminated by the driver's licenses example.

A. The Case for Limiting State Involvement in the Criminalization of Immigrants

State laws that criminally punish unlawful presence directly have generally been met with skepticism in the modern era. This is based on a recognition that subfederal measures that impose burdens on immigrants are often borne out of antipathy or majoritarian disfavor towards immigrants, particularly immigrants of color.[19] Though state and local civil

13. Stumpf, *supra* note 10, at 1613–16 (concluding that such exercises of power should be viewed with disfavor). *See also* Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1258–59 (2014) (noting, in the context of federal regulation of migration through criminal law, how crimes of migration combine two of the most coercive and distinctly violent practices the state can engage in—criminal punishment and banishment).

14. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976).

15. *See* Stumpf, *supra* note 10, at 1613–16; Morales, *supra* note 13, at 1260–61 (observing that a core objection to the "dissolution of the boundaries between separate criminal and immigration spheres" has been "the way that this move enables the magnification of the coercive force deployed against migrants").

16. *See infra* notes 28, 34 and accompanying text.

17. *See* Padilla v. Kentucky, 559 U.S. 356, 360–64 (2010) (describing the expansion of immigration consequences based on criminal convictions); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482–86 (2007).

18. Stumpf, *supra* note 10, at 1581–84, 1600–07.

19. *See* Jorge M. Chavez & Doris Marie Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 78–92 (2009) (finding that conservative citizen ideology appears to be the factor that most drives anti-immigrant state legislation); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2102–07 (2013) (observing, based on an empirical analysis, that many state and local immigration laws are the product of politicized processes rather than organic policy responses); Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 27–42 (2013) (discussing the long history of local discrimination against immigrants and document-

ordinances aimed at making life difficult for immigrants can arise from similar political circumstances,[20] criminal laws punishing immigrants present a heightened concern.[21]

Consistent with the general skepticism towards subfederal laws that punish unlawful presence, the Supreme Court recently struck down Arizona's attempt to create two new state misdemeanors tied directly to violations of the immigration laws.[22] The *Arizona* decision sounded a death knell for other state laws that had been challenged in the courts. Injunctions soon followed for state harboring and smuggling laws.[23] These developments were not altogether surprising, given the laws' reliance on individuals' (or their companions') immigration status as an element of the offense.

But the Supreme Court in *Arizona* appeared to be concerned with more than just prosecution for state immigration crimes. Writing for the majority, Justice Kennedy also expressed a worry that unsupervised state and local efforts to enforce the federal immigration laws would lead to undue harassment of immigrants that federal officials had deprioritized for removal.[24] In fact, the majority did something the Court does not usually do. In striking down the provision that authorized state and local officers to make a warrantless arrest of any person they believed to be removable from the United States, the Court proclaimed "it is not a crime" for an immigrant to remain present in the United States in violation of federal immigration laws.[25]

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ing a forgotten equality norm in immigration preemption); Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 251–58 (2011) (discussing how localities have invoked nuisance laws that have no explicit reference to status as a way to target immigrant populations and express community preferences). While the doctrinal basis for striking down state and local immigration measures has largely been the Supremacy Clause, this literature demonstrates that courts can be skeptical of state and local immigration lawmaking and even make preemption rulings for reasons other than a wish to aggrandize federal power.

20. Examples include laws imposing restrictions on renting to undocumented immigrants and limiting access to public benefits, professional licenses, and higher education. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 73–76 (2014).

21. *See supra* notes 13–17 and accompanying text; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 367–68 (1886) (invalidating San Francisco's discriminatory enforcement of a misdemeanor fire ordinance against Chinese laundry operators noting that "in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses").

22. *See* Arizona v. United States, 132 S. Ct. 2492, 2501–03 (2012) (upholding injunction for Section 3 on the grounds that Congress had already created a comprehensive, fully-integrated scheme for alien registration that left no room for state regulation); *id.* at 2503–05 (upholding injunction of Section 5(C) based on the finding that Congress had specifically declined to impose criminal penalties on unauthorized workers as part of the Immigration Reform and Control Act of 1986).

23. United States v. South Carolina, 720 F.3d 518, 529–32 (4th Cir. 2013) (striking down provisions of South Carolina's Act 69 making it a crime for an undocumented person to allow himself or herself to be transported or harbored or fail to carry an alien registration document); We Are Am. v. Maricopa Cnty. Bd. of Supervisors, 297 F.R.D. 373, 386–95 (D. Ariz. 2013) (ruling unconstitutional Maricopa County's practice of prosecuting migrants under state law for conspiring to smuggle themselves).

24. *Arizona*, 132 S. Ct. at 2506 (discussing the dangers of Section 6 of S.B. 1070).

25. *Id.* at 2505.

Of course, the statement that unlawful presence is not a crime was not itself novel. The Court had frequently reached for a distinction between the civil and criminal to deny individual rights in the immigration context.[26] But this time, the Court was appealing to the civil nature of removability to settle a question about the appropriate role of local criminal justice actors in the enforcement of federal immigration law in a generally rights-*protective* way.[27] This followed on the heels of a debate about local officers' authority that had intensified in the lead up to the decision.[28] Left unchecked, state and local immigration enforcement ef-

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26. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–51 (1984) (collecting cases where civil nature of deportation proceedings led to denial of criminal trial protections and holding that suppression of evidence is similarly unavailable as a remedy for Fourth Amendment violations in the absence of evidence that such violations were widespread or egregious). *See generally* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (declaring that because deportation is not punishment for a crime, constitutional rights such as the right to trial by jury, and the prohibition on cruel and unusual punishment do not attach); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 134–35 (2007) (observing how the reasoning of *Fong Yue Ting* has led to denial of procedural protections to immigrants in removal proceedings). In recent years, scholars have begun to take aim at the untenable nature of characterizing immigration as a purely civil matter. *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346, 1346 (2014) (challenging the conventional understanding of immigration detention as a form of civil confinement through historical examination of immigration detention legislation's punitive goals); Legomsky, *supra* note 17, at 476–500 (discussing the asymmetric incorporation of criminal law doctrine and enforcement norms in deportation proceedings); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1332–50 (2011) (arguing that Padilla v. Kentucky, 130 S. Ct. 1473 (2010), marked the beginning of a reconceptualization of deportation as neither truly civil nor truly criminal).

27. *See also Arizona*, 132 S. Ct. at 2509 (noting, in discussion of Section 2(B) of S.B. 1070, that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns").

28. After the Department of Justice Office of Legal Counsel issued a memorandum in the wake of September 11th reversing a longstanding view that local police did not have the authority to make arrests based on civil removability, see Memorandum from Jay S. Bybee, Assistant Att'y Gen. on Non-Preemption of the Auth. of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations to the Att'y Gen. (Apr. 3, 2002), *available at* https://www.aclu.org/files/FilesPDFs/ACF27DA.pdf, state and local governments began taking a more active role in immigration enforcement, initially at the invitation of the federal government, and then, later, on their own. Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 598–606 (2012) (tracing states and localities' increased participation in immigration policy and enforcement over the past two decades); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1161–65 (2008) (describing federal-local collaborations in immigration enforcement, and state and local governments' own statutes, ordinances, and orders seeking to involve officers in immigration enforcement); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085–88 (2004) (critiquing early efforts by the federal government to enlist state and local officials in immigration enforcement).

By the time Arizona submitted its brief, the State was asserting that states had inherent authority to enforce federal immigration laws, both civil and criminal. Brief for Petitioners at 42–46, Arizona v. United States, 132 S. Ct. 2492 (Feb. 6, 2012) (No. 11-182). The State noted cases from the First, Fourth, Fifth, Eighth and Tenth Circuits that apparently authorized detentions by state and local officials based solely on suspected unlawful presence. *Id.* The Ninth Circuit, on the other hand, had concluded that states had no such authority, though it did note an earlier case that permitted Arizona officials to arrest an individual for a criminal immigration violation. United States v. Arizona, 641 F.3d 339, 362 (9th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012). Part of the confusion may have been caused by dicta in the Supreme Court's *INS v. Lopez-Mendoza* decision suggesting that "remaining unlawfully in [the U.S.]" could be considered "itself a crime." 468 U.S. at 1038.

forts had caused widespread racial profiling, illegal detentions, and other individual rights violations.[29]

The *Arizona* decision therefore had a tangible, positive impact on communities threatened by state and local involvement in immigration enforcement in a post-2012 world.[30] While the Court left a critical gap in its protection of racial minorities by failing to invalidate Section 2(B) of S.B. 1070,[31] advocates and scholars managed to leverage the decision in other ways, for example, by arguing that even detention by local officials on an immigration detainer was unlawful.[32] *Arizona* thus represented an important milestone.

Proxy criminalization, however, undermines both the Supreme Court's disapproval of the creation of state immigration crimes and its circumscription of the role of state and local police in making arrests based on suspected unlawful presence. Regarding the former, proxy criminalization offers states a way to criminalize migration all the same through facially neutral laws that nominally target conduct. Regarding the latter, state and local governments' ability to enact measures that criminalize immigrants' subsistence allows them to rely on their own police powers to conduct arrests.

Before proceeding, it is important to note that the Supreme Court's pronouncements in this area can be undermined because they are themselves unstable. Decades of complicated interactions between the immigration law system and the criminal law system have created a momen-

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29. *See, e.g.*, *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: Joint Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law & Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 11–20 (2009) (statements of Julio Cesar Mora and Antonio Ramirez). *See generally* ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 28–30 (2009), *available at* http://www.policefoundation.org/sites/pftest1.drupalgardens.com/files/Khashu (2009) - The Role of Local Police.pdf.

30. *See, e.g.*, Melendres v. Arpaio, 695 F.3d 990, 1000–01 (9th Cir. 2012) (invalidating Maricopa County Sheriff's Office's (MCSO) practice of detaining suspected unauthorized immigrants after loss of the agency's 287(g) authority in the field based, in part, on *Arizona v. United States*).

31. *Arizona*, 132 S. Ct. at 2509 (limiting but not invalidating Section 2(B), which requires local law enforcement officers to investigate suspected unlawful presence during the course of lawful stops, detentions or arrests); Chacón, *supra* note 28, at 609–17 (warning that the Court's decision to leave Section 2(B) intact cedes substantial enforcement powers to subfederal entities and would invite discrimination and harassment of Latinos); Fernanda Santos, *In Arizona, Confusion on Ruling on Migrants*, N.Y. TIMES, Jun. 26, 2012, at A12 (noting mixed reaction to Court's decision).

32. *See* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 673–95 (2013) (explaining how the *Arizona* decision undermines the legality of detention on an immigration detainer); KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 19–24 (2014) (summarizing unlawful seizure analysis and collecting decisions). On November 20, 2014, federal officials announced that they were replacing Secure Communities with a new program based largely on notification detainers rather than detention-based detainers. Johnson Memorandum, *supra* note 5, at 2. Notably, the Memorandum does not rule out detention altogether. It suggests that ICE may continue to issue requests for detention in certain cases where a "person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien." *Id.*

tum that is difficult to reverse. By 2012, immigration enforcement had become a normalized feature of local criminal justice bureaucracies.[33] The legacy of federal-local collaboration programs is not so easily erased, and the persistence of jail-based programs sends a message that it is business as usual when it comes to investigating unlawful presence.[34] Further, while federal proposals to criminalize unlawful presence have been unsuccessful,[35] federal law allows certain migration-related acts to be criminally punished, and federal officials have been prosecuting these offenses at an unprecedented rate.[36] As Hiroshi Motomura has observed, if police authority to enforce the federal criminal immigration provisions is accepted, then as a practical matter, state and local officers unable to distinguish between mere unlawful presence and probable cause of unlawful entry or other "immigration crimes" will continue to target undocumented immigrants for arrest and detention.[37]

Ultimately, the reach of state and local powers in immigration enforcement rests on legal constructions—the legally constructed line between "civil" and "criminal" and the legally constructed distinction between "immigration crimes" and "other crimes." Proxy criminalization is both produced by these categories, in the sense that the categories give proxy criminalization its meaning and significance, and confounds these categories, since it fails to fit neatly into any of them. Given proxy criminalization's potentially far-reaching impact for immigrant communities, a more focused study of it is long due.

B. State Driver's License Schemes as Proxy Criminalization

Next, I turn to describing a paradigmatic example of subfederal proxy criminalization in the immigration context—state driver's license

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33. *See supra* note 28 and accompanying text.

34. *See, e.g., Civil Rights Orgs Celebrate the End of S-Comm, Caution Against the Replacement "PEP-Comm" Program*, CAL. IMMIGRANT POL'Y CENTER (Nov. 21, 2014), http://www.caimmigrant.org/groups-celebrate-s-comm-end/ (explaining how the Administration's new Priority Enforcement Program continues to entangle local law enforcement in immigration enforcement); *see also* Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 327–35 (2013) (explaining how the State Criminal Alien Assistance Program, or SCAAP, creates financial incentives for state and local officials to engage in immigration screening).

35. *See, e.g.*, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203 (2005) (proposing new legislation which would have made it a misdemeanor offense to be present in the United States in violation of federal immigration laws).

36. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142–43 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–83 (2010); Michael T. Light , Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth*, PEW RES. CENTER: HISPANIC TRENDS (Mar. 18, 2014), http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/.

37. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1825 (2011). Others have challenged the notion that police can be assumed to have authority to enforce the criminal provisions of federal immigration law. *See* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 977–78 (2004); Wishnie, *supra* note 28, at 1090–93. The Supreme Court specifically did not reach this issue in *Arizona*. Arizona v. United States, 132 S. Ct. 2492, 2509–10 (2012).

schemes. I have selected state driver's license schemes as a focus for several reasons. First, the structure of state driver's license schemes provides a useful illustration of how proxy criminalization works. Rather than criminalizing status itself, state laws criminalize conduct (i.e., driving without a license) that, by virtue of their status, undocumented immigrants as a group must by and large engage in. Second, there is already growing public consciousness that driver's license laws can act to criminalize undocumented communities,[38] though detailed legal study of this phenomenon has been limited. Finally, unlike subfederal efforts to criminalize immigration that have received the lion's share of scholarly attention in recent years, criminalization of undocumented status through driver's license schemes is occurring in the vast majority of states rather than being concentrated in only a few states.[39]

State driver's license schemes are already understood by many to be an important battlefront for immigration issues at the local level.[40] In the past few years, nine states, the District of Columbia, and Puerto Rico have passed measures extending eligibility for driver's licenses to undocumented immigrants.[41] Campaigns to grant immigrants access to driver's licenses revealed how licenses have come to represent much more than a permission slip to drive. For example, supporters have spoken about the significance of the license as a symbol of belonging and a source of personal security.[42] And the *Los Angeles Times* called California's move last year to allow undocumented immigrants to receive li-

38. *See infra* note 40 and accompanying text.

39. *See infra* notes 69–75 and accompanying text.

40. Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 215–23 (2004) (describing how access to driver's licenses has become a primary civil rights concern for the Latino community); María Pabón López, *More Than A License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 126–27 (2005) (calling driver's license restrictions "a civil rights issue among noncitizens").

41. The states include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, and Vermont. Assemb. 60, 2013–2014 Leg., Reg. Sess. (Cal. 2013); S. 13-251, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.R. 6495, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013); S. 69, 148th Gen. Assemb., Reg. Sess. (Del. 2015); H.R. 1007, 28th Leg., Reg. Sess. (Haw. 2015); S. 957, 97th Gen. Assemb., Reg. Sess. (Ill. 2013); S. 715, 2013 Gen. Assemb., Reg. Sess. (Md. 2013); S. 303, 77th Leg., Reg. Sess. (Nev. 2013); S. 38, 2013–2014 Gen. Assemb., Reg. Sess. (Vt. 2013); *see also* D.C. 20–275, 2013–2014 Council of the D.C., Reg. Sess. (D.C. 2013); P. de C. 900, 17th Legis. Assemb., 1st Sess. (P.R. 2013). Washington, New Mexico and Utah previously allowed undocumented immigrants to obtain driver's licenses. Some of the above states issue special or temporary licenses or driving privilege cards to those not able to show lawful presence. This has prompted criticism from advocates who fear that any distinguishing feature on licenses can draw attention to the fact that their holders are undocumented. *See, e.g.*, Ruben Navarrette, *Don't Meddle With Driver's Licenses for Undocumented*, CNN (May 13, 2014, 7:51 AM), http://www.cnn.com/2014/05/13/opinion/navarrette-immigration-licenses/.

42. *See, e.g.*, Mary E. O'Leary, *2,000 Attend New Haven Hearing on Bill to Give Licenses to Undocumented*, NEW HAVEN REGISTER (Mar. 4, 2013, 12:01 AM), http://www.nhregister.com/general-news/20130304/2000-attend-new-haven-hearing-on-bill-to-give-licenses-to-undocumented (discussing statements of Carolina Bortolleto, Sen. Martin Looney and Rev. James Manship); Becca Heller, *Legislature Extends Md. Driver's Licenses for Immigrants Here Illegally*, MARYLAND REPORTER (Apr. 7, 2013), http://marylandreporter.com/2013/04/07/legislature-extends-md-drivers-licenses-for-immigrants-here-illegally/ (discussing statement of Del. Joseline Pena-Melnyk).

censes a step forward "in the long campaign to decriminalize [immigrants'] day-to-day lives."[43]

But state driver's licenses did not start out having such significance in the struggle for immigrants' rights. The first state driver's license laws date back to the early 1900s and were enacted to establish standards for who was fit to be on the road.[44] Eligibility criteria focused on public safety considerations and included age, physical capacity to drive, driving competency, and knowledge of traffic laws.[45] For safety reasons, the original idea was to license all drivers who would be on the road.[46] Though driving is characterized as a "privilege," the conventional wisdom was that a driver's license should be granted to anyone fit to be on the road.[47]

The ubiquity of the license eventually led to its prominence as a primary form of identification in American society.[48] It was this feature of driver's licenses, and not a concern for road safety, that led policymakers to start to see licenses as a "benefit" that should be denied to undocumented immigrants.[49] After nearly a century without restrictions on driver's license eligibility based on immigration status, in the early 1990s, states began to require applicants to demonstrate authorized presence in the United States to receive a license.[50]

In 1993, as nativist sentiment swept the country,[51] California became one of the first states to disallow undocumented residents from obtaining licenses.[52] Proponents of the measure expressed alarm that the license might serve as a "breeder document" to allow immigrants to qualify for other public services and programs; they noted openly their hope that the denial of driver's licenses would "act as a deterrent to illegal immigration."[53] For its part, the California Department of Motor Vehicles (DMV) questioned whether it was their role to enforce federal

43. Richard Winton, Hector Becerra & Kate Mather, *Driver's Licenses for Undocumented Immigrants Stir Debate*, L.A. TIMES, Sept. 13, 2013, http://www.latimes.com/local/lanow/la-me-ln-drivers-license-for-undocumented-immigrants-stir-debate-20130913-story.html.

44. López, *supra* note 40, at 108–09.

45. *Id.*

46. Johnson, *supra* note 40, at 220.

47. *Id.* at 221.

48. *Id.*

49. *Id.*

50. *See infra* notes 51–58 and accompanying text.

51. *See* Johnson, *supra* note 40, at 215. This same wave would be responsible for California's Proposition 187 in 1994. Gerald L. Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1450–51 (1995) (discussing the "inflated rhetoric" about "'illegal' aliens" and coded racial appeals that preceded the referendum); Johnson, *supra* note 40, at 218–19 (observing that California's bid to deny immigrants driver's license came shortly before voters approved Proposition 187).

52. S. 976, 1993–1994 Leg., Reg. Sess. (Cal. 1993).

53. S. B. Analysis, S. 976, 1993–1994 S., Reg. Sess. (Cal. Sept. 10, 1993), CA B. An., S.B. 976 Sen., 9/10/1993 (Westlaw) (quoting sponsors of S.B. 976).

immigration laws.[54] Notwithstanding objections that it would lead to many more unlicensed drivers on the road, the legislature passed the bill and it was signed into law.[55]

California's rationales for restricting driver's license eligibility had traction, and other states soon followed suit. Over the next decade, numerous states began requiring their residents to demonstrate lawful presence before receiving a driver's license.[56] Others that did not explicitly require proof of lawful presence nevertheless required applicants to submit a Social Security number to obtain a license.[57] This operated as a de facto ban on undocumented immigrants receiving driver's licenses since individuals not authorized to work in the United States are not eligible for a Social Security number.[58] In addition to driver's licenses, state motor vehicles offices were also offering non-driver identification cards for residents who could not drive.[59] States restricted eligibility for these documents based on immigration status as well.[60]

Restrictions on driver's license and non-driver identification card eligibility for immigrants peaked after the September 11th attacks.[61] Public debate focused on the fact that the hijackers apparently had United States driver's licenses.[62] It is far from clear whether the hijackers needed driver's licenses to carry out the attacks.[63] But for many people, it was problematic enough that driver's licenses allowed the hijackers to "blend in[]" with the rest of society.[64]

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54. Assemb. Comm. on Transp. B. Analysis, S.B. 976, 1993–1994 Assemb., Reg. Sess. (Cal. Aug. 16, 1993), CA B. An. S.B. 976 Assem. 8/16/1993 (Westlaw); S. Transp. Comm. B. Analysis, 1993–1994 S., Reg. Sess. (Cal. Apr. 14, 1993), CA B. An. S.B. 976 Sen. 4/14/1993 (Westlaw).

55. S. 976, 1993–1994 Leg., Reg. Sess. (Cal. 1993).

56. *See, e.g.*, S. 1009, 43rd Leg., 1st Reg. Sess. (Ariz. 1997); S. 1, 59th Gen. Assemb., 2d Reg. Sess. (Colo. 1994); S. 89, 2002 Leg., 1st Extraordinary Sess. (La. 2002).

57. López, *supra* note 40, at 105–06.

58. 20 C.F.R. § 422.104(a) (2015) (listing classes of persons who may be assigned a Social Security number). Some believe that federal law requires driver's license applicants to present a Social Security number. To the contrary, states may require applicants to provide the Social Security numbers, if they have them. *See, e.g.*, 42 U.S.C. §§ 405(c)(2)(C)(i), 666(a)(13) (2015) (discussing procedures requiring the Social Security number of applicants to be recorded for child support enforcement purposes).

59. *See* López, *supra* note 40, at 99.

60. *Id.* at 96.

61. *Id.*

62. Deborah Sharp, *Immigrants Encounter Red Lights at DMVs*, USA TODAY (May 9, 2002, 8:05 PM), http://usatoday30.usatoday.com/news/nation/2002/05/10/drivers-usat.htm; Jude Joffe-Block, *How 9/11 Changed our Driver's Licenses*, FRONTERAS: THE CHANGING AMERICA DESK (Sept. 9, 2011), http://www.fronterasdesk.org/content/how-911-changed-our-drivers-licenses.

63. Margaret D. Stock, *Driver's Licenses and National Security: Myths and Reality*, 10 BENDER'S IMMIGR. BULL. 422, 424–25 (2005) (noting that the hijackers did not need driver's licenses to board commercial aircraft, since they all had passports).

64. Sharp, *supra* note 62.

The distorting lens of national security[65] thus fueled further restrictions on the eligibility of immigrants to obtain driver's licenses. Several states passed laws restricting access to driver's licenses in their own jurisdictions during this period.[66] In 2005, Congress passed the REAL ID Act, which mandated strict, uniform standards for driver's license and state identification cards used to board commercial flights and enter federal buildings.[67] One of these standards was the requirement to show lawful immigration status.[68]

Thirty-eight out of fifty states currently restrict or effectively restrict undocumented immigrants' ability to obtain a driver's license.[69] A survey of state laws reveals that most states that restrict eligibility for driver's licenses on this basis also make it a misdemeanor to operate a motor vehicle without a valid license.[70] Several states go further, subjecting

65. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1832 (2007) (describing how national security rhetoric has led to distortions in immigration policy).

66. *See, e.g.*, H.R. 188, 2002 Gen. Assemb., Reg. Sess. (Ky. 2002); S. 2182, 2002 Leg., Reg. Sess. (Miss. 2002); Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1711–12 (2005). Louisiana passed the "Prevention of Terrorism on the Highways Act," which made it a misdemeanor for a person to "operate a motor vehicle in the state without documentation demonstrating that the person is lawfully present in the United States." S. 89, 2002 Leg., 1st Extraordinary Sess. (La. 2002). The law was eventually held to be preempted by federal law. State v. Sarrabea, 126 So. 3d 453, 465 (La. 2013).

67. REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231 (2005) (codified at 49 U.S.C. §§ 30301–30308 (2015)) [hereinafter REAL ID Act].

68. REAL ID Act, § 202(c)(2)(B). "Lawful status" is defined at 6 C.F.R. § 37.3 (2015). The REAL ID Act makes a preemption challenge to the denial of access to driver's licenses by undocumented immigrations more difficult because the Act invites states to condition license eligibility by status. However, complying states also have the option to make licenses available to undocumented immigrations, so long as they are marked. REAL ID Act § 202(d)(11); *cf.* Shirley Lin, *States of Resistance: The REAL ID ACT and Constitutional Limits upon Federal Deputization of State Agencies in the Regulation of Non-Citizens*, 12 N.Y. CITY L. REV. 329, 337–38 (2009) (noting that the requirement to specially mark licenses provided to undocumented immigrants nevertheless draws states, some unwillingly, into the business of screening and classifying noncitizens).

69. *See State Laws & Policies on Driver's License for Immigrants*, NAT'L IMMIGR. L. CENTER, http://www.nilc.org/driverlicensemap.html (last updated July 1, 2015).

70. This was originally to encourage every driver to take the requisite tests and obtain a driver's license. Thirty-six of the forty states make driving without a license a misdemeanor offense. ALA. CODE § 32-6-18(a) (2014); ALASKA STAT. §§ 28.15.011, 28.15.281, 28.90.010(a) (2014) (specifying penalty); ARK. CODE ANN. §§ 27-16-602, 27-14-301 (2015) (specifying penalty); FLA. STAT. §§ 322.03(1), 322.39 (2010) (specifying penalty); GA. CODE ANN. §§ 40-5-20(a), 40-5-121(a) (2014); IND. CODE § 9-24-18-1(a) (2015); IOWA CODE §§ 321.174(1), 321.482 (2015) (specifying penalty); KAN. STAT. ANN. § 8-235(a), (e) (2015); KY. REV. STAT. ANN. §§ 186.410(1), 186.990(3) (West 2014); LA. REV. STAT. ANN. §§ 32:52, 32:57 (2014) (specifying penalty); ME. REV. STAT. tit. 29-A, § 1251(1)(A) (2015); MASS. GEN. LAWS ch. 90, §§ 10, 23 (2014); MICH. COMP. LAWS §§ 257.301(1), 257.901 (2015) (specifying penalty); MINN. STAT. §§ 171.02, 171.241 (2015) (specifying penalty); MISS. CODE ANN. § 63-1-5 (2014); MO. REV. STAT. § 302.020 (2014); MONT. CODE ANN. § 61-5-102(1) (West 2015); NEB. REV. STAT. §§ 60-484(1)(a), 60-4,111 (2015) (specifying penalty); N.H. REV. STAT. ANN. § 263:1 (2015); N.J. STAT. ANN. § 39:3-10 (West 2015); N.Y. VEH. & TRAF. LAW § 509(1), (11) (McKinney 2015); N.C. GEN. STAT. §§ 20-7(a), 20-35(a1) (2014) (specifying penalty); OHIO REV. CODE ANN. § 4507.02(A)(1) (West 2014) (specifying no jail unless multiple offenses); OKLA. STAT. tit. 47, § 6-303(A) (2014); R.I. GEN. LAWS § 31-11-18(a) (2014); S.C. CODE ANN. § 56-1-440 (2015); S.D. CODIFIED LAWS § 32-12-22 (2014); TENN. CODE ANN. §§ 55-50-301(a)(1), 55-50-603 (2014) (specifying penalty); TEX. TRANSP. CODE ANN. §§ 521.021, 521.461 (2013) (specifying penalty, no jail unless multiple offenses); VA. CODE ANN. § 46.2-300

drivers to felony punishment in some cases—drivers are either cited under statutes penalizing driving while their licenses are revoked or suspended,[71] or state law makes it a felony to drive without a license after the third or subsequent convictions.[72]

Proxy criminalization works by punishing conduct that—whether by operation of law or other circumstance—an identifiable group of individuals must regularly engage in for social or economic survival. The Ninth Circuit recently recognized, also in a case arising out of Arizona, that "[a]s a practical matter, the ability to drive may be a virtual necessity" for residents who are working.[73] This is true not only of Arizona but for many other places as well.[74] By excluding immigrants from being able to obtain a driver's license, the government does not deter them from driving.[75] Instead, states force them to risk arrest or a criminal citation for engaging in an everyday activity needed to survive.

State and local law enforcement agents have taken advantage of this state of affairs to investigate, arrest, and detain undocumented immigrants.[76] These enforcement actions have little relation to road safety. Instead, driver's license schemes became an immigration enforcement tool of choice for police agencies and sheriff's offices around the country

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(West 2014); W. VA. CODE §§ 17B-2-1(a)(1), 17B-5-1 (2015) (specifying penalty); WIS. STAT. § 343.05(3)(a), (5)(b)(1) (2015) (specifying no jail unless multiple offenses); WYO. STAT. ANN. § 31-7-106(a), § 31-7-136 (2014) (specifying penalty).

Three states—Arizona, Oregon and Pennsylvania—treat driving without a license as a civil or summary offense, but undocumented immigrants can still effectively be arrested. ARIZ. REV. STAT. ANN. §§ 28-3151(A), 28-121(B), 28-1595(B) (2015) (specifying that a driver not licensed who fails to show qualifying ID is guilty of a misdemeanor); OR. REV. STAT. §§ 807.010(1), (4), 807.570 (2015) (describing how an officer can detain to verify identity of anyone who fails to present license); 75 PA. CONS. STAT. §§ 1501(a), (d), 6304 (2014) (specifying that officer can arrest). Only one out of the forty states appeared to treat driving without a license as a civil moving offense without the possibility of arrest. N.D. CENT. CODE §§ 39-06-01, 39-06.1-09 (2013).

71. Memorandum from Daniel Morales, Joanne Lin & Chris Rickerd to Alejandro Mayorkas, Deputy Sec'y, U.S. Dep't of Homeland Sec., on Driving Without License Felonies and Deferred Action Eligibility 1 & n.3 (Jan. 23, 2015), *available at* https://www.aclu.org/sites/default/files/assets/felony_driving_convictions_1-23-15.pdf (explaining that in those jurisdictions, drivers without licenses are treated as having their licenses "revoked" upon the first stop).

72. *Id.* at 2–3.

73. Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1062 (9th Cir. 2014) (noting that Arizona's denial of driver's licenses to DACA recipients may violate the Supremacy Clause because federal law intended them to be able to work, but declining to reach the question due to its holding that Arizona's policy violated the Equal Protection Clause by treating DACA recipients differently than other immigrants with deferred action).

74. Aldana & Lazos Vargas, *supra* note 66, at 1709–10 (explaining how driving rises to the level of necessity in many areas where immigrants live); Gregory A. Odegaard, *A Yes or No Answer: A Plea to End the Oversimplification of the Debate on Licensing Aliens*, 24 J.L. & POL. 435, 448 (2008) (discussing the unavailability of public transportation and noting that it is often difficult, if not impossible, to function without a car).

75. Odegaard, *supra* note 74, at 448.

76. *See, e.g.*, Brown, *supra* note 1 and accompanying text.

interested in exacting retribution from undocumented immigrants, allowing racially motivated traffic stops to flourish.[77]

After the Obama Administration announced the DACA program in 2012, a move that was met with overwhelming voter support that election season,[78] state legislatures started to enact the first measures in two decades to roll back restrictions on driver's license eligibility for immigrants.[79] The vast majority of states also confirmed they would extend eligibility for driver's licenses to recipients of deferred action under the program.[80] It is unclear, though, if this trend to integrate immigrant populations into the fabric of local communities will continue, given the current political climate.[81]

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77. *See* Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dept. of Justice, to Joseph Maturo, Jr., Mayor, Town of East Haven 8–10 (Dec. 19, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (describing police department's practice of patrolling locations where Latinos congregated and following vehicles with a Latino driver in an attempt to enforce immigration laws); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dept. of Justice, to Clyde B. Albright, Alamance Cnty. Att'y, et al. 4–5 (Sept. 18, 2012), *available at* http://www.justice.gov/iso/opa/resources/1712012918124624881 98.pdf (describing Alamance County Sheriff's Office's discriminatory traffic enforcement and checkpoint practices and referring to one deputy who said "he stopped a Latino man because 'most of them drive without licenses'" (quoting Alamance County Sheriff's Office deputy)); *see also* Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Data Shows*, N. Y. TIMES, Apr. 6, 2014, at A1 (finding that two-thirds of the nearly two million deportations during the Obama administration involved individuals who had only a minor traffic violation, or no criminal record at all).

78. *See* Loren Collingwood, Matt A. Barreto & Sergio I. Garcia-Rios, *Revisiting Latino Voting: Cross-Racial Mobilization in the 2012 Election*, 67 POL. RES. Q. 632 (2014); Lynn Vavreck, *It's Not Too Late for Republicans to Win Latino Votes*, N.Y. TIMES, Aug. 11, 2014, http://www.nytimes.com/2014/08/12/upshot/its-not-too-late-for-republicans-to-win-latino-votes.html?abt=0002&abg=1.

79. *See supra* note 41 and accompanying text.

80. Nat'l Immigration Law Ctr., *Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for Driver's Licenses?*, NILC.ORG, http://www.nilc.org/dacadriverslicenses.html (last updated June 19, 2013). Because state restrictions on driver's license eligibility are typically linked to unlawful presence and the lack of a Social Security number, and DACA recipients have lawful presence (though not lawful status) and work authorization, they are in a different position than undocumented immigrants who do not have deferred action. Arizona and Nebraska were notable exceptions, though DACA recipients in those states can now receive licenses. *See* Arizona Dream Act Coal. v. Brewer, 81 F. Supp. 3d 795, 799 (D. Ariz. 2015) (granting permanent injunction against Arizona's denial of driver's licenses to DACA grantees); Griselda Nevarez, *Nebraska Ends Ban on Driver's Licenses for Young Immigrants*, NBC NEWS (May 28, 2015, 2:53 PM), http://www.nbcnews.com/news/latino/nebraska-ends-ban-drivers-licenses-young-immigrants-n366136. Georgia recently made news with introduction of a bill that would take driver's licenses away from DACA recipients, though the bill was eventually defeated. Aaron Morrison, *Immigration Reform 2015: Georgia Lawmakers Defeat Driver's License Ban For Undocumented Immigrants Under Obama Relief*, INT'L BUS. TIMES (Mar. 31, 2015, 4:38 PM), http://www.ibtimes.com/immigration-reform-2015-georgia-lawmakers-defeat-drivers-license-ban-undocumented-1865552.

81. For example, the President's expansion of administrative relief to undocumented parents in the Deferred Action for Parental Accountability (DAPA) program was met with strong opposition. Muzaffar Chishti, Faye Hipsman & Bethany Eberle, *Policy Beat: As Implementation Nears, U.S. Deferred Action Programs Encounter Legal, Political Tests*, MIGRATION POL'Y INST. (Feb. 11, 2015), http://www.migrationpolicy.org/article/implementation-nears-us-deferred-action-programs-encounter-legal-political-tests. That states would have to provide driver's licenses to recipients of deferred action is one of bases on which U.S. District Court Judge Andrew Hanen recently found they have standing in the legal challenge to DAPA and Administration's expansion of DACA. *Texas*

C. Diagnosing the Harms of Proxy Criminalization

In Part II.A above, I explained that proxy criminalization is undermining some of the gains of recent decisions limiting the role of state and local participation in the immigration arena. Reconceptualizing state driver's license schemes as a form of proxy criminalization also makes it easier to see some of the other harms associated with proxy criminalization. In this section, I discuss the multiple and complex harms of subfederal proxy criminalization of migration. In addition to the human costs, proxy criminalization contributes to the notion that immigrants should be viewed with suspicion in general and outcast from local communities at the expense of real policy solutions.

Of course, the enforcement of laws that criminalize the subsistence activities of undocumented immigrants has direct impacts on immigrants' lives. An individual who is cited or arrested for a violation of driving without a license can incur substantial criminal fines. Enforcement also carries a possibility of jail time in many states[82] and the prospect of temporary separation from one's family and community. Arrest can then serve as a pipeline to deportation and permanent separation.[83]

Proxy criminalization is also harmful because it brands immigrants as deviant for conduct that is not deviant,[84] whether or not they spend any time incarcerated for the offense.[85] The mark of criminality becomes a form of local community self-definition, cementing immigrants' outsider status.[86] In the process of defining who is "in" and who is "out," the law also constructs the undocumented immigrant identity.[87] Individuals

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v. United States, 86 F. Supp. 3d 591, 616–25 (S.D. Tex. Feb. 15, 2015) (No. B-14-254). The United States has taken an appeal of Judge Hanen's injunction to the U.S. Court of Appeals for the Fifth Circuit. *See* Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (dismissing the United States' motion to stay the preliminary injunction).

82. *See supra* note 70.

83. *See supra* notes 28, 34; *see also* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–33 (2015) (explaining, inter alia, how arrests have increasingly become a tool for immigration screening and enforcement).

84. *See* Chacón, *supra* note 65, at 1886 (noting that criminalization of immigrants makes it "even harder to distinguish between those who pose a genuine threat to personal security and those who are merely trying to survive").

85. Though most states treat driving without a license as a misdemeanor rather than a felony, carrying little or no jail time, misdemeanors can still have significant branding effects. *Cf.* Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. OF SOCIOLOGY 351, 351–93 (2013) (detailing how misdemeanor justice can exert social control); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 285–89 (2012) (describing the impact of misdemeanor convictions on defendants and their families).

86. In her influential piece, *The Crimmigration Crisis*, Juliet Stumpf discusses how criminal law and immigration law can both serve membership gatekeeping functions. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 396–402 (2006); *see also* Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 372–73 (2010) (observing that local immigration regulations can be a way by which communities define themselves).

87. *Cf.* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 58–64 (2004) (describing the process by which the "illegal immigrant" subject

falling within this definition are reduced to the sum of their immigration transgressions and "crimes," and their existence is problematized across settings.[88]

The stigmatizing impact of proxy criminalization, combined with the tangible consequences for immigrants, has led to reduced civic participation of some immigrants in their communities. Though many immigrants will drive without a license to go to work, for example, they may otherwise try to refrain from being on the roads out of fear of arrest.[89] They are literally kept inside by criminalization, hidden from public view. Driver's license schemes can thus constitute a powerful way by which states assert dominance over noncitizens, altering their movements and very existence.[90]

In a new book, Charles Epp, Steven Maynard Moody, and Donald Haider-Markel explain how driving can be understood as a marker of democratic citizenship.[91] Driving has become a prerequisite to freedom, essential to participation in the social and economic life of one's community; and it has special meaning for racial minorities who were historically deprived of mobility in various ways.[92] The criminalization of driving for undocumented immigrants substantially limits their access to these aspects of democratic citizenship.

Finally, the perversion of the criminal justice system for immigration control ends fuels misperceptions about migrant criminality. Public discourse around immigration has already become "dominated by the trope of criminality."[93] When immigrants are reimagined as criminals for engaging in everyday activities, this—together with enforcement of the laws through arrests, citation, and incarceration—generates a feedback loop and validates the public's fears.[94] The notion that immigrants com-

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was constructed in early 20th century America, noting that the "illegal alien" became "something of a specter, a body stripped of individual personage. . . . both fulfilling and fueling nativist discourse").

88. *Cf.* Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 81 (1998) ("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.").

89. *See* SARAH E. HENDRICKS, IMMIGRATION POLICY CTR., LIVING IN CAR CULTURE WITHOUT A LICENSE 3–6 (2014), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/living_in_car_culture_without_a_license_3.pdf.

90. López, *supra* note 40, at 111–12 (discussing Michel Foucault's theory of power and applying it to state restrictions on driver's license eligibility).

91. CHARLES R EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP, 17–19 (2015) (discussing traffic stops of African Americans and, to a lesser extent, other people of color).

92. *Id.*

93. Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 629 (2012).

94. Chacón, *supra* note 36, at 146 (describing how enforcement efforts can generate a feedback loop of popular pressure that drives even greater enforcement).

mit more crime has been empirically disproven.[95] Nevertheless, proxy criminalization helps ensure that the myth persists—because the definition of crime itself has been altered. John Hagan, Ron Levi, and Ronit Dinovitzer explain how this type of linking of crime and immigration can affect a type of symbolic violence by which immigrants come to be viewed as inherently delinquent.[96]

Indeed, proxy criminalization may be more concerning than direct criminalization because the role of the state in conflating immigrants and crime is obscured. A state can claim that it is merely trying to address the criminal externalities of migration. When criminalization operates on a subconscious level, we are less likely to resist it.[97] The state avoids legal scrutiny and the public is left with unchallenged internalized associations of immigrants with disorder.

Ultimately, proxy criminalization of migration affects more than just immigrants and their families. In the case of driver's license laws, internalized associations have taken on a racialized image—the prototypical traffic misdemeanant becomes a Latino/a immigrant who is driving without a license.[98] Proxy criminalization thus becomes a way by which the law reaffirms racial salience and racial hierarchy.[99]

Certainly, there are moments of dissonance. Campaigns by immigrants' rights groups, typically around individual cases, have prompted reflection about the "criminal" label and how it is being deployed. But on the whole, proxy criminalization has helped to legitimate a host of state practices towards immigrants and minorities, from police harassment to the erosion of procedural rights and deprivation of liberty, that the public might otherwise find intolerable. In the next section, I explore what lessons we can learn from the experience of another group that has been

95. *See* Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION POL'Y INST. (June 1, 2006), http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young.

96. John Hagan, Ron Levi & Ronit Dinovitzer, *The Symbolic Violence of the Crime-Immigration Nexus: Migrant Mythologies in the Americas*, 7 CRIMINOLOGY & PUB. POL'Y 95, 97–99 (2008); *see also* Jeff Ferrell, *Cultural Criminology*, 25 ANN. REV. OF SOC. 395, 405 (1999) (describing how cultural criminalization may be an "end in itself, successfully dehumanizing or delegitimating those targeted, though no formal legal charges are brought against them").

97. *See* Nash, *supra* note 19, at 265–66 (explaining how the targeting of immigrants through nuisance regulation facilitates implicit bias by labeling their ways of living as quality-of-life diminishing, leveraging and validating pre-existing negative associations with immigrant communities).

98. *See supra* note 77.

99. *See also* Jamie Longazel, *Moral Panic as Racial Degradation Ceremony: Racial Stratification and the Local-Level Backlash against Latino/a Immigrants*, 15 PUNISHMENT & SOC'Y 96, 96 (2013) (describing passage of Hazelton ordinance as perpetuating racial stratification). This process is not entirely different from the process by which states, through Black Codes, criminalized African-Americans for engaging in ordinary actions that were legal for white people. *See, e.g.*, David F. Forte, *Spiritual Equality, the Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 600–01 (1998).

subject to persistent proxy criminalization at the local level—the homeless—and how courts have analyzed their claims.

II. PROXY CRIMINALIZATION AS UNDERSTOOD THROUGH COURTS' EIGHTH AMENDMENT ANALYSIS OF LOCAL LAWS TARGETING THE HOMELESS

It is perhaps not surprising that proxy criminalization is often carried out against groups at the center of local political debates who themselves have limited political power (at least in a conventional sense). Because the group being targeted is often perceived as being undesirable or imposing a burden, communities may disguise criminalization as a neutral response to local concerns or public safety, making it harder to recognize. It is useful, then, to examine how other groups and their advocates have framed their objections to proxy criminalization and, specifically, how they have described proxy criminalization's relationship to overt or direct criminalization based on status.

Over the past few decades, advocates for the homeless have been able to gain some ground arguing that local ordinances that criminalize sitting, lying, sleeping, or camping in public spaces are tantamount to criminalizing homelessness itself. The cruel and unusual punishment clause of the Eighth Amendment prohibits the government from criminally punishing individuals based on a status or condition.[100] Therefore, these advocates contend, the enforcement of laws that render these necessary, life-sustaining activities of homeless persons criminal are unconstitutional.[101]

In both the immigration and the homelessness context, direct criminalization based on status is generally impermissible. In both contexts, states and localities have responded by passing measures that have the veneer of punishing conduct rather than status. Some courts evaluating the claims of homeless persons, however, have been willing to look past the conduct/status distinction, particularly where a locality has played a role in leaving the homeless with no option but to sleep outdoors. In the remainder of this section, I provide some background on the homelessness example and review the Eighth Amendment decisions to see what light they can shed on the phenomenon of subfederal proxy criminalization in immigration.

A. Local Responses to Homelessness

Beginning in the 1980s, cities grappled anew with the question of how to address homeless populations within their jurisdictions.[102] As

100. *See infra* notes 112–13 and accompanying text.

101. *See infra* notes 109–14 and accompanying text.

102. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1169 (1996) (describing what he calls

with immigration, differing local contexts have led to a patchwork of approaches,[103] with some jurisdictions being more hostile to the homeless and others treating them with greater humanity.[104] Local policies have also fluctuated over time.[105]

One response to the presence of homeless populations has been the passage of anti-camping ordinances and other measures that limit resting or sleeping in a public space.[106] The practical effect of such ordinances is that poor people are forced to violate the law since they do not have private spaces to which they can go. When they violate the law, local police may then subject them to questioning, searches, arrest, and fines. Enforcement of these low-level ordinances has become a major way by which local communities manage, control, and sometimes expel poor people out of a jurisdiction.[107] Proponents of the measures garner support for them by framing their motivations in the language of public safety.[108]

In the late 1980s, the Miami Chapter of the American Civil Liberties Union and others brought a class action suit against the city for its practice of harassing and arresting homeless persons in an attempt to drive them out of public spaces.[109] Four years into litigation, in 1992, U.S. District Court Judge Clyde Atkins held in *Pottinger v. City of Mi-*

"[c]hronic street nuisances" as presenting "practically knotty and normatively perplexing questions about the management of public spaces"); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 646–47 (1992) (discussing the dramatic rise of homelessness in American cities in the 1980s).

103. *See supra* notes 19–20 and accompanying text; *see also* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624 (2008) (arguing that local immigration ordinances are "products of, and complicated by, how localism organizes and defines the powers and interests of local governments").

104. *See* Donald E. Baker, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 424 (1991) ("Local and state governmental responses to the problems of homeless persons vary."); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 35–41 (2014), *available at* http://www.nlchp.org/documents/No_Safe_Place (describing examples of constructive approaches).

105. Gary Blasi, *And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAV. SCIENTIST 563, 569–75 (1994) (comparing attitudes toward the homeless in New York City in the early 1980s versus the early 1990s).

106. Jamie Michael Charles, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 317–20 (2009); Donald Saelinger, *Nowhere To Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 551–53 (2006) (describing restrictions on sleeping, sitting, or storing property in public spaces).

107. *See* Saelinger, *supra* note 106, at 553; *see also* Simon, *supra* note 102, at 645–47. As Rick Su has explained with reference to immigration regulations, such measures can be understood as a technique by which cities use the law to "demarcate, define, and enforce the role of space and community in American society." Su, *supra* note 86, at 372-73.

108. *See* Saelinger, *supra* note 106, at 553–54 (describing rationales advanced for "quality of life" ordinances and origin of public safety rationale in George Kelling and James Wilson's broken windows theory of crime and order maintenance).

109. Baker, *supra* note 104, at 457–59; Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-Homeless Lawsuit*, 23 STETSON L. REV. 467, 467–68 (1994).

ami[110] that the city had violated the Eighth Amendment by punishing homeless residents for lying, sleeping, standing, or sitting in public.[111] He relied on a line of cases starting with the Supreme Court's decision in *Robinson v. California*,[112] which had held that the cruel and unusual punishment clause of the Eighth Amendment prohibits the government from criminally punishing individuals based on a status or condition.[113] Though *Robinson*'s admonition applied only to the punishment of status, Judge Atkins found that the Eighth Amendment could also work to limit the government's punishment of conduct that is closely associated to that status—in this case, resting or sleeping in a public place.[114]

The court in *Pottinger* supported the connection between status and conduct incidental to status by pointing to a concurring opinion by Justice White in a Supreme Court case that closely followed *Robinson*.[115] In *Powell v. Texas*,[116] a majority of justices voted not to overturn the conviction of a Texas resident under a statute that punished "be[ing] found in a state of intoxication in any public place, or at any private house except his own."[117] A plurality of four justices concluded in that case that unlike Lawrence Robinson, Leroy Powell had not been punished for the status of being an alcoholic.[118] Justice White also ruled to uphold Mr. Powell's conviction but noted that he might have overturned the conviction under the Eighth Amendment if Mr. Powell had come forward with evidence that his condition essentially rendered his public intoxication involuntary.[119] In other words, if Mr. Powell could have persuaded Justice White that his conduct was an unavoidable consequence of his alcoholic condition, the outcome may have been different.

In the *Pottinger* case, Judge Atkins found that the conduct for which homeless individuals were being punished was an unavoidable conse-

110. 810 F. Supp. 1551 (S.D. Fla. 1992).

111. *Id.* at 1562–65. The Court also ruled the practice unconstitutional on other grounds, including overbreadth and infringement on plaintiffs' right to travel. *Id.* at 1575–83. Prior to *Pottinger*, courts had occasionally overturned vagrancy statutes on the ground that they punished a status or condition. *See id.* at 1562 (collecting cases). *Pottinger* was the first to do so for laws that criminalize sleeping in public. *See id.* at 1563.

112. 370 U.S. 660, 662, 667 (1962) (overturning the conviction of a California man who had been found guilty of violating a statute that made it a crime "[t]o be addicted to the use of narcotics").

113. *Pottinger*, 810 F. Supp. at 1562. In *Robinson*, the Supreme Court found offensive the notion that a condition or illness could be made into a criminal offense, rendering a person "continuously guilty" and subject to prosecution at any time without committing a transgression. *Id.* at 666 (internal quotation omitted). Though the Eighth Amendment cruel and unusual punishment clause is more popularly understood as limiting *how* a state may punish, *Robinson* and its progeny address limits of *what* a state may punish. *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977) (noting that the Eighth Amendment circumscribes the criminal process in several ways, one of which is that it "imposes substantive limits on what can be made criminal").

114. *Pottinger*, 810 F. Supp. at 1564.

115. *Id.* at 1563 (citing Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring)).

116. 392 U.S. 514 (1968).

117. *Id.* at 517, 536–37 (discussing Mr. Powell's conviction under Texas Penal Code Art. 477).

118. *Id.* at 533–34.

119. *Id.* at 551, 553–54 (White, J., concurring).

quence of their condition. Sleeping, eating, standing, and congregating in public, the court found, were essential, life-sustaining activities that class members had no reasonable choice but to perform in public.[120] To arrive at this conclusion, the court relied on expert testimony describing the shortage of shelter beds in the city and the social, economic, and psychological barriers homeless people faced.[121] So long as the city did not have sufficient shelter to house Miami's homeless, the court ruled, the city could not criminalize otherwise innocent acts if doing so would be tantamount to punishing the homeless for their status.[122]

Over a decade later, in *Jones v. City of Los Angeles*,[123] the Ninth Circuit adopted similar reasoning to uphold an injunction prohibiting the City of Los Angeles from enforcing an ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks in the Skid Row area.[124] The court held that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds," the city could not unconditionally enforce the ordinance against them.[125] Most recently, the U.S. Department of Justice Civil Rights Division filed a Statement of Interest in a federal case in Idaho arguing—based on *Jones*—that criminalizing the homeless for sleeping in public spaces when there is insufficient shelter space violates the Eighth Amendment.[126]

One innovation in these cases is the introduction of a notion that local governments could not deny homeless populations shelter on the one hand and criminalize the only alternative they had—sleeping in the street and in public places—on the other. In other words, the relationship between these two acts by a local government turned the criminalization of a homeless person's *conduct* into the de facto criminalization of a homeless person's *status*. While courts opining on the lawfulness of anti-camping laws in other jurisdictions have sometimes declined to invalidate them, several have done so on grounds that the plaintiffs had not shown an insufficiency in shelter for the homeless.[127]

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120. *Pottinger*, 810 F. Supp. at 1574.

121. *Id.* at 1564.

122. *Id.* at 1564–65.

123. 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

124. *Id.* Judicial pronouncements in these cases helped to highlight the complex causes of homelessness and the social and economic reality confronting homeless persons, leading cities to adopt more constructive solutions through settlement. Unfortunately, criminalization continues to this day. Paul Boden & Jeffrey Selbin, Op-Ed., *California is Rife with Laws Used to Harass Homeless People*, L.A. TIMES, Feb. 15, 2015, http://www.latimes.com/opinion/op-ed/la-oe-0216-boden-california-vagrancy-laws-target-homeless-20150216-story.html.

125. *Jones*, 444 F.3d at 1138.

126. News Release, U.S. Dep't of Justice, Justice Department Files Brief to Address the Criminalization of Homelessness (Aug. 6, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness.

127. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (finding that Orlando's law prohibiting, inter alia, sleeping or being in a temporary shelter on public property did not violate the Eighth Amendment because the city presented evidence of an abundance of shelter

B. Going Beyond the Homelessness Cases

Some scholars and advocates have argued for an application of the *Robinson* prohibition on the criminalization of status to additional contexts. For example, before the Supreme Court decided *Lawrence v. Texas*,[128] Claude Millman argued that sodomy statutes should be held unconstitutional under the Eighth Amendment because they punished conduct closely related to status.[129] Millman suggested that the reasoning of Justice White's concurring opinion in *Powell* should apply to acts that are "elemental" or "lie at the core of the individual's status," even if they are not, in the strict sense, involuntary.[130] As for types of statuses that should be protected by the Eighth Amendment, Millman again turned to Justice White, noting that a status in this context applied to "a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, . . . relatively permanent in duration . . . [and] of great magnitude and significance in terms of human behavior and values."[131]

Taking the homelessness cases and Millman's argument to heart, one can see how a similar analysis might apply to local proxy criminalization of migration through state driver's license schemes. In the homelessness context, courts recognized that a local government may be tempted to use its power to define crime to express local community preferences by punishing the disfavored group as a "lawbreaking other."[132] When a state forces discrete groups to violate the law, in that case

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space); Joyce v. City of San Francisco, 846 F. Supp. 843, 846–47 (N.D. Cal. 1994) (declining to enjoin enforcement of camping prohibition in public parks as part of San Francisco's "Matrix Program" in part because plaintiffs failed to make a substantial evidentiary showing that there was insufficient shelter available). *Cf.* Tobe v. City of Santa Ana, 892 P.2d 1145, 1167 (Cal. 1995) (reversing ruling of Court of Appeals that Santa Ana, CA ordinance prohibiting unlawful camping violated the Eighth Amendment rights of homeless residents, noting, among other things, that "it is far from clear . . . [they] had [no] alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations").

128. 539 U.S. 558 (2003).

129. Claude Millman, *Sodomy Statutes and the Eighth Amendment*, 21 COLUM. J.L. & SOC. PROBS. 267, 269 (1988). He pointed to four justices' dissent in *Bowers v. Hardwick*, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting), where they noted that it could be cruel and unusual to criminally punish a homosexual for an act of sodomy. *Id.* at 267–68; *see also* Sheldon Bernard Lyke, Lawrence *as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633, 634–35 (2009).

130. Millman, *supra* note 129, at 269 & n.15.

131. *Id.* at 285 (quoting Powell v. Texas, 392 U.S. 514, 550 n.2 (White, J., concurring)); *see also Powell*, 392 U.S. at 567 (Fortas, J., dissenting) (noting that even though the defendant in *Robinson* had voluntarily elected to take drugs at some point in the past, punishing him for the addiction he eventually developed would have been inappropriate). Millman also noted it was important to look at the state's interest in punishing such conduct. Millman, *supra* note 129, at 278, 291–94. He argued that there were no compelling state interests furthered by sodomy statutes. *Id.* at 302–06.

132. In a volume that explores the ways that LGBT people have been problematized criminalized in law and social discourse, Joey Mogul, Andrea Ritchie, and Kay Whitlock write, "[t]he very definition of crime is socially constructed, the result of inherently political processes that reflect consensus only among those who control or wield significant influence. It often has more to do with preservation of existing social orders than with the safety of the larger populace." JOEY L. MOGUL,

by failing to provide sufficient shelter space, it engages in the punishment of status through the punishment of conduct. Similarly, states force undocumented immigrants to risk arrest and criminal sanctions by denying them drivers' licenses as a categorical matter, on the one hand, and making it a crime to drive without a license on the other. As the Supreme Court has stated, "possession [of a driver's license] may be[] essential in the pursuit of a livelihood."[133] Immigrant workers may have no realistic choice but to get behind a wheel so they can put food on the table. Even if driving without a license is not in a strict sense involuntary, under Millman's framework, it is sufficiently integral to immigrants' livelihoods and existence to be "elemental,"[134] just as sleeping outdoors may be to a homeless person.

The underlying "status" at issue in state driver's license schemes—undocumented immigration status—is one that should fit Justice White's definition in *Powell*.[135] Though coming to the United States in violation of immigration laws may be a voluntary act for some,[136] those voluntary actions are usually remote in time from application of the criminal laws relating to driving without a license. Once a person enters the United States without status, that status can become virtually fixed and permanent.[137] Undocumented status also carries great personal significance for individuals who live with it and its attendant disabilities.[138]

That local efforts to control homelessness and state responses to the presence of immigrant communities might follow a similar trajectory is probably to be expected. Both groups have, at various times, served as easy scapegoats for jurisdictions confronted with the complex effects of joblessness, poverty, and demographic change. Indeed, the regulation of migrants and the poor were once formally intertwined. Early in our country's history, for example, states, having inherited the tradition of the English poor laws, enacted various restrictions on the ability of poor

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ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES, at xvi (2011).

133. Bell v. Burson, 402 U.S. 535, 539 (1971).

134. Millman, *supra* note 129, at 269.

135. *See supra* note 129 and accompanying text.

136. For others, it is not voluntary, but a response to persecution or severe conditions in their countries of origin.

137. *See* Immigration and Nationalitiy Act § 245(a), 8 U.S.C. § 1255(a) (2012) (generally limiting those who may adjust status to that of a legal permanent resident to individuals who were "inspected and admitted or paroled into the United States"); *Why Don't They Just Get In Line?: The Real Story of Getting a "Green Card" and Coming to the United States Legally*, IMMIGR. POL'Y CENTER (Mar. 13, 2013), http://www.immigrationpolicy.org/sites/default/files/docs/why_dont_they_get_in_line.pdf.

138. *See supra* note 131 and accompanying text; *see also* Roxana Kopetman, *Group Fights for Immigrants Living in the U.S. Illegally*, ORANGE COUNTY REG. (May 5, 2014, 4:03 PM), http://www.ocregister.com/articles/raiz-612533-immigration-members.html. (profiling the stories of DREAMers who have grown up without status in the United States); Jose Antonio Vargas, *Inside the World of the "Illegal" Immigrant*, TIME (June 14, 2012), http://ideas.time.com/2012/06/14/inside-the-world-of-the-illegal-immigrant/.

people to settle in or move between jurisdictions.[139] The Articles of Confederation denied "paupers" and "vagabonds" the equal enjoyment of the privileges and immunities of citizens.[140] The use of low-level ordinances to police these populations would thus seem a natural extension of their common history.

III. IMPLICATIONS OF A NEW UNDERSTANDING OF PROXY CRIMINALIZATION FOR THE MANAGEMENT OF MIGRATION

The analysis of the homelessness cases under the Eighth Amendment suggests a way of understanding proxy criminalization that cuts across subject matters and even areas of constitutional law. Where a governmental jurisdiction's power to punish a group based on that group's status or condition—whether created by operation of law or circumstance—is limited, the jurisdiction should not be permitted to elude that limitation by criminally punishing conduct incidental to that status, particularly where the jurisdiction has a role in forcing the group to engage in such conduct. In the immigration area, this means that states and localities should not be able to use their police powers to punish undocumented immigrants for activities they must engage in for their social and economic survival simply because those laws are focused as a formal matter on conduct and tend to be rules of general applicability. This is all the more the case when, as with the driver's license schemes, the state has elected to deny immigrants access to the means to engage in essential subsistence activities lawfully.

The foregoing analysis may be applied to other forms of subfederal proxy criminalization of immigrants as well. For example, some states arrest and prosecute undocumented immigrants for using false documents to work under fraud, identity theft, and related statutes.[141] Like

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139. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1846–59 (1993); *see also* Simon, *supra* note 102, at 635–42. Those laws made relief for the poor the responsibility of the community where they settled, incentivizing states to try to close their doors to migrant laborers who moved from place to place in search of work. *See* Simon, *supra* note 102, at 637–38.

140. Neuman, *supra* note 139, at 1846–47 (quoting ARTICLES OF CONFEDERATION of 1871, art. IV § 1) (internal quotation mark omitted). "[F]ugitives from justice" were also exempted. *Id.* (quoting ARTICLES OF CONFEDERATION of 1871, art. IV § 1) (internal quotation mark omitted). Today, "public charge" provisions in federal immigration and welfare law continue to impact poor immigrants. *See, e.g.*, Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge"*, 78 DENV. U. L. REV. 1161, 1161 (2001) (internal quotation marks omitted).

141. *See* AM. CIVIL LIBERTIES UNION: IMMIGRANTS' RIGHTS PROJECT, CRIMINAL CONVICTIONS AND ELIGIBILITY FOR ADMINISTRATIVE RELIEF FROM REMOVAL 1–3 (2014), *available at* https://www.aclu.org/sites/default/files/assets/14_9_30_memo_on_state_criminal_convictions_and_eligibility_for_administrative_relief_from_removal.pdf; *see generally* John Leland, *Some ID Theft is Not for Profit, But to Get a Job*, N.Y. TIMES, Sept. 4, 2006, at A5. The Immigrant Rights Clinic at the University of California, Irvine School of Law, which I co-direct, has also joined with others to file a lawsuit challenging workplace raids conducted by Maricopa County law enforcement officials based on such laws. Complaint for Declaratory and Injunctive Relief, Puente Arizona v. Arpaio, No. 2:14-cv-01356-DGC, 2014 WL 2872310 (D. Ariz. June 18, 2014) (describing impact concerted enforcement efforts on workers). The court granted plaintiffs a preliminary injunction in January.

driving without a license laws, the fraud and related statues generally do not have immigration status as an element.[142] But immigrant workers often have little choice but to use a different name or Social Security number in order to subsist.[143] In the absence of federal immigration reform, systematic enforcement of these laws against immigrants has the effect of criminalizing workers based on their status. Unlike state driver's licenses schemes, only certain states have had a direct role in regulating businesses' verification of employees' eligibility to work through state employer sanctions laws. But even if federal law alone creates the conditions for proxy criminalization, enterprising state and local officials should not be able to capitalize on those conditions to enact a punishment scheme.

Doctrinally, this more nuanced framework for evaluating subfederal criminal law measures that punish migration by proxy is most likely to come into play in the evaluation of preemption claims. But current preemption doctrine alone is insufficiently robust.[144] Instead, I posit that it is necessary to borrow developments from the Eighth Amendment cases and equal protection norms as an analytical lens to discern the right result. While others have discussed the overlap between preemption and equal protection norms in the immigration context,[145] critical here is the addition of an Eighth Amendment analysis in response to states' invocation of criminal law.[146] Crossover in the analysis of constitutional law claims has some precedent[147] and would be well-placed here.

Arizona v. Arpaio, No. CV-14-01356-PHX-DGC, 2015 WL 1432674, at *1 (D. Ariz. Mar. 27, 2015).

142. AM. CIVIL LIBERTIES UNION, *supra* note 141, at 2–3.

143. Federal law prohibits employers from hiring those who do not have authorization to work and requires that they verify prospective employees' eligibility by checking their information and documents. Immigration and Nationality Act § 274, 8 U.S.C. § 1324(a)(1)(B) (2012).

144. *See supra* note 10 and accompanying text. In some areas relevant to immigration, such as with regard to driver's license regulations, the federal government has allowed for states to have a role. *See supra* notes 67–68 and accompanying text. Thus, courts have generally not found state restrictions on driver's license eligibility to be preempted unless the law applies explicitly to noncitizens. *See supra* note 66 (discussing Louisiana Supreme Court's invalidation of law making it a misdemeanor for certain noncitizens to operate a motor vehicle without carrying documentation of lawful presence); *see also* John Doe No. 1 v. Georgia Dep't of Pub. Safety, 147 F. Supp. 2d 1369, 1375–76 (N.D. Ga. 2001) (opining that Texas's driver's license eligibility restrictions are consistent with national policy and thus not preempted by federal law).

145. *See, e.g.*, Guttentag, *supra* note 19; *cf.* Plyler v. Doe, 457 U.S. 202, 224 (1982) (noting that courts "faced with an equal protection challenge respecting the treatment of aliens . . . must be attentive to congressional policy"); Hiroshi Montomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1730–46 (2010) (describing how equal protection arguments of undocumented immigrants tend to be obliquely asserted through institutional competence claims like preemption).

146. Like preemption doctrine, equal protection doctrine provides an unsatisfying answer to proxy criminalization because laws of general applicability will be upheld absent a showing of discriminatory intent. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). But the main obstacle to equal protection challenges in the immigration context has been courts' resistance to applying heightened scrutiny to laws that affect undocumented immigrants. *See, e.g.*, Plyler, 457 U.S. at 220 (noting that for equal protection analysis, undocumented status is "not irrelevant to any proper legislative goal" but applying heightened scrutiny in that case because the

I have discussed in detail the contribution that the Eighth Amendment cases can make. As for equal protection norms, the lack of an articulable state interest can be circumstantial evidence of invidious intent and invalidate a law.[148] With regard to driver's licenses, there can be no serious public safety rationale for not allowing immigrants to learn the driving rules and be tested on their driving ability.[149] The same goes for arbitrarily subjecting them to criminal punishment for not having a license, particularly since many will drive anyway.

Notably, the framework I propose for understanding proxy criminalization here does not necessarily depend on bad motives of states in enacting criminal laws or of state and local officers in enforcing them. Indeed, some states that have driver's license schemes that punish immigrants are integrationist in other ways. There can be heterogeneity in approaches to enforcement at the municipal level. And while many state laws precluding undocumented immigrants from obtaining driver's licenses acted with restrictionist intent, the statutes making driving without a license a criminal offense generally predated eligibility rules conditioned on lawful presence and were not about immigration at all. The framework for proxy criminalization accounts for this complexity by focusing more so than other legal analytical tools on the effect of criminalization measures on immigrants' experience. Not every punitive state

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Texas law at issue was directed a children who "have little control" over their presence in the United States); *see also* Sanchez v. State, 692 N.W.2d 812, 817 (Iowa 2005) (declining to apply heightened scrutiny review to Iowa's driver's license eligibility restrictions, claiming that undocumented immigrants are not a suspect class). There have been some recent successes with equal protection challenges to policies targeting undocumented immigrants based on improper animus. *See, e.g.*, Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1067 (9th Cir. 2014) (holding that animus theory could support an equal protection challenge to Arizona's decision to deny driver's licenses to DACA recipients); Puente Arizona v. Arpaio, 76 F. Supp. 3d 833, 864–67 (D. Ariz. 2015) (denying motion to dismiss equal protection claim against state identity theft measures enacted to penalize undocumented workers). But progress is slow.

Eighth Amendment law would also likely be insufficient on its own. A challenger would need to overcome courts' reluctance to expand the prohibition on the criminalization of status to new contexts. *See* Benno Weisberg, Comment, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes"*, 96 J. CRIM. L. & CRIMINOLOGY 329, 329–31 (2005) (suggesting Robinson v. California, 379 U.S. 660 (1962) may be somewhat of a dead letter but arguing for its revival in the homelessness context); *see generally* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 140–56 (2007) (expressing skepticism that the Eighth Amendment, as presently interpreted, can be a locus of reform).

147. *See, e.g.*, Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 176–78 (2014) (describing Hampton v. Wong, 426 U.S. 88 (1976) as an example of interest-limiting noncongruence based on federalism in the equal protection context).

148. *See, e.g.*, *Vill. of Arlington Heights*, 429 U.S. at 267; *see also* Stumpf, *supra* note 10, at 1615 (noting that lack of empirical support for prioritizing immigrants in criminal legislation suggests that motives other than crime control underlie at least some of the subnational criminal laws focusing on noncitizens).

149. In fact, studies show that licensing immigrants make the roads safer. AAA FOUND. FOR TRAFFIC SAFETY, UNLICENSED TO KILL 13 (2011), *available at* https://www.aaafoundation.org/sites/default/files/2011Unlicensed2Kill.pdf (reporting that unlicensed drivers are more likely to be involved in fatal car crashes); HENDRICKS, *supra* note 89, at 6–8 (describing public safety benefits of licensing immigrants). No other group has been so uniformly denied a driver's license based on reasons other than road safety.

law is invalid simply because immigrants are also affected. But nor can schemes that feel like criminalization because they punish conduct intimately connected to status be immune from attack.

Beyond doctrinal application, and perhaps more importantly, a better understanding of how proxy criminalization works might improve policy decisions. To give just one example, the immigration legalization proposal that passed out of the Senate in 2013, as well as guidance for the DAPA program, contain clauses intending to preserve eligibility for immigrants whose only criminal convictions are based on laws that penalize undocumented status.[150] However, these clauses only apply to state and local criminal statutes where immigration status is an essential element, reflecting an incomplete view of the way that immigration status is criminalized at the subfederal level.[151] Although the Administration has released updated details on its enforcement priorities stating that officers should be sensitive to the overall circumstances of the arrest and conviction in cases that punish immigrants for using false documents to work, it still regards immigrants with identity theft related convictions as presumptively falling into priority categories.[152] The federal government could go much farther in ameliorating the effects and legacy of proxy criminalization.

CONCLUSION

As the criminal and immigration law systems evolve and interact, our legal analytical tools must also evolve. Immigration scholars and advocates must be willing to transcend conventional frameworks in their own areas and look to the experience of other groups. Historically, both immigrants and the homeless have been the target of local prejudice, and their political marginalization means policymakers will frequently bend to the will of the majority when making decisions about their welfare. It makes sense that the struggle of homeless persons should yield lessons for immigrants burdened by criminalization.

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150. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(b)(3)(A)(i)(I) (2013); Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec. to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al. on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 3–4 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (describing the circumstances that make an individual an enforcement priority and therefore not eligible for DAPA).

151. For a discussion of how these clauses fail to capture a significant number of cases where immigrants are being penalized for their status, *see* AM. CIVIL LIBERTIES UNION, *supra* note 141. Our Immigrant Rights Clinic also sent a letter to Administration officials explaining the inadequacy of this exception in connection with the Puente Arizona v. Arpaio case. Letter from Annie Lai et al., to Esther Olavarria, Senior Counselor to the Sec'y, U.S. Dep't Homeland Sec. et al. (Jan. 20, 2015) (on file with author).

152. *Frequently Asked Questions Relating to Executive Action on Immigration*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/immigrationAction/faqs (last visited June 28, 2015).

The same forces that have caused proxy criminalization to persist produce excesses in other areas of the modern criminal justice system, and confronting proxy criminalization should be part of a larger project to tackle mass incarceration. By studying the proxy criminalization of migration, we are reminded that it is important to pay close attention to the lived experience of those subject to the law. When legal phenomena are experienced as criminalization and articulated as so by impacted communities, we can no longer ignore those voices because existing legal frameworks fail to clearly locate their illegitimacy. Only by listening more closely can we truly begin to transform the relationship between subordinated groups and governmental institutions in the communities where they live.