



VCJC – Vermont Criminal Justice Council

Vermont Criminal Justice Council (VCJC) Model Fair and Impartial Policing Policy (FIPP)

*(FIPP Model VCJC Context, Civil Law v. Criminal Law, Interaction with Federal Authorities)
February 2025*



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This presentation is drafted and presented for educational purposes only and may be subject to change and revision. This presentation is set forth under the authority and liability of the Vermont Criminal Justice Council in an effort to provide training pursuant to Vermont's Model, adopted, Fair and Impartial Policing Policy. Vermont's Model Fair and Impartial Policing Policy was approved by the Vermont Criminal Justice Council in 2024.



Vermont FIPP Context: Vermont Statutes

- **20 V.S.A. § 2366:** According to Vermont's controlling statute on Fair and Impartial Policing (FIPP), 20 V.S.A. § 2366(f), "Nothing in [20 V.S.A. § 2366] [meaning both the statute and the VCJC Model FIPP] . . . is intended to prohibit or impede any public agency from complying with the lawful requirements of 8 U.S.C. §§ 1373 and 1644. To the extent any State or local law enforcement policy or practice conflicts with the lawful requirements of 8 U.S.C. §§ 1373 and 1644, that policy or practice is, to the extent of the conflict, abolished."

- **20 V.S.A. § 2366:** States that the VCJC, "in consultation with the Office of the Attorney General, shall review the policies of law enforcement agencies and constables required to adopt a policy ... to ensure compliance. If the [VCJC], in consultation with the Office of the Attorney General, finds a policy does not comply, it shall work with the agency to bring the policy into compliance. If, after consultation, the agency fails to adopt a compliant policy, it shall follow and enforce the model policy issued by the [VCJC]."

- **20 V.S.A. § 2358(e):** Requires all law enforcement officers to receive Fair and Impartial Policing training, approved by the VCJC during odd-numbered years. Minimum training standards under this section shall include anti-bias training approved by the Vermont Criminal Justice Council and training on the State, county, or municipal law enforcement agency's fair and impartial policing policy, adopted pursuant to subsection 2366(a) of this title. And, in order to remain certified, law enforcement officers shall receive a refresher course on the training required by this subsection during every odd-numbered year in a program approved by the Vermont Criminal Justice Council designed to demonstrate achieved law enforcement officer competency in fair and impartial policing.



VCJC Model FIPP Context: 8 U.S.C § 1373 and 8 U.S.C. § 1644

Vermont Statute, 20 V.S.A. § 2366(f), makes reference to the following federal statutes:

- 8 U.S.C. § 1373(a)
 - “Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” (effective: September, 1996)

- 8 U.S.C § 1644
 - “Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.” (effective: August 22, 1996) (emphasis added).



Vermont Caselaw: *State v. Walker-Brazie*

In *State v. Walker-Brazie*, 215 Vt. 492, 280 A.3d 24, 25–26 (2021), that involved a warrantless stop and search of a vehicle near the Canadian border by federal Border Patrol agents using their “roving patrol” authority, controlled substances were found, and the case was turned over to Vermont authorities for prosecution. *Walker-Brazie*, 280 A.3d at 26.

- The Vermont Supreme Court noted, “A warrantless search of an automobile is per se unreasonable under Article 11 [of the Vermont Constitution] unless there exists probable cause and a showing of exigent circumstances, meaning a threat to officer safety or to the preservation of evidence.” *Id.* at 29.
- The Court also noted, “The language of Article 11 is broadly worded—it protects individuals from unreasonable searches or seizures ‘by any officer or messenger.’ ” *Id.* at 36.
- The Court emphasized the “privacy rationale” behind Vermont's exclusionary rule. *Id.* at 35–37.
- The Court held that “evidence gathered in violation of article 11 by Border Patrol agents on roving patrol is not admissible in a state criminal proceeding.” *Id.* at 37.
- **Takeaway?** This case underscores the distinct separation between federal and state law enforcement powers in immigration-adjacent matters, in Vermont.



VCJC Model FIPP: Introduction and Purpose

➤ **The purpose of the Model VCJC FIPP** is to require that all members of Vermont Law Enforcement Agencies (LEAs) “conduct policing in a fair and impartial manner, to clarify the circumstances in which officers can consider personal characteristics or citizenship or immigration status when making law enforcement decisions and to reinforce processes and procedures that enable Vermont LEAs to provide services and enforce laws in an equitable and impartial way.”

(Language summarized from the VCJC Model FIPP and Vermont Statute)
(link to the VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>)



Vermont's FIPP: Introduction and Purpose

➤ The VCJC Model FIPP :

(1) Requires that Vermont LEAs are prohibited from engaging in biased policing. Meaning, no member of a Vermont LEA shall take actions based on personal characteristics or citizenship or immigration status, except as allowed by the VCJC Model FIPP or as otherwise allowed by law. Note that 20 V.S.A. § 2366(f) provides that: “[n]othing in [20 V.S.A. § 2366] [meaning Vermont’s FIPP / VCJC Model FIPP] is intended to prohibit or impede any public agency from complying with the lawful requirements of 8 U.S.C. §§ 1373 and 1644. To the extent any State or local law enforcement policy or practice conflicts with the lawful requirements of 8 U.S.C. §§ 1373 and 1644, that policy or practice is, to the extent of the conflict, abolished.”

(2) Requires that Vermont LEAs adopt each component of the VCJC’s Model FIPP. Vermont LEAs may adopt additional components, as approved by the VCJC and Vermont Office of the Attorney General.

(3) Highlights that enforcement of civil immigration law is a federal responsibility, and Vermont LEAs should not engage in such enforcement except as otherwise outlined in this policy. Note that 20 V.S.A. § 2366(f) provides that: “[n]othing in [20 V.S.A. § 2366] [meaning Vermont’s FIPP / VCJC Model FIPP] is intended to prohibit or impede any public agency from complying with the lawful requirements of 8 U.S.C. §§ 1373 and 1644. To the extent any State or local law enforcement policy or practice conflicts with the lawful requirements of 8 U.S.C. §§ 1373 and 1644, that policy or practice is, to the extent of the conflict, abolished.”



VCJC Model FIPP: Definitions

- **“Biased policing”** - conduct by law enforcement officers motivated by an individual’s actual or perceived or self-identified personal characteristics.
- **“Personal characteristics”** - may include but is not limited to actual or perceived identity, race, ethnicity, national origin, color, gender, sexual orientation, gender identity, marital status, mental or physical disability, age, religion and socio-economic status.
- **“Citizenship or Immigration status”** - generally refers to the legal rights, if any, of a non-citizen to enter or remain in this country, or to exercise certain rights (e.g., vote in federal elections). Examples of status include, without limitation, “lawful permanent resident,” “temporary worker,” “refugee,” and “undocumented.”
- **“Reasonable suspicion”** - suspicion, for which an officer can articulate factual reasons, does not need to rise to the level of probable cause.
- **“Probable cause”** - facts or circumstances that would lead a reasonable person to believe that a crime has been committed, or is being committed, or is about to occur.
- **“Member” or “employee”** - any employee employed by [agency/department], regardless of their assigned tasks or duties.
- **“Federal immigration authorities”** - federal agencies, departments, or employees or contractors thereof, tasked with enforcement of immigration law and border entry, including without limitation the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).



VCJC Model FIPP: Policing Impartially & Rule 3 Reminders

Pursuant to the VCJC Model FIPP:

- As required by law, all law enforcement actions by law enforcement officers, such as investigations, detentions, traffic stops, arrests, searches and seizures, etc., must be based on the relevant and appropriate legal standard (e.g., reasonable suspicion, probable cause or relevant exigent circumstances, supported by articulable facts, circumstances, and conclusions that support the given action).
- Pursuant to the VCJC Model FIPP, Vermont LEAs may take into account reported race, ethnicity or other personal characteristics of persons based on credible, reliable, locally relevant, temporally specific information that links a person of specific description to particular criminal incidents or other matters under investigation and is combined with other identifying information.

**VERMONT LEAS MUST ALWAYS COMPLY WITH
THE REQUIREMENTS OF RULE 3 OF THE
VERMONT RULES OF CRIMINAL PROCEDURE:**

[HYPERLINK HERE.](#)

SEE NEXT SLIDE FOR DETAIL.



VCJC Model FIPP: Policing Impartially & Rule 3 Reminders

- **VERMONT LEAs MUST ALWAYS COMPLY WITH THE REQUIREMENTS OF RULE 3 OF THE VERMONT RULES of CRIMINAL PROCEDURE: [Hyperlink here](#).**

- **Rule 3(c)** of the Vermont Rules of Criminal Procedure provides for the foundation upon which Vermont LEAs may arrest persons for **nonwitnessed misdemeanor offenses**. Note, in particular, Rule 3(c) (4): provides that for nonwitnessed misdemeanor offenses, if an officer has probable cause to believe a person has committed or is committing a misdemeanor outside the presence of the officer, the officer may issue a citation to appear before a judicial officer in lieu of arrest. The officer may arrest the person without a warrant if the officer has probable cause to believe: (4) [t]he person has no ties to the community reasonably sufficient to assure his or her appearance, or there is a likelihood that he or she will refuse to respond to a citation.”

- **Rule 3(b)** of the Vermont Rules of Criminal Procedure, provides that Vermont LEAs may arrest without a warrant for a **misdemeanor offense committed in the presence of an officer** a person whom the officer has probable cause to believe has committed or is committing a misdemeanor in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay.

- **Rule 3(a)** of the Vermont Rules of Criminal Procedure, provides that Vermont LEAs may arrest without a warrant for a **felony offense** a person whom the officer has probable cause to believe has committed or is committing a felony.



VCJC Model FIPP: Policing Impartially and Rule 3 Reminders

Pursuant to the VCJC Model FIPP:

- Citizenship or immigration status shall not be used as the sole reason to arrest someone instead of issuing a citation, pursuant to Vermont Rule of Criminal Procedure 3, except as otherwise provided by law or for matters where there is criminal liability for offenses where one's citizenship, or immigration status, is an essential element is a factor that may be considered in a Rule 3 determination.
- *(Example: An individual convicted of a violent felony is removed by immigration authorities after serving their sentence. Unlawful re-entry into the United States by that individual may result in substantial prison time – 10 years or more. These factors may be considered because the prospect of long incarceration can be relevant to case-by-case evaluation concerning risk of nonappearance.)*
- Note that per Section V of the VCJC Model FIPP, Vermont LEAs do not have standalone authority to investigate civil immigration laws, and Vermont LEAs shall not ask about or investigate a person's citizenship or immigration status unless information regarding citizenship or immigration status is an essential element of a crime or otherwise allowed by law.



VCJC Model FIPP: Policing Impartially Reminders

Pursuant to the VCJC Model FIPP:

- Personal characteristics and/or citizenship or immigration status, including the existence of a civil immigration detainer, shall not affect the detainee's ability to participate in pre-charge or police-initiated pre-court processes such as referral to diversion or a Community Justice Center.
- Under federal and state law, law enforcement agencies are required to provide qualified interpretation services, either in person or telephonically, to any person in need of it.



VCJC Model FIPP: State / Local Enforcement Authority / Priorities and Federal Immigration Law

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

- Vermont LEAs do not have authority to enforce federal civil immigration law. Mere presence in the United States without authorization – for example, residing in the country with an expired visa – is a civil violation and may not be subject to criminal investigation.
- Vermont LEAs have authority to investigate federal criminal law, enforcement of federal criminal immigration law is generally not a priority for Vermont LEAs. Accordingly, Vermont LEAs members should not make warrantless arrests, detain individuals, facilitate the detention of individuals, or otherwise expend resources investigating or enforcing unlawful entry or unlawful reentry cases unless such actions are (1) necessary to ensure public safety or officer safety (imminent risk of physical injury to subject, officer, or third party) or (2) integral to the investigation of criminal offenses unrelated to immigration law.

(Language summarized from the VCJC Model FIPP, Vermont Statute, and the Vermont Rules of Criminal Procedure)
(link to the VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>)



VCJC Model FIPP: State / Local Enforcement Authority / Priorities and Federal Immigration Law

(Language summarized from the VCJC Model FIPP)

- VCJC Model FIPP: “Some individuals crossing the border outside of an authorized checkpoint may be seeking asylum and receive federal permission to remain in the United States. Because it is often difficult to determine whether someone is crossing the border to obtain safety and lawful status, Vermont LEA members should not presume that unauthorized border crossing implicates Vermont, as opposed to federal interests. Vermont LEA enforcement of alleged ‘unlawful entry’ may create the misconception that the Vermont LEA is involved in immigration enforcement and undermine partnerships with local communities.”

(Language summarized from the VCJC Model FIPP, Vermont Statute, and the Vermont Rules of Criminal Procedure)
(link to the VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>)



VCJC Model FIPP: State / Local Enforcement Authority / Priorities and Federal Immigration Law

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

➤ The following do not, on their own, establish reasonable suspicion of a criminal offense and are not sufficient to warrant an investigation:

1. Personal characteristics, including Limited English Proficiency
2. Citizenship or Immigration status,
3. Presence in the United States without authorization or formal documentation, and
4. Proximity to the border.

➤ Note, the elements, above, in combination with others may contribute to reasonable suspicion. As noted in Section II(b) of the VCJC Model FIPP, personal characteristics may be taken into account only where there is credible, reliable, locally relevant, temporally specific information that links a person of specific description to particular criminal incidents and is combined with other identifying information (or as otherwise allowed for by law).



VCJC Model FIPP: State / Local Enforcement Authority / Priorities and Federal Immigration Law

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

- In interacting with all people, including suspects, crime victims, and witnesses, Vermont LEA members shall **not**:
 - Ask about or investigate a person's citizenship or immigration status unless information regarding citizenship or immigration status is an essential element of the crime (such as human trafficking).
 - Initiate or prolong stops for the purpose of enforcing civil immigration matters.
- As explained in Section VI of the VCJC Model FIPP, federal immigration law permits a categories of voluntary communications with federal immigration authorities — *i.e.*, those regarding citizenship or immigration status.

(Language summarized from the VCJC Model FIPP, Vermont Statute, and the Vermont Rules of Criminal Procedure)
(link to the VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>)



VCJC Model FIPP: Interactions with Federal Immigration Officers

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

- Two federal statutes, 8 U.S.C. §§ 1373 and 1644, provide that local and state agencies and officials may not prevent or restrict their employees from communicating with federal immigration authorities regarding an individual's citizenship or immigration status. The VCJC Model FIPP notes that: Vermont LEAs "...should note that accurately determining an individual's citizenship or immigration status can be difficult in the absence of clear documentation and immigration law expertise. Moreover, making a mistake in this arena may undermine community confidence that Vermont LEA is focused on public safety and state/local enforcement, rather than civil immigration enforcement."
- As noted in Section I of the VCJC Model FIPP, information regarding "citizenship or immigration status" refers **only** to an individual's legal rights, if any, to enter or remain in this country, or to exercise certain rights (e.g., vote in federal elections).



VCJC Model FIPP: Interactions with Federal Immigration Officers

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

- **“Sections 1373 and 1644 permit state and local authorities to decide whether or when to limit communications with federal immigration authorities...”** regarding certain types of information about individuals, such as:

•Physical appearance;	•Vehicle / license plate information;
•Current whereabouts;	•SSN or lack thereof;
•Places of residence, work, or education;	•Family relationships; or
•Telephone number;	•Custody status, release date/time; or court dates



VCJC Model FIPP: Interactions with Federal Immigration Officers

(Language summarized from the VCJC Model FIPP)

- 20 V.S.A. § 2366(f) states that “[n]othing in **[20 V.S.A. § 2366]** [meaning both the statute and the VCJC Model FIPP] . . . is intended to prohibit or impede any public agency from complying with the lawful requirements of 8 U.S.C. §§ 1373 and 1644...,” the VCJC Model FIPP does place lawful restrictions on Vermont LEAs, as noted below (again as long as such restrictions do not run afoul of 8 U.S.C. §§ 1373 and 1644).

Pursuant to the VCJC Model FIPP:

- **Restricted Access to [Vermont LEA] facility.** Unless federal immigration agents have a judicially-issued criminal warrant or a legitimate law enforcement purpose exclusive of the enforcement of civil immigration laws, Vermont LEAs shall not: grant immigration authorities access to individuals located in otherwise-restricted portions of a Vermont LEA facility absent a court-approved search or arrest warrant relating to alleged crimes; or permit immigration authorities to use Vermont LEA facilities for investigative interviews.
- **Restricted Access to individuals outside of [Vermont LEA] facility.** Unless federal immigration agents have a judicially-issued criminal warrant or a legitimate law enforcement purpose exclusive of the enforcement of civil immigration laws, Vermont LEA members who have an individual in their custody shall not grant or otherwise facilitate immigration authorities’ access to the individual.
- **However,** the VCJC’s Model FIPP “shall not be construed to require members to affirmatively interfere with a federal official’s lawful authority to interview, detain, or arrest (with or without a warrant) an individual — e.g., by using force or physically blocking the official.” Instead, Vermont LEA members asked to grant access to an individual in their custody (e.g., requests made during a traffic stop) shall respond to the official that they intend to complete their stop first, without interruption – unless it would be unlawful for them to provide that response (e.g., making such statements in an effort to intentionally facilitate an escape of a person subject to lawful arrest).



VCJC Model FIPP: Interactions with Federal Immigration Officers

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

- Vermont LEA “members who are unsure how to proceed in a given situation should immediately contact a supervisor (if available) for guidance....”
- The takeaway? Vermont LEAs are not authorized to participate in civil immigration enforcement and, thus, Vermont LEA members should “swiftly and safely complete their law enforcement duties (e.g., issue a traffic citation) and move on, leaving immigration enforcement to the appropriate authorities. Maintaining focus on state or local enforcement serves to build and maintain community confidence...” in the Vermont LEA.

(Language summarized from the VCJC Model FIPP, Vermont Statute, and the Vermont Rules of Criminal Procedure)
(link to the VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>)



VCJC Model FIPP: Key Points

(Language summarized from the VCJC Model FIPP)

Pursuant to the VCJC Model FIPP:

- If a person's citizenship or immigration status is an essential element of a crime then there are certain exceptions that apply, that are outlined in the policy, in the criminal context. For example, if status is/was an element of the alleged crime in question.
- Link to the VCJC Model FIPP: [Model Fair and Impartial Policing policy | Criminal Justice Council](#). In relevant part:

“....Citizenship or immigration status shall not be used as reason to arrest someone instead of citing them and shall not impact the decision on whether to seek continued custody pursuant to Vermont Rule of Criminal Procedure 3, except that criminal liability for offenses where one's citizenship, or immigration status, is an essential element is a factor that may be considered in a Rule 3 determination.”

➤ *“(Example: An individual convicted of a violent felony is removed by immigration authorities after serving their sentence. Unlawful re-entry by that individual may result in substantial prison time – 10 years or more. Those factors may be considered because the prospect of long incarceration can be relevant to case-by-case evaluation of flight risk.)”*



VCJC Model FIPP: Key Points

(Language summarized from VCJC Model FIPP)

- Note that per Section V of the VCJC Model FIPP, Vermont LEAs do not have authority to investigate civil immigration laws, and that Vermont LEAs shall not ask about or investigate a person's citizenship or immigration status unless information regarding citizenship or immigration status is an essential element of a crime or otherwise permitted under law.

Pursuant to the VCJC Model FIPP:

- In interacting with all people, including suspects, crime victims, and witnesses, Vermont LEAs shall not: ask about or investigate a person's citizenship or immigration status unless information regarding citizenship or immigration status is an essential element of the crime (such as human trafficking) or otherwise permitted under law.
- "...[T]wo federal statutes, 8 U.S.C. §§ 1373 and 1644, provide that local and state agencies and officials may not prevent or restrict their employees from communicating with federal immigration authorities regarding an individual's citizenship or immigration status...."



A related aside, Vermont Statute: 20 V.S.A. Sec. 2222

- 20 V.S.A. § 2222 outlines the conditions under which federal law enforcement officers can operate within Vermont.
- 20 V.S.A. § 2222 emphasizes, by effect, that federal law enforcement officers' primary authority is derived from federal law – likewise that Vermont law enforcement officers' authority and focus is under Vermont law. (20 V.S.A. § 2222).



Understanding the differences between Civil Law Enforcement and State and Federal Criminal

The distinctions below, amongst others, highlight that greater protections are afforded to the accused in criminal proceedings versus those accused of civil infractions.

- **Right to Counsel:** In criminal prosecutions, the accused has the right to be heard by oneself and by counsel, to demand the cause and nature of the accusation, to be confronted with the witnesses, to call for evidence in their favor, and to a speedy public trial by an impartial jury (VT Const. CH I, Art. 10).
- **Jury Trials:** In criminal cases, the accused has the right to a trial by an impartial jury, and a unanimous verdict is required to find the accused guilty.
- **Self-Incrimination:** In criminal cases, the accused cannot be compelled to give evidence against themselves. (VT Const. CH I, Art. 10).
- **Distinct from Vermont State Criminal Law, Federal Immigration Law primarily deals with the regulation of noncitizens' entry, stay, and removal from the United States.** It includes both civil and criminal provisions—both of which are to be enforced by the Federal Government. For example, unauthorized work by noncitizens can lead to civil penalties and removal from the country, but it is not generally criminalized unless fraudulent means are used to obtain employment (Arizona v. U.S., 567 U.S. 387 (2012)). Federal law also criminalizes actions such as transporting, harboring, or shielding unauthorized persons, with penalties including fines and imprisonment (8 U.S.C.A. § 1324). Additionally, reentry after deportation is criminalized under federal law, with varying penalties depending on the circumstances of the reentry (8 U.S.C.A. § 1326).



Understanding the differences between Civil Law Enforcement and State and Federal Criminal

- Federal civil immigration law governs the entry, stay, and removal of noncitizens and includes both civil and criminal penalties, while Vermont criminal law addresses offenses within the state and the authority of state law enforcement officers to make arrests for state law violations.
- Federal law preempts state attempts to regulate immigration, limiting the scope of state involvement in immigration enforcement.

*(Language summarized from the VCJC Model FIPP, Vermont Statute)
(link to VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>)*



Understanding the differences between Civil Law Enforcement and State and Federal Criminal

- **The United States Supreme Court has maintained that immigration enforcement engaged in the deportation and removal is not a criminal punishment but rather a civil mechanism to return persons to their native countries.** Fong Yue Ting v. United States, 149 U.S. 698 (1893).
- **If civil immigration enforcement were criminal then ALL person detained under the federal government's immigration authority would have the full host of constitutional rights, including, the right to an attorney, the right to a jury trial, etc.**
- That said, there are certain Federal crimes that are relate to immigration enforcement. Those federal crimes are, by their very nature, non-civil and non-State. As such, Federal criminal conduct that includes and immigration element exist outside the scope of presumptive State law enforcement powers.
- **Regardless of Civil v. Criminal law, immigration enforcement law in the United States is under the authority of the federal government—** and the federal government has exclusive authority over matters related to immigration and naturalization.
- Federal criminal conduct involving immigration typically includes offenses like illegal reentry after deportation, visa fraud, human trafficking, and the smuggling of undocumented individuals. These are criminal violations of federal immigration statutes, and they are separate from the civil regime of immigration enforcement.



Understanding the differences between Civil Law Enforcement and State and Federal Criminal

- **Exclusive Federal Authority:** The federal government exercises exclusive authority over immigration. As such, certain actions that violate federal immigration law, such as entering the U.S. without proper documentation or overstaying a visa, are handled exclusively by federal agencies like U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE).
- **State Role:** States are not typically empowered to enforce federal immigration law independently. However, they can collaborate with federal agencies under certain circumstances (e.g., dealing with criminal conduct that intersects with immigration offenses).
- **Immigration-related offenses are primarily a matter for federal jurisdiction**, and state law enforcement cannot independently enforce federal immigration law unless authorized under specific federal-state agreements. This ensures that there is a clear distinction between state powers and federal immigration authority.
- **As the United States Supreme Court noted in an 1893 case:**
 - **“The order of deportation is not a punishment for crime.** It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.” *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).
- **By classifying deportation and removal as a “civil” penalty**, the Court held that immigrants facing removal are not entitled to the same constitutional rights provided to defendants facing criminal punishment. It is for this reason that immigrants facing deportation today are not read their rights after being arrested, are not provided an attorney if they cannot afford one, and are not permitted to challenge an order of removal for being “cruel and unusual punishment.”



Understanding the differences between Civil Law Enforcement and State and Federal Criminal: Non-Exhaustive Relevant Caselaw

- In I.N.S. v. Lopez-Mendoza, the Supreme Court noted that civil deportation proceedings are not criminal in nature and that various protections applicable in criminal trials do not apply in deportation hearings (I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984))[1]. The primary objective of INS agents is to use evidence in civil deportation proceedings, not criminal prosecutions (I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984)).
- Carlson v. Landon further clarifies that deportation is not a criminal proceeding and has never been considered a criminal punishment. It highlights that no jury is involved in deportation cases (Carlson v. Landon, 342 U.S. 524 (1952)).
- Reno v. American-Arab Anti-Discrimination Committee reiterates that deportation is not imposed as a punishment but as a means to enforce immigration laws. The consequences of deportation, while severe, are not criminal penalties (Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999)).
- Harisiades v. Shaughnessy explicitly states that deportation, despite its severe consequences, is a civil procedure (Harisiades v. Shaughnessy, 342 U.S. 580 (1952)).
- U.S. v. Spector underscores that administrative determinations of deportability are considered civil in nature, with no criminal consequences or connotations (U.S. v. Spector, 343 U.S. 169 (1952)).



FIPP Context: 10th Amendment

- “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”
- From this text, the Supreme Court has derived an “**anticommandeering principle**,” which prohibits the federal government from compelling the States to enact or administer a federal regulatory program. See [Printz v. United States, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 \(1997\)](#) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).” (emphasis added.)



FIPP Context: Exclusive and Concurrent Powers

Exclusive federal powers	Concurrent powers	Exclusive state powers
Coining money	Taxation	Conducting elections
Regulating interstate and foreign commerce	Lawmaking and enforcement	Establishing local governments
Regulating the mail	Chartering banks and corporations	Providing for public safety, health, welfare
Declaring war	Taking land for public use (eminent domain)	Maintaining militia
Raising armies	Establishing courts	Ratifying Constitutional amendments
Conducting foreign affairs	Borrowing money	Regulating intrastate commerce
Establishing inferior courts		
<u>Establishing rules of naturalization</u>		



FIPP Context: The Supremacy Clause

- [Article VI](#), Paragraph 2 of the U.S. Constitution is commonly referred to as the Supremacy Clause.
- The Supremacy Clause establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with the federal government's exercise of its constitutional powers, and from assuming any functions that are exclusively entrusted to the federal government. It does not, however, allow the federal government to review or veto state laws before they take effect.



VCJC Model FIPP Context Reminder: 8 U.S.C § 1373 and 8 U.S.C. § 1644

➤ 8 U.S.C. § 1373(a)

- “Notwithstanding any other provision of Federal, [State](#), or local law, a Federal, [State](#), or local government entity or official **may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and [Naturalization](#) Service** information regarding the **citizenship or immigration status**, lawful or unlawful, of any individual.”
(effective: September, 1996)

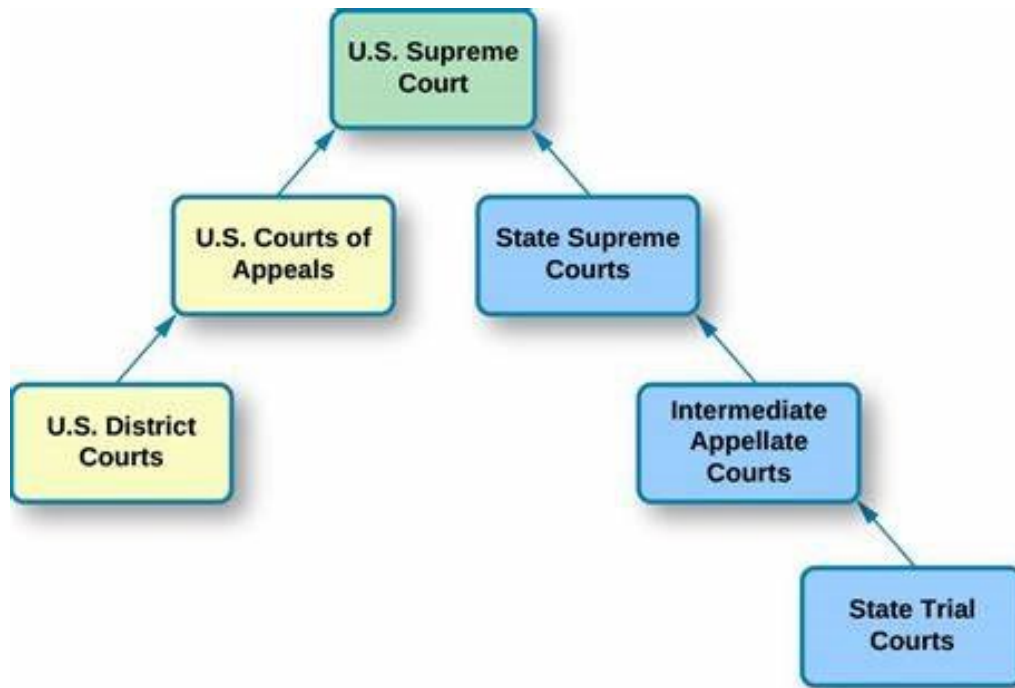
➤ 8 U.S.C § 1644

- “Notwithstanding any other provision of Federal, State, or local law, **no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status**, lawful or unlawful, of an alien in the United States.” (effective: August 22, 1996) (emphasis added).

Reminder: 8 U.S.C. § 1373(a) and 8 U.S.C § 1644 are both cited in Vermont’s controlling statute concerning FIPP (20 V.S.A. § 2366) the VCJC Model FIPP.



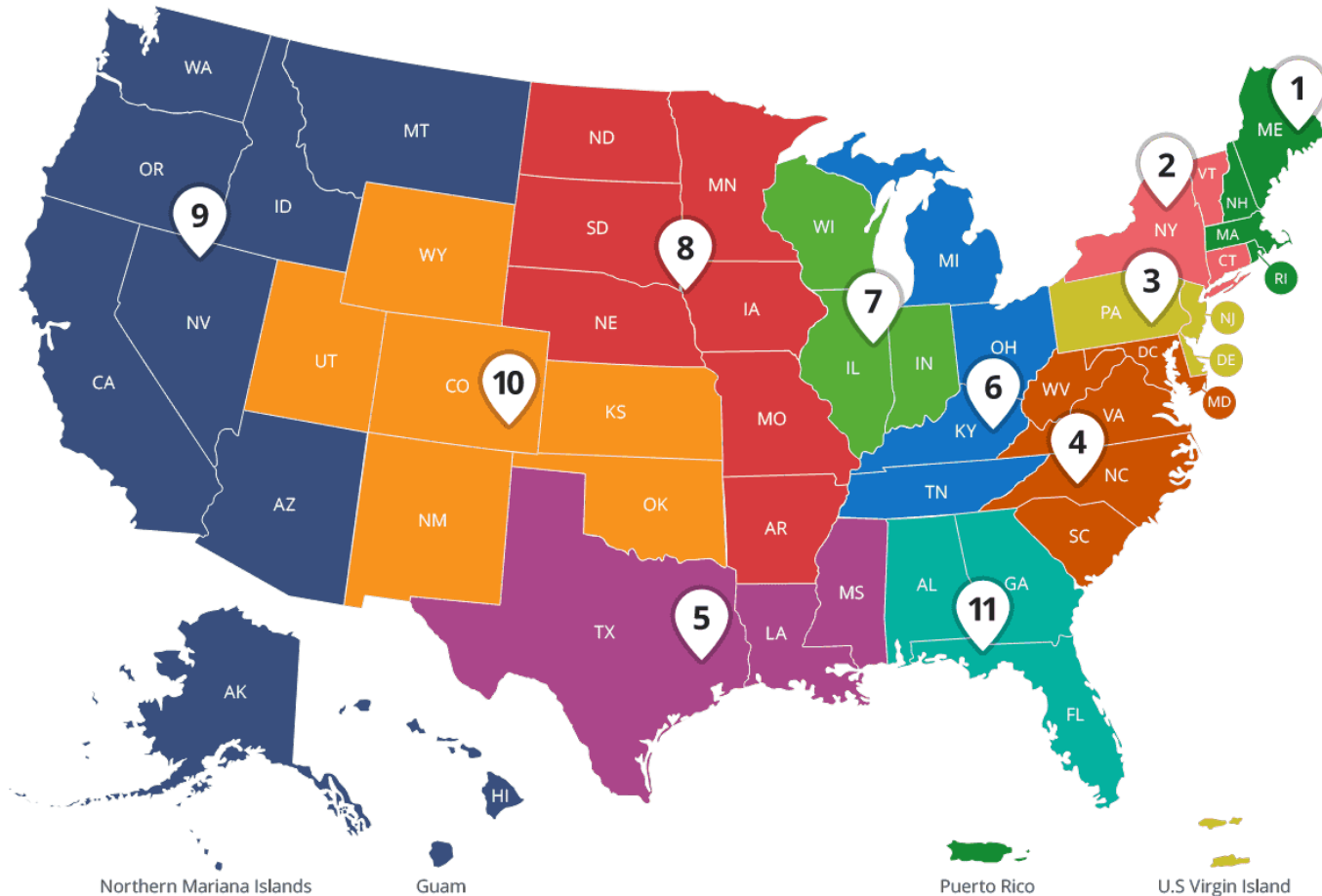
FIPP Context: Dual Court System and Legal Precedent



- Precedent refers to a **court decision that is considered as authority for deciding subsequent cases involving identical or similar facts, or similar legal issues.** Precedent is incorporated into the doctrine of stare decisis and requires courts to apply the law in the same manner to cases with the same facts.
- Stare decisis – “let the decision stand” or “to stand by things decided.”
- In Vermont, legal precedent is set by the Vermont Supreme Court and the U.S. Supreme Court. If a state issue, we would next look to neighboring states for precedent. **If a federal issue, we would look to the Second Circuit of the U.S. Court of Appeals, and then to other Circuits if 2nd Cir. did not address the issue.**



FIPP Context: The Circuits of the US Court of Appeals & Decisions Regarding the 10th Amendment and 8 U.S.C 1373 and 1644





FIPP Context: The Federal Statutes and the 10th Amendment

➤ Does 8 USC 1373 and/or 1644 violate the 10th amendment thereby making the federal statutes unconstitutional?

➤ **2nd Cir** stated that the Federal statutes (noted above) were not unconstitutional, “on its face.” Specifically:

➤ “But the conclusion that § 1373, **on its face**, violates the Tenth Amendment does not follow. A commandeering challenge to a federal statute depends on there being pertinent authority “reserved to the States.” In Murphy, there was no question that, but for the challenged federal law, the States’ police power allowed them to decide whether to permit sports gambling within their borders. That conclusion is not so obvious in the immigration context where it is the federal government that holds “broad,” Arizona v. United States, 567 U.S. at 394, 132 S.Ct. 2492, and “preeminent” power, Toll v. Moreno, 458 U.S. at 10, 102 S.Ct. 2977. Title 8 of the United States Code, commonly known as the Immigration and Nationality Act (“INA”), see 8 U.S.C. § 1101 et seq., is Congress’s “extensive and complex” codification of that power, Arizona v. United States, 567 U.S. at 395, 132 S.Ct. 2492.” State v. Dept. of Justice, 951 F.3d 84, 113 (2nd Cir 2020). Thus, at the same time that the Supreme Court has acknowledged States’ “understandable frustrations with the problems caused by illegal immigration,” it has made clear that **a “State may not pursue policies that undermine federal law.”** *Id.* at 91 (quoting Arizona at 416.)



VCJC Model FIPP Context: Resources

➤ Statutes and Policy

- 20 V.S.A. 2366
- VCJC Model FIPP: <https://vcjc.vermont.gov/content/model-fair-and-impartial-policing-policy>
- 8 U.S.C. 1377
- 8 U.S.C 1644

➤ Caselaw

- [Arizona v. United States, 567 U.S. 387, 132 S.Ct. 2492, 183 L.Ed.2d 351 \(2012\)](#)
- [Murphy vs. National College Athletic Ass'n., 584 U.S. 453, 138 S.Ct. 1461 \(2018\)](#)
- [City of Chicago v. Sessions, 888 F.3d 272 \(7th Cir 2018\)](#)
- [City of Los Angeles vs. Barr, 941 F.3d 931 \(9th Cir 2019\)](#)
- [Steinle v. City and County of San Fran, 919 F.3d 1154 \(9th Cir 2019\)](#)
- [State v. Dept. of Justice, 951 F.3d 84 \(2nd Cir 2020\)](#)
- [Ocean County Bd of Commissioners v. Attorney General of State of NJ, 8 F.4th 176 \(3rd Cir. 2021\)](#)