

PROBLEMS FACING THE FIRST GENERATION OF LOCAL IMMIGRATION LAWS

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I. INTRODUCTION

Colorado made national headlines in 2006 when it passed a series of controversial measures requiring applicants for most state benefits to prove legal immigration status before obtaining that benefit. Signed by out-going Governor Bill Owens, the law makes proof of legal immigration status a prerequisite to obtaining most forms of public assistance (for example, disability payments) and state-issued licenses for professionals and commercial enterprises (for example, licenses for insurance agents and physicians).¹ The law also requires Colorado employers to verify their employees' legal immigration status or risk hefty fines (up to \$5000 for a first offense and up to \$25,000 for subsequent offenses).²

Described by proponents as the toughest immigration reform package in the country, the law was passed with great fanfare. Governor Owens predicted that the law would remove as many as 50,000 undocumented immigrants from the state's public benefit rolls,³ moving Colorado into "the forefront of immigration reform."⁴ Yet a year after the law's enactment, Colorado had very little to show for its efforts. Instead, bureaucratic problems, lack of funding, and legislative inaction have converged to stymie the law's effectiveness.

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1. Myung Oak Kim, *New Era for Colorado: Owen Puts Pen to Tough Immigration Bills Aimed at Identifying Legal Citizens*, ROCKY MTN. NEWS, Aug. 1, 2006, at A5, available at www.rockymountainnews.com/drmn/government/article/0,2777,DRMN_23906_4885028,00.html.

2. COLO. REV. STAT. ANN. § 8-2-122(4) (West 2008).

3. David Migoya, *New Era on Immigration*, DENV. POST, Aug. 1, 2006, at A1, available at http://www.denverpost.com/search/ci_4119484.

4. Kim, *supra* note 1.

Consider these facts: As of August 2007, state government offices in Colorado reported spending \$2 million to comply with the legal status requirements for state aid, but could not identify any savings as a result of that compliance.⁵ The departments could not say how many, if any, undocumented immigrants were being denied state-funded services as a result of the law. Similarly, the Division of Registrations (within the Department of Regulatory Agencies), responsible for overseeing 290,000 professional licenses, had not revoked any professional licenses because of residency issues, and the Department of Labor and Employment had not audited any employers under the law.⁶ Furthermore, the Attorney General, charged with prosecuting those who forge employment documents, requested but did not receive funding to enforce this law.⁷

The problems that Colorado experienced are not uncommon among jurisdictions implementing local immigration laws. Yet public attention continues to focus on the successful enactment of these laws, largely ignoring their often problematic implementation. The purpose of this Article is to shed light on the problems that many of these first-generation local immigration laws are experiencing and to consider, briefly, the implications of these problems for local immigration enforcement generally.

It should be noted that this Article is not intended to be a comprehensive survey of all local immigration laws. The huge number of such laws and the rapid pace at which the laws are proposed, enacted, amended, or rescinded would make such a survey very difficult to draft. Nor does this Article make the claim that *all* local immigration laws have experienced implementation problems. Rather, by analyzing the experience of local governments that have experienced problems, this Article seeks a more complete understanding of local immigration implementation.

II. FINANCIAL CHALLENGES

Drawing from the experience of Colorado and other local governments, implementation problems can be divided into three categories: financial, legal, and community-related.

5. Mark P. Couch, *Immigration Laws Stymied*, DENV. POST, Aug. 6, 2007, at B1, available at http://www.denverpost.com/search/ci_6552322.

6. *Id.*

7. *Id.*

The most immediate problem that local governments face is a financial one. In most cases, local governments enacting these laws must pay for the costs entirely out of local budgets.⁸ Often, in situations reminiscent of federal immigration problems, local governments enact these laws without authorizing adequate funding.⁹ Implementation costs vary, depending on the substance of the local law enacted, but usually involve costs for training local government employees, hiring additional employees (both to implement the new laws and to assist current employees who now have immigration enforcement responsibilities), and providing physical resources like jail space and equipment.¹⁰

Prince William County, Virginia provides an instructive example of how these financial problems can play out. In July 2007, county supervisors unanimously passed a resolution to deny county services to undocumented immigrants and to allow county police to enforce immigration laws.¹¹ But funding the resolution—estimated to cost \$6.4 million in the first year (twice the initial estimate) and \$25.9 million over five years—has proven to be problematic.¹² In passing the resolution, the county supervisors committed only \$325,000 for the measures and pledged to find the rest of the money later.¹³ Faced, however, with a shrinking tax base (caused by foreclosures and overall

8. Local law enforcement agencies that enter into an agreement (known as a 287(g) Agreement) with the Department of Homeland Security to allow designated officers to enforce immigration laws do receive training paid for by DHS. However, the local agencies continue to pay the salaries of these officers. Immigration and Nationality Act § 287, 8 U.S.C. § 1357(g) (2007); see also U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT § 287(g), *Immigration and Nationality Act; Delegation of Immigration Authority*, http://www.ice.gov/partners/287g/Section287_g.htm (last visited June 29, 2008).

9. In 2006, Congress enacted the Secure Fence Act to build a 700-mile fence along the southern border with Mexico. But the Act lacked any funding mechanism for the fence. Earlier legislation appropriated \$1.2 billion to pay for border security measures, including possible funding for a fence. But estimates suggested that building the fence alone would cost double that amount. *Bush OKs 700-Mile Border Fence*, CNN.COM, Oct. 26, 2006, <http://edition.cnn.com/2006/POLITICS/10/26/border.fence>. Officials from the Department of Homeland Security have whittled the plan down to include 370 miles of pedestrian fencing and 300 miles of vehicle barriers, with a goal to finish by December 2008. N.C. Aizenman, *Border Fence Would Slice Through Private Land*, WASH. POST, Feb. 16, 2008, at A1.

10. See, e.g., Kristen Mack, *Pr. William Crackdown To Cost More Than Planned*, WASH. POST, Mar. 2, 2008, at C6.

11. Specifically, the police measure authorized the county police to check the immigration status of all detained persons and to cooperate with federal immigration authorities in deportation proceedings. Nick Miroff, *Citing Cost, Prince William Delays Immigrant Measures*, WASH. POST, Oct. 3, 2007, at A1.

12. Kristen Mack, *28% Higher Property Tax Rate Eyed in Pr. William*, WASH. POST, Feb. 27, 2008, at B1.

13. Nick Miroff & Kristen Mack, *After Vote, Pr. William Immigrant Plan Faces Hurdles*, WASH. POST, Oct. 18, 2007, at A1.

declining property values) and cuts in state funding for county police services, the county initially delayed implementation of key elements of the policy.¹⁴

To fund the immigration measures and to cover expected budget shortfalls, county officials have proposed cutting \$19 million in jobs and services from the budget and increasing property taxes by twenty-eight percent.¹⁵ Board Chairman Corey A. Stewart, who based his reelection campaign on passing these immigration measures, has promised to fully fund the immigration laws. “We made a promise to the community[,]” he said.¹⁶ But other supervisors aren’t so sure. Supervisor Frank J. Principi agrees that some parts of the program should be funded, such as the initiation of deportation for criminal illegal aliens. As to the other provisions, he comments, “There are too many priorities that need to be addressed. We’ll have to pick and choose.”¹⁷

Compounding the problem, local governments often underestimate the costs and overestimate the anticipated savings from implementation. Again, in Prince William County, when the board of supervisors voted unanimously for its immigration resolution, the estimated cost was \$14.2 million over five years.¹⁸ But the actual cost of implementation is now roughly double that initial estimate—\$26 million over five years (\$6.4 million incurred during the first year). The increase is due to unexpected and higher-than-estimated costs for equipment, staff overtime, jail space, and foster care services for children separated from deported parents.¹⁹ Even the resolution’s supporters admit that assessing the resolution’s effectiveness—whether undocumented immigrants leave the county or whether the county saves money in denying services—is not possible in the short term.²⁰

And as discussed earlier, Colorado’s political leaders anticipated that Colorado’s immigration laws would save substantial state funds. Specifically, House Bill 1023, which requires proof of legal immigration status to receive state-funded benefits or services, was expected to

14. Miroff, *supra* note 11.

15. Mack, *supra* note 12.

16. Kristen Mack, *Immigration Initiative Is Left Out of Budget*, WASH. POST, Jan. 22, 2008, at B8.

17. *Id.*

18. Miroff & Mack, *supra* note 13.

19. Installing cameras in county police cars to defend against allegations of racial profiling and monitoring footage alone will cost \$3.1 million in the first year. Mack, *supra* note 10.

20. The University of Virginia, James Madison University, and the Police Executive Research Forum plan to undergo a comprehensive review of Prince William County’s immigration policies in October 2009. *Id.*

remove 50,000 undocumented immigrants from the state's welfare rolls.²¹ But after spending \$2 million to comply with the law, state agencies could not show that any undocumented immigrants were receiving welfare benefits.²²

Financial problems are particularly onerous for local governments because they have more limited budgets and fewer revenue sources. Simply stated, local governments can only tax the property, people, or transactions occurring within their jurisdictions. So if property values within that jurisdiction decline significantly, then the local government's budget will also decline significantly, to the extent that the budget depends on property tax revenues. Unlike the federal government, most local governments cannot run deficits because of legal restrictions on their ability to borrow funds.²³ So if a local government operates under one of these legal constraints, it may well have to make the difficult decision to raise additional tax revenues or cut spending elsewhere to pay for enforcement of its immigration regulations.

III. LEGAL CHALLENGES

These financial problems are often exacerbated by the legal challenges that local immigration laws face. In many jurisdictions, groups like the American Civil Liberties Union and local chambers of commerce, as well as individual residents and business owners, have filed lawsuits challenging the laws on various grounds: that the local laws are preempted by federal and sometimes state law; that the laws are poorly drafted and are thus void for vagueness; and that the laws violate the due process rights of would-be tenants, landlords, employers, and other affected parties.²⁴ As examples, lawsuits have been brought challenging the local immigration laws enacted in Hazleton, Pennsylvania; Valley Park, Missouri; Escondido, California; Arizona; and Oklahoma.²⁵

21. Migoya, *supra* note 3, at A1. House Bill 1023 is codified at COLO. REV. STAT. ANN. § 24-76.5-101 (West Supp. 2007).

22. Couch, *supra* note 5.

23. See Joseph W. Little, *The Historical Development of Constitutional Restraints on the Power of Florida Governmental Bodies to Borrow Money*, 20 STETSON L. REV. 647, 650-51 (1991) (discussing constitutional and statutory restrictions on a local government's ability to borrow).

24. See, e.g., Gray v. City of Valley Park, No. 4:07CV00881, 2008 WL 294294, at *31 (E.D. Mo. Jan. 31, 2008) (holding that Valley Park's employer sanction law was not preempted by federal law, did not violate the Equal Protection Clause or the Due Process Clause, and did not violate Missouri law).

25. Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22.

These lawsuits have had a mixed track record. Plaintiffs successfully challenged local immigration laws in Hazleton, Valley Park (state court), and Escondido, but have lost recent cases in Arizona, Oklahoma, and Valley Park (in federal court).²⁶ Win or lose, local governments enacting immigration laws run the risk of expensive, protracted litigation; if they lose, the governments also risk having to pay plaintiffs' legal costs.²⁷

It was these risks that prompted the city of Escondido, California to drop its housing ordinance (requiring landlords to verify the legal immigration status of tenants) and to pay \$90,000 in legal fees to the landlords and undocumented immigrants who filed the lawsuit.²⁸ Similarly, in September 2007, Riverside, New Jersey rescinded its immigration laws that penalized anyone who employed or rented to an undocumented immigrant.²⁹ By the time of the rescission, the town (population 8000) had already spent \$82,000 in legal fees to defend its laws and consequently had to delay road paving projects, repairs to town hall, and other bread and butter expenditures.³⁰

Thus, local governments contemplating their own immigration laws have to take into account the risk and expense of litigation to defend those laws.

IV. COMMUNITY-RELATED CHALLENGES

The third challenge that local governments face, and perhaps the most serious, are community-related problems. In many communities, enforcing immigration laws has complicated the relationship between local police departments and their residents. Local police, particularly within the last twenty years, have increasingly employed community policing, problem-oriented policing, and other approaches that rely on community cooperation to reduce crime.³¹ For local police working in jurisdictions with sizeable immigrant communities, enforcing immigration laws (or even being identified with that enforcement) risks

26. *Id.*

27. For example, a court may award attorney's fees to the prevailing plaintiff in actions to enforce various federal civil rights statutes. 42 U.S.C. § 1988(b) (2000). The prevailing defendant in these types of cases should only receive attorney's fees if the lawsuit was "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983).

28. Preston, *supra* note 25, at A22.

29. Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

30. *Id.*

31. David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 7 (2006).

cutting off that community cooperation. The concern, expressed by both police officers and immigrant advocacy groups, is that immigrants will not report crimes or assist with criminal investigations, because they do not want to risk deportation, for themselves or undocumented family members.³²

Local governments and their police departments that want to preserve immigrant cooperation have to navigate a precarious path. Local police departments are primarily responsible for enforcing criminal laws, but when this enforcement overlaps with immigration law enforcement, then the police risk undermining their primary enforcement objective. It was this risk that led Nassau County officials in Long Island to withdraw all support for federal immigration raids.³³ County police had earlier cooperated with Immigration and Customs Enforcement (“ICE”) in pre-dawn operations that were supposed to target gang members.³⁴ But ninety of the ninety-six administrative warrants for suspected gang members had wrong or outdated addresses, resulting in the erroneous round-up of United States citizens and legal residents from their beds. And most of those arrested were undocumented immigrant workers with no criminal record.³⁵ Pointing out that Nassau County has the lowest crime rate in the nation for a county of its size, Police Commissioner Lawrence Mulvey attributed that low crime rate, in part, to good cooperation with the community. He and Nassau County Executive Thomas Suozzi halted all cooperation with the raids for fear that the raids could undermine that crucial police-community cooperation.³⁶

In other communities, enforcing immigration laws has had collateral consequences beyond law enforcement cooperation. After its police started cooperating with ICE to identify and turn over undocumented criminal defendants for removal proceedings, Irving, Texas found itself identified as an anti-Hispanic City.³⁷ News reports

32. *Id.* at 40-44. The Pew Hispanic Center reported that as of March 2005, 14.6 million people lived in families in which the head of the household or the spouse was an undocumented immigrant. Some 3.1 million of this population are U.S. citizen children. Thus, the number of mixed status households is sizeable. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 7 & fig.6 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

33. Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at 1B, available at <http://www.nytimes.com/2007/10/03/nyregion/03raid.html>.

34. *Id.*

35. *Id.*

36. *Id.*

37. Brandon Formby, *Hispanics in Irving Feeling Disheartened*, DALLAS MORNING NEWS, Oct. 7, 2007, at B1, available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews>

that Irving police had turned over 1600 people for deportation proceedings (more than any other city in 2007) fueled protests and wild rumors. In September 2007, more than 1000 people rallied at City Hall to protest that cooperation.³⁸ Rumors circulated within the Hispanic community that the Irving police were raiding schools, Hispanic grocery stores, and even the Irving Mall, demanding that people produce immigration papers. The Mexican consulate has even warned its nationals to avoid the city.³⁹

City officials have tried unsuccessfully to dispel these rumors. The mayor, Herbert Gears, visited a local high school to reassure students that nobody would check on their immigration status there. “‘A lot of work over the years has simply been destroyed,’ Mr. Gears said. ‘There is a large segment of our city that is now anxious about talking to a police officer, and it is causing problems.’”⁴⁰ City officials have consistently denied the rumors of police raids. “‘I don’t know where the rumors originate from,’” Police Chief Larry Boyd admitted.⁴¹ But for a city where one-third of the residents are foreign-born,⁴² the persistence of the rumors, and their origins in police enforcement of immigration laws, is troubling.

V. CONCLUSION

The future for local immigration laws is unclear. On the one hand, the laws are politically popular, responding to public demands for immigration law enforcement and to public frustration about federal immigration policy. The rapid pace at which these laws are being enacted suggests that the laws will continue to be an important part of the political and legal landscape, at least in the near future.

On the other hand though, implementation for many local governments has been extremely problematic. As briefly described here, local governments have faced complicated financial, legal, and community-related problems as they try to implement their own immigration laws. Now, it may turn out that with time and more

/stories/DN-irvimmigration_07met.ART.North.Edition1.424c966.html. Irving police participate in the federal Criminal Alien Program, which provides around-the-clock communication with federal immigration authorities. Now, instead of doing physical sweeps of Irving jails to check on an arrestee’s immigration status, ICE does phone interviews with all inmates who have unclear immigration status. This change subjects all inmates to immigration scrutiny. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

experience, local governments will be able to resolve some or all of these problems, so that local immigration laws can be successfully implemented. But given the myriad responsibilities that local governments have and their limited resources for doing so, it seems more likely that these financial, legal, and community-related problems will continue.

What are the larger implications of these problems for local immigration enforcement generally? At a minimum, the problems experienced by this first generation of local immigration laws should give local governments pause as they consider whether to enact local immigration laws in the first place or to expand the laws already in existence. Enacting local immigration laws has political benefits, but implementing these laws also imposes financial, legal, and community-related costs. Local governments should consider both the costs and benefits of local immigration laws, as they formulate their policies.

These implementation problems also inform the debate about which level(s) of government should be formulating and enforcing our immigration laws. The debate about whether local governments should enforce immigration laws has largely focused on legal questions of authority (for example, whether the federal government has preempted local regulation in this area or whether local governments have inherent authority to enforce immigration laws).⁴³ The experiences of local governments in actually implementing these laws, and the complicated problems they have faced, provide practical reasons to keep immigration laws and enforcement of those laws concentrated at the federal level.

43. See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199-201 (2005); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381-82, 1404-08 (2006); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 968-87 (2004).