

PRACTICE POINTER

RESISTANCE TO ANTI-IMMIGRANT INITIATIVES: THE WAY FORWARD FOR IMMIGRANTS, THEIR ADVOCATES, FAITH-BASED AND LABOR LEADERS, AND STATE AND LOCAL GOVERNMENTS

Part 2 Focus on next steps for communities and service providers

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State and local governments

U.S. State and local governments must play a major role in standing with and protecting immigrant communities allocating technical resources and funding for community education and representation.

Several State and local governments and foundations dedicated significant resources in an effort to achieve comprehensive immigration reform. The brief opportunity for comprehensive immigration reform ended in November 2010, when in midterm elections Republicans regained control of the House of Representatives and opponents of “amnesty” could control the fate of any proposed legislation. The 2010 election resulted in the highest loss of a party in a House midterm election since 1938. Immigration reform was then almost dead. When the Democrats lost control of the Senate in November 2014, any hope for rational and humane comprehensive immigration reform was buried.

However, States, local governments and foundations should now reboot their focus on immigration issues and, as discussed below, direct substantial resources and funding to coordinated efforts aimed at educating immigrant communities about their legal rights and providing legal representation for immigrants in removal proceedings, petitions to legalize status and in the range of related law violations immigrants will experience at the hands of unscrupulous landlords, employers and businesses as their status becomes more vulnerable under new federal policies.

This memorandum suggests six components of a strategic resistance that will protect the human and civil rights of the vast majority immigrants targeted by the Trump executive decrees:

1. Community education is essential to successfully combat injustice

Community education is essential to replace pervasive “fear” with “knowledge of rights” from the moment of contact with immigration enforcement authorities, including, for example, the right to remain silent, the right not to be searched without a warrant, the right (except in exigent circumstances) not to be arrested without a warrant, the right to a prompt bond hearing if ever arrest, the right to be represented by counsel, and the right

(for most people) to formal removal proceedings with administrative and judicial appeals that routinely take several years to resolve.

Those who have lived here for less than two years may apply for asylum before being expelled, and should be released from custody if they have a credible fear of persecution in their home countries.

Separate groups within the immigrant communities need different information about their rights. Children who have been abused, abandoned or neglected may qualify for lawful permanent resident status, along with survivors of domestic violence and victims of certain serious crimes who cooperated with law enforcement by reporting crimes. Community education must include both rights when confronted by enforcement authorities and options some immigrants may have legalization of status.

Different groups that the Administration could target for enforcement should be identified and members of these groups must be especially prepared to exercise their rights.

DHS could identify 1-2 million long-term residents who have approved or pending visa petitions but are ineligible for adjustment of status because they entered the country without inspection, and have resided here for more than a year without authorization. Since 1996, these immigrants must return to their home countries for ten years before they can be granted lawful permanent resident status. Because of family ties, none of these immigrants have left or will leave the U.S. and be apart from their spouses and children for ten years in order to legalize their status. DHS has each of these applicants' names, addresses, etc. This is low-hanging fruit for any mass deportation scheme.

Whether DHS selects this population or any other, it is less likely to engage in many mass raids than to pursue arrests by writing to immigrants already in the DHS system and demanding that they attend a registration interview. This was the approach taken post-9/11 in the National Security Entry-Exit Registration System, when immigrants were ordered to appear for interviews and if determined to be out of status, detained and removed if they had entered on a visa-waiver program, or subject to removal proceedings. If and when any effort is undertaken to have large groups of immigrants report to ICE, those immigrants and their families and advocates will have to decide how to respond. As discussed below, even if they appear, most will be entitled to extended administrative removal proceedings potentially delaying any deportation for years.

Local police enforcement of immigration laws and policies to detain suspected undocumented immigrants for ICE agents is a central part of the Trump Policy. The recent DHS policy memo makes clear that "Empowering state and local law enforcement agencies to assist in the enforcement of federal immigration law is critical to an effective enforcement strategy, and CBP and ICE will work with interested and eligible jurisdictions ..."

Communities that support intelligent law enforcement understand that the more local police cooperate with ICE, the less immigrants report crimes and the more violent criminals will remain on the streets.

Communities and their advocates must encourage State and local laws that clearly separate criminal and immigration law enforcement.

Outreach community education must address the policies of any police jurisdictions where immigrants live and work. An easily accessible database available in several languages should inform immigrants and their advocates of the policies of all law enforcement agencies where immigrants reside and work. In jurisdictions where the policy is not to hold suspected immigrants for ICE, immigrants may carry cards that reiterate the policy and present those cards to police officers who threaten to arrest or hold them for ICE.

Numerous difficult cases will arise in which immigrants already in the system must advise DHS of changes of addresses, or are considering filing new applications especially if eligibility is unclear, or must report monthly or annually while under a discretionary stay of deportation, deferred action status or parole status. While these concerns should be addressed in community outreach materials and discussions, they almost always will require individual consultations with legal services or pro bono counsel.

Outreach community education must also address areas in which the civil rights of immigrants are in danger because of the *ripple effect* of harsh federal policies that increase the vulnerability of immigrant communities in many localized situations. For example, in past periods of repressive national policy, exploitative landlords and employers increased the use of threats of reporting to the immigration authorities as a weapon to exploit tenants and workers. Immigrant consumers, tenants and workers must be informed through outreach materials and group discussions about State laws and local policies that provide legal protections to tenants, workers and consumers regardless of immigration status. At the same time, immigrant communities need to be better informed about the meaning and scope of anti-immigrant State and local initiatives that have already been adopted or are under consideration.

Some States (California, Colorado, Connecticut, Illinois, Maryland, Nevada, New Mexico, Utah, Vermont, and Washington), as well as Washington, D.C., allow undocumented immigrants to apply for drivers licenses and some local entities issue identity cards regardless of immigration status. In today's anti-immigrant environment, many immigrants question whether they may safely apply for or renew drivers license or identity cards without being exposed to arrest and deportation. In community outreach materials and discussions the risks or lack of risks involved in obtaining State or local government issued licenses or identification cards should be addressed.

At bottom, community education must stress that the vast majority of undocumented migrants living in the U.S. *do not face deportation as long as they are aware of and exercise their existing statutory and constitutional protections and have access to legal representation.*

No families or long-tem residents should be unjustly deported until there is a new President who understands the emotional and psychological harm caused when nuclear

families are separated, and appreciates the adverse and recessionary consequences mass deportations would have on the economy. Then a new policy or possibly legislation may block the removal of long-term residents.

Over the past week long-term managers at ICE and CIS have finally explained the basics of the law to key people in the Trump Administration. DHS Secretary Kelly today said: [“There will be no mass deportations.”](#) He added that all removals will be conducted in accordance with the law, including the right to appeal. He also acknowledged this is a long process.

Effective defense requires that fear among the immigrant population be addressed and reduced and replaced with knowledge of immigrants’ rights under U.S. laws and resolve to exercise these rights if and when ever encountered by law enforcement authorities. This is perhaps the best tool to block the worst aspects of President Trump’s initiatives aimed at isolating, intimidating and marginalizing immigrants and their families.

2. Strengthening the capacity of legal services programs

It is critically important to strengthen and expand the capacity of legal services programs, community-based programs, unions and *pro bono* panels to defend low-income immigrants both in removal proceedings and in applications for potential benefits (asylum, SIJ, U-visas, family-based visas, etc.).

The presence of legal representation in individual cases is vitally important to the outcome of the proceedings. [Without legal representation, the chances of success drop significantly.](#)

Broad policies that violate statutes or the constitution may be subject to judicial challenge in class action cases.

States, counties, cities and foundations must be encouraged to refocus the support they previously dedicated to comprehensive immigration reform on the immediate resource needs of community-based and legal services programs now ready, willing and able to represent and defend immigrant families and children.

As was true during past periods of mass arrests at work site raids, legal services attorneys and paralegals and pro bono attorneys must be familiar with the Fourth Amendment rights of immigrants, the right to [suppress coerced statements and statements made in violation of the right to counsel](#), what people confronted by law enforcement are required to say or have the right not to say, [the right to consult with counsel before, during or after arrest](#), the right to a [prompt bond hearing](#), factors to consider at bond hearings, administrative and judicial review of bond decisions, [burdens of proof in removal hearings, defenses to deportation](#) and appeals processes following hearings before the Immigration Judges.

Lawyers and accredited representatives representing immigrants in removal cases must also be familiar with the full scope of [due process rights](#) that immigrants possess while

subject to removal proceedings. These certainly include the right to a fair and non-biased judge and decisions, the right to exclude illegally obtained evidence, the right to present evidence including witnesses and to confront adverse evidence, the right in some cases to cross-examine ICE arresting agents who obtained statements from the immigrant now being used to establish deportability, the right to a record of the proceedings, notice of classified evidence, and the right to competent legal representation. Immigrants in removal proceedings also have the right to equal treatment: Individuals may not be treated differently from other similarly situated individuals without a rational reason for such different treatment. This much is guaranteed by the Fifth Amendment of the U.S. Constitution, which luckily trumps President Trump's executive powers.

3. Role of State and local Governments

State, county and city governments will play a critical role in the unfolding of new federal policies. Some may be inclined to embrace the Administration's new anti-immigrant policies, some may stay essentially neutral, others may play an affirmative role in reducing the personal, political and economic harms likely to result from implementation of Trump's policies. As discussed below, major efforts must be undertaken by community-based groups, faith-based and labor leaders, the media and others to encourage State and local governments to stand firm against policies that would harm local communities' efforts at effective policing, providing medical care, making drivers licenses or identity cards available, access to education, etc.

In an interview with Breitbart News in May 2016, candidate Donald J. Trump stated, "Sanctuary cities are a disaster." Trump claimed sanctuary cities are "a safe-haven for criminals ..."

On January 25, 2017, President Trump issued an Executive Order entitled, "Enhancing Public Safety in the Interior of the United States." Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("Public Safety Executive Order").

The Executive Order relies on Title 8, Section 1373 of the United States Code, which provides that local governments may not prohibit or restrict any government entity or official from "sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual." To address the purported harm caused by Sanctuary Cities, the Executive Order establishes the policy that "jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." Executive Order, at 8799.

The Executive Order directs the Attorney General and Secretary of Homeland Security to ensure that sanctuary jurisdictions do not receive Federal grants, and directs the Attorney General to take enforcement action against any local entity that "hinders the enforcement of Federal law."

DHS and DOJ are still assessing the ways in which they can use Section 1357(g) to bludgeon States and local governments into compliance with the Administration's extreme immigration enforcement policies.

States and local Governments may adopt laws or policies to counteract some of the harms that will result from President Trump’s anti-immigrant agenda.

In California, for example, Senate President pro Tem Kevin de León has introduced Senate Bill 54 (the California Values Act). As amended in the Senate on January 24, 2017, this bill if enacted would prohibit state and local law enforcement agencies from using resources to investigate, detain, detect, or arrest persons for the purposes of immigration enforcement. The proposed law seeks to protect immigrants’ personal data, requiring state agencies to review their confidentiality policies and to ensure that they are only collecting information necessary to their departments. It would prohibit local police from giving federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes or performing the functions of an immigration officer, whether pursuant to Section 1357(g) of Title 8 of the United States Code or any other law, regulation, or policy.¹

Another example of local Government’s refusing to collaborate with ill-advised and inhumane federal policy is San Francisco’s challenge to President Trump’s executive order seeking to pull federal funds from “sanctuary” cities. San Francisco is a Sanctuary City and has been since 1989. Numerous other municipalities—including New York, D.C., Chicago, Los Angeles, New Orleans, Santa Clara, Minneapolis, and Houston—have also enacted Sanctuary City laws. San Francisco law limits when city employees and agencies may assist with the enforcement of federal immigration law.

On January 31, 2017, the City of San Francisco filed suit challenging the constitutionality of President Trump’s executive order threatening to withhold federal funds from “sanctuary” cities. The complaint is available [here](#).

There are legitimate policy grounds on which State and local governments may decline to be part of a federal detention and deportation regime. Immigrant communities and their advocates should share these grounds with the public and local and State elected officials.

Briefly, governing entities must be able to reliably collect confidential information from all residents regarding health issues. Both effective medical treatment programs and information gathering would be jeopardized if release of personal information results in a person being taken into immigration custody.

Second, it is our experience after representing tens of thousands of immigrants that they and their U.S. citizen immediate family members are unlikely to report crimes or cooperate with the prosecution of criminals if they fear exposing themselves, family members, or friends to a risk of arrest and deportation. *See, e.g. Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*. Indeed, violent

¹ The proposal builds on the California Trust Act that California Gov. Jerry Brown signed in October 2013. The state law prevents law enforcement agencies from detaining immigrants longer than necessary for minor crimes so that federal immigration authorities can take them into custody.

criminals are the primary beneficiaries when their victims are afraid to cooperate with police because they fear being turned over to deportation authorities.

Finally, cooperating with federal immigration enforcement efforts (which rarely involve criminal conduct) requires the redirection of scarce local law enforcement personnel and resources. Responding to a civil immigration detainer includes extended detention time, the administrative costs of tracking and responding to detainers, and the legal liability for erroneously holding an individual who is not subject to a valid and lawful immigration detainer.

Protection for immigrants outside of the area of local cooperation with ICE is also important as the exploitation of low-income undocumented immigrants will now increase in response to the new repressive federal policies. One example of a response to these threats is California State Assembly member David Chiu's proposed legislation that would bar landlords from using a tenant's immigration status to intimidate them into leaving. The bill, [AB 291](#), would make it illegal for a landlord to disclose a tenant's immigration status. It would also prohibit landlords from threatening a tenant with reporting them to immigration authorities if the tenant reports building violations.

In 2013 Gov. Brown approved a measure allowing immigrants to receive California driver's licenses. "While Washington waffles on immigration, California's forging ahead," Brown said. "I'm not waiting."

In 2013 other bills signed into law by Gov. Brown allow undocumented immigrants to be licensed as lawyers, impose restrictions on those who charge a fee to help immigrants gain legal status, and make it a crime for employers to "induce fear" by threatening to report someone's immigration status.

These California laws are examples of actions States and local Governments across the country may consider to counteract the political and economic harms and personal hardships President Trump's immigration policies will otherwise impose on local communities.

Immigrants are more likely than the native-born population to be poor and unable to afford retained legal services. Successful defense against some of the harshest aspects of the Trump executive orders will require representation by lawyers and paralegals. States and local Governments must consider vastly increasing funding of community-based organizations to engage in community education regarding immigrants' rights and providing legal representation to immigrants who face deportation and to those who are eligible to apply for legalization of status. The provision of additional funding for such efforts is particularly important given the federal [restrictions placed on legal services programs funded by the federal Legal Services Corporation](#). In the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Congress barred LSC-funded lawyers from providing any assistance to many undocumented persons, whether using LSC-funds or non-LSC-funds.

More paralegals must be trained to become "[accredited representatives](#)" allowing them to represent immigrants in DHS proceedings. Accredited representatives may assist

immigrants in immigration proceedings before the CIS and ICE, and the Executive Office for Immigration Review's (EOIR) immigration courts and the Board of Immigration Appeals (BIA). All "accredited representatives" must be affiliated with an organization that is recognized. Organizations must apply for recognition as well as accreditation of their representatives. States should promptly allocate funds for non-profit organizations to gain "recognition" by the EOIR and to train and get accredited representatives certified to represent low-income immigrants in petitions submitted to CIS and ICE and in removal proceedings before EOIR.

At the same time, community-based organizations need substantially increased funding to conduct community education programs and to provide lawyers to represent low-income immigrants in applications for legal status based on asylum claims, domestic abuse, cooperation with police in the investigation of serious crimes, family relationships, and in the case of minors, abuse, abandonment or neglect. Lawyers also will play a critical role in minimizing the number of immigrants who fail to appear in removal proceedings after being released on bond following apprehension, and defending immigrants placed in removal proceedings following arrest by ICE authorities. Such defense work requires training of lawyers, on-going technical support to those lawyers, and the time needed to research and adequately defend clients with meritorious defenses to deportation. At bottom, States are in a unique position to fund such humanitarian efforts that will stave off the worst aspects of the Trump immigration policies.

Overall, this is the time for immigrant communities and their representatives to advocate for State and local funding for a range of programs to represent low-income immigrants and to consider innovative laws and local ordinances that will protect immigrants from the harsh consequences of the Trump executive decrees and from the exploitative practices that will now mushroom as unscrupulous employers, landlords and businesses seek to take advantage of the new vulnerabilities immigrants experience as a result of President Trump's assault on and limitation of their legal protections and rights.

4. Representation and support for immigrant children

Increased *pro bono* and legal services protection of immigrant children is critically important. Children may suffer the most under President Trump's policies as they are increasingly detained by ICE in unlicensed secure facilities comingled with unrelated adults, possibly not treated as unaccompanied minors (and transferred from ICE to ORR custody) because they have one or more parents residing in the US, arrest of parents if they show up to collect their detained children, separation of children from parents with whom they were apprehended so the parents can be criminally prosecuted, etc.

Children possess a range of legal rights under the *Flores* settlement and the TVPRA and increased funding and technical support for free legal services will be needed so that those rights are exercised, the detention of children is held to a minimum, the conditions of detention are humane, children eligible for Special Immigrant Juvenile Status are not deported, and that children's asylum claims are fairly assessed separate and apart from the claims possessed by accompanying parents.

5. Public and media education

Public and media education initiated by immigrants and immigrant leaders must focus on the fruitless and unjust nature of mass deportations and the break up of families, and the likely unintended consequences of new restrictions on traditional avenues to legalize status – i.e. a further build up of the undocumented population as traditional methods to legalize status are blocked by new restrictive policies and practices. Public education must also make clear that all immigrants have statutory and constitutional protections and that exercising those rights is entirely justified to avoid summary or unjust deportation and to avoid the breakup of families.

6. Immigration reform

Further advocacy for comprehensive immigration reform (other than as a long-term goal when the votes exist for passage) must be set aside for an *incremental* approach starting with obvious populations that should be granted lawful permanent resident status, including, for example, (1) certain farmworkers, (2) refugees who have had Temporary Protected Status (TPS) for several decades, and (3) people who have applied for DACA.

Legalizing these three groups of immigrants who in practical terms are unlikely to ever be deported could extend permanent lawful status to 1-2 million people.

Immigrants should also advocate for a change in Advance Parole policy which could allow an additional one to two million immigrants to be granted permanent resident status after briefly visiting family abroad and then returning with inspection (rather than without inspection). Having returned through the “door” President Trump said during his campaign would be available, they could then apply for lawful permanent resident status and would not have to return to their home countries for ten years before being granted resident status.

Other issues that directly impact on migration policy are not addressed in this memorandum but may be discussed in future memoranda. Obvious issues include the plan to build a “wall” along the US-Mexico border, a looming possible trade war with Mexico, the externalization of enforcement in the form of interdiction of Central American asylum seekers along the southern border of Mexico in violation of international law, and an overarching tendency to support authoritarian regimes and exploitation of natural resources that may well soon precipitate new migrant flows seeking to enter the United States.

These issues must be assessed and reacted to as they impact migrants before they reach the US-Mexico border and may increase future migration flows as migrants seek refuge from spiraling violence, displacement and poverty.

The Center for Human Rights and Constitutional Law is available to provide training and technical support to immigrant communities and legal services and pro bono attorneys

representing immigrants and asylum seekers. For support or assistance please email support@centerforhumanrights.org

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