



# CHILDREN IN HARM'S WAY

CRIMINAL JUSTICE, IMMIGRATION ENFORCEMENT, AND CHILD WELFARE

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## AUTHORS' VIEWS DISTINCT

The views expressed in this publication are those of the authors alone and do not necessarily reflect those of First Focus or The Sentencing Project. These papers have been published in an effort to facilitate a candid conversation about the important issues addressed in the series.

## PHOTOGRAPHY CREDIT

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## FOREWORD

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In 1998, the Child Welfare League of America published a seminal issue of *Child Welfare* describing the needs of children with parents in prison. It marked a milestone in what has become an ongoing effort to influence how the child welfare system responds to children whose parents are arrested and the support available to relatives caring for children whose parents are incarcerated. It pointed to policies and practices that either ignored the needs of this group of vulnerable children and their families, or created impediments to reunifying children with parents who had been incarcerated. This publication, produced jointly by The Sentencing Project and First Focus, introduces readers to concerns about a subgroup of this vulnerable group of children: children whose parents are affected by the interplay of the criminal justice, child welfare, *and* immigration enforcement systems.

In the past decade, the federal government dramatically changed its approach to enforcing federal immigration laws and the scale of its efforts. As a result, a growing number of parents are being apprehended by local and state police (often for relatively minor offenses), turned over to federal immigration authorities, held in federal detention centers, and then returned to their home countries. In many cases, their children are U.S. citizens who are forced to leave their homes to be with their parents, or who remain in the United States permanently separated from their parents. Others end up in the foster care system where they may be placed for adoption.

The number of people being held in immigration detention centers while waiting for their cases to be heard in administrative immigration proceedings has reached a historic high at a time when prison growth is otherwise beginning to slow. For-profit prison companies are poised to seize on this opportunity to bolster their profit margins. This became most evident in 2010 when Arizona legislators adopted the notorious S.B. 1070 law, perceived by many as an open invitation for law enforcement agencies to engage in racial profiling. Not long after the enactment of S.B. 1070, it became clear that the legislation was based on a blueprint that had been handed out by representatives of the private prison industry at a meeting of the American Legislative Exchange Council.

Like an echo from the past, the questions being raised about children whose parents are targets of stepped-up immigration enforcement are similar to those that were first raised nearly 20 years ago about children whose parents were then being sent to jails and prisons in record numbers. Those questions include:

- What happens to children in the wake of authorities taking their parents into custody?
- How do children of color view the legal system after seeing so many members of their communities being taken away by police?
- How are communities changed when arrests or immigration enforcement actions can happen at any time?

- And, a central issue in the articles assembled here: How does the child welfare system help or hinder families in the wake of criminal or immigration court actions against parents?

The Sentencing Project and First Focus have very distinct missions, yet we recognize the potential advantages of advancing understanding of the issues raised by current immigration enforcement practices and highlighting areas that might form the basis for joint advocacy efforts. Our common ground includes mutual concerns about the continued sprawl of the criminal justice system and the collateral harm to children.

Despite these shared concerns, the criminal justice reform, immigrants' rights, and child welfare advocacy communities have remained largely apart. One reason is that these three systems – criminal justice, immigration enforcement, and child welfare – are each rather arcane systems with formal structures that often only provide a glimpse into how daily decision making is actually carried out. A simple flow chart of these systems is hardly sufficient to understand their basic operations or the intricacy of their respective decision-making processes.

Actors within each system often operate without fully understanding the ripple effects of their actions. The defense attorney may feel she has succeeded when she negotiates a one-year sentence for her non-citizen client when the prosecutor was seeking a much longer sentence, yet not realize that such a sentence carries the added consequence of deportation that may permanently separate her client from his or her children. The law enforcement officer who takes the domestic violence victim to the station may not understand that the victim's batterer was using her immigration status and the potential for deportation as a threat against her. Family courts may proceed with termination of parental rights without taking into account that parents in detention may not be able to fulfill requirements for reunifying with their children.

The articles in this collection provide a multifaceted look at some of the problems that potentially arise for children when the criminal justice, immigration enforcement, and child welfare systems converge in their parents' life. They provide information and offer insights reflecting diverse perspectives and experiences and lay out a range of policy and practice reform recommendations. Our hope is that these articles will advance understanding of the issues at hand and serve as the basis for discussions of areas in which advocacy groups might join together in promoting reforms that benefit children within these various institutional systems.

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## INTRODUCTION: CHILDREN IN HARM'S WAY

**Susan D. Phillips**, *The Sentencing Project*

One hard-learned lesson from America's era of mass incarceration is that there are innocent children in harm's way when policymakers overly rely on the criminal justice system to address complex social problems. More than half of all adults in penal institutions in the United States are parents.<sup>1</sup> Consequently, about one in every 33 children in this country has a parent in jail or prison on any given day. The public safety benefits of incarcerating a record number of parents are debatable,<sup>2</sup> but the possibility of collateral harm to children is clear.

Some children experience adversity before their parents are sent to jail or prison, but arresting and incarcerating parents introduces trauma and hardship of its own into children's lives.<sup>3,4</sup> Sending parents to jail or prison can disrupt bonds between children and their parents, lead to children being separated from their siblings, trigger residential instability, and cause children to be alienated from friends and ostracized by peers.<sup>5,6,7</sup> The arrest and incarceration of parents also takes an emotional toll on children, leaving some psychologically traumatized, fearful, anxious, withdrawn, socially isolated, grieving, or possibly acting out their feelings in disruptive ways.<sup>8,9,10</sup> It can result in enduring social and economic hardships for the family members who care for incarcerated parents' children. Accounting for other factors, it can also significantly increase the odds of children living in chronic poverty, which is associated with a wide range of adverse outcomes for youth.<sup>11,12</sup>

Typically, discussions of the adverse consequences of parental arrest and incarceration for children have highlighted the War on Drugs and the disproportionate impact of mass incarceration policies on African-American families and communities in particular.<sup>13,14,15</sup> The importance of addressing these issues has not diminished, but there are now added concerns about the collateral harm to another group of children, those whose parents are targets of stepped-up policing, criminal prosecution, detention, and deportation for violations of immigration laws. Accounts of the experiences of these children and their parents beg the same question that was first asked nearly 40 years ago about children with parents in jail or prison: Why punish the children?<sup>16,17</sup>

## ENTWINING OF THE CRIMINAL JUSTICE AND IMMIGRATION ENFORCEMENT SYSTEMS

The United States is notorious for being the world's leading jailer. After 40 years of record growth, prison expansion is finally slowing and some states' prison populations are beginning to decline, leading to optimism that we may be on the verge of an era of more rational public safety policy<sup>18</sup>. But, even as state policymakers are beginning to re-think criminal justice policy, the criminal justice system is emerging as a key player in a new arena: the enforcement of federal immigration policies.

In recent decades, particularly since the Bureau of Immigration and Customs Enforcement (ICE) was created in 2003 to replace Immigration and Naturalization Services, the criminal justice system has become



increasingly entwined with the immigration enforcement system.<sup>19</sup> Certain immigration rule violations have been reclassified as criminal offenses, and the number of non-immigration criminal offenses that can result in deportation has increased. Efforts to identify and deport immigrants have expanded, with local and state law enforcement agencies playing a more prominent role in routing people into the federal immigration enforcement system for deportation.

## **Criminalized Violations of Immigration Law**

Immigration law falls into the realm of administrative law, a body of law that gives rise to rules governing interactions between government agencies and members of the public. Beginning in the 1980s when policymakers were enacting harsher and more severe criminal justice policies, a number of immigration rule violations (e.g., returning to the United States after being deported) were reclassified as criminal offenses.<sup>20</sup> Federal criminal courts in some jurisdictions are now being inundated with people being prosecuted for these criminalized immigration offenses because of zero tolerance initiatives such as Operation Streamline, an initiative that began in 2005 and was expanded in 2008.<sup>21</sup>

Historically, people apprehended by United States Border Patrol agents were subject to deportation hearings or expedited removal, a form of formal removal with limited judicial review, but most were not prosecuted for criminal offenses.<sup>22</sup> Zero tolerance initiatives changed that by prioritizing criminal prosecution.<sup>23</sup> In 2010, 32 percent of the people prosecuted in federal district courts were charged with criminal immigration offenses, compared to 18 percent in 2000.<sup>24</sup>

## **Immigration Consequences of Non-Immigration Criminal Offenses**

In addition to criminally prosecuting more people for unauthorized entry or re-entry into the United States, the number and types of “regular” criminal offenses that carry immigration consequences has also increased. Whereas Operation Streamline and similar initiatives target people as they are attempting to enter or re-enter the country, increasing the number of non-immigration crimes that can lead to deportation affects people already in the United States, including those who entered the country lawfully and lawful permanent residents.

The major types of criminal convictions that can affect a person’s immigration status include aggravated felonies, crimes involving moral turpitude, domestic violence, drug crimes, and firearm offenses. However, as Weller & Martin explain in this issue, the definitions of crimes that carry immigration consequences under federal law are sometimes ambiguous and case law is still evolving. As a result, some crimes that are minor offenses under state laws (e.g., turnstile jumping, prostitution) can also subject people to deportation under certain circumstances.

## **Expanded Role of Local Law Enforcement**

In the last decade, contact with local and state law enforcement agencies has become a more frequent pathway into the federal immigration enforcement system. In the first few years it existed, ICE conducted numerous workplace raids to apprehend people for immigration law violations. These raids evoked public outrage because children were left abandoned and traumatized in their wake.<sup>25,26</sup> ICE responded by adopting

a policy of notifying local child welfare agencies in advance of raids so they could coordinate support for detained workers' children. As described below and in the articles by Butera & Cervantes and Wessler in this volume, this practice is also problematic because of the challenges parents face reunifying with their children once family courts are involved.

Workplace raids have since subsided. Currently, parents are more likely to end up in immigration enforcement proceedings because of ICE Agreements of Cooperation in Communities to Enhance Safety and Security programs, particularly the 287(g) jail program and Secure Communities.<sup>27</sup> The 287(g) jail program gives local law enforcement officers expanded authority to check arrestees' federal immigration records. Under Secure Communities, the FBI sends the fingerprints it routinely receives from jails to ICE to be checked against its immigration database.<sup>28</sup> In either case, when someone is identified who is believed to have violated immigration rules, ICE may issue a detainer. A detainer is an official request asking local authorities to notify ICE prior to releasing someone so ICE can take the person into custody. Once a person is turned over to ICE, he or she may be transported to an immigration detention center and held in custody to await an administrative immigration hearing. Between 2004 and 2010, the number of people held in immigration detention centers increased 54 percent.

Immigration enforcement was purportedly stepped-up to apprehend and deport people who pose a serious threat to national security or public safety.<sup>29</sup> Jail-based enforcement activities, however, potentially affect everyone law enforcement officers arrest, no matter how trivial the offense or whether they are even found guilty of the charge that was the basis for their arrest. As Junck and her colleagues explain, some jurisdictions even routinely turn juveniles over to ICE, which means that youth who were brought to the United States by their parents and have lived here since infancy can be deported to countries where they have no ties and without a legal pathway to return to rejoin their families.

Local and state law enforcement agencies, however, cannot be made to enforce federal immigration laws and are not compelled to honor ICE detainers. A few jurisdictions (e.g., Cook County, Illinois; Washington, D.C.) have taken the bold step of refusing to cooperate with ICE because of concerns that Secure Communities and 287(g) are undermining public safety by eroding community trust in local law enforcement and destabilizing families. Other jurisdictions are attempting to do the same.<sup>30,31</sup>

## THE "TREACHEROUS TRIANGLE"

Enter a third court system: family courts.

Wessler (this volume) describes the complex interplay among the criminal justice, immigration enforcement, and family court systems as "a treacherous triangle" for children that results in "shattered families." The parent-child relationship and the fundamental legal protections that attach to that relationship are not legally altered by either a parent's criminal conviction or their immigration status (see Thronson). Parents have the legal right to determine where and with whom their children will live unless and until a court formally rules otherwise. Family courts (or juvenile courts, in some jurisdictions) typically make such decisions, and the best interests of children are a primary consideration and procedural safeguards are in place to protect children's rights to their relationships with their parents. As a matter of everyday practice, however, criminal courts and immigration courts routinely make decisions with practical consequences for parent-child relationships, but without taking stock of the interests of the defendants' children and without the procedural safeguards that



operate in family court cases.<sup>32</sup> At the same time, when parents *are* involved in family court proceedings, the decisions of criminal and immigration courts can create barriers to parents meeting requirements family courts set out for reunification with their children, and impede the ability of parents to participate in family court proceedings.

Some children become involved with family courts as a direct result of law enforcement or immigration enforcement officers taking parents into custody. In other cases, child maltreatment investigations lead to criminal charges being filed against parents and, for parents who are immigrants, possible subsequent immigration detention.<sup>33</sup> There are also times when parents who are already involved in family court cases are coincidentally arrested or picked up by law enforcement officers or immigration authorities.<sup>34</sup>

When local or state police arrest parents, local policies and the circumstances of the arrest influence whether officers allow parents to make arrangements for the care of their children or instead turn children over to child welfare authorities; practices vary widely across jurisdictions.<sup>35</sup> In comparison, when immigration officers arrest parents, it has been the policy of ICE during certain types of operations to have officers contact child welfare authorities rather than permit parents to select a person to care for U.S. citizen children.<sup>36</sup> Additionally, the arrest of a parent, whether for criminal offenses or immigration offenses, is associated with a greater likelihood of children being placed in foster care (see Wessler, this volume).<sup>37,38</sup>

As is the case when parents are incarcerated as punishment for violating criminal laws, parents held in immigration detention facilities awaiting immigration proceedings face challenges meeting the requirements family courts impose on them for reunifying with their children (see Butera & Cervantes and Wessler). The timeframes under which criminal justice and/or immigration enforcement proceedings unfold can clash with the time constraints set for family courts to reunify children with their parents, pushing family courts to terminate parents' rights. Parents in confinement also face challenges staying in contact with their children and receiving notification of and participating in family court proceedings.

The deportation of parents further complicates the process of reunifying parents and children because once parents are deported, reunification requires investigating parents' living conditions in their home country, monitoring whether absent parents are meeting the conditions of reunification plans, and possibly obtaining visas for children to enter the parent's country. At the same time, in deciding to deport parents, immigration courts may create circumstances that preclude parents from legally re-entering the United States to participate in family court hearings.

## ICE PRIORITIES

The best available current estimate is that about one in five people (23 percent) who are removed from the United States are parents of U.S. citizen children.<sup>39</sup> What happens to children when their parents are forced to leave the country is unclear because, as Dettlaff & Lincroft explain, no official data are kept on the circumstances of children after their parents are removed from the country. Anecdotally, we know that some are expatriated, taken to live with their parent in their parent's home country. Others remain in the United States, but with one less parent. And, some (currently about 5,100, according to Wessler) end up in the foster care system where they may be placed for adoption.

Ostensibly, immigration enforcement was stepped up to protect the public from serious threats to national security and public safety – these are legitimate goals. But, as has been the case with criminal justice policy in the last several decades, the penalties being imposed by courts are sometimes overly harsh and fail to recognize the potentially counterproductive collateral harm to children, families, and communities.

*Ostensibly, immigration enforcement was stepped up to protect the public from serious threats to national security and public safety – these are legitimate goals. But, as has been the case with criminal justice policy in the last several decades, the penalties being imposed by courts are sometimes overly harsh and fail to recognize the potentially counterproductive collateral harm to children, families, and communities.*

ICE estimates it only has the resources to apprehend and remove a small proportion of people (4 percent) who are in the United States in violation of immigration laws.<sup>40</sup> Because of resource constraints, ICE prioritized apprehending and deporting people who are a serious public safety threat, among whom they include people convicted of crimes. In rank order, ICE personnel have been instructed to prioritize removing people convicted of (1) an aggravated felony or two or more other felonies, (2) a non-aggravated felony or three or more misdemeanors, and (3) one or two misdemeanors only, with subsequent guidance of priorities for the issuing of detainers.

Approximately 392,000 people were removed from the United States in 2011. At least 39 percent (or about two out of five) had been convicted of a non-immigration criminal offense.<sup>41</sup> On closer examination, two of the largest categories of criminal offenses were traffic offenses (about 11 percent of all deportations) and “other” criminal offenses (7 percent), a category believed to capture many misdemeanor offenses. All other crime categories combined equate to about 21 percent of removals (one in five), of which dangerous drugs (the sale, manufacture, distribution or possession of illegal drugs) is the single largest category (11 percent of all removals).<sup>42</sup>

**Table 1: People Removed, FY 2011**

	Number	% of all Removals
<b>Total people removed</b>	<b>391,953</b>	<b>100</b>
Violations of immigration rules (expedited removals, overstaying visas, etc).	203,571	52
Convicted of criminalized immigration offense (charged criminally for unauthorized re-entry, “alien” smuggling, and so forth)	37,458	10
Convicted of a non-immigration criminal offense	150,924	39

Immigration reform advocates argue that the expatriation of some U.S.-born children and the permanent separation of some deported parents from their children is an excessive penalty. In response to criticisms, ICE has instructed its agents and officers to use discretion in making arrests and prosecuting cases.<sup>43</sup> In particular, they have been instructed to exercise discretion when dealing with minor traffic offenses such as driving without a license, and to consider among other things whether individuals are the primary caregivers of children.<sup>44</sup> If these relatively recent changes have reduced the number of parents of U.S.-born children being removed from the country, it is not yet detectable in the statistics ICE publishes.

**Table 2: Categories of Non-immigration Criminal Offenses**

	<b>Number</b>	<b>% of all Removals</b>
<b>Total people removed who were convicted of a non-immigration criminal offense</b>	<b>150,924</b>	<b>39</b>
Dangerous drugs (sale, distribution, manufacture, possession)	43,262	11
Criminal traffic offenses	43,022	11
Other criminal convictions	27,889	7
Assault	12,755	3
Larceny	5,705	2
Fraudulent activities	4,218	1
Burglary	3,795	1
Robbery	3,745	1
Family offenses	2,961	1
Sexual assault	3,572	1

## COMMON CONCERNS AND OBJECTIVES OF THE CRIMINAL JUSTICE AND IMMIGRATION REFORM COMMUNITIES

The criminal justice reform and immigration reform communities have tended to “stay on their own side of the fence”<sup>45</sup> despite common concerns that might serve as the basis for joint reform efforts. They include common concerns about:

- the sprawl of the criminal justice system;
- the profiteering, political influence, and expansion of for-profit prison companies;
- assuring procedural justice for disempowered groups;
- and, the issue at the heart of this collection of articles, the potential harm to children when the criminal justice, immigration enforcement, and child welfare systems converge on parents’ lives.

Where children are concerned, many of the recommendations made by contributors to this anthology mirror recommendations that have been promoted over the years by advocates for children whose parents are in jails or prisons, only extended to include actors and policies specific to the immigration enforcement system. They include:

- implementing protocols for law enforcement and immigration enforcement agents to follow in order to prevent children from being traumatized when authorities take parents into custody;
- allowing parents the opportunity to arrange for someone to care for their children when parents are taken into custody;
- limiting the practice of confining parents prior to criminal/immigration hearings unless doing so clearly serves public safety interests;
- housing incarcerated/detained parents in proximity to their children to make it easier for children to see their parents;

- providing affordable opportunities for parents in custody to regularly communicate with their children;
- allowing parents to notify their children and/or their children's caregivers when they are transferred from one correctional/detention facility to another;
- assuring incarcerated/detained parents are able to fully participate in family court proceedings;
- assuring parents who are incarcerated or detained have access to programs and services they need to meet requirements family courts establish for parents to be reunited with their children; and
- adopting policies that allow and encourage judges to consider defendants' parenting responsibilities when making decisions about parents' cases.

Given common concerns and shared objectives, one might wonder what keeps the criminal justice and immigration reform communities from combining forces in advocating for change. As Mauer & Lesley note in the foreword to this volume, one challenge is a lack of understanding of the details of multiple different bodies of policy and the nuances of the day-to-day operations of multiple highly complex systems. The articles in this volume help overcome that barrier by providing basic information about the immigration enforcement system, enumerating specific policies and practices that are problematic for children whose parents are vulnerable to immigration enforcement, and outlining recommendations for reform.

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## FAMILY UNITY IN THE FACE OF IMMIGRATION ENFORCEMENT: PAST, PRESENT, AND FUTURE

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On March 6, 2007, U.S. Immigration and Customs Enforcement (ICE) raided the Michael Bianco, Inc. (MBI) leather goods factory in New Bedford, Massachusetts, on suspicion that the owners had mistreated workers and aided them in obtaining fraudulent documents. The owners of MBI were quickly released back into the community to await legal proceedings, but 361 of their employees, the majority of them women, were not so fortunate. Those apprehended at MBI were taken into ICE custody for suspected violations of immigration law and transferred out of the area for processing. Ultimately, many were sent to immigration detention facilities close to the U.S.-Mexico border pending removal from the United States.

Among those apprehended were 110 sole caregivers of minor children. Although ICE knew many of the workers at the factory were parents, the agency failed to ensure that people with childcare responsibilities were identified and that childcare arrangements could be made. As a result, nearly 200 children were left behind at schools and daycare centers, and many came home that night to a house without a parent. In the days that followed, reports surfaced of children in precarious situations, including a 7-year-old who called a hotline asking for her mother, and a nursing baby who was hospitalized after refusing to take bottles and becoming severely dehydrated. Child welfare workers struggled to locate and communicate with the detained parents to ensure that the children were safe. Ultimately, the Massachusetts Department of Social Services resorted to sending child welfare workers to Texas to locate parents, determine how their children were being cared for, and press ICE to release the parents. Many of the parents apprehended that day were ultimately removed from the United States. Their children suffered, and continue to suffer, the effects of this sudden separation from their parents, and many of the families involved have been irreparably torn apart.

The New Bedford raid, one of many worksite enforcement operations conducted by ICE in recent years, was not unique in its scope or outcomes. However, it was notable for the attention it brought to the events that can occur when the criminal justice, immigration, and child welfare systems intersect. In the aftermath of the raid, senators Ted Kennedy and John Kerry and Massachusetts Governor Deval Patrick called on ICE to implement humanitarian guidance to prevent the needless separation of families in future worksite raids, and immigrant, child rights, and faith-based advocates coalesced around the need for protocols that would minimize trauma at the time of apprehension for families affected by immigration enforcement. Later that year, ICE responded by issuing guidelines instructing officers involved in worksite raids in which 150 people or more were apprehended to identify parents and other vulnerable individuals and consider them for release rather than detention. These guidelines represented a small step forward and proved effective in reducing family separations due to large worksite enforcement operations.<sup>1</sup>

Just as these guidelines were being rolled out, the very nature of immigration enforcement shifted dramatically away from a focus on ICE-run worksite operations and towards expanded use of local and state law enforcement agencies to identify people suspected of violating immigration law. The complex and multi-systemic nature of this form of enforcement complicated efforts to make apprehensions more humane by



reducing ICE's control over how enforcement is conducted. It also changed both the demographics of and the assumptions made about people in immigration proceedings.

Today, a person is more likely than ever to have entered the immigration enforcement system following contact with local and state law enforcement.<sup>2</sup> Only a small percentage of those apprehended in this manner were arrested for serious criminal acts.<sup>3,4</sup> Others may be victims of false accusations, or apprehended as a result of racial profiling or immigration-related pretextual arrest (arrests conducted for improper motives).

The rising trend to conflate all violations of immigration law with criminal activity means that even those convicted of misdemeanors or non-violent offenses, as well as those with no criminal background at all, are perceived to be “criminal aliens.” This nomenclature can lead to inaccurate and unfounded conclusions about individuals in immigration proceedings. One of the many situations in which this can be problematic is when parents are simultaneously involved in the immigration enforcement and child welfare systems. The child welfare system, which has limited understanding of the immigration system and a responsibility to assess parental fitness, may make inappropriate assumptions about a person's parenting ability based solely on his or her involvement in immigration proceedings.

## THE UNINTENDED CONSEQUENCES OF EFFORTS TO DO GOOD

Family separations arising from immigration enforcement are sometimes the unintended consequence of the criminal justice, immigration, and child welfare systems' well-intentioned, but siloed thinking. The police officer who responds to a domestic violence call believes he or she is acting in the interest of public safety by taking both parties to the station for questioning. The ICE officer who investigates the arrested domestic violence victim after a fingerprint check revealing she is undocumented believes he is appropriately carrying out his responsibility to enforce immigration law. The child welfare worker who places the victim's children into foster care believes she is making the best decision for the children's safety and well-being.

These systems, and the individual actors within them, operate in the vacuum of their unique frames of reference, and without sufficient awareness of the ripple effects their actions cause in other arenas. The police officer does not realize that the mother's abuser is using her immigration status against her and that taking her to the station could result in her being placed into immigration proceedings. The ICE officer does not recognize that the woman is the victim, not the abuser, and that her children were left alone when a detainer (essentially a referral from law enforcement to ICE) prevented her from returning home. The child welfare worker concludes that if the mother is in federal custody, she must therefore be an unfit parent, even though incarceration alone is insufficient for determining one's parental fitness and immigration detention is administrative custody, not incarceration for punitive purposes. Further compounding the problems that arise because the systems fail to understand each other are fundamental inadequacies in policy and practice that can seriously undermine migrant parents' rights.

*Family separations arising from immigration enforcement are sometimes the unintended consequence of the criminal justice, immigration, and child welfare systems' well intentioned, but siloed thinking.*

The challenges to parental rights and family unity that arise at the intersection of the criminal justice, immigration, and child welfare systems necessitate unique approaches to minimize the likelihood of family separation. Yet, thus far all three systems have failed to put in place adequate safeguards to ensure that parents do not lose their parental rights because they are arrested and detained, and that parents who are involved in immigration proceedings have the ability to maintain a relationship with their children.

This paper will explore key immigration enforcement, detention, and removal policies as they relate to family unity, with an emphasis on parents' ability to protect their due process rights. We will discuss the changes in enforcement policy over recent years, ICE's recent prosecutorial discretion guidance, and its detention and removal practices as they impact families involved with the child welfare system. We will then review promising policy developments and offer recommendations for needed changes in policy and practice going forward.

## **ICE POLICIES AND PRACTICES AND IMPLICATIONS FOR FAMILY UNITY**

### **Humanitarian Guidelines**

In 2007, ICE issued humanitarian guidelines for worksite enforcement operations involving 150 or more people.<sup>5</sup> These guidelines require ICE to coordinate with relevant federal and local social service agencies in advance of large worksite operations to ensure the identification and possible release of individuals categorized as “vulnerable,” including pregnant women, nursing mothers, and sole caregivers of minor children. While these guidelines have proven effective in minimizing family separations within the worksite context, and were later expanded to include worksite operations involving as few as 25 people, they do not apply to ICE enforcement activities targeting individuals or smaller groups, or those carried out under Secure Communities and other cooperative programs between ICE and law enforcement.

### **Guidelines when Juveniles are Present at Apprehension**

In 2007, ICE also released a memorandum instructing officers on how to proceed when a U.S. citizen or lawful permanent resident child is present at the time a parent is apprehended in a fugitive operation, a type of enforcement action involving immigrants with outstanding removal orders or other immigration-related violations that is often conducted as a home raid. The memorandum prioritizes contacting local child welfare agencies or the police over permitting a parent to select a caregiver.<sup>6</sup> This policy, which is still under review by ICE as of the writing of this article, undermines parents' rights to determine what is best for their children and places an unnecessary burden on the child welfare system.

### **ICE Enforcement Actions in Sensitive Locations**

In 2008, ICE issued a “sensitive locations” memorandum clarifying that ICE should refrain from enforcement activities at or near community locations such as schools, places of worship, and religious ceremonies.<sup>7</sup> While there have been isolated violations of this policy, ICE has taken action to investigate allegations of abuse and encourage compliance.

## ICE Enforcement Priorities, Mandatory Detention Laws, and Prosecutorial Discretion

While the ultimate goal of cooperation between ICE and law enforcement was apprehension and removal of people who pose a serious threat to national security and public safety, studies have shown that the majority of people apprehended through these programs have only minor, non-violent offenses or no criminal involvement at all.<sup>8</sup> Following much criticism, in June 2010, ICE Assistant Secretary John Morton issued a memorandum directing the agency to prioritize removal of those who pose a threat to national security; have been convicted of serious crimes, including those who have committed violent crimes, felons, and repeat offenders; have returned after being removed; or have recently crossed the border unlawfully.<sup>9</sup> This guidance was followed by a June 2011 memorandum that further clarified ICE's enforcement priorities and directed employees to use their prosecutorial discretion to decide to what degree to enforce immigration law in any given case. This memorandum delineated factors to be considered in deciding whether to open or pursue an immigration removal case, including whether the person has U.S. citizen or lawful permanent resident children, or is the primary caregiver of a minor.<sup>10</sup> In late December 2012, Secretary Morton released another memo detailing new detainer guidance for all ICE enforcement programs, including Secure Communities.<sup>11</sup> The new guidance limits the use of detainers (a request to law enforcement to hold a person while ICE decides whether it wants to initiate removal proceedings against them) to those who fall under ICE's enforcement priorities, including those who have been charged with certain crimes or are repeat offenders. The policy restricts the use of detainers against individuals who are not enforcement priorities and who have come to the attention of law enforcement as a result of minor misdemeanors, such as traffic violations.<sup>12</sup>

Unfortunately, many migrant parents who are involved with the child welfare system will not benefit from these policies because they still fall under ICE's enforcement priorities and are subject to mandatory detention under immigration law. By law, certain categories of people, including those who try to enter the United States without valid immigration documents, those who return to the United States after being removed, and those with certain criminal convictions, including convictions for minor crimes, fall under mandatory detention.<sup>13</sup> While ICE has the discretion to forego immigration proceedings against a person who is subject to mandatory detention, and similarly could decide to use an alternative to detention, most officers are reluctant to do so, particularly if the individual was identified following contact with law enforcement. The reality is that with expanded cooperation between law enforcement and ICE, a large percentage of parents who are involved in the child welfare system will be detained until they win relief or are removed.

## DETENTION POLICIES

There is no requirement that individuals in immigration detention be held close to the community where they were living at the time they were apprehended. As a result, detained parents are routinely transferred thousands of miles from home, which has serious consequences for their ability to participate in child welfare plans and proceedings. In addition, detainees can be transferred between facilities without warning, which makes it difficult for child welfare and the family courts to locate and communicate with them. A new transfer policy, released in 2012, aims to minimize the transfer of individuals with family and other humanitarian concerns, but it is not as effective as it could be because it does not apply until after the individual has been placed in the first detention facility, which could be anywhere in the country.<sup>14</sup>

Even though detainees are regularly held for months and even years, ICE views detention as a temporary measure designed to facilitate removal. As a result, immigration detention facilities do not provide the sort of programming that child welfare reunification plans typically require. We are not aware of a single immigration detention facility that provides parenting classes. Furthermore, therapeutic services such as drug and alcohol counseling and anger management are extremely rare and difficult to access, particularly those that are culturally competent and offered in multiple languages.

Communication with the outside world is also difficult for people who are detained. Detainees are permitted to make phone calls, but they must purchase phone cards in order to do so. Phone cards are extremely expensive and many detainees cannot afford them unless they have family with the means to send them funds. In addition, in many detention facilities, phones cut out after a few minutes or do not work at all. Visitation is permitted in all detention facilities. However, when parents are held far from home, it is often too difficult or too expensive for child welfare workers or foster parents to bring children for visits. In addition, if the children or their caregiver are undocumented they cannot enter an immigration detention facility. Even when visitation is possible, the facility may prohibit contact visits, creating another potential point of noncompliance with a child welfare reunification plan.

The deleterious effect of a parent's inability to participate in reunification plans is compounded by the inability to meaningfully participate in court proceedings. ICE does not have a consistent or enforceable policy guaranteeing parents' right to participate in family court. Similarly, there is no clear policy on how a parent can request to participate in hearings, either telephonically or in person, and ICE and detention facility staff often claim they need a writ from the family court judge in order to facilitate an appearance. As a result, few parents participate in family court proceedings, leaving child welfare workers and the courts to conclude parents are unwilling or unable to reunify with their children. Too often, the outcome of these limitations is movement to terminate parental rights.

## **CHALLENGES TO FAMILY REUNIFICATION TRIGGERED BY REMOVAL**

Parents in immigration detention do not know exactly when they are going to be removed. This limits their ability to make permanent care arrangements for their children who will remain in the United States or to arrange for their children to accompany them to their country of origin. In addition, because ICE typically removes individuals on dedicated, government-operated removal flights, children are not able to travel with their parents. Families must guess when trying to coordinate children's commercial travel so that they can arrive at the same time or after their parents. ICE keeps travel information confidential, so if someone finds out when a parent is going to be removed, the agency will change the travel arrangements, creating the potential for scenarios in which families have purchased non-refundable tickets for children who ultimately cannot use them because their parent has not yet arrived in the country of origin to receive the children.

Another complication is the difficulty detained parents face in obtaining a passport and other travel documents for their children, as well as school and medical records. It can be extremely difficult to gather this information without assistance from someone on the outside, yet without these items it may be impossible, or not in children's best interest, to join parents in their country of origin.

When children are in the child welfare system, it can be very difficult, and even impossible, to facilitate family reunification after a parent's removal. This is especially true when there is no coordination between ICE and the child welfare agency. In some cases, a family court judge or child welfare caseworker may determine that it is in the best interest of a child to remain in the United States, even if that means permanent separation from a parent. Or, child welfare workers and the court may decide that the parent needs to continue to participate in the child welfare process to establish their ability and willingness to reunify with their children. Yet, once a parent is deported, it is nearly impossible to fulfill case plan requirements or participate in family court hearings, making termination of parental rights extremely likely.

## **FAVORABLE ADMINISTRATIVE REFORMS AND POLICY DEVELOPMENTS**

As a result of ongoing advocacy by immigrant rights organizations, ICE has recognized that immigration enforcement, detention, and deportation can have adverse effects on family unity. We are hopeful that more comprehensive reforms will be announced soon. In the meantime, the Department of Homeland Security has taken some encouraging steps to reduce the collateral consequences of enforcement on families.

### **Detainee Locator**

Child welfare caseworkers, court appointed attorneys, and the courts themselves often struggle to locate and communicate with parents who have been detained. In 2010, ICE launched an Online Detainee Locator System to make it easier to determine whether and where an individual is being held. This tool has been effective in many cases, and child welfare workers should make efforts to obtain identifying information about a parent so that they can avail themselves of this resource.<sup>15</sup>

### **Detention Standards on Access to Family Court Proceedings**

ICE's 2011 Performance-Based National Detention Standards include language addressing parents' access to family court proceedings. The standards, which are not enforceable, state that ICE may escort detainees to family court proceedings on a case-by-case basis. However, detainee requests are reviewed by the deportation officer, the same person who is charged with removing the parent, and are only granted with a favorable recommendation from that official. Parents must cover their travel costs and are shackled both during transit and court proceedings. Because ICE is slowly rolling out the standards, this policy has yet to be implemented at the majority of facilities.<sup>16</sup>

### **Risk Classification Assessment**

One of the primary purposes of detention is to ensure that people appear at immigration proceedings. However, alternatives to detention exist and studies have shown favorable appearance rates for a variety of different programs.<sup>17</sup> In addition, releasing people on their own recognizance is appropriate in certain cases, especially when the likelihood of winning immigration relief depends on appearing in court. Soon, ICE is expected to have in place nationwide a risk classification assessment tool that will help the agency determine whether a person who comes into custody is eligible for release or alternatives to detention. This assessment is expected to prevent the detention of parents in some instances. However, the only childcare factor that will

be considered is whether someone is a sole caregiver of a minor. As a result, many parents will continue to be detained if there is another parent in the home.

## Public Advocate and Community Hotline

In 2012, ICE created public advocate positions. Public advocates are individuals charged with receiving and responding to problems created by enforcement and detention. Each ICE field office has a designated public advocate who can receive complaints and concerns from stakeholders, including those related to participation in child welfare proceedings. Issues that are not resolved at the local level can be elevated to the public advocate at headquarters. A toll-free community hotline was also established in late 2012 through the Office of the Public Advocate to enhance ICE's ability to engage with stakeholders and to address enforcement and detention concerns.<sup>18</sup> The hotline is expected to expand to all detention facilities by early 2013. Although the Office of the Public Advocate has not yet been widely tested in the child welfare context, it is a potentially helpful development that warrants use.<sup>19</sup>

## Stateside Visa Waiver Process

Individuals who have been out of immigration status for any length of time and leave the country can face a three- or ten-year bar to reentering the United States. While these out-of-status individuals may have relatives sponsor them for permanent residency, they must return to their country of origin in order to complete their visa processing, an often unpredictable process which may take several years to complete. While waivers for the re-entry bars are available to individuals who can demonstrate that certain U.S. citizen family members may suffer "extreme hardship" as a result of denying reentry, individuals currently must leave the country to apply for the waiver, with no guarantee that they will receive it. In response to these problems, in April 2012, U.S. Citizenship and Immigration Services (CIS) proposed a policy that would reduce the time that families are separated by allowing certain eligible individuals who lack lawful presence to apply for a provisional waiver to the re-entry bar *prior* to leaving the United States to ensure that they are not separated from their family for unduly long periods of time.<sup>20</sup> To receive a waiver, an individual must meet certain requirements including demonstrating that prolonged separation would cause extreme hardship to a U.S. citizen spouse, parent, or child over the age of 21.<sup>21</sup> While the policy does not allow U.S. citizen children under the age of 21 to be considered under the extreme hardship requirement, it still has the potential to significantly reduce the number of family separations occurring as a collateral consequence of immigration law. The policy is scheduled to go into effect in March 2013.

## Deferred Action for Childhood Arrivals

On June 15, 2012, the Secretary of Homeland Security announced a groundbreaking new policy for certain undocumented migrants who entered the United States as children. The policy, known as deferred action for childhood arrivals, is a temporary but renewable form of administrative relief that provides eligible youth protection from deportation and an opportunity to receive employment authorization for a period of two years. While deferred action does not provide a path to lawful permanent resident status or U.S. citizenship, it does provide an opportunity for those who are eligible to work legally.<sup>22</sup> The policy directive went into effect on the day of the announcement for qualified individuals who were already in removal proceedings, and as of August 15, 2012, CIS began accepting applications for those not already in the process of removal. An



estimated 1.2 million individuals may be able to benefit from the policy, which has positive implications for family unity for families with eligible children or parents.

### **POLICY RECOMMENDATIONS: LOOKING TO THE FUTURE**

The face of migration in the U.S. is increasingly that of women, children, and families. Individuals are staying for longer periods, returning to their home country less often, and we are seeing a corresponding rise in the number of mixed immigration-status families. Currently, 5.5 million children in the United States have at least one parent who entered the United States without appropriate documentation, and 4.5 million of those children are U.S. citizens.<sup>23</sup> The potential for long-term or permanent separation is very real for these families. However, our immigration laws are still calibrated to the single, male, economic migrant who moves relatively easily between the United States and his home country, and are not sufficiently responsive to the family unity considerations that increasingly motivate unlawful migration. Changes in the demographics of the immigrant population, as well as the expansion of enforcement, have resulted in unintended consequences for children and families. Immigrant parents who wish to be with their children may be caught in the intersection of three separate systems, each with their own set of rules and standards that often conflict with one another.

Recent efforts by policymakers to address family separations arising from immigration enforcement are promising, but much more needs to be done. The following legislative and administrative recommendations would promote family unity, a core American value.<sup>24</sup>

#### **Immigration Reform: Reaffirming Our Nation's Commitment to Family Unity**

Congress must pass an immigration reform bill that reaffirms our nation's commitment to family unity. Popular wisdom mistakenly holds that parents can legalize their status and get on a path to citizenship as soon as they have a U.S. citizen child. In reality, children must be 21-years-old to sponsor a parent. In addition, the family visa process is riddled with backlogs, has failed to keep up with demand, and includes waiting periods upwards of ten or 20 years in many cases. These factors make it all but impossible for migrants to comply with the law while maintaining any kind of meaningful family relationship. Individuals who are eligible for family-based visas need an efficient mechanism to apply from within the United States so they are not deterred from legalizing their status by bars to reentry. Similarly, the number of family-based visas must be increased to reflect the current realities of the U.S. population. Lastly, undocumented individuals who can demonstrate strong community and family ties in the United States need a path to permanency so they do not have to choose between family unity and compliance with the law.

#### **Train Employees to Identify Individuals with Humanitarian Concerns**

U.S. Department of Homeland Security (DHS) employees who come into contact with individuals suspected of being in violation of immigration laws should receive training in effective techniques to identify parents and other individuals with humanitarian concerns. Prosecutorial discretion and risk classification assessment

will only be as effective as the ability of ICE officers to identify those who are eligible for discretion and release.

## **Issue Guidelines that Allow Parents to Make Childcare Arrangements**

ICE should issue guidelines granting all the individuals they apprehend phone calls to make childcare arrangements within a short time of apprehension by immigration enforcement officials or of a detainer being issued. These guidelines should apply to ICE officials and all state and local law enforcement agencies cooperating with ICE. Phone calls are essential to ensure that parents and others with child care responsibilities who are taken into ICE custody can arrange care for their children. Phone calls will reduce the costly and unnecessary involvement of the child welfare system in cases where alternative care options are available.

## **Reform Mandatory Detention Laws**

Mandatory detention laws must be reformed or eliminated so that detention is the rare exception and not the norm. The most effective way to preserve family unity is to allow parents to stay in the community with their children while their immigration proceedings move through the courts.

## **Detain Parents Close to their Children**

In cases where a parent must be detained, ICE should expand its transfer policy to require that the initial place of detention be close to the individual's family. Keeping detained parents close to their families will help enable regular visitation with children and makes it easier for child welfare caseworkers to locate and work with parents.

## **Implement Protocols that Aid Parents in Complying with Child Welfare Reunification Plans**

ICE should establish protocols to facilitate the ability of parents to visit with their children, comply with child welfare reunification plans, and participate in proceedings impacting upon child custody. Such protocols should include providing parents with regular, affordable phone calls and visitation with their children and requiring that detention facilities maintain child-friendly visitation areas. ICE and detention facilities should also coordinate with the child welfare agency to provide parents access to court-mandated services and programs, such as parenting classes, and must implement a policy to facilitate participation in family court hearings.

## **Designate Child Welfare Liaisons in Field Offices**

ICE should designate a liaison in every field office to handle matters that arise as a result of parents' involvement in the immigration and child welfare systems. The liaison could serve as a point of contact for child welfare staff, manage court participation and family travel requests, and ensure that parents receive the resources and information necessary to navigate the child welfare process.

## Restore Judicial Discretion in Considering Impact of Decisions on U.S. Citizen Children

Congress should reinstate judicial discretion so that immigration judges may consider the impact of a parent's removal on U.S. citizen children. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 eliminated immigration judges' discretion to consider the potential harm of a parent's removal to U.S. citizen children. Reinstating this discretion will allow judges to weigh factors such as the psychological and economic hardship to children of removing their parents, as well as the increased risk of children entering the child welfare system.

## Remove Obstacles to Parents Making Travel Arrangements to Reunify their Children

ICE must support family unity at the time of a parent's removal by sharing travel information when necessary and delaying a parent's removal to allow time to obtain children's travel documents. ICE carefully guards travel information for people being removed. If detainees' travel information is compromised, the agency will alter the arrangements. There are documented cases of families that purchased costly plane tickets for children to travel with a parent, only to lose the ticket and the likelihood of near-term family reunification when ICE changed the flight. This policy creates significant impediments to family unity in the parent's country of origin, especially for young children who are not able to travel alone.

## Allow Parents to Remain in or Return to the United States for Child Welfare Proceedings

DHS must make humanitarian parole readily available to parents who need to remain in or return to the United States pending an outcome in proceedings impacting upon custody of their children. It is extremely difficult for parents to comply with a reunification plan and participate in family court proceedings from outside the United States and removal all but severs any meaningful relationship between parents and children.

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## Notes

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## THE TRECHAROUS TRIANGLE: JUSTICE, IMMIGRATION ENFORCEMENT, AND CHILD WELFARE

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Adapted in part from *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*. <http://www.arc.org/shatteredfamilies>.

Roberta's story starts when she was pulled over by local police in Phoenix, Arizona, while driving three of her five children home from a family party where she admits she had one too many beers. Local police administered a Breathalyzer and put her under arrest for drunken driving. Roberta was shuttled to the county jail and her three children were immediately placed in temporary foster care. She expected to bond out and quickly return to her children. And, if Roberta were a citizen, that's probably exactly what would have happened. But Roberta is not a citizen. She's an undocumented immigrant. So, despite the fact that she's a single mother of five who lived in the United States without any previous run-ins with law enforcement, Roberta was flagged for deportation by federal immigration authorities and moved to an immigration detention center in the desert an hour and a half south of her home. She lost contact with her children, all five of whom were placed in foster care, and after seven months inside the detention center, Roberta was deported to Mexico without her children.

Roberta's story is not unique. Federal data obtained by the Applied Research Center (ARC) through a Freedom of Information Act (FOIA) request, and first published in *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, shows that in the six month period between January and June 2011, the federal government deported over 46,000 parents of U.S. children.<sup>1</sup> In December 2012, ARC obtained additional federal data through another FOIA request that reveals that the federal government deported nearly 205,000 parents of U.S. citizen children during the time period between July 1, 2010, and September 30, 2012.<sup>2</sup> The number accounts for 23 percent of all deportations in that period.<sup>3</sup>

One of the most troubling effects of this mass deportation of parents and separation of families is that thousands of children languish in foster care for long periods and are sometimes put up for adoption, at least in part because of the deportation of their mother or father. Based on surveys with child welfare caseworkers, attorneys who represent parents and children in juvenile courts, and analyses of data from 22 states, the *Shattered Families* report conservatively estimated that as of late 2011, there were at least 5,100 foster children around the country who faced barriers to reunifying with their families because their mothers or fathers had been detained or deported by the federal government. These families are often separated for long periods of time, and sometimes children are permanently separated from their parents.

Although U.S. Immigration and Customs Enforcement (ICE) issued a memo in 2011 instructing its agents to use discretion to focus immigration enforcement efforts on people with "serious" criminal convictions while avoiding the deportation of people charged with low level crimes, or whose sole violation is that they lack proper immigration documentation, the most up-to-date data reveal that this discretion has scarcely been applied and many of those deported as a result of involvement with the criminal justice system have been convicted of minor violations.<sup>4</sup> Meanwhile, the ICE memo on prosecutorial discretion enumerated a set of

factors to weigh while making deportation decisions. One of these factors is whether a potential deportee is a parent to a U.S. citizen child.<sup>5</sup> The recent data on parental deportations suggest that the memo has not significantly changed ICE practice. Indeed for Roberta, a DUI charge, the first blemish she's ever had on her record, made her subject to rapid movement into deportation. The consequences for her and her children are Spartan: they may never see each other again.

## EXPANDED ROLE OF LOCAL LAW ENFORCEMENT IN FEDERAL IMMIGRATION ENFORCEMENT

In recent years, there has been an expanding conflation of immigration and criminal laws and the systems that enforce them and, as a result, a growing proportion of deportees now come to the attention of federal immigration authorities through county and state criminal justice systems. The federal government's flagship deportation program, Secure Communities, is broadening jail-based immigration enforcement, creating a treacherous triangle of the criminal justice, immigration, and child welfare systems. The federal government under the Obama Administration rapidly expanded collaboration with and use of local law enforcement departments to identify noncitizens for deportation. If the Bush Administration's immigration enforcement strategy can be defined by its focus on workplace immigration raids, Obama's enforcement approach is defined by its focus on local law enforcement and jails. The Obama Administration has extended its enforcement infrastructure deeply into local jails in a strategic shift putatively aimed at deporting "criminal aliens" (noncitizens convicted of criminal offenses) rather than on immigrants who have only violated non-criminal immigration laws.

Secure Communities was piloted in 2008 and rapidly expanded under the Obama Administration. The deportation program uses local jails to identify immigrants for deportation. Currently, any time someone is booked into a local jail in the United States, his or her fingerprint data are automatically run through an FBI database. In jails where Secure Communities has been implemented, the FBI forwards that same data to ICE, which then determines the person's immigration status. ICE can issue a detainer to put an immigration hold on any arrested individual who is not a citizen, including lawful permanent residents of the United States, asking the local jail to continue detaining the arrested person until ICE arrives to move him or her to an immigration detention center. Secure Communities now operates in nearly all jails in the country and is scheduled to be implemented in all remaining counties by 2013.<sup>6</sup> Localities have no choice whether to participate in the program; it is mandatory and, as a partnership between the FBI and ICE, functions automatically.

President Obama and the heads of his U.S. Department of Homeland Security (DHS) and ICE regularly claim that they have deported record numbers of "criminal aliens," largely as a result of this program. And, they claim that the program is color-blind, immune from the racial profiling that's plagued previous federal-local immigration partnerships. However, both claims are shaky. Well over one-quarter of deportees who come to the attention of ICE through Secure Communities have no criminal conviction at all and are deported simply for violating immigration laws, like entering the United States without authorization.<sup>7</sup> Another 30 percent involve minor charges, including violations like driving without a license, a common charge against undocumented immigrants who, because of laws in most states, cannot obtain drivers' licenses.<sup>8</sup> In fact, fewer than 30 percent of Secure Communities deportations since the program was implemented have been a result of what ICE calls "level 1" convictions, or felonies.<sup>9</sup> As for the claim of



color-blindness, although ICE may be correct that database immigration checks are run without regard for identity, the program cannot control for the discretion local police exercise in who they arrest and book into jail. In a jurisdiction where police are interested in targeting people whom they think are immigrants, Secure Communities provides a surefire mechanism for getting people deported. Rather than apprehending people who have been convicted of serious criminal offenses, Secure Communities is much more akin to a dragnet that feeds off of local police practices. The result is that any non-citizen who comes into contact with local police for whatever reason is at risk of deportation.

## INCREASED RISK OF SEPARATION

DHS' widespread use of local jails to detain noncitizens puts families at particular risk of separation. In jurisdictions where local police aggressively participate in immigration enforcement through programs like Secure Communities, children are more likely to be separated from their parents and face barriers to reunification. ARC measured the impact of a similar local immigration enforcement program called 287(g) – the name refers to a section of the Immigration and Nationality Act. Through 287(g), ICE deputized local police and jails to act as federal immigration agents, giving them authority to arrest and detain noncitizens.

The impact of aggressive policing and local enforcement is clear when comparing counties that are otherwise similar except for 287(g) programs.<sup>10</sup> In counties surveyed by ARC where local police signed 287(g) agreements with ICE, children in foster care were about 29 percent more likely to have detained or deported parents than in other counties (an average of 4.9 percent of foster care kids in 287(g) counties compared to 3.8 percent in others). The difference was statistically significant when variation in the size of counties noncitizen populations and their proximity to the border were taken into account.

*In jurisdictions where local police aggressively participate in immigration enforcement through programs like Secure Communities, children are more likely to be separated from their parents and face barriers to reunification.*

An attorney for children in Tucson, Arizona, explained to the author the impact of jail-based immigration enforcement while describing a current foster care case in which a mother was picked up on charges that were entirely unrelated to the children. Considering the nature of the relatively minor allegations, had she been a citizen, the attorney had little doubt that she would have bonded out of jail in a day or two.

The attorney described a mother who was otherwise “fit” to parent, but was separated from her children for an extended period because of the federal government’s use of local jails as staging grounds for deportation. The mother was not released after a day or two, but rather moved to an immigration detention center and deported.

“In this particular case, it was her inability to be with her kids because of detention and deportation that got them into care. The kids are a little older and if she had been a citizen, the children would have made do for a day and then she would have been out and back with them.”

The period of separation that was caused by the mother’s detention and deportation, the attorney explained, “means it’s considered to be neglect now by our state’s statutory regime. This case has been open two months and the kids are still in foster care.”<sup>11</sup>

## BARRIERS TO REUNIFICATION

Once parents with children in foster care are moved to federal immigration detention centers, they are severed from the vital lines of communication that connect them with their children, the child welfare system, juvenile court, and the court-appointed attorney. According to the ARC study, ICE has categorically refused to transport parents to their juvenile court hearings. While parents are sometimes able to appear telephonically in these hearings, all of the dozens of detained parents interviewed for *Shattered Families* missed at least one hearing because they were detained.

Moreover, detained mothers and fathers are nearly always denied access to the services they need to comply with their child welfare reunification plans. In general, jails and prisons provide few parenting, drug and alcohol, and other programs for parents. The federal immigration authorities, and the counties and private prison contractors paid to run many immigration detention centers, are even less likely to provide these services. Indeed, none of the six detention centers visited during the *Shattered Families* investigation made services available to detainees. And, ARC heard reports of county jails that provide some access to services to “regular” inmates, but refused similar access to ICE detainees held in the same facility.

In the Baker County jail in Florida, which has a contract with the federal government to hold ICE detainees, a British immigrant mother of a young daughter who was in foster care received a letter from her child welfare caseworker listing tasks she was required to complete to reunify with her daughter. The letter read as follows:

*This letter is to advise you that as part of your outstanding dependency case plan tasks, you are court ordered to complete:*

- 1. Parent Educational Training for Teens*
- 2. Psychological Evaluation and follow all Court approved recommendations*
- 3. Substance Abuse Evaluation and follow all Court approved recommendations*
- 4. Family Counseling upon release*
- 5. Stable Housing and Income....<sup>12</sup>*

The mother could complete none of these requirements from within detention. The document that the caseworker sent her went on to read, “One of the tasks in your case plan is to visit with your child,” but the case worker would not drive the daughter to see her mother in the detention center located four hours away. According to a 2011 report by Human Rights Watch, detainees are on average transferred to detention centers 370 miles from their initial arrest or apprehension by immigration authorities.<sup>13</sup>

## PATHS OF SEPARATION

Detained and deported parents’ children enter foster care for a variety of reasons, and the child welfare and immigration enforcement systems can intersect in a number of ways. Some children enter into the child welfare system solely because their parents are detained. Other families already have child welfare system involvement, but immigration enforcement derails the family reunification process. Though every case bares a

unique set of facts, there are a number of common routes leading to the separation of families at the intersection of parental deportation and the children welfare system. In each of these scenarios, detention and deportation result in extended family separation.

## **Straight Path**

One route is that children enter foster care as a direct result of their parents' arrest or detention. In these cases, when parents are detained by ICE directly or are arrested by police and then shuffled to immigration authorities through Secure Communities or another program, parents are not able to care for their children and their children enter into foster care.

Even if parents in these cases are eventually released from immigration detention through the discretion of immigration authorities, the fact that their children are in the custody of the child welfare system can mean that the family will not be immediately reunified. In Phoenix, Arizona, an attorney told the author of a case in which a 2-year-old girl was placed in foster care when her mother was pulled over by police and arrested because she was undocumented and was driving without a license. The author spoke with the girl's foster care provider who said without equivocation, "The only reason they're not back together yet is the bureaucracy of the system. Before they can return her to her mother, they have to verify that the mom has a stable home, everyone else in the home passes background checks and that takes time." He added that if the mother had not been detained, the child welfare system would never have been involved in this family's life. "None of these were made into problems until she was detained."

## **Parallel Path**

The second common route entails ostensibly "normal" allegations of child maltreatment that first bring a family to the attention of the child welfare department, but because the mother or father is detained, reunification is not immediately possible. In some cases, when police are involved in child welfare investigations, a case that might have resulted in prompt reunification for a citizen parent leads instead to detention and extended separation. Parents in detention are often denied the due process right to advocate for themselves in juvenile court, and the child welfare system poses obstacles to reunifying families.

In many cases, children enter into the child welfare system after a parent is deported following abuse or neglect allegations against a remaining parent or relative. In Alleghany County, North Carolina, for example, Felipe Montes, the father of three young U.S. citizens, was deported to Mexico in late 2010 because of repeated driving violations.<sup>14</sup> His kids remained with their mother, Marie Montes, a U.S. citizen. Marie struggled to take care of the children alone. Her husband had been the primary wage earner and caregiver in their family and she had long struggled with mental health and substance abuse issues. The local child welfare department quickly removed the three young children from their mother, deeming her neglectful. Rather than quickly reuniting the boys with their father, a man who had never been found to be neglectful, the boys were placed in foster homes. The child welfare department refused to consider placing the children with their father in Mexico. Even after Marie and Felipe told the department that they wanted the children sent to live with their father, who now lived with an uncle and aunt in Tamaulipas, Mexico, the child welfare system continued to move toward terminating both Felipe and Marie's parental rights. After nearly two years of separation, in November 2012, Felipe regained custody of his three children on a "trial" basis and as of the writing of this article, he expects the child welfare case to be fully closed in early 2013.<sup>15</sup>

## Interrupted Path

The third route involves families that were already involved with the child welfare system when parents are detained. Immigration enforcement can interrupt the reunification process for families that are already involved with the child welfare system when parents are taken to detention facilities. A mother, a green card holder from Portugal who we'll call Magda, interviewed by the author in a Florida detention center, was just weeks away from fully reunifying with her son. The boy had been removed from her custody previously because of child maltreatment allegations stemming from substance abuse, but the family was well on its way to reuniting. Magda and her son were spending the afternoon together on one of their unsupervised biweekly visits when her son soiled his pants. With little money to spare, Magda walked across the street to a dollar store and stole the set of clothes he needed. She wanted to avoid taking her son back to the foster home without changing his clothes first. She didn't make it out the door. The security guard called the police, who arrested the mother for petty theft. The officers drove her son back to his foster home and the mother was placed in deportation proceedings because of the theft charge. From detention, she could do little to maintain contact with her son, and their path to reunification was interrupted. Though it's likely an arrest of this kind during a visit would interrupt any reunification process, the difference for Magda was that detention denied her the chance to continue efforts to reunify.

## CHILD WELFARE PRACTICE AFTER PARENTAL DEPORTATION

The intersection of child welfare and immigration enforcement is treacherous from all directions. Though detention and deportation separate families on the front end, once parents are deported, child welfare departments often lack clear policies to facilitate the reunification of children with their parents in other countries.

Currently, few child welfare departments systematically contact consulates when child welfare departments take custody of U.S. citizen children of a noncitizen parent. This lack of communication is significant because when foreign consulates are involved in these cases, children are sometimes reunified with their deported parents. Consulates can serve as a bridge between parents and child welfare departments. They can help mothers and fathers access case plan services in other countries, facilitate home studies, conduct searches for parents who may have been deported leaving behind children in foster care, and process passports so that children are allowed to leave the United States. Based on interviews, the practice of involving consulates when a foreign national is involved in a case is increasing in some jurisdictions, but in too many instances, parental deportation leads directly to extended and sometimes permanent family separation.

Without explicit policies to facilitate reunification with detained or deported parents, reunification decisions may be driven by systemic bias against placing children with their parents in other countries. One common barrier to the reunification of children with parents who have been deported is bias in child welfare systems, which manifests as a belief that children are better off in the United States, even if it means they will be in foster homes or placed for adoption. This bias can supersede the child welfare system's mandate to reunify families whenever possible.

Many of the attorneys, social workers, children’s advocates, and judges interviewed in the *Shattered Families* investigation raised questions about prejudice against reunifying U.S. citizen children with their deported noncitizen parents. According to the *Shattered Families* research, these biases were especially pronounced from many children’s attorneys, advocates, and caseworkers. A parent and child attorney in Brownsville, Texas, said,

*With the climate in Mexico, nobody wants to send any of the kids to that – it’s unsafe there now. Most of the attorneys don’t want to send the kids back to Mexico and their arguments are, one, poor conditions in that country and, two, they only get public education up to a certain age before the parents have to pay for it. Most of our parents don’t have education themselves; they are poor and they don’t have the ability to pay for further education.*

Because child welfare systems are tasked primarily with reunifying children with “fit” parents, the impact of this bias raises serious due process questions about how poverty, immigration status, and national origin may be used inappropriately to determine parental fitness.

These biases can compound anxieties among child welfare attorneys and courts about giving up jurisdiction over a dependency case, even if that case was near closure. A judge in Pima County took this position explicitly: “As a general matter, everyone is hesitant about placing a kid in another country because, from a practical standpoint, we are going to lose control of the case. Once I place the child [in another country], the judge basically ends up being asked to dismiss the dependency.” Without clear agreements with foreign consulates to take part in the transition of children from the United States to reunify with their parents, there’s nothing to soothe these anxieties, and children can remain in foster care that might otherwise be reunified with their parents.

## RECOMMENDATIONS

If the number of deported parents remains anywhere near the 2011 level, families will continue to be separated and children will continue to become stuck in foster care. This year, the Obama Administration offered a reprieve from deportation and work permits to young immigrants who entered or were brought into the United States without authorization before they were age 16 and who do not have criminal convictions. The deferred action for childhood arrivals policy could protect hundreds of thousands of young people from deportation. Yet some have asked, “What about these young immigrants’ parents?” In September during a forum aired on Univision, the president was asked directly if he would consider granting a similar deferral of removal to parents of U.S. citizen children. President Obama did not offer a clear response, but the question placed such a policy shift on the table.<sup>16</sup>

## Suspend Secure Communities

Meanwhile, immigrant rights advocates around the country are advocating for a suspension of the Secure Communities program. As *Shattered Families* found, the use of local jails in identifying non-citizens puts families at risk of separation and increases the chances that children in foster care will have parents who are detained and deported. Advocates call for an end to Secure Communities on the grounds that it is not the selective, targeted enforcement program that the administration claims it to be and that it separates families. In California, the legislature passed a bill that would have instructed local jails to refuse to participate in the program. The bill, called the TRUST Act, was ultimately vetoed by California Governor Jerry Brown, but a number of counties, including Cook County, home to Chicago, and Washington, D.C., have passed

ordinances similar to the TRUST Act. By interrupting the pipeline from local jails to deportation, families might be spared separation or allowed the time and space to reunite.

## Minimize the Use of Detention before Deportation

If the federal government ultimately decides to deport parents, minimizing the use of detention before deportation could help reduce the prevalence of foster care cases. Were mothers and fathers released on their own recognizance while their immigration cases proceed, they could fully participate in decision-making about their children. As things stand, detention often makes this nearly impossible.

## Train Child Welfare Departments and Attorneys

Short of changing immigration policy, child welfare departments around the country are the frontline in preventing the prolonged separation of children from their deported parents. These departments, however, often lack clear policies and guidelines to ensure that detained immigrant parents are provided with appropriate due process. Child welfare departments and juvenile courts can implement trainings for child welfare staff and attorneys who represent children and parents in juvenile dependency hearings to improve their understanding of the circumstances facing detained immigrant parents.

## Legislative and Administrative Policy Reforms

Child welfare policies, protocols, and guidelines can be developed to specifically address detained and deported immigrant parents. The California legislature recently passed two pieces of legislation that would help reunify families separated by immigration enforcement and the child welfare system. California legislation, the Reuniting Immigrant Families Act (SB 1064) would authorize juvenile court judges to provide detained or deported parents additional time to reunify with their children and require state child welfare authorities to offer guidance to counties about how to establish agreements with foreign consulates.<sup>17</sup> The bill would also prohibit child welfare departments from considering immigration status when making foster care placement decisions. A similar federal bill, the Help Separated Families Act (H.R. 6128), was introduced, but not yet passed in Congress.

Most components of the California and federal legislation could be adopted via administrative reforms at the state or federal level. For example, a number of county and state child welfare departments around the country have had Memorandum of Understanding (MOU) with foreign consulates for a number of years, most often with the Mexican consulate. These MOUs could be adopted without legislative action. Similarly, at least one state, Illinois, has a clear policy that excludes immigration status from consideration in potential kinship placements.<sup>18</sup> In addition to child welfare departments, juvenile courts could also enter into MOUs with foreign consulates directly, such as the agreement developed by Los Angeles County Juvenile Court and the Mexican consulate.

A second California bill, the Call for Kids Act (AB 2015), would provide incarcerated immigrant parents with clear information in their native language about their right to make two phone calls at the time of arrest, clearly post this right in the jail/police location, and provide an additional two phone calls at the time of their transfer from local law enforcement to a federal detention facility.<sup>19</sup> Because immigrants in the criminal justice system are often moved quickly to immigration detention, the additional phone calls could help



parents with childcare arrangements at the time of transfer so that they do not simply disappear into detention. This bill will also help incarcerated parents in general, by providing all parents in the criminal justice system with greater access to the world outside their cells.

Roberta, the mother whose case was described at the opening of this chapter, was deported late last year and has still not been reunified with her children. According to a local legal services provider who has intermittent contact with Roberta, two of the kids have now been placed in the care of relatives, while three remain in foster care with nonrelatives. With no likely route for her to return to the United States given the mandatory ten-year bar for illegal entry and lack of responsiveness from the child welfare department, she and her children will likely be separated for years. The policy and practice changes discussed here could help to keep other families from facing a similar fate.

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## Notes

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<sup>15</sup> Seth Freed Wessler. "A Deported Father Wins a Long, Painful Fight to Keep His Kids," Colorlines.com November 28, 2012. [http://colorlines.com/archives/2012/11/nc\\_judge\\_reunites\\_deported\\_father\\_with\\_three\\_us\\_citizen\\_children.html](http://colorlines.com/archives/2012/11/nc_judge_reunites_deported_father_with_three_us_citizen_children.html).

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<sup>17</sup> SB 1064, 2011-2012 Leg., Reg. Sess. (CA 2012). Retrieved from <http://legiscan.com/gaits/text/574600>.

<sup>18</sup> Illinois Department of Children and Family Services. *Licensing, payment and placement of children with undocumented relatives*. III. *Policy guide* 2008.01. Retrieved from <http://www.f2f.ca.gov/res/pdf/PolicyGuideLicensing.pdf>.

<sup>19</sup> AB 2015, 2011-2012 Leg., Reg. Sess. (CA 2012).

[http://leginfo.ca.gov/faces/billTextClient.xhtml;jsessionid=fb26709e73be6c01b8866926a8e2?bill\\_id=201120120AB2015](http://leginfo.ca.gov/faces/billTextClient.xhtml;jsessionid=fb26709e73be6c01b8866926a8e2?bill_id=201120120AB2015).

## TWO-TIERED JUSTICE FOR JUVENILES

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In 2010, a mother from East Palo Alto, California, approached the Silicon Valley De-Bug's Albert Cobarub Bias Justice Project for help for her 16-year-old daughter, Yareli. Yareli had been arrested and subsequently reported to federal immigration authorities by a juvenile probation officer at the San Mateo County Youth Services Center (commonly referred to as Hillcrest Juvenile Hall). U.S. Immigration and Customs Enforcement (ICE), the immigration enforcement arm of the U.S. Department of Homeland Security (DHS), had requested that Hillcrest hold Yareli for an additional 48 hours after her juvenile case was concluded so that immigration officials could then arrest her for violating immigration laws. The mother was distraught at the thought of her daughter being sent to a country she had left when she was only 2-years-old. "I wanted to die," she said. "Who was going to care for her?"

Yareli's family moved to East Palo Alto after arriving from Mexico over 15 years earlier. Her parents lived a quiet life, building a foundation for their children to have educational and employment opportunities they did not have in Mexico. Yareli's mother worked as a housekeeper for most of her life, and had recently become a para-educator in the local school district. Her father worked in construction. Her sister was a youth organizer fighting for tenants' rights and economic opportunities in the community. The family was heartbroken at the thought of Yareli being ripped from their home to fend for herself alone in a different land.

Initially, advocates thought that Yareli's case must surely be a rare occurrence. They learned, however, that in 2008, the San Mateo County probation department had begun notifying ICE of all youth processed at Hillcrest who were suspected of being in the United States unlawfully. In fact, according to reports from the federal Office of Refugee Resettlement, in 2009 and from 2011 to 2012, San Mateo County had one of the highest rates of the reporting of youth to ICE in California, and arguably the country.<sup>1</sup>

It was the policy of the San Mateo County juvenile probation department to report youth to immigration enforcement officials regardless of the nature of their juvenile offense and before youth had even seen a juvenile court judge or met with their defense attorneys. In Yareli's case, she had no idea that she was talking to an ICE official. She explained, "My probation officer asked me 'do you have papers?' I said no. I can't lie to them, so I said no. Then they told me to go talk to this person. He just started asking me questions, and at the end he said, 'By the way, I'm an ICE agent.'" Some youth were turned over to ICE even though their juvenile charges were dismissed. Others were reported to ICE by probation officers as a form of punishment for not complying with the terms of their probation, such as by violating curfew.

It took eight months of advocacy, coordination between her juvenile defender and immigration attorneys, and community support to keep Yareli from being deported. During that time, Yareli spent four months at the San Mateo County juvenile detention facility before being transferred to the custody of federal immigration authorities. When she was transferred, she was first taken to the ICE processing facility in San Francisco. Although federal law prohibits immigration authorities from detaining minors with adults except in facilities

specifically approved for juveniles,<sup>2</sup> Yareli was held for hours in a room with adults. She recalled, “They put me in handcuffs and into a van where you can’t see where you’re going. Then they took me to San Francisco where I was in a room, and it was all guys in there – guys from prison. I was in a room for hours and hours, and all they gave me was a sandwich. Then they put me on a plane to L.A.”

After the transfer, immigration authorities at a group home in Fullerton, California, detained Yareli with other girls who were involved in deportation proceedings. It was a lonely and sad experience, particularly not knowing when or if she would be going home. Yareli remained in detention for four months and was released after ultimately winning her deportation case.

The San Mateo County Juvenile Probation Department based their policy of reporting youth to immigration authorities on a provision of a 1994 state law that prohibited access to public benefits and services for undocumented immigrants.<sup>3</sup> This provision was subsequently declared unconstitutional in 1995.<sup>4</sup> It was only when advocates pointed this out to the County Juvenile Probation Department in November 2011 that the chief probation officer recognized the department’s error, noting, “Juveniles were being reported, based on a law that was no longer in effect.”<sup>5</sup>

Advocacy groups are now fighting for policy reforms to prevent local authorities from ever reporting youth to ICE. In 2012, the probation department implemented a policy that fell short of this goal. The policy provides broad guidelines for when youth are to be referred to ICE that gives probation officers the widest possible latitude in making referral decisions. Although the new policy continues to allow probation officers to report youth to ICE, probation officers are no longer encouraged to refer every youth suspected of being in violation of immigration laws. Instead, the policy calls for youth to be reported to ICE only if they are: (1) arrested for certain drug offenses, (2) re-arrested after previously being convicted of a serious felony, (3) considered to be a threat to public safety, or (4) if it is in the youth’s best interest. Since the policy was enacted, it appears that fewer youth are being reported to ICE, but the probation department has not been able to provide data on the number of youth reported before and after the new policy was implemented.

## INVOLVEMENT IN IMMIGRATION ENFORCEMENT VARIES

The phenomenon of juvenile probation departments reporting youth to immigration authorities is not isolated to San Mateo County. Juvenile probation departments throughout California and in other states such as Arizona, Florida, Minnesota, New York, Oregon, Pennsylvania, Texas, and Washington state routinely report youth to immigration officials. Some believe they are legally obligated to cooperate with federal immigration officials. However, there is no federal law that affirmatively requires juvenile justice personnel or other local officials to enforce federal civil immigration laws, as it is unconstitutional for the federal government to require local officials to enforce federal laws.<sup>6</sup>

While juvenile probation officers in some jurisdictions routinely report immigrant youth to immigration authorities, others believe all youth should be treated equally regardless of their immigration status. These jurisdictions include, for example, Santa Cruz County, California; Multnomah County, Oregon (Portland); and Cook County, Illinois (Chicago). These jurisdictions do not ask about the immigration status of defendants and generally do not interact with federal immigration officials. In fact, several jurisdictions including Santa Clara County, California, and Washington, D.C., have adopted public policies that specifically limit local assistance to immigration enforcement for both adults and juveniles. For example, Santa Clara

County, a county neighboring San Mateo, adopted a countywide policy that no juvenile shall ever be turned over to ICE.<sup>7</sup> In the case of adults, various local policies across the country prohibit law enforcement officials from inquiring about an individual's immigration status,<sup>8</sup> prohibit disclosure of several categories of information, or prohibit the use of local funds or resources for the purpose of enforcing federal immigration law.<sup>9</sup>

Although jurisdictions differ in their involvement in immigration enforcement activities, since 2008 there have been reports of an increasing number of immigrant youth being referred to immigration authorities by juvenile probation officers and other juvenile justice officials.<sup>10</sup> This trend stems from a larger effort by the federal government to dramatically expand the enforcement of immigration law to local jurisdictions by merging immigration enforcement activities into state and local criminal justice systems. With the creation of the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) initiative, the agency merged 13 of its immigration enforcement programs into an umbrella regime with the purpose, according to ICE, of aiding communities seeking ICE assistance.<sup>11</sup> In reality, ICE is increasingly making local law enforcement agencies part of its immigration enforcement operations.

On May 6, 2009, DHS Secretary Janet Napolitano stated to the U.S. Senate Committee on the Judiciary that a key DHS priority is removing “criminal aliens” using programs under the ICE ACCESS initiative such as 287(g), Secure Communities, and the Criminal Alien Program. Prior to 2008, federal efforts to apprehend these individuals focused on adult jails and prisons. Although the federal government has not affirmatively stated that minors fall into the category of “criminal aliens,” which would make their apprehension and deportation a federal priority, law enforcement officials erroneously believe that federal immigration enforcement efforts equally target both adults and children. Consequently, some juvenile justice personnel report youth whom they suspect of lacking legal immigration status to immigration authorities and permit ICE officials to enter juvenile facilities to interview suspect youth. Even departments and staff that would prefer to stay out of immigration enforcement sometimes believe they are legally obligated to cooperate with federal immigration officials to facilitate apprehension of juveniles suspected of violating immigration laws.

## **WHEN YOUTH ARE TURNED OVER TO IMMIGRATION AUTHORITIES**

Once youth are turned over to federal immigration authorities, ICE usually takes them into custody.<sup>12</sup> They are then classified as accompanied or unaccompanied minors. This designation is critical as it determines who will be charged with the custody of a minor pending the outcome of deportation proceedings.

Federal law defines an unaccompanied minor as an undocumented person under the age of 18 who does not have a parent or legal guardian who is willing or able to provide care and physical custody.<sup>13</sup> The vast majority of youth turned over to ICE by the juvenile system are designated as unaccompanied minors because many have undocumented parents who are afraid to come forward to claim their children.

The care and custody of unaccompanied minors falls to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement (ORR), Division of Children's Services, rather than to ICE. Therefore, after apprehension, ICE transfers many unaccompanied minors to the custody of ORR, which takes a child welfare approach in handling children rather than an enforcement approach.

Whether ICE or ORR ultimately has jurisdiction of detained youth, youth may be moved to detention centers located far away from their home states. Youth in ORR custody, in particular, can be held in any number of different types of facilities, ranging from juvenile halls to group homes, located throughout the United States.

A minor's placement is determined by a number of factors including delinquency history, mental health, and flight risk. While immigration authorities often try to place minors within their home state, the decision is ultimately based on where bed space is available at the time of detention and the youth's particular needs and background.

Some youth, like Yareli, are fortunate to win their deportation cases and return home. Others are deported to countries where they have few or no ties. Because of prolonged periods of detention, some youth "self-deport," meaning they voluntarily accept deportation without fighting their case in court, usually to avoid continued indefinite detention in immigration custody. Some do this even though they have an avenue to legally stay in the United States, their entire family lives in the United States, they have no family abroad, and/or they fear returning to their countries of origin. Some also do it to protect their families from being arrested by immigration enforcement authorities.

## A POOR PUBLIC POLICY OPTION

The practice of local juvenile justice entities reporting youth to federal immigration enforcement authorities is not in the best interest of youth, their communities, or local agencies. It undermines: (1) the fundamental goals and purpose of the juvenile justice system, (2) community trust in the judicial system and public safety, and (3) due process protections.

## Undermining the Goals of the Juvenile Justice System

The underlying purpose of the juvenile justice system is to rehabilitate youth and protect the community. In California, for example, the goals of the juvenile justice system include providing treatment that is in the minor's best interest, rehabilitating youth, and preserving and reuniting families.<sup>14</sup> Reporting youth to ICE directly undercuts these goals because it renders youth vulnerable to physical and emotional harm,<sup>15</sup> undermines their prospects for rehabilitation, weakens family ties, and violates the foundational principles of the juvenile justice system to help youth successfully transition into adulthood.

Reporting youth to ICE can culminate in youth being transferred to the custody of federal immigration authorities, and possibly deportation. Prolonged detention and the perceived betrayal by their probation officers can exacerbate underlying issues that caused youth to enter the juvenile justice system in the first place and may jeopardize their prospect for rehabilitation. Many youth in the juvenile justice system have suffered from some form of childhood trauma or unstable home environments.<sup>16</sup> Detaining these youth for long periods of time can exacerbate underlying mental health and behavioral issues.<sup>17</sup> In addition, multiple transfers and prolonged detention disrupt their education, increasing the likelihood of recidivism.<sup>18</sup> Immigration enforcement also undermines family preservation and reunification because it weakens rather than solidifies ties between youth and their families.

Also, youth who know that probation officials disclose information to immigration authorities may withhold important information that is needed to develop case plans that effectively promote rehabilitation and prevent recidivism. This may include information about domestic violence, abuse at home, mental health issues, and addiction problems.

Finally, the practice of probation officers reporting youth to immigration authorities involves sharing confidential information in violation of many states' laws. In California law, for example, it is unlawful to share information about youth who are involved with juvenile justice authorities with third parties without a prior court order.<sup>19</sup> Confidentiality is a core component of a youth's rehabilitation, as it is intended to keep juveniles from being stigmatized as adults by acts they committed in their youth.

## Undermining Public Safety and Community Trust

Alerting immigration enforcement authorities of youth who are suspected of being in the United States unlawfully undermines public safety by eroding trust in the judicial system. East Palo Alto Police Chief Ron Davis stated that, "If a person is fearful of [an ICE] hold, then you're asking them to put at risk their entire family to help [the police department] and the community.... Any policy that puts holds on youth and at risk of deportation compromises public safety." In addition, community members may be hesitant to report juveniles who commit offenses because of the disproportionate immigration consequences.

Moreover, family involvement in juvenile case plans is crucial. If families believe that their identities will be revealed to immigration authorities, they are likely to abstain from participating in the juvenile justice process. The practice of reporting youth to immigration authorities in San Mateo had a particularly negative effect on undocumented parents, who already live in fear of deportation. Some did not attend their children's juvenile court hearings out of fear that ICE would be present and that participating in their children's cases would lead to their own deportation. As one youth educator noted, community leaders could not assure parents that they were safe speaking to or cooperating with their children's probation officers. Indeed, in San Mateo County, families like Yareli's felt betrayed and fearful. Parents who cooperated with their children's probation officers felt that they unwittingly aided in their children's deportation. Some parents believed that probation officers were targeting their children, rather than trying to help them.

## Undermining Due Process

The practice of reporting youth in the juvenile justice system to immigration authorities results in a two-tiered system of justice, in which immigrant youth may be denied a dismissal or release from the juvenile system, detained for longer periods, or disqualified from rehabilitative programs. Treating immigrant youth differently than U.S. citizens in the juvenile justice system subverts the constitutional principles underlying our criminal justice system: equal treatment under the law and due process protections for all.

Fundamental principles of justice, equal protection, and due process (constitutional rights that apply to all youth in the United States regardless of their immigration status), are undermined when juvenile probation officers report youth to immigration authorities. Youth who are referred to ICE are not told that the information they are providing their probation officer will be used to help the government try to deport them, nor do they have the opportunity to access an attorney before being interviewed by immigration authorities.



In the juvenile justice context, youth are encouraged to speak freely with their probation officers in return for assistance with their juvenile cases. Some youth believe that ICE officers will likewise help them if they cooperate. In one case, a minor's probation officer told him, "Don't worry, the government doesn't deport youth like you." In other cases, youth have reported being told by their probation officers that they must speak with ICE officials and answer officers' questions, undermining the right of minors to remain silent.<sup>20</sup>

*The practice of reporting youth in the juvenile justice system to immigration authorities results in a two-tiered system of justice in which immigrant youth may be denied a dismissal or release from the system, detained for longer periods, or disqualified from rehabilitative programs.*

Reporting youth to immigration authorities also undermines access to immigration relief, a path to legal status and defense against deportation, to which they are otherwise entitled under federal law. Congress has created several means by which undocumented minors may apply to obtain legal immigration status, some of which rely upon assistance by the local juvenile justice system. For example, Special Immigrant Juvenile Status (SIJS) is an immigration relief option that allows immigrants under 21 years of age to obtain lawful permanent residence (a green card) if they are under the jurisdiction of a juvenile court; cannot be reunified with one or both of their parents due to abuse, abandonment, or neglect; and their best interest is served by remaining in the United States rather than returning to their country of origin. A large number of youth in the juvenile justice system are eligible for SIJS based on their troubled childhoods, but the juvenile court must first make factual findings that youth meet the basic eligibility requirements noted above. Without this order, youth cannot even apply for SIJS.

Notifying immigration authorities before a qualified attorney or agency screens youth to see if they are eligible to obtain legal status through a form of relief such as SIJS cuts youth off from possible avenues for avoiding deportation. This is because youth are put into a defensive posture where they are in adversarial removal proceedings with opposing counsel charging them with illegal conduct, often far away from family members and sometimes with little access to immigration legal counsel. In this context, it is exceedingly difficult for youth to assert a viable claim for relief. On the other hand, if they submit an immigration application affirmatively, meaning before they have been reported to ICE, there is no opposing party or adversarial process. This greatly increases their chances of obtaining legal status.

Reporting youth to immigration authorities can also affect the outcome of their juvenile justice cases. According to juvenile defenders and other advocates, youth who are reported to immigration enforcement officials are detained when in comparable cases non-immigrant youth are diverted out of the juvenile system or released. Because they are persons of interest to immigration authorities, they spend more time in detention, are less likely to be sentenced to alternatives to incarceration such as drug rehabilitation programs, and are less likely to be placed on probation. In some instances, after they have been transferred to the custody of federal immigration authorities, they are issued warrants for failing to appear in juvenile court or for not complying with conditions of their probation when it was physically impossible for them to do so because they were being detained by immigration authorities.

## RECOMMENDATIONS

The following recommendations are based on work being done in San Mateo County by a coalition of community organizations, legal service providers, and juvenile justice and immigrant rights advocates. This work began in 2010 when the Stanford University’s Immigrants’ Rights Clinic, along with Community Legal Services in East Palo Alto (CLSEPA) and the Immigrant Legal Resource Center, conducted a study of the practice of juvenile probation officers reporting youth to ICE. The study consisted of interviewing juvenile defense attorneys, community and legal advocates, and youth and families who had gone through this process. Following the investigation, legal and political strategies were developed to: (1) mitigate the impact that reporting youth to ICE has on youth in the short term, and (2) halt the probation department’s practice of reporting youth in the long term. The groups that have united in carrying out these plans include:

- ACLU, North Peninsula Chapter,
- *Comitéde Padres Unidos*,
- Community Legal Services in East Palo Alto,
- Immigrant Legal Resource Center,
- Silicon Valley De-Bug,
- Stanford University’s Immigrants’ Rights Clinic,
- Youth United for Community Action, and
- Individual private juvenile defense attorneys.

### Mitigate the Impact of Reporting Youth to ICE

#### Establish Collaboration Between Juvenile Criminal Defense Attorneys and Immigration Attorneys to Obtain Relief from Deportation

Collaboration between juvenile criminal defense attorneys and immigration attorneys is critical for ensuring that youths’ rights are not violated and that they have access to the deportation relief to which they are entitled under federal law. To that end, CLSEPA expanded its Immigrant Youth Outreach Program to provide immigration legal services to youth who have contact with the juvenile justice system. It established a process by which defense attorneys notify CLSEPA when youth are reported to ICE. An immigration attorney from CLSEPA then visits these youth while they are in juvenile detention to provide the youth with basic information about their rights and gather information to determine if the youth are eligible for relief from deportation.

Many youth are eligible for SIJS based on abuse, abandonment, or neglect that they have suffered by one or both parents. In order for youth to apply for SIJS, the juvenile court must first make certain findings of fact. In such cases, immigration attorneys work with defense attorneys to pursue the necessary findings. This enables youth to begin taking legal action with respect to their immigration cases before they are transferred to immigration detention facilities that are often located out of state, making it difficult to communicate with the youth and gather the documentation that is needed to provide effective representation.

## Take Court Action to Protect Confidential Information from Being Shared with and Used by Immigration Authorities

Under California law, information related to a youth's juvenile case is protected from disclosure to agencies outside of the juvenile justice system, including federal immigration authorities. One strategy for preventing youth from being deported is for immigration attorneys to seek to have immigration judges throw out evidence that is disclosed by probation departments on the basis that the information was collected in violation of the youth's constitutional right to due process under the Fifth Amendment. To date, no case where this strategy has been implemented has advanced far enough in immigration court to determine the viability of this tactic. A further strategy is to file motions in juvenile court to prevent probation from sharing confidential information with immigration authorities or to hold probation in contempt if information has already been shared.

## Create Opportunities for Defense Counsel to Advise Youth of Their Rights

During negotiations with officials from San Mateo County, County Counsel agreed to add a requirement that probation officers must notify the youth's defense attorney and parent(s) before referring youth to ICE. This gives the defense attorney a chance to advise youth of their rights before they speak with ICE and to prevent ICE from obtaining information that could later be used to deport the youth.

## Educate Youth About Their Rights

Members of the coalition developed a *Know Your Rights* presentation, the aim of which is to inform youth in the community about their rights during encounters with immigration or law enforcement officers. The coalition is also currently working with the probation department to develop youth-friendly *Know Your Rights* brochures and trainings for youth who are detained.

## Halt the Reporting of Youth

### Adopt a Countywide Policy to Prevent the Referral of Any Youth to ICE

As a result of advocacy efforts, the San Mateo County Probation Department no longer encourages probation officers to refer every youth suspected of being in violation of immigration laws to ICE. Nonetheless, probation officers continue to have broad latitude in making referrals. In contrast, advocacy groups are calling for a countywide ban on referring any youth to ICE. To that end, advocacy efforts have focused on engaging county officials and decision makers on the issue, including meeting with the presiding juvenile court judge, the chief of the probation department, the San Mateo County Board of Supervisors, and County Counsel. One result of these efforts is that the county board formed a juvenile ICE hold policy subcommittee to address the issue.

In addition to advocacy targeting county officials and decision makers, coalition members are also involved in extensive efforts to educate the community about the practice of referring youth to ICE and about their rights. They also make sure that families caught at the intersection of the juvenile justice and immigration enforcement systems are not alone. For example, Yareli's mom came on Sundays to De-Bug with other

families who had loved ones in the criminal justice or immigration systems to seek support, to lend support, and to fight her daughter's deportation. Knowing that she had an entire community fighting with her gave her strength throughout the long process. Another agency, *Comité de Padres Unidos* in Redwood City, supports families by accompanying them to court hearings. Finally, San Mateo youth are being organized and mobilized to take an active role in the community's campaign to end the practice of referring youth to ICE.

## Recommended Citation

Junck, A., Domingo, C., & Beasley, H. (2013). Two-tiered justice for juveniles. In Phillips, S.D., Cervantes, W., Lincroft, Y., Dettlaff, A.J., & Bruce, L. (Eds.). *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* (pp. 31-40). Washington, D.C.: Jointly published by The Sentencing Project and First Focus.

## Notes

<sup>1</sup> Email to the Immigrant Legal Resource Center from Maureen Dunn, Director of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, Division of Children's Services (ORR) on April 2, 2010 providing data from FY 2009 on unaccompanied minors who were in ORR custody after an arrest originating from the California juvenile justice system. Email to the Immigrant Legal Resource Center from Toby Biswas, Policy Analyst, ORR, on August 15, 2012 providing a sampling of data from March 1, 2011, through June 30, 2012, of unaccompanied minors who were placed in ORR custody after apprehension from U.S. Department of Homeland Security, Immigration & Customs Enforcement (ICE) in California.

<sup>2</sup> 8 CFR § 1236.3.

<sup>3</sup> California Penal Code section 834b required that “[e]very law enforcement agency in California shall fully cooperate with” federal immigration authorities “regarding any person who is arrested if he or she is suspected of being present in the United States in violation of federal immigration laws.” It compelled law enforcement to “attempt to verify the legal status of [any] such person,” and, if the inquiry suggests that they are undocumented, to notify the person, the state Attorney General, and federal immigration authorities of the person's apparent illegal status. Cal. Pen. Code § 834b also states that “[a]ny legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity...or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.”

<sup>4</sup> In 1995, the United States District Court for the Central District of California in *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 771 (C.D. Cal.1995) declared Section 4, which contains the language of Pen. Code § 834b, *preempted in its entirety by federal law*. The court held that “the sole stated purpose and the sole effect of [this section was] to impermissibly regulate immigration,” in violation of prior holdings of the United States Supreme Court. This preemption has since been recognized in California courts, and conceded by the California Attorney General's office. *Fonseca v. Fong*, 167 Cal. App. 4th 922, 933-935 (2008); *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1423-1426 (2009); 84 Ops. Cal. Atty. Gen. 189 (2001) (“the mandatory provisions of section 834b... are not subject to enforcement by local law enforcement agencies.”).

<sup>5</sup> Eslinger, B. (July 13, 2012). San Mateo County admits mistakenly reporting arrested minors to ICE agents. *Palo Alto Daily News*. Retrieved from [http://www.mercurynews.com/peninsula/ci\\_21066015/san-mateo-county-admits-mistakenly-reporting-arrested-minors](http://www.mercurynews.com/peninsula/ci_21066015/san-mateo-county-admits-mistakenly-reporting-arrested-minors).

<sup>6</sup> *Printz v. United States*, 521 U.S. 898, 927–35 (1996). In this legal decision, the U.S. Supreme Court held that Congress is without the authority to “compel the States to enact or enforce a federal regulatory program” or circumvent that prohibition by conscripting the State's officers directly. See also Huffington Post, October 31, 2011, “Detainers are Not Mandatory.” According to internal U.S. Department of Homeland Security documents, local law enforcement agencies are not required to hold undocumented immigrants at the request of the federal government. [http://www.huffingtonpost.com/2011/10/31/dhs-hold-undocumented-immigrants\\_n\\_1067558.html?13](http://www.huffingtonpost.com/2011/10/31/dhs-hold-undocumented-immigrants_n_1067558.html?13).

<sup>7</sup> Santa Clara County Board Policy 3.54.

<sup>8</sup> See *Sturgeon v. Bratton*, 174 Cal.App.4th 1407 (2009), upholding the policy of the Los Angeles Police Department prohibiting officers from initiating police action with the sole objective of inquiring into the immigration status of an individual.

<sup>9</sup> See “Annotated Chart of Laws, Resolutions and Policies Instituted Across the U.S. Limiting the Enforcement of Immigration Laws by Local Authorities” National Immigration Law Center at <http://www.aialdownloads.org/advo/NILC-LocalLawsResolutionsAndPoliciesLimitingImmEnforcement.pdf>; Cook County Ordinance 11-O-73 (declining to respond to ICE hold requests unless fully reimbursed by the federal government); District of Columbia Act 19-379 (limiting response to ICE detainers); Santa Clara County Board Policy 3.54 (same). Similar policies can be found at: <http://altopolimigra.com/detainers/>.

<sup>10</sup> Presentation by Maureen Dunn, Director of U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, Division of Children's Services (ORR) at the 2009 National Conference on Unaccompanied Immigrant Children in Washington, D.C. This increase has also been reported to the Immigrant Legal Resource Center by agencies serving such youth including the Lutheran Immigrant and Refugee Service, Vera Institute of Justice's Unaccompanied Children Program, immigrant youth legal service providers across the country, juvenile probation departments, and juvenile defenders.

<sup>11</sup> <http://www.ice.gov/access/>.

<sup>12</sup> In places along the border, Customs & Border Protection (CBP), the border enforcement arm of the U.S. Department Homeland Security, serves this function and interfaces with juvenile justice agencies.

<sup>13</sup> 6 USC § 279(g)(2), as amended by the Homeland Security Act.

<sup>14</sup> California Welfare and Institutions Code § 202.

<sup>15</sup> National Collaboration for Youth and National Juvenile Justice Network. *Undocumented Immigrant Youth: Guide to Advocates and Service Providers*. Policy Brief No. 2, November 2006. <http://www.nationalassembly.org/Publications/documents/immigrationbrief.pdf>.

<sup>16</sup> Widom C.S. & Maxfield M.G. (2001). *An update on the "cycle of violence."* Washington (DC): National Institute of Justice; Langsford, J.E., Miller-Johnson S., Berlin L.J., Dodge K.A., Bates J.E., & Pettit G.S. (2007). Early physical abuse and later violent delinquency: A prospective longitudinal study. *Child Maltreatment*, 12(3):233–245.

<sup>17</sup> Holman, B. & Ziedenberg, J. (2006). *The dangers of detention: The impact of incarcerating youth in detention and other secure facilities*. Justice Policy Institute.

<sup>18</sup> Hawkins, J.D., Herrenkohl, T. I., Farrington, D. P., Brewer, D., Catalano, R. F., Harachi, T.W. & Cothorn, L. (2000). Predictors of youth violence. *Juvenile Justice Bulletin*. Office of Juvenile Justice and Delinquency Prevention.

<sup>19</sup> California Welfare & Institutions Code § 827.

<sup>20</sup> While the scope of constitutional protections differ in immigration and criminal proceedings, youth and adults being questioned by immigration authorities continue to hold the right to remain silent under the Fifth Amendment of the Constitution.

## POTENTIAL IMMIGRATION CONSEQUENCES OF STATE CRIMINAL CONVICTIONS

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The immigration status of a parent or child may limit the options available to family or juvenile judges or impact the ability of parents to provide for the health, education, emotional well-being, or physical needs of their children. In turn, this can affect child placement or custody decisions. Further, federal immigration law, policy, and practice may result in separating families that family or juvenile courts might otherwise seek to keep together, or may result in children who are legally in the United States being taken to another country by their deported parents rather than allowing families to remain in the United States for the welfare of their children.<sup>1,2</sup> Also, in some instances, a key party to a family or juvenile court case may be out of the country with no ability to obtain legal entry.

Prior criminal convictions are a primary determinant of non-citizen parents' immigration rights. There are a number of areas where criminal convictions under federal immigration law operate in a manner that is unpredictable and have consequences that appear disproportionate to the level of seriousness of the criminal offenses involved. This makes the immigration consequences of a particular criminal conviction difficult to determine. The discussion that follows, while not a definitive treatise on immigration law, explains ways in which a criminal conviction may affect non-citizens who are parties to family or juvenile court cases.

### CURRENT AND EMERGING ISSUES

Contact with the state criminal justice system is now the primary causal factor leading to the removal of immigrants. According to U.S. Immigration and Customs Enforcement (ICE) statistics,<sup>3</sup> in FY 2011, the agency removed 396,906 non-citizens, the largest number of removals in the agency's history. Of these, 216,698 individuals, or nearly 55 percent of the people removed, were convicted of felonies or misdemeanors. According to ICE, the 2011 numbers included 44,653 non-citizens convicted of drug related crimes, 35,927 convicted of driving under the influence, 5,848 convicted of sexual offenses, and 1,119 convicted of homicide. That leaves 129,151 people who were convicted of other crimes, including misdemeanors.

*There are a number of areas where criminal convictions under federal immigration law operate in a manner that is unpredictable and have consequences that appear disproportionate to the level of seriousness of the criminal offenses involved.*

Part of the reason for the increase in removals of non-citizens with criminal records is the expansion of the Secure Communities program, in which fingerprints of individuals booked into local jails are compared to the ICE database through data sharing between the FBI and ICE. Because all individuals who are booked into



jails are screened, many with lesser crimes are coming to the attention of ICE and many crimes that are considered minor under state law can make non-citizens deportable, including those who are lawfully in the United States.

With increased immigration enforcement efforts, the number of individuals involved in juvenile or family cases who are at risk of removal is likely increasing as well. This means that there will likely be a growing number of juvenile and family cases where knowledge of the criminal record of foreign-born parties and the possible immigration consequences of their prior criminal records may provide family court judges with information that may be useful in making decisions regarding child welfare issues.<sup>4,5,6,7</sup> At the same time, juvenile and family court judges must be aware of the limitations of predicting immigration consequences from a record of convictions. Judges can rarely be certain about the actual risks facing an immigrant party.<sup>8</sup>

Further, courts have made it clear that immigration issues should not be allowed to override the basic tenets of family law. Parents have an equal right to the custody and care of their children without regard to their immigration status, so judges must guard against bias against parents solely based on their immigration status.<sup>9,10,11</sup> Judges cannot automatically assume in making custody or placement determinations that it is in children's best interests to remain in the United States, as staying with their parents may be more important than remaining in the United States.<sup>12,13</sup>

Given the complexities of the interactions between federal immigration law and family law, and the potential for misunderstanding and even bias on the part of juvenile or family court judges, judges need to be cautious about how they consider immigration status. In many cases it may be desirable for juvenile or family court judges to leave it up to the parties to decide whether and in what circumstances to raise immigration status as an issue affecting child welfare, keeping in mind the possibility that one party may raise immigration concerns as a way to intimidate the other party.<sup>14</sup>

## DIFFICULTIES DETERMINING THE IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION

A criminal conviction can be a major determinant of immigration rights under federal immigration law. Certain criminal convictions can prevent a non-citizen from entering the United States, make a person legally in the United States potentially subject to deportation, and affect the eligibility of non-citizens for certain immigration benefits, including naturalization. These consequences of a criminal conviction apply to both lawful and unauthorized immigrants and can affect family relationships, particularly the welfare of children.

The immigration consequences of a particular criminal conviction, however, are sometimes difficult to determine, due to:

- ambiguities created by unclear definitions in federal immigration law of certain crimes that carry immigration consequences;
- the lack of any definitive list of crimes included under each category of crimes that carry immigration consequences under federal immigration law;
- differences among the federal circuit courts in interpreting which crimes carry immigration consequences under federal immigration law;

- the constantly changing interpretation of federal immigration law as case law develops;
- state criminal statutes include multiple crimes in a single section, some of which carry immigration consequences and some of which do not, so court documents other than the record of conviction may have to be considered to determine the actual elements of the crime for which the individual was convicted;
- the level of discretion that can be exercised by immigration court judges in determining removability of an immigrant and by officers of the U.S. Citizenship and Immigration Services (USCIS) in determining eligibility for naturalization and other discretionary immigration benefits;
- and the possibility that a non-citizen with a criminal conviction may not necessarily come under scrutiny or be prosecuted by ICE.<sup>15</sup>

These difficulties make it risky for juvenile or family court judges to think they fully understand the immigration rights of non-citizen parties before them merely from what they know about the parties' criminal records.

## POSSIBLE CONSEQUENCES OF STATE CRIMINAL CONVICTIONS

The following are consequences of a state criminal conviction affecting an immigrant's ability to enter or remain legally in the United States.

### Deportability

Certain criminal convictions can make a non-citizen deportable, possibly even after having lived many years in the United States as a lawful permanent resident.<sup>16</sup> Being deportable means that the immigrant is subject to an order of removal from the United States by an immigration court. Deportation of a parent can have dramatic effects on family unity, as an immigration court cannot prevent a deported parent from taking a child with him or her, even if the child is a U.S. citizen, as long as the parent has legal custody.

### Inadmissibility

An immigrant offender who is inadmissible will be prevented from reentry if he or she leaves the country.<sup>17</sup> Admissibility is also a requirement for eligibility for certain immigration benefits. There are some crimes that do not make a defendant deportable but still make him or her inadmissible. An immigrant who is inadmissible can be denied entry to the United States or removed after reentry if he or she leaves the United States and attempts to return from abroad. An individual may be denied admission even if he or she has a spouse or child lawfully residing in the United States.

### Ineligibility for Cancellation of a Removal Order

Cancellation of a legally entered order that the immigrant be deported may be available at the discretion of the immigration judge.<sup>18</sup> The immigration judge's decision may be based on a variety of considerations, including promoting family unity. An unauthorized immigrant must be able to show that he or she is of good

moral character to be eligible for such relief, and engaging in certain specified behavior or conviction of certain crimes will negate good moral character.

## Ineligibility for Naturalization

A criminal conviction may make the defendant ineligible for naturalization as a U. S. citizen.<sup>19</sup> Eligibility for naturalization is conditioned on the applicant’s ability to show that he or she is of good moral character for a specified time period prior to applying for citizenship, and conviction of certain crimes will negate good moral character.<sup>20</sup> Becoming a U.S. citizen gives a person advantages in bringing family members into the country. A U.S. citizen can bring a spouse, unmarried child under the age of 21, or parent (if the citizen is 21 or older) into the United States without numerical limitation. Further, non-U.S.-born children of U.S. citizens can attain citizenship through the citizenship of the parent.

## DEFINITION OF CONVICTION AND SENTENCE UNDER FEDERAL IMMIGRATION LAW

Under federal immigration law, the term “conviction” means, with respect to immigrants that are both lawfully and unlawfully in the United States, a formal judgment of guilt of the non-citizen entered by a court or, if adjudication of guilt has been withheld, where:

- a judge or jury has found the person guilty or the person has entered a plea of guilty or *nolo contendere*, or has admitted sufficient facts to warrant a finding of guilt; and
- the judge has ordered some form of punishment, penalty, or restraint on the person’s liberty to be imposed.<sup>21</sup>

Something considered as a conviction under federal immigration law may not be considered a conviction under state law. For example, the following all constitute a conviction under federal immigration law, if coupled with some form of punishment, penalty, or restraint on liberty:

- admission on the record of facts supporting a conviction;
- diversion, if there is a finding of guilt or admission of facts on the record that would support a finding of guilt;
- deferred adjudication where a plea of guilty or *nolo contendere* is entered; and
- deferred adjudication coupled with rehabilitative treatment.

An expungement of a criminal conviction does not erase the conviction for immigration purposes. A presidential or gubernatorial pardon does erase certain convictions for immigration purposes.

With regard to what constitutes a sentence, federal immigration law provides that “[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”<sup>22</sup> A sentence of incarceration that is suspended for probation

is still a sentence for the full term of the possible incarceration. A sentence solely to probation with no incarceration is not a sentence to a term of imprisonment.

## TYPES OF CONVICTIONS THAT CARRY IMMIGRATION CONSEQUENCES

The major types of criminal convictions that can affect an immigrant's status include aggravated felonies, crimes involving moral turpitude (CIMT), crimes of domestic violence, crimes related to a controlled substance, and firearm offenses. For a crime to carry immigration consequences, it must fall within one of the defined categories under federal immigration law, but the elements of the crime as defined by state statute, the possible sentence under state law, the actual sentence imposed, when the crime was committed, whether the individual has committed other crimes, and the present immigration status of the individual can all affect whether a specific conviction carries immigration consequences. For a juvenile or family court judge, then, just looking at a person's criminal record may not tell the judge whether the person is at risk of deportation. The record may not provide enough information about the elements of the crime for which the individual was convicted for the judge to determine whether the crime carries immigration consequences.

### Aggravated Felony

Aggravated felonies carry severe consequences. Federal immigration law contains a long list of crimes that are classified as aggravated felonies,<sup>23</sup> some of which may be neither aggravated nor classified as felonies under the laws of some states. Further, there is no definitive list of which specific state crimes may be considered aggravated felonies under federal immigration law. Some crimes require a term of imprisonment of one year or more imposed by a judge to qualify as an aggravated felony, keeping in mind, as noted previously, that the length of the term includes time for which imposition or execution of the sentence was suspended. Conviction of an aggravated felony makes an immigrant deportable, ineligible for discretionary relief from a removal order, and ineligible for naturalization.

The following are some of the more common aggravated felonies:

- murder;
- rape;
- sexual abuse of a minor;
- crime of violence, as defined in federal law, with a term of imprisonment of one year or more;
- theft with a term of imprisonment of one year or more;
- burglary with a term of imprisonment of one year or more; and
- drug trafficking.

Note that this is not an exhaustive list.

A crime that meets the definition of a crime of violence under 18 U.S.C. 16 may be an aggravated felony if it also has a term of imprisonment of one year or more. A crime qualifies as a crime of violence if it involves:

- the use, attempted use, or threatened use of physical force against the person or property of another; or
- a felony that involves a substantial risk that physical force against the person or property of another may be used.

Some misdemeanors may fall within the above definition of a crime of violence, and if they also involve a term of imprisonment of one year or more, they qualify as an aggravated felony even if the sentence is suspended. Examples of typical state court misdemeanors that could fall in this category include:

- reckless endangerment,
- assault,
- unlawful imprisonment,
- menacing or threatening,
- coercion, and
- theft.

Conviction of an aggravated felony makes a person deportable and ineligible for cancellation of a deportation order. It also is a lifetime bar to establishing good moral character and thus prevents the person from ever being able to naturalize. Note, however, that conviction of an aggravated felony does not make an immigrant inadmissible.

### Crime Involving Moral Turpitude

A CIMT is a crime containing an element of fraud or other behavior considered morally offensive. This category is deceptive, as many crimes classified as a CIMT may be considered very minor, and even classified as misdemeanors under state law.

There is no definition of a CIMT in the relevant section of federal immigration law,<sup>24</sup> so all of the crimes so classified depend on case law from the immigration courts or federal circuit courts. Case law is not all that helpful either. For example, the most commonly applied definition of a CIMT from the federal case law is the rather vague: “a crime that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between persons.” The courts have interpreted this to include crimes that involve:

- evil or malicious intent or inherent depravity,
- intent or reckless behavior to commit great bodily harm, or
- intent to defraud, including theft.

Neither the seriousness of the crime nor the severity of the sentence is determinative of whether a crime is a CIMT. The aspect of moral turpitude must be a necessary element of the crime as defined by state statute. If a person could be convicted of the crime, as defined by statute, without an aspect of moral turpitude, it is not a CIMT. Where the crime as defined by statute includes both crimes that qualify as moral turpitude and crimes that do not, the record of conviction, including indictment, plea, verdict, and sentence, and other evidence of what specific elements were involved, may be considered to determine the elements of the crime.

In addition, to be deportable, a CIMT must involve:

- a crime that carries a possible sentence of one year or more, or
- two convictions not arising out of the same incident, regardless of possible sentence.

There are some common crimes that are considered minor in state law that can qualify as a CIMT and put a lawful permanent resident at risk of removal. Some misdemeanors could qualify as a CIMT if the possible sentence is one year or more or a person commits two of them, such as:

- petty theft (for example, turnstile jumping has been found to be a CIMT),
- fraud,
- perjury, and
- prostitution.

A crime involving intent or reckless behavior to commit great bodily harm may be a CIMT if there is specific intent to cause physical injury or reckless behavior causing serious bodily injury. Knowing gross deviation from a reasonable standard of care is reckless behavior, but reckless behavior alone is not enough to constitute a CIMT, unless coupled with the infliction of serious bodily injury.

Conviction of a CIMT carries the following immigration consequences:

- Any crime involving the elements of moral turpitude, or attempt or conspiracy to commit such a crime, renders the person inadmissible, subject to the petty offense exception for an individual who has just one conviction of a crime involving moral turpitude with a maximum sentence of one year or less and actual sentence of six months or less.
- The following CIMTs are grounds for deportation: (1) a CIMT with the possibility of a sentence of one year or longer committed within five years of admission to the United States, and (2) any two convictions of CIMTs not arising from a single event.
- For non-permanent residents, conviction of a CIMT is a bar to eligibility for cancellation of a deportation order if it meets the requirements for deportability.
- Conviction of a CIMT is a bar to establishing good moral character if committed within the specified statutory time period unless it falls within the petty offense exception described above.

### **Crime of Domestic Violence**

Conviction of a crime of domestic violence makes an immigrant deportable.<sup>25</sup> A crime of domestic violence may also be classified as an aggravated felony or CIMT in certain circumstances.

The crime must be committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as



a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any state, Indian tribal government, or unit of local government.

Crimes of domestic violence include the following under federal immigration law:

- stalking;
- domestic violence, if it qualifies as a crime of violence (could also be an aggravated felony, with actual sentence of one year or more); and
- criminal child abuse, neglect, or abandonment.

In addition, violation of a civil or criminal protective order makes a person deportable. Also, having a protection order issued against an immigrant will be treated by USCIS as an act that prevents the immigrant from showing good moral character.

### Crime Related to a Controlled Substance

A violation of a law related to a controlled substance, as defined in 21 U.S.C. 802, can carry immigration consequences under federal immigration law. In addition, conviction of trafficking in a controlled substance, where trafficking includes the sale, possession for sale, or manufacture of a controlled substance, and state drug felony convictions that are analogous to offenses punishable as felonies under federal drug trafficking laws, can also be classified as conviction of an aggravated felony.

Conviction of a crime related to a controlled substance carries the following immigration consequences:

- Conviction of any crime related to a controlled substance, with an exception for a single conviction of simple possession of 30 grams or less of marijuana, makes an immigrant deportable.<sup>26</sup>
- Being a drug abuser or addict makes a person potentially deportable without conviction of a crime.<sup>27</sup> Being a drug abuser or addict may also make an individual inadmissible on health-related grounds.
- Conviction or admission to having committed a crime relating to a controlled substance makes a person inadmissible, and there is no automatic exception for simple possession of 30 grams or less of marijuana, although that can be the subject of a discretionary waiver. In addition, an immigrant who is known or reasonably believed to have engaged in trafficking in a controlled substance is inadmissible without a criminal conviction.<sup>28</sup>
- Conviction of a crime related to a controlled substance, with an exception of one conviction of simple possession of 30 grams or less of marijuana for personal use, negates good moral character. In addition, being a habitual drunkard negates good moral character.<sup>29</sup>

## Firearm Offense

Conviction of a firearm offense makes a person deportable.<sup>30</sup> The following are defined as firearm offenses under federal immigration law:

- purchase, sale, exchange, use, ownership, possession, or carrying a firearm or attempting or conspiring to do any of the above in violation of any law; or
- the use of a firearm in the commission of another crime.

The firearm need not be actually fired to constitute a firearm offense. The use of the firearm must be either a separate offense or a required element of the crime for which the individual has been convicted, or a necessary fact for the conviction. Where the presence of a firearm causes enhancement of sentence, but is not an element of the offense for which the defendant is convicted, there is no conviction of a firearm offense for immigration purposes.

## RECOMMENDATIONS

There are a number of areas where criminal convictions under federal immigration law operate in a manner that is unpredictable and have consequences that appear disproportionate to the level of seriousness of the criminal offenses involved. In particular, there can be devastating collateral consequences of a conviction for even a minor crime on the family of an immigrant defendant. The following areas of criminal convictions should, we believe, be important candidates for consideration in any serious attempt to reform federal immigration law.

- Crimes for which one day in the length of a sentence imposed by a state court judge (364 days as opposed to 365 days) that can have dramatically different immigration consequences are not grounded in the reality of how state court judges are supposed to determine sentences. A state court judge is required to take into account the whole circumstance of the defendant, including mitigating circumstances such as family stability and community connections, and not just the actual criminal act. For crimes that have a maximum sentence of 365 days, it is common for a judge to use the maximum sentence and suspend it all, thinking that he or she is being lenient, whereas the one extra day can be a lifetime bar to living in the United States for an immigrant defendant, even one who is a lawful permanent resident. One focus of immigration reform that we propose is to eliminate this disconnect.
- As the discussion above indicates, there are many minor crimes that can carry severe immigration consequences, particularly with regard to the ill-defined category of CIMT. Some crimes that fall into that category can be governed by state statutes that provide for a wide range of possible sentences, and it is the maximum possible sentence and not the actual sentence that matters under federal immigration law. Further, some crimes that can result in deportation are so minor that indigent defendants do not have a right to appointed counsel in state court. We propose that immigration reform consider eliminating immigration consequences for minor crimes and crimes for which a defendant is not incarcerated.

- Finally, we propose that federal immigration law be revised to provide that considerations of family stability and the well-being of children be added to the criteria for determining deportability. This might even include a specific provision that an immigration court judge may grant relief from removal based on a determination by a juvenile or family court judge that it is in the best interests of a particular family for all of its members to remain in the United States.

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## Notes

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<sup>17</sup> 8 U.S.C. 1227.

<sup>18</sup> 8 U.S.C. 1229b.

<sup>19</sup> 8 U.S.C. 1427.

<sup>20</sup> 8 U.S.C 1101(f).

<sup>21</sup> 8 U.S.C. 1101(a)(48)(A).

<sup>22</sup> 8 U.S.C. 1101(a)(48)(B).

<sup>23</sup> 8 U.S.C 1101(a)(43).

<sup>24</sup> 8 U.S.C. 1227(a)(2)(A)(i).

<sup>25</sup> 8 U.S.C. 1227(a)(2)(E).

<sup>26</sup> 8 U.S.C. 1227(a)(2)(B)(i).

<sup>27</sup> 8 U.S.C. 1227(a)(2)(B)(ii).

<sup>28</sup> 8 U.S.C. 1182(a)(2)(A)(i).

<sup>29</sup> 8 U.S.C 1101(f).

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## IMMIGRATION ENFORCEMENT AND FAMILY COURTS

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Deeply rooted ideals regarding the sanctity of families face jarring disconnects when they come into contact with the immigration system. Immigrant parents' fears that they will be deported and lose rights and relationships with their children are common, as is the assumption both in and out of immigrant communities that the deportation of parents inevitably results in legal separation of parents and children. Such fear is not without basis as many family courts struggle to find appropriate ways to balance family law principles with immigration law mandates. Immigrant parents are keenly aware of highly publicized instances in which foreign born parents, even those with legal authorization to stay in the United States, face the prospect of losing their children through interaction with unfamiliar judicial and child welfare systems. When parents actually are deported, immigration concerns can and often do play a direct and critical role in the separation of parents and children, sometimes in ways that are appropriate and often in ways that are not. Parents who are susceptible to deportation, therefore, have understandable cause to worry that expanded enforcement of immigration laws may threaten their ability to maintain family integrity as a practical, if not always legal, matter.

## FAMILY INTEGRITY FOR MIXED-STATUS FAMILIES

The ongoing political stalemate surrounding immigration reform in the United States is reflected in the prevalence of mixed-status families (i.e. families in which all members do not share the same immigration or citizenship status).<sup>1</sup> Existing immigration laws provide potential immigrants with strong disincentives to leave the United States, yet fail to provide mechanisms by which family members who lack authorization to remain in the United States can regularize their immigration status.<sup>2</sup> With a large unauthorized population in place, record immigration enforcement activities directly impact thousands of families.<sup>3</sup> Given the large number of unauthorized migrants in the United States, however, most immigrant families continue to live strikingly stable lives in the United States despite the constant shadow of uncertainty that accompanies the lack of lawful status.<sup>4</sup>

Through narrow laws that restrict access to legal immigration status and increased border enforcement that discourages historical patterns of cyclical migration, the United States has become home to a tremendous population of mixed-status families. Such families include members that have different forms of lawful immigration status, and many are characterized by at least some family members who are not authorized to remain in the United States. A closer look at immigrant families reveals the extent to which immigrants are woven into the national fabric.

Children in immigrant families now account for approximately one-fourth of all children in the United States.<sup>5</sup> Of these, more than five million have at least one parent who lacks authorization to remain in the United States,<sup>6</sup> and 3.8 million parents of U.S. citizen children lack authorized immigration status.<sup>7,8</sup> Parents of U.S. citizen children comprise 37 percent of the adult population of unauthorized immigrants,<sup>9</sup> while children themselves constitute approximately 13 percent of the unauthorized population in the United

States.<sup>10</sup> Combining the numbers of adults and children living in the United States with authorization, almost 9 million people live in families with at least one unauthorized immigrant.<sup>11</sup>

Given the presence in so many families of members not authorized to remain in the United States, immigration enforcement against individuals inevitably impacts not just individuals, but rather significant numbers of immigrant children and families. Mixed-status families face difficult choices between family integrity and continued life in the United States. And when children in immigrant families are involved with child welfare systems, issues as central as seeking placements for children can create struggles as child welfare workers grapple with the difficulties, both practical and legal, that arise in the vetting of possible transnational placements, potential placements with undocumented caregivers, and resource limitations related to immigration status that impact reunification planning.

The numbers directly impacted by the intersection of immigration and family law are significant. Between July 1, 2010, and September 30, 2012, U.S. Immigration and Customs Enforcement removed 204,816 parents of U.S. citizen children from the United States.<sup>12</sup> Meanwhile, the most recent Mexican Census reported 500,000 U.S. citizen children living in Mexico. More than a million people have migrated from the United States to Mexico since 2005, “including about 300,000 U.S.-born children, most [of whom] did so voluntarily, but a significant minority were deported and remained in Mexico.”<sup>13</sup> At the same time, many children are left behind in the United States and “there are at least 5,100 children in foster care whose parents have been deported or detained.”<sup>14</sup>

As immigration law and family law inevitably intersect, the potential for tension and inconsistency is high. Immigration and family law are animated by different values and priorities, and it is common that immigration law will reach a conclusion that an individual should be deported that is starkly contrary to an outcome that would advance the best interests of that person’s children. Less dramatically, immigration status also can subtly influence family court decisions as misinformation and misunderstanding of immigration laws lead to questionable outcomes.

The parent-child relationship and the fundamental legal protections that attach to this relationship are not altered by immigration status. Yet when immigrant families find themselves divided across immigration status lines or caught up in immigration enforcement efforts, the potential for family separation is real. The enforcement of immigration law and the failure of family courts to account for the consequences of this enforcement undermine family integrity and create unnecessary separations of children from their parents, threatening children’s safety, security, well-being, and long term development.

## THE DEVALUATION OF CHILDREN IN IMMIGRATION LAW

Before looking for solutions to the challenges presented by the prevalence of mixed status families in the United States, it is important to understand the laws and policies that created this demographic. The existence of a large population of mixed status families is not a fluke, but rather the predictable outcome of immigration laws and policies that fundamentally devalue children. As such, the distinctions that immigration law makes between lawful immigrants and those labeled “illegal aliens” often are the direct result of immigration law frameworks that operate on principles that are contrary to deeply held societal notions of family and values regarding the treatment of children. To protect core family law values when immigrant

families are involved, it is critical to unpack the ways in which immigration law is motivated by principles other than the best interests of children manifest in family law settings.

U.S. immigration law and policy adopt peculiar assumptions and attitudes regarding children that are critical in shaping the lives of migrant families, yet these attitudes are often masked by the excruciating complexity of immigration law and are completely missing from public dialogue about immigration enforcement and reform. U.S. immigration law has a distinctive veneer of family friendliness that creates an appearance of advancing children's interests and general notions of family unity.<sup>15</sup> Immigration law includes a complex system of family-sponsored immigration, derivative immigration for the family members of some immigrants, and waivers of bars of admissibility and cancellation of removal based on hardship to specified family members.<sup>16</sup> Substantial numbers of children do legally immigrate under the provisions of immigration law.<sup>17</sup> Upon closer inspection, however, immigration law's limited and often antagonistic approach to children is revealed.

The failures of immigration law to advance, or in most instances even consider the interests of children, place it far from mainstream values and legal conceptions regarding children. In particular, immigration law fails to fully recognize children as individuals with independent rights and interests, effectively and pervasively precludes children from generating immigration rights in their parents or others, and attaches punishing and lasting legal consequences to children for choices of adults in their lives or for choices that children make prior to reaching the age of discretion. These three avenues for devaluing children create a structural imbalance in immigration law that perpetuates the large population of mixed-status families.

## Treating Children as Objects

Immigration law fails to fully recognize children as individuals with independent rights and interests. The law uses a restrictive and highly technical definition of who qualifies as a "child," conceptualizing children as passive objects. In immigration law, a "child" is defined with circularity as a child who meets other qualifying conditions, such as being born in wedlock or having a father who has taken specified steps to "legitimate" the child.<sup>18</sup> Further, an adopted child is not a child for immigration purposes if the adoption is finalized after the child reaches age 16.<sup>19</sup> When a child is born out of wedlock, a biological relationship with a father that is not accompanied by a "bona fide parent-child relationship" is not recognized for immigration purposes.<sup>20</sup> As a result, not all children are children for immigration purposes, and the actions that determine who is a child are not in the control of children. In U.S. immigration law, children are "by definition passive objects subject to parental control."<sup>21</sup>

Second, U.S. immigration law is distinctly parent-centered. Children's lack of agency in influencing whether they are even considered a child for purposes of fitting into the immigration law framework is only the starting point for the law's devaluation of children. Even when a parent-child relationship is satisfactorily established under immigration law, children are treated less favorably than adults in their ability to exercise agency and extend status to other family members. Under the Immigration and Nationality Act's family-sponsored immigration framework, legal permanent residents and citizens may petition for immigrant visas for certain family members.<sup>22</sup> The person having legal immigration status is the "petitioner," and the person wishing to immigrate and who the law presumes is waiting outside the country is the principal "beneficiary." If the principal beneficiary has a spouse or children, in some instances the spouse or children may acquire



immigration status as derivatives.<sup>23</sup> Through this framework, petitioners with lawful immigration status control the flow of immigration status from themselves to qualifying relatives and their dependents.

Not all family relationships are recognized and immigration law assigns various levels of priority to family-sponsored immigration petitions depending on both the immigration status of the sponsoring petitioner and the familial relationship between the beneficiary and the petitioner.<sup>24</sup> U.S. citizens can petition for their spouses, children, siblings, and parents.<sup>25</sup> The ability of legal permanent residents to petition for relatives is restricted further and they may petition only for their spouses and unmarried children.<sup>26</sup> Petitions of U.S. citizens receive priority over those of legal permanent residents and petitions based on the parent-child and spousal relationships of traditional nuclear families are privileged over other family relationships.<sup>27</sup> Petitions filed by U.S. citizens for their spouses and unmarried minor children are not subject to numerical limits and are immediately available.<sup>28</sup> Less favored relationships, such as the relationship between a legal permanent resident parent and a child, are subject to numerical limitations that result in lengthy backlogs.<sup>29</sup> Immigration petitions relying on the relationship between adult citizens and their siblings, the recognized relationship given lowest priority by immigration law, can be backlogged in excess of 20 years.<sup>30</sup>

Under this statutory framework, parent-child relationships receive favored treatment, but only where the parent holds legal immigration status. Children, in contrast to citizen and legal permanent resident parents, may never petition for their parents to obtain lawful immigration status. In fact, U.S. citizens are permitted to petition for their parents only after they reach age 21 and are no longer children.<sup>31</sup> Immigration law thus subordinates children's status to that of their parents. When parents successfully navigate the immigration system, they may include their children with them or may petition later for their children to join them. But when parents' attempts to immigrate fail, the attempts of their children fail with them. Children are passively advanced through the process by successful parents or held back by unsuccessful parents.

In contrast to its treatment of parents, immigration law does not permit children with legal immigration status, such as children who are U.S. citizens based on their births in the United States, to extend family-based immigration benefits to a parent or other family members. Immigration law assimilates children's status to that of their parents, but does not allow the assimilation of parents' status to that of their child. Only allowing an extension of immigration status if the legal status holder is the parent and not the child is a reflection of the asymmetrical value placed upon the parent-child relationship.<sup>32</sup>

This asymmetry is a central characteristic of immigration law. For example, a child cannot include a parent as a derivative if the child obtains legal immigration status through a family petition.<sup>33</sup> Also, while adult asylees and refugees may obtain derivative status for their spouses and children, child asylees and refugees cannot petition for derivative status for their parents.<sup>34</sup> There is no statutory provision for a child granted protection from removal pursuant to the Convention Against Torture to reunify with a parent.<sup>35</sup>

## Expecting and Accepting Harm to Children

U.S. immigration law further devalues children by failing to give weight to their interests in the context of waivers of grounds of inadmissibility and in cancellations of removal. Even if an immigration visa is available, certain grounds of inadmissibility may preclude a beneficiary from being able to immigrate to the United States.<sup>36</sup> In some instances, grounds of inadmissibility may be overcome by showing hardship to adult family

members (i.e., spouses and parents).<sup>37</sup> However, the immigration statutes make hardship to children irrelevant.<sup>38</sup> Children’s interests are expressly excluded from the equation.

This failure to provide meaningful consideration of children’s best interests extends to immigration removal proceedings. In this context, an individual facing removal may seek cancellation of the removal based, in part, on “exceptional and extremely unusual hardship” to his or her legal permanent resident or U.S. citizen spouse, parent, or child.<sup>39</sup> This standard, in practice, is remarkably difficult to meet. To qualify for relief, parents must demonstrate hardship to children “substantially different from, or beyond that, which would normally be expected from the deportation of an alien with close family members here.”<sup>40</sup>

*...the structure of immigration law creates a serious imbalance that virtually guarantees the perpetuation of a large block of unauthorized migrants who will stay for their children’s interests, yet not be able to legalize their own status.*

Parents facing removal generally can argue hardship to their children in one of two ways.

First, they can assert that if children are left behind, separation will cause hardship. However, courts are unlikely to find that hardship is “exceptional and extremely unusual” because a high level of harm is a typical result of removal as “[d]eportation rarely occurs without personal distress and emotional hurt.”<sup>41</sup> Moreover, separation from family members is “simply one of the ‘common results of deportation or exclusion [that] are insufficient to prove extreme hardship.’”<sup>42</sup> Second, parents can argue that if children leave the United States with the parent, the children will face hardship in the destination country. However, the fact that children will not have the same levels of education, health care, and economic opportunities that they would have in the United States also is a common result of deportation and thus insufficient to meet the “exceptional and extremely unusual hardship” standard.<sup>43</sup> Whether children stay behind or accompany parents abroad, the interests of the children influence the outcome only in the rare case in which they rise to an exceptional and extremely level of hardship. As a practical matter, this is incredibly difficult to prove, and the burden of proof lies with the applicant. Therefore, in contrast to societal norms establishing the primacy of children’s interests, family separation and potentially significant levels of harm to children are an expected and accepted part of the immigration system.

The devaluation of children and their interests is out of step with mainstream consideration of the best interests of children. One result of this, contrary to popular misconceptions, is that parental decisions to seek a better life in the United States for their children generally will not assist parents in obtaining lawful immigration status. But by stripping immigration law of consideration for the interests of children, immigration law guarantees that actions we generally expect from parents to advance their children’s interests are ignored in making immigration determinations.

The result is a misalignment of United States immigration law and policy with the motivations that drive unauthorized migrants to arrive and remain in the United States. Indeed, the structure of immigration law creates a serious imbalance that virtually guarantees the perpetuation of a large block of unauthorized migrants who will stay for their children’s interests, yet not be able to legalize their own status. The notion that children’s interests in family integrity do not serve as a basis for possible extension of immigration status thus contributes directly to the perpetuation of mixed-status families in the United States. Preventing the

legalization of parents has far-reaching effects as it hampers the integration of immigrant children and the children of migrants into United States society.

## Punishing Children for Adult Decisions

Immigration law retains the long disfavored idea of punishing children for the sins of their parents. For example, we have long acknowledged that penalizing children for birth out of wedlock is “illogical and unjust.”<sup>44</sup> Outside immigration law, it is clear that attaching punishment to children for circumstances of birth outside their control “is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual, as well as an unjust, way of deterring the parent.”<sup>45</sup> Indeed, the notion of deterring adult behavior by penalizing children runs counter to the mainstream recognition of children as autonomous individuals.<sup>46</sup>

As to children’s own actions, it is generally understood that “juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”<sup>47</sup> Because “juveniles have lessened culpability they are less deserving of the most severe punishments,”<sup>48</sup> we do not expect adult levels of maturity from children and do not assign legal consequences to juveniles as they do adults.

U.S. immigration law, however, imposes upon children many of the same severe penalties and barriers that apply to adults who enter the United States without inspection or remain without authorization. Even children too young to be capable of exercising independent judgment and volition in entering the United States, such as infants carried across the border, face the full legal consequences of unauthorized entry. This effectively negates the possibility that children’s responsibility for violations of immigration law is proportionate to any perceived culpability.<sup>49</sup> U.S. immigration law, therefore, often attaches the consequences of adult decisions and actions to children who had no control over the actions for which they are now punished. This approach continues, although it has demonstrably failed as a deterrent to adult behavior.

The devaluation of children and their interests in immigration law plays a large role in a legal system that results in mixed-status families unable to achieve a common immigration status. Understanding this gives rise to caution in mixing immigration and family law in determinations regarding children. At its extreme, immigration law can function as family law by providing a de facto determination of where family members may live, yet immigration operates in a manner that does not take children’s interests into account. When family courts allow immigration considerations to overwhelm family law principles and practices, they further enhance the devaluing aspects of immigration law by allowing them to undermine protections for families and children that are foundational in family law. Family law provides a counter to immigration law’s devaluation of children only if its own principles and values regarding the centrality of the integrity of family and child’s interests are preserved.

## RECOMMENDATIONS

### **Family Courts Must Allow Introduction of Immigration Status Issues in Family Proceedings Only Where the Proponent of the Information can Establish that Specific Facts Have Relevance to the Legal Determination at Hand**

A strict prohibition against any consideration of immigration status in child custody and welfare proceedings would stand as a firewall against discrimination and the intimidation inherent in parties' attempts to raise immigration status matters, but such a rule is both impractical and problematic. The need to prevent bias and discrimination does not necessarily mean that an absolute prohibition on the consideration of immigration status is the answer. While a restriction on any mention of immigration status admittedly has appeal as one way of avoiding discrimination, it has significant downsides as well. One of these is the possibility that discrimination is silently swept under the rug and courts' true rationales are obfuscated.<sup>50</sup> More broadly, and quite apart from impermissible bias, it is difficult to think that courts motivated by the best interests of children can reasonably ignore the real, tangible, and immediate impacts on the lives of children.<sup>51</sup>

In many situations, moreover, it is parties without legal immigration status who seek to raise concerns related to immigration status in family courts, asking courts to accommodate realities related to their situations or to tailor findings to facilitate desired immigration outcomes, as in the instance of court-dependent children who might be eligible for Special Immigrant Juvenile Status.<sup>52</sup> More generally, immigration status is an influential force that shapes the life experiences of many immigrants and immigrant families, and the immigration status of parents and children forms an understandably tempting area of inquiry for family judges struggling to make difficult determinations about the interests of children.

A strict prohibition on raising immigration status issues in child custody matters would be difficult to maintain because immigration status does affect the experiences of many immigrants and their families. This impact is especially important for mixed-status families that face daily conundrums as they interface with societal institutions unsure of the implications associated with the array of statuses that such families present. The influence of immigration status in shaping daily life can be logistical and practical, or it can be much more significant. In some cases, the influence of immigration status is vitally relevant to determining a child's interests. Sorting out the real implications of immigration status from the misconceptions and stereotypes that abound is not an easy task.

One common example arises in the manner in which immigration status can play a central role in establishing and perpetuating dynamics of family violence. In such instances, ignoring the power and influence of immigration status may be among the least appropriate choices. Any examination of families where exploitation and control based on immigration status is a strong negative force would be incomplete and misleading without reference to concerns related to immigration. Indeed, as the American Bar Association has noted, "Offering battered immigrant parents and their children a way out of violent homes requires that attorneys, judges, police, child protective service workers and advocates develop an understanding of immigrant parents' life experience, so that they may craft legal relief that will be effective in stopping violence while being respectful of their cultural experiences."<sup>53</sup>

Family courts and advocates must realize that “[i]n many instances, the fact that battered immigrant women have no legal immigration status or documentation in the U.S. is a result of the batterer’s use of the victim’s immigration status as a weapon of abuse.”<sup>54</sup> Moreover, it may well be the case that in some instances an “abuser’s attempt to raise the other parent’s immigration status ... [itself] is evidence of on-going abuse.”<sup>55</sup> If this is the case, a court’s inquiry into the abuser’s motives and rationale for attempting to inject the issue of immigration status into the proceeding may be especially telling. Further, the strategic decision of a party or attorney in a particular case to educate a judge regarding the true impact of immigration status ought to not be prohibited or even discouraged.<sup>56</sup> Contrary to attempts to introduce irrelevant status concerns to intimidate a party, in such instances it may well be a person lacking immigration authorization who seeks to bring immigration concerns that are highly relevant to the child’s best interests to the court’s attention.

Absolute silence about immigration status cannot be, or at least cannot always be, the appropriate line in child custody matters. This conclusion extends outside the realm of domestic violence, as immigration status unquestionably influences the lives of many immigrants and immigrant families in a variety of predictable and unpredictable ways. To argue that concerns related to immigration never impact the interests of children in any situation is not credible, and it is unrealistic to think that judges will or should completely ignore the persistent and pervasive collateral impact of immigration status on some children and families. Practically significant examples include establishing levels of child support or enforcing child support when parties are not unauthorized to work.<sup>57</sup> Eligibility restrictions for important benefits, such as Supplemental Security Income, Supplemental Nutrition Assistance Program (formerly known as food stamps), and Temporary Assistance for Needy Families may be highly relevant to some families.<sup>58</sup> If an affidavit of support is executed to support an immigration application, this affidavit may have relevance to support issues.<sup>59</sup>

As such, an important criterion emerges that limits the consideration of immigration issues in family court and prevents the introduction of immigration status to promote bias in outcomes. Restricting the consideration of immigration issues to instances where immigration concerns are demonstrably relevant on an individualized basis prevents the introduction of material for discriminatory purposes. The proponent of considering immigration status or concerns must establish specific facts and their relevance to the legal determination at hand. Forcing the proponent to articulate a rationale for the consideration of immigration status brings transparency to the reasoning and reduces opportunities for discrimination and obfuscation. At the same time, this approach maintains flexibility in responding to the myriad unseen ways that immigration law impacts lives.<sup>60</sup> The rejection of irrelevant bias based on immigration status per se does not preclude carefully delineated factual analysis of the collateral consequences of the workings of immigration law on children.

### **Family Courts Must Demand and Ensure Detained and Deported Parents’ Participation in Family Court Proceedings**

When parents actually are deported or detained, proceedings related to child welfare become more difficult, but fundamental procedural rights to notice and participation persist. A parent’s “location abroad presents many challenges for any child welfare agency assigned by the state to oversee the welfare of the child.”<sup>61</sup> There are “many unavoidable obstacles, including information disadvantages, financial limitations, cultural differences, communication barriers, and the involvement of multiple judicial systems.”<sup>62</sup> When immigration law prohibits a parent from returning to the United States, these cross-border difficulties are compounded. Yet these barriers are not insurmountable, and certainly the imperative to preserve the parent-child

relationship requires efforts to overcome them. Notably, the American Bar Association’s House of Delegates recently resolved that “the length of one’s status as an immigration detainee, or one’s removal or pending removal from the country, cannot be the sole basis for a state not to provide legally mandated reasonable efforts to reunify children with their parent, legal guardian, or primary caretaker.”<sup>63</sup>

Parents detained by immigration authorities pending removal proceedings face particular obstacles. A recent study found that “[i]n none of the accounts shared by detained parents with children in foster care or by attorneys, caseworkers and judges was a detained parent allowed to physically appear at their dependency proceedings.”<sup>64</sup> Access to proceedings by phone was also limited.<sup>65</sup> Distance is sometimes an obstacle, as detainees “are transferred an average of 370 miles from their homes.”<sup>66</sup> Yet distance cannot explain every failure to find means for parents to participate.

In one egregious case, “despite knowledge of the social workers, the guardian ad litem and ultimately the judge that [the mother] was held next door by immigration officials, the county court proceeded in her absence with hearings to adjudicate the fate of the children.”<sup>67</sup> Although overturned on appeal, such cases “send a strong message to immigrant parents that however unassailable their parental rights may be, as a practical matter they are not secure in their relationships with their children in the face of immigration law.”<sup>68</sup> Appellate “vindication of family rights will not counteract perceptions that immigrants are disadvantaged in child custody matters until frontline practices align with appellate articulations of the rights of immigrant children and parents.”<sup>69</sup> This change “will require social service agencies and family courts to commit resources and question existing routines, but the preservation of fundamental family rights requires no less.”<sup>70</sup>

The barriers to parent participation in such instances are often the creation of immigration detention policies and practices. That said, family courts enable immigration actors by failing to demand means to communicate with and ensure the participation of detained parents. Change is unlikely without strong leadership from family courts requiring efforts on the part of child welfare workers and demanding cooperation of immigration officials in vindicating parents’ constitutional rights to participation in proceedings regarding their children.<sup>71</sup>

### **Family Courts Must Consider all Family Reunification Options, Including Placement of Children Outside the United States**

When family members, social workers, and courts assume that U.S. citizen children must remain in the United States, they have essentially decided that a parent or caregiver forced by immigration law to leave the country can no longer care for that child.<sup>72</sup> In individual cases this conclusion may turn out to be true, but the general proposition that children cannot thrive in other lands is plainly unsustainable. The need to consider options related to life in other countries holds true regardless of the immigration or citizenship status of the children involved.<sup>73</sup>

Immigration and citizenship laws determine who is permitted to legally remain in the United States, but these laws do not determine who is permitted to leave. Generally, “[e]veryone has the right to leave any country, including his own, and to return to his country.”<sup>74</sup> Children who are not citizens of the United States, even those with permanent permission to reside in the United States, can hardly be thought unable to return to their country of citizenship. Moreover, U.S. citizens have a constitutionally mandated right to leave the United States. The “right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the



due process of law under the Fifth Amendment. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage.”<sup>75</sup> Travel within the United States and “[t]ravel abroad ... may be as close to the heart of the individual as the choice of what he eats, or wears, or reads.”<sup>76</sup>

When family courts have been asked to review the possibility of assigning the custody of a child in a manner that might result in the child leaving the United States, they have not balked at ordering children to leave the country. Well over 100 years ago writing for the Kansas Supreme Court, future Supreme Court Justice Brewer wrote, “I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty to do so is clear and absolute. As, for instance, where parents moving to a foreign country, and leaving their little child here for a while, come back to claim it, and are hindered by those who have it in possession.”<sup>77</sup> The U.S. citizenship or legal immigration status of children is no impediment to their leaving the United States.<sup>78</sup>

The real issue, then, is not whether children may leave the United States, but rather how to decide whether they leave or stay, especially when children are too young to exercise agency in influencing this decision. As discussed previously, in the immigration context courts have overwhelmingly turned to parents to make this difficult decision. Parents may adamantly resist the de facto deportation of their children to join them outside the United States, and if so their wishes deserve due consideration. But a parent’s wish for a child to remain in the United States cannot be confused with a belief that the child must remain due to her citizenship or immigration status. Similarly, family courts are the best forum to consider the voices and desires of children in decisions about where they will live. An immigration overlay on a case does not override the complex work that courts do in integrating children’s wishes into decision making as children gain in maturity and autonomy.

### **Family Courts Must Consider All Family Reunification Options, Including Placement with Caregivers who Lack Lawful Immigration Status**

Courts too often allow stereotypes regarding immigrant families to prevent placements in the best interests of children. Even when immigration matters are appropriately raised in family law matters, there is a critical need to prevent the introduction of irrelevant stereotypes. Stereotypes cannot replace the case-by-case inquiries about the lives of children required to promote children’s best interests. Immigrant families have unique experiences of life in the United States and vigilance is required to combat attempts to essentialize their experiences and replace individualized fact finding with assumption and stereotypes. One of the most pervasive stereotypes regarding immigrants is that they lead unstable and precarious lives.

The insecurity and precariousness of immigrants’ continuing presence in the United States are easily overstated.<sup>79</sup> The presence of a population lacking authorized immigration status in the United States is quite established.<sup>80</sup> Millions of immigrants, without regard to immigration status, have regular employment and established homes in the United States. In overturning the termination of a father’s parental rights, one appellate court noted:

*Essentially, the termination of the father’s parental rights was based on the possibility that the father could someday be deported and, ... [the child] might be returned to DFAC’s custody or sent to Mexico. When we wield the awesome power entrusted to us in these cases, our decisions must be based on clear and convincing evidence of parental misconduct or inability and that termination is in the best interests of the child, and not*

*speculation about the vagaries or vicissitudes that beset every family on its journey through the thickets of life.*<sup>81</sup>

Despite spikes in the enforcement of immigration laws, most unauthorized immigrants are unlikely to face removal.<sup>82</sup> Even those in removal proceedings may be eligible for relief, such that “a State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed.”<sup>83</sup> And, of course, immigrants in removal proceedings are entitled to due process protections that provide time from the initiation of removal proceedings to avenues of appeal to possible removal.<sup>84</sup> Presence in the United States without authorized immigration status is not in and of itself evidence of instability.

The Texas Supreme Court recently emphasized the need for individualized analysis of cases, noting that while “deportation, like incarceration, is a factor that may be considered (albeit an insufficient one in and of itself to establish endangerment), its relevance to endangerment depends on the circumstances.”<sup>85</sup> The court rejected the conclusion of the lower appellate court that “the mere threat of deportation or incarceration resulting from an unlawful act, regardless of severity, would establish endangerment.”<sup>86</sup> Under the lower court’s analysis, “virtually any offense that could lead to deportation – even a minor one committed long before the parent’s children were born – would create such an unstable and uncertain environment as to establish endangerment, subjecting countless immigrants to the potential loss of their children.”<sup>87</sup> Noting that such broad reasoning would apply to citizen parents as well, the court rejected this approach as unconstitutional, reasoning that under this rationale “[a]ny offense committed by a citizen that could lead to imprisonment or confinement would also apparently establish endangerment, simply because the parent’s ability to be present in his children’s lives would be uncertain.”<sup>88</sup> Moreover, the court noted that while “there are similarities between incarceration and deportation in that the parent is no longer available to reside with the children in their home in the United States... there are important differences ... [because] a person who is deported is able to work, have a home, and support a family. More importantly, it is possible for the person’s children to live with him.”<sup>89</sup>

The relative stability of immigrant populations is true not only for parents, but also for other relatives and potential caregivers. Yet routinely, “[c]hild welfare departments and agencies are turning away family members and family friends who wish to care for their young kin because of their immigration status.”<sup>90</sup> Even if workers assume that such placements are possible, “the dearth of policy means that biases of caseworkers or the internal policies of case management agencies can derail the maintenance of extended families.”<sup>91</sup> In some jurisdictions, such as Illinois, policies establish explicitly that as long as other criteria are met, the “[i]mmigration status of a relative caregiver should not hinder the placement of a relative child in the home.”<sup>92</sup> Looking past stereotypes and unfounded assumptions regarding the instability of immigrants provides children with more options and enhances the prospects of non-institutional placements.

## **Family Courts Must Recognize and Support Opportunities to Regularize Immigration Status through Family Court Involvement**

Awareness in family court of immigration law and sensitivity to its requirements is important to understand the immigration implications that might be associated with various family law outcomes. “In some instances, involvement with family courts and child welfare systems provides unique, often fleeting, opportunities for children to achieve legal immigration status. Recognizing immigration opportunities and seeking timely

assistance from immigration experts may change a child's life."<sup>93</sup> This is especially true for court-dependent children, including children with court-approved guardians, who may qualify for Special Immigrant Juvenile Status.<sup>94</sup> In such cases, federal immigration law expressly requires findings that may only be made by state courts empowered to make decisions about the care and custody of children.<sup>95</sup>

In other situations, the requested accommodation for immigration purposes might be less direct, but equally important. For example, parties might request that an adoption proceeding be expedited because an adoption that is finalized after the child reaches age 16 is not recognized for immigration purposes.<sup>96</sup> Victims of domestic and sexual violence are often eligible for special visas for victims of crimes and human trafficking, and child welfare systems and family courts are among the institutions most likely to flag potential eligibility and leverage resources in the pursuit of such options.<sup>97</sup>

## CONCLUSION

Immigrant children and families in the family courts are a reality that cannot be ignored.<sup>98</sup> Opening the door to the consideration of the collateral consequences of immigration status creates a tremendous challenge for immigrants, their advocates, and the courts to combat stereotypes and assumptions. But addressing these difficult issues head on is absolutely necessary to ensure that the complications of immigration law in the lives of children and families are acknowledged, understood, and, when appropriate, affirmatively addressed in legal representation. Nothing less will protect the fundamental rights of immigrant children and parents.

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## Notes

<sup>1</sup> Fix, M.E. & Zimmerman, W. (1999). *All under one roof: Mixed-status families in an Era of Reform*. Washington, D.C.: Urban Institute.

<sup>2</sup> Thronson, D.B. (2006). You can't get here from here: Toward a more child-centered immigration law. *Virginia Journal of Social Policy & the Law*, 58, 72-76 (detailing barriers to obtaining legal immigration status for families living in the United States).

<sup>3</sup> Immigration Customs and Enforcement (October 18, 2011). *FY 2011: ICE announces year-end removal numbers, highlights focus on key priorities including threats to public safety and national security*. Retrieved from <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>.

<sup>4</sup> Transactional Records Access Clearinghouse (TRAC). *ICE seeks to deport the wrong people*. Retrieved from <http://trac.syr.edu/immigration/reports/243>. Even the record 396,906 removals in 2011 represents only 3.6 percent of the estimated population of 11 million undocumented immigrants, and priorities for removal include persons with criminal involvement leaving those who do not come into contact with law enforcement even less likely to face formal removal proceedings.

<sup>5</sup> Cervantes, W. D. & Hernandez, D. (2011). *Children in immigrant families: Ensuring opportunity for every child in America*. Washington, D.C.: First Focus.

<sup>6</sup> Terrazas, A. & Batalova, J. (2009). *Frequently requested statistics on immigrants and immigration in the United States*. Washington, D.C.: Migration Policy Institute. Retrieved from <http://www.migrationinformation.org/USfocus/display.cfm?ID=747#7>.

<sup>7</sup> Passel, J.S. & Cohn, D. (2009). *A portrait of unauthorized immigrants in the United States*. Washington, D.C.: Pew Hispanic Center. Retrieved from <http://pewhispanic.org/files/reports/107.pdf>.

<sup>8</sup> Thronson, D.B. (2010). Thinking small: The need for big changes in immigration law's treatment of children. *U.C. Davis Journal of Juvenile Law and Policy*, 14, 239.

<sup>9</sup> *Ibid.* 7

<sup>10</sup> Passel, J.S. (2006). *The size and characteristics of the unauthorized migrant population in the U.S.: Estimates based on the March 2005 current Population Survey*. Washington, D.C.: Pew Hispanic Center. Retrieved from <http://pewhispanic.org/files/reports/61.pdf>.

<sup>11</sup> *Ibid.* 7

<sup>12</sup> U.S. Immigration and Customs Enforcement. *Deportation of Parents of U.C. Citizen Children July 1, 2010- September 30, 2013*. Accessed by Colorlines.com on December 12, 2012. [http://colorlines.com/archives/2012/12/deportations\\_of\\_parents\\_of\\_us-born\\_citizens\\_122012.html](http://colorlines.com/archives/2012/12/deportations_of_parents_of_us-born_citizens_122012.html).

<sup>13</sup> Passell, J., Cohn, D. & Gonzales-Barrera, A. (2012). *Net migration from Mexico falls to zero – and perhaps less*. Washington, D.C.: Pew Hispanic Center.

<sup>14</sup> *Ibid.* 12.

<sup>15</sup> Sanger, C. (1988). Immigration reform and control of the undocumented family. *Georgetown Immigration Law Journal*, 295, 296-97. “Families composed of aliens and citizens have received special attention as “[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.” *Id.* (quoting House Judiciary Comm., Facilitating Entry Into the United States of Certain Adopted Children, and Other Relatives of United States Citizens, H.R. Rep. No. 1199, 85<sup>th</sup> Cong., 1<sup>st</sup> Sess. 7, reprinted in 1957 U.S. Code Cong. & Admin. News 2016, 2020).

<sup>16</sup> See 8 U.S.C.A. § 1153(a) (establishing preference allocations for family-sponsored immigrants); 8 U.S.C.A. § 1151(b)(2)(A)(i) (excluding “immediate relatives” of U.S. citizens from direct numerical limitations on immigrant visas); 8 U.S.C.A. § 1151(c) (establishing numerical levels of family-sponsored immigrants); 8 U.S.C.A. § 1153(d) (establishing who may accompany or follow to join immigrants based on family relationship); 8 U.S.C.A. § 1229(b) (establishing cancellation of removal for lawful permanent residents or nonpermanent residents based on, among other things, a qualifying familial relationship with a U.S. citizen or lawful permanent resident).

<sup>17</sup> Thronson, D.B. (2010). Entering the mainstream: Making children matter in immigration law. *Fordham Urban Law Journal*, 393, 397 (“[I]n fiscal year 2009 children as beneficiaries by parents or as derivatives of parents granted immigration visas constituted about 26.6% of all family sponsored immigration.”).

<sup>18</sup> 8 U.S.C.A. § 1101(b)(1).

<sup>19</sup> 8 U.S.C.A. § 1101(b)(1)(E-G). A small exception exists for the siblings under age 18 of children adopted while under age 16. *Id.*

<sup>20</sup> 8 U.S.C.A. § 1101(b)(1)(D).

<sup>21</sup> Thronson, D.B. (2002). Kids will be kids? Reconsidering conceptions of children’s rights underlying immigration law. *Ohio State Law Journal*, 63, 979, 992

<sup>22</sup> See 8 U.S.C.A. § 1151(b)(2)(A)(i), 8 U.S.C.A. § 1153(a).

<sup>23</sup> See 8 U.S.C.A. § 1153(d).

<sup>24</sup> See 8 U.S.C.A. § 1153(a).

<sup>25</sup> *Id.*; see also 8 U.S.C.A. § 1151(b)(2)(A)(i).

<sup>26</sup> 8 U.S.C.A. § 1153(a).

<sup>27</sup> See generally Romero, V.C. (2005). Asians, gay marriage and immigration: Family unification at a crossroads. *Indiana International & Comparative Law Review*, 15, 337; Demleitner, N.V. (2003). How much do western democracies value family and marriage? Immigration law’s conflicted answer. *Hofstra Law Review*, 32, 273; Kelly, L. (2001). Family planning, American style. *Alabama Law Review*, 52, 943, 955–60; and Motomura, H. (1995). The Family and immigration: A roadmap for the ruritanian lawmaker. *American Journal of Comparative Law*, 43, 511, 528.

<sup>28</sup> See 8 U.S.C.A. § 1151(b). The immediate availability of an immigration visa should not be confused with the ability to immigrate immediately given processing times and bureaucratic delays that can be extensive.

<sup>29</sup> See U.S. Dep’t of State, Visa Bulletin, [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html).

<sup>30</sup> *Ibid.* 30

<sup>31</sup> 8 U.S.C.A. § 1151(b)(2)(A)(i).

<sup>32</sup> Bhabha, J. (2004). The “mere fortuity” of birth? Are children citizens? *Differences: A Journal of Feminist Cultural Studies*, 15(2), 91. (discussing the “striking asymmetry in the family reunification rights of similarly placed adults and minor children”).

<sup>33</sup> 8 U.S.C.A. § 1153(d).

<sup>34</sup> See 8 U.S.C. A §§ 1158(b)(3), 1157(c)(2).

<sup>35</sup> See generally Nessel, L.A. (2005). Forced to choose: Torture, family reunification and United States immigration policy. *Temple Law Review*, 78, 897.

<sup>36</sup> 8 U.S.C.A. § 1182.

<sup>37</sup> 8 U.S.C.A. § 1182(a)(9)(B)(v).

<sup>38</sup> *Ibid.* 38

<sup>39</sup> 8 U.S.C.A. § 1229b.

<sup>40</sup> *In re Monreal-Aguinaga*, 23 I & N Dec. 56, 65 (BIA 2001).

<sup>41</sup> *Sullivan v. INS*, 772 F.2d 609, 611 (9<sup>th</sup> Cir. 1985).

<sup>42</sup> *Jimenez v. INS*, No. 96-70169, 1997 WL 349051 at 1 (9<sup>th</sup> Cir. June 25, 1997) (unpublished decision).

<sup>43</sup> *Ibid.* 43

<sup>44</sup> *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

<sup>45</sup> *Ibid.* 45

<sup>46</sup> Brown, R.L. (2005). Disinheriting the “legal orphan”: Inheritance rights of children after termination of parental rights. *Missouri Law Review*, 70, 125, 150 (arguing that deterring adult activity by punishing children rather than the adults who engaged in that activity is “grossly unfair”).

<sup>47</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)).

<sup>48</sup> *Ibid.* 48 (citing *Roper*, 543 U.S. at 551).

<sup>49</sup> *Ibid.* 33

<sup>50</sup> Thronson, D.B. (2005). Of borders and best interests: Examining the experiences of undocumented immigrants in U.S. family courts. *Texas Hispanic Journal of Law and Policy*, 45, 67-72 (providing examples of courts obfuscating importance actually placed on immigration considerations).

<sup>51</sup> *Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005) (recognizing the propriety of considering a parent's immigration status, but only "to determine its derivative effects on the children").

<sup>52</sup> The federal statutory scheme to obtain special immigrant juvenile status specifically requires that some factual findings be made in state court. See Brady & Thronson, *supra* note 22 at 415. The factual findings concerning the child that are required "may only be made by the juvenile court." Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 58 Fed. Reg. 42,847 (Aug. 12, 1993). Specifically, the federal government has noted that in implementing the special immigrant juvenile statutory scheme it "does not intend to make determinations in the course of deportation proceedings regarding the 'best interest' of a child for the purpose of establishing eligibility for special immigrant juvenile classification." *Id.*

<sup>53</sup> Davidson, H. (1994). *The impact of domestic violence on children. A report to the President of the American Bar Association.*

<sup>54</sup> Orloff, L.E., Dutton, M.A., Hass, G.A., & Ammar, N. (2003). Battered immigrant women's willingness to call for help and police response. *UCLA Women's Law Journal*, 15, 55.

<sup>55</sup> Orloff, L. et al. (2002). *Countering abusers' attempts to raise immigration status of the victim in custody cases*, Ch. 6.1 at 6. Courts "have generally recognized the *interrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim." *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002).

<sup>56</sup> The "pervasive lack of understanding of the life experiences of battered immigrant women by the systems designed to protect battered women and immigrant victims greatly reduces the likelihood that immigrant victims will be able to escape the violence in their lives." Orloff et al., *supra* note 56 at 46.

<sup>57</sup> See *Gomez v. Fernandez*, No. R-120399 (Nev. Eighth Jud. Dist. Ct. Fam. Div. hearing Mar. 22, 2004) (copy on file with author).

<sup>58</sup> See *In re Kittridge*, 714 N.Y.S.2d 653, 654 (N.Y. Fam. Ct. 2000). See also, National Immigrant Law Center, *Overview of Immigrant Eligibility for Federal Programs*, <http://www.nilc.org/immisps/special/overview-immeligfedprograms-2011-10.pdf>.

<sup>59</sup> See 8 U.S.C. § 1182(a)(4)(C) (requiring affidavits of support in the context of family-sponsored immigration); Abrams, K. (2007). Immigration law and the regulation of marriage. *Minnesota Law Review*, 91, 1625, 1700-07 (discussing enforceability of affidavits of support in the context of immigration based on marriage).

<sup>60</sup> Given the many ways, some of which are unpredictable, that immigration issues can impact the lives of children and families, a flexible approach to the introduction of immigration status is more in line with the general ability of family courts to craft equitable responses to peculiar situations. *But see* Abrams, K. (2006). Immigration status and the best interests of the child standard., 14 *Virginia Journal of Social Policy and Law*, 14, 87, 98 (proposing "a presumption that immigration status is not relevant in child custody disputes, coupled with specific classes of cases in which the presumption could be rebutted").

<sup>61</sup> Boyce, A.R. (2004). Making sure children find their way home: Obligating states under international law to return dependent children to family members abroad. *Brooklyn Law Review*, 69, 1515, 1517 (2004).

<sup>62</sup> *Ibid.* 62

<sup>63</sup> See American Bar Association, House of Delegates, Resolution 103B (Aug. 8, 2011).

<sup>64</sup> *Ibid.* 62

<sup>65</sup> *Ibid.* 34

<sup>66</sup> *Ibid.* 36

<sup>67</sup> Thronson, D.B. (2008). Creating crisis: Immigration raids and the destabilization of immigrant families. *Wake Forest Law Review*, 43,391, 408 (describing the proceeding in *In re Mainor T.*, 674 N.W.2d 442 (Neb. 2004) which overturned the termination of mother's parental rights).

<sup>68</sup> *Ibid.*68at 410.

<sup>69</sup> *Ibid.*68at 416-17.

<sup>70</sup> *Ibid.*68at 417.

<sup>71</sup> See American Bar Association, House of Delegates, Resolution 103C (Aug. 8, 2011) (calling for detained parents to have access to attorneys and representation in state court custody, dependency, and other legal actions related to their children, together with the opportunity to participate meaningfully in all state judicial proceedings involving their children and to access court-mandated services related to their parenting).

<sup>72</sup> See *In re D.R.*, 204 Conn. Super. LEXIS 325, at \*34, 2004 WL 423993 (Conn.Super.Feb. 9, 2004) (stating without support that a mother's "return to Honduras renders her effectively unable to serve as a responsible parent").

<sup>73</sup> Importantly, many children in immigrant families may hold citizenship of other countries, sometimes along with U.S. citizenship. On the other hand, the child's ability to lawfully reside in a parent's country of citizenship cannot be presumed.

<sup>74</sup> Declaration of Human Rights art.13(2), G.A. Res. 217A, at 71, U.N. GAOR, 3d sess., 1st plen.mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>75</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

<sup>76</sup> *Ibid.*76 at 125-26.

<sup>77</sup> *In re Bullen*, 28 Kan. 781, 1882 WL 1125, at \*3 (1882).

<sup>78</sup> See *State ex rel. Graveley v. Dist. Ct. 3d Jud. Dist.*, 174 P.2d 565, 572 (Mont. 1946) ("the court may properly permit a parent ... to take it [a child] to another state, or even to a foreign country"); *Lane v. Lane*, 186 S.W.2d 47 (Mo.App. 1945) (finding no obstacle to mother's decision "to take the child out of the state and to a foreign country [Mexico]"); *Church v. Church-Corbett*, 625 N.Y.S.2d 367 (N.Y. App.



Div, 1995) (permitting parent to take child to Italy during three-year Naval assignment abroad); *Blackwell v. Blackwell*, 12 Cal. Rptr. 201 (Cal. Ct. App. 1961) (finding no error in trial judge's decision allowing parent to move with children outside United States); *Viltz*, 384 So.2d 1348 (Fla. Dist. Ct. App. 1980) (allowing parent to take children to Venezuela); *Tamari v. Turko-Tamari*, 599 So.2d 680 (Fla. Dist. Ct. App. 1992) (granting permission for parent to relocate with child to Israel); *Byers v. Byers*, 370 S.W.2d 193 (Ky 1963) (permitting parent to permanently relocate to South Africa with children).

<sup>79</sup> *In re Margarita T.*, No. A-95-530, 1995 Neb. App. LEXIS 397, at \*3 (Neb. Ct. App. Dec. 19, 1995) (finding that a father's "illegal immigration status in the country renders his presence here to supervise his child temporal, at best"). For a more grounded review of the possibilities of immigration enforcement, see Wessler *supra* note 12 at 52).

<sup>80</sup> See *In re B. del C.S.B.*, 559 F.3d 999, 1012 (9th Cir. 2009) (noting that "the likelihood of deportation of law-abiding aliens . . . is small, both because of the sheer number of undocumented immigrants and because the government has set a priority to deport those with criminal records"). This is, of course, not a new situation. In 1980, the U.S. Supreme Court noted testimony of the U.S. Attorney General that "[w]e have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community." *Plyler v. Doe*, 457 U.S. 202, 219 n.17 (1982).

<sup>81</sup> *Interest of M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (internal citations omitted).

<sup>82</sup> In fact, for some demographic groups, the statistical probability of immigration removal generally is significantly less than the probability of incarceration for a crime. Abrams, *supra* note 5 at 93.

<sup>83</sup> *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

<sup>84</sup> Persons "who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness, encompassed in due process of law." *Schaughnessy v. U.S. ex rel. Maze*, 345 U.S. 206, 212 (1953).

<sup>85</sup> *In re E.N.C.*, \_\_\_ S.W.3d \_\_\_, 2012 WL 4840710 at \*7 (Tex. Oct. 12, 2012).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Wessler, *supra* note 12 at 54.

<sup>91</sup> *Ibid.*

<sup>92</sup> Illinois Department of Children and Family Services, Policy Guide 2008.01, Licensing, Payment and Placement of Children with Undocumented Relatives (noting that "[p]lacement practices shall be consistent with the child's best interest and special needs").

<sup>93</sup> Brady, K. & Thronson, D.B. (2010). Immigration issues—Representing children who are not United States citizens. In Duguet, D.N. & Haralambie, A.M. (Eds). *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases*, 2<sup>nd</sup> Edition (pp. 416-422), CO: Bradford Publishing.

<sup>94</sup> See *ibid.* at 416-422. See also American Bar Association, House of Delegates, Resolution 103C (Aug. 8, 2011) (urging that unaccompanied and undocumented children "be screened promptly upon apprehension by immigration authorities or placement in foster care, or upon other entry to a child welfare system, to determine whether the child is eligible for immigration relief....").

<sup>95</sup> 8 U.S.C. § 1101(a)(27)(J).

<sup>96</sup> 8 U.S.C. § 1101(b)(1)(E)-(G)

<sup>97</sup> See Brady & Thronson, *supra* note 94 at 422-24 (discussing the Violence Against Women Act, T visas, and U visas).

<sup>98</sup> See *In the matter of D.M.T.-R, M.C.* (June 27, 2011, Minn. Ct of App.).



## UNANSWERED QUESTIONS ABOUT IMMIGRATION ENFORCEMENT AND CHILDREN'S WELL-BEING

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Immigration enforcement activities conducted by U.S. Immigration and Customs Enforcement (ICE) have increased significantly over the past decade. The period between 2005 and 2008 saw a particularly large increase in enforcement efforts, most notably with several large, highly publicized worksite enforcement operations. Although worksite raids have been suspended under the Obama Administration, the high levels of detentions and deportations have remained consistent. In 2009, ICE detained a record total of 383,524 immigrants. Additionally, more than 393,000 immigrants were removed from the United States in 2009, the seventh consecutive record yearly total.<sup>1</sup>

To some extent, these numbers can be attributed to increased cooperation between ICE and local law enforcement. Beginning in 2007, a new strategy was adopted to prioritize the apprehension of immigrants who have committed criminal offenses, resulting in the merging of several programs under the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) initiative. One of the most well known of these is the 287(g) program, which establishes collaborations between ICE and local officials that allow local police to be deputized to enforce immigration laws. Currently ICE has 287(g) agreements with 68 law enforcement agencies in 24 states, and ICE officers have certified more than 1,500 local officers to enforce immigration law.<sup>2</sup> A related program, Secure Communities, uses local jails to identify immigrants for deportation by forwarding fingerprint data from the FBI to ICE, which determines the arrested person's immigration status. If the arrested person is identified as a non-citizen, ICE can request that local authorities detain that person until ICE moves him or her to an immigration detention center.

The stated goal of these programs is the removal of individuals who pose a threat to national security and public safety. This includes, in order of priority, immigrants convicted of an aggravated felony or multiple felonies (Level 1), those convicted of a felony or multiple misdemeanors (Level 2), or misdemeanors (Level 3). Recent data have demonstrated that Secure Communities has resulted in the deportation of thousands of immigrants who do not fall in these priority areas. Over one-quarter of deportees who come to the attention of ICE through Secure Communities have no criminal conviction at all. Another 30 percent are Level 2 or 3 offenders, including people charged with misdemeanors such as driving without a license.<sup>3</sup> In fact, data from ICE indicate that less than 30 percent of individuals who have been deported since the implementation of Secure Communities were convicted of Level 1 offenses.<sup>4</sup> Nevertheless, Secure Communities operates as a partnership between local law enforcement and ICE throughout the country and is scheduled to be fully implemented by 2013.<sup>5</sup>

### UNANSWERED QUESTIONS

To date, it has been difficult to quantify the impact of immigration enforcement on children in immigrant families, as data on these children are not collected in a systematic way within any local or federal system. Thus, many questions regarding the impact that immigration enforcement has on children remain

unanswered, including:

- the number of children affected by immigration enforcement,
- the impact of immigration enforcement on children's well-being, and
- the extent to which children impacted by immigration enforcement are served by formal systems such as the child welfare system or other public or private human services agencies.

## Number of Affected Children

Although specific data remain elusive, it is clear that children are being impacted by immigration enforcement efforts. In 2009, the U.S. Department of Homeland Security estimated that between 1998 and 2007, more than 108,000 immigrant parents of U.S. citizen children were removed from the United States.<sup>6</sup> Another study exploring the aftermath of worksite enforcement operations in the mid-2000s estimated that for every two adults arrested in these operations, one child was affected.<sup>7</sup>

## Impact on Children's Well-being

In response to the growing awareness of children affected by these operations, ICE developed humanitarian policies for enforcement activities involving more than 25 apprehensions.<sup>8</sup> These guidelines included screening and expedited release of pregnant women, nursing mothers, and parents who are the sole caretakers of minor children, and coordination with relevant federal and local social service agencies to determine the humanitarian needs of arrestees. When conducted properly during larger enforcement operations, these humanitarian guidelines have generally proven effective in minimizing the duration of parent-child separations or preventing separation altogether.<sup>9</sup> However, these guidelines do not apply to enforcement activities targeting individuals or small groups, which are typically the types of arrests associated with local law enforcement's partnerships with ICE. Thus, parents arrested under these programs are left vulnerable to separation from their children. The possibility of a child being present during these smaller enforcement operations is also much higher, creating the risk for increased emotional trauma.

*To date, it has been difficult to quantify the impact of immigration enforcement on children in immigrant families, as data on these children are not collected in a systematic way within any local or federal system.*

While few studies have examined the effects of family separation on children impacted by immigration enforcement, a large body of research has documented the adverse effects of separation that occurs when children are removed from their parents and placed into the foster care system. These include the psychological and neurobiological effects associated with disrupted attachment, increased mental health problems, symptoms of posttraumatic stress disorder, developmental delays, and poor academic performance.<sup>10</sup>

Research examining the impact of immigration enforcement suggests that, much like the trauma associated with foster care placement, children separated from their parents experience not only significant emotional trauma, but also threats to their safety and economic well-being. For example, in a study following children affected by worksite enforcement operations in three communities, housing insecurity and food shortages were common hardships experienced by children due to the loss of one or more parents' incomes.<sup>11</sup> Adverse

behavior changes such as more frequent crying and increased fear and anxiety were also noted in two-thirds of children in the six months following a parental arrest, and these changes were most significant in children who witnessed a parental arrest in the home. Nearly one-quarter of families included in the study had to make the difficult decision whether children, many of whom were U.S. citizens, would accompany a deported parent or remain behind in the United States.<sup>12</sup> Another study following a worksite raid in Postville, Iowa, documented increased behavioral problems in schools and increased need for mental health services.<sup>13</sup> In another example, a study in Georgia found that 71 percent of children of a deported parent remained in the United States, with many of those children suffering harmful consequences including negative educational and mental health outcomes.<sup>14</sup>

In addition to children who experience family separation following parental detention, there is a growing population of children who are themselves detained by ICE officials. According to the U.S. Department of Health and Human Services, 8,327 unaccompanied minors were taken into the care of Office of Refugee Resettlement from October 2011 to May 2012, more than double the 4,016 unaccompanied children detained during the same period in the previous year.<sup>15</sup> Although many issues facing unaccompanied children are different, there is a growing body of research that has documented the serious mental health needs of this population of separated children.<sup>16</sup>

## **Involvement with Systems and Service Agencies**

Despite the growing awareness of children affected by immigration enforcement and the impact to their well-being that may result, statistics made available from ICE in late 2012 showed that between July 1, 2010, and September 30, 2012, ICE removed 204,816 parents of U.S. citizen children from the United States.<sup>17</sup> While these figures were concerning, equally concerning was that no data were provided on the whereabouts of the children from these families or the consequences they faced as a result of separation from their parents. While anecdotal data suggest that many children whose parents are detained or deported are likely cared for by relatives or family friends, it is likely that some of these children enter the formal foster care system because there is no one immediately available to care for them. A recent study estimated that as many as 5,100 children in foster care have parents who have been detained or deported.<sup>18</sup> Although this study could not determine whether these children entered foster care as a direct result of their parents' detention or deportation, anecdotal information suggests that this is indeed a growing problem.

Ultimately, although evidence is limited, it is clear that children who experience family separation following immigration enforcement, whether they become involved in the child welfare system or not, have multiple and complex needs that must to be addressed to facilitate positive outcomes. Yet, very little is known about the specific impact of immigration enforcement on children's well-being and the responses that are necessary to address their needs.

Available evidence and anecdotal information indicate that there are multiple barriers to ensuring positive outcomes for this vulnerable population. Although children's well-being has always been an issue addressed by child welfare systems, a recent information memorandum from the Children's Bureau has re-emphasized the importance of addressing the well-being of children receiving child welfare services. Given this emphasis, it is imperative that the unique well-being needs of children affected by immigration enforcement are understood so that efforts to address those needs are undertaken. It cannot be assumed that the well-being needs of this population are equivalent to the majority of children who enter the child welfare system due to child maltreatment. Thus, in order to address the well-being needs of children affected by immigration

enforcement, whether those children enter the child welfare system or not, it is necessary for research to examine the extent to which immigration enforcement affects children in immigrant families and the unique concerns to their well-being that result.

## RECOMMENDATION

Specifically, in order to improve the understanding of and response to children affected by immigration enforcement, research is needed to determine:

- the extent to which children have been separated from one or both parents by immigration enforcement;
- the living situations of children impacted by enforcement;
- the unique needs of children and families impacted by immigration enforcement and how those needs differ from those of other children and families;
- the effects of immigration enforcement and family separation on children’s health, mental health, education, and material needs (e.g., income, housing, living conditions);
- the extent to which children impacted by immigration enforcement have contact with child welfare and other human service systems;
- the adequacy of efforts made by those systems to either reunite children with their parents or ensure permanency for those children who remain in the United States; and
- the extent to which U.S. citizen children depart with their deported parents, and the impact of this departure on child outcomes and later re-entry.

Collecting data on this population is difficult given the lack of data collected by formal systems and the challenges to identifying this population. Nonetheless, understanding the experiences and needs of this vulnerable group of children is essential to ensuring that appropriate responses are developed to address their needs. Research on these issues may best be facilitated through partnerships between researchers and the service systems that come into contact with this population. This would assist programs in identifying children’s needs and developing appropriate responses. Collaboration with immigrant communities may also facilitate connections that can lead to both research and to the development of prevention programs and other supportive services. Researchers should further explore these collaborations across disciplines and transnationally in order to develop a body of knowledge that can be used to facilitate positive outcomes for this population of vulnerable children.

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## Notes

- <sup>1</sup> U.S. Department of Homeland Security, Office of Immigration Statistics. (2010). *Immigration enforcement actions: 2009*. Washington, D.C.: Author.
- <sup>2</sup> U.S. Department of Homeland Security. (2012). *Fact sheet: Delegation of immigration authority section 287(g). Immigration and Nationality Act*. Retrieved from <http://www.ice.gov/news/library/factsheets/287g.htm>.
- <sup>3</sup> U.S. Immigration and Customs Enforcement. *Secure Communities: Monthly statistics through April 30, 2012*. Retrieved from [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2012-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf).
- <sup>4</sup> *Ibid.* 3
- <sup>5</sup> U.S. Department of Homeland Security. *Secure Communities: Activated jurisdictions*. Retrieved from <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.
- <sup>6</sup> U.S. Department of Homeland Security, Office of Inspector General (January, 2009). *Removals involving illegal alien parents of United States citizen children* (OIG-09-15). Washington, D.C.: Author. Retrieved [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_09-15\\_Jan09.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_09-15_Jan09.pdf).
- <sup>7</sup> Capps, R., & Castaneda, R. (2007). *Paying the price: The impact of immigration raids on America's children*. Washington, D.C.: Urban Institute for the National Council of La Raza.
- <sup>8</sup> ICE Release (November 2007). *Guidelines for identifying humanitarian needs among administrative arrestees*.
- <sup>9</sup> Chaudry, A., Capps, R., Pedroza, J.M., Castaneda, R.M., Santos, R., & Scott, M. (2010). *Facing our future: Children in the aftermath of immigration enforcement*. Washington, D.C.: The Urban Institute.
- <sup>10</sup> For a review, see Bruskas, D. (2008). Children in foster care: A vulnerable population at risk. *Journal of Child and Adolescent Psychiatric Nursing*, 21(2), 70-77.
- <sup>11</sup> Capps, R., & Castaneda, R. (2007). *Paying the price: The impact of immigration raids on America's children*. Washington, D.C.: Urban Institute for the National Council of La Raza.
- <sup>12</sup> *Ibid.* 11
- <sup>13</sup> Juby, C., & Kaplan, L. (2011). Postville: The effects of an immigration raid. *Families in Society*, 92, 147-153.
- <sup>14</sup> Shore, E., (2010). *Immigration enforcement and its impact on Latino children in the state of Georgia*. Atlanta, GA: Sapleo Foundation.
- <sup>15</sup> "Kids cross border alone, fleeing drugs and gangs," MSNBC, July 5, 2012.
- <sup>16</sup> For a review, see Huemer et al. (2009). Mental health issues in unaccompanied refugee minors. *Child and Adolescent Psychiatry and Mental Health*, 3:13.
- <sup>17</sup> U.S. Immigration and Customs Enforcement. *Deportation of Parents of U.C. Citizen Children July 1, 2010- September 30, 2013*. Accessed by Colorlines.com on December 12, 2012. [http://colorlines.com/archives/2012/12/deportations\\_of\\_parents\\_of\\_us-born\\_citizens\\_122012.html](http://colorlines.com/archives/2012/12/deportations_of_parents_of_us-born_citizens_122012.html).
- <sup>18</sup> Wessler, S.F. (2013). The treacherous triangle: Criminal justice, immigration enforcement, and child welfare. In Phillips, S.D., Cervantes, W., Lincroft, Y., Dettlaff, A.J., & Bruce, L. (Eds.). *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* (pp. ). Washington, D.C.: Jointly published by The Sentencing Project and First Focus.