

Q&A: State Immigration Legislation and Human Rights

The United States Congress has failed to reform the “broken” immigration system, and states have been attempting to fill the vacuum with their own immigration enforcement bills. One of the first efforts by states to regulate immigration was the passage of Proposition 187 in California in 1994. Proposition 187 attempted to require local law enforcement to verify the immigration status of anyone “suspected of” being in the US unlawfully, and also required schools to verify the immigration status of students. Proposition 187 was later found unconstitutional, but it set the stage for statewide immigration enforcement bills in Oklahoma in 2007 and Arizona in 2010. It is an explosive trend; the National Conference of State Legislatures reports that in 2010, 208 immigration bills were enacted at the state level and over 1,400 were introduced. This Q&A addresses whether common aspects of these bills comport with international human rights obligations of the United States and discusses possible constitutional violations as well.

The status quo on immigration policy in the United States is unsustainable. Not one US Senator or Representative argues that the current system is working. But states are ill-suited, and often legally barred, from taking on the task of immigration reform and enforcement themselves. Instead of working to pass laws that violate international obligations and are subject to protracted litigation, states should focus their energies on pushing the US Congress to fix the current weaknesses in the system, in a manner that respects basic human rights.

Can a state require law enforcement to verify the immigration status of an arrested individual if there is “reasonable suspicion” that the arrestee is in the country unlawfully?

Such policies are probably not consistent with US obligations under international human rights law. The requirement of “reasonable suspicion” could lead to instances of racial discrimination and profiling, violating the right to non-discrimination.¹ A law enforcement officer cannot use perceived nationality, race, ethnicity, lack of English skills, or cultural markers like clothing to claim “reasonable suspicion” that a person is not authorized to be in the country. For example, some long-term US citizens are dominant in other languages, while some undocumented immigrants are Canadian and are dominant in English. Additionally, this issue was litigated in California in response to Proposition 187 and was

¹ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 26. “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

found unconstitutional due to its infringement on the federal power to regulate immigration. The issue is also currently being litigated in Arizona in response to the passage of SB 1070 (the injunction against implementation of parts of SB 1070 was upheld by the 9th Circuit Court of Appeals on April 11, 2011).

Can a state require employers to use E-Verify (the federal employment eligibility program) and still respect workers' human rights?

Maybe. Over 200,000 employers currently use the E-Verify system. However, there are concerns about the potentially discriminatory impact of the program. A recent Government Accountability Office report detailed that E-Verify can lead to discrimination against legal US workers of foreign origin, as they often use multiple surnames and are more likely to be flagged as potentially unauthorized to work.² If certain groups, such as Latinos or Arab Americans, are more likely to be blocked in their access to employment due to their names, the program may be violating their right to non-discrimination by making getting hired more difficult for people of certain backgrounds.³ The system should be modified to address these concerns before its use is required of further employers.

Can a state require proof of citizenship for emergency hospital visits?

Probably not without violating the United States' international human rights obligations. Given the complexity of immigration law, it is likely that a hospital may make verification of citizenship more difficult for certain ethnic groups or only report certain ethnic groups to immigration authorities for failure to verify status. Such laws risk violating the right to non-discrimination.⁴ Federal law also currently requires emergency medical care to be provided to all, regardless of whether or not the patient has insurance. Requiring proof of citizenship would oblige medical care providers to enforce immigration law rather than provide medical care. Any delay in providing emergency care which results in death might also violate the right to not be arbitrarily deprived of life.⁵ The International Covenant on Economic, Social and Cultural Rights, which the United States has signed but not ratified, "recognize[s] the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health" (emphasis added).⁶

Can a state require proof of citizenship for non-emergency hospital visits without violating the human rights of patients?

² US Government Accountability Office, "Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, But Challenges Remain," December 2010, <http://www.gao.gov/new.items/d11146.pdf> (accessed April 7, 2011).

³ ICCPR, art. 26.

⁴ Ibid., art. 26.

⁵ Ibid., art. 6(1). "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, art. 12. The US signed the ICESCR in 1977 but has not ratified.

Maybe. However, such a rule could pressure hospitals into implementing policies that result in setting higher burdens of proof for Latinos or other ethnic groups to verify their immigration status. As in the above example, if the hospital makes verification of citizenship more difficult for certain ethnic groups or only reports certain ethnic groups to immigration authorities for failure to verify status, the right to non-discrimination would be impacted.⁷ Additionally, if the hospital delays treatment due to the process of contacting a federal immigration officer and the person suffers injury or death due to the delay, the person's right to not be arbitrarily deprived of life may be violated.⁸

Can a state require all students in elementary schools to provide citizenship information?

No, such a policy is likely to violate the rights of children. "School census" bills are likely to have a chilling effect upon the right of all children to access primary education in the United States, a right under US law protected by the US Supreme Court in the 1982 *Plyler v. Doe* decision.⁹ While these "school census" bills do not ban undocumented children from public schools outright, they may de facto deter parents from enrolling their children, as the children or parents themselves may be undocumented. Also, US citizen children may have undocumented siblings in the school, and parents may pull all their children from school out of fear of revealing their immigration status. The international human right to free primary education for all children is found in the Universal Declaration of Human Rights, which is widely accepted as reflective of customary international law.¹⁰ It is also provided in two treaties the US has signed but not ratified: the International Covenant on Economic, Social and Cultural Rights¹¹ and the Convention on the Rights of the Child.¹²

Can a state bar unauthorized immigrants from public universities and community colleges without violating human rights?

Maybe. There is no guarantee of access to higher education in US domestic law or international law. However, higher education institutions may violate the right to non-discrimination if they enforce such a prohibition on unlawful grounds, like on the basis of the student's nationality or ethnicity. For example, if a college sought more information about immigration status from persons of Middle Eastern descent, compared to persons of European descent, the right to non-discrimination may be violated.¹³

⁷ ICCPR, art. 26.

⁸ Ibid., art. 6(1).

⁹ *Plyler v. Doe*, 457 US 202 (1982).

¹⁰ Universal Declaration of Human Rights (UDHR), G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), art. 26(1). "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages." While not a legally binding treaty, its provisions are considered reflective of customary international law. The UDHR is the foundation for international human rights treaties, and was adopted by consensus by the member countries of the General Assembly, including the United States.

¹¹ ICESCR, art. 13.

¹² Convention on the Rights of the Child (CRC), G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. The US signed the CRC in 1995 but has not ratified.

¹³ ICCPR, art. 26.

Can a state bar unauthorized workers from accessing workers' compensation?

No, such a policy would violate human rights law. The Universal Declaration of Human Rights underscores everyone's right to "just and favorable conditions of work ... and the right to security in the event of unemployment, disability ... or other lack of livelihood in circumstances beyond his control."¹⁴ The International Covenant on Economic, Social and Cultural Rights repeats the call for "just and favorable conditions of work" and "the right of everyone to social security, including social insurance."¹⁵ Lawmakers should also consider that any attempt to deny access to workers' compensation coverage cannot prevent an unauthorized worker from suing an employer for negligence due to a workplace injury.

Can a state or local government bar day laborers from soliciting work?

No, such a policy would violate the rights of laborers under international human rights law. Courts in the US have held that asking for work is a form of protected expression.¹⁶ The right to free expression is also protected by the International Covenant on Civil and Political Rights, which the US ratified in 1992.¹⁷ Any laws that would prevent a person from simply asking a question (e.g., "Would you hire me?") would violate these legal protections and would also open a problematic door to potential abuse by law enforcement. This issue is currently being litigated in New York.

Can a state or local government prohibit the "harboring" of undocumented immigrants?

Probably not without violating the international human rights obligations of the United States. Harboring laws refer to some form of regulation of the provision of housing to immigrants. Many state harboring proposals interfere with fundamentally protected relationships, such as the right to family life.¹⁸ For example, some proposals would criminalize providing housing to a family member if that family member has overstayed a visa. The proposals could also impact the freedom of association¹⁹ and freedom of expression.²⁰ Take the following example: A church sends its youth group on a trip to Washington, DC. One of teens is undocumented, which is known by members of the church. By paying for the hotel room of the undocumented youth group member, the church may be

¹⁴ UDHR, art. 23(1) and art. 25(1).

¹⁵ ICESCR, art. 7 and art. 9.

¹⁶ *Comité de Jornaleros v. Redondo Beach*, No. 06-55750, (USCA, 9th Cir. June 9, 2010), <http://www.ca9.uscourts.gov/datastore/opinions/2010/06/09/06-55750.pdf> (accessed April 13, 2011).

¹⁷ ICCPR, art. 19.

¹⁸ *Ibid.*, art. 17(1). "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

¹⁹ *Ibid.*, art. 22(1). "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

²⁰ *Ibid.*, art. 19(2). "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

“harboring” the teen in violation of the law.

Can a state or local government prohibit landlords from renting to unauthorized immigrants?

No, such proposals do not comport with international human rights law. These proposals typically have two prongs. First, they prohibit renting to an unauthorized person while knowing or “recklessly disregarding” the fact that the person is not authorized to be in the US. Secondly, they establish a scheme by which every renter must apply for an “occupancy license,” which requires documentation of legal immigration status. These schemes are problematic in several ways. If landlords chose to make renting units to persons of certain ethnic backgrounds more difficult, or if local governments made issuing occupancy licenses to certain racial groups more difficult, it would infringe upon the right to non-discrimination.²¹ These laws would also require continual interference by the landlord and government into a renter’s family and private life.²² If a US citizen invited a foreign family member to visit for a few months, the law would require the landlord to continually verify that the family member’s tourist visa has not expired. Landlords would also be forced by the law to meddle in the most personal of relationships. For example, if a renter (with an occupancy license) married an unauthorized immigrant, the landlord in certain situations would be prohibited by law from allowing the spouses to live together. Finally, such laws implicate the human right to adequate housing found in the International Covenant on Economic, Social and Cultural Rights.²³

Can a state prohibit the transportation of unauthorized immigrants without violating international human rights obligations of the United States?

Probably not, as such a prohibition would risk violating several rights, such as the protection from arbitrary interference with family life,²⁴ the rights to free expression and association,²⁵ and the right to freely worship.²⁶ For example, such a law would prohibit a US citizen from driving an unauthorized family member to a doctor or to church. The law would prohibit a US citizen from driving an unauthorized person to a political rally or to a meeting with a legislator.

²¹ICCPR, art. 26.

²² Ibid., art. 17(1).

²³ ICESCR, art. 11.

²⁴ ICCPR, art. 17(1).

²⁵ Ibid., art. 22(1).

²⁶ Ibid., art. 18(1). “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”