



FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

ISSUES AT A GLANCE

Addressing Immigration Issues

Fair and Just Prosecution (FJP) brings together recently elected district attorneys¹ as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.

SUMMARY

This FJP "Issues at a Glance" brief discusses the prosecutor's role in addressing immigration considerations that intersect with criminal justice issues. This brief seeks to provide guidance to DAs considering new approaches to this topic.

With expanding federal immigration enforcement efforts and mounting fear within the immigrant community, distrust towards law enforcement is a growing concern. This distrust can exacerbate fragile relationships between immigrants who encounter the justice system and the prosecutors who seek to protect them. Elected DAs are an integral part of allaying immigrant concerns, strengthening community trust, and ensuring that *all* members of the community feel protected and respected. Moreover, because federal immigration law can impose additional penalties when a noncitizen receives a criminal conviction, prosecutors need to understand the potential collateral consequences of their decisions.

¹ The term "district attorney" or "DA" is used generally to refer to any chief local prosecutor, including State's Attorneys, prosecuting attorneys, etc.

"There's certainly a line of argument that says, 'Nope, we're not going to consider all your individual circumstances, we want to treat everybody the same. But more and more, my eyes are open that treating people the same means that there isn't a life sentence of deportation that might accompany that conviction.'"

— KING COUNTY (SEATTLE, WA) PROSECUTING ATTORNEY DAN SATTERBERG

BACKGROUND AND DISCUSSION

Prosecutors are charged with serving the public and are expected to “act with integrity and balanced judgment to increase public safety...protect the innocent, convict the guilty, consider the interests of victims and witnesses and respect the constitutional and legal rights of . . . defendants.”² With these broad goals in mind, prosecutors have a vital role to play in ensuring that expanding federal immigration enforcement does not undermine community trust, public safety or the fair administration of justice.

Impacts of Federal Immigration Activities and Policies on Community Trust and Public Safety

Prosecutors often face challenges when trying to secure cooperation from crime victims and witnesses. These concerns are amplified with immigrants, and more specifically noncitizens, who may fear apprehension by immigration authorities.³ As recent federal enforcement practices have intensified, immigrants are now being approached by Immigration and Customs Enforcement (ICE) agents at churches, at schools, in courthouses,⁴ and in front of families, children and community members.⁵ Against this backdrop, immigrants are less likely to contact law enforcement after a crime occurs.⁶ Yet, as noted by King County (Seattle, WA) Prosecuting Attorney Dan Satterberg, “undocumented immigrant victims...are particularly vulnerable to crime... [and] violent criminals are adept at preying on the most vulnerable and marginalized in our community.”⁷

Despite efforts to protect immigrant crime victims through efforts such as U-Visas,⁸ recent immigration enforcement policies — such as courthouse arrests of testifying victims — may further deter crime victims from coming forward.⁹ In response, states and local jurisdictions have

² American Bar Association, *Criminal Justice Standards for the Prosecution Function*, Fourth Edition, “Functions and Duties of the Prosecutor,” Standard 3-1.2 (b).

³ See, e.g., Kim Janssen, “Foxx Fears ‘Chilling Effect’ of Trump Orders on Immigrants Who are Victims of Crime.” Chicago Tribune, Mar. 28, 2017, available at: <http://www.chicagotribune.com/news/chicago-inc/ct-kim-foxx-girltalk-0329-chicago-inc-20170328-story.html>.

⁴ California Supreme Court Chief Justice Cantil-Sakauye expressed concern about immigration enforcement at California Courthouses. See Letter from Chief Justice of California Tani G. Cantil-Sakauye to Attorney General Jeff Sessions and Secretary John Kelly, Mar. 16, 2017, available at: <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>.

⁵ Christina Carrega, “Brooklyn DA, New York AG Demand a Halt to ICE Raids,” New York Daily News, Aug. 3, 2017, available at: <http://www.nydailynews.com/new-york/brooklyn-da-new-york-ag-demand-halt-ice-raids-article-1.3381092>. See, also, Veronica Rocha, “After ICE Agents Appear at a Sacramento Church, Pastor Tries to Calm His Flock’s Deportation Fears,” Los Angeles Times, May 19, 2017, available at: <http://www.latimes.com/local/lanow/la-me-ln-sacramento-church-ice-deportation-fears-20170519-htlmstory.html>.

⁶ Kirk, Papachristos, Fagan and Tyler, *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?* Columbia Public Law Research Paper Number 11-281, Oct. 4, 2011, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939506.

⁷ Dan Satterberg, “Crackdown on Immigrants Undermines Public Safety,” Seattle Times, Mar. 24, 2017, available at: <http://www.seattletimes.com/opinion/crackdown-on-immigrants-undermines-public-safety/>.

⁸ A U-Visa is a special visa for victims of certain crimes who assist law enforcement in the investigation of or prosecution of crime. See U.S. Citizenship and Immigration Services, *Victims of Criminal Activity: U Nonimmigrant Status*, available at: <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

⁹ Marty Schladen, “Immigration Agents Detain Domestic Abuse Victim in Court,” USA Today, Feb. 15, 2017, available at: <https://www.usatoday.com/story/news/nation-now/2017/02/15/immigration-agents-detain-domestic-abuse-victim-court/97973230/>.

proposed or enacted policies to disentangle local law enforcement from federal immigration enforcement.¹⁰ Recent research suggests that public safety may be enhanced in those locations where local law enforcement is explicitly separated from immigration enforcement.¹¹

DAs can play a key role in strengthening community trust and ensuring that all members of the community feel safe engaging with law enforcement. In particular, DAs can use their authority to speak out against troubling immigration enforcement practices, such as the unlawful extended-detention of incarcerated immigrants. They can also partner with law enforcement to jointly affirm their commitment to protecting vulnerable victims, stressing the importance of avoiding inquiries into immigrant status and reassuring noncitizens of their safety in reporting crime.¹² For instance, Denver (CO) District Attorney Beth McCann and Los Angeles (CA) City Attorney Mike Feuer have used their bully pulpit to condemn enforcement tactics such as courthouse arrests while amplifying the confusion that results when the roles of federal agents and local law enforcement are conflated.¹³

In addition, DAs can and should develop their own internal policies to address these concerns. In Cook County, for example, State's Attorney Kim Foxx created a hotline for immigrant victims to report fraud and issued a policy limiting questioning regarding immigration status.¹⁴

Federal Immigration Policies and the Fair Administration of Justice

Arrests or contact with local law enforcement are the primary mechanisms for ICE to apprehend noncitizens for deportation.¹⁵ As such, criminal justice and immigration policy have become inextricably linked. However, when prosecutors determine that certain charges (felony or

¹⁰ See, e.g., "Senate Leader de León Introduces Bill to 'Freeze Out ICE,'" Dec. 7, 2016, available at: <http://sd24.senate.ca.gov/news/2016-12-07-senate-leader-de-le%C3%B3n-introduces-bill-%E2%80%9Cfreeze-out-ice%E2%80%9D>.

¹¹ Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Center for American Progress, Jan. 26, 2017, available at: <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

¹² Special Order 40 prohibits LAPD from initiating contact with individuals to inquire about immigration status and prohibits making arrests based on violations of federal immigration law. See Office of the Chief of Police, "Special Order No. 40 - Los Angeles Police Department" available at: http://assets.lapdonline.org/assets/pdf/SO_40.pdf.

¹³ Noelle Phillips, "Mayor Hancock Tells ICE: Back Off Arrests in Courthouses and Near Schools," Denver Post, Apr. 6, 2017, available at: <http://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids/>; see, also Catherine Shoichet, "L.A. Officials to ICE: Stop Calling Yourself Police," CNN, Mar. 13, 2017, available at: <http://www.cnn.com/2017/03/10/us/immigration-ice-police-los-angeles/index.html>.

¹⁴ "State's Attorney Kim Foxx Announces Fraud Hotline for Immigrants," Chicago Tribune, Feb. 24, 2017, available at: <http://www.chicagotribune.com/news/local/breaking/ct-immigrant-fraud-hotline-met-20170224-story.html>.

¹⁵ In 2016, 92% of all removals initiated at the interior (not at the border) were based on a criminal conviction. See Fiscal Year 2016 ICE Enforcement and Removal Operations Report, U.S. Immigration and Customs Enforcement, available at: <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>.

"The State's Attorney's Office is committed to advocating for Cook County's immigrant communities and to fighting against those who seek to prey on them."

— COOK COUNTY (CHICAGO, IL) STATE'S ATTORNEY KIM FOXX

misdemeanor) and penalties (jail, prison or probation) are appropriate, they may be unaware of the additional penalties and consequences resulting from federal immigration laws.

Under federal immigration law, certain misdemeanor convictions can lead to mandatory deportation.¹⁶ This can include many low-level, non-violent offenses, such as drug possession, tax fraud, and even failing to pay a public transportation fee.¹⁷ Thus, the decisions that prosecutors make during the charging and plea bargaining stages can result in overly harsh consequences for immigrant defendants and their families, including minor children.

Prosecutors have an obligation to ensure fairness in the administration of the criminal justice process.¹⁸ As articulated by Supreme Court Justice Anthony Kennedy, “as a profession . . . [lawyers] should know what happens after the prisoner is taken away” to better understand the “hidden world of punishment.”¹⁹ The Supreme Court has long recognized that deportation is a severe “penalty”²⁰ and cannot be divorced from the criminal process.²¹ Since there will be “numerous situations in which the deportation consequences of a particular plea are unclear or uncertain,” it is imperative that prosecutors understand immigration consequences.²²

Prosecutors around the country have implemented this approach. Santa Clara County (CA) District Attorney Jeff Rosen instructed his staff to consider in plea discussions whether immigration consequences will be “disproportionately heavy” compared to the “actual sentence.”²³ Brooklyn (NY) Acting District Attorney Eric Gonzalez similarly directed staff to consider immigration consequences and to offer, where possible, immigration-neutral dispositions that “neither jeopardize . . . public safety nor lead . . . to removal or to any other disproportionate collateral consequence.”²⁴ He has also brought in immigration experts to train line prosecutors on how to evaluate cases involving noncitizen defendants.²⁵ In Baltimore City, State’s Attorney Marilyn Mosby recently instructed her prosecutors “to ensure that there are only minor consequences for minor crimes” by “considering the unintended collateral consequences that our decisions have on our immigrant population.”²⁶

¹⁶ Selena Teji, *Immigration Consequences of Criminal Convictions*, Center on Juvenile and Criminal Justice, Oct. 22, 2013, available at: <http://www.cjci.org/news/6814>.

¹⁷ *Id.*

¹⁸ *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

¹⁹ Supreme Court Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, Aug. 9, 2003, available at: https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

²⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893).

²¹ *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

²² *Padilla*, 130 S. Ct. at 1483, 1486.

²³ Letter from Jeff Rosen to Prosecutors, Santa Clara District Attorney’s Office, Sept. 14, 2011, available at: https://www.ilrc.org/sites/default/files/resources/unit_7b_4_santa_clara_da_policy.pdf.

²⁴ “Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants,” Brooklyn District Attorney’s Office, Apr. 24, 2017, available at: <http://www.brooklynnda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/>.

²⁵ *Id.*

²⁶ Justin Fenton “Baltimore Prosecutors Told to Consider Consequences for Prosecuting Illegal Immigrants for Minor Crimes,” The Baltimore Sun, Apr. 28, 2017, available at: <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-states-attorney-immigrants-20170428-story.html>.

Prosecutors can also address disproportionate penalties through pre-plea and pre-arrest diversion programs. Since most diversion programs require a guilty plea prior to participation, federal immigration policies can use these convictions as grounds for deportation, despite a court's dismissal. Some DAs are reevaluating their policies with this starting point in mind. In Cook County, individuals with first-time and low-level offenses can participate in classes on substance abuse and "justice involvement" to avoid a conviction, and thus avoid deportation.²⁷ California has proposed a bill that allows individuals to participate in a treatment program before entering a plea.²⁸ Diversion programs can also minimize the amount of courthouse contacts and may increase participation by noncitizen defendants in treatment programs. In Seattle, for example, the Law Enforcement Assisted Diversion (LEAD) Program allows police officers to divert individuals directly to community-based programs.²⁹

Finally, some states have enacted laws to prevent deportation of noncitizens for low-level crimes. Washington, Nevada, and California passed laws reducing the maximum penalty for a misdemeanor conviction from one year to 364 days,³⁰ thereby avoiding mandatory deportation under federal law.³¹ California also enacted a series of other immigration reform laws, including: (1) a mandate that prosecutors consider how to avoid immigration consequences as part of plea discussions; (2) a post-conviction remedy if the defense attorney failed to apprise the defendant of an available immigration-safe alternative plea; and (3) a remedy to remove, for immigration purposes, a conviction that has been dismissed pursuant to a deferred entry of judgment.³² Prosecutors can work with legislators to enact similar laws, or implement similar policies within their offices.

RECOMMENDATIONS

DAs should consider implementing the following reforms that can minimize collateral immigration consequences, help keep families together, and fortify public trust in communities that are often wary of law enforcement.

1. **Enhance the Understanding of, and Consider, Immigration Consequences during Charging and Plea Negotiations** — Factor potential immigration consequences into charging decisions and plea negotiations and, where appropriate, modify practices to immigration-safe pleas. DA offices should also build out their own expertise and train prosecutors on these complex immigration issues.
2. **Establish Pre-Arrest and Pre-Plea Diversion Programs** — Pre-arrest and pre-plea diversion programs often enable prosecutors to address the drivers of crime, such as substance use and mental health issues, thereby promoting public safety while also minimizing immigration

²⁷ Cook County State's Attorney, Drug School Diversion Program, available at: <http://www2.tasc.org/program/state-s-attorney-s-drug-school-diversion-program>.

²⁸ Assembly Bill 208, "Deferred Entry of Judgment: Pretrial Diversion," California Assembly, 2017, available at: https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB208.

²⁹ LEAD National Support Bureau, available at: <http://www.leadbureau.org>.

³⁰ See RCWA 9A.20.021, et seq.; N.R.S. § 193.140 (2013); Cal. Penal Code § 18.5 (2014).

³¹ Under federal law, individuals convicted of an "aggravated felony," defined as a conviction carrying a sentence of one year or longer, are deportable. See 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony is deportable."); § 1101(a)(43) (defining "aggravated felony" to include crimes carrying sentences of one year or longer).

³² Cal. Penal Code § 1016.3 (2016); Cal. Penal Code § 1473.7 (2016); Cal. Penal Code § 1203.43 (2016).

consequences for noncitizens. These programs also allow noncitizen defendants access to important treatment services, which may be unavailable if they enter the justice system.

3. **Support Adequate Legal Representation and Post-Conviction Relief** — Many noncitizens who are not adequately advised of the immigration consequences of their guilty pleas are subject to unanticipated mandatory deportation. DAs should support efforts to enhance immigrant legal representation and streamline legal processes for challenging or vacating convictions predicated on inadequate information regarding collateral immigration consequences.
4. **Establish the DA's Office as a Safe Place for Immigrant Crime Victims** — DAs can promote their offices and courthouses as “safe places” for the immigrant community, and partner with community groups and other stakeholders to create alternate systems for crime reporting if immigrants victimized by crime are reluctant to engage law enforcement. DAs can support efforts to combat immigration attorney fraud by establishing hotlines and other mechanisms that provide defrauded immigrants with a place to turn.³³
5. **Limit Inquiry on Immigration Status of Witnesses** — Attorneys in some jurisdictions have intimidated noncitizen crime victims by asking about immigration status at trial.³⁴ San Francisco District Attorney George Gascón worked with state legislators to draft a law that would require in camera review of questions involving immigration status.³⁵ Other DAs should consider similar policies.
6. **Limit Requests for Money Bail** — While money bail disproportionately affects poor defendants, there are additional impacts on noncitizens. In some jurisdictions, custody increases the likelihood that federal agents will locate and detain noncitizens — even before any conviction.³⁶ Prosecutors should implement a presumption of release and seek detention only when the defendant is a flight risk or a danger to the community.
7. **Expunge Old Arrest Warrants** — Individuals with old warrants may no longer pose a public safety risk. However, if noncitizens are arrested on an old warrant, they may be exposed to deportation. Prosecutors should follow “Brooklyn (NY) Acting DA Eric Gonzalez’s lead; his “Begin Again” program is reported to have cleared over 2,100 arrest warrants without a single arrest.³⁷

³³ Immigration attorney fraud, also called notario fraud, involves deception by non-legal experts to immigrants who are seeking legal advice. In a recent radio interview Boulder, Colorado DA Stan Garnett spoke out against this type of fraud. See Rachel Estabrook, “Boulder’s Strategies to Protect Immigrants from Fraud Could Go Statewide,” Colorado Public Radio, July 17, 2017, available at: <http://www.cpr.org/news/story/colorado-ag-wants-to-take-boulders-strategy-to-protect-immigrants-from-fraud-statewide>.

³⁴ Defense attorneys used this line of questioning to suggest crime victims were fabricating testimony in exchange for a U-Visa. See Heather Knight, “San Francisco Courts Anything but Safe for Some Immigrants in Sanctuary City,” San Francisco Chronicle, Apr. 2, 2017, available at: <http://www.sfchronicle.com/news/article/SF-courts-anything-but-safe-for-some-immigrants-11045155.php>.

³⁵ Heather Knight, “How to Ensure Undocumented Have Voice in Courts,” San Francisco Chronicle, May 5, 2017, available at: <http://www.sfchronicle.com/news/article/How-to-ensure-undocumented-have-voice-in-courts-11122522.php>.

³⁶ Nick Pinto, “The Bail Trap,” New York Times Magazine, Aug. 13, 2015, available at: https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0.

³⁷ See “Begin Again Continues in 2017,” Brooklyn District Attorney’s Office, available at: <http://brooklynda.org/begin-again/>. See, also “District Attorneys from 4 Boroughs Vacate Nearly 700,000 Warrants Dating Back 10 Years Or More,” CBS New York, July 26, 2017, available at: <http://newyork.cbslocal.com/2017/07/26/district-attorneys-old-warrants/>.

8. **Limit Prosecution of Quality-of-Life/Low-Level Offenses** — Prosecution of “quality-of-life” crimes expose noncitizens to deportation for minor infractions such as urinating in public, driving without a license, failing to pay a public transportation fee, or possessing small quantities of marijuana. It is questionable whether any public safety benefits of prosecuting these quality-of-life crimes³⁸ outweigh the disproportionate impacts on poor people, people of color, and noncitizens.³⁹ Some DAs are reconsidering charging various low-level offenses.⁴⁰ Prosecutors should also stop charging certain traffic crimes, such as driving without a license, that can be dealt with through fines or civil citations and thereby minimize exposure to deportation.
9. **Speak Out on Issues Affecting Immigrant Communities** — DAs can use their platform as elected leaders to speak out on issues that are unjustly impacting noncitizens. Through press conferences, public statements, radio interviews and other media outlets, DAs can affirm for noncitizens, and the broader community, that prosecutors seek to protect all members of the community. DAs can also use their status as elected justice system leaders to raise awareness of the protections available to noncitizens and stand up against detention premised on illegal ICE detainers⁴¹ and other concerning aspects of immigration enforcement.⁴²

RESOURCES

- Center for American Progress, *The Effects of Sanctuary Policies on Crime and the Economy*, at: <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.
- Immigrant Defense Project, *Immigration Consequences of Crimes Summary Checklist*, at: <https://www.immigrantdefenseproject.org/wp-content/uploads/2016/08/Imm-Consq-checklist-2017.pdf>.
- Immigrant Justice Network, *Dismantle, Don't Expand: The 1996 Immigration Laws*, at: http://immigrantjusticenetwork.org/wp-content/uploads/2017/05/IJN1996LawsReport_Final.pdf.

³⁸ Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 Univ. Chic. L. Rev. 272 (2006); John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in Alfred Blumstein and Joel Wallman, *The Crime Drop In America*, 207, 228 (Cambridge 2000).

³⁹ Derrick Jackson, “‘Broken Windows’, Broken Policy,” *Boston Globe*, Dec. 29, 2014, available at: <https://www.bostonglobe.com/opinion/2014/12/29/broken-windows-broken-policy/WM8hUySULOYerJq2S2Ay1N/story.html>.

⁴⁴ In Nueces County, Texas, District Attorney Mark Gonzalez announced that he would stop prosecuting individuals for low-level marijuana possession. See Rudy Trevino, “New D.A. Announces Changes to Marijuana Enforcement,” *KIII TV*, Jan. 5, 2017, available at: <http://www.kiiitv.com/news/local/new-da-announces-changes-to-marijuana-enforcement/382667253>.

⁴¹ See, Immigrant Legal Resource Center, *Legal Issues with Immigration Detainers*, Nov. 2016, available at: https://www.ilrc.org/sites/default/files/resources/detainer_law_memo_november_2016_updated.pdf.

⁴² See, e.g., James Queally “‘Breathtaking Violation of Rights’: L.A. City Attorney Barred From Seeing Detainees at LAX,” *Los Angeles Times*, Jan. 29, 2017, available at: <http://www.latimes.com/local/lanow/la-me-ln-feuer-trump-20170129-story.html> (detailing City Attorney Feuer’s attempts to secure the release of detainees at an airport after a federal court issued a stay on President Trump’s executive order).

STATE LEGISLATION

- Revised Code Washington 9A.20.021 *et seq.* (2011)
- Nevada Revised Statute Section 193.140 (2013)
- Cal. Penal Code Sections 18.5 (2014); 1016.3 (2016); 1473.7 (2016); 1203.43 (2016)

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