PRESUMED GUILTY: "ILLEGAL ALIEN" EVIDENCE AND THE RIGHTS OF NON-CITIZEN DEFENDANTS

*CHRISTIAN POWELL SUNDQUIST**

ABSTRACT

Dangerous political rhetoric demonizing migrants and racialized persons has altered social norms regarding the acceptability of racism while ushering in a new era of white nationalism across the world. The increasing normalization of racism has shaken bedrock American constitutional principles of equality and fair treatment under the law. As such, it has become commonplace for courts to admit prejudicial evidence of a Latinx criminal defendant's lack of citizenship and undocumented immigration status in non-immigration proceedings. Relying on recent empirical research on juror cognitive biases, this Article argues that the strategic use of a criminal defendant's immigration and citizenship status to signify criminality and untruthfulness undermines the defendant's constitutional rights to a fair trial and equal application of our evidentiary laws while reifying racialized stereotypes about undocumented non-citizens.

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* Professor of Law, University of Pittsburgh, School of Law. I am extremely grateful to César Cuauhtémoc García Hernández (Ohio State) for his insightful comments on this Article, as well as for the helpful suggestions made by Greer Donley (Pitt Law), Darrell D. Jackson (Wyoming Law), and Areto Imoukhuede (FAMU Law). This Article was influenced by my experience providing expert witness services for the criminal defense in the Colorado case, *People v. Garcia-Bravo*, No. 17-CR-1736 (Colo. Dist. Ct. El Paso Cnty. 2019). In that case, the defendant unsuccessfully moved the trial court to consider the potential biasing impact that prosecutorial references to his undocumented immigration status (including remarks by the prosecutor at trial that the defendant was an "illegal alien") had on jury decision-making. *Id.* While I regret that the trial court ultimately denied the defense motion, I am grateful to defense counsel Carrie Lynn Thompson for engaging me in the case and for valiantly striving to protect her clients from racism in the administration of justice.

I.
INTRODUCTION

Criminal defendants are entitled to equal treatment under the law, regardless of their race, nationality, or immigration status.[1] Introducing evidence of a criminal defendant's race, nationality, or immigration status in non-immigration related criminal trials, with remarkably few exceptions, amounts to "unjust and illegal discrimination[] between persons in similar circumstances" that violates the Equal Protection Clause of the Fourteenth Amendment.[2] This bedrock constitutional doctrine was recognized generations ago by the United States Supreme Court in its seminal decision, *Yick Wo v. Hopkins*, which declared that our laws must be applied equally to criminal defendants without regard to their race, nationality, or immigration status.[3] The constitutional and statutory right to have our evidentiary rules applied equally, nonetheless, has been eroded by the widespread acceptance of evidence concerning the immigration and citizenship status of undocumented non-citizen criminal defendants for the stated purposes of witness impeachment and post-verdict sentence enhancement.

1. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
2. *See id.* at 374.
3. *See id.* at 369 ("[A]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . . ." (quoting 42 U.S.C. § 1981)) (noting that the "provisions" of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws").

State and federal courts are divided as to the admissibility of immigration status evidence in criminal prosecutions and sentencing.[4] Some states—such as Washington, Pennsylvania, Illinois, Oregon, and California—have proactively legislated to exclude immigration status evidence for non-citizen criminal defendants.[5] Nonetheless, other states—as well as many federal courts—routinely admit such evidence against undocumented non-citizen criminal defendants as proof of untruthfulness or a lack of fidelity to the law.[6] The overwhelming majority of such cases involve the admission of "illegal alien" evidence against undocumented Latinx criminal defendants. While courts tend to view evidence of a Latinx criminal defendant's citizenship and immigration status as race-neutral, empirical research has demonstrated that the presentation of such evidence activates juror racial bias due to negative stereotyping of Latinx persons as "illegal aliens" and criminals.[7] Juror expression of latent racial bias against Latinx criminal defendants is facilitated when seemingly non-racial factors (such as the defendant's citizenship and immigration status) are introduced at trial, which allow jurors to justify, and thus express, their underlying prejudice in a manner that accords with prevailing social norms.

This Article argues that the admission of evidence concerning a Latinx criminal defendant's immigration status in non-immigration related criminal trials runs afoul of our evidentiary rules concerning relevance, impeachment, character, and unfair prejudice while violating the defendant's Sixth and Fourteenth Amendment constitutional rights to a fair trial free from racial bias. While many scholars have explored the modern criminalization of immigration

4. *See infra* Part IV.

5. *See* WASH. R. EVID. 413 (amended effective Nov. 2, 2021) (stating that "evidence of a party's or a witness's immigration status" is generally inadmissible in both civil and criminal cases); PA. R. EVID. 413 (effective Oct. 1, 2021) (stating that "evidence of a party's or a witness's immigration status" is generally inadmissible in both civil and criminal cases) (noting that it was modeled after WASH. R. EVID. 413); 735 ILL. COMP. STAT. ANN. 5/8-2901 (West, Westlaw through P.A. 103-1065 of the 2024 Reg. Sess.) (stating that evidence of a person's immigration status is generally inadmissible in civil cases); OR. REV. STAT. § 135.983 (2023) (stating that evidence of a defendant's immigration status is generally inadmissible in criminal proceedings); CAL. EVID. CODE §§ 351.2–351.4 (West, Westlaw through Ch. 1017 of 2024 Reg. Sess.) (providing that evidence of a person's immigration status is generally inadmissible in civil and criminal proceedings); CAL. COMM. REP., A.B. 2159, 2015–2016 Reg. Sess. (Cal. 2015); CAL. COMM. REP., S.B. 836, 2021–2022 Reg. Sess. (Cal. 2022).

6. *See infra* Part IV.

7. *See infra* Part III.

("crimmigration"),[8] and others have broadly identified how the criminal process can disadvantage non-citizen defendants,[9] this Article is the first to provide a critical analysis of the important constitutional and statutory issues raised by the admission of immigration status evidence against non-citizen criminal defendants at trial and during sentencing. Empirical research in cognitive psychology has thoroughly demonstrated that the introduction of citizenship and immigration status evidence against a Latinx criminal defendant facilitates the expression of latent juror racial bias.[10] One study, for example, found that evidence of a "Mexican" criminal defendant's undocumented immigration status activated racial biases that led mock jurors to convict and punish at a much higher rate as compared to situations where the jurors were not informed of the defendant's immigration status.[11] This Article thus argues that the strategic use of a Latinx criminal defendant's immigration and citizenship status to signify criminality and untruthfulness undermines the defendant's constitutional rights to a fair trial and equal application of our evidentiary laws while reifying racialized stereotypes about Latinx persons and immigrants.

Part II of the Article examines the intersection of immigration status, nationality, and race in contemporary America. This Part examines the role of political rhetoric, selective media coverage, and racially restrictive immigration policy in promoting the social conflation of Latinx racial identity with criminality and a lack of citizenship and immigration status. Part III of the Article examines empirical psychological research on the factors that facilitate the expression of juror racial bias against criminal defendants. Jurors are much more likely to engage in racially prejudiced decision-making when they are enabled to rationalize their decisions on the basis of seemingly non-racial factors—such as proof introduced at trial regarding a Latinx criminal defendant's immigration status. Finally, Part IV of the Article explores the admissibility of evidence concerning a Latinx criminal defendant's immigration status in state and federal courts. Courts have largely allowed such evidence to be introduced during opening and closing statements, witness impeachment, and criminal

8. *See generally* César Cuauhtémoc García Hernández, Crimmigration Law (2d ed. 2021).

9. *See generally* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. Rev. 1417, 1423–33 (2011).

10. *See infra* Part III.

11. Russ K.E. Espinoza et al., *The Impact of Ethnicity, Immigration Status, and Socioeconomic Status on Juror Decision Making*, 13 J. Ethnicity Crim. Just. 197, 207 (2015).

sentencing, notwithstanding the empirically demonstrated risk that such evidence will enable racially biased juror decision-making in violation of the defendant's evidentiary and constitutional rights.

II.
THE INTERSECTION OF IMMIGRATION STATUS, CITIZENSHIP, AND RACE

Race, immigration, and citizenship intersect in the criminal justice system in a variety of ways: non-citizen defendants convicted of certain serious crimes may face deportation from the country; non-white defendants are often subjected to racial discrimination in arrests, guilt adjudication, and sentencing; and prejudice against non-citizen, non-white defendants is commonplace. This Part examines racial disparities in criminal justice outcomes while identifying the role of political rhetoric and media coverage in promoting the social conflation of Latinx racial identity with criminality and lack of citizenship and immigration status.

A. Racial Bias in the Criminal Justice System

The United States Constitution seeks to prohibit racial discrimination in the administration of criminal justice.[12] The "central purpose of the Fourteenth Amendment," in particular, is "to eliminate racial discrimination emanating from official sources in the States."[13] The U.S. Supreme Court has held that "[t]he Constitution prohibits racially biased prosecutorial arguments,"[14] racial discrimination in the selection of jurors,[15] and the exclusion of prospective jurors on

12. U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .").

13. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *see also* Strauder v. West Virginia, 100 U.S. 303, 305–09 (1880) (applying the Fourteenth Amendment to prohibit the exclusion of racial minorities from criminal juries); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (finding that the Fourteenth Amendment prohibits racially-based juror peremptory strikes); Ham v. South Carolina, 409 U.S. 524, 526–27 (1973) (interpreting the Fourteenth Amendment to require trial judges in criminal cases to ask prospective jurors about their potential racial biases).

14. McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

15. *Strauder*, 100 U.S. at 306, 309 ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing

the basis of race through seemingly race-neutral peremptory challenges.[16] The U.S. Supreme Court has thus recognized that "[t]he unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'"[17]

The constitutional prohibition against racial bias in the criminal justice system applies to all people in the United States without regard to nationality, citizenship, or immigration status.[18] Of particular relevance, the U.S. Supreme Court's seminal decision in *Yick Wo v. Hopkins* established that our laws must be applied equally to criminal defendants without regard to their race, nationality, or immigration status.[19] The petitioners in *Yick Wo*—Chinese immigrants who were temporary or permanent residents of the United States—challenged the racially disparate enforcement of a facially-neutral California ordinance that criminalized the permit-less operation of laundries in San Francisco.[20] The Supreme Court held that the protections of the

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to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. . . . [The Fourteenth Amendment] was designed . . . to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." (racist reference to "the superior race" in the original)); *see also* Neal v. Delaware, 103 U.S. 370, 386 (1881); Hollins v. Oklahoma, 295 U.S. 394, 395 (1935) (per curiam); Avery v. Georgia, 345 U.S. 559, 561 (1953); Hernandez v. Texas, 347 U.S. 475, 479 (1954); Castaneda v. Partida, 430 U.S. 482, 496, 499 (1977). Nearly 100 years after its decision in *Strauder*, the U.S. Supreme Court also belatedly held that prospective jurors could be "interrogated on the issue of racial bias" during the pre-trial voir dire process. *See Ham*, 409 U.S. at 527.

16. *Batson*, 476 U.S. at 89; *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 617–18 (1991); Georgia v. McCollum, 505 U.S. 42, 59 (1992); Flowers v. Mississippi, 588 U.S. 284, 288 (2019); Clark v. Mississippi, 143 S. Ct. 2406, 2408 (2023) (mem.) (Sotomayor, J., dissenting from denial of certiorari).

17. Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

18. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (invalidating a California statute that criminalized the operation of laundries without an official permit—which was not made available to Chinese Americans or Chinese immigrants—and finding that the Fourteenth Amendment rights of the petitioners "are not less because they are" not United States citizens).

19. *Id.* at 369 (noting that the protection provisions of the Fourteenth Amendment extend "to all persons within the territorial jurisdiction, without regard to any differences" in race, nationality, or citizenship status and that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by [W]hite citizens" (quoting 42 U.S.C. § 1981)).

20. *Id.* at 359, 374 (noting that the petitioners submitted non-contested evidence that all permit applications made by persons of Chinese descent were

Constitution "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[21] The disparate enforcement of the ordinance based on the race, nationality, and citizenship status of applicants therefore constituted "unjust and illegal discrimination[] between persons in similar circumstances" that violated the Equal Protection Clause of the Fourteenth Amendment.[22]

The constitutional prohibition against racial bias in the administration of criminal justice can be found not only within the Fourteenth Amendment's equal protection guarantees but also in the Sixth Amendment's right to an impartial jury.[23] Prosecutorial appeals that threaten to create racial bias in a jury "equally offend[] the defendant's right to an impartial jury."[24] The U.S. Supreme Court has thus recognized that a "constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[25] Our courts thus perform a vital role in upholding the "criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[26]

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denied by the city, while nearly all permit applications made by white persons were granted).

21. *Id.* at 368–69 (holding that "[t]he [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens" based on the plain language of the text which provides that every "person" is entitled to equal protection of the laws)

22. *Id.* at 373–74 ("[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to . . . all . . . persons, by the broad and benign provisions of the [F]ourteenth [A]mendment . . . . Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the [C]onstitution.")

23. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .").

24. Calhoun v. United States, 568 U.S. 1206, 1207 (2013) (mem.) (Sotomayor, J., statement respecting denial of certiorari).

25. Peña-Rodriguez v. Colorado, 580 U.S 206, 225 (2017).

26. *See* McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)); *see also Peña-Rodriguez*, 580 U.S at 224 (finding racial bias to be "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice").

Notwithstanding the constitutional prohibitions against race and nationality discrimination in civil and criminal trials, the American criminal justice system has long been plagued by racial discrimination and race-based disparities in outcomes.[27] Our adversarial system of laws developed in a socio-historical context in which de jure discrimination based on racial difference was accepted as a matter of law and social policy.[28] Racial discrimination was an early defining feature of the American criminal trial system.[29] Non-white persons were, inter alia, prevented from testifying in court and serving as jurors, while prosecutors were permitted by law to engage in racially discriminatory peremptory exclusions of non-white prospective jurors.[30] Following the end of chattel slavery, an important goal of the Reconstruction Amendments was to eliminate the de jure features of racial bias in the criminal justice system, with a particular focus on ending "racial discrimination emanating from official sources in the States."[31] While de jure slavery ended with the passage of the Reconstruction Amendments, state resistance to full equality took the form of racially discriminatory laws (rooted in slave-era legal codes) and "Jim Crow" segregation policies that sought to harness the power of the criminal justice system to re-entrench racial inequality and de facto patterns of slavery.[32]

The entrenchment of racial discrimination in courts has been difficult to overcome, and racial bias continues to pervade the criminal justice system, leading to significant race-based disparities in trial outcomes and sentencing.[33] While our laws are now race-neutral in their language, racial disparities in the criminal justice system

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27. *See, e.g.*, Jelani Jefferson Exum, *Sentencing Disparities and the Dangerous Perpetuation of Racial Bias*, 26 Wash. & Lee J.C.R. & Soc. Just. 491, 492–93 (2020).

28. *See, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 187 (rev. ed. 2012).

29. *Cf., e.g.*, Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 51–54 (2019) (discussing "the exclusion of Africans and Native tribes" from the Constitution's vision of democracy); Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1599–1604 (2018) (describing the first integrated juries in the Reconstruction-era South).

30. *See* Hiroshi Fukurai, Edgar W. Butler & Richard Krooth, Race and the Jury: Racial Disenfranchisement and the Search for Justice, at v, 4, 13–14 (1993).

31. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *see also Peña-Rodriguez*, 580 U.S at 224 ("[R]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.").

32. *See* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 Calif. L. Rev. 371, 383–87 (2022).

33. *See id.* at 395–98.

abound. For example, Black men receive longer federal prison sentences than white men for *similar* convictions,[34] while over 38% of prison inmates are Black despite constituting only 13% of the overall population.[35] Research has similarly demonstrated that "biased attitudes against Latino immigrants have been on the rise [since 2011]" and that racial bias and discrimination against Latinx persons in the criminal justice system is pervasive.[36]

B. The Racialization of Immigration and Citizenship Status

Discrimination against criminal defendants based on their race or nationality is clearly prohibited by the United States Constitution.[37] Similarly, discrimination against racialized defendants in non-immigration proceedings based on their immigration status is constitutionally invalid given the likelihood that jurors will conflate a defendant's immigration status (e.g., as undocumented) with the defendant's race and nationality.[38]

The vast majority of Latinx persons in the United States are citizens, lawful permanent residents, or documented immigrants.[39]

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34. U.S. Sent'g Comm'n, Demographic Differences in Federal Sentencing 3–4 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf [https://perma.cc/6D9X-WPZV].

35. Mike Wessler, *Updated Charts Provide Insights on Racial Disparities, Correctional Control, Jail Suicides, and More*, Prison Pol'y Initiative (May 19, 2022), https://www.prisonpolicy.org/blog/2022/05/19/updated_charts/ [https://perma.cc/G6UR-DNB6]. The racial disparities inherent in the imposition of the death penalty are even more striking. An independent study by the U.S. General Accounting Office (renamed Government Accountability Office) analyzed dozens of empirical studies on racial bias and the death penalty, and concluded that "[i]n 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered [B]lacks." U.S. Gen. Acct. Off., GGD-90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5 (1990).

36. Espinoza et al., *supra* note 11, at 199–200 (referencing research studies demonstrating that "there is a history of prejudice toward Latinos within the [American] legal system").

37. *See* discussion *supra* Section II.A.

38. *See infra* notes 124–40 and accompanying text.

39. *See* Mohamad Moslimani & Luis Noe-Bustamante, *Facts on Latinos in the U.S.*, Pew Rsch. Ctr. (Aug. 16, 2023), https://www.pewresearch.org/race-and-ethnicity/fact-sheet/latinos-in-the-us-fact-sheet/ [https://perma.cc/59BT-4WHC] (noting that 81% of the Latinx population in the United States possess U.S. citizenship); Espinoza et al., *supra* note 11, at 199 ("Although there is a long history of Mexican immigration to the United States, the undocumented are not the majority of the Latino population." (citation omitted)); Evin Millet & Jacquelyn Pavilon,

Nonetheless, numerous empirical studies have found that a significant number of Americans falsely assume that Latinx and Asian persons living in America are undocumented immigrants and lack United States citizenship.[40] The prejudiced conflation of Latinx persons as undocumented immigrants continues to persist today, and arguably has increased with the continued rise of anti-Latinx and anti-immigrant media and political rhetoric.[41] As one research study explained, "[a]nti-Latino bias is related to anti-immigrant bias because Latinos are one ethnic group commonly associated with immigration. Greater prejudice toward Latinos among [w]hite participants is related to more negative perceptions of undocumented immigrants."[42]

The biased perception that the majority of Latinx persons are "illegal aliens" is directly connected with the racial stereotyping of Latinx persons as being more likely to engage in criminal acts and

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Demographic Profile of Undocumented Hispanic Immigrants in the United States, Ctr. for Migration Stud. N.Y. (Oct. 2022) (estimating that of the approximately 21 million immigrants of Hispanic origin living in the United States, approximately 7.4 million are undocumented), https://cmsny.org/wp-content/uploads/2022/04/Hispanic_undocumented.pdf [https://perma.cc/DA8R-CPVL].

40. *See, e.g.*, John Gramlich, *How Americans See Illegal Immigration, the Border Wall and Political Compromise*, Pew Rsch. Ctr. (Jan. 16, 2019), https://www.pewresearch.org/short-reads/2019/01/16/how-americans-see-illegal-immigration-the-border-wall-and-political-compromise/ [https://perma.cc/N6SE-HRKS] (finding that despite the fact that the overwhelming majority of immigrants residing in the United States are authorized to do so by the government, more than a third of Americans erroneously believe that most immigrants are in America "illegally"); Espinoza et al., *supra* note 11, at 199 (finding that "a sizeable portion of non-Latinos [wrongly] believe that the majority of Latinos are undocumented immigrants" (citing research studies)); Esmeralda Navarro, Wendy P. Heath & Joshua R. Stein, *Mock Juror Decisions Regarding an Undocumented Immigrant: Similarity of Defendant-Juror Ethnicity Matters*, 20 J. Ethnicity Crim. Just. 227, 240 (2022) ("It is . . . worth noting that citizens may link the issue of being undocumented with being Hispanic. This could be due to media influence."); *see also id.* (referencing an empirical study that "found that almost all undocumented immigrants presented in [U.S. cable and network] news coverage were Hispanic").

41. Espinoza et al., *supra* note 11, at 199 (citing research studies in finding that "media representations fail to make [the fact that the majority of Latinx persons are U.S. citizens or documented immigrants] clear and focus on negative aspects of Latino undocumented immigrants rather than positive aspects").

42. Mauricio J. Alvarez & Monica K. Miller, *How Defendants' Legal Status and Ethnicity and Participants' Political Orientation Relate to Death Penalty Sentencing Decisions*, 3 Translational Issues Psych. Sci. 298, 300 (2017) (citation omitted). The authors similarly note that "[n]egative attitudes toward immigrants and support for restrictive immigration policies are linked to prejudice against Mexicans, and support for policies that facilitate the deportation of undocumented immigrants is stronger when the prototypical target of this policy is Mexican, compared to Euro-Canadian." *Id.* (citations omitted) (citing research studies).

threaten public safety.[43] The false equivalence between residing in the United States without authorization[44] and being "innately criminal, violent, and dangerous"[45] has contributed to the widespread conflation of Latinx ethnicity with undocumented immigration. Studies have demonstrated that "[i]mmigrants are commonly depicted as being criminals, especially when describing undocumented immigrants"[46] and that a striking 73% of Americans believe that "more immigrants cause higher crime rates."[47] Mexican American individuals, in particular, "are not only believed to be in the United States illegally [sic] but also believed to be more prone to criminal behavior compared with U.S. citizens and immigrants from other countries."[48]

The common perception that Latinx persons and immigrants (whether documented or undocumented) are prone to criminality, however, has been thoroughly demonstrated to be false.[49] As one

43. Espinoza et al., *supra* note 11, at 199 (referencing research studies in stating that "Mexican American immigrants are not only believed to be in the United States illegally [sic] but also believed to be more prone to criminal behavior compared with U.S. citizens and immigrants from other countries").

44. *See* 8 U.S.C. §§ 1158, 1227.

45. Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 Ann. Rev. L. & Soc. Sci. 421, 426 (2020) (referencing the findings of numerous studies).

46. Laura P. Minero & Russ K.E. Espinoza, *The Influence of Defendant Immigration Status, Country of Origin, and Ethnicity on Juror Decisions: An Aversive Racism Explanation for Juror Bias*, 38 Hisp. J. Behav. Scis. 55, 56–57 (2016) (citing studies that have found that the "increase in the Latino population within the United States has influenced prejudicial attitudes that stereotype Mexican Americans as 'illegal aliens,' poor, lazy, and uneducated"). *See generally* Russ K.E. Espinoza, *Juror Bias and the Death Penalty: Deleterious Effects of Ethnicity, SES and Case Circumstances*, 13 Am. Ass'n Behav. & Soc. Scis. J. 33, 33 (2009) (citing research studies); Johnson, *supra* note 45, at 426 (noting that "[n]umerous studies have found that Latinos are viewed as innately criminal, violent, and dangerous" and that "stereotypes that Latinos are drug traffickers and gang members are common").

47. Minero & Espinoza, *supra* note 46, at 56–57 (quoting Tom W. Smith et al., *General Social Survey, 1972-2010 [Cumulative File] (ICPSR 31521)*, ICPSR (Feb. 7, 2013), https://www.icpsr.umich.edu/web/ICPSR/studies/31521 (choose "Variables"; then search "IMMCRMUP")) (analyzing FBI data from 1990 to 2010 in finding that, despite this popular misconception, both violent crime and crime rates decreased 45% and 42%, respectively, despite a significant increase in immigration during the same period); *see also* Navarro et al., *supra* note 40, at 228 (citing other research studies that found that "approximately half of those surveyed historically and even recently believe that immigrants contribute to crime").

48. Espinoza et al., *supra* note 11, at 199 (noting that numerous research studies have found that "there is a criminal stereotype of Mexican Americans and Mexican immigrants").

49. *See also* Navarro et al., *supra* note 40, at 228 ("Despite the often-observed negative relationship between the prevalence of immigrants and the prevalence of crime, people often perceive a positive association between immigrants and

study observed, "[r]esearchers have long considered the relationship between immigration and crime, and they have generally found that this relationship is non-existent or negative, with crime rates often falling as the number of immigrants in a community increase."[50] Undocumented immigration is likewise not associated with an increase in violent crime or crime rates in the United States.[51] A recent study that examined the connection between crime rates and undocumented immigration in Texas, for example, found that "undocumented immigrants are far less likely to be arrested for violent and property crimes as well as drug and felony traffic offenses than U.S. citizens and legal immigrants."[52] Researchers have concluded that, in light of this and other empirical studies, "undocumented immigrants pose substantially less criminal risk than native U.S. citizens."[53]

C. Popular Immigration Rhetoric and Racial Bias

Conservative political rhetoric and disingenuous media reporting, nonetheless, have distorted public perception of the criminality of Latinx immigrants through the use of racist "dog whistles" and racial stereotypes.[54] Exposure to anti-Latinx and anti-immigrant rhetoric by politicians "who have espoused the [false] link between

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crime."); *see generally* Minero & Espinoza, *supra* note 46, at 55–57 (citing a study in concluding that "[d]espite the contrary relationship between crime rates and immigration influx rates, this misconception of immigrants remains prominent").

50. Navarro et al., *supra* note 40, at 227.

51. *See generally id.* at 227–28; Michael T. Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born U.S. Citizens in Texas*, 117 Proc. Nat'l Acad. Scis. U.S. 32340 (2020).

52. Navarro et al., *supra* note 40, at 228 (citing Light et al., *supra* note 51, at 32340).

53. Light et al., *supra* note 51, at 32345.

54. Other factors contributing to the misconception of Latinx immigrants as dangerous criminals include the failure of most Americans to distinguish between documented and undocumented immigrants, racial prejudice against immigrants from Latinx countries, and the continuing impact of the United States' history of racially restrictive immigration policies. *See* Navarro et al., *supra* note 40, at 228–29 (referencing a 2018 study by the Pew Research Center that found that "only 45% of Americans recognized that most immigrants are in the country legally" and concluding that "for many, the link between immigration and crime may exist because of a belief that if one was born in another country, but resides in the U.S., it is evidence of a crime"); Tiane L. Lee & Susan T. Fiske, *Not an Outgroup, Not Yet an Ingroup: Immigrants in the Stereotype Content Model*, 30 Int'l J. Intercultural Rels. 751, 758–59 (2006) (finding that prejudice against immigrant groups was influenced by their country of origin); Minero & Espinoza, *supra* note 46, at 57 (noting that while United States' "immigration policy has traditionally favored individuals of European and Canadian descent," it has racially restricted immigration "from Asia, Africa, Latin America, and the Caribbean" and that "Latinos and persons of African

crime and immigration," as well as pervasive media portrayals of Latinx persons as "illegal aliens" and criminals, has been empirically demonstrated to increase racial bias against Latinx persons.[55]

The media not only contributes to the false perception that most Latinx persons are undocumented immigrants, but also exacerbates stereotypes of Latinx persons as being "innately criminal, violent, and dangerous."[56] Research demonstrates, for example, that the media rarely individualizes its stories about Latinx immigrants, but rather essentializes Latinx citizen and non-citizen identity by grouping all Latinx people together when reporting on crime and immigration reform.[57] While Latinx persons constitute slightly more than 17% of the United States population, "stories about Latinos . . . constitute less than 1% of national news programs—and the primary topics of that coverage are negative and generally connected to immigration and crime."[58]

The American public has similarly been inundated with anti-immigrant political rhetoric during the last few decades, as conservatives and other political groups have relied on immigrant and racial fearmongering for political gain.[59] The Republican Party, for example, has actively encouraged conservative political candidates to spread false claims about the supposed criminality and economic

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heritage are perceived as lazy and burdens on society and are much more likely to be the target of prejudiced behaviors").

55. *See* Navarro et al., *supra* note 40, at 228.

56. Johnson, *supra* note 45, at 426–27.

57. *See* Matt A. Barreto et al., Nat'l Hisp. Media Coal., The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos 22 (2012), https://www.chicano.ucla.edu/files/news/NHMCLatinoDecisionsReport.pdf [https://perma.cc/F5AQ-T2E5] ("There is a common perception that Latinos and undocumented, or in this case, 'illegal' immigrants are one in [sic] the same."); *see also* Maritza Perez, Los Lazos Viven*: California's Death Row and Systematic Latino Lynching*, 37 Whittier L. Rev. 377, 384–85 (2016) (discussing misrepresentations of the Latino community by the media); Navarro et al., *supra* note 40, at 240 (stating that the conflation of the Latinx population with being undocumented "could be due to media influence" and referencing a study that "found that almost all undocumented immigrants presented in [U.S. cable and network] news coverage were Hispanic").

58. Johnson, *supra* note 45, at 426–27 (referencing findings made by assistant federal public defender Walter I. Gonçalves, Jr. in *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 Seattle J. for Soc. Just. 333, 370 (2020)); Espinoza et al., *supra* note 11, at 199 (referencing studies finding that "media representations fail to [dispel the myth of Latinx immigrant criminality] and focus on negative aspects of Latino undocumented immigrants rather than the positive aspects").

59. *See generally* Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class (2015).

drain of both documented and undocumented immigrants.[60] The rise of "Trumpism" and white supremacy during and following the 2016 presidential candidacy of Donald Trump has similarly increased public exposure to media coverage of racist and violent rhetoric concerning both immigrants and Latinx persons.[61] President Donald Trump, in particular, has made innumerable false and racist statements associating Latinx persons with criminality and undocumented immigration status during the last eight years.[62] The falsehoods espoused by Trump and other conservative political leaders have continued unabated, as such racist anti-immigrant "dog whistles" tap into deep-seated American racial fears and biases, which have led to political success for the Republican Party.[63] Indeed, the success of Donald Trump in winning a second presidential term can be attributed in part to his use of racialized anti-immigrant rhetoric that appealed to American voters.[64]

Empirical studies have demonstrated that exposure to media coverage of crimes purportedly committed by immigrants and racial minorities leads to an increase in cognitive bias against those groups.[65] Professor Jerry Kang provides a succinct analogy as to how

60. *See* Perez, *supra* note 57, at 392–93 (documenting how Republican consultant Frank Luntz issued policy directives to Republican candidates to repeat the unfounded narrative that "immigrants believe that 'breaking the law brings more benefit to them than abiding by it'" (quoting López, *supra* note 59, at 121–22)).

61. *See* Orestis Papakyriakopoulos & Ethan Zuckerman, *The Media During the Rise of Trump: Identity Politics, Immigration, "Mexican" Demonization and Hate-Crime*, 15 Proc. Int'l AAAI Conf. on Web & Soc. Media 467, 468 (2021) (noting that "candidates such as Donald Trump . . . attract disproportionate attention both on social media and news media" through the use of racialized immigration rhetoric); *cf.* Lisa A. Flores, Deportable and Disposable: Public Rhetoric and the Making of the "Illegal" Immigrant (2021).

62. *See, e.g.*, Trip Gabriel, *Trump Escalates Anti-Immigrant Rhetoric with 'Poisoning the Blood' Comment*, N.Y. Times (Oct. 5. 2023), https://www.nytimes.com/2023/10/05/us/politics/trump-immigration-rhetoric.html [https://perma.cc/VK7X-KXYD] (stating that Trump's recent comment that immigrants are "poisoning the blood of our country" is similar to past Nazi-era nativist rhetoric while referencing Trump's history of anti-immigrant and racist comments); David A. Graham et al., *An Oral History of Trump's Bigotry*, Atlantic, June 2019, at 52.

63. *See generally* López, *supra* note 59.

64. *See, e.g.*, Mike Ludwig, *Trump Sails to Presidency in Election Fueled by Racism and Anti-Immigrant Hate*, Truthout (Nov. 6, 2024), https://truthout.org/articles/trump-sails-to-presidency-in-election-fueled-by-racism-and-anti-immigrant-hate/ [https://perma.cc/H34G-7UUQ] (describing challenges voting rights groups and election officials faced during the election, including bomb threats and reports of racist voter intimidation fueled by anti-immigrant conspiracy theories).

65. *See* Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1491–94, 1555 n.355 (2005).

media portrayals of immigrants and other racialized groups can lead to increased levels of cognitive bias:

> [L]ocal news programs, dense with images of racial minorities committing violent crimes in one's own community, can be analogized to Trojan Horse viruses. A type of computer virus, a Trojan Horse installs itself on a user's computer without her awareness. That small program then runs in the background, without the user's knowledge, and silently waits to take action—whether by corrupting files, e-mailing pornographic spam, or launching a "denial of service" attack—which the user, if conscious of it, would disavow.
>
> . . . [W]e turn on the television in search of local news, and with that information comes a Trojan Horse that alters our racial schemas. The images we see are more powerful than mere words. As local news, they speak of threats nearby, not in some abstract, distant land. The stories are not fiction but a brutal reality. They come from the most popular and trusted source.[66]

The activation and expression of racial bias is connected to the use of racialized stereotypes and language, including anti-immigrant rhetoric and racially biased terminology such as "illegal aliens" and "illegals."[67] Anti-immigrant language and stereotypes are linked to anti-Mexican and anti-Latino racial stereotyping processes, such that the expression of seemingly race-neutral anti-immigrant words and phrases is also linked to the expression of racial bias. The use of seemingly race-neutral language by politicians and the media, such as "illegal aliens" and "illegals," can encode racial prejudice and increase the likelihood that racial bias will be expressed.[68]

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66. *Id.* at 1553–55 (footnotes omitted).

67. *See generally* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 Fordham L. Rev. 1545 (2011) (marshalling cognitive linguistics research to demonstrate how metaphorical labels such as "illegal alien" dehumanizes Latinx persons).

68. *See* Lilian Jiménez, *America's Legacy of Xenophobia: The Curious Origins of Arizona Senate Bill 1070*, 48 Cal. W. L. Rev. 279, 287 (2012) (discussing how the term "'illegal alien' . . . activate[s] racist concepts that have already been planted in the public consciousness, and can be purposefully or accidentally activated by political elites, campaign activities, or media coverage"). The federal government under President Biden, for example, issued a Policy Memorandum in 2021 that instructed the Executive Office for Immigration Review (EOIR) to replace the dehumanizing term "illegal alien" with the more accurate term "undocumented noncitizen." *See* Policy Memorandum 21-27 from Jean King, Acting Dir., Exec. Off. of Immigr. Rev., U.S. Dep't of Just. 2 (July 23, 2021); *see generally* 8 C.F.R. § 1003.0 (2021). This Memorandum was rescinded during Trump's second presidential term. Policy Memorandum 25-07 from Sirce E. Owen, Acting Dir., Exec. Off. of Immigr. Rev.,

The emerging field of neurorhetoric helps us understand how racial stereotyping through the use of rhetoric alters the neural pathways of the brain. Research on neurorhetoric has found that repeated exposure to persuasive language—such as political rhetoric—can embed racial stereotypes on a neurophysiological level.[69] Professor Lucy Jewel succinctly describes how persuasive messaging can impact the structure of the brain such that the expression of racial bias becomes normalized:

> [R]acially coded categories . . . create neural pathways that, upon continued use, become collectively entrenched. An entrenched neural pathway offers a smooth and rapid path for a conclusory message to reach an individual's consciousness. Coded categories are harmful because they encourage rapid unconscious thinking that has the effect of hardwiring stereotypes into the pathways of the brain. The rapid way in which a term raises these unspoken conclusions makes it difficult to imagine other narrative possibilities or engage in reasoned deliberation about the issue.[70]

The widespread popular and legal description of undocumented immigrants as "illegal aliens" demonstrates how linguistic rhetoric can canalize racial stereotypes.[71] Neurorhetoric research explains how the use of "illegal alien" language in the courtroom can prime jurors for the expression of racial bias:

> A freighted word that is frequently reiterated, the term likely triggers neural networks connected to deep-seated fears of unknown persons, crime, and more generalized fears of the "other." As a descriptor for people existing outside the bounds of what is familiar and safe, the term removes the humanity from an entire population of people because "they" are not like "us." In this way, the term rapidly and unconsciously generates

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U.S. Dep't of Just. (Jan. 29, 2025). Notably, the Library of Congress refrained from using the term "alien" in 2016 after determining that "the phrase *illegal aliens* has become pejorative." *See* Libr. of Cong., Library of Congress to Cancel the Subject Heading "Illegal Aliens" (2016), https://www.loc.gov/catdir/cpso/illegal-aliens-decision.pdf [https://perma.cc/4PCY-UEAP].

69. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 Md. L. Rev. 663 (2017) (examining the science of neurorhetoric and how stereotypes can become embedded in cognitive processing).

70. *Id.* at 664.

71. *Id.* The dated Immigration and Nationality Act of 1952, for example, uses the term "alien" to describe any person that is "not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

collective support for policies of removal, detention, and deportation of Mexican immigrants.[72]

Prosecutorial rhetoric that demonizes a Latinx criminal defendant as an "illegal alien" thus primes jurors for the cognitive expression of racial bias against the defendant in their decision-making.[73]

III.
RACIALIZED ANTI-IMMIGRANT BIAS AND JURY DECISION-MAKING

Empirical research in cognitive psychology has thoroughly demonstrated that juror decision-making is distorted by cognitive biases and other non-legal factors.[74] The race and ethnicity of both the juror and the criminal defendant has been shown to "negatively influence[] verdict outcomes, length of sentence, and culpability assignment."[75] Recent research has discovered that juror racial biases against Latinx defendants are more readily expressed when seemingly non-racial evidence of the defendant's undocumented immigration status is presented at trial.[76] The introduction of such racially-coded, yet facially neutral, evidence about the defendant allows jurors to rationalize the expression of racial bias while believing that they still adhere to socially-acceptable norms of equality and fairness.

A. Race, Citizenship, and Juror Bias

The continuing presence of anti-immigrant racial bias continues to thwart the equitable administration of justice while distorting the jury decision-making process.[77] Psychological studies have

72. Jewel, *supra* note 69, at 683–84 (footnote omitted).

73. *Id.*

74. *See generally* Cynthia Willis Esqueda, Russ K.E. Espinoza & Scott E. Culhane, *The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making*, 30 Hisp. J. Behav. Scis. 181, 181 (2008); *see also* Alvarez & Miller, *supra* note 42, at 299 (citing research demonstrating that "[j]urors are influenced by extralegal factors, including the defendant's race").

75. Esqueda et al., *supra* note 74, at 182 (citations omitted) (summarizing research studies); *see* Espinoza et al., *supra* note 11, at 198 ("Research indicates that race bias intrudes into the jury decision-making process." (citations omitted)).

76. *See* Espinoza et al., *supra* note 11, at 206–07; Minero & Espinoza, *supra* note 46, at 55; Esqueda et al., *supra* note 74, at 181; Navarro et al., *supra* note 40, at 237; Matthew P. West et al., *How Mock Jurors' Cognitive Processing and Defendants' Immigrant Status and Ethnicity Relate to Decisions in Capital Trials*, 17 J. Experimental Criminology 423, 423 (2021).

77. *See generally* Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 Legal & Criminological Psych. 171, 171–72 (2007) (collecting studies).

advanced a number of models to better understand the expression of racial bias (or prejudice) in individuals, as well as how such bias may impact individual and group decision-making.[78] Underlying these models is an understanding that individuals naturally rely on stereotypes—or "cognitive schemas"—as mental heuristics to enable more efficient decision-making.[79]

People engage in various types of stereotyping in order to categorize others into distinct social categories—based on perceived racial, gender, sexuality, and other identity statuses.[80] The development of a positive as opposed to a negative stereotype about others is strongly influenced by ingroup and outgroup bias, with negative stereotyping occurring most often against persons who are not perceived as members of the same identity group.[81] The use of a racial stereotype, then, refers to a mental association between a particular racial group and a particular social trait—such as criminality, unintelligence, laziness, hypersexuality, and so forth.[82] Psychological research on juror decision-making has found that "[j]urors and mock jurors hold schemas regarding what constitutes specific crimes, as well as what offenders should look and act like. The use of schemas and stereotypical information can lead jurors to make biased or prejudiced verdict and sentencing decisions."[83]

Empirical studies have developed a variety of psychological models to help understand the expression of racial bias. Traditional theories—such as the dominative racism model—focus on understanding direct forms of racism that typically involve the expression of explicit racial slurs and/or bigoted statements tied to specific racial stereotypes.[84] Modern psychological theories of racism—such as the aversive racism, symbolic racism, and implicit bias models—focus on understanding the more indirect and subtle forms of racial bias.[85] These models focus on situations where an

78. *See generally* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269, 275–77 (2015) (examining empirical studies on the impact of race on jury decision-making).

79. *See id.* at 276.

80. *See id.*

81. *See id.* at 275.

82. *See* Riquel Hafdahl et al., *Social Cognitive Processes of Jurors*, 61 Washburn L.J. 305, 331–32 (2022).

83. Charles Edwards, Riquel Hafdahl & Monica K. Miller, *Social Cognition of Jury Decision-Making*, *in* The Cambridge Handbook of Psychology and Legal Decision-Making 309, 311 (Monica K. Miller et al. eds., 2024) (citations omitted).

84. *See generally* Joel Kovel, White Racism: A Psychohistory 54 (1970).

85. *See* John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 Advances Experimental Soc. Psych. 1, 6–7 (2004).

individual has not communicated an explicitly racial statement (such as a racial slur or directly equating membership in a particular racial group with a specific social or intellectual trait), but whose decision-making is nonetheless impacted by underlying racial bias.[86]

The aversive model of racism has found that some individuals may identify as "non-racist" and even support racial equality in theory, and yet are influenced by psychological processes to express racial bias.[87] Such persons "consciously recognize and endorse egalitarian values and because they truly aspire to be nonprejudiced, they will *not* discriminate in situations with strong social norms when discrimination would be obvious to others and to themselves" in order to "avoid the attribution of racist intent."[88] The likelihood that racial bias will be expressed can thus be reduced by creating a social situation where the expression of bias violates stated norms of behavior:[89]

> [A]versive racism postulates that people genuinely believe that they have egalitarian values, but yet feel uncomfortable when interacting with members of minority groups. This prejudicial aversive feeling that arises because of race can be ameliorated when it is displaced onto another perceived negative [non-racial] variable . . . . Thus, individuals do not feel guilty for being prejudiced toward members of minority groups when they have another perceived negative variable to substitute for race and/or ethnicity.[90]

A central finding of research on aversive racism is that the cognitive expression of racial bias is more likely to occur when an individual can attribute their negatively biased behavior and thoughts to seemingly non-racial factors. Research studies have found that "jurors demonstrate bias towards minority defendants . . . when they can attribute behavior to factors other than ethnicity"[91] and that people express more negative attitudes towards immigration when provided with a non-race-based opportunity to do so.[92] This finding is connected to research that demonstrates that cognitive biases—including racial biases—are often activated when new information

86. *Id.*
87. *Id.* at 3, 6–7.
88. *Id.* at 7.
89. *See id.*
90. Minero & Espinoza, *supra* note 46, at 59 (citation omitted) (noting that the "theory of aversive racism suggests that negative attitudes are manifested in subtle, indirect, and rationalized ways").
91. Espinoza, *supra* note 46, at 34 (collecting research studies).
92. *Cf. id.*

is introduced that the brain then associates with existing biases.[93] "Priming" individuals with negative racial stereotypes increases the likelihood that racial bias will be expressed when engaging in decision-making.[94] For example, one study found that research participants "who were primed with more [negative racial] stereotypes judged the person's ambiguous behavior more harshly than participants who were primed with fewer stereotypes."[95]

Psychological theories based on aversive racism research—such as the symbolic model of racism, the implicit bias model of racism, cognitive-experiential self-theory, and the justification-suppression model of prejudice—have similarly found that the expression of racial bias is often tied to the ability of a person to rationalize and justify their negative racial feelings.[96] The symbolic model of racism has found that the expression of racial bias is often rationalized by individuals by reference to broader, seemingly race-neutral political beliefs.[97] Such individuals may feel comfortable expressing racial bias in situations where they can defend their statements—such as that certain racial groups have a poor work ethic or are culturally deficient—by reference to an overarching political belief.[98]

The aptly named justification-suppression model of racial bias aligns with aversive racism theory in its finding that the cognitive expression of racial prejudice is mediated by social norms.[99] This model posits that while racial "prejudice is an automatic reaction to members of groups associated with negative schemas," social norms (such as non-racism or egalitarianism) can suppress the actual expression

93. *See* Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 117–18, 132 (2018); Karenna F. Malavanti et al., *Subtle Contextual Influences on Racial Bias in the Courtroom*, Jury Expert, May 2012, at 2, 5 (defining priming as "the unconscious influence of individuals' environmental cues on their behaviors").

94. *See* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1267–68.

95. *Id.* at 1268 (citing Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 329 (2010)).

96. *See* Dovidio & Gaertner, *supra* note 85, at 6–7; West et al., *supra* note 76, at 425; Alvarez & Miller, *supra* note 42, at 301–02.

97. *See* Dovidio & Gaertner, *supra* note 85, at 6 ("Symbolic Racism Theory emphasizes that beliefs about individualism and meritocracy that become racialized motivate opposition to policies designed to benefit racial and ethnic minorities.").

98. *See id.*

99. *See* West et al., *supra* note 76, at 425 (describing justification-suppression model research that has found that while "the *experience* of prejudice is automatic, . . . the *expression* of prejudice depends on social norms").

of racial bias.[100] It is important to note that while some individuals may be successful in suppressing the expression of their racial prejudice to abide by prevailing social norms, "[i]t is more likely . . . that individuals will attempt to justify their prejudice" against others through reliance on seemingly non-racial factors (such as one's perceived immigration status).[101]

Finally, cognitive-experiential self-theory ("CEST") has found that individuals employ two separate information processing systems: rational and experiential.[102] Whereas the experiential system is "quick, intuitive, preconscious, and emotional," the rational processing system is characterized by conscious deliberation.[103] Research studies applying CEST have found that experiential processing of information enables juror decision-making based on extralegal factors, which allow for the expression of racial prejudice—such as the defendant's race, ethnicity, and immigration status.[104]

Numerous empirical studies have found that the prevalence of racial bias in society has negatively impacted juror decision-making in criminal cases. The negative impact of racial bias on juror thought processes is due in part to the activation of cognitive schemas that rely on racialized stereotypes to associate non-white defendants—and in particular Latinx and Black defendants—with criminality.[105] The expression of racial bias is particularly strong in situations where a defendant is on trial for a crime that is stereotypically linked to the defendant's own racial group.[106] For example, a study found that mock jurors were more likely to express racial biases against a Latinx criminal defendant when the alleged crime was "low status" (such as crimes involving violence, drugs, or theft) as opposed to "high status" (such as crimes of "art theft, embezzlement, insider trading, [or] corporate fraud").[107]

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100. Alvarez & Miller, *supra* note 42, at 301–02 (collecting studies and describing the justification-suppression model of prejudice as demonstrating how "individuals develop unique cognitive systems that determine whether to express their prejudice, based on social norms that govern the [acceptability of the] expression of prejudice").

101. *Id.* at 302.

102. West et al., *supra* note 76, at 425.

103. *Id.*

104. *Id.* ("[M]ock jurors' tendency to process information experientially might moderate the effects of a defendant's ethnicity and immigrant status. In contrast, rational processing among mock jurors is associated with leniency and following judge's instructions." (citations omitted)).

105. *See* Hunt, *supra* note 78, at 275–76.

106. Esqueda et al., *supra* note 74, at 184 (collecting studies). Stereotype-activation theory has demonstrated that a jury is more likely to find a defendant guilty and deserving of more severe punishment if the case involves "a stereotypical crime for the defendant's social group." *Id.*

107. *Id.*

Psychological studies have found that white mock jurors are "often harsher in their judgments of out-group vs. in-group defendants" as well as in their "sentencing recommendations for Black vs. [w]hite defendants" due to the activation of both explicit and implicit racial cognitive biases.[108] Research has also demonstrated that mock jurors "held implicit associations between Black and Guilty compared to White and Guilty" in a judicial setting,[109] and "that juror interpretations of ambiguous evidence 'varied based upon whether they had been exposed to a photo of a darker- or lighter-skinned perpetrator.'"[110] Based on these and other research findings, criminal justice experts argue that jurors are prone to "fill in the gaps" and "complete the story" by relying on racial stereotypes during criminal trials.[111] Jurors similarly resort to racial stereotypes when their recollection of facts presented at trial is faulty.[112]

B. Juror Bias Against Latinx Persons and Racialized Immigrants

Racial bias against Latinx criminal defendants has also been demonstrated to negatively impact juror decision-making due to the racial stereotyping of Latinx persons as undocumented immigrants, gang members, and criminals.[113] Research has found, for example,

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108. Sommers, *supra* note 77, at 172–73.

109. Justin D. Levinson et al., Commentary, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187, 190 (2010).

110. Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 Denv. L. Rev. 309, 346 (2019) (citing Levinson & Young, *supra* note 95, at 337); *see* Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J.F. 406, 406 n.4 (2017).

111. Thompson, *supra* note 94, at 1267; *see* Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 Harv. J. on Racial & Ethnic Just. 1, 26–27 (2016).

112. Thompson, *supra* note 94, at 1271; *see* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 376–77 (2007).

113. *See* Alvarez & Miller, *supra* note 42, at 300 (collecting studies); Esqueda et al., *supra* note 74, at 191 (conducting two empirical studies that found that with "the introduction of [non-racial] negative characteristics [such as low socioeconomic status and low status criminal charges], European American participants showed biases in culpability, guilt, sentencing, and underlying trait ascription decisions for the Mexican American defendant"); Espinoza, *supra* note 46, at 33 ("Results demonstrated that jurors showed bias against the low SES [socioeconomic status], Mexican-American defendant significantly more than all other conditions . . . ."); *see also* Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 Harv. C.R.-C.L. L. Rev. 297, 304–07 (2009) (discussing how racial and cultural stereotypes have contributed to historical underreporting of Latino lynchings). *See generally* Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 Soc. Just., nos. 1–2, 2004, at 242, 242–43

that "[w]hite jurors are biased against Latino defendants" and perceive Mexican American defendants, in particular, to be more blameworthy, more responsible, and less credible as compared to white defendants.[114] Similarly, empirical research has demonstrated that prejudice against non-citizen immigrant criminal defendants is pervasive, with jurors more likely to render guilty verdicts and to recommend more severe punishment when the defendant is an immigrant as opposed to a United States citizen.[115]

The U.S. Supreme Court recently acknowledged the role that racial bias plays in negatively impacting juror decision-making in criminal trials.[116] In *Peña-Rodriguez v. Colorado*, the Court held that criminal defendants were entitled under the Sixth and Fourteenth Amendments to a post-verdict judicial inquiry as to whether their rights to a fair trial and equal protection of the laws were violated when there was clear evidence that juror racial bias may have infected jury deliberations.[117] The *Peña-Rodriguez* majority found that a juror's statements during deliberations that the Latinx defendant was guilty because he was Mexican violated the defendant's constitutional rights.[118] The Court also recognized that juror racial bias against immigrant defense witnesses undermined the defendant's constitutional rights,[119] noting that the juror in question stated during deliberations that "he did not find [the defendant's] alibi witness credible because . . . the [Latinx] witness was 'an illegal'"

(mentioning findings that show discrimination against Latinx criminal defendants in death sentencing outcomes).

114. *See* Alvarez & Miller, *supra* note 42, at 300 (collecting studies).

115. *See* Michael T. Light, Michael Massoglia & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 Am. Socio. Rev. 825 (2014) (reviewing federal sentencing data and finding that non-citizen criminal defendants, and in particular undocumented defendants, received more severe criminal sentences than U.S. citizens for the same crime).

116. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017).

117. *Id.* at 225 ("[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.")

118. The juror in question told other jurors that he "believed the defendant was guilty [in the sexual assault trial] because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women" and that "I think he did it because he's Mexican and Mexican men take whatever they want." *Id.* at 212–13.

119. *Id.* at 226–27.

(despite the fact that the witness was actually a legal resident of the United States).[120] The Court thus held that the defendant's constitutional right to a fair trial under the Sixth Amendment was violated by the failure of the trial court to conduct a post-verdict inquiry into juror racial bias.[121]

An emerging field of research has focused directly on the intersection between the criminal defendant's race and immigration status. As discussed previously in Part II of this Article, anti-Latinx "bias is related to anti-immigrant bias because Latinos are one ethnic group commonly associated with immigration."[122] The conflation of the defendant's Latinx race and immigration status in jurors' minds can lead jurors to discriminate against Latinx defendants on racial grounds when evidence of the defendant's immigration status or lack of citizenship is allowed at trial. As Professor Leti Volpp observes:

> Today the conflation of the racial identity "Mexican" with the term "illegal alien" is indisputable. The two terms completely subsume one another . . . . [T]he "illegal alien" was produced as a new legal and political subject and . . . became synonymous with the racial identity "Mexican."[123]

Juror racial bias against Latinx defendants is more prevalent when seemingly non-racial factors (such as the defendant's citizenship and immigrations status) are introduced at trial, which then allow jurors to justify, and thus express, their underlying prejudice in a manner that accords with prevailing social norms. A 2015 empirical study by Espinoza, Willis-Esqueda, Toscano, and Coons examined the extent to which the immigration status, ethnicity, and socioeconomic status ("SES") of criminal defendants activate juror bias.[124] The study participants included 320 white venire persons called for jury duty at a courthouse in Southern California.[125] The participants were asked to volunteer to act as mock jurors and were then shown one of eight criminal trial transcripts that varied, among other factors, the ethnicity ("White Canadian or Mexican"), immigration status (undocumented or documented), and socioeconomic

120. *Id.* at 213.

121. *Id.* at 225.

122. Alvarez & Miller, *supra* note 42, at 300.

123. Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1597 (2005) (footnotes omitted); *see also* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (updated ed. 2014) (discussing the conflation of the term "illegal alien" with Mexican racial identity).

124. *See generally* Espinoza et al., *supra* note 11.

125. *Id.* at 202.

status (low or high) of the criminal defendant.[126] The results from the study "indicated that the low-SES undocumented Mexican defendant was found guilty more often, given a more severe sentence, thought to be more culpable, and rated lower on a number of trait measures compared with all other conditions."[127] The authors of the study found that "[s]ubtle bias theories, such as aversive racism, appear to best explain the biases in juror decisions."[128]

A related empirical study from 2016 examined juror expression of racial prejudice, through the lens of the aversive racism model, against immigrant defendants based on immigration status, country of origin, and ethnicity.[129] In this study, 320 undergraduate students reviewed a criminal court trial packet that included information about the criminal charges (murder), the defendant's racial ethnicity (white or Latinx), the defendant's nationality (Canadian or Mexican), and the defendant's immigration status (legal or "illegal").[130] Participants were asked to act as though they were an actual juror deciding the case, and to render a verdict and sentencing recommendations.[131] The researchers found that "European American mock jurors found undocumented, Latino immigrants from Mexico guilty significantly more often, more culpable, and rated this defendant more negatively on various trait measures in comparison with all other conditions."[132] The study also found that "participants were most confident in their decisions for the undocumented, Latino defendant from Mexico and placed the most blame on this defendant compared with all other conditions."[133] The study authors found that the expression of juror racial bias was facilitated when "other perceived negative variables were coupled with ethnicity."[134] The study interpreted these findings as according with aversive racism theory, given that juror racial bias was activated only once a seemingly non-racial factor—such as the defendant's undocumented immigration status—was included in the trial evidence.[135] Additional empirical studies have similarly found juror racial bias against Latinx

126. *Id.* at 197, 202–03.

127. *Id.* at 197, 207 ("[T]he results confirmed . . . and provided evidence of modern bias operating in legal decision making by actual venire persons.").

128. *Id.* at 197.

129. Minero & Espinoza, *supra* note 46, at 55.

130. *Id.* at 60–61.

131. *Id.*

132. *Id.* at 55 (noting that Latinx mock jurors "did not demonstrate ingroup favoritism or outgroup bias").

133. *Id.* at 63.

134. *Id.* at 67.

135. Minero & Espinoza, *supra* note 46, at 59, 67.

criminal defendants,[136] and that such bias is more freely expressed when jurors are provided evidence of seemingly non-racial factors (such as immigration status and socioeconomic status) about the defendant.[137]

These empirical findings accord with modern aversive racism models, such as justification-suppression theory and cognitive-experiential self-theory.[138] As predicted by the justification-suppression model, jurors were more likely to express their latent racial biases against Latinx criminal defendants when the trial facts included evidence of seemingly non-racial factors about the defendant (such as the defendant's undocumented immigration status and lack of U.S. citizenship).[139] Similarly, these studies align with cognitive-experiential self-theory in demonstrating that jurors relied on preconscious experiential processing in expressing racial bias once presented with extralegal factors (such as immigration status) about the defendant.[140]

C. Limiting the Expression of Juror Racial Bias

Researchers, judicial committees, and policymakers have striven for decades to identify and implement measures to reduce the likelihood that racial bias will be expressed by jurors.[141] Modern anti-racism initiatives attempt to translate empirical research findings on the reduction of racial bias into practical interventions geared towards the traditional criminal trial. The vast majority of anti-racism juror interventions involve educating jurors about the possibility of racial bias and the reliance on stereotypes during decision-making—that is, making racism education a salient and important aspect of juror selection, training, and instructions.[142] Making jurors aware of

136. *See generally* Esqueda et al., *supra* note 74, at 181 (finding that white mock jurors racially discriminated against low socioeconomic status Mexican American defendants); Espinoza, *supra* note 46, at 40 ("Mock jurors gave the low SES, Mexican-American defendant who committed a crime with extenuating aggravating circumstances the death penalty significantly more often than all other conditions.").

137. *See, e.g.*, Navarro et al., *supra* note 40, at 237 (finding that "[w]hite participants saw the Hispanic defendant as more likely to commit a crime . . . than Hispanic participants"); West et al., *supra* note 76, at 423 (concluding that a "defendant's immigrant status and ethnicity might indirectly lead to punitive decisions in capital cases because they influence how jurors weigh aggravators and mitigators").

138. *See supra* Part II for a more thorough summary of these cognitive bias models.

139. *See, e.g.*, West et al., *supra* note 76, at 425.

140. *See id.*

141. *See generally* Jacqueline M. Kirshenbaum & Monica K. Miller, *Judges' Experiences with Mitigating Jurors' Implicit Biases*, 28 PSYCHIATRY PSYCH. & L. 683 (2021) (discussing judicial attempts to reduce juror racial bias).

142. *See id.* at 684.

their own possible latent racial bias and stereotypes, through specialized jury instructions, has been linked to the reduction of later expressions of bias.[143] Aversive models of racism have found that people (at least those who consider themselves to be non-prejudiced) "will *not* discriminate in situations with strong social norms when discrimination would be obvious to others and to themselves" in order to "avoid the attribution of racist intent."[144] For example, empirical research has demonstrated that white jurors are more likely to evaluate the culpability of Black defendants similarly to white defendants when they are made aware of their potential for racially biased decision-making—whether through voir dire questioning, opening and closing statements, or specialized judicial instructions.[145] Research has also found that encouraging people to conform to their personal understandings of egalitarianism is correlated with a reduction in expressions of both explicit and implicit bias.[146] These research findings suggest that raising juror awareness of their own potential racial bias—whether prior to, during, or after trial—may promote fairness in jury decision-making.[147]

The American Bar Association ("ABA"), as well as an increasing number of state and federal courts, has developed model jury instructions intended to reduce the expression of juror racial bias.[148] The ABA model instruction, which was heavily informed by

143. *See id.* at 685.

144. Dovidio & Gaertner, *supra* note 85, at 7.

145. *See, e.g.*, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 867–69 (2015).

146. *See, e.g.*, Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCH. SCI. 1472, 1475–76 (2011) (finding that people are motivated to suppress their expression of prejudice when educational messaging appeals to their personal understandings of fairness and equality). The emerging field of neurorhetoric, *see supra* notes 69–73 and accompanying text, similarly suggests that presenting jurors with non-biased messaging can counteract embedded racial stereotypes. *See* Jewel, *supra* note 69, at 692–93 ("[J]ust as negative thought structures can become entrenched in the brain . . . , they can also be weakened, or even removed, with alternative discourses.").

147. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 141–42 (2010) (citing Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCH. 856 (2001)); Lee, *supra* note 145, at 866–69.

148. *See, e.g.*, Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 AM. CRIM. L. REV. 349, 354–61 (2022). The Western District of Washington has also been a leader in addressing racial bias in the courtroom. They developed a similar model of jury instructions based on empirical research regarding the suppression of cognitive bias:

> I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in

empirical psychological findings, provides a representative example of such efforts:

> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
>
> Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.
>
> - Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
> - Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?
> - You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.
>
> Working together will help achieve a fair result.[149]

> the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

W. Dist. Wash., Criminal Jury Instructions—Unconscious Bias (footnotes omitted), https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf [https://perma.cc/5EJP-8BNK].

149. Am. Bar Ass'n, Achieving an Impartial Jury (AIJ) Toolbox 17–20 (footnotes omitted), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf [https://perma.cc/K4SH-R765].

The practical effectiveness of juror interventions that rely solely on anti-racism education is nonetheless unclear.[150] A 2021 study funded by the U.S. Department of Justice and conducted by leading cognitive bias empiricists, for example, was unable to find any "differences in verdict outcomes between those who heard the implicit bias instructions compared to those who heard the standard instructions" when using jury instructions modeled after those created by the Western District of Washington.[151]

One possible explanation for the failure of recent research to find that anti-racist juror instructions reduce the expression of racial bias is that such research assumes that most jurors view themselves as being non-racist and egalitarian. It is possible that maintaining a non-racist and egalitarian identity is no longer important to a significant proportion of the population, given the rise of Trumpism and white supremacy in recent years. The expression of racial prejudice has arguably become normalized for many individuals who observed President Trump and senior government leaders expressing explicitly racist thoughts without significant political or legal consequences.[152] The November 2024 re-election of Trump to the Presidency, along with Trump's planned appointment of noted white supremacists to cabinet-level positions in the new administration, indicate that expressing explicitly racist views are no longer taboo to a significant portion of society.[153] Policy initiatives to reduce juror racial

150. *See* Mona Lynch & Emily Shaw, Can Jury Instructions Have an Impact on Trial Outcomes? 16–17 (2021), https://www.ojp.gov/pdffiles1/nij/grants/300717.pdf [https://perma.cc/X76N-LDRS].

151. *Id.* at 3–4, 16. The study authors opined that the dearth of findings could be due to various limitations inherent in the empirical model, such as the small size of juror groups, the type of crime (drug conspiracy), and the awareness of participants that they were not *actually* rendering a decision on the guilt of a real defendant. *Id.* at 28–29.

152. *See* Abby Corrington et al., *The Influence of Social Norms on the Expression of Anti-Black Bias*, 38 J. Bus. & Psych. 89 (2023) (demonstrating empirically that changing social norms were strongly related to the expression of racial bias). *See generally* Federica Berdini & Sofia Bonicalzi, *Normalization of Racism and Moral Responsibility: Against the Exculpatory Stance*, 40 J. Applied Phil. 246 (2023) (examining the normalization of racism generally, with Italy as a case study to explore its implications for moral responsibility).

153. *See, e.g.*, Martin Pengelly, *Trump's White House Circle Takes Shape Amid Fears Over Extremist Appointments*, Guardian (Nov. 10, 2024, 7:00 AM), https://www.theguardian.com/us-news/2024/nov/10/trump-white-house-circle [https://perma.cc/247U-K9U7]; Ellie Quinlan Houghtaling, *Trump Brings Back White Nationalist Stephen Miller for Second Term*, New Republic (Nov. 11, 2024, 12:18 PM), https://newrepublic.com/post/188254/trump-white-nationalist-stephen-miller-second-term-policy [https://perma.cc/2XKZ-49ZK]; Michelle L. Price & Alex Connor, *A Guide to Key Figures in Donald Trump's Orbit*, Associated Press (Nov. 11,

bias in the courtroom, then, should consider bolder measures in addition to anti-racist jury instructions—such as racial bias testing of prospective jurors[154] and encouraging the inclusion of jurors with the same racial identity as the defendant.[155]

IV.
THE ADMISSION OF IMMIGRATION STATUS EVIDENCE AT TRIAL

Evidence of a criminal defendant's citizenship and immigration status is routinely introduced in non-immigration state and federal trials, notwithstanding the aforementioned risk that such evidence will facilitate juror expression of racial bias against the defendant.[156] Prosecutors have referenced a Latinx defendant's undocumented immigration status in opening and closing jury statements to malign the defendant as being prone to criminality and untruthfulness, attempted to use such evidence to establish the elements of a crime, relied on immigration status evidence to attack the credibility of Latinx defendants (and defense witnesses) during cross-examination, and introduced immigration status evidence for the purpose of sentence enhancement. Such strategic uses of a defendant's immigration status to signify criminality and untruthfulness undermine the defendant's constitutional rights to a fair trial and equal application of our evidentiary laws while reifying racialized stereotypes about Latinx persons and immigrants.[157]

A. Opening and Closing Arguments

Prosecutors have unconstitutionally remarked on the immigration status of a Latinx criminal defendant during opening and closing statements to the jury to demonstrate that the defendant is

2024, 1:00 PM), https://apnews.com/article/trump-key-people-transition-election-93605a3ffa9f929cb1b74fde7f1ee877 [https://perma.cc/ZRK9-NZYY].

154. *See generally* Ariana R. Levinson et al., *Challenging Jurors' Racism*, 57 Gonz. L. Rev. 365, 398–99 (2022) (noting that judges and lawyers can use various validated psychological tests, such as the Modern Racism Scale, the Symbolic Racism 2000 Scale, and the Color-Blind Racial Attitudes Scale, to eliminate jurors with explicitly racist views).

155. *See generally* Espinoza et al., *supra* note 11, at 209 (referencing various empirical studies that have found that the inclusion of jurors that identify with the same race as the criminal defendant operates to reduce juror racial bias).

156. *See supra* Part III.

157. *See supra* Part II for a more detailed analysis of the constitutional issues implicated by immigration status evidence in criminal prosecutions.

untruthful and prone to criminality.[158] Courts traditionally afford criminal litigants with wide discretion in the presentation of opening and closing arguments. There are no rules within either the Federal Rules of Criminal Procedure[159] or the Federal Rules of Evidence[160] that directly address restrictions on the content of such arguments. Rather, limitations on the content of opening statements and closing arguments are typically regulated by the Sixth and Fourteenth Amendments to the United States Constitution, the common law, and ethical guidelines.[161] Counsel nonetheless is prohibited during opening and closing statements from appealing to the potential racial, social, religious, and other prejudices of the jury.[162] Courts have

158. This is a technique commonly used by prosecutors. *See, e.g.*, United States v. Lopez-Medina, 596 F.3d 716, 739 (10th Cir. 2010) ("Now defense counsel tried to show him as a nice person, as a person that was law abiding and never committed crime. He's here illegally. Been so for 13 years. He's living the lie."); Portillo v. United States, 609 A.2d 687, 690 (D.C. 1992) ("Where the prosecutor went wrong concerning appellant's immigration status, however, was to suggest that the illegal entry itself was 'the grandest deception,' which rendered appellant's testimony incredible."); Commonwealth v. Kouma, 53 A.3d 760 (Pa. Super. Ct. 2012). *Cf., e.g.*, United States v. Saeku, 436 F. App'x 154 (4th Cir. 2011) (discussing prosecutor's remarks calling attention to the defendant's immigration status but admonishing the jury not to consider it); Kashkoul v. State, No. 36A05-0908-CR-478, 2010 WL 1539966, at *2–3 (Ind. Ct. App. Apr. 19, 2010) (calling attention to defendant's immigration status and national origin).

159. Fed. R. Crim. P. 29.1, for instance, merely sets forth the order that closing arguments must follow.

160. Nonetheless, the Federal Rules of Evidence do provide that the evidence presented cannot be irrelevant (Fed. R. Evid. 402), unfairly prejudicial (Fed. R. Evid. 403) or lure the jury into improper consideration of the defendant's character (Fed. R. Evid. 404). *See, e.g.*, United States v. Santana-Camacho, 833 F.2d 371, 373 (1st Cir. 1987) (finding reversible error when the prosecutor referred to the Latinx defendant in closing arguments as an "illegal alien," when the evidence established otherwise).

161. For a general overview of the law on opening statements, *see* J. Alexander Tanford, The Trial Process: Law, Tactics, and Ethics 153–58 (3d ed. 2002) (noting that the common limitations on opening statements include (a) limitations on discussion of the facts or law involved in the case, (b) prohibitions against personal attacks on the judge, attorneys, witnesses, or parties to the case, and (c) prohibitions against appeals to racial and other prejudices).

162. *See generally* A.S. Frank, Annotation, *Counsel's Appeal to Racial, Religious, Social, or Political Prejudices or Prejudice against Corporations as Ground for a New Trial or Reversal*, 78 A.L.R. 1438 (2024) ("It is a general rule, applicable in civil and in criminal cases alike, that an improper appeal by counsel to racial, religious, social, or political prejudices, resulting injuriously to the adverse party, is ground for granting a new trial or reversing a judgment where the effect of the improper appeal was not sufficiently counteracted by action in the trial court, and where proper preliminary steps have been taken by the party aggrieved to preserve his right to relief."); United States v. Raney, 633 F.3d 385, 395 (5th Cir. 2011) ("A prosecutor is 'not

found that such appeals to prejudice undermine the criminal defendant's right to a fair trial under the Sixth Amendment and violate the Fourteenth Amendment's right to equal protection.[163]

Courts have, nonetheless, often upheld references to a Latinx defendant's immigration and citizenship status during a prosecutor's closing statements based on the common law "opening the door" doctrine.[164] The doctrine provides that a party may inadvertently "open the door" to the admission of otherwise inadmissible evidence if it first introduces evidence on the topic.[165] The doctrine is premised on sub-constitutional fairness grounds which allows courts to engage in "curative admissibility" only when necessary to counter any unfair prejudice that the original evidence may have caused to the other party.[166] The U.S. Constitution, however, prohibits the

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permitted to make an appeal to passion or prejudice calculated to inflame the jury.'" (quoting United States v. Crooks, 83 F.3d 103, 107 n.15 (5th Cir. 1996))); Tashjian v. Bos. & Me. R.R., 80 F.2d 320, 321 (1st Cir. 1935) (closing arguments "must be confined to the evidence and must not appeal to passion or prejudice or sympathy in an unfair way"); Victorino v. State, 127 So. 3d 478, 494 (Fla. 2013) ("[C]omments in closing argument [that] are intended to and do inject elements of passion and fear into the jury's deliberations . . . [are] far outside the scope of proper argument." (alteration in original) (quoting King v. State, 623 So. 2d 486, 488 (Fla. 1993))).

163. *See, e.g.*, Williams v. Henderson, 451 F. Supp. 328, 333 (E.D.N.Y.), *aff'd*, 584 F.2d 974 (2d Cir. 1978); Chandler v. State, 572 P.2d 285, 290 (Okla. Crim. App. 1977); Commonwealth v. Mayberry, 387 A.2d 815, 818 (Pa. 1978).

164. *See, e.g.*, United States v. Saeku, 436 F. App'x 154, 158–59, 164 (4th Cir. 2011) (finding no error when the prosecutor asked the jury during closing arguments to "find the defendant guilty, whether [he is] a citizen or whether [he is] a visitor," where the defendant had referenced his nationality and immigration status repeatedly during trial); Kashkoul v. State, No. 36A05-0908-CR-478, 2010 WL 1539966, at *2–3 (Ind. Ct. App. Apr. 19, 2010) (finding no fundamental error occurred when the prosecutor in closing arguments stated that the defendant is "an immigrant to this country. We're all immigrants to this country . . . but that doesn't give you the right to go commit a crime and take the law into your own hands," given that the defendant had introduced evidence of his immigration status and nationality during his opening arguments and testimony); Commonwealth v. Kouma, 53 A.3d 760, 769–70 (Pa. Super. Ct. 2012) (holding that the defendant's rights were not violated when the trial judge held that if the defendant chose to introduce character witness testimony that he was a law-abiding person, that their testimony could be rebutted with evidence that the defendant was "an illegal alien"); Portillo v. United States, 609 A.2d 687, 690 (D.C. 1992) ("Once appellant admitted that he had entered 'without papers,' he opened the door to the government's exploration of his status with the Immigration and Naturalization Service.").

165. *See generally* United States v. Martinez, 988 F.2d 685, 702 (7th Cir. 1993).

166. *Id.* (noting that "[t]he extent to which an opponent may counter with evidence is within the discretion of the . . . court"); JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 15 (4th ed., 2025-1 Cum. Supp. 1985), VitalLaw (database updated Dec. 2024); United States v. Winston, 447 F.2d 1236, 1240 (D.C. Cir. 1971) (holding that otherwise inadmissible evidence is

doctrine from being "subverted into a rule for [the] injection of prejudice."[167] Indeed, the U.S. Supreme Court recently held in *Hemphill v. New York* that the "open the door" doctrine does not permit the introduction of hearsay evidence that would otherwise be inadmissible under the Confrontation Clause of the Sixth Amendment.[168] The Supreme Court held that "[e]ven [if the Court] . . . has recognized and reaffirmed the vital truth-seeking function of a trial, the Court has not allowed such considerations to override the rights the Constitution confers upon criminal defendants."[169]

In *United States v. Lopez-Medina*, the trial judge denied the Latinx defendant's motion for a new trial based, in part, on the prosecutor's references to the defendant's undocumented immigration status during both cross-examination and closing arguments.[170] Gerardo Lopez-Medina was charged with possession of methamphetamine with intent to distribute and testified to his innocence at trial.[171] Lopez-Medina testified on direct that he was born in Mexico but had lived in the United States for between thirteen and fourteen years and that his only previous arrest was for a traffic ticket.[172] On cross-examination, the prosecutor asked the leading questions, "[y]ou are illegally here, aren't you," and "[h]ave you been breaking the law for 13 or 14 years?"[173] The prosecutor continued to reference Lopez-Medina's immigration status during closing arguments, telling the jury that the "defense counsel tried to show him as a nice person, as a person that was law abiding and never committed crime. He's here illegally. Been so for 13 years. He's living the lie."[174]

Lopez-Medina was ultimately convicted and appealed on the grounds that the references to his "illegal" immigration status during cross-examination and closing arguments constituted reversible prosecutorial misconduct.[175] The Tenth Circuit disagreed and affirmed his conviction, holding that Lopez-Medina "opened the

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allowed "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence" (quoting Cal. Ins. Co. v. Allen, 235 F.2d 178, 180 (5th Cir. 1956))).

167. United States v. Johnson, 502 F.2d 1373, 1376 (7th Cir. 1974) (quoting *Winston*, 447 F.2d at 1240).

168. Hemphill v. New York, 595 U.S. 140, 152–53 (2022).

169. *Id.* at 153.

170. United States v. Lopez-Medina, No. 1:05-CR-00112, 2008 WL 11266683, at *1 (D. Utah Feb. 29, 2008) (finding "that there is no basis in law or fact to support Defendant's request for a new trial"), *aff'd*, 596 F.3d 716 (10th Cir. 2010).

171. *Lopez-Medina*, 596 F.3d at 722–23, 728–29.

172. *Id.* at 728.

173. *Id.*

174. *Id.* at 739.

175. *Id.*

door for inquiry about his illegal status by testifying about his clean record" and that evidence of his immigration status was relevant to "counter his suggestion [that] he was a law-abiding citizen wrongly accused of his half-brother's criminal acts."[176]

The permission of prosecutorial references to a Latinx criminal defendant's immigration status on the grounds that the defendant "opened the door" to such appeals to prejudice, however, runs afoul of basic evidentiary principles and the U.S. Constitution.

The common law "open the door" doctrine must cede to a defendant's constitutional rights to equal protection and a fair trial whenever improper prosecutorial references to a criminal defendant's immigration status raise the specter that the jury's decision-making will be influenced by prejudice.[177] For example, the D.C. Court of Appeals found in *Portillo v. United States* that the prosecutor's statement during closing argument that Cristino Portillo "'engaged in the grandest form of deception' by illegally entering the country" constituted prosecutorial misconduct, despite finding that the defendant had earlier opened the door by testifying on direct about his immigration status.[178] The court found that the statement wrongly "implie[d] that anyone who—for whatever reason—ha[d] crossed our borders in violation of the government's immigration procedures should not believed," even though Portillo's "unlawful presence in this country did not bear directly upon his veracity in respect to the issue of his guilt on the charge of distributing drugs."[179]

The Eighth Circuit reached a similar conclusion in *United States v. Cruz-Padilla*, finding that the prosecutor's linkage of the defendant's undocumented immigration status to a character for untruthfulness during closing arguments was prohibited.[180] In *Cruz-Padilla*, the

176. *Id.* The Tenth Circuit erroneously characterized the defendant's testimony as stating that he was a United States citizen, a characterization of the facts that is not supported by the trial record.

177. *See* Portillo v. United States, 609 A.2d 687, 690 (D.C. 1992) ("If an improper remark drew an objection from defense counsel at trial, we will nevertheless affirm the conviction unless the defendant suffered 'substantial prejudice.' . . . If, on the other hand, the defendant failed to object to the improper remark, in order to obtain a reversal, appellant must show plain error, *i.e.*, 'error "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial."'" (footnote omitted) (citations omitted) (quoting McGrier v. United States, 597 A.2d 36, 41 (D.C. 1991))).

178. *Id.* at 689–91. The court did find, however, that the "open the door" doctrine allowed limited cross-examination of Portillo during the trial regarding his immigration status. *Id.* at 690.

179. *Id.* at 690–91. The court ultimately affirmed, however, because "none of the improprieties alleged by the appellant . . . rose to the level of plain error." *Id.* at 691.

180. *See* United States v. Cruz-Padilla, 227 F.3d 1064, 1070 (8th Cir. 2000).

prosecutor told the jury in its closing that the defendant Alejandro Cruz-Padilla's testimony should be disbelieved as the defendant "had been living a lie ever since he came to this country . . . and as such . . . lying and deceiving to Mr. Cruz-Padilla is not something that is hard to do or out of the ordinary."[181] In reversing Cruz-Padilla's conviction and granting him a new trial, the Eighth Circuit affirmed the long-standing principle that "[t]he Constitution prohibits racially biased prosecutorial arguments"[182] in finding that the prosecutor's "repeated references to Cruz-Padilla's [undocumented immigration] status reinforced to the jury his foreign origin and contributed nothing of legitimate evidentiary value."[183]

B. Witness Impeachment

State and federal courts are conflicted as to whether the credibility of Latinx criminal defendants and their defense witnesses can be impeached with extrinsic evidence of their nationality and/or immigration status.[184] State and federal evidentiary principles provide that the credibility of witnesses can be called into question for bias,[185]

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181. *Id.* at 1068.

182. *Id.* at 1069 (quoting the Fourteenth Amendment U.S. Supreme Court decision in McCleskey v. Kemp, 418 U.S. 279, 309 n.30 (1987)).

183. *Id.* The Eighth Circuit found that the prosecutor's statements during closing arguments prejudicially affected the substantial rights of Cruz-Padilla so as to deprive him of a fair trial under the Sixth Amendment. *Id.* ("A prosecutor . . . [has as much of a] 'duty to refrain from improper methods calculated to produce a wrongful conviction as [they do] to use every legitimate means to bring about a just one.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

184. *See, e.g.*, United States v. Lopez-Medina, 596 F.3d 716, 739 (10th Cir. 2010) (holding no plain error to refer to defendant's immigration status as defendant opened the door to inquiry by testifying that he was "law abiding and never committed a crime"); United States v. Garcia, 994 F.2d 1499, 1507 (10th Cir. 1993) (finding that a prosecutor's question about the defendant's awareness that a conviction would render him deportable was relevant to credibility because it meant that the defendant had a reason to testify falsely and analogizing to a defendant knowing that they will go to jail if convicted); State v. Gallegos-Olivera, No. A19-0023, 2019 WL 7049557, at *1 (Minn. Ct. App. Dec. 23, 2019) (finding that cross-examination of a defense witness in a domestic violence case about the immigration consequences that the defendant might suffer if convicted was relevant to showing that the witness had a motive to lie to protect the defendant); Commonwealth v. Kouma, 53 A.3d 760, 761 (Pa. Super. Ct. 2012) (holding that evidence of being an "illegal alien" is relevant to whether a defendant is "law-abiding" if defendant opens the door by offering character evidence of being law abiding).

185. *See* Fed. R. Evid. 607 ("Any party . . . may attack the witness's credibility."); United States v. Abel, 469 U.S. 45, 51 (1984). Case law interpreting Rule 607 has clarified that the rule encompasses the common-law tradition allowing impeachment of witnesses for bias, motive, inaccurate perception, faulty recollection, inconsistent

motive,[186] perception and/or memory issues,[187] making inconsistent statements,[188] making false claims,[189] and for having an untruthful disposition.[190] As to the latter, non-conviction extrinsic evidence is not admissible to impugn a witness's character for untruthfulness except on cross-examination and at the discretion of the trial court.[191] The admissibility of impeachment evidence also depends on whether other rules of evidence and the U.S. Constitution would be violated by its introduction.[192] As such, impeachment evidence is only admissible if it is found to be relevant to assessing the credibility[193] or untrustworthy character[194] of a witness and is not unfairly prejudicial to the opposing party.[195]

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statements, and contradiction. *See* ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE §§ 33–50 (8th ed. 2020) [hereinafter MCCORMICK ON EVIDENCE].

186. MCCORMICK ON EVIDENCE, *supra* note 185, § 39.

187. *Id.* § 44.

188. *Id.* §§ 34–38; United States v. Ince, 21 F.3d 576, 579 (4th Cir. 1994); *see also* FED. R. EVID. 613(b) (setting forth procedural requirements for impeaching a witness with a prior inconsistent statement).

189. *See* MCCORMICK ON EVIDENCE, *supra* note 185, § 39 (self-interestedness resulting in false testimony), § 42 (prior convictions relating to false statements).

190. *See* FED. R. EVID. 608 (permitting non-conviction evidence pertinent to a witness's character for truthfulness or untruthfulness in limited situations); FED. R. EVID. 609 (permitting the impeachment of a witness's character for truthfulness by using evidence of the witness's past criminal conviction in limited situations).

191. *See* FED. R. EVID. 608(b). Some states, such as Texas, do not allow for the admission of extrinsic evidence to attack a witness's character for untruthfulness even during cross-examination. *See* Sanchez v. Davis, 888 F.3d 746, 750 (5th Cir. 2018).

192. *See* FED. R. EVID. 402; *see also* FED. R. EVID. 105 (limiting the admission of evidence that is not admissible for other purposes); FED. R. EVID. 403 (allowing the trial court to exclude otherwise admissible evidence if there is a substantial likelihood that the jury might misuse the evidence in an improper manner).

193. *See* FED. R. EVID. 402 (only relevant evidence is admissible, unless some other rule, federal statute, or the U.S Constitution provides for its admissibility).

194. *Id.*; *see also* FED. R. EVID. 608(b) (stating that while "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness . . . the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: [a] witness"); FED. R. EVID. 609(a). Rule 609 adopts a per se finding that all felony criminal convictions are at least minimally probative of a witness's character for untruthfulness, and that all convictions, regardless of punishment, are probative of such if the elements of the crime required proving—or the witness's admitting—the commission of a dishonest act or false statement. *Id.* The racial bias and disparities that attend the admission of prior convictions under Rule 609 has been much documented and criticized. *See generally* Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment*, 50 FORDHAM URB. L.J. 377, 380–81 (2023).

195. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . .");

Some courts have permitted the impeachment of the defendant with evidence of their undocumented immigration status on the rationale that such evidence is relevant to demonstrating that the defendant has a motive to lie at trial. While the D.C. Court of Appeals' decision in *Portillo v. United States* held that prosecutorial references to the defendant's immigration status during closing arguments was prohibited, it also found that using such evidence to impeach the defendant was appropriate.[196] Portillo appealed his conviction, in part, on the grounds that the prosecutor's references to his citizenship and immigration status "improperly appealed to the prejudice and racial or ethnic bias of the jury" and deprived him of a fair trial.[197] The prosecutor in this case disparagingly addressed the defendant as "Señor Portillo" and questioned Portillo about his immigration status and the risk of deportation upon conviction during cross-examination.[198] The prosecutor also "remarked, without evidentiary foundation, that 'no one on the streets of D.C. carries their life savings around,'" and told the jury that Portillo had "'engaged in the grandest form of deception' by illegally entering the country."[199] The prosecutor later told the jury that Portillo was not being truthful about his fluency in English.[200]

The D.C. Court of Appeals rejected Portillo's concerns that the prosecutor's statements appealed to jury racial bias.[201] The court, somehow, found that the prosecutor's reference to the defendant as "Señor Portillo" "was an isolated incident, was not inherently derogatory, and . . . may have been inadvertent."[202] The court also found that Portillo opened the door to questions on cross-examination about his immigration status after he testified on direct examination that he had entered the United States "without papers" in order to rebut the negative inference stemming from his possession of a significant amount of cash.[203]

Old Chief v. United States, 519 U.S. 172, 180 (1997) ("[Rule 403's] term 'unfair prejudice' . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.")

196. Portillo v. United States, 609 A.2d 687, 690–92 (D.C. 1992).

197. *Id.* at 688.

198. *Id.* at 689.

199. *Id.*

200. *Id.*

201. *Id.* at 691–92.

202. *Portillo*, 609 A.2d at 690 ("[W]e cannot say that a single reference to the defendant by a common form of address in his native language amounted to prosecutorial misconduct.").

203. *Id.* at 690 n.7.

Relatedly, the Tenth Circuit in *United States v. Garcia* upheld the prosecutor's cross-examination of the defendant Sergio Garcia concerning his awareness of the deportation consequences of conviction[204]—thus presenting information to the jury that Garcia was not a United States citizen and was subject to removal.[205] The Tenth Circuit rejected Garcia's argument that information regarding his immigration and citizenship status was irrelevant to his credibility, finding that "a defendant who knows he will be deported if convicted has a reason to testify falsely."[206]

The Minnesota Court of Appeals reached a similar conclusion, finding that impeachment questioning concerning a defense witness's knowledge of the potential immigration consequences that might face the Latinx defendant upon conviction was relevant to credibility.[207] The court rejected the defendant's argument that evidence about his immigration status was irrelevant and unfairly prejudicial, holding that it was relevant to show that the defense witness had a potential motive to lie.[208]

The admission of impeachment evidence concerning a criminal defendant's citizenship and immigration status, however, runs afoul of both our evidentiary rules on witness impeachment and the Sixth Amendment's right to a fair trial. Evidence of a Latinx defendant's citizenship and immigration status simply does not make it "more or less probable" that the witness lacks credibility.[209] It is not objectively reasonable for the jury to conclude that a witness is not telling the truth based merely on the citizenship and immigration status of the witness. Even if such evidence were relevant to credibility, it should be excluded on the grounds that its low probative value is substantially outweighed by the risk that the Latinx defendant will be unfairly prejudiced—given the empirically demonstrated likelihood that juror racial bias will be activated.[210] Such prosecutorial

204. United States v. Garcia, 994 F.2d 1499, 1507 (10th Cir. 1993).

205. Persons possessing United States citizenship are not removable from the United States. Persons that are not United States citizens—including lawful permanent residents, asylees, temporary non-immigrants, and undocumented immigrants—are subject to deportation under the Immigration and Nationality Act for various offenses. *See generally* Immigrant and Nationality Act, 8 U.S.C. § 1227 ("Deportable aliens").

206. *Garcia*, 994 F.2d at 1507.

207. State v. Gallegos-Olivera, No. A19-0023, 2019 WL 7049557, at *1 (Minn. Ct. App. Dec. 23, 2019).

208. *Id.* at *3.

209. Fed. R. Evid. 401.

210. *See* Fed. R. Evid. 403; *supra* Part III.

appeals to juror racial and nationality biases are strictly forbidden by the Constitution.[211]

A handful of state and federal courts have begun to recognize as much, holding that impeachment evidence of a defendant's immigration status is irrelevant to demonstrating a motive to lie and is so unfairly prejudicial and inflammatory as to amount to a violation of the defendant's Sixth Amendment right to a fair trial.[212] The Fifth Circuit in *Sanchez v. Davis*, in particular, found that evidence of "a defendant's illegal [sic] status is considered so inflammatory that it is often the subject of motions in limine, the point of which is to ensure that testimony is not revealed to the jury that is so prejudicial that even a subsequent instruction to disregard cannot undo the damage."[213] The New Jersey Supreme Court in *State v. Sanchez-Medina* relatedly found that such evidence is inadmissible to assess the defendant's credibility given its irrelevance and substantial prejudice, and that "a defendant's immigration status is likewise not admissible under other rules of evidence," such as Rule 404 or Rule 608 of the New Jersey Rules of Evidence.[214] The American Civil Liberties

211. *See generally supra* Part III.

212. *See* State v. Sanchez-Medina, 176 A.3d 788, 794–95 (N.J. 2018) (finding reversible error for the trial court to allow evidence of the defendant's immigration status to impeach witness during cross-examination) ("As a general rule, . . . evidence [of immigration status] should not be presented to a jury" given its irrelevance and prejudicial effect.); Sanchez v. Davis, 888 F.3d 746, 752 (5th Cir. 2018) (finding that questioning a witness about the defendant's immigration status was irrelevant and unfairly prejudicial); *see also* Andrade v. Walgreens-OptionCare, Inc., 784 F. Supp. 2d 533, 535 (E.D. Pa. 2011) ("Many courts have opined that references to a party's immigration status expose that party to a substantial risk of unfair prejudice." (citing cases)); Escamilla v. Shiel Sexton Co., 73 N.E.3d 663, 675 (Ind. 2017) (finding that evidence of a party's immigration status "carr[ies] some risk of unfair prejudice"); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010) (finding that the "prejudicial potential" of evidence of a party's immigration status "substantially outweighed any probative value"); Salas v. Hi-Tech Erectors, 230 P.3d 583, 587 (Wash. 2010) (en banc) (finding that "the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice"); Gonzalez v. City of Franklin, 403 N.W.2d 747, 760 (Wis. 1987) (noting the "obvious prejudicial effect" of allowing evidence of a party's undocumented immigration status).

213. *Sanchez*, 888 F.3d at 751 (noting that "illegal immigration has . . . become a more 'highly charged' issue" in recent years (quoting Republic Waste Servs., Ltd. v. Martinez, 335 S.W.3d 401, 409 (Tex. Ct. App. 2011))). The *Sanchez* court also noted that extrinsic evidence of a criminal defendant's immigration status is not admissible under Texas law for credibility purposes, as Texas does not recognize the exception contained in FED. R. EVID. 608(b) for the discretionary admission of extrinsic evidence of a witness's character for truthfulness on cross-examination. *Id.* at 750.

214. *Sanchez-Medina*, 176 A.3d at 794–95. FED. R. EVID. 404 provides a general prohibition against the admission of character evidence with limited exceptions,

Union, granted leave to appear as amicus curiae in *Sanchez-Medina*, "stress[ed] that evidence of a defendant's federal immigration status is rarely probative . . . and can 'arous[e] public passion and prejudice against undocumented immigrants.'"[215]

C. As Substantive Evidence

State and federal courts have generally found evidence regarding the immigration status of parties to be irrelevant to establishing substantive, non-impeachment issues at trial. Courts have held that such evidence is inadmissible on relevancy and unfair prejudice grounds when introduced against a criminal defendant to prove a substantive legal issue in the case.[216] As the Georgia Supreme Court succinctly observed,

> [A]n appeal to national or other prejudice is improper . . . and evidence as to . . . race, color, or nationality . . . is not admissible, where such evidence is introduced for such purpose and is not relevant to any issue in the action . . . . [T]his rule is equally applicable to evidence as to an individual's immigration status.[217]

Courts have also generally found immigration status evidence offered against civil parties to be irrelevant when offered for substantive non-impeachment purposes.[218]

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while FED. R. EVID. 608 bars extrinsic evidence of a witness's character for truthfulness except for on cross-examination, within the discretion of the trial judge, if it is found to be probative of the witness's character for truthfulness.

215. *Sanchez-Medina*, 176 A.3d at 793–94.

216. *See, e.g.*, Sandoval v. State, 442 S.E.2d 746, 747–48 (Ga. 1994) (finding evidence of the defendant's immigration status to not be relevant to any issue in the case, but upholding the conviction on harmless error grounds); Commonwealth v. Sanchez, 595 A.2d 617, 620 (Pa. Super. Ct. 1991) (finding that reference to the defendant as an "illegal alien" was irrelevant and prejudicial); United States v. Delgado, No. CR-05-920, 2006 WL 1308303, at *1–2 (D.N.M. Feb. 9, 2006) (granting defense motion in limine to exclude evidence of the defendant's undocumented immigration status as irrelevant in heroin possession with intent to distribute case) ("Pursuant to [Federal Rule of Evidence] 402, the Court does not believe . . . that evidence of Cruz-Barajas' potential illegal immigration status, if any, is relevant to the charges . . . .").

217. *Sandoval*, 442 S.E.2d at 747 (citations omitted).

218. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1075 (9th Cir. 2004) (finding plaintiff's immigration status not relevant in disparate impact discrimination claim under Title VII); Walsh v. Fusion Japanese Steakhouse, Inc., 585 F. Supp. 3d 766, 790–91 (W.D. Pa. 2022) (holding that evidence of an employee's immigration status is irrelevant in Fair Labor Standards Act ("FLSA") action); Francois v. Mazer, No. 09 Civ. 3275, 2012 WL 1506054 (S.D.N.Y. Apr. 24, 2012) (granting motion in limine to exclude evidence of plaintiff's immigration status as irrelevant and prejudicial in

A number of states have only recently recognized the evidentiary and constitutional dangers of allowing evidence of the defendant's immigration status to be admitted at trial (whether for impeachment purposes *or* as substantive evidence). Pennsylvania,[219]

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an FLSA action); Romero v. Prindle Hill Constr., LLC, No. 3:14-CV-01835, 2017 WL 3390242, at *2 (D. Conn. Aug. 7, 2017) (granting plaintiff's motion in limine to exclude evidence of his immigration status in FLSA action as both irrelevant and unduly prejudicial); Hocza v. City of New York, No. 06 Civ. 3340, 2009 WL 124701 (S.D.N.Y. Jan. 20, 2009) (holding that evidence of plaintiff's immigration status, standing alone, was irrelevant in state labor law action); Mancilla v. Chesapeake Outdoor Servs., LLC, No. 1:22-CV-00032, 2024 WL 361328, at *2 (D. Md. Jan. 31, 2024) (holding that evidence of plaintiff's immigration status was irrelevant in FLSA actions); Perez v. El Tequila, LLC, No. 12-CV-588, 2015 WL 12999709 (N.D. Okla. July 10, 2015) (holding that evidence of employee immigration status in FLSA actions was irrelevant and thus inadmissible) (collecting cases); Velasquez v. Centrome, Inc., 183 Cal. Rptr. 3d 150, 153–54 (Ct. App. 2015) (finding worker's status as an undocumented immigrant was irrelevant to claim that he would need a future lung transplant in negligence action against food flavoring factory); Salas v. Hi-Tech Erectors, 230 P.3d 583, 586–87 (Wash. 2010) (en banc) (excluding evidence of immigration status in construction worker's lawsuit against employer as being unduly prejudicial (though minimally relevant to future earnings) as illegal immigration is a "politically sensitive issue" that "can inspire passionate responses" that interfere with a jury's deliberation).

Some courts have found immigration status to be relevant, but unduly prejudicial. *See* Republic Waste Servs., Ltd. v. Martinez, 335 S.W.3d 401, 406–11 (Tex. Ct. App. 2011) (finding employee's status as "illegal immigrant" was relevant to claim for lost future income in wrongful death action but prejudicial effect substantially outweighed probative value); Ayala v. Lee, 81 A.3d 584, 596–99 (Md. Ct. Spec. App. 2013) (finding plaintiff's status as an undocumented immigrant in personal injury action was not relevant or admissible for impeachment purposes, and prejudicial effect may substantially outweigh probative value as to future likelihood of earnings); *see also* Escamilla v. Shiel Sexton Co., 54 N.E.3d 1013, 1022 (Ind. Ct. App. 2016) (finding evidence of plaintiff employee's immigration status relevant to claim of lost earning capacity in workplace injury action), *vacated*, 73 N.E.3d 663, 669–70, 675 (Ind. 2017) (holding that evidence of immigration status was relevant to future earnings, yet only admissible if the employer could prove by a preponderance of the evidence that the employee would be deported, due to unfair prejudice concerns) ("Most courts . . . have concluded that immigration status is relevant to damages . . . in a decreased earning capacity claim."); Doe v. Bd. of Trs. of Neb. State Colls., No. 8:17-CV-00265, 2020 WL 2793558, at *2 (D. Neb. May 29, 2020) (noting that evidence of plaintiff's immigration status in gender discrimination action under Title IX was irrelevant to damages and other issues in the case); Maldonado v. Allstate Ins. Co., 789 So. 2d 464, 470 (Fla. Dist. Ct. App. 2001) (holding that any probative value of plaintiff's immigration status in car accident case was "thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading the jury"); Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 113 (Miss. Ct. App. 2016) (finding that evidence that the guest that assaulted plaintiff was an "illegal immigrant" was irrelevant to issues in premises liability action against hotel where sexual assault took place).

219. Pa. R. Evid. 413 (effective Oct. 1, 2021) (stating that evidence of a party's or witness's immigration status is generally inadmissible in both civil and

Illinois,[220] Washington,[221] California,[222] and Oregon[223] have all passed state legislation within the last few years that exclude evidence of a party's or witness's immigration status in civil and/or criminal trials.[224] These states made legislative findings that evidence concerning the immigration status of civil parties, criminal defendants, and witnesses is generally irrelevant to credibility and the substantive issues involved at trial and is unfairly prejudicial.[225] The legislative history of Washington state's law—which was the model for all other state efforts to regulate the admission of immigration status evidence—is particularly insightful. The Washington state legislature stated that preventing the admission of immigration status evidence in most civil and criminal cases was critical to "[p]roviding immigrants with access to the courts and a fair trial."[226] The legislature found that the introduction of immigration status evidence "poses serious obstacles to our courts' ability to deliver a fair trial" under the Sixth Amendment given that "[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."[227] The legislature ultimately concluded that a rule restricting the admission

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criminal cases and noting this rule was modeled after Washington State's Rule of Evidence 413).

220. 735 Ill. Comp. Stat. Ann. 5/8-2901 (West, Westlaw through P.A. 103-1065 of the 2024 Reg. Sess.) (stating that evidence of a person's immigration status is generally inadmissible in civil trials).

221. Wash. R. Evid. 413 (amended effective Nov. 2, 2021) (stating that evidence of a party's or witness's immigration status is generally inadmissible in both civil and criminal cases).

222. Cal. Evid. Code § 351.2 (West, Westlaw through Ch. 1017 of 2024 Reg. Sess.) (providing that evidence of a person's immigration status is inadmissible in civil proceedings for personal injury or wrongful death); *id.* § 351.3 (providing that in all other civil proceedings, evidence of a person's immigration status can only be disclosed after an in camera hearing); *id.* § 351.4 (same in criminal proceedings).

223. Or. Rev. Stat. § 135.983 (2023) (preventing courts from inquiring into defendants' immigration status in criminal proceedings).

224. Note that parties and witnesses remain free to voluntarily introduce evidence of their immigration status under these provisions.

225. *See* Cal. Lab. Code § 1171.5 (West 2018); 225 Pa. Code. R. 413 cmt. (noting that "the introduction of immigration status has received heightened consideration in terms of relevancy and prejudice" and that the Pennsylvania Rule 413 is "warranted to avoid potential intimidation of witnesses for fear of deportation" (citing Commonwealth v. Sanchez, 595 A.2d 617, 620 (Pa. Super. Ct. 1991))).

226. 5A Elizabeth A. Turner & Karl B. Tegland, Washington Practice: Evidence Law and Practice § 413.2, Westlaw (database updated Aug. 2024) (Drafter's Comments accompanying original Wash. R. Evid. 413).

227. *Id.* (quoting Salas v. Hi-Tech Erectors, 230 P.3d 583, 586 (Wash. 2010)) (noting that Rule 413 would accord with other evidentiary rules that restrict the introduction of prejudicial evidence, such as Fed. R. Evid. 411 (restricting evidence of

of immigration status evidence "would promote equitable access to justice by removing the potential for racial and ethnic stereotyping that inevitably results from the unnecessary injection of immigration status evidence into the fact-finding process."[228] Washington's new evidentiary Rule 413, then, was "designed to protect Washington's immigrants and ensure they can obtain access to the justice system without fear of the legal process being overtaken by racial, ethnic, or anti-immigrant prejudice."[229]

The state legislatures of the remaining forty-five states, as well as the federal legislative branch, should strongly consider implementing similar evidentiary rules in order to protect the constitutional right of non-citizen criminal defendants to a fair and equitable trial free from racial bias and unfair prejudice.

D. As an Aggravating Factor in Criminal Sentencing

Allowing the jury to consider evidence of a Latinx criminal defendant's immigration and citizenship status in non-immigration related trials greatly enhances the likelihood that the jury will engage in racially biased decision-making prohibited by the Constitution.[230] The law is similarly clear that a court may not base any sentencing determination on a defendant's race or national origin, or on the fact that he or she is a citizen of a foreign state.[231] The prohibition in sentencing from considering the defendant's race, nationality, and citizenship applies with equal force to the sentencing of undocumented criminal defendants.[232]

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a party's insurance coverage) and FED. R. EVID. 412 (limiting evidence of a sexual assault victim's past sexual behavior)).

228. *Id.*

229. *Id.*

230. *See supra* Part III.

231. United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994); *see also* Pepper v. United States, 562 U.S. 476, 489 n.8 (2011) ("A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." (quoting *Leung*, 40 F.3d at 586)); United States v. Onwuemene, 933 F.2d 650, 651–52 (8th Cir. 1991) (finding that the defendant's due process rights were violated when the trial court imposed a harsher sentence based on defendant's national origin and alienage); United States v. Borrero-Isaza, 887 F.2d 1349, 1352–55 (9th Cir. 1989) (holding that criminal sentencing that relies on the defendant's national origin or alienage as a factor violates due process).

232. *See, e.g.*, Trujillo v. State, 698 S.E.2d 350, 354 (Ga. Ct. App. 2010) (The trial court's "broad discretion when determining the appropriate sentence to impose upon a criminal defendant . . . must . . . be exercised within the perimeters of the Fourteenth Amendment, which protects all 'persons'—including those residing in this country illegally—from invidious governmental discrimination based solely upon their immigration status." (citing Plyler v. Doe, 457 U.S. 202, 210 (1982)

State and federal courts, nonetheless, have allowed evidence demonstrating that a defendant lacks United States citizenship and an authorized immigration status to be considered as a non-listed aggravating factor in criminal sentencing decisions.[233] Given the popular social conflation of Latinx racial identity with "illegal immigration," the admission of such evidence creates an undue risk that the factfinder will engage in racialized decision-making. These decisions attempt to justify consideration of the defendant's undocumented immigration status by making a tenuous distinction between discrimination based on race, citizenship, and nationality with discrimination based on immigration status—despite the myriad ways in which those factors are intertwined and often conflated.[234] Courts that rely on this thin distinction generally devote minimal, if any, analysis in support of their conclusion and rather mechanically cite to older case precedent holding that a defendant's civil immigration status is relevant to a "disregard for the law."[235] Rote reliance on constitutionally invalid precedent, however, is clearly insufficient to

("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.")))).

233. *See, e.g.*, United States v. Flores-Olague, 717 F.3d 526, 534 (7th Cir. 2013); Chavez v. United States, 499 A.2d 813, 815 (D.C. 1985); United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986); United States v. Cervantes-Rubio, 275 F. App'x 601, 604 (9th Cir. 2008); United States v. Garcia-Cardenas, 242 F. App'x 579, 583 (10th Cir. 2007); Yemson v. United States, 764 A.2d 816, 819 (D.C. 2001); United States v. Loaiza-Sanchez, 622 F.3d 939, 942 (8th Cir. 2010); United States v. Lopez-Salas, 266 F.3d 842, 846 n.1 (8th Cir. 2001); State v. Beltran, 706 P.2d 85, 86–87 (Idaho Ct. App. 1985); Viera v. State, 532 So. 2d 743, 745 (Fla. Dist. Ct. App. 1988); State v. Salas Gayton, 882 N.W.2d 459, 471–72 (Wis. 2016); Escobedo v. State, 987 N.E.2d 103 (Ind. Ct. App.), *aff'd in relevant part*, 989 N.E.2d 1248 (Ind. 2013); *Trujillo*, 698 S.E.2d at 354–55; People v. Sanchez, 235 Cal. Rptr. 264, 267 (Ct. App. 1987); People v. Hernandez-Clavel, 186 P.3d 96, 99 (Colo. App. 2008); State v. Svay, 828 A.2d 790, 794–95 (Me. 2003); State v. Zavala-Ramos, 840 P.2d 1314, 1316 (Or. Ct. App. 1992); State v. Alcala, No. 2 CA-CR 2007-0161, 2008 WL 2756496, at *5 (Ariz. Ct. App. May 8, 2008); People v. Cesar, 14 N.Y.S.3d 100, 106 (App. Div. 2015). *But see* Martinez v. State, 961 P.2d 143, 145 (Nev. 1998) (finding that trial court "violated appellants' due process rights, if it based its sentencing decision, in part, upon appellants' status as illegal aliens").

234. *See, e.g.*, *Hernandez-Clavel*, 186 P.3d at 99 (rejecting the defendant's concerns of racial, alienage, and citizenship prejudice by stating that "nothing in the record indicates that . . . the sentencing court was punishing defendant for his race, national origin, or Mexican citizenship"); *supra* Part III. Latinx defendants in many of these cases appealed their sentencing on the ground that the reliance on immigration status as an aggravating factor "invoked prejudicial stereotypes and was an intrinsically improper factor," but to no avail. *See, e.g.*, *Salas Gayton*, 882 N.W.2d at 471.

235. *See supra* note 233.

override the due process, equal protection, and fair trial demands of the Fifth, Sixth, and Fourteenth Amendments.[236]

A defendant's past "disregard for the law" is typically not included as a listed aggravating factor in state and federal law.[237] Nonetheless, both state and federal law provide discretion to the trial court in considering any other aggravating factors that are relevant to the facts of the case.[238] Courts have tended to refer to a defendant's past "disregard for the law" as part of a broader examination of the defendant's character.[239] For example, the Indiana Court of Appeals in *Alexander v. State* found that the trial court was allowed to consider the defendant's status as an "illegal alien" as bearing on his disregard for the laws "of this country," even though "he had no choice" when he was brought to the United States without documents as a young child.[240] The court incredulously believed that Alexander "could have rectified his illegal alien [sic] status by returning to his native country or by applying for a visa in this country"—even though neither option provided a realistic opportunity for Alexander to obtain authorized status in the United States.[241]

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236. *See* U.S. Const. art. VI, cl. 2 (the "Supremacy Clause").

237. For example, Indiana statutory law lists aggravating factors such as whether the defendant committed a crime of violence, had recently violated the conditions of probation or parole, or had a history of criminal behavior. Ind. Code § 35-38-1-7.1 (2024). The Violent Crime Control and Law Enforcement Act of 1994 allows courts to consider aggravating factors for homicide such as whether the defendant has been convicted of certain serious felonies (including violent felonies involving firearms, child molestation, sexual assault, and repeated felony drug distribution). 18 U.S.C. § 3592(c).

238. *See, e.g.*, 18 U.S.C. § 3592 (stating that the trier of fact "may consider whether any other aggravating factor . . . exists"); 18 U.S.C. § 3553(b)(1) (permitting a court to find "that there exists an aggravating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating [these sentencing] guidelines"); Ind. Code § 35-38-1-7.1(c) (2024) (noting that the listed statutory aggravators "do not limit the matters that the court may consider in determining the sentence").

239. *See Salas Gayton*, 882 N.W.2d at 472–73 (finding that the defendant's status as an "illegal alien" and "an illegal" was relevant to his character and demonstrated his disregard for law as an aggravating factor); Escobedo v. State, 987 N.E.2d 103, 119–20 (Ind. Ct. App.), *aff'd in relevant part*, 989 N.E.2d 1248 (Ind. 2013) (same).

240. Alexander v. State, 837 N.E.2d 552, 556 (Ind. Ct. App. 2005).

241. *Id.* Departing the United States would have almost certainly rendered Alexander inadmissible to the United States for the remainder of his lifetime. *See* Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (providing that an "alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designation by the Attorney General, is inadmissible") Applying for a temporary or permanent visa while residing in the United States in an undocumented status is generally prohibited by federal immigration law (Immigration and Nationality Act §§ 237, 245,

Courts have thus erroneously equated the offense of possessing an undocumented immigration status with the commission of past serious criminal offenses.[242] Indeed, a defendant's violation of immigration laws is the predominant, if only, context in which courts have enhanced criminal sentencing based on the commission of past civil offenses. Rather, trial courts focus on a criminal defendant's history of criminal felony disregard for the law in the vast majority of reported decisions. Evidence of a criminal defendant's "disregard for the law" is typically found to exist when the defendant has been convicted of very serious (and often violent) past felonies—such as child molestation, aggravated assault, and gun crimes.[243] The false equivalence of immigration offenses—either unintentionally for defendants that arrived in the United States as a child, or intentionally so as to escape violence, persecution, and/or poverty in their

8 U.S.C. §§ 1227, 1255), save for limited situations such as the much-contested Deferred Action for Childhood Arrivals executive policy.

242. Unauthorized presence in the United States historically was treated as a civil offense that was not subject to criminal punishment. *See* Immigration and Nationality Act §§ 208, 237, 8 U.S.C. §§ 1158, 1227. Nonetheless, anti-immigrant political rhetoric has led to an increasing criminalization of immigration law, such that certain immigration violations (such as entering the United States without authorization and smuggling) are now subject to criminal punishment. *See generally* HERNÁNDEZ, *supra* note 8, at 145–84.

243. *See* State v. Hughes, 110 P.3d 192, 204 (Wash. 2005) (repeated felony offense of child molestation just three months after release for child molestation); Flores v. Kernan, No. 1:05-CV-00379, 2008 WL 683462, at *14 (E.D. Cal. Mar. 10, 2008) (two convictions for assault with semiautomatic weapon, convictions for narcotics transportation, aggravated gassing and battery); Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006) (extensive criminal history including three felony convictions: theft, violating probation, felony battery with a deadly weapon, and felony drug possession); State v. Goodman, 30 P.3d 516, 520 (Wash. Ct. App. 2001) (burning down wife's house in domestic violence conviction established "extraordinary disregard for the law"); State v. Cham, 267 P.3d 528, 535 (Wash. Ct. App. 2011) (commission of felony domestic assault, unlawful imprisonment, and other crimes within one hour of release from incarceration for felony domestic assault); State v. Sanders, No. A-3377-07T4, 2009 WL 2168776, at *7 (N.J. Super. Ct. App. Div. July 22, 2009) (finding the twenty-three year old defendant already had a "longstanding pattern of disregard for the law" based on a conviction for aggravated assault as well as four drug convictions); Shepherd v. State, No. 70A01-0911-CR-529, 2010 WL 2834961, at *3 (Ind. Ct. App. July 20, 2010) (convictions for attempted robbery, aggravated battery, possession of cocaine, delivery of a controlled substance, and domestic battery); People v. Bolagh, No. E028258, 2002 WL 32655, at *7 (Cal. Ct. App. Jan. 11, 2002) (convictions for attempted voluntary manslaughter and attempted terroristic threat); United States v. Scott, No. 23-1324, 2023 WL 8433687, at *2 (8th Cir. Dec. 5, 2023) (two violent felon in possession convictions prior to current conviction for same offense).

birth countries—with violent criminal felonies is as illogical as it is discriminatory.[244]

V.
CONCLUSION

The constitutional and evidentiary rights of Latinx non-citizen defendants have long been infringed by the introduction of evidence concerning their citizenship and immigration status during non-immigration related criminal trials. A wealth of empirical psychological research has demonstrated that informing the jury that a Latinx criminal defendant is not a United States citizen and/or is an "illegal alien" greatly increases the likelihood that racial bias will infect the decision-making process. The possibility that juror racial bias will be activated by such proof is significant, especially given the recent increase in conservative political rhetoric falsely equating Latinx racial identity and immigration with criminality. The presentation of immigration status evidence—whether during opening and closing statements, as proof of substantive legal issues, for witness impeachment, or as an aggravating sentencing factor—violates the defendant's right to an impartial jury and equal application of the law.

244. Johnson, *supra* note 45, at 426–27 (referencing the findings of numerous empirical studies).