

Note

Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments

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“If you are an illegal immigrant in New York City and a crime is committed against you, I want you to report that. Because . . . the next time a crime is committed, it could be against a citizen or a legal immigrant.”

—Rudolph Giuliani¹

Introduction

Leaders of states, cities, and counties in the United States, like Mayor Giuliani, have struggled to determine the best way for local governments to treat the undocumented immigrants² that live in their communities. Even though undocumented immigrants have broken

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¹ Rudolph Giuliani, former New York City Mayor, New Hampshire Republican Presidential Primary Debate (Sept. 5, 2007), available at <http://www.foxnews.com/story/0,2933,295886,00.html> (defending the noncooperation policies he supported as mayor of New York City).

² In this Note, the term “undocumented immigrant” is used to describe an immigrant who is not legally authorized to be in the United States. This includes people who have entered the country without authorization and those who have overstayed a legally granted visa. Others have also used the term “illegal immigrant” to describe a person with this immigration status.

federal immigration laws by entering the country illegally or by overstaying a legally obtained visa, the reality is that they are in the country and are often a valuable part of the labor force.³ Currently, there are approximately eleven million undocumented immigrants living in the United States, three-quarters of whom come from Latin America.⁴ Congress has failed in recent attempts to reach a consensus and pass comprehensive federal immigration reform deciding how the country will proceed to treat undocumented immigrants.⁵ Local governments cannot wait for the federal government to act because the undocumented immigrants are in their communities now and will not be leaving anytime soon.

As long-term residents of a country that has not authorized their presence, undocumented immigrants in the United States live in “shadow populations”⁶ on the periphery of their communities, in constant fear of deportation.⁷ These undocumented immigrants are frequently the victims of crime, fraud, and exploitation because criminals know they are easy targets.⁸ The immigrants rarely report crimes committed against them to police because they fear the local law enforcement will deport them.⁹ When the crime is not reported, there is no way for the police to capture the perpetrators. Not only do the undocumented immigrants continue to be victimized, but the criminals remain on the streets, endangering other undocumented immigrants and citizens alike. It is in the best interests of local commu-

³ See, e.g., Randal C. Archibold, *Arizona Is Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13 (noting that the Arizona economy is heavily dependent on its “Latino work force” and that undocumented immigrants made up “close to 11 percent of the state’s work force of 2.9 million people in 2006”); *Newly-Released Study Predicts Economic Pain for Oregon if Federal Immigration Regulations Are Implemented*, REUTERS, July 9, 2008, <http://www.reuters.com/article/pressRelease/idUS216226+09-Jul-2008+PRN20080709> (reporting that if federal regulations designed to deport more undocumented immigrants were implemented, Oregon would experience a loss of billions of dollars in decreased production and tax losses).

⁴ See Julia Preston, *Fearing Deportation but Clinging to Life and Homes in U.S.*, N.Y. TIMES, Jan. 18, 2008, at A14.

⁵ See Joel Millman & June Kronholz, *Economic Crises Will Take Precedence over Near-Term Immigration Overhaul*, WALL ST. J., Nov. 12, 2008, at A4 (describing the ongoing struggle for immigration reform).

⁶ *Plyler v. Doe*, 457 U.S. 202, 218 (1982) (using the term “shadow population” to refer to communities of undocumented immigrants).

⁷ See Preston, *supra* note 4.

⁸ See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1450–55 (2006) (describing the peculiar vulnerability of undocumented immigrants).

⁹ See *id.* at 1454–55.

nities to encourage undocumented immigrants to report crimes to local law enforcement.

Numerous local governments have tried to find a practical solution to the problem of undocumented immigrants who fear interaction with local police officers by enacting various forms of noncooperation policies.¹⁰ Noncooperation policies limit the role that local law enforcement plays in enforcing federal immigration law.¹¹ Noncooperation policies are intended to allow immigrants to report crimes to local law enforcement and to aid in investigating crime without fear of deportation.¹² A common type of these policies and laws instruct local law enforcement and government agencies not to inquire into any resident's immigration status so that there will be no information to pass on to federal immigration law enforcement.¹³ These policies help cit-

¹⁰ "Sanctuary law" is the term most often used to describe laws or policies that discourage local law enforcement from enforcing federal immigration laws or disclosing the immigration status of residents to federal immigration authorities. See, e.g., Tyche Hendricks, *Sanctuary Laws Seen as Practical*, S.F. CHRON., July 6, 2008, at A1 (describing the development of "sanctuary" laws in San Francisco and other cities and states throughout the country); Steve Hendrix, *Council Votes to Stay an Immigrant 'Sanctuary'*, WASH. POST, Oct. 30, 2007, at B5 ("[T]he officer contacted federal authorities, not knowing that the city's sanctuary law prohibited him from doing so."). The term "noncooperation law," however, has also been used, albeit less frequently. See, e.g., Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. REV. 83, 94-95 (2004) ("[T]he Second Circuit Court of Appeals confirmed that the statutory ban on non-cooperation policies was constitutional." (footnote omitted)); Huyen Pham, *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374 (2006) ("While some local governments enthusiastically embraced the opportunity to enforce immigration laws, others refused to become involved, passing laws that limit their authority to cooperate in immigration law enforcement (non-cooperation laws)." (footnotes omitted)). Because the term "sanctuary law" is actually derived from a different immigration law movement involving asylum seekers from Central America in the 1980s, see *infra* Part I.A, and because the term "sanctuary" connotes laws and policies that are more protective than these laws and policies are in actuality, this Note uses the term "noncooperation law" to describe such locally enacted laws and policies.

¹¹ See Hethmon, *supra* note 10, at 95 ("These sanctuary policies effectively prohibit city employees, including police, from reporting immigration violations to federal authorities.").

¹² See Pham, *supra* note 10, at 1375 ("These cities, towns, and states (collectively local governments) oppose local cooperation in immigration law enforcement for various reasons: concern for immigrants who may shun essential government services (police protection, schools, and hospitals) for fear of being deported; concern for public safety as immigrants may not report crimes or cooperate in criminal investigations; concern about racial profiling and civil liberties generally; and concern for overburdened police departments in times of strained local budgets." (footnote omitted)).

¹³ See *id.* (describing Seattle's noncooperation ordinance); see also, e.g., Hartford, Conn., Ordinance Concerning the City of Hartford's Policy of Providence of City Services as It Relates to Residents' Immigration Status (July 23, 2008), available at <http://www.hartford.gov/Government/Town&CityClerk/Proposed%20Ordinances/immigration%20status.htm> (proposing an ordinance providing that "Hartford police officers shall not inquire about a person's immigration status unless such an inquiry is necessary to an investigation involving criminal activity.").

ies combat crime with the aid of undocumented immigrants and also focus the local governments' limited resources on fighting crime instead of controlling illegal immigration, which is a federal responsibility.

Noncooperation policies can be beneficial to states and localities by encouraging undocumented immigrants to emerge from "shadow populations" on the periphery of communities, and to report crimes and assist local law enforcement in the investigation of criminal activity. Because most jurisdictions have unique noncooperation policies, however, undocumented immigrants do not understand the effects of the policies in varying jurisdictions. Fearful of possible deportation, they choose to play it safe by not reporting crimes. States and localities should agree to enact a comprehensive and uniform noncooperation policy that will be consistent in every jurisdiction that decides to adopt such a policy, allowing it to be better understood and publicized, and therefore more effective.

Part I of this Note explains how the noncooperation laws of today originated out of the sanctuary movement of the 1980s, when churches and local governments worked to protect refugees from Central America. This Part further discusses the federal response to the sanctuary movement and the noncooperation policies that have evolved and are in force today. Part II will analyze the effectiveness of noncooperation laws in encouraging undocumented immigrants to report crimes to local police. This Part will also identify the problem that noncooperation laws are poorly understood by undocumented immigrants, thereby making the laws less effective. Part III of this Note proposes that all states and localities that decide to enact noncooperation policies should agree to enact the same uniform noncooperation policy, which would be better understood and publicized in the undocumented immigrant community. Additionally, this Part examines counterarguments to this proposal, such as the appropriateness of a federal statutory solution instead of this locally based proposal.

I. The Origin and Current State of Noncooperation Laws

A. Central American Refugees and the Sanctuary Movement of the 1980s

Modern noncooperation laws have their origins in the sanctuary movement of the early 1980s, which is why these laws are often referred to as "sanctuary laws."¹⁴ The sanctuary movement of the 1980s

¹⁴ See Pham, *supra* note 10, at 1382.

was a response to a disagreement over whether undocumented immigrants from Central America should be granted political asylum in the United States. During the 1980s, hundreds of thousands of refugees,¹⁵ predominantly from El Salvador and Guatemala, fled to the United States to escape the violence caused by Central American dictatorial regimes which were supported by the United States.¹⁶ Advocates for the refugees argued that these undocumented Central American immigrants would face imminent harm if deported to their countries of origin, but it was the United States government's stance that they had immigrated illegally for employment opportunities and not for political asylum.¹⁷ Many Central American refugees were denied political asylum in the United States during this period because they were unable to show the "well-founded fear of persecution" required by the Refugee Act of 1980¹⁸ in order to be granted asylum.¹⁹ Some legal commentators argued, however, that the asylum determinations against the Central Americans were motivated by the political and economic interests of the United States Government.²⁰

Private organizations and religious institutions supported the Central American immigrants by protecting them on church property and providing them with needed services.²¹ These religious institutions believed they were "placing morality above the law" by protecting the immigrants on their property and guarding them from detection by federal immigration authorities.²² The religious institu-

¹⁵ See Jeffrey L. Romig, Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 295 (1985) ("Several thousand undocumented Salvadorans enter the United States each month and the number of Salvadorans who remain in this country illegally is estimated to be between 300,000 and 500,000." (footnote omitted)).

¹⁶ See Peter Applebome, *Sanctuary Movement: New Hopes After Trial*, N.Y. TIMES, May 6, 1986, at A20.

¹⁷ See Ari L. Goldman, *Churches Becoming Home to Central American Exiles*, N.Y. TIMES, Apr. 1, 1984, at E9.

¹⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). "Refugee" is statutorily defined as a "person . . . outside any country of such person's nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution . . ." 8 U.S.C. § 1101(a)(42)(A) (2006).

¹⁹ See Goldman, *supra* note 17.

²⁰ See Deborah Cohan et al., *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 529 (1986) (arguing that Cold War politics was involved in asylum decisions and that "human rights violations are apparently relevant only if they promote U.S. foreign policy objectives," as evidenced by the fact that fifty percent of asylum seekers from communist countries were eventually granted asylum, while less than four percent of asylum seekers from El Salvador and Guatemala were granted asylum).

²¹ See *id.* at 553-54.

²² E.R. Shipp, *For Houses of Worship, Long History as Havens*, N.Y. TIMES, June 8, 1988, at B6; see also John M. Gannon, Note, *Sanctuary: Constitutional Arguments for Protecting Un-*

tions were able to provide sanctuary because, even though there was no law against it, federal immigration law enforcement rarely entered the property of religious institutions to make arrests for immigration violations.²³

Local governments also provided protection to undocumented immigrants, including immigrants from Guatemala and El Salvador, by passing laws that prohibited local law enforcement from reporting the immigrants to federal immigration authorities.²⁴ For example, in 1985, the city of Takoma Park in Maryland passed a resolution expressing concern that the United States was violating its commitment not to send refugees back to places where they would be subject to persecution, and that city employees were prohibited from cooperating with the federal Immigration and Naturalization Service (“INS”) in investigating undocumented immigrants.²⁵ Further, city employees were instructed neither to inquire about the immigration status of city residents nor to release any immigration information to federal authorities.²⁶ During the 1980s, four states and twenty-three cities, including New York, Chicago, and Washington, D.C., passed some form of law or resolution limiting local law enforcement cooperation with federal immigration authorities to investigate undocumented immigrants from Central America.²⁷

documented Refugees, 20 SUFFOLK U. L. REV. 949, 955 (1986) (“Sanctuary activists believe that history, moral strength, and Christian tenets obligate them to protect undocumented Central American refugees.” (footnote omitted)).

²³ See Shipp, *supra* note 22. This was not the first time in American history that religious institutions gave sanctuary to those whom they supported morally by doing something that was officially illegal: many religious institutions harbored fugitive slaves during the Civil War and attempted to protect conscientious objectors to the military draft during the Vietnam War. See Cohan et al., *supra* note 20, at 550–52.

²⁴ See, e.g., Cambridge, Mass., City Council Order No. 4 (Apr. 8, 1985), available at <http://www.rwinters.com/council/sanctuary1985.htm> (recognizing that “[t]he Immigration and Naturalization Service (INS), under advice from the U.S. Department of State, almost never grants petitions for political asylum under the Refugee Act of 1980 for refugees from El Salvador or Guatemala, and seldom for refugees from Haiti,” and ordering that no Cambridge government employee assist in investigating federal immigration law violations or inquire into the immigration status of any city residents).

²⁵ See Takoma Park, Md., Ordinance No. 2007-58 (Oct. 29, 2007), available at <http://www.takomaparkmd.gov/clerk/ordinance/2007/or200758.pdf> (reaffirming and describing the 1985 City of Refuge Ordinance); see also Pham, *supra* note 10, at 1383–84.

²⁶ See Pham, *supra* note 10, at 1383–84; see also Victor Merina, ‘A City of Sanctuary’: Council Committee Sees L.A. as a Haven for Guatemalans and Salvadorans Fleeing Persecution, L.A. TIMES, Nov. 23, 1985, Metro, at 1 (discussing the symbolic impact of city resolutions instructing local police not to cooperate with federal officials as an effort to protect the refugees in the city).

²⁷ See Pham, *supra* note 10, at 1383; see also Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 305–23 (1989)

B. Federal Legislative Reaction to the Sanctuary Movement

In 1996, Congress expressed its opposition to the noncooperation laws of the sanctuary movement by passing section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) of 1996²⁸ and section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996.²⁹ The House Conference Report that was appended to the bill of PRWORA stated that the drafters intended “to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens.”³⁰ The basic purpose of the two acts was to statutorily preempt the local governments from passing noncooperation laws, forcing local governments to allow communication between local government employees and the federal immigration enforcement authorities.³¹

Section 434 of PRWORA, titled “Communication between State and local government agencies and Immigration and Naturalization Service,” provides: “[N]o 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.”³² Section 642 of IIRIRA contains almost identical language, but further limits local governments’ authority to prohibit their employees from communicating with or transferring immigration information to the INS.³³ These acts worked to preempt any laws passed by local governments which prohibit local agencies or employees from reporting undocumented immigrants to federal immigration authorities.³⁴

(describing the different ways in which the local sanctuary laws of the 1980s were enacted—for example, by municipal executive orders or state legislative actions—and ultimately expressing doubt as to whether the laws were effective or constitutional).

²⁸ Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 § 434, 8 U.S.C. § 1644 (2006).

²⁹ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 642, 8 U.S.C. § 1373 (2006).

³⁰ H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 2183, 4649, quoted in *City of New York v. United States*, 179 F.3d 29, 32 (2d Cir. 1999).

³¹ See Pham, *supra* note 10, at 1384.

³² PRWORA § 434, 8 U.S.C. § 1644.

³³ See IIRIRA § 642, 8 U.S.C. § 1373.

³⁴ See Kittrie, *supra* note 8, at 1496; see also Karla Mari McKanders, *Welcome to Hazelton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 16 (2007) (claiming that section 642 of IIRIRA “un-

One noncooperation law that was preempted by the two 1996 federal acts was that of the largest city in the country, New York City.³⁵ In 1989, the Mayor of New York City, Edward Koch, issued Executive Order No. 124, which prohibited any city employee from reporting the immigration status of any individual to federal authorities, unless: (1) it was required by law, (2) the individual authorizes the immigration information to be transmitted to federal authorities, or (3) the individual had been engaging in criminal behavior.³⁶ Executive Order No. 124 was reissued by the subsequent mayors of New York City.³⁷

Shortly after the two federal acts were signed into law in 1996, the city of New York, led by Mayor Rudolph Giuliani, sued for injunctive relief against enforcement of the laws in an effort to maintain the validity of Executive Order No. 124.³⁸ The city claimed that sections 434 and 642 were facially unconstitutional and “violate[d] the Tenth Amendment because they directly forbid state and local government entities from controlling the use of information regarding the immigration status” obtained by city employees, and that the acts unconstitutionally interfered with the city’s control over its own workforce.³⁹ In *City of New York v. United States*,⁴⁰ the Second Circuit Court of Appeals rejected the city’s claims and upheld the constitutionality of the acts.⁴¹ The court stated that the legal “effect of those Sections here is to nullify an Order that singles out and forbids voluntary coop-

equivocally allows unrestricted communication between local authorities and the federal government”).

³⁵ See Kittrie, *supra* note 8, at 1497.

³⁶ City of N.Y., Exec. Order No. 124 (Aug. 7, 1989), available at http://courts.state.ny.us/library/queens/PDF_files/Orders/ord124.pdf; see also *City of New York v. United States*, 179 F.3d 29, 31–32 (2d Cir. 1999) (describing the order’s effect and history).

³⁷ See *City of New York*, 179 F.3d at 32.

³⁸ See *id.* at 33.

³⁹ *Id.*

⁴⁰ *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999).

⁴¹ See *id.* at 37. The court held “that states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.” *Id.* at 35. The court stated that a “system of dual sovereignties” would be dysfunctional if each could “hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s).” *Id.* Further, the federal laws here did not present the same Tenth Amendment concerns as did the laws in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), because here Congress was not “conscript[ing] states to enact or administer federal regulatory programs.” *City of New York*, 179 F.3d at 34.

eration with federal immigration officials.”⁴² Therefore, New York City’s Executive Order No. 124 was preempted by federal statute.⁴³

C. Current Noncooperation Laws

Shortly after the passage of the two federal acts in 1996, Guatemalans and Salvadorans became eligible for political asylum as refugees in the United States, diminishing the need for the sanctuary movement.⁴⁴ The importance of noncooperation laws has not decreased, however, because they remain at the center of the contentious debate over the extent to which local governments should use their limited resources in assisting federal immigration law enforcement.⁴⁵

1. The Purpose of Current Noncooperation Laws

After the terrorist attacks of September 11, 2001, the debate regarding noncooperation laws has focused primarily on the enforcement of federal immigration laws and unreported crime in the undocumented immigrant community. Noncooperation laws of today are no longer focused on the protection of political refugees from Central America.⁴⁶

The purpose of current noncooperation laws is to encourage undocumented immigrants to feel comfortable approaching local law enforcement and to increase the ability of police to fight crime in their communities.⁴⁷ Undocumented immigrants are frequently the victims of crime, fraud, and exploitation, because criminals know that they are easy prey who will be reluctant to report crimes to local police.⁴⁸ One local police official noted that undocumented immigrants “are almost the perfect victims They cannot turn to authorities because they have problems with their legal status They’re prime for the picking.”⁴⁹ Some New Haven, Connecticut, police officials said that un-

⁴² *City of New York*, 179 F.3d at 37.

⁴³ *Id.*

⁴⁴ See Pham, *supra* note 10, at 1385.

⁴⁵ See, e.g., Hethmon, *supra* note 10, at 84–92 (describing the debate over whether state and local law enforcement authorities are authorized, or possibly even required, to assist federal immigration law enforcement).

⁴⁶ Cf. Pham, *supra* note 10, at 1386 (discussing influence of September 11, 2001 attacks on today’s noncooperation laws).

⁴⁷ See *supra* note 12.

⁴⁸ See Kittrie, *supra* note 8, at 1454–55.

⁴⁹ Wendy Lin, *Immigrants Fear Fighting Back*, NEWSDAY (New York), June 10, 1991, at 23 (quoting James Hubert, chief of the antibias unit of the Queens County District Attorney’s Office).

documented immigrants are viewed by criminals as “walking A.T.M.’s” because they are easy victims who will not report the crimes committed against them.⁵⁰ Because undocumented immigrants are reluctant to report crime committed against them, local police are often unable to protect them from continually being victimized.

Not only is unreported crime harmful to undocumented immigrant communities, it allows criminals to remain free to attack any member of the general community—undocumented immigrant or citizen. “If an undocumented woman is raped and doesn’t report it, the suspect who raped that woman . . . could be the suspect who rapes someone else’s sister, mother or wife later,” said Los Angeles Police Department Assistant Chief George Gascon to the *Los Angeles Times*.⁵¹ Encouraging all residents to feel comfortable in reporting crimes to police and to be an active part of the community is in the best interest of both undocumented immigrants and citizens. The goal of noncooperation laws is to open lines of communication between the local police and undocumented immigrants by limiting local enforcement of federal immigration law.⁵²

2. *Forms of Current Noncooperation Laws*

Many of the largest cities in the United States have enacted some form of noncooperation policy limiting the cities’ involvement in federal immigration law enforcement, including Baltimore, Chicago, Denver, Detroit, Houston, Los Angeles, Minneapolis, New York City, Philadelphia, San Francisco, Seattle, and Washington, D.C.⁵³ A small number of states, including Alaska, Maine, and Oregon, have also adopted noncooperation policies.⁵⁴

Local governments that have decided to limit their cooperation with federal immigration law enforcement have enacted various types of noncooperation laws. The laws have been instituted through both

⁵⁰ Jennifer Medina, *New Haven Welcomes Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, at B1.

⁵¹ Richard Winton & Daniel Yi, *Police Split on Plan for Migrant Checks*, L.A. TIMES, Jan. 23, 2006, at B1.

⁵² In describing the goal of her city’s noncooperation policy, the District Attorney of San Francisco, Kamala Harris, stated: “It is a trademark of a criminal predator to convince victims that because of the victims’ immigration status that they—not the predator—will be treated as the criminal.” Jesse McKinley, *San Francisco to Advertise City as Being Safe for Undocumented*, SAN DIEGO UNION-TRIB., Apr. 6, 2008, at A4. According to Harris, the city adopted its noncooperation policy “to remove that tool from the criminal’s tool belt.” *Id.*

⁵³ See Kittrie, *supra* note 8, at 1466–68 & nn.98–109 (noting and citing each city policy).

⁵⁴ See Jesse McKinley, *Immigrant Protection Rules Draw Fire*, N.Y. TIMES, Nov. 12, 2006, at 22.

executive and legislative means, including city council resolutions, municipal ordinances or statutes, mayoral executive orders, and police chief policy statements.⁵⁵ There are four main types of noncooperation laws: (1) laws prohibiting local government agencies from discriminating on the basis of immigration status or country of origin when providing government services, (2) laws prohibiting the use of government resources, particularly police resources, in cooperating with enforcement of federal immigration laws, (3) laws instructing local government employees not to inquire into the immigration status of any resident, and (4) laws prohibiting government employees from transmitting the immigration information of any resident to federal immigration authorities.⁵⁶

Local government resolutions that proclaim the government's commitment not to discriminate on the basis of citizenship or country of origin are not typical noncooperation laws. Nondiscrimination resolutions do not limit local cooperation in federal immigration enforcement, but attempt to limit racial profiling by local police and government agencies, a common consequence of local enforcement of federal immigration law.⁵⁷ For example, a nondiscrimination resolution passed by the Minneapolis City Council in April of 2003, states: "Be It Further Resolved that the Minneapolis Police Department not engage in profiling based on race, ethnicity, citizenship, religious or political affiliation."⁵⁸ Many of these resolutions are accompanied by more general statements regarding the local government's equal protection policies.⁵⁹ Many local government nondiscrimination resolutions were passed in response to concern that section 412 of the USA PATRIOT Act,⁶⁰ passed in October of 2001, would encourage racial profiling by law enforcement to the detriment of foreign nationals and racial minorities.⁶¹

⁵⁵ See Kittrie, *supra* note 8, at 1474; Pham, *supra* note 10, at 1388.

⁵⁶ See Pham, *supra* note 10, at 1389–91 (categorizing common noncooperation laws into five forms).

⁵⁷ See *id.* at 1389 & n.75.

⁵⁸ Minneapolis, Minn., City Council Res. 2003R-109 (Apr. 4, 2003), Minneapolis City Council Official Proceedings 259, 260 (2003), available at <http://www.ci.minneapolis.mn.us/council/2003-meetings/20030404/20030404-proceedings.pdf>.

⁵⁹ See Pham, *supra* note 10, at 1389.

⁶⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 § 412, 8 U.S.C. § 1226a (2006).

⁶¹ See Kittrie, *supra* note 8, at 1474; Minneapolis, Minn., City Council Res. 2003R-109, Minneapolis City Council Official Proceedings, at 260 (expressing concern that § 412 of the USA PATRIOT Act threatens individual civil liberties and "specifically target[s] foreign nationals and encourages the profiling of Muslims and people of Middle Eastern and South Asian descent, but

The second type of noncooperation law restricts local government resources from being used to enforce immigration laws, thereby likely conserving the limited resources of the local government.⁶² San Francisco has a law that provides: “No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law”⁶³ Laws like this often further state that it is the federal government’s responsibility to enforce immigration laws.⁶⁴ The local governments do not want to get into the business of enforcing federal immigration law and feel that their resources are stretched far enough in meeting the needs of their residents and battling crime.⁶⁵

The third type of noncooperation law restricts local government employees from inquiring about the immigration status of residents who seek government or police services.⁶⁶ For example, Seattle added a section to its municipal code that provides that “no Seattle City officer or employee shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person.”⁶⁷ These laws have been referred to as incorporating a “don’t ask” approach by some commentators.⁶⁸ “Don’t ask” noncooperation laws were passed in response to the 1996 federal statutes that preempted local governments from prohibiting their employees from reporting on the immigration status of any person to federal immigration authorities.⁶⁹

could potentially affect anyone in the United States acting and speaking legally in opposing government policy”).

⁶² See Pham, *supra* note 10, at 1390.

⁶³ S.F., CAL., ADMIN. CODE § 12H.2 (1989), available at http://www.sfgov.org/site/sanctuary_page.asp?id=81004#sec12h2.

⁶⁴ Pham, *supra* note 10, at 1390.

⁶⁵ Cf. McKinley, *supra* note 54 (quoting San Francisco Supervisor Gerardo C. Sandoval as stating, “If [the federal authorities] want to enforce the law, they should put troops on the ground to do that,” in defense of the City’s noncooperation policy as necessary because the federal government was trying to pass the cost of immigration enforcement after having failed to secure the borders).

⁶⁶ See Pham, *supra* note 10, at 1390.

⁶⁷ SEATTLE, WASH., MUNICIPAL CODE ch. 4.18, § 4.18.015 (2003), available at <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CODE&s1=4.18.015.snum.&Sect5=CODE1&Sect6=HITOFF&l=20&p=1&u=/~public/code1.htm&r=1&f=G>; see also S.F., CAL., ADMIN. CODE § 12H.2 (proclaiming that “[n]o department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources . . . to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco” unless required by law or court order).

⁶⁸ See Kittrie, *supra* note 8, at 1474.

⁶⁹ See Pham, *supra* note 10, at 1390–91.

After having its noncooperation laws preempted by the 1996 statutes, New York City now has a “don’t ask” law for its city employees under Executive Order No. 41, which was enacted by Mayor Michael Bloomberg in September of 2003.⁷⁰ The idea is that if government employees are instructed not to ask about a person’s immigration status, there will be no information that the local government employees could report to federal immigration enforcement.⁷¹ The “don’t ask” laws actually serve as de facto “don’t ask, don’t tell” laws, because by not asking, the city employees are left with nothing to tell.⁷²

The fourth type of noncooperation law is one that restricts local government employees from reporting on the immigration status of any resident to federal authorities. The State of Maine has such a noncooperation law.⁷³ The Maine policy defines “confidential information” to include “immigration status,” and states that this confidential information can only be disclosed to federal authorities if: (1) the individual is suspected of engaging in illegal activity other than undocumented status, (2) disclosure of the individual’s immigration status is necessary to apprehend an individual suspected of a crime other than undocumented status, (3) disclosure is necessary to investigate possible terrorist threats, or (4) disclosure is required by law.⁷⁴

This fourth type of noncooperation law was likely preempted by the two federal acts in 1996 that prohibited local governments from restricting their employees from disclosing information to federal authorities.⁷⁵ Noncooperation laws rarely have been challenged in the courts, however, and they often remain on the books at the local level.⁷⁶ Even New York City’s original no-disclosure policy was held by the courts to be preempted by the federal statutes only *after* the

⁷⁰ See City of N.Y., Exec. Order No. 41 (Sept. 17, 2003), available at http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf (“Law enforcement officers shall not inquire about a person’s immigration status unless investigating illegal activity other than mere status as an undocumented alien.”).

⁷¹ See Pham, *supra* note 10, at 1391.

⁷² See Ronald Brownstein, *Is It ‘Sanctuary,’ or Is It Simple Practicality?*, FORT WORTH STAR-TELEGRAM, Aug. 26, 2007, at 1E (noting that New York currently has a “don’t ask, don’t tell” policy which “usually leaves local officials with no information to share except . . . in criminal cases”).

⁷³ See Governor of Maine, John E. Baldacci, Exec. Order, An Order Concerning Access to State Services by All Entitled Maine Residents (Apr. 9, 2004), available at http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=21351&v=Article.

⁷⁴ *Id.*

⁷⁵ See Pham, *supra* note 10, at 1391 (“[I]t is apparent that at least one category of non-cooperation provisions—no notifying federal immigration authorities—is preempted.”).

⁷⁶ Cf. Hethmon, *supra* note 10, at 95 (“[A] growing number of municipal governments . . . have enacted such measures and have not experienced hostile legal challenges.”).

city sought an injunction to affirmatively challenge the constitutionality of the statutes, and not in an action brought against the city.⁷⁷ Therefore, some of the no-disclosure policies remain in force, despite the federal statutory preemption.⁷⁸

D. *The Recent Political Climate Surrounding Noncooperation Laws*

The debate over noncooperation laws, and whether federal or local law enforcement should be responsible for enforcing immigration law, is currently at the forefront of political discussion. Proponents of the controversial noncooperation policies argue that they are necessary for local governments to fight crime in their communities while the country waits for the federal government to reform the immigration system and to decide what should be done with the millions of undocumented immigrants in the United States.⁷⁹ On the other hand, critics argue that noncooperation policies evade federal immigration laws, inhibit the investigation of terrorists inside the United States, and encourage more undocumented immigrants to enter the country illegally.⁸⁰

City and state governments in the country are currently debating the extent that their local law enforcement should be involved in enforcing federal immigration laws. Many local governments are looking for new ways to encourage undocumented immigrants to connect in the community, and in some cases are meeting strong resistance.⁸¹ Other local governments are working in the opposite direction and are looking to have their local law enforcement take a more active role in federal immigration law enforcement.⁸² Immigration reform is

⁷⁷ See *City of New York v. United States*, 179 F.3d 29, 31–33 (2d Cir. 1999).

⁷⁸ See, e.g., *An Order Concerning Access to State Services by All Entitled Maine Residents*, *supra* note 73.

⁷⁹ See Pham, *supra* note 10, at 1399 (“[S]ome of the strongest advocates of non-cooperation laws . . . argue that the involvement of [police] employees in immigration law enforcement (or even the *perception* of involvement) will hinder their ability to investigate and prevent crimes throughout their jurisdictions . . .” (footnote omitted)).

⁸⁰ See Laurel R. Boatright, Note, “*Clear Eye for the State Guy*”: *Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1647–48 (2006) (summarizing arguments supporting local enforcement of federal immigration laws).

⁸¹ See, e.g., Danny Hakim, *Spitzer Dropping His License Plan*, N.Y. TIMES, Nov. 14, 2007, at A1 (noting the tremendous opposition that forced New York Governor Spitzer to abandon his attempt to provide driver licenses to undocumented immigrants in an effort to bring undocumented immigrants “out of the shadows”).

⁸² See McKanders, *supra* note 34, at 3 (discussing the local municipal ordinances passed by Hazelton, Pennsylvania that sought to control immigration by fining landlords who rented to undocumented immigrants, suspending the licenses of businesses that employed undocumented

a major issue in political discussion today and noncooperation policies will likely play a large role in the course of the debate.⁸³

At the federal level, there have been several recent legislative attempts to discourage local governments from enacting noncooperation policies. The proposed Clear Law Enforcement for Criminal Alien Removal (“CLEAR”) Act of 2007⁸⁴ is a representative example of the ongoing attempt to legislate at the federal level against noncooperation policies. The CLEAR Act was first introduced into the House of Representatives in 2003⁸⁵ and again in 2005⁸⁶ and 2007.⁸⁷ The proposed CLEAR Act would provide that: (1) local law enforcement personnel are fully authorized to assist federal authorities in enforcing immigration law,⁸⁸ and (2) any state that still has a statute or policy prohibiting enforcement of federal immigration laws by its local law enforcement in two years will not receive specific federal funds for the state’s incarceration system.⁸⁹ The CLEAR Act was referred to the House Judiciary Committee and was not enacted by the close of the 110th Congress.⁹⁰ Even if federal legislation like the CLEAR Act were to be enacted, it may not be any more effective at curbing non-

immigrants, and making English the official language of the city). Some local governments, such as the city of Escondido, California, have also attempted to apply local pressure on undocumented immigrants by requiring landlords to verify potential tenants’ immigration status before renting their properties, thereby discouraging undocumented immigrants from living in their jurisdictions. See ROGER HEDGECOCK, *THE 2008 CONSERVATIVE VOTER’S FIELD GUIDE: #1—IMMIGRATION 14* (2007).

⁸³ The 2007 presidential primary debates put the national spotlight on noncooperation policies. Most of the Democratic candidates said that they would allow “sanctuary cities” to continue not to cooperate with federal immigration law enforcement in the absence of “comprehensive immigration reform.” See Donald Lambro, *Democrats Split on Total Pullout*, WASH. TIMES, Sept. 27, 2007, at A4; Michael Coleman, *Gov. Stands Out at Debate*, ALBUQUERQUE J., Sept. 27, 2007, at A11. The Republican presidential candidates were actively hostile to noncooperation policies and stated that the local governments are frustrating the federal immigration law enforcement efforts. See Wyatt Buchanan, *City Has a Plan for Immigrant ID Card*, S.F. CHRON., Sept. 7, 2007, at B4. For example, Mitt Romney, the former governor of Massachusetts, declared that as president he would “cut back federal funds to cities that provide sanctuary to illegal immigrants,” and sharply criticized former New York City Mayor Rudolph Giuliani for the noncooperation policies of the city he governed. See *id.*

⁸⁴ Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2007, H.R. 3494, 110th Cong. (2007).

⁸⁵ H.R. 2671, 108th Cong. (2003).

⁸⁶ H.R. 3137, 109th Cong. (2005).

⁸⁷ CLEAR Act, H.R. 3494, 110th Cong. (2007).

⁸⁸ See *id.* § 2.

⁸⁹ See *id.* § 3.

⁹⁰ See Library of Congress, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03494>: (last visited Jan. 31, 2009).

cooperation policies than the two federal acts passed in 1996 that had the same goal.

II. Effectiveness of Noncooperation Policies and Confusion in the Undocumented Immigrant Community

Noncooperation policies are only valuable to local governments if they are effective in encouraging communication between undocumented immigrants and local police to better fight crime.⁹¹ Los Angeles' noncooperation policy, originally enacted in 1979, justifies limiting local police involvement with immigration law by stating that "[p]articipation and involvement of the undocumented alien community in police activities will increase the Department's ability to protect and to serve the entire community."⁹² The purpose of noncooperation policies is to limit local police involvement in the enforcement of federal immigration laws, so that undocumented immigrants will feel that they can converse with the city police and officials without fear of deportation.⁹³ This increased communication is supposed to aid in investigating crime to the betterment of the community.

If the undocumented immigrants do not understand the implications of the noncooperation policies, however, the undocumented immigrants will continue to fear the police.⁹⁴ Unless the noncooperation

⁹¹ Although the primary motivation behind noncooperation policies is to encourage undocumented immigrants to report crime to local police by reducing the specter of the possibility of deportation by local law enforcement, there are at least two other secondary justifications for noncooperation policies that will not be fully discussed in this Note. One justification that is often given for noncooperation policies is that it is the federal government's responsibility to enforce immigration laws, and to ask the local governments to tackle this responsibility would constitute an unfunded mandate and a strain on the local governments' resources. See Kittrie, *supra* note 8, at 1477; see also H.R. Con. Res. 19, 111th Cong. (2009) (referred to Subcomm. On Immigration, Citizenship, Refugees, Border Security, and Int'l Law, Feb. 9, 2009) (suggesting legislation should be passed to ease burden on local governments enforcing immigration laws). Also, other commentators have justified noncooperation laws on the basis that if local law enforcement were asked to enforce immigration, their lack of specific training would likely lead to racial profiling of both recent immigrants and citizens. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102–03 (2004); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119–23 (2007).

⁹² L.A., CAL., Chief of Police Special Order No. 40 (Nov. 27, 1979), available at <http://keepstuff.homestead.com/Spec40orig.html> (codified as amended at 1 L.A. POLICE DEP'T MANUAL § 390 (2008), available at http://www.lapdonline.org/lapd_manual/volume_1.htm#390).

⁹³ See Medina, *supra* note 50 (quoting the Mayor of New Haven, Connecticut: "The last thing you want is [undocumented immigrants] not to talk to City Hall because they are afraid of us.").

⁹⁴ See Kittrie, *supra* note 8, at 1483 ("[V]ictimised unauthorized aliens who are confused

policies can be made known to and understood by undocumented immigrants, they do not serve their main purpose and local police officers will be no better off in their investigation of crime.

Noncooperation policies in the United States are currently ineffective because undocumented immigrants are confused about how they operate or are unaware of the laws of a given jurisdiction and “are likely to play it safe and not report the crime” rather than risk deportation.⁹⁵ There are three main reasons why noncooperation policies are not well understood by undocumented immigrants and are therefore ineffective. First, many cities and counties have noncooperation policies while their neighboring jurisdictions do not, and undocumented immigrants may not be aware whether the jurisdiction they are in has noncooperation policies. Second, the noncooperation policies in many localities differ greatly in substance, and undocumented immigrants may have different levels of protection when disclosing immigration information from one jurisdiction to the next. Third, the noncooperation laws are not understandable or well publicized to members of the undocumented community they are meant to benefit.

A. Localities with Noncooperation Laws Adjacent to Localities with Strict Local Immigration Enforcement

The varying consequences of noncooperation policies are challenging for undocumented immigrants to comprehend partly because neighboring jurisdictions have contradictory stances toward the involvement of their local police in the enforcement of federal immigration law. Many local jurisdictions that have noncooperation policies are adjacent to localities that either do not have noncooperation policies or are actively participating in enforcing federal immigration law.⁹⁶ For example, the Los Angeles Police Department has long had noncooperation policies that prohibit local police officers from inquiring about the immigration status of the people in the city.⁹⁷ Directly to the south of Los Angeles, however, Orange County is actively seeking to send its local sheriff’s deputies for special training by federal Immigration and Customs Enforcement on how they can locally en-

as to how the policy in their jurisdiction operates are likely to play it safe and not report the crime.”).

⁹⁵ *Id.*

⁹⁶ *Cf. id.* at 1482 (“Although many localities, including most major cities, in the United States now have sanctuary policies, many others do not.”).

⁹⁷ *See* Winton & Yi, *supra* note 51; *see also supra* note 92 and accompanying text.

force federal immigration law.⁹⁸ Within Orange County itself, there are at least three cities that also want to train their municipal police officers to enforce immigration law while another Orange County city, Irvine, has enacted noncooperation policies.⁹⁹

This example from Southern California is just one of many instances in the United States where neighboring jurisdictions have opposite stances on noncooperation policies.¹⁰⁰ An undocumented immigrant living in Southern California would be able to report a crime to police in Los Angeles without fear of being interrogated about his immigration status, whereas he should fear being reported to federal immigration law enforcement if he steps over the county line into Orange County to speak to local law enforcement there. Understandably, an undocumented immigrant would not feel comfortable speaking with the local police when the immigration consequences vary so drastically from one jurisdiction to the next, and it is not easy to know the effects of the laws in each jurisdiction.

B. *Varying Consequences of Different Noncooperation Policies*

Further complicating the situation for undocumented immigrants is the fact that even in localities that do have noncooperation policies, the policies can differ greatly in their substantive effects. For example, Professor Orde F. Kittrie argued that there could be different consequences for an undocumented immigrant for disclosing his immigration status in a locality that has a “don’t ask” policy as opposed to a “don’t ask, don’t tell” policy.¹⁰¹ If an undocumented immigrant self-disclosed his immigration status in a “don’t ask, don’t tell” jurisdiction he would have no cause for concern because the police officer or government official would not be permitted to report that information to federal authorities.¹⁰² On the other hand, if the jurisdiction only had a “don’t ask” policy, once the undocumented immigrant self-disclosed his immigration status, the police officer or city official would be free to report his immigration status to federal immigration law enforcement.¹⁰³

⁹⁸ Winton & Yi, *supra* note 51.

⁹⁹ *Id.* (quoting Irvine Mayor Beth Krom: “Why create an environment that pits neighbor against neighbor or causes a person in line at the grocery store to look suspiciously around?”).

¹⁰⁰ *See, e.g.,* Maria Sacchetti, *Not All Find Comfort in Sanctuary Designation*, BOSTON GLOBE, Nov. 1, 2007, at A1 (describing reactions to the differing policies of Massachusetts cities Cambridge and neighboring Everett towards noncooperation laws).

¹⁰¹ Kittrie, *supra* note 8, at 1483.

¹⁰² *See id.*

¹⁰³ *See id.* (“For example, in a jurisdiction which takes a ‘don’t ask’ but not a ‘don’t tell’

C. *Poor Publication and Understandability of the Policies*

Finally, most localities with noncooperation laws do not publicize the consequences of the policies in a manner that is accessible and understandable to undocumented immigrants. Most noncooperation policies are only accessible as legal memoranda that are written in English.¹⁰⁴ The policies are directed as instructions to police officers and city officials, and are not written to inform the undocumented immigrants of the consequences of their interaction with local police.¹⁰⁵ Legal scholars have argued that noncooperation laws fail to encourage undocumented immigrants to report crime in their communities because the immigrants do not understand the legal consequences of the policies.¹⁰⁶ At a congressional hearing, Professor Kris Kobach stated: “[Undocumented immigrants] don’t know the niceties of whether it is a State authority or a local authority or a Federal authority. The smart thing for [them] to do is to avoid all contact with law enforcement.”¹⁰⁷ If the undocumented immigrants are not aware of the legal consequences of the noncooperation policies, then the policies will not encourage undocumented immigrants to report crimes. As a result, therefore, this lack of awareness subverts the primary goal of the locality’s noncooperation policy.

Because noncooperation policies are enacted in nonadjacent localities, the policies of different localities have varying legal consequences, and the consequences of the policies are not well publicized or easily comprehensible to undocumented immigrants, the policies are not effective in dispelling the apprehension that undocumented immigrants have about communicating with local police. For noncooperation policies to encourage undocumented immigrants to report crimes to the police, they must be more readily understood and well known in the undocumented immigrant community.

approach, an unauthorized alien who self-discloses his status, for example by nervously blurting it out, could end up being deported.”).

¹⁰⁴ See *id.* at 1483–84 (describing language difficulty); see also, e.g., City of N.Y., Exec. Order No. 41 (Sept. 17, 2003); SEATTLE, WASH., MUNICIPAL CODE ch. 4.18, § 4.18.015 (2003).

¹⁰⁵ See, e.g., 4 L.A. POLICE DEP’T MANUAL § 264.50 (2008), available at http://www.lapdonline.org/lapd_manual/volume_4.htm#264.50 (“Officers shall not initiate police action where the objective is to discover the alien status of a person. Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).”).

¹⁰⁶ See *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. 19 (2004) (statement of Professor Kris W. Kobach).

¹⁰⁷ *Id.*

*III. A Proposal for a Uniform Noncooperation Policy to Be
Enacted by Local Governments*

A. The Benefits of a Uniform Noncooperation Policy

For noncooperation policies to be better understood and better known by undocumented immigrants, all local governments that decide to have noncooperation policies should agree to enact the same uniform noncooperation policy. A comprehensive noncooperation policy can be drafted by selecting from the various forms of noncooperation laws in effect today to create the best overall policy that will encourage undocumented immigrants to communicate with local police. Such a uniform policy would eliminate or ameliorate the deficiencies of current noncooperation policies outlined in the previous part of this Note.

One deficiency of the current noncooperation policies that a uniform policy would effectively eliminate is the varying substance between policies of different localities. In any locality that enacted the uniform noncooperation policy, the legal consequences of communicating with the local police would be identical from jurisdiction to jurisdiction. No longer would there be a difference between a city that had a “don’t ask” policy and a city with a “don’t ask, don’t tell” policy. Once the legal consequences of the uniform noncooperation policy became understood by undocumented immigrants, they would only need to determine if the jurisdiction they are in has enacted the policy to know the effects of the noncooperation policy in that locality. A uniform policy would not solve the problem caused by neighboring jurisdictions that take opposite stances on local involvement in immigration enforcement, but the distinction would be clearer. Either the city would have the uniform policy or it would not.

The debate that would ensue when localities discuss enacting the uniform noncooperation policy would also help address the ineffectiveness caused by the lack of common knowledge about noncooperation policies. The decision on whether to enact the uniform policy would encourage public and political discussion on the topic, shedding light on the goals of the policies and how they would work. Not only would this public debate inform citizens about the laws, but undocumented immigrants would also be exposed to more information about the legal consequences of the policies. Further, the public debate might encourage more localities without noncooperation policies to reconsider that position, after seeing that cities like New York, Los Angeles, and Houston have found these exact same policies to be beneficial.

A uniform noncooperation policy enacted at the local level would be consistent with ideals of federalism.¹⁰⁸ Within the concept of federalism is the idea that local governments are best at solving certain issues at the local level, allowing the democratic participation of the citizens to affect the issues facing their communities. Citizens of cities and counties have a closer relationship with the leaders of their local governments and can hold their decisionmakers accountable through the ballot box.¹⁰⁹ If the federal government has failed to enforce federal immigration law consistently, the local governments should democratically decide how their city or county will respond to the undocumented immigrants in their regions. This uniform noncooperation policy would provide an opportunity for local governments to decide for themselves if they want to have their law enforcement involved in enforcing immigration law and not have the decision imposed on them by a federal law.

B. The Uniform Noncooperation Policy

The comprehensive uniform noncooperation policy should have three main substantive components: (1) a recommitment of the local government agencies and police department not to discriminate on the basis of suspected immigration status or country of origin, (2) a prohibition on the use of local government resources in assisting the federal immigration law enforcement, and (3) a restriction on local government employees from inquiring into the immigration status of any resident. Further, the uniform policy must be written in a manner that is understandable to undocumented immigrants and published in a manner that is likely to reach them.

1. The Components of the Uniform Policy

The first two components of the proposed uniform policy are found in some noncooperation policies, but should be in force in every jurisdiction with a noncooperation policy. The first component of the uniform noncooperation policy, the commitment not to discriminate, will reiterate that undocumented immigrants have the right to use local government services and police protection.¹¹⁰ Moreover, a com-

¹⁰⁸ See Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 *DENV. U. L. REV.* 1061, 1069–73 (2007).

¹⁰⁹ See *id.* at 1071.

¹¹⁰ In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that undocumented immigrants are “persons” under the terms of the Fifth and Fourteenth Amendments, and were entitled to equal protection under the laws of the federal, state, and local governments. See *id.* at

mitment not to discriminate on the basis of immigration status will remind government employees and police officers of their duty to treat all people in their jurisdiction equally, regardless of their suspected immigration status.

The second component of this uniform policy, the prohibition on the use of local government resources in the enforcement of federal immigration law, will instruct police officers not to cooperate with federal immigration law enforcement or federal Immigration and Customs Enforcement raids in their community. This is an essential part of the policy, because it will allow the undocumented immigrants to view the local law enforcement as distinct from the federal immigration authorities who deport undocumented immigrants. If local law enforcement cooperates with federal immigration authorities in investigating undocumented immigrants, the immigrants will not feel comfortable reporting crimes to the same officers. Although local law enforcement does not have the authority to interfere with federal raids, they would have the obligation, under this policy, to refrain from assisting in the enforcement of federal immigration law.¹¹¹

The third component of the uniform noncooperation policy should be a restriction on local government employees and police officers from inquiring into the immigration status of people within their jurisdiction. This would be a “don’t ask” policy and should be similar to New York City’s Executive Order No. 41.¹¹² Local government employees would be instructed not to inquire into the immigration status of a person, unless (1) the person is suspected of engaging in illegal activity other than the suspicion of having violated federal immigration laws, or (2) information regarding the immigration status of the

211–12 (recognizing that the Fifth and Fourteenth Amendments “protect an identical class of persons”); *id.* at 214–15 (concluding that undocumented immigrants may claim benefit of Fourteenth Amendment). In *Plyler*, the Court found that the benefits of a public elementary school education could not be withheld from undocumented immigrant children in Texas based on their immigration status alone. *Id.* at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”). This case provides that local government services must be equally available to undocumented immigrants.

¹¹¹ Local governments are federally preempted from frustrating federal immigration regulatory schemes, but usually may enforce immigration laws that are consistent with the federal scheme. See Jay T. Jorgensen, Note, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 911–14 (1997); see also *De Canas v. Bica*, 424 U.S. 351, 354–56 (1976) (stating that “[p]ower to regulate immigration is unquestionably exclusively a federal power,” but that state action that is harmonious with the federal regulation is not necessarily federally preempted).

¹¹² City of N.Y., Exec. Order No. 41 (Sept. 17, 2003).

person is necessary to apprehend another person who is either engaging in illegal activity or potential terrorist activity.¹¹³

This policy would strike a balance between the need to shield undocumented immigrants from the risks of deportation when interacting with local government employees, and the government's interest in deporting undocumented immigrants who themselves have engaged in criminal activity. Further, a "don't ask" policy is preferable to a "don't ask, don't tell" policy because the latter type of policy was preempted by the two federal acts passed in 1996.¹¹⁴ Rather than risk a legal challenge to the uniform policy, it would be better to have a simple "don't ask" policy, which essentially accomplishes the same end as a "don't ask, don't tell" policy because it leaves the city employees with no immigration information to report.

2. *The Accessibility of the Uniform Policy and Its Publication*

The uniform noncooperation policy must be presented in a format that is accessible and understandable to undocumented immigrants. The policy should be written both as guidance to local government employees and police officers (who would be obligated to perform according to the policy), and to inform undocumented immigrants about the noncooperation policies. For example, New York City has a pamphlet available on its website which explains the legal consequences of Executive Order No. 41 to the immigrant community.¹¹⁵ The pamphlet has a section titled "How Does the Mayor's Privacy Policy Affect Immigrants?," which explains the legal consequences of the noncooperation policy from the standpoint of an immigrant.¹¹⁶ The section explains: "If you are the victim or witness of a crime, or if you call or approach the police seeking assistance, police officers will not inquire about your immigration status."¹¹⁷ Also, the pamphlet explains that if police officers suspect the person is engaged in illegal activity, the officer may ask about immigration status.¹¹⁸ This is an honest and clear way to inform the immigrant community of the practical effects that policy will have on them. Further, the website

¹¹³ See *id.* §§ 2–3.

¹¹⁴ See *supra* Part I.B.

¹¹⁵ See CITY OF N.Y., MAYOR'S OFFICE OF IMMIGRANT AFF., MAYOR BLOOMBERG'S EXECUTIVE ORDER 41 PROTECTS ALL NEW YORKERS, available at <http://www.nyc.gov/html/imm/downloads/pdf/eo41english.pdf>.

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* ("However, if police officers suspect illegal or criminal activities, they may ask you about your immigration status and/or disclose that information.").

provides this same information in Spanish, Chinese, Urdu, Russian, and Korean.¹¹⁹

While the information available on the New York City website is a step in the right direction, many undocumented immigrants do not have access to the internet. Therefore, local governments should also publicize their noncooperation policies through common visible advertising methods, such as by placing advertisements on the sides of buses and on billboards in areas frequented by undocumented immigrants.¹²⁰ The uniform noncooperation policy should be explained clearly, from the standpoint of an immigrant and in several different languages common to the local undocumented immigrant communities.¹²¹

C. *The Disadvantages of a Federal Solution to Incongruous Noncooperation Policies*

Professor Kittrie recognized the ineffectiveness of noncooperation laws caused by the “confusion” of the “current hodgepodge” of noncooperation policies enacted in various localities throughout the United States.¹²² Professor Kittrie proposes the enactment of a federal statute that would prohibit law enforcement officials from reporting any immigration information that may come to light when an individual reports crime to the police as either a victim or a witness.¹²³ He advocates that this federal statute borrow from the language used

¹¹⁹ See City of N.Y., Mayor’s Office of Immigrant Aff., Executive Order 41, Privacy Policy, <http://www.nyc.gov/html/imm/html/executive/eo41.shtml> (last visited Jan. 31, 2009).

¹²⁰ Some local governments have utilized creative advertising methods, such as bus advertising, in their public awareness campaigns aimed at specific populations. See, e.g., Cheryl Clark, *County Health Campaign Stresses Flu Preparation*, SAN DIEGO UNION-TRIB., May 29, 2007, at B2 (describing county-sponsored public service announcements in the form of bus signs and billboards to educate the community about flu season preparation); NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., CLICK IT OR TICKET MAY 2008 MOBILIZATION STRATEGIC MEDIA WORK PLAN (2008), available at <http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Click%20it%20or%20Ticket/Articles/Associated%20Files/MediaWorkPlan2008.pdf> (detailing budget and plan for public service announcements about seatbelt safety).

¹²¹ See, e.g., McKinley, *supra* note 52 (describing San Francisco’s advertising campaign to publish multilingual brochures and to air multilingual commercials that inform undocumented immigrants in the city that the local officials will not report them to the federal authorities).

¹²² See Kittrie, *supra* note 8, at 1506.

¹²³ See *id.* at 1503.

in the federal use and derivative use immunity statute¹²⁴ for this similar immigration statute.¹²⁵

The uniform noncooperation policy proposed by this Note is a better option than a federal statute for several reasons. First, noncooperation policies have been enacted by local governments in response to the large number of undocumented immigrants that are in their localities as a direct result of the federal government's failure to enforce its immigration laws. Any federal action in this area should not attempt to improve the noncooperation laws of local governments, but should focus on rebuilding the national system of immigration law enforcement.

Second, a federal solution to this problem is inconsistent with the principles of federalism because the federal government would instruct the local law enforcement how to treat undocumented immigrants in their communities. However, the uniform noncooperation policy proposed here would allow the democratic powers of the local government to determine if the local law enforcement should cooperate with the enforcement of federal immigration law.

Third, and finally, it is extremely unlikely that the federal government would ever pass a law to improve the noncooperation of local governments. The federal government would be in favor of any help that local governments would provide in enforcing immigration law and would not want to encourage noncooperation.

Conclusion

Noncooperation policies that encourage undocumented immigrants to report crimes to local law enforcement are beneficial to cities and counties because they help the local police fight the crime that affects all residents. Noncooperation policies are only effective, however, if the undocumented immigrants understand the policies that are in effect in any given jurisdiction and their practical consequences. By eliminating the inconsistencies between the noncooperation policies in the jurisdictions that have enacted them and fostering public debate

¹²⁴ 18 U.S.C. § 6002 (2006). The federal use and derivative use immunity statute was passed by Congress in 1970. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 927 (codified as amended at 18 U.S.C. § 6002 (2006)). The statute balances the government's need for witness testimony in prosecuting crimes with the witnesses' Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege is not violated when the government compels incriminating testimony so long as the testimony is immunized. *See* 18 U.S.C. § 6002. This statute provides that compelled testimony, as well as any evidence discovered through investigatory use of the compelled testimony, is immunized. *See id.*

¹²⁵ *See* Kittrie, *supra* note 8, at 1503.

about their utility, a comprehensive uniform noncooperation policy can improve the investigation of crime in communities in the United States and protect undocumented immigrants from continuing to be the victims of crime.