



DISAPPEARING PARENTS:
A Report on Immigration Enforcement and the Child Welfare System



SOUTHWEST INSTITUTE FOR RESEARCH ON WOMEN, COLLEGE OF SOCIAL AND BEHAVIORAL SCIENCES
BACON IMMIGRATION LAW AND POLICY PROGRAM, JAMES E. ROGERS COLLEGE OF LAW

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The drawing on the cover was drawn by a detained immigrant parent with children in state custody. She has subsequently been deported and separated from her four children who remain in the foster care system. This report is dedicated to her.

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The lead author and contact for questions about this report is Nina Rabin, (520) 621-9206, nina.rabin@law.arizona.edu.

Executive Summary

Quiet, slow motion tragedies unfold every day in immigration detention centers throughout the country, as parents caught up in immigration enforcement are separated from their young children and disappear into the detention system. If no relative is identified who can take the children at the time of an immigrant parent's apprehension, the children may be placed in state custody and find themselves in foster homes, abruptly unable to communicate with their parents or even know where their parents are. If parents choose to accept their deportation, they risk being forever separated from their children, since their children will likely be unable to accompany them so long as they remain in state custody. If parents choose instead to fight their deportation, they often remain detained for months or even years, greatly complicating efforts to reunify as a family even if they are eventually successful in their case against deportation.

The story of Laura (a pseudonym), a mother recently detained in an immigration detention center in Arizona illustrates the problem:

Laura is a single mother of three children, ages 16, 11, and 5 years old, the youngest of whom is a U.S. citizen. Laura spent over ten years in a severely violent relationship with her husband, who was eventually deported last year. As the family worked towards recovery from this trauma, Laura's teenage son threw a rowdy party without her permission. The police were called, and when they arrived on the scene, they arrested Laura for serving alcohol to minors. They contacted CPS and her children were taken into state custody.

Laura was taken into ICE custody, where she had no contact with her children, her juvenile court attorney, or the CPS case worker for over two months. Her repeated requests to ICE for release were denied and she could not afford to pay the \$4,000 bond ordered by the Immigration Judge to secure her release. ICE finally released her after three months, when another immigration agency, Citizenship and Immigration Services, found her eligible for a visa based on her experience of severe domestic violence. During this time, her children were moved three times within the foster care system.

Laura now must make immediate progress on her CPS case plan for family reunification, as the clock is ticking before the state could move to terminate her parental rights based on her children's lengthy stays in out-of-home placements. She waits anxiously for a final determination on her application for a visa, since without it, her prospects of complying with the reunification case plan are dim.

This report provides data obtained from surveys and interviews with over 50 personnel in the child welfare system that reveal that Laura's story is far from unique or idiosyncratic. On the contrary, the child welfare system encounters families caught up in immigration

enforcement with some frequency. Yet the data also reveal a striking absence of systemic mechanisms for addressing the challenges posed by these cases. With no policies or practices in place in either the immigration or the child welfare system to address the unique situation of immigrant parents in detention or deportation proceedings, stories like Laura's are unfolding with alarming frequency.

The key findings of this research are listed below and discussed in more depth in the body of the report.

Key Findings

FREQUENCY OF THE PROBLEM: Across the board, attorneys, judges, and case workers working in the child welfare system all had experience with cases involving parents in detention or deportation proceedings. While such cases do not dominate their caseloads, they arose frequently enough so that all the personnel interviewed were aware of the challenges posed by such cases. *Yet no formal policies or mechanisms exist to address these cases.*

PROBLEMS CREATED BY IMMIGRATION ENFORCEMENT

- **Disappearing Parents:** child welfare personnel all used strikingly similar language to describe their observation that parents “disappear” into the immigration enforcement system and are exceedingly difficult to track down once they are apprehended by ICE.
- **Better Off in Jail:** parents struggle in detention facilities to participate in the “case plan” for reunification with their children. Many personnel in the child welfare system noted that, because immigration detention facilities lack the programming or services available in some jails or prisons, these detained parents are actually worse off than incarcerated parents.
- **The Climate of Fear:** the pervasive fear under which undocumented immigrants live has specific effects on families involved in the child welfare system. Parents are reluctant to provide information for kinship placements, so their children are more likely to wind up in the foster care system instead of with family members. In some cases, parents and children abscond from the child welfare system altogether due to fear.
- **Prolonged Detention and ICE's Failure to Exercise Prosecutorial Discretion:** if an immigrant parent chooses to fight her deportation, she will likely face many months and potentially years in detention. Although in many cases ICE has the discretion to decide whether or not to initiate deportation proceedings and/or detain immigrants, it often fails to exercise its discretion in favor of immigrants, even those with young U.S. citizen children in state custody.

- **The Criminalization of Immigrants:** the current immigration enforcement regime criminalizes immigrants, even those who are not criminal offenders. One impact of the criminalization of immigrants is that it encourages personnel in the child welfare system to “write off” parents in detention and/or deportation proceedings and assume that they will be unable to regain custody of their children.

PROBLEMS CREATED BY THE CHILD WELFARE SYSTEM

- **Ad Hoc Approach to Immigration Issues:** Not a single one of the participants in the interviews and focus groups mentioned a policy or written guidance regarding work with families with undocumented family members. Instead, participants repeatedly described a process in which outcomes are highly dependent on the personnel involved, most significantly the CPS case worker and, to a lesser extent, attorneys and judges.
- **Timelines for Dependency/Permanency:** the state has detailed statutory timelines that must be met once a child is in state custody. These timelines are difficult to reconcile with the timeline of immigration cases, which tend to be long and unpredictable.
- **Under-Utilization of Consular Offices:** the consulate can play a critical role when parents are detained and/or deported and their children are in state custody. In particular, the consulate can assist in identifying, evaluating, and communicating with family placements in the parent’s home country. Yet they are only incorporated into a small number of such cases.

Summary of Recommendations

The findings summarized above, and discussed in more detail in the body of this report, demonstrate that any attempt to address these complex tragedies will require reforms of both the federal immigration enforcement system and the state child welfare system. A list of suggested reforms follows. A more expansive discussion of these recommendations is in the full report.

FOR THE DEPARTMENT OF HOMELAND SECURITY

- Establish a mechanism for early identification of cases in which immigrant parents in detention and/or deportation proceedings have children in the child welfare system.
- Increase the use of parole, prosecutorial discretion, and alternatives to detention for these cases.

- Improve detention facilities' compliance with telephonic appearances and establish procedures for parents to appear in person in child welfare hearings.
- Increase the availability of services in detention facilities, such as parenting classes, substance abuse rehabilitation programs, and access to psychiatric evaluations.
- Establish a key liaison position in each detention facility that can be a point of contact for all child welfare personnel.
- Train deportation officers and detention facility personnel to be familiar with the challenges facing detained parents with children in state custody.
- Reform immigration enforcement measures that rely on local law enforcement agencies and create a climate of fear for immigrant families that chills their ability to interact with the child welfare system.

FOR THE CHILD WELFARE SYSTEM

- Establish mandatory and regular trainings for judges, attorneys, and CPS case workers regarding immigration detention and deportation proceedings.
- Create a key liaison position in each CPS region for case workers to contact when immigration issues arise.
- Increase utilization of the consulate in cases involving foreign nationals.
- Establish statewide policies or practices to improve the provision of reunification services to immigrants in detention facilities.

FOR THE DEPARTMENT OF JUSTICE

- Establish a portion of the Legal Orientation Program devoted to educating immigrant detainees about defending their parental rights.

FOR CONGRESS

- Provide funding for attorneys specializing in representation of immigrant parents with U.S. citizen children, in part by waiving the restriction on Legal Services Corporation ("LSC") funds for these purposes.
- Increase funding for the Legal Orientation Program, which informs immigrant detainees of their legal rights, to allow for education on the dependency process for immigrant parents with children in state custody.

- End mandatory detention. Establish judicial discretion to consider urgent circumstances including children in state custody in determining whether detention is warranted.
- Increase judicial discretion in cases for relief from deportation involving parents with children in state custody.

Disappearing Parents: A Report on Immigration Enforcement and the Child Welfare System

Introduction

Over the past few years, staff members of the Southwest Institute for Research on Women (SIROW) who provide social and legal services to women in immigration detention facilities have repeatedly come into contact with mothers experiencing extreme stress and anxiety about the custody of their children while they are detained. In several of these cases, the children have been in state custody and the mothers have encountered significant frustration attempting to participate in the juvenile court process while they are detained.

In an effort to understand how often these cases arise and analyze how equipped the immigration and child welfare systems are to deal with these circumstances, SIROW and the Bacon Immigration Law and Policy Program of the James E. Rogers College of Law developed a research project to take an in-depth look at how often such cases arise in a single county in Southern Arizona. The results of this study are summarized in this report.

Methodology

In the summer of 2010, SIROW conducted surveys and interviews with personnel in the Pima County Juvenile Court system. As a county on which to focus, Pima County has several distinguishing features. First, it is a border county, with a 120 mile long border along the southern and central region of Arizona. Second, it contains Tucson, the second largest city in the state. Pima County has a population of roughly one million. In 2009, the Juvenile Court reported that it had 1,744 open dependency cases and 3,104 dependent children. Finally, Pima County is a “model court.” The Model Courts consist of 25 juvenile and family courts nationwide that work with the National Council of Juvenile and Family Court Judges and use a best-practices bench book as a guide to systems reform.

Through the Juvenile Court’s training center, which offers training opportunities to judges, attorneys, case workers, and other personnel in the county’s child welfare system, SIROW offered a training on immigration issues in June 2010. Attendees were invited to fill out a survey at the training or complete it online. Those interested could volunteer to participate in a follow up interview in which they could discuss the issues in more detail.

SIROW received a total of 52 survey responses from a mix of attorneys, CPS case workers and other personnel, social service providers that work in partnerships with CPS, and juvenile court judges.¹ The researchers then conducted a total of 20 interviews, some individually and some in focus groups.² While the number of participants is modest, they clearly confirm that the story of Laura in the Executive Summary is not an outlier, but rather taps into issues faced by many immigrant families caught in the intersecting systems of immigration and child welfare.

How Often Does Immigration Enforcement Intersect with the Child Welfare System?

One of the questions on the survey asked how often the social service provider, attorney, or judge encounters families in which at least one member is undocumented. More than half of the respondents reported that it occurs in more than ten percent of their cases.³ When asked whether they had encountered cases in which one or more family members were in immigration detention facilities, six of the seven judges, 19 of the 27 social service providers, and 13 of the 15 attorneys had encountered it at least one to five times in the past five years, and many reported its occurrence significantly more than five times in the past five years.⁴ Finally, in response to a question about how often they worked with families in which one member was deported, all of the judges reported that they had encountered deportation at least one to five times in last five years, and 22 out of 27 social service providers and 13 out of 15 attorneys said the same.⁵

Perhaps unsurprisingly, these figures rise steeply when only social service providers who speak Spanish are considered.⁶ Of this sub-population, 11 of the 15 Spanish speakers

¹ The 52 surveys break down as follows: 15 attorneys, 30 social service providers (including CPS personnel, nonprofit organizations that work with families in CPS, and staff of the Mexican consulate), and seven judges.

² The 20 interviewees consisted of six attorneys, eight social service providers, and six judges.

³ Of the 30 social service providers, 14 reported undocumented family members in more than ten percent of their cases, and of these, four reported it came up in more than 50 percent of their cases. Eight reported it occurred in less than ten percent of their cases, and eight did not know. Of the 15 attorneys surveyed, nine reported encountering an undocumented family member in more than ten percent of their cases; six reported that it occurred in less than ten percent of their cases. Of the seven judges, two reported encountering an undocumented family member in more than ten percent of the families in their courtroom; two reported that it occurred in less than ten percent of their cases, and three reported that they did not know.

⁴ Of the social service providers, five reported having cases with a family member in immigration detention more than ten times in the last five years. Of the attorneys, nine reported 1-5 times in last five years; four reported 5-10 times; and only two reported that it had never occurred. One of the judges reported that it occurred more than ten times in the last five years; the other three reported that it occurred 1-5 times.

⁵ Six of the social service providers, two of the attorneys, and three of the judges reported that deportation occurred more than ten times in the last five years. In addition, 15 of the 22 social service providers who had cases with a deportation had never had a case in which the child or children were reunified with the deported parent. Of the attorneys with such cases, ten of the 13 had never seen the children reunified.

⁶ Fifteen of the thirty social service providers surveyed spoke Spanish fluently. Only three of the 15 attorneys surveyed spoke Spanish fluently. All three reported that more than ten percent of their clients were in families with at least one undocumented family member, that detention had come up 1-5 times in the last five years, and that deportation had come up at least 1-5 times in the last five years.

reported that at least ten percent of the families had at least one undocumented family member, and four estimated that this constituted more than fifty percent of their families. One third (five out of 15) of the Spanish-speaking social service providers had a family member in a detention facility more than ten times in the past five years, and the same number had a case in which a family was deported occur more than ten times in the past five years.

In interviews, child welfare personnel confirmed the indications from the survey of the prevalence of immigration issues. The following comments are illustrative:⁷

- One CPS supervisor who had worked for years beforehand as an investigator in South Tucson confirmed that the proportion of families facing these issues varies greatly based on language and geography. In her previous position, in South Tucson where the city's Latino population has historically lived in high numbers, she estimated that ninety percent of the families with whom she worked had at least one family member without legal status. In contrast, in her current zip code, in central Tucson, she estimated that only ten to fifteen percent of the families have undocumented family members.⁸
- A staff member at the Mexican consulate estimated that their Tucson office receives five or six new cases every month in which children with at least one Mexican national parent are in the care of CPS and the Mexican consulate gets involved. He felt strongly that this was only a small fraction of the cases in which undocumented immigrants were involved in the child welfare system. He commented, "We are here working with one reality but there is a whole other reality that we don't see."⁹
- One Spanish-speaking social services provider with a nonprofit organization that contracts with CPS to facilitate parenting classes and support groups estimated that 90 percent of the families with whom she works have at least one member without legal status.¹⁰
- A judge who has been on the bench for over a decade reported a notable increase in the cases in which immigration issues arise, to the point where now more than 25 percent of his cases involve immigration issues in one way or another. When asked how he knows, he explained that he does not explicitly ask about immigration status but it always comes up in the CPS report, because it impacts the undocumented parents' access to services and/or employment prospects.¹¹

⁷ In order to maintain the anonymity of interviewees, the citations refer to the source of each comment by numbers assigned to each subject, preceded by either "A" for attorneys, "J" for judges, or "S" for CPS workers or other service providers.

⁸ S3.

⁹ S4.

¹⁰ S1.

¹¹ J2.

Taken as a whole, the responses by participants in the survey and interviews to questions about the numbers of such cases in the system suggest that the presence of immigration status in child welfare proceedings arises frequently enough for it to be an issue of which they are aware, but not so frequently that they are accustomed to dealing with such cases in a prescribed, uniform manner. The consequences of this lack of uniformity are explored more fully in the remainder of this report.

The Systemic Failures

Immigrant parents are being separated from their children, at times permanently, due to the complex and uncoordinated interactions between the immigration enforcement system and the child welfare system. The next two parts address the failures of each of these systems.

FAILURES OF IMMIGRATION ENFORCEMENT

Disappearing Parents

Across the board, judges, social workers, and attorneys all used strikingly similar language to describe the phenomenon of parents “disappearing” after they are picked up by ICE. One CPS investigator described it as follows:

Parents get taken to Pima County Jail, there we have them on a website, we know they are on an [immigration] hold, and then it seems like from one minute to the next they disappear. What I mean by disappear is that they are no longer at the Pima County Jail and we don't know where they went . . . As you know, INS¹² facilities are not public, are not published, there's not a web page that we can go to, to see if parents are there . . . it's just a big mess . . .¹³

A judge described cases where parents are in detention facilities as “a big mystery to everyone involved in the case.” He went on,

Where the parent is, what their status is, what is going on with them, [it's a] complete mystery, let alone how to reach them and how to get them to participate in the case. It's just a mystery. I'll get reports that say ‘we believe dad is being held, we don't know where, we don't know what is going on.’”¹⁴

Another judge said immigration cases are especially hard to track. She reported that “the lawyers can't find their clients.”¹⁵ Another judge commented that when an

¹² “INS” refers to the Immigration and Naturalization Service, the federal agency that handled immigration enforcement until 2001, when Congress created a new agency, Immigration and Customs Enforcement (“ICE”), as part of the newly created Department of Homeland Security (“DHS”).

¹³ S3.

¹⁴ J2.

¹⁵ J1.

attorney or case worker cannot locate a parent, often “there is a sense of willfulness, that they have abandoned the child or the case plan, and it may be that [in fact] their absence is involuntary and they have been detained or deported.”¹⁶

All of the attorneys interviewed commented on the difficulty of communicating with parents once detention or deportation has occurred. One attorney reported that it was a challenge to set up a phone call with his detained client. He had to talk with multiple people and, “it took a lot of finagling to set something up.”¹⁷ Another attorney stated that in her opinion it was significantly harder to communicate with clients in detention than in jail.¹⁸ She has had to “call and call” to find someone once they are picked up by ICE. Another attorney noted that in her observation, court-appointed attorneys for parents are unlikely to go to the trouble of locating detained clients because they lack the familiarity with the system that they have with the prison system.¹⁹ Another attorney reported that in her experience CPS workers don’t even bother to try to call parents in detention.²⁰

One recurring theme mentioned by several attorneys was the “disappearing dad.” They all described that noncitizen fathers who are in deportation proceedings tend to disappear. It is difficult to know how much of this is due to their failure to be proactive and how much is due to their circumstances, which make receiving phone calls and providing contact information exceedingly difficult. Many players in the child welfare system are quick to write off these fathers and cease efforts to track them down.²¹

One judge described a specific case in which a dad was well on his way to reunification through his active efforts to work the case plan. The judge described, “This was a dad on the verge of getting his children back and he’s just gone. None of us know where he is. We know he was picked up and was being detained pending deportation, but we don’t know where. His lawyer can’t get any information, can’t get a hold of him. He’s gone. For me, that’s the norm – I hope that’s an anomaly.”²²

Better Off in Jail

Several attorneys contrasted the situation of immigrant parents in detention with parents in jail, some of whom have many more services available to them, such as substance abuse counseling, parenting courses, and psychological evaluations. In contrast, “If that parent is in detention. . . they are not getting any services. It’s not that CPS is holding out, it’s not a legal issue but as a practical matter . . . in those places there are just not

¹⁶ J5.

¹⁷ A2.

¹⁸ A5.

¹⁹ A3.

²⁰ A4.

²¹ A2 (example of judge who did not even inquire into notice to parents who were in jail in Mexico in a private dependency proceeding), A3, A4, A5.

²² J2.

services.”²³ Another attorney commented that programs available in some jails like AA and NA can make a difference in parents’ ability to “work” their case plan, and as far as she knows, there aren’t any such programs in immigration detention.²⁴

One attorney offered a similar account of parents’ ability to participate in hearings from detention: “When they’re in local jail or state prison, it’s a lot easier. When they’re in a state run facility, there are some protocols that have been worked out by the court and the local jails and detention facilities in this county to have people transported, and it’s incredibly easy, just get the judge to sign a transport order. If you do it two days in advance, your client will be there.”²⁵ In contrast, in the detention facility, it is a struggle even to arrange for telephonic participation.

One CPS worker provided an example of a Cuban family with parents arrested for selling crack to an undercover officer in the presence of their daughters. They were arrested, taken to Pima County Jail, and then “disappeared.”²⁶ Eventually, through an adult relative, the CPS worker was able to learn that the parents were in immigration detention in Florence. She continued,

So the dependency proceedings went on, and we knew that they were there, and the court knew that they were there, but they were not able to be a part of that process. And so when they wound up being released five or six months later . . . they knew that the children were in our custody and they came to be a part of the process, but by then they had lost five or six months. And in the dependency action, there are time frames . . . When we have parents that are in prison, they can start working . . . towards their case plan, and when they get released, they’re not so far behind. But in INS facilities, I don’t know if they offer any services. There’s no way for us to figure out what they offer, where they’re at.²⁷

One CPS worker who has worked intensively with immigrant families for seven years stated that she has never encountered a case in which a parent has participated in reunification efforts from detention. She stated, “The most we’ve gotten is confirmation that parents are there.” She contrasted that with the situation for parents in jail: “If a parent is in Pima County Jail . . . we have relations, liaisons with the jail who make sure they participate telephonically. This doesn’t happen in detention. In dependency, even assigned attorneys have a hard time ensuring they participate. It’s just a difficult situation.”²⁸

²³ A1.

²⁴ A4.

²⁵ A6.

²⁶ S3.

²⁷ S3.

²⁸ S3.

The judges expressed substantial frustration with their efforts to coordinate participation with federal detention facilities. One judge described the contrast between parents in state or local jails versus in immigration detention: “It’s very difficult. It’s nowhere near that difficult with the state DOC [Department of Corrections]. They’re great about making parents available; or the jail . . . [parents are] always available.” She continued, “But in federal facilities we have a terrible time because we have no authority.”²⁹

Another judge said that in all the over twenty years he’s been on the bench, he has never had a parent successfully participate in a hearing from immigration detention.³⁰ He also contrasted the services available in jails and prisons as compared to detention:

I don’t have any idea what if anything is available to folks in a detention facility while they are awaiting deportation – but my guess is, very little. There’s very little available in the prison, but there are some things available . . . I mean, a person in prison can go to AA, NA groups, for example; we can send someone to the prison to do a psych eval, they could establish paternity, they can get their GED, they can do some things in a prison that would better prepare them to get out and complete the CPS case plan. I don’t think the folks in federal detention facilities awaiting deportation have those benefits.³¹

It is important to note that many of the participants’ comments regarding jails may have been shaped by their work in Pima County in particular. The jails in Maricopa County are infamous for their poor conditions for citizens and noncitizens alike.³² However, for immigrants living in Pima County and other counties where constitutional standards are met with regard to jail conditions, from the perspective of the child welfare system, they are often better off in jail than in immigration detention.

The Climate of Fear

These are unquestionably fearful times for undocumented immigrants in this country. Numerous scholars and advocates have described the way the shift in immigration enforcement policies over the past decade from a focus on the border to the interior has made the possibility of detection and deportation a constant threat in undocumented

²⁹ J1. Another judge echoed the same account of the differences between the state and federal systems. “. . . Any time we are dealing with the federal system it is more difficult. We don’t have authority over them. We can’t order writs for example for parents to appear without going through the U.S. attorney. And so it becomes a lot more cumbersome.” Without having the threat of a writ, the federal government has little motivation to comply. As this judge put it, “if they’re nice they’ll submit, if they’re not, they won’t.” J5.

³⁰ J2.

³¹ J2.

³² See, e.g., JJ Hensley, *Judge: County Failed to Improve Jails’ Medical, Mental-Health Conditions*, THE ARIZONA REPUBLIC, April 8, 2010 (reporting that a federal court judge found Maricopa County officials failed to improve conditions in county jails, 16 months after the court had found the jails failed to meet constitutional standards in key areas, including food quality, access to recreation, and quality and availability of medical and mental-health care).

immigrants' daily lives.³³ The surveys and interviews suggest that this pervasive climate of fear has distinctive and particularly troubling implications for families involved in the child welfare system. The climate is the creation of both federal and state immigration enforcement measures. On the federal level, Immigration and Customs Enforcement ("ICE") has undertaken a number of programs, including the National Fugitive Operations Program, the 287(g) agreements, and Secure Communities, all of which pursue an explicit goal of deporting aliens with serious criminal histories by ramping up enforcement measures in a variety of sites including workplaces, homes, and local jails and prisons.³⁴ In practical effect, the majority of immigrants apprehended and deported under these programs are not serious criminal offenders and in many cases have no criminal records whatsoever; they are undocumented immigrants deported solely for immigration violations.³⁵

At the state level, Arizona recently attracted national and international attention with its passage of the state law, SB 1070, which among its provisions required local law enforcement officials to inquire into immigration status.³⁶ The bill was broadly decried for the terrorizing effect it would have on the immigrant community in Arizona. While many aspects of the law were novel, this terrorizing effect was just the culmination of a wave of acts passed by the state legislature in recent years linking immigration reporting requirements with the criminal justice system and the receipt of public benefits.³⁷

Cumulatively, these acts and programs have created a widespread sense of fear in the immigrant community of interactions with any governmental authorities. The next two sections describe the distinctive implications of this climate of fear for immigrant families involved with the child welfare system.

³³ See, e.g., Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010); DANIEL KANSTROOM, *DEPORTATION NATION* (2010); MARGOT MENDELSON ET AL., *MIGRATION POLICY INSTITUTE, COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM* (2009), available at http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

³⁴ *Id.*

³⁵ See *MIGRATION POLICY INSTITUTE, DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT* (January 2011) (finding that nationally the program is not focused primarily or even mostly on serious criminal offenders), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>; NATIONAL DAY LABORER ORGANIZING NETWORK ET AL., *BRIEFING GUIDE TO "SECURE COMMUNITIES:" NEW STATISTICS AND INFORMATION REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED* (analyzing data provided by ICE that document that 79 percent of the people deported due to Secure Communities from October 2008 through June 2010 were non-criminals or were picked up for low-level offenses, such as traffic offenses or petty juvenile mischief).

³⁶ For a thorough discussion of the statute, see G. Jack Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L. J. 47 (2010).

³⁷ Proposition 200, passed in 2004, requires identity documents in order to vote and receive certain government benefits. Proposition 300, passed in 2006, denies undocumented immigrants in-state tuition, adult education and child care funded at taxpayer expense. HB 2008, passed by the legislature in 2009, requires state and local government workers to report any undocumented immigrant requesting a public benefit.

Kinship placements in mixed status families: When a child is placed in state custody, Arizona state law requires that CPS give preference to placing the child with kin rather than foster care providers.³⁸ Yet parents in detention face several barriers to identifying kinship placements. If they are not in touch with their case worker or attorney, they may have no means of communicating about potential placements. Even if they have the opportunity to discuss placement options with CPS, many are unlikely to volunteer information about potential contacts to anyone, given their fearful experience with law enforcement and ICE. In particular, many parents do not want to jeopardize the wellbeing of any of these contacts, some of whom may lack immigration status themselves or have family members without legal status.

This is a serious issue for immigrant families, particularly because, as more than one judge emphasized, family networks play such a central role in Hispanic families.³⁹ One judge explained,

[W]e are disproportionately underrepresented with Hispanic kids [in the foster care system] here because . . . of extended families, people come in and help each other. Whereas, for other folks, this is a very transient town. People move here, they have no family, they have no family support. So for our Caucasian families, our refugee families, there is nobody [when] the bottom falls out . . . The reason the undocumented parent/kid thing is not a much huger issue than it is, is because there is support, there is family support.⁴⁰

Nearly all of the attorneys and case workers interviewed commented on the difficulty of identifying kinship placements for immigrant families because of the culture of fear created by the intermingling of local, state, and federal immigration enforcement.

One CPS worker commented,

It's becoming increasingly difficult as new legislative acts take effect because the families automatically associate us with . . . having the ability and the duty to enforce whatever immigration law debate is going on at that time. And so the biggest barrier up front is engaging the family to let them know . . . They avoid us. It's understandable because they're afraid. And so it takes a lot of efforts to give them some education as to our role . . . Yes, we are a government agency, but our role is not immigration enforcement. Our role is child safety.⁴¹

The direct correlation between state immigration legislation and families' willingness to identify potential kinship placements for CPS was brought into high relief by SB

³⁸ A.R.S. § 8-514 (the order of placement preference is: with a parent; grandparent; in kinship care with another member of the child's extended family, including a person who has a significant relationship with the child; in licensed foster care; in licensed therapeutic foster case; in a group home; or in a residential treatment facility).

³⁹ J1, J5.

⁴⁰ J1.

⁴¹ S3.

1070, which several participants believed has had a chilling effect on the identification of potential kinship placements.⁴² For example, a social service provider that contracts with CPS to provide parenting classes and other social services described her work with immigrant families to develop a “Plan B:” a plan for what they will do in the event that one parent is deported. She commented that recently, particularly after SB 1070, parents are finding this process increasingly difficult because many relatives don’t want to be part of “Plan B” anymore.⁴³

Opting out of the system altogether: In addition to the problems the climate of fear creates for establishing kinship placements, in some cases, child welfare personnel reported that it drove families out of the child welfare system altogether. One judge described a case with a mother and three children, all of whom were undocumented. The mother was in detention and the children were scheduled to come in for a dependency review, a hearing during which the juvenile court reviews the parent’s progress on the case plan. She described that the children recently refused to come to court. She went on,

I want all my kids to come to court; I like to meet all my kids and I encourage it, so I get kids to come to almost all the hearings. But [these kids] don’t want to come because they are afraid they’re going to get arrested in the courtroom. They’re old enough to read the paper and to talk to their friends . . . I told the lawyer to tell them . . . I have no obligation to have ICE here. You know, I can’t promise that it wouldn’t ever happen, but . . .⁴⁴

At the time of her interview, the children had not shown up to the hearing and she had to proceed in their absence.

An attorney reported that he has seen a “marked increase in fear and anxiety since SB 1070.” He went on, “I must have 15 to 20 clients who are undocumented who are just scared to death.” He did not think it directly prevents parents from participating in their case plan, “but it adds a level of anxiety to everything.”⁴⁵

Sometimes this level of stress and anxiety can reach such a level that parents abscond with their children, rather than continue to participate in the dependency proceedings.

One social services provider described a family in which both parents were undocumented and the children were U.S. citizens. The case was going well; the parents were receiving services and following through on the case plan. Yet abruptly one day during a supervised visit, the supervising family member left and the parents fled with two of the three children, leaving their 16 year old child behind. No one has heard from them since. The service provider explained, “They just got scared with everything that was going on.”⁴⁶

⁴² S3.

⁴³ S1, S2.

⁴⁴ J1.

⁴⁵ A5.

⁴⁶ S5.

Attorneys also reported cases in which parents absconded. One attorney described a case that began when parents living in Mexico brought their daughter to Tucson for urgent medical care on two occasions. On the second occasion, CPS was contacted because there appeared to be the possibility of abuse. CPS assumed custody of both children. The father's visa expired and he was forced to return to Mexico. He was unable to see his children for the next nine months. The mother was able to obtain a temporary visa and was complying with the case plan. According to this attorney, she was about three weeks away from regaining custody of the children when she had the children for a weekend visit and fled. He explained, "She ran for the border and [we] never heard from her again. I can't really say I blame them."⁴⁷

Another attorney described a case in which her client, a teenage child, absconded to be with her mother, who was deported.⁴⁸

Finally, a judge described a case in which the intensity of fear prevented reunification from occurring. In this case, a mother was deported and her infant child was left with her sister, who was undocumented. The father, also undocumented, lived in Texas. CPS arranged for a site visit of the father's home and approved it. Yet the transfer of the child never occurred because the judge could not find a satisfactory means of transporting the child from Tucson to Houston. The father wanted to take the child, but told the judge in court that he was too fearful of taking the bus to Tucson. The judge described the case, "It's really heartbreaking. It's a real dilemma. I wanted to make sure it wasn't a financial barrier and he said, 'No, I'm afraid that if I get on a bus I'll be stopped and I'll be detained.'"⁴⁹ At the time of the interview, the child was in foster care because the aunt was unable to keep the child long term.

Prolonged Detention and Prosecutorial Discretion

Several participants commented on the way a lengthy stay in detention can impact an immigrant parent's child welfare case. One attorney described a client who was a victim of domestic violence. She had no criminal convictions, but ICE held her in detention for three months. This gave her abusive spouse, a U.S. citizen, time to start litigation in divorce court in an attempt to gain custody of their children. He used her immigration status and the possibility of deportation as an argument for why the court should assign him custody.⁵⁰

⁴⁷ A6. This same attorney described another case he had in which the parents fled with two of their three children, leaving the oldest son behind. He said in this case he was "shocked" when this happened because they were eight months into the case plan and making good progress.

⁴⁸ A1.

⁴⁹ J5.

⁵⁰ A1.

It is not just the length of detention but also its uncertain nature that make it particularly problematic for the child welfare system. As one attorney put it, the problem with deportation and detention,

... from an attorney's perspective, at least mine, is that you never really know when it is going to end ... It just seems [it] can go on for a really long time; there aren't really any deadlines with which you can make expectations. At least with a parent who is incarcerated ... you know what your timelines are. It's hard to really gauge that when they're in immigration detention.⁵¹

One judge described a case where "the father was working the case plan, he was doing everything asked of him, the case was on track for reunification – and then, boom, he's gone." It turned out he had been picked up by immigration and was placed in detention. Eventually his lawyer was able to establish some communication with him and reported to the court, "well, he's going to have a hearing" [in immigration court]. The case was in limbo, and then three months later, the lawyer returned with the same information, "he's going to have a hearing." The judge described his frustration:

[T]here's no concrete information. We don't know, don't have a straight answer. So, [it's] pretty frustrating. And what's going to wind up happening is this father's rights are going to end up terminated and [the kids] are going to wind up with someone else. And that's with being really patient, giving a lot of time to get to the bottom of it.⁵²

Intertwined with the problem of prolonged detention is ICE's failure to exercise prosecutorial discretion. There are several points at which ICE can exercise discretion in the removal process. As summarized by the Government Accountability Office in 2007,

ICE officers exercise discretion when they decide whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure ...; and whether to detain an alien in custody. ... [O]nce an ICE officer has made a decision to pursue removal, ICE attorneys exercise discretion when they decide whether and how to settle or dismiss a removal proceeding or to appeal a decision rendered by an immigration judge.⁵³

There are particularly key moments at which ICE's failure to exercise prosecutorial discretion can have a major impact on a parent's child custody proceedings. First, there is the decision about whether to initiate deportation proceedings against parents who are not criminal offenders. Second, if deportation is initiated, there is the decision about

⁵¹ A4.

⁵² J2.

⁵³ GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING 2-3 (2007), available at <http://www.gao.gov/new.items/d0867.pdf> (hereafter "GAO Report on Alien Removal Decision Making").

whether or not to detain. Decisions to deport and detain parents who are not serious criminal offenders run counter to agency guidance that humanitarian considerations, including the fact that an immigrant is a primary caregiver of young children, should be taken into account in decisions regarding removal and detention.⁵⁴ Yet recent reports document that ICE routinely prosecutes immigrants with little to no criminal histories.⁵⁵

The forcefulness of ICE's prosecution of immigrants can be mystifying. One juvenile court judge mused about immigration enforcement:

To me, it seems very inconsistently applied. I don't understand why they would want to deport the 15 year old who is in court for a very minor offense, whose parents brought him here illegally, why they would want to deport him, and not want to deport a 17 year old kid who came across illegally without his parents who's committing felonies. I don't understand.⁵⁶

The Criminalization of Immigrants

Contrary to popular perception, living in the United States without authorization is not a crime in and of itself. The act of crossing the border without proper documentation is a crime,⁵⁷ as is re-entering the country without permission after a deportation order.⁵⁸ In fact, however, many undocumented immigrants enter the country legally but then overstay their visa or violate its terms.⁵⁹ Even of those who do enter illegally, very few are prosecuted for this crime, particularly once they are already living in the interior. The vast majority of undocumented immigrants are subject to civil removal proceedings rather than criminal prosecution.⁶⁰

Yet despite the fact that only a small fraction of immigrants apprehended by immigration enforcement are actually prosecuted for any crime, the current immigration enforcement

⁵⁴ See Memorandum from Assistant Secretary John Morton, Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (June 30, 2010), available at www.ice.gov/doclib/detention-reform/pdf/civil_enforcement?priorities.pdf (hereafter "Morton Memo"); Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, *Exercising Prosecutorial Discretion* (Nov. 17, 2000). See also Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

⁵⁵ See GAO Report on Alien Removal Decision Making, *supra* n. 53; TRANSACTIONAL RECORDS CLEARINGHOUSE REPORT, DETENTION OF CRIMINAL ALIENS: WHAT HAS CONGRESS BOUGHT? (2010), available at <http://trac.syr.edu/immigration/reports/224/> (hereafter "TRAC Report on Criminal Aliens") (analyzing government data that demonstrates that detainees without any criminal conviction doubled between 2005 and 2009, while the number of criminal detainees barely changed).

⁵⁶ J2.

⁵⁷ A first offense is subject to six months imprisonment (a misdemeanor) and any subsequent offense is punishable by up to two years incarceration (a felony). INA § 275(a), 8 U.S.C. § 1325(a).

⁵⁸ INA § 276, 8 U.S.C. § 1326.

⁵⁹ See PEW HISPANIC CENTER, *MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION* (2006) ("Nearly half of all the unauthorized migrants now living in the United States entered the country legally through a port of entry such as an airport or a border crossing point where they were subject to inspection by immigration officials.").

⁶⁰ MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERVICE REPORT TO CONGRESS CRIMINALIZING UNLAWFUL PRESENCE: SELECTED ISSUES (updated May 2006).

regime criminalizes all immigrants, even those who are not criminal offenders.⁶¹ This shapes public perceptions of immigrants in ways that have insidious effects far beyond the simple threat of actual immigration enforcement measures. This research suggests that one impact of the criminalization of immigrants is that it encourages personnel in the child welfare system to “write off” parents in detention and/or deportation proceedings and assume that they will be unable to regain custody of their children.

One question in the survey asked, “To the best of your knowledge, have all people in immigration detention facilities been convicted of a crime?” The results were skewed by the fact that the majority of participants took the survey directly after a training that covered the basics of immigration detention, in which one of the key points was that many people in immigration detention have not been convicted of a crime. Yet even after the presentation, 12 out of 30 case workers and other child welfare personnel and 5 out of 13 attorneys answered “yes” or “maybe” to the question.

In reality, a recent report estimated that 58% of immigrants in detention have not been convicted of any crime.⁶² In addition, even those who have been convicted of a crime, the majority are for nonviolent offenses with little to no incarceration imposed.⁶³ In most cases, these convictions would be unlikely to sever parental rights were it not for the fact that the parent is then transferred to ICE custody. The perception by CPS that the parent is a serious criminal as a result of her lengthy stay in detention creates a dynamic in which the dependency proceedings take on a momentum of their own once this initial impression about the parent is formed.

FAILURES OF THE CHILD WELFARE SYSTEM

On the whole, the surveys and interviews conducted portrayed a child welfare system difficult to reconcile with the problems described in the opening pages of this report. The attorneys, case workers, and judges who participated were sensitive to the unique concerns of immigrant parents and thoughtful in their perceptions regarding the challenges posed by the immigration enforcement system. Yet, despite the awareness and thoughtfulness of the survey and interview respondents, their responses also highlight striking systemic weaknesses of the state child welfare system. The following sections outline three key areas in which the child welfare system fails to protect the parental rights of immigrant parents like Laura.

⁶¹ See, e.g., ACLU IMMIGRANT RIGHTS PROJECT, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS, *available at* www.aclu.org/files/assets/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf.

⁶² DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INSTITUTE, IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6-7 (2009), *available at* www.migrationpolicy.org/pubs/2009.php; see also TRAC Report on Criminal Aliens, *supra* n. 55.

⁶³ See HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NONCITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES (2009), *available at* <http://www.hrw.org/node/82173> (hereafter “Forced Apart”).

Ad Hoc Approach to Immigration Issues

Not a single one of the participants in the interviews and focus groups mentioned a policy or written guidance regarding work with families with undocumented family members. Instead, participants repeatedly described a process in which outcomes are highly dependent on the personnel involved, most significantly the CPS case worker and, to a lesser extent, attorneys and judges.

CPS Case workers: CPS case workers play an especially crucial role in shaping the trajectory of a case, since they make the initial decisions about placements and reunification efforts that establish the probability of severance proceedings in the future. Many participants reported a wide variation in how individual CPS case workers handle cases in which immigration status is an issue. According to one attorney, some case workers go “above and beyond” to keep a parent facing deportation involved in a case, while others are very minimally involved.⁶⁴ One attorney described that, in her experience, when a parent is in detention, “CPS workers don’t even bother to call; they’ll maybe write a letter.”⁶⁵ Others described specific cases in which CPS workers worked hard to locate parents in Mexico.⁶⁶ One judge commented that the view that immigration status is a barrier or obstacle for family reunification is not system-wide, but is expressed by individual case workers or supervisors.⁶⁷

On the whole, however, the attorneys interviewed found CPS case workers reluctant to undertake reunification efforts when a parent has been deported or is facing deportation. Many commented on the tendency to write off parents who are facing deportation. This could be attributed to several factors. First, the high turnover of CPS workers makes it difficult for them adequately to understand how to work with the equivalent of CPS in Mexico, DIF (“Desarrollo Integral de la Familia”), to coordinate reunification services in Mexico.⁶⁸ Even if DIF is involved, CPS workers often do not trust the Mexican agency to provide services as they would be provided in this country.⁶⁹ CPS workers’ reluctance could also be attributed to their high caseload and lack of resources.⁷⁰

Language and culture barriers also play a key role in shaping CPS workers’ relationships with immigrant families. Several participants lamented the dearth of Spanish-speakers in the child welfare system. One attorney said it was a “giant problem” that Mexican parents “simply cannot communicate with their case worker because their case worker

⁶⁴ A1.

⁶⁵ A4.

⁶⁶ A6, S4.

⁶⁷ J5.

⁶⁸ A5.

⁶⁹ A1, A5.

⁷⁰ A1 (“One of the issues with the child welfare system is that it’s just overworked. There’s such a high volume of cases that it’s very hard to find opportunities for the counterparts of these respective countries . . . to have a meaningful conversation and communicate about ways that we can collaborate better and have a smoother integration of services and exchange of information so that the border is not a barrier.”); A6.

doesn't speak Spanish.”⁷¹ In discussing the pervasive climate of fear surrounding immigrant communities, one CPS worker emphasized the importance of being bilingual and bicultural in order to make any headway in establishing trust.⁷² Relatedly, one judge noted that case workers are also less likely to pursue relative placements in Mexico if they don't have the “cultural or linguistic ability to engage.” They are overworked and simply don't have the time or language skills necessary to make this happen.⁷³

Finally, there is the problem of conscious or unconscious bias regarding immigrant parents or Mexicans. One CPS supervisor discussed the range of perspectives of her case workers:

Just like any other issue that we encounter in social work, different people come with their own experiences and biases and thought processes on how the world should work . . . [W]e hire a lot of brand new college graduates. That means that people come from different experiences than our families. People that come into this field want to make a difference, help a child, but the reality is that families have the right to be families, to stay together. Just because someone is poor doesn't mean they are abusing their children. Just because a child isn't as clean doesn't mean they are unsafe. I'm sure there are cases where [case workers] think reunification shouldn't occur, but if you look at child safety, it isn't related to safety.⁷⁴

Both the consulate and one of the social service agencies interviewed reported encountering certain CPS workers who felt strongly that if a child is a U.S. citizen, he or she should stay in this country, regardless of the deportation of his or her parents.⁷⁵

On a small scale, the survey results confirmed this mix of perspectives among case workers on the significance of immigration status. In response to a question about whether parents who are undocumented immigrants are more likely than native born parents to have problems with abuse, neglect, abandonment, substance abuse, poverty, domestic violence, and mental health, of the 26 CPS workers who responded, nearly all thought undocumented parents would be more likely to have problems with poverty, more than half thought they would be more likely to have problems with domestic violence, and roughly one quarter thought they would be more likely to have problems

⁷¹ A6.

⁷² S4.

⁷³ J5.

⁷⁴ S3.

⁷⁵ S4 (“At times, although it shouldn't be this way, CPS workers say the lack of status of the parents, it is a risk to the well being of the children . . . There are really professional people in CPS and also people who are very closed-minded, and they say, the child is American, the parents are illegal, they have to go back to Mexico and the children have to stay here.”); S5 (“I don't think a lot of [CPS case] workers are going the route of reunification. I think they're saying, ‘well, this is a child, she's a citizen, let's keep her here. We're going to have to sever the rights because mom is going to Mexico,’ not thinking of all that's attached to severance.”).

with child neglect, abandonment, substance abuse, and mental health. These figures suggest that a significant number of case workers assume negative characteristics of immigrant families that may shape the way they proceed with individual cases.

Judges: Just as there is no written protocol or guidance for CPS case worker regarding immigration issues, there is also no statutory guidance or caselaw for judges regarding how, if at all, immigration status should be considered. The judges interviewed were fairly uniform in their view that immigration status is not a factor to be considered in determining a case plan.⁷⁶ In addition, in contrast to the range of responses of case workers to the survey question posed above regarding a correlation between immigration status and other concerns, of the seven judges surveyed, only one found a greater likelihood of problems with abandonment and two found a greater likelihood of poverty. The rest found no greater likelihood of any of the problems listed.

However, many of the judges interviewed noted that it was up to each judge to determine what factors are appropriate considerations, and there were some judges that would feel otherwise. As one judge recalled,

We used to have a judge who believed it was his obligation to ask everyone their legal status and then to report. So that is a view on the bench. It is definitely a minority view, but I think there are judges who think it is their obligation. I don't know how it was handled, I don't know if he ever actually reported anyone. It was a big topic of debate and disagreement.⁷⁷

Another judge commented that the judges in his courthouse are “probably less likely to adopt any severe attitudes about undocumented status, but that's the situation right now, a few years ago it may have been quite different.”⁷⁸ He also noted that superior court judges rotate in and out of the juvenile court system, and could have other views on how to consider immigration status.

A few participants described experiences in which judges appeared to be leery of a case plan that worked towards reunification in Mexico. The consulate described a case in which a mother was deported to Mexico, had completed all the requirements for reunification, and yet the reunification was not moving forward. He stated, “This case is very typical, unfortunately for the family, in that everyone involved (the judge, the

⁷⁶ J1 (“For me, it's not really a factor. If they're working a case plan, and doing everything they need to be doing, their obligation is minimally adequate parenting.”); J2 (“There are serious concerns in these cases. It certainly would not prohibit me from returning the child to the parent, but what it would do for me would be to generate the question of what can we do, in the context of this case, to help.”); J5 (“I'll tell the parent or the relative that I don't care what their immigration status is, that we need to find a way to work around it so that the child can be placed back with them and it can be done so safely. And if I see a case worker who is using it as a barrier [to reunification]. . . I'll state that I'm not going to accept that as a barrier, unless we know there is a current order for deportation, or the parent is in detention.”).

⁷⁷ J1.

⁷⁸ J5.

attorneys, the therapists) has an outside idea that can't escape from their minds . . . It is about an image here of Mexico and Mexicans that unfortunately we can't get rid of.”⁷⁹

Along similar lines, an attorney stated that “some judges think . . . returning a kid to Mexico is like returning them to the moon.” He went on to describe a case in which a child would need ongoing medical treatment and the parents were in Agua Prieta. The judge was very reluctant to return the child to her parents because of concerns about the availability of care. “We were saying that she can get treatment in Mexico, it's not like medieval Europe. And the judge said, ‘Well, I don't know about that.’ I can understand if she was going to the farm 80 miles outside of Guanajuato, but she was going to Agua Prieta.”⁸⁰

Attorneys: Many participants reported that it is not unusual for a parent in detention to have little to no contact with his or her attorney. According to one attorney who represents a Native American tribe that regularly has cases with family members in immigration detention, an attorney visit to a client in immigration detention is the exception. This also came through in the survey responses. Only two of the 15 attorneys who took the survey had ever been to an immigration detention facility, despite the fact that nearly all (13 of the 15) had multiple cases which involved a family member in detention.

This is not to say that all attorneys were uninvolved with their clients with immigration issues. On the contrary, several of the attorneys interviewed described extensive and creative efforts to work with immigrant families. In one example, an attorney contacted the consulate for assistance in arranging with DIF for a visit with a potential relative caregiver across the border in Sonora, Mexico. She took the children, along with the consulate, and found the relatives to be “incredibly warm and devoted to the kids.” In the end, CPS agreed to place the children with these relatives, and the attorney believes if it weren't for her effort, they would have been severed and adopted.⁸¹

There is a risk, however, that just like the CPS case workers, a mix of a high caseload, limited resources, and conscious or unconscious bias can lead attorneys to view severance as inevitable once a parent is in detention and/or deportation proceedings. One judge commented that attorneys often report to him that they have been unable to locate a client in immigration detention. He described, “There is a certain sense of, ‘well, it's inevitable what's going to happen.’ I think that there's a mentality out there with some of [the attorneys]: ‘What, is he going to reunify?’ But I think that the ones who have a successful reunification with a parent in Mexico, they would never [think] that.”⁸²

⁷⁹ S4.

⁸⁰ A6.

⁸¹ A5.

⁸² J6.

A staff member of a social services organization described that the majority of attorneys are not likely to make extensive efforts in a case involving trans-border issues because they do not want to throw a wrench into the case's trajectory. She explained, "The juvenile court attorneys work with one another, they see each other on case after case after case, so rather than being a strong advocate for a family member, it's easier to row together . . . they make it easy for each other."⁸³

Timeline for Dependency/Permanency

The state has detailed statutory timelines that are triggered when the state assumes custody of a child. Most significantly, the Adoption and Safe Families Act ("ASFA"), passed by Congress in 1997, requires states to meet stringent time requirements for either achieving family reunification or adoption after a child is removed from home.⁸⁴ The legislation grew out of a concern that the child welfare system's emphasis on family reunification above all other goals could pose safety risks to children and result in long unresolved cases. In order to move children out of foster care to a permanent living arrangement more quickly, ASFA mandates that if a child remains in an out of home placement for fifteen out of twenty two months, the state is required to initiate proceedings to terminate parental rights.

Arizona has implemented ASFA's requirements and added additional grounds for termination of parental rights after only nine months of out of home placement when the parent has "substantially neglected or willfully refused" to remedy the circumstances that caused the out of home placement.⁸⁵ Along with these requirements, ASFA and the corresponding state laws also require that the state make "reasonable" or "diligent" efforts to provide the services necessary to reunify a child prior to terminating parental rights. Examples of reunification services include supervised visitation, parenting classes, and substance abuse counseling.

These timelines and requirements are difficult to reconcile with the timeline of immigration cases, which tend to be long and unpredictable. Many participants commented on this tension. One CPS worker explained,

We're running on a timeframe. Once we serve that notice of temporary custody . . . we have 72 hours to return the child or initiate the dependency process. A lot happens in those 72 hours. We have a TDM ['Team Decision Making'] meeting to develop a plan to determine if children can safely go home. If a parent is in Pima County Jail, it is really easy for parent to be part of that process. We have relations, liaisons with the jail who make sure that they participate telephonically. This doesn't happen in detention.⁸⁶

⁸³ S5.

⁸⁴ The Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

⁸⁵ A.R.S. § 8-533(B)(8) (2011).

⁸⁶ S4.

This initial 72 hours, culminating in the TDM meeting, is a crucial time period that determines the future trajectory of the case. If a parent cannot be involved in the TDM meeting because they cannot be located or cannot access a telephone to participate, there is no way to arrange for an alternative the dependency process. Once this process gets started and attorneys get involved, “it gets much more complicated. [It] restricts the placements you can look at . . . There are options before dependency, there are services, but [you] need the parent to agree.”⁸⁷

Once a dependency is initiated, there are new timelines that establish when the state can move to terminate parental rights. The judges interviewed all stated that the timelines are discretionary and emphasized that extensions can be granted when warranted. In addition, there are creative ways to avoid severance while still allowing for the child to remain with an out of home placement, particularly when a relative can be located to take the child until the parents’ immigration issues are resolved. But all the judges agreed that their ability to avoid severance can only be pushed so far. One judge put it, “I think there’ll be a point in which you can’t [avoid it] anymore. Nobody wants an infant growing up in foster care. So at that point . . . the bottom line is, they can’t parent and you’ve got a six month old.”⁸⁸

One judge described a case in which the father was working the case plan, doing everything asked of him, and the case was on track for reunification when he suddenly disappeared. He had been detained and it took time for his lawyer to locate him. When his lawyer eventually tracked him down and communicated with him, it was impossible to get any concrete information about his situation. The judge anticipated that in the end, the father’s rights would likely be terminated and the children would wind up with someone else.⁸⁹

Under-Utilization of Consular Offices

Across the board, participants reported positive experiences working with the Mexican consulate.⁹⁰ Perhaps the consulate’s most important contribution is to facilitate communication between CPS and DIF. Without the consulate acting as a go-between, arrangements with DIF for home studies or other services are much more difficult to coordinate.⁹¹

⁸⁷ S3.

⁸⁸ J1. Another judge expressed similar sentiments: “[If the] child is not bonded to the parent and the parent is in limbo and we’re approaching these time lines – I have to look at what is best for the child and that’s going to enter to the detriment of the parent. There are no exemptions for people whose immigration or criminal status is undetermined for a protracted period of time; they are just no exemptions. Whether incarcerated or in immigration status; they are unable to parent, doesn’t matter if they are in a coma. I’m not imputing any ill intent on the part of the parent, but they’re just unavailable.” J5.

⁸⁹ J2.

⁹⁰ A1; A5; A6 (“consulate is helpful – they are hard to get a hold of, but pretty good”); J1 (“the consulate has been amazing; incredibly helpful”); J5; J6; S3 (“I’m thankful that we have the kind of relationship we do with the Mexican consulate.”); S5.

⁹¹ A1.

The consular representative who was interviewed agreed that this was a crucial role the consulate can play. “There is willingness by DIF to prepare things specifically for a given family, but they need the consulate to act as a go between. If CPS called DIF directly, DIF would say ‘we don’t do that.’ But if the consulate is there, we can explain the importance of things to CPS and DIF. We can get a home study done in a couple days, whereas if CPS asks for it, it will take a month.”⁹²

According to the representative interviewed, the greatest challenge faced by the Mexican consulate in Pima County is simply getting involved in cases. He expressed frustration that they are “working with one reality but there is a whole other reality that we don’t see.”⁹³ They have tried to enter into a formal agreement in which CPS would automatically notify the consulate if either or both parents are Mexican nationals, but no such formalized relationship has materialized.

In the absence of such an agreement, most of the calls the consulate receives come directly from families. “It is rare that the call comes from CPS.” However, as one judge commented, many families may be leery of contacting the consulate without encouragement from their case workers and/or attorneys. She explained, “I think the parents need to know, which means the department needs to know, and the lawyers need to know, to send the parents. Because these are people with very marginalized life styles, very afraid of doing anything that puts them on anybody’s radar screen, and so I don’t know if they would be uncomfortable even going into their own consul.”⁹⁴

Recommendations

The next sections describe legislative and administrative reforms that could address the concerns identified on a local, state, and federal level.

FEDERAL REFORMS

The Supreme Court has repeatedly held that the right to parent is of such a fundamental nature that the Constitution requires that a parent receive significant procedural protections when a state seeks to permanently sever the parent-child relationship.⁹⁵ Undocumented immigrant parents are entitled to these same due process protections in the context of proceedings regarding their parental rights. A

⁹² S4.

⁹³ S4.

⁹⁴ J1.

⁹⁵ *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (due process and equal protection require the state to provide a right to appeal parental termination decisions); *Santosky v. Kramer*, 455 U.S. 745, 751 (1982) (due process requires that the state support allegations regarding severance of parental rights with clear and convincing evidence); *Lassiter v. North Carolina*, 452 U.S. 18, 32 (1981) (parental interest in a just and correct decision in termination proceedings is “commanding” and “extremely important,” but due process does not require the appointment of counsel in all cases).

system that afforded them different rights in this context would be irreconcilable with the long history of cases establishing that undocumented immigrants retain certain constitutional rights by virtue of their presence in the country.⁹⁶

Yet in the child welfare system, immigrant parents are at risk of losing their children without the same constitutional due process protections in place that other parents receive. In light of the constitutional rights at stake, the federal government should take steps to ensure that immigrant parents can meaningfully participate in their children's dependency proceedings. The following three sections outline key areas for federal reform; a more detailed list of recommendations is in the Executive Summary and Appendix of the report.

Effective Assistance of Counsel in Child Welfare Proceedings

Many of the problems that interviewees described could be eliminated or at least ameliorated by an effective and resourceful advocate for the immigrant parent's rights in the child welfare system. Being an effective advocate would require expertise in the practical and legal considerations of immigrant parents. From a practical standpoint, familiarity with the detention facilities' policies with regard to telephonic participation, access to visitation and services, and release procedures would greatly increase the chances that a parent could participate in dependency proceedings while detained. Developing contacts with the consulate and DIF would permit more coordination of efforts with relatives in Mexico. Legally, if the attorney had an understanding of the parent's prospects for immigration relief, and could convey to the court and the case worker the likely timeline and possible future scenarios facing the parent, the information could greatly increase the system's ability to develop a case plan that realistically reflects the parent's circumstances.

Given the caseloads of most juvenile law attorneys and their lack of exposure to immigration law, this type of representation tailored to immigrant parents seems unlikely to emerge without a concerted effort. Thus, one recommendation emerging from this research is for the government to provide resources to the bar to ensure that this type of effective representation is readily available.

One means of doing so would be to lift the funding restrictions currently in place for the Legal Services Corporation (LSC), the federal institution that provides federal funding to legal aid organizations around the country, in order to provide targeted legal assistance to indigent immigrant parents in dependency proceedings. Currently,

⁹⁶ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). For a thorough discussion of the constitutional rights of undocumented immigrants, see LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* (2006).

LSC is prohibited from providing funds for services to undocumented immigrants.⁹⁷ In the reenactment of the Violence Against Women Act (VAWA) in 2005, Congress enacted an exception to this rule for victims of domestic violence, sexual assault, or trafficking.⁹⁸ This decision reflected the view that “Across the country, many immigrant victims have nowhere to turn for legal help.”⁹⁹

Like domestic violence victims, undocumented immigrant parents whose children are in state custody often have nowhere to turn for legal help. The government has an interest in ensuring that these parents have effective representation in light of the constitutional rights at stake and the U.S. citizen children involved. Providing resources for family law attorneys to provide this specialized representation would be an efficient means of addressing the complex challenges that arise in these types of dependency proceedings.

Key Liaison in ICE Facilities

The most significant factor leading to the problem of “disappearing parents” has been the lack of any centralized system for tracking detainees. As the interviews made plain, very often case workers and attorneys simply do not know how to locate a client who they have learned has been transferred to ICE custody. These interviews only begin to capture the need for a centralized locator system, since they only tap into child welfare personnel in Arizona. The majority of detainees are transferred to detention facilities from out of state. Thus, their dependency proceedings are in a different state, and the case workers and attorneys involved in the case would be even less likely to know that a parent has been transferred to Arizona.

In 2010, ICE launched an online locator system that permits anyone with a detainee’s alien registration number and country of origin or name and date and country of birth to locate a detainee.¹⁰⁰ The accuracy and accessibility of the tool remains to be seen, but assuming the system is effective, it is a very positive development. The challenge now is to ensure that case workers and attorneys know about this resource so they can use it to track down parents in detention.

It is not simply a matter of locating parents, however, but also successfully communicating with them. As discussed, if CPS is unable to communicate with a parent quickly, it can have crucial impacts on the children’s custody status. By law, the state is required to file a dependency petition with the state within 72 hours of removal of a child from the home.¹⁰¹ If CPS can establish contact with the parent during this window and communicate with them about potential kinship placements, they can avoid initiating

⁹⁷ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(11), 110 Stat. 1321, 53-55; 45 C.F.R. § 1626.3.

⁹⁸ Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 103-322 § 104.

⁹⁹ 151 CONG. REC. S13,753 (2005) (statement of Sen. Kennedy).

¹⁰⁰ The website for the locator system is <https://locator.ice.gov/odls>.

¹⁰¹ A.R.S. § 8-802(D).

the dependency proceedings, which can take on a momentum of their own once they are underway. Thus, while the online locator system is a step in the right direction, further reforms are needed to deal with the problem of the “disappearing parent.”

One means of rapidly increasing the ability of CPS to interface with the facility would be to appoint a key ICE liaison for each detention facility that could be a point of contact for dependency matters. CPS case workers and attorneys could contact this person to arrange for telephonic contact with a parent. Without this sort of direct assistance, it is virtually impossible for case workers or attorneys to reach a parent by telephone in the facility.

This key liaison could also assist with arrangements with the family court for telephonic appearances by parents. The judges interviewed expressed frustration with their inability to ensure that parents are available by telephone, something they routinely arrange in state and local jails. Appointing a key point person to ensure that these types of arrangements are made would greatly facilitate this process. The liaison could also be the key contact regarding visitation arrangements, since often children in state custody will not be able to visit during the facility’s regular weekend family visitation hours.

Detention Reform

While it is an obvious point, it is worth stating that the single most effective way to address many of the problems described in this report would be to avoid immigration detention altogether. A thorough discussion of the need for reforms of the detention system is beyond the scope of this report. However, the detention of parents with children in state custody highlights several of the most concerning aspects of immigration detention: its overuse, its prolonged nature, and its contribution to the criminalization of immigrants.

The overuse of detention stems from two separate and distinct problems: mandatory and discretionary detention. With regard to mandatory detention, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), federal legislation passed by Congress in 1996, mandates the government to hold in detention during their removal proceedings virtually any noncitizen with a criminal conviction and arriving aliens who lack proper documentation.¹⁰² Mandatory detention means that there is no consideration of whether individuals that fall under one of these categories pose a flight risk or threat while their deportation is pending. Instead, noncitizens in these categories *must* be detained for the entire duration of their removal proceedings.

In the context of parents who are primary caregivers for young children, this means that there is no capacity for a decision maker in the system – either judicial or administrative – to consider the fact that young children will be placed in state custody as a factor in the

¹⁰² INA § 236(c), 8 U.S.C. §1226(c) (mandating detention of broad categories of criminal aliens); INA § 235(b)(1)(B)(IV), 8 U.S.C. §1225(b)(1)(B)(IV) (mandating detention of arriving aliens unless they establish a credible fear of persecution).

decision to detain. As a result, parents who are arrested for relatively minor criminal infractions that have little to do with their parental fitness can be subject to mandatory detention, triggering out of home placement for children and extended dependency proceedings that would in all likelihood not have occurred had the parent not have “disappeared” into the detention system.

In addition, even noncitizens who are not in a category in which detention is mandatory are often detained. Although ICE has the authority to grant detainees who are not subject to mandatory detention humanitarian parole or release on bond, it does not often exercise its discretion to authorize such releases.¹⁰³ In cases where detainees are given a bond, it is often too high for them to pay to gain release, as in the case of Laura, described in the Executive Summary.

In June 2010, ICE issued a memorandum regarding its enforcement priorities.¹⁰⁴ The memo emphasized that given limited resources and detention space, ICE should focus its efforts on aliens who pose national security or public safety risks, aliens who recently entered the country illegally, and aliens who have not complied with a final order of removal. It then stated,

Absent extraordinary circumstances or the requirements of mandatory detention, [ICE] should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or *demonstrate that they are primary caretakers of children* or an infirm person, or whose detention is otherwise not in the public interest.

The memo goes on to state that if aliens in these categories are not subject to mandatory detention, there must be approval by a director of the decision to detain. Furthermore, if they are subject to mandatory detention, ICE Counsel should be contacted for guidance.

This memo is a positive step in acknowledging the particular hardship detention poses to primary caregivers. However, thus far, there is no indication that it has translated into actual changes in ICE’s widespread use of detention. On the contrary, a recent report suggests that the problem of detaining primary caregivers continues.¹⁰⁵

The damage caused by detaining parents with children in state custody is greatly compounded by the prolonged nature of detention. If a parent wishes to fight her deportation, she is facing a minimum of several months in detention while the

¹⁰³ See GAO Report on Alien Removal Decision Making, *supra* n. 53.

¹⁰⁴ See Morton Memo, *supra* n. 54.

¹⁰⁵ See WOMEN’S REFUGEE COMMISSION, TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION (2010), available at <http://womensrefugeecommission.org/programs/detention/parental-rights>. On a local level, SIROW continues to receive referrals of detained women with children in state custody on a regular basis. In fact, since June 2010, of the 89 referrals to our social worker of vulnerable women detainees, 23 had CPS involvement.

immigration case proceeds. In 2009, an Associated Press investigation obtained data that on a single day in January 2009, at least 4,170 individuals had been subject to detention for six months or longer, and 1,334 of these individuals had been subjected to detention for one year or longer.¹⁰⁶ A recent ICE report acknowledges that while the average length of time in detention is 37 days, this number is significantly skewed by the number of Mexicans subject to expedited removal. The report states that approximately 2,100 aliens are detained for a year or more.¹⁰⁷

As discussed, the lengthy and uncertain period of time that parents spend in detention has very serious effects on the trajectory of their child welfare proceedings. So, too, does the remote location of the detention facilities, the frequency with which detainees are transferred, and the lack of any programming or services available to detainees. All these issues are the product of the fundamental problem at the heart of the detention system: the facilities are indistinguishable from criminal penal institutions, despite the fact that immigration detention is a purely administrative system. Its sole purpose is to ensure that immigrants do not abscond during the pendency of their deportation proceedings. And yet, as one scholar recently described, “detention has embraced the ‘aesthetic’ and ‘technique’ of incarceration, evolving for many detainees into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”¹⁰⁸

Recently, ICE has publicly acknowledged the inappropriately criminal nature of the detention system. It has pledged to overhaul the system to make it “truly civil.”¹⁰⁹ Scholars and advocates have expressed concerns that the measures undertaken by the government to achieve this goal have had no notable effect thus far and seem unlikely to result in the kind of systemic change necessary to truly reform the system. The impact detention has on parental rights is yet another indication of the pressing need for effective reform.

STATE MEASURES

While the surveys and interviews tell the story of a federal system crying out for reform, they also capture a story particular to immigrants in Arizona. There is strong evidence that immigrant parents are at risk of losing their children in many states throughout the country. But it also appears that there are some states where these types of losses are not happening, or at least not happening with any systemic frequency. It is clear that some states have established a much more robust set of policies and practices when it

¹⁰⁶ Michelle Roberts, *Immigrants Face Detention, Few Rights*, ASSOCIATED PRESS, Mar. 13, 2009.

¹⁰⁷ DORA SCHIRRO, IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SECURITY, IMMIGRATION DETENTION: OVERVIEW AND RECOMMENDATIONS 6 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

¹⁰⁸ Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 54 (2010) (quoting Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 237-39 (2009)).

¹⁰⁹ Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants*, NEW YORK TIMES, Aug. 6, 2009, at A1.

comes to working with immigrant families than is the case in Arizona. Drawing on these other states as helpful models, this section highlights several state measures that could ameliorate the problems faced by immigrant parents in the child welfare system, either in concert with federal measures or in the absence of federal reforms.

Increased Utilization of the Consulate

Several Child Protective Services agencies have implemented memorandums of understanding (MOUs) with the Mexican consulate.¹¹⁰ The MOUs vary in their scope and precise terms, but all require that the consulate be notified when CPS encounters a case involving Mexican nationals. Even if a formal MOU is not implemented in Arizona, CPS case workers, attorneys, and judges, should be encouraged to make greater use of consular offices as a resource in cases involving foreign nationals.

Key Liaison in CPS

The surveys and interviews conducted suggest that cases involving immigration issues arise with regularity, but not with such frequency that any particular case worker is likely to develop an expertise in handling detention and deportation issues. This is particularly true in light of the high turnover of CPS case workers and limited resources available to them. An efficient means of addressing this concern would be to appoint one key liaison for case workers to contact in each region when immigration related issues arise. Other states have established these positions and reported positive outcomes.¹¹¹

Training

Particularly in the absence of any federal or state measures to address the concerns identified on a systemic level, training is a crucial means of addressing the problems of the ad hoc system. Attorneys, CPS workers, and judges should receive specific training in what immigration detention is, how to locate detained parents and interface with detention facilities, what deportation proceedings mean, and how to work with the consulate and DIF. This training should be mandatory and should include specific information about the provision of reunification services to immigrant parents in detention and/or deportation proceedings.

¹¹⁰ These arrangements have been made at the county and the state level. Examples are available on the website <http://www.f2f.ca.gov/sampleMOUs.htm>.

¹¹¹ See, e.g., Yali Lincroft, *Helping Immigrant Families: Interviews with Four California Social Workers*, CHILDREN'S VOICE MAGAZINE (Sept./Oct. 2008) (reporting on interviews with social workers acting as "international liaisons" in four different counties in California), available at <http://www.cwla.org/voice/0809immigrantfamilies.htm>.

Conclusion

At the time of this report's release, Laura, whose story opens the report's Executive Summary, remains separated from her children. Her struggle to comply with the current case plan of reunification will continue so long as her immigration status remains uncertain. The interviews and surveys presented in this report make clear that there are countless parents facing similarly dim prospects of reunifying with their children after an encounter with immigration enforcement. This report calls on federal and state actors to take immediate steps to avoid the slow motion tragedies currently unfolding in an unknown number of immigrant households each day.

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Appendix: Summary of Recommendations

FOR THE DEPARTMENT OF HOMELAND SECURITY

- Establish a mechanism for early identification of cases in which immigrant parents in detention and/or deportation proceedings have children in the child welfare system.
- Increase the use of parole, prosecutorial discretion, and alternatives to detention for these cases.
- Improve detention facilities compliance with telephonic appearances and establish procedures for parents to appear in person in child welfare hearings.
- Increase the availability of services in detention facilities, such as parenting classes, AA, NA, and access to psychiatric evaluations.
- Establish a key liaison position in each detention facility that can be a point of contact for all child welfare personnel.
- Train deportation officers and detention facility personnel to be familiar with the challenges facing detained parents with children in state custody.
- Reform immigration enforcement measures that rely on local law enforcement agencies and create a climate of fear for immigrant families that chills their ability to interact with the child welfare system.

FOR THE CHILD WELFARE SYSTEM

- Establish mandatory and regular trainings for judges, attorneys, and CPS case workers regarding immigration detention and deportation proceedings.
- Create a key liaison position in each CPS region for case workers to contact when immigration issues arise.
- Increase utilization of the consulate in cases involving foreign nationals.
- Establish statewide policies or practices to improve the provision of reunification services to immigrants in detention facilities.

FOR THE DEPARTMENT OF JUSTICE

- Establish a portion of the Legal Orientation Program devoted to educating immigrant detainees about defending their parental rights.

FOR CONGRESS

- Provide funding for attorneys specializing in representation of immigrant parents with U.S. citizen children, in part by waiving the restriction on Legal Services Corporation (“LSC”) funds for these purposes.
- Increase funding for the Legal Orientation Program, which informs immigrant detainees of their legal rights, to allow for education on the dependency process for immigrant parents with children in state custody.
- End mandatory detention. Establish judicial discretion to consider urgent circumstances including children in state custody in determining whether detention is warranted.
- Increase judicial discretion in cases for relief from deportation involving parents with children in state custody.