

HEINONLINE

Citation:

Karla M. McKanders, America's Disposable Youth:
Undocumented Delinquent Juveniles, 59 Howard L.J. 197
(2015)

Provided by:

Vanderbilt University Law School

Content downloaded/printed from [HeinOnline](#)

Mon Nov 19 11:40:54 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

America's Disposable Youth: Undocumented Delinquent Juveniles

KARLA M. MCKANDERS*

INTRODUCTION	198
I. CONSTRUCTING THE LEGAL SUBJECT: UNDOCUMENTED DELINQUENT YOUTH AND MULTIPLE LAYERS OF ILLEGALITY	201
A. Layer One: The Undocumented Child and the Immigration System	202
1. Rhetoric and the “Othering” of Immigrants	204
2. Immigrant Children and Vulnerability	207
B. Layer Two: State and Local Juvenile Delinquency Systems	211
II. LOCAL, STATE AND FEDERAL POLICIES TOWARDS UNDOCUMENTED DELINQUENT IMMIGRANT YOUTH	212
CONCLUSION	218

*The future of people “who have been living legally in the United States for so long that their native lands are a distant memory and the language of their youth feels like a foreign tongue to them” are very vulnerable to deportation for childhood mistakes that would normally be excused for youth of U.S. citizenry.*¹

* Associate Professor of Law, University of Tennessee; J.D., Duke University School of Law, B.A., Spelman College. I would like to thank the participants in the 2014 North Carolina Law Review Symposium on Vulnerable Defendants in the Criminal Justice System for comments and discussion. I am also thankful for comments provided by Kenneth McKanders. Thank you to Maria Lungu for your research assistance.

1. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/>.

INTRODUCTION

José spent the majority of his life in a small town in Southern United States.² He entered the United States through the desert when he was six months old with his mother without lawful status. He attended school and engaged in the activities of a “normal” teenager. Since his time in the United States, his primary language was English and he only spoke a little bit of Spanish. At the age of sixteen, he was involved in an altercation in which he was accused of shoplifting with an alleged local Latino gang. The local police department arrested José and sent him to the local juvenile detention facility. The local juvenile prosecutor attempted to indefinitely detain José and his Latino counterparts who were also arrested as undocumented. José’s friends, however, were immediately released when their parents produced their U.S. birth certificates to the juvenile detention facility.³

Immigration and Customs Enforcement was immediately called to handle the “illegal” immigrant child.⁴ During the child’s first appearance in juvenile court, the Immigration and Customs Enforcement Officer yelled at the child, inaccurately telling him that he was going to be immediately deported from the United States.⁵ Uncertain

2. The case study on José is fictional based on working with immigrant children and litigating their cases.

3. *Id.*

4. The discourse surrounding the use of the terminology “illegal” has pervaded conversations on immigration for the last few years. It is a term used to refer to immigrants who do not have lawful status to remain in the country. “The veneer of precision and neutrality embedded in the term ‘illegal’ is an apt guise for assumption and stereotype.” CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND THE LAW* (2008). The term is typically used as a means to stigmatize a group of people and creates a community of immigrants to be seen as “others” or “outsiders.” This term is used in a pejorative sense in conversations and in the media. Further, the term focuses in on criminalizing immigrant conduct as part of this stigmatization. Accordingly, in this article the terminology “illegal immigrant” will not be used. Instead the term “undocumented immigrant” will be utilized. *See generally* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1, 291 (6th ed. 2008) (explaining “the terms ‘illegal aliens,’ ‘undocumented aliens,’ and ‘explaining that an immigrant is “a noncitizen authorized to take up permanent residence in the United States. This is a subset of the group that common or journalistic usage often labels immigrants, meaning noncitizens who have been present for a while and wish to stay indefinitely, legally or illegally”). *See also* STEPHEN LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1350 (4th ed. 2005) (stating “[t]he stereotypes used against undocumented Latino immigrants likewise extend to those with lawful status who are often assumed to be “illegal.” The general public often conflates the different categories of immigration status and assumes that Latino is synonymous with “illegal”).

5. *See generally* 8 C.F.R. §1263.3(b)(1) (stating “children should be released to parents, legal guardians, or adult relatives, in that order. If such persons cannot be found or do not exist, the child will not be released except in ‘unusual and compelling circumstances’, even to adults willing to execute an agreement to care for the child’s well-being.”).

as how to proceed, the juvenile delinquency attorney had the child plead to the offense as charged.⁶ The magistrate judge refused to provide any services to rehabilitate the child under the assumption that the child would be immediately removed from the United States, never to return back to his jurisdiction.⁷

The child was immediately placed into the custody of U.S. Marshalls with Immigration and Customs Enforcement who moved him to an out-of-state detention center for immigrant children to await deportation proceedings.⁸ The Office of Refugee Resettlement with the Department of Health and Human Services has a policy of reunifying immigrant children with their family members until removal proceedings are concluded.⁹ Under this practice, within a week, José was back home in the same jurisdiction with his mother pending deportation proceedings.¹⁰

José is like many young people who come to the United States but do not have and cannot obtain lawful immigration status. José's story demonstrates that undocumented immigrant children who have resided in the United States from a young age are vulnerable in their interactions with juvenile justice and immigration systems. While many undocumented youth have spent many years being educated and socialized in the United States, when they transgress societal norms, unlike U.S. citizen youth, the consequences, depending on the jurisdiction, are severe.¹¹ Undocumented immigrant children may be placed in immigration detention,¹² separated from their families,¹³ relocated to an unfamiliar country,¹⁴ and not given access to the rehabilitation services that U.S. citizen children are afforded to rehabilitate "delinquent" behavior.¹⁵ It is important to consider the implications of the interface between state juvenile systems, the immi-

6. *Supra* note 2.

7. *Id.*

8. *Id.*

9. 8 C.F.R. §1236.3(b)(1).

10. *Supra* note 2.

11. See generally Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. L. & SOC. CHANGE 63 (2011) (discussing the numerous and severe collateral consequences of immigrant youth who become involved with the juvenile justice system).

12. *Id.* at 72–80.

13. *Id.* at 93.

14. See *id.* at 66 (discussing an immigrant youth who was sent back to a country that he had not lived in since age 5 to live with distant family members he had never met).

15. *Id.* at 84–87 (discussing how the aims of the juvenile justice system are at odds with the immigration system in part because the latter does not further rehabilitative goals).

gration system and the treatment of undocumented immigrant youth, specifically young Latino males, interacting with these systems. Approximately 23.2 percent of children in the United States are either immigrants or the children of immigrants.¹⁶ Further, approximately two-thirds of undocumented immigrants in the United States have lived in the United States for at least a decade.¹⁷

To compound the national migration trends, there has been a significant increase in immigrants migrating to U.S. cities who have not typically interacted with immigrant populations.¹⁸ While states like California, New York, Texas and Florida, have traditionally had the highest foreign-born populations in the United States,¹⁹ between 2000 and 2009 the foreign born populations in Georgia, Washington, Virginia, Maryland, Pennsylvania, North Carolina, Nevada, Colorado, and Tennessee increased by over 100,000 people.²⁰ In Georgia, North Carolina, Nevada and Tennessee, the foreign born population increased by more than 50%.²¹ These statistics demonstrate that it is inevitable that more juvenile justice systems across the country will create policies regarding the treatment of undocumented youth. The types of policies and practices in each jurisdiction have varied widely.²² “Beginning in 2008 there have also been reports by the federal government of an increasing number of noncitizen youth being referred to immigration authorities by juvenile probation officers and other juvenile justice officials.”²³

This Article takes a look at various state and local policies towards undocumented immigrant youth in their interactions with the juvenile justice and immigration systems. Central to this conversation is a discussion of how undocumented immigrant youth are defined

16. SHANNAN WILBER, *NON CITIZEN YOUTH IN THE JUVENILE JUSTICE SYSTEM* 4 (2014).

17. PAUL TAYLOR ET AL., *UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD* 3 (2014).

18. *See* WILBER, *supra* note 16, at 4.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.* at 25 (citing *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407 (2009)) (“The Los Angeles Police Department adopted a policy that prohibited its officers from initiating any police action for the sole purpose of investigating an individual’s immigration status. The policy was upheld by the California Court of Appeals. The court found that the policy was not preempted by, nor did it violate, federal immigration law.”); WILBER, *supra* note 16, at 26 (“Oregon state law prohibits law enforcement agencies from utilizing any public resources ‘for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.’” (citing OR. REV. STAT. § 181.850)).

23. WILBER, *supra* note 16, at 6.

and perceived within these systems. In particular, this Article examines how local rhetoric surrounding undocumented immigrants can adversely affect the policies that are implemented in addressing how to manage undocumented children who are placed in the juvenile delinquency and immigration systems after residing in the United States for many years. The first section of the Article addresses how the undocumented delinquent youth, mainly Latino males, are constructed through the various narratives of immigrant children that are perpetuated in the media and policymakers, which in turn impacts their treatment as immigrant children with the juvenile justice and immigration systems. This section addresses the multiple identities of race, class, gender and socio-economic status that impact the Latino delinquent immigrant child's interactions with both the immigration and juvenile justice system. The second section of the Article examines state and local policies for the referral of delinquent immigrant youth to the Department of Homeland Security, Immigration and Customs Enforcement which begins removal proceedings. This section considers the inherent bias and the targeting of particular groups that may develop from varied state and local policies that are not uniform and based on the discretion of political actors.

Overall, this Article takes a critical look at the contrasting ways in which vulnerable undocumented immigrant youth are defined within these legal systems and how the "othering" of Latino male youth facilitates the denial of legal guarantees of equality and reinforces existing hierarchies and stereotypes. In conclusion, the Article finds that advocating for undocumented youth who are interfacing with these two systems, where the goal has become exclusion—not rehabilitation of youthful behavior and a preference for family unity—presents attorneys and advocates with a substantial task that must be addressed at a federal legislative level to promote uniformity and justice in the treatment of delinquent immigrant children who interface with actors within the juvenile justice and immigration systems.

I. CONSTRUCTING THE LEGAL SUBJECT: UNDOCUMENTED DELINQUENT YOUTH AND MULTIPLE LAYERS OF ILLEGALITY

In order to address how to establish policies and advocacy strategies for undocumented immigrant youth who interface with both the immigration and juvenile delinquency systems it is imperative to ex-

amine the varied narratives of immigrant children. These varying narratives shape the legal rights that are afforded to different categories of immigrant children and can help us understand how the undocumented delinquent juvenile is treated within the juvenile delinquency and immigration systems. Scholars Galicia and Rios describe how the legal system interfaces with the perception of undocumented children to create “layers of illegality.”²⁴ The delinquent undocumented child is faced with varied legal constructions involving the interaction between the immigration and delinquency system.²⁵ These constructions are coupled with stereotypes attributed to undocumented Latino immigrant children, which impacts the remedies and differential treatment they receive when they transgress societal norms as juveniles in contrast to U.S. citizen juveniles whose conduct in other contexts may be easily overlooked and rehabilitated.²⁶ This section examines how each system impacts how undocumented children are treated when they interface with the juvenile delinquency system.

A. Layer One: The Undocumented Child and the Immigration System

The immigration system is a system of exclusion and inclusion. During different periods in the history of the United States, immigration laws and policies have been constructed in a manner that reflects societal bias and stereotypes about immigrant populations.²⁷ The no-

24. Victor M. Rios & Mario G. Galicia, *Smoking Guns or Smoke in Mirrors?: Schools and the Policing of Latino Boys*, 7 *ASS'N OF MEXICAN-AM. EDUCATORS* 54, 60 (2013).

25. *Id.* at 55.

26. *Id.* (stating “[t]he xenophobia follows: Multiple marginality can help us explain how the boys in this study became constructed as criminal threats in the multiple contexts and institutions in which these boys navigated”).

27. See generally Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 *HARV. J. ON RACIAL & ETHNIC JUST.*, 163, n.114 (2010) (citing MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 37–39 (2003) (noting that Congress often aimed such legislation at Asians. Examples include the 1882 Chinese Exclusion Act; the Gentlemen’s Agreement of 1907, which prevented the immigration of Japanese laborers; and the 1924 Immigration Act’s exclusion of “aliens ineligible for citizenship,” which included “peoples of all the nations of East and South Asia.”); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”: Enforcing the Chinese Exclusion Acts: 1882–1910*, 25 *LAW & SOC. INQUIRY* 1, 4 (2000) (noting a 1877 Congressional report demonstrates the racial attitudes that drove these policies: “there is not sufficient brain capacity in the Chinese race to furnish motive power for self-government. Upon the point of morals, there is no Aryan or European race which is not far superior to the Chinese.”); Devon W. Carbado, *Racial Naturalization*, 57 *AM. Q.* 633, 641 (2005) (“[R]ace is implicated in naturalization not only as a prerequisite—that is as a basis for determining who gets to become an American citizen. Race also determines the kind of American citizenship status one occupies”); Mae M. Ngai, *The Lost Immigration Debate: Border Control Didn’t Always Dictate Policy*, *BOSTON REV.*, Sept. 2006, <http://www.bostonreview.net/mae-m-ngai-the-lost-immigration-debate-border-control>. Addi-

tion of exclusion involves the intentional act of “denying someone access to something [or] shutting someone out from a place.”²⁸ Inherent to a sovereign state is the prerogative to include and exclude persons from its territory.²⁹ This process involves the complex intersection of policies developed by the legislative, executive and judicial branches within a government.³⁰ Access to inclusion within a nation-state typically involves access to “goods, lifestyle, practiced language, opportunity, environmental conditions, etc.”³¹ In the ideal context, nation-states provide rational justifications for excluding persons from the nation-state’s territories. Immigration scholar, Bas Schotel, explains:

First, the reasons for the exclusion must be backed up by sufficient relevant facts derived from stakeholders and scientific research. [G]eneric and abstract reasons for exclusion do not constitute proper justification. Second, the authorities must show that in light of these relevant facts they have conducted the difficult exercise of balancing the migrants (legitimate) interest in immigration against the interests of the receiving country.³²

Theoretically, in developing sound immigration policies that account for exclusion of particular migrants the state will have well-reasoned non-discriminatory justifications that align with research that are balanced with the nation-state’s interest.

At different times in our nation’s history, discriminatory policies have been used as justification to exclude various immigrant populations from the United States. For example, the seminal United States Supreme Court case *Fong Yue Ting v. United States* directly illustrates

tionally, Carbedo states that “racism helps to determine who we are as Americans and how we fit into the social fabric of American life. Racism, in other words, is always already a part of America’s social script, a script within which there are specific racial roles and or identities for all of us. None of us exists outside of or is unshaped by the American culture racism helps to create and sustain.” Devon W. Carbedo, *Racial Naturalization*, 57 AM. Q. 633, 651 (2005).

28. BAS SCHOTEL, ON THE RIGHT OF EXCLUSION: LAW, ETHICS AND IMMIGRATION POLICY 14 (2011).

29. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute excised by the Government’s political departments’”); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (recognizing the inherent power of a sovereign nation to control its borders)). See generally *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (pointing out that the Constitution vests the national government with absolute control over international relations); *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (stating that the government’s power to exclude aliens from the United States is not open to controversy).

30. SCHOTEL, *supra* note 28, at 10–11.

31. *Id.* at 14.

32. *Id.* at 17.

this point.³³ This case addresses whether a federal immigration law permitted the federal government to exercise exclusive power over immigration and exclude Chinese immigrants in a highly discriminatory manner.³⁴ Accordingly, in the immigration debate, we must be highly conscious of the fine line between reasoned factual assertions to justify the right to exclude as a sovereign nation in contrast to rhetoric that promulgates the exclusion of certain populations.

1. Rhetoric and the “Othering” of Immigrants

This section will explore how the perceptions of immigrant populations are developed in the United States. As explained below, there is a complex interplay between the terminology used to describe immigrant populations in the media and by elected state and local officials and how daily rhetoric can transform into policing policies that are implemented against immigrant communities. This section uses the examples from national media descriptions of immigrant communities, mainly Latino communities. It explains how discourses on Latino immigrant communities impact local policing policies.

The discourse surrounding the use of the terminology “illegal” has pervaded conversations surrounding immigrants and immigration reform for the last few years.³⁵ This term used to refer to immigrants who do not have lawful status to remain in the country. The term “illegal” is often viewed as being legally precise and accurately describing immigrants’ legal status; however, the stigmatization that is imbedded in the use of the term typically associated with criminal activities stereotypes the civil immigration violations and ignores the complexities of immigration law to accurately depict a person’s immigration status. Use of the term stigmatizes a group of people; helps to define a group “others” and “outsiders,” which makes it easier to develop exclusionary policies towards a certain group of individuals—especially young Latino males.³⁶

Over the years, the media and other advocates have started a campaign to remove the use of the word “illegals” from the American

33. Karla Mari McKanders, *Federal Preemption and Immigrants Rights*, 3 WAKE FOREST J.L. & POL’Y 333, 334–35 (2013); *Fong Yue Ting*, 149 U.S. at 711.

34. *Fong Yue Ting*, 149 U.S. at 711.

35. See generally DAUVERGNE, *supra* note 4 (explaining the assumptions and stereotypes that are associated with the term “illegal”).

36. *Id.* at 11 (“The veneer of precision and neutrality embedded in the term ‘illegal’ is an apt guise for assumption and stereotype.”).

vernacular.³⁷ The campaign has resulted in the Associated Press, USA Today, LA Times, San Francisco Chronicle and other news outlets rejecting to use the “I” word.³⁸ The campaign to not use the term “illegal” started in an effort to divert from using racially charged rhetoric to divisively polarize the immigration debate.³⁹ The movement away from this terminology is to facilitate a more inclusive and humane discourse on immigration issues.⁴⁰ The dehumanization of immigrants by leaders and the media colors our perceptions and the types of policies that are developed locally and nationally for immigrant children who come in contact with both the juvenile delinquency and immigration systems. For example, in response to the federal government’s decision to reject the Knox County’s application to jointly enforce immigration laws with the 287(g) program, in August 2013, Knox County Sheriff Jones stated, “I will continue to enforce these federal immigration violations with or without the help of U.S. Immigration and Customs Enforcement. If need be, I will stack these violators like cordwood in the Knox County Jail until the appropriate federal agency responds.”⁴¹ This comment exemplifies the stereotyping and dehumanization of immigrant populations in which local authorities engage. Comparing immigrants, who are people, to cordwood is dehumanizing. The Sheriff’s comments also mock the criminal justice system in a manner which likens the system to one that is in the business of blankly processing immigrants without any regard or consideration to their individual circumstances or constitutional due process rights. The Sheriff’s reference to immigrants as cordwood symbolizes the mass processing and detention of immigrants without regard to their individual circumstances or humanity. Imbedded in his public statement is the sweeping generalization that a person’s status as an immigrant is deeply connected with illegality. This type of thinking leads to racial profiling in policing and unequal treatment within the criminal and immigration systems.

The Knox County Sheriff’s comments and use of the “I” word exemplifies a common phenomenon when it comes to the debate on

37. See *Drop the I-Word*, COLORLINES, <http://colorlines.com/droptheiword/> (last visited Nov. 3, 2014).

38. *Id.*

39. *Id.*

40. McKanders, *supra* note 27, at 173.

41. Lawrence Downs, *Comparing Immigrants to Cordwood*, N.Y. TIMES: TAKING NOTE (Aug. 22, 2013, 10:10 AM), http://takingnote.blogs.nytimes.com/2013/08/22/comparing-immigrants-with-cordwood/?_r=0.

immigration reform: the objectification of immigrants. This comment is reminiscent of Arizona Sheriff Arpaio's remarks deriding Mexican border crossers as swine-flu carriers and his own reference to the "tent city" extension of the Maricopa County Jail as a "concentration camp."⁴² In addition, Arpaio's comments led the Arizona federal district court to find that his police department disproportionately singled out Latinos and advanced racial profiling of immigrants within Maricopa County.⁴³ Specifically the federal district court found in favor of the Plaintiffs and granted them injunctive relief.⁴⁴ The Court found that:

(1) detaining, holding or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons are in the country without authorization. (2) Following or enforcing its LEAR policy against any Latino occupant of a vehicle in Maricopa County. (3) Using race or Latino ancestry as a factor in determining to stop any vehicle in Maricopa County with a Latino occupant. (4) Using race or Latino ancestry as a factor in making law enforcement decisions with respect to whether any Latino occupant of a vehicle in Maricopa County may be in the country without authorization. (5) Detaining Latino occupants of vehicles stopped for traffic violations for a period longer than reasonably necessary to resolve the traffic violation in the absence of reasonable suspicion that any of them have committed or are committing a violation of federal or state criminal law. (6) Detaining, holding or arresting Latino occupants of a vehicle in Maricopa County for violations of the Arizona Human Smuggling Act without a reasonable basis for believing that, under all the circumstances, the necessary elements of the crime are present. (7) Detaining, arresting or holding persons based on a reasonable suspicion that they are conspiring with their employer to violate the Arizona Employer Sanctions Act.⁴⁵

This decision is important as it reinforces the notion that developing policing policies based on assumptions and stereotyping of a particular group is unconstitutional. This decision is a step towards

42. Esther Yu-Hsi Lee, *Sheriff Joe Arpaio's Four Most Racist Moments*, THINKPROGRESS (May 28, 2013, 5:27 PM), <http://thinkprogress.org/immigration/2013/05/28/2064801/top-joe-arpaio-moments/>.

43. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013), *aff'd*, 784 F. 3d 1254 (9th Cir. 2015); *see also* Darryl Webb, *Judge Rules Against Arizona Sheriff in Racial Profiling Suit*, REUTERS (May 24, 2013, 7:26 PM), <http://www.reuters.com/article/2013/05/24/us-usa-arizona-sheriff-idUSBRE94N0Y320130524>.

44. *Melendres*, 989 F. Supp. 2d at 912.

45. *Id.*

breaking the predictable pattern that has developed across the nation where local officials rail against the federal government's purported inaction and, while doing so, make inflammatory comments against Latinos, "illegals," and immigrants. Such comments and related anti-immigrant rhetoric by state and local officials now play a large role in framing local policies that are implemented in addressing immigrant juveniles who interface with the juvenile delinquency courts.⁴⁶ The rhetoric that is set forth in the media and policy debates actively contribute to the "othering" of undocumented immigrant youth, which influences state and local policies towards Latino immigrants.

2. Immigrant Children and Vulnerability

The stereotyping language and policing policies as described above in Knox County, Tennessee and Maricopa County, Arizona as explained below impacts the ways in which immigrant children, mainly Latino, are treated within the immigration and juvenile justice systems. Before examining the specific relationship of immigrant children's vulnerability in the juvenile justice system, it is important to understand the ways in which immigrant children relate to the legal system in the United States, which often gives them reduced agency.

For example, immigrant children are often afforded legal rights and status through their relationships with parents.⁴⁷ Rarely, until recently in the history of U.S. immigration laws, have immigrant children been able to change their immigration status without the support of an adult.⁴⁸ Further compounding the immigrant child's reduced agency is the fact that immigrant children are also mainly afforded immigration benefits through immigration laws aimed at protecting immigrant children from harm.⁴⁹ For example, immigrant children are offered protections under immigration law when they express a fear of returning to their country of origin through being granted asylum,⁵⁰

46. See Christine Reyna, Ovidiu Dobria & Geoffrey Wetherell, *The Complexity and Ambivalence of Immigration Attitudes: Ambivalent Stereotypes Predict Conflicting Attitudes Towards Immigration Policies*, 19 *CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL.* 342, 350–51 (2013) (discussing how stereotypes about immigrants enacted for the policies that affect them).

47. Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 29 *IMMIGR. & NAT'LITY L. REV.* 229, 233 (2008).

48. See Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. (June 15, 2012).

49. Shah, *supra* note 47, at 236.

50. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42).

when they are abused abandoned or neglected,⁵¹ or when they are victims of violence⁵² or trafficking.⁵³ The immigrant child's relationship to the immigration system has traditionally been one of dependence and victimhood. The immigrant child narrative has been one of a child seeking protection from harm.⁵⁴

Only recently through the Obama Administration's exercise of prosecutorial discretion, not legislative action, were undocumented children who migrated to the United States and have resided here for several years afforded temporary relief and the ability to remain in the United States through their dependency on their parents or victim status. Deferred Action for Childhood Arrivals ("DACA") is different from past immigration laws in which children's immigration has been derived.⁵⁵ Until DACA, immigrant children have related to the immigration system as victims or dependents. They have not been granted any agency over their status in relation to immigration laws.

In support of immigrant children's reduced agency, many scholars have identified undocumented immigrant children in many ways. There is often a dichotomy between the deserving and undeserving immigrant that plays out in the narratives created surrounding immigrant children.⁵⁶ Who is perceived as vulnerable within society often determines the choice of charity afforded to individuals within the legal system and the immigration system.⁵⁷ The deserving immigrant is a victim of his circumstances, whereas, the undeserving immigrant is one who actively transgresses societal norms and is not worthy of integration into the American populace.⁵⁸ Media, politicians and policies towards different immigrant populations create perceptions of deserving and undeserving immigrants.⁵⁹

We see this playing out with undocumented immigrant delinquent children in that they are in a category where they "fail to live up to idealized notions of autonomy, [and] . . . are blamed, and either

51. 8 U.S.C. § 1101(a)(27)(j).

52. 8 U.S.C. § 1101(a)(15)(U); § 1641(c)(1)(B)(i).

53. 8 U.S.C. § 1101(a)(15)(T).

54. Shah, *supra* note 47, at 233–34.

55. Barack Obama, President, U.S., Remarks by the President on Immigration (June 12, 2012); *see also* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. (June 15, 2012) (transcript available at whitehouse.gov).

56. LAUREN HEIDBRINK, *MIGRANT YOUTH, TRANSNATIONAL FAMILIES AND THE STATE: CARE AND CONTESTED INTERESTS* 173 (2014).

57. *Id.*

58. *Id.*

59. *Id.*

deprived of support or . . . severely punished.”⁶⁰ Undocumented youth are “caught between two identities—one that they have for themselves and another that the federal government places upon them.”⁶¹ Delinquent immigrant children are straddling two worlds. The first world places upon them a dependency on adults in order to obtain their immigrant status and identity.⁶² Whereas when Latino immigrant children transgress societal norms, the severe punishment that ensues divorces them from their dependency and fails to see them as minors, placing them outside the norms wherein children are seen as being worthy of rehabilitation and treatment under circumstances that are applied to U.S. citizen children within the juvenile justice system.⁶³

Correspondingly, the recent surge in unaccompanied immigrant youth entering the country has focused attention on the Southern border entry of unaccompanied minors and the “humanitarian crisis.”⁶⁴ The discussion has centered on a humanitarian crisis with children fleeing their countries in response to violence and poverty.⁶⁵ The increased attention given to immigrant juveniles at the border can be contrasted with undocumented immigrant youth, brought to the country as children, who have been residing in the U.S. since early childhood and end up interfacing with the state juvenile delinquency system.⁶⁶ The latter child, in some circles, may be categorized as a victim and may be perceived as the “safe” or “vulnerable” immigrant to afford more protection under the law, whereas the former is perceived as violating social norms.⁶⁷

As anthropologist Lauren Hiedbrink observed:

As a Border Patrol officer surveilling the Texas-Mexican border remarked to me, “But these are not *our* children,”; in fact, migrant children are not seen as possessing the vulnerability or rights of children at all. The detention, containment, and removal of the Other

60. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 *YALE J.L. & FEMINISM* 317, 321 (2014).

61. Shah, *supra* note 47, at 231.

62. *Id.* at 232–33.

63. HEIDBRINK, *supra* note 56, at 46.

64. Daneille Renwick, *The U.S. Child Migrant Influx*, COUNCIL ON FOREIGN RELATIONS: CFR BACKGROUNDEERS (Sept. 1, 2014), <http://www.cfr.org/immigration/us-child-migrant-influx/p33380> (discussing generally the influx of children on the U.S. Southern border and the humanitarian crisis).

65. *Id.* (“Experts say violence and poverty in sending countries and a desire to reunite with family members already in the United States, as well as a growing number of human smuggling networks, are the primary drivers of the migration.”).

66. See *infra* Part I.B; *infra* text accompanying notes 89–109.

67. Lauren Heidbrink, *Criminal Alien or Humanitarian Refugee?: The Social Agency of Migrant Youth*, 33 *CHILD. LEGAL RTS. J.* 133, 184 (2013).

are palatable. The illegality and perceived innate criminality of migrant youth have become the preeminent factor in the ways that they are apprehended, detained and cared for by law enforcement and child welfare authorities.⁶⁸

The border patrol agent's statement illustrates the invisible status of immigrant children who are viewed as not worthy of protection under U.S. laws. The border agent's perspective can be contrasted with advocates' narratives which place undocumented youth in a victim category where the children "are not responsible for their presence in this country, they live with the burdensome threat of deportation that drives them and their families into the shadows, marginalized by the need to remain invisible."⁶⁹ The contrast to this narrative that has been advanced more recently is that "[immigrant children] whose parents are identifiable are seen as reproductions of their parents' illegal or criminal behavior, destined to reproduce the same pathological behaviors embodied in the illicit presence in the United States."⁷⁰

Designating the unaccompanied child as a category of vulnerable victim frames mobility as a symptom of their vulnerability as children and a condemnation of the conditions spurring their migration. Advocates have come to frame this movement as representative of a rupture. The discourses of "lost childhoods" and social anxieties around the "lost generation" gain traction as advocates publicize the victimization of child migrants, abandoned children, and trafficking victims.⁷¹

As advocates may perpetuate the victim narrative in litigating cases for immigrant children, they must be cognizant of the repercussions of this narrative. For example, judges or immigration officers may be more receptive to narratives that play to stereotypes and depict children as victims with no agency in need of being saved by the immigration system. The dichotomy that the victim and vulnerable immigrant child creates versus the delinquent, undeserving immigrant child has repercussions on the ways in which immigrant children are dehumanized within the juvenile justice system and not afforded equal protection which inhibits their access to forms of immigration relief.

68. HEIDBRINK, *supra* note 56, at 49.

69. WILBER, *supra* note 16, at 5-6.

70. Heidbrink, *supra* note 67, at 154.

71. *Id.* at 171.

The way that the migrant child is perceived also is also impacted by race, gender, and socio-economic status.⁷² The juvenile delinquent undocumented immigrant is uniquely situated within this framework based on the fact that the majority of undocumented youth that interface with the juvenile system are young Latino males.⁷³ This particular population is viewed outside of the victim/dependent narrative, which makes this population susceptible to “othering” and more severe punishment when they transgress societal norms.

B. Layer Two: State and Local Juvenile Delinquency Systems

*Unaccompanied migrant youths become yet another group of unencumbered, untrustworthy, brown men requiring law-enforcement intervention to control the threat to the nation.*⁷⁴

An examination of the interface between the immigration system and juvenile justice system and its impact on Latino male juveniles reveals how race, lower socio-economic class and poverty intersect to create disparate treatment within these systems. Alarming statistics demonstrate how Latino boys are increasingly interfacing with the juvenile justice system. Across the country, there are approximately 600 juveniles arrested daily.⁷⁵ Every Latino boy born in 2001 has a one in six chance of going to prison.⁷⁶ Further, through the juvenile justice system school officials identify many Latino boys as gang threats.⁷⁷ The result is hyper-surveillance and hyper-criminalization of Latino boys for common adolescent behavior.⁷⁸

These statistics show how a juvenile justice system initially set up to rehabilitate children reinforces stereotypes and acts as a means to exclude vulnerable children. The juvenile justice system was set up in 1899 to recognize “the special status of youth as amenable to and worthy of rehabilitation.”⁷⁹ Some communities are utilizing the juvenile justice system to effectuate deportation of children instead of rehabili-

72. *Id.* at 156–57.

73. See Rios & Galicia, *supra* note 24, at 55.

74. HEIDBRINK, *supra* note 56, at 48.

75. Rios & Galicia, *supra* note 24, at 55.

76. *Id.* (citing Cradle to Prison Pipeline Campaign, *California Children in the Pipeline*, LOS ANGELES: CHILDREN'S DEFENSE FUND CALIFORNIA (Oct. 23, 2008), <http://www.childrensdefense.org/library/data/cradle-prison-pipeline-california-2008-fact-sheet.pdf>).

77. *Id.* at 56–57.

78. *Id.* at 57.

79. Selena Teji, *The Unnecessary Detention of Undocumented Youth*, CENTER ON JUVENILE AND CRIMINAL JUSTICE (Aug. 20, 2013), <http://www.cjcrj.org/news/6559>.

tating undocumented juvenile children, which results in separating families and implements a very adult punishment for very juvenile conduct.⁸⁰ In practice, the juvenile system has become an institution that increasingly criminalizes juvenile behavior and overlooks the ability to act as a mechanism to address the underlying issues that contribute to a child's delinquent acts.⁸¹

II. LOCAL, STATE AND FEDERAL POLICIES TOWARDS UNDOCUMENTED DELINQUENT IMMIGRANT YOUTH

Race, socio-economic status, and gender all contribute to the immigrant juvenile child's increased vulnerability within the immigration and criminal justice systems. The interactions between the juvenile justice and immigration systems work in tandem to criminalize undocumented immigrant youth behavior. For undocumented youth, criminalization occurs where individuals are dehumanized to the point where society feels justified in punishing the individual.⁸² When dehumanization occurs children may not have adequate access to due process with the justice system to defend against delinquency charges or assert a form of immigration relief.⁸³ Individuals who fall within this category are often poor, immigrant and minority populations."⁸⁴

It is in this light that interactions between the immigration and criminal justice systems must be examined as both of these systems have had adverse effects on minority, poor and immigrant populations.⁸⁵ Both systems interconnect wherein perceptions of immigrant children are influenced by the stereotypes that come with the use of the term "illegal aliens." In this context, "illegal alien[s] [are viewed as individuals] who must be apprehended, controlled and removed from the state. This social sensibility taps into social anxieties about an *invasion* or *flood* of 'illegal aliens', requiring repression and containment unaccompanied children in the same ways that their adult counterparts do."⁸⁶ "For unaccompanied migrant youth, the state's

80. Frankel, *supra* note 11, at 84–87.

81. *See id.*

82. *See, e.g.,* Rios & Galicia, *supra* note 24, at 55.

83. *Id.* at 55.

84. *Id.*

85. *See generally* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 404 (2013) ("From its inception, the juvenile court has operated as an institution for 'other,' nonmainstream youth living outside of the middle-class ideal.").

86. HEIDBRINK, *supra* note 56, at 41.

presumption is that they are an inherent risk to public safety and as a result, forfeit any opportunity for rehabilitation. Instead, by governing through crime, the state easily can remove them from the “home-land,” while those who are citizens remain incarcerated with little potential for rehabilitation.”⁸⁷ “The out-of-place migrant youth transforms from *at risk* to *the risk*.”⁸⁸

Several states and localities, which regularly interface with undocumented immigrant children, have developed policies, regulations and laws surrounding the detention and referral of undocumented immigrant children to Immigration and Customs Enforcement to initiate removal proceedings.⁸⁹ More prominently since September 2001, there has been a shift from border enforcement for the removal of immigrants to interior enforcement.⁹⁰ Interior enforcement is the removal of immigrants through referral to the Department of Homeland Security.⁹¹ With the passage of 1996 legislation, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), there was an increase of interior enforcement through the monitoring and verification of authorized immigrants within the United States.⁹² There also was an increase in the cooperation between federal, state and local governments with the creation of 287(g) agreements under

87. *Id.* at 46.

88. *Id.* at 48.

89. See generally S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-1509 (2010) (repealed); Jeffrey Kaye, *Enforcing Arizona's SB 1070: A State of Confusion*, IMMIGRATION POLICY CENTER 9 (July 2010), http://www.immigrationpolicy.org/sites/default/files/docs/Arizona_and_SB1070-_A_State_of_Confusion_072710.pdf; VICTORIA ANDERSON ET AL. UC IRVINE SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, WHY ORANGE COUNTY PROBATION SHOULD STOP CHOOSING DEPORTATION OVER REHABILITATION FOR IMMIGRANT YOUTH 4 (Annie Lai & Shamer Ashar eds., 2013), http://www.law.uci.edu/academics/real-life-learning/clinics/UCILaw_SecondChances_dec2013.pdf; CHILD TRENDS DATA BANK, JUVENILE DETENTION: INDICATORS ON CHILDREN AND YOUTH (2013), http://www.childtrends.org/wp-content/uploads/2012/05/88_Juvenile_Detention.pdf (discussing the varied policies on the detention of immigration youth that vary based on the individual state or locality in which the child resides).

90. See generally LISA M. SEGHEITTI ET AL., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT, 2-3 (2006) (focusing on the shift to interior enforcement of immigration laws after September 11, 2001 with the creation of the Department of Homeland Security) (stating “currently, there are express provisions in federal law that provide state and local law enforcement the authority to assist federal officers with the enforcement of immigration law under certain circumstances. Such authorities were enacted into law in 1996 in §439 of the Antiterrorism and Effective Death Penalty Act (AEDPA; P.L. 104-132) and §133 and §372 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; P.L. 104-206). In addition to the provisions enacted in AEDPA and IIRIRA, the DHS has several initiatives with state and local law enforcement agencies to facilitate the investigation, arrest and apprehension of foreign nationals who have violated the law, as discussed below.”).

91. *Id.*

92. See 8 U.S.C.A. § 1231.

IIRAIRA.⁹³ The 287(g) agreements permit state and local law enforcement officials to partner with the Department of Homeland Security, Immigration and Customs Enforcement Division under Memorandums of Agreement to apprehend and remove unauthorized immigrants from the country.⁹⁴ With the implementation of IIRAIRA and 287(g) programs, interior enforcement increased. Between 2006 and 2008, interior enforcement removals accounted for forty-three percent of removals.⁹⁵ Between 2011 and 2013, criminal removals accounted for eight percent of interior removals.⁹⁶ The implementation of these laws resulted in a shift to integrate state and local officials into the interior enforcement of immigration laws.

Under the state and local policies, once an undocumented immigrant child enters the juvenile justice system, prosecutors, probation officers, and juvenile justices may refer the child to Immigration and Customs Enforcement through placing an immigration detainer warrant on the child.⁹⁷ An immigration detainer warrant permits a state entity to place a hold on an immigrant for forty-eight hours after the conclusion of the state criminal proceedings.⁹⁸ During the forty-eight

93. Immigration and Nationality Act, § 287, (codified as 8 U.S.C.A. § 1357(g)) (“(1) Notwithstanding section 1342 of Title 31, United States Code, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.”).

94. *Id.*

95. *Id.*

96. *Id.*

97. See generally ANDERSON ET AL., *supra* note 89, at 4 (illustrating the point that individual local jurisdictions may develop their own policies regarding the referral of immigrant children to Immigration and Customs Enforcement); SEGHETTI ET AL., *supra* note 90, at 3 (discussing Congress’ first authorization of Quick Response Teams (QRTs) in 1999 to apprehend illegal aliens and deport them back to their country by working directly with state and local law enforcement officers. As of September 30, 2002, there were 45 QRTs in 11 different states, comprised of federal, state and local law enforcement officials, and established in areas that experienced an increase in illegal immigration. QRTs respond to requests from state and local law enforcement authorities who believe they have an illegal immigrant in custody. The federal law enforcement officials on a QRT usually include special agents, immigration officers and detention and removal officers. Congress appropriated funding for QRTs in FY1999 and FY2001.).

98. See generally 8 C.F.R. § 287.7 (2011) (providing that the Department of Homeland Security may advise a state prison, or another law enforcement agency, to detain an unlawful immigrant who is within their custody). Typically, the detainer process is commenced through a state or local entity contacting Immigration and Customs Enforcement Officers. Then, the Department of Homeland Security places a detainer advising a state prison, or another law enforcement agency, that ICE seeks custody of an alien presently in their custody. The law enforcement agency (state or local) must hold the immigrant for up to 48 hours, excluding Saturdays, Sundays, and holidays, to allow ICE to assume custody. The regulations empower the Department

hours, Immigration and Customs Enforcement must come and take the immigrant into custody.⁹⁹ If this time period elapses without Immigration and Customs Enforcement intervention, then the state and local officials must release the immigrant.¹⁰⁰ This policy is applicable to both adult and youth immigrants.¹⁰¹

Part of the increase in state and local enforcement has included the referral of undocumented juveniles who interface with the juvenile delinquency system to Immigration and Customs Enforcement.¹⁰² Different states and localities have developed varied policies towards whether to refer children to Immigration and Customs Enforcement on an ad hoc basis, strict referral policies, or to remain silent.¹⁰³ Some jurisdictions have developed policies where Immigration and Customs Enforcement officers are always contacted when an immigrant, undocumented and/or documented, is in their custody—strict referral policies—whereas, other jurisdictions, have developed policies based on varied local justifications and exercising prosecutorial discretion for referral of immigrants to Immigration and Customs Enforcement—ad hoc policies.¹⁰⁴ The discussion below outlines the varied and inconsistent policies in Arizona, Los Angeles, San Francisco and Oregon.

For example, Arizona's law (SB 1070) is an example strict referral policy. SB 1070 requires all police officers to investigate the immigration status of all individuals they stop if the officers suspect that the individuals are in the country unlawfully.¹⁰⁵ Under Arizona's policy, immigrant children are often referred to Immigration and Customs Enforcement.¹⁰⁶ Different counties in Arizona have, however, developed varying implementation of SB 1070 towards undocumented delinquent children. "In the city of Chandler, [Arizona] . . . if police

of Homeland Security to issue detainers "for the purpose of arresting and removing the immigrant from the United States." *Id.*

99. *Id.*

100. *Id.*

101. Teji, *supra* note 79 ("ICE may issue a non-binding request to detain . . . youth for up to 48 hours, excluding weekends and federal holidays, allowing ICE to assume federal custody. Counties that choose to respond to these requests hold youth in detention regardless of their criminal records or rehabilitative needs. These youth face complex challenges to participation in society as a result of their immigration status, which are exacerbated by the unnecessary detention.").

102. See generally ANDERSON ET AL., *supra* note 89, at 4.

103. WILBER, *supra* note 16, at 25.

104. *Id.*

105. ARIZ. REV. STAT. ANN. § 11-1051 (2010) (West).

106. Kaye, *supra* note 89, at 9.

suspect the immigration status of a juvenile, they will likely conduct an investigation of the parents.”¹⁰⁷ The city of Nogales will refer children directly to juvenile authorities based on perception of undocumented status.¹⁰⁸

In contrast to the varied policies in Arizona, the Los Angeles Police Department adopted a policy that prohibited its officers from initiating any police action for the sole purpose of investigating an individual’s immigration status. The policy was upheld by the California Court of Appeal. The court found that the policy was not preempted by, nor did it violate, federal immigration law.¹⁰⁹

Another jurisdiction, Oregon, has a state law that prohibits law enforcement agencies from utilizing any public resources “for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.”¹¹⁰

Similarly, “[i]n San Francisco, immigrant rights advocates have pushed for a revision of a 2008 ordinance that mimics the federal Secure Communities program, a controversial initiative that compels local cops to report to ICE the immigration status of all people they detain.”¹¹¹ Under the old policy, which was instituted by Lee’s predecessor Gavin Newsome, all undocumented youth who were arrested by city police were reported to Immigration and Customs Enforcement, even if their arrests never resulted in a conviction. Under this policy, an estimated hundreds of undocumented youth have been reported to immigration officials for deportation.¹¹² This policy is an example of the varied policies for the referral of immigrant children within the state or locality in which immigrant children reside.

In its 2013 policy, Orange County started detaining and referring youth to Immigration and Customs Enforcement based on their “questionable” immigration status.¹¹³ Under this policy, in 2011, 170 youth were referred to immigration.¹¹⁴ “Between October 1, 2009 and February 10, 2013, ICE issued immigration detainer requests for nu-

107. *Id.* at 8.

108. *Id.* at 9.

109. *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1410 (Cal. Ct. App. 2009).

110. OR. REV. STAT. § 181.850 (1987).

111. Julianne Hing, *San Francisco Narrows Policy on Reporting Immigrant Youth to ICE*, COLORLINES, May 18, 2011, http://colorlines.com/archives/2011/05/san_francisco_revises_policy_on_reporting_immigrant_youth_to_ice.html.

112. *Id.*

113. ANDERSON ET AL., *supra* note 89, at 4.

114. *Id.*

merous youth detained in Orange County Juvenile Hall.”¹¹⁵ Based on advocacy efforts by the University of Irvine’s Immigrant Rights Clinic, in June 2014, Orange County stopped referring youth to Immigration and Customs Enforcement and stopped all immigration holds after the conclusion of criminal proceedings.¹¹⁶ It is evident that there are varying state and local policies towards referring undocumented juveniles to Immigration and Customs Enforcement.

Currently, children in the immigration system are not viewed as rights holders capable of social and political agency.¹¹⁷ The U.S. government has not modified the immigration detainer system for children.¹¹⁸ Thus children and adults are treated the same.

The juvenile justice system is a system that is intended to be one of rehabilitation and treatment for children. Even though this is the goal, the juvenile justice system across the United States has become a system wherein children enter into a system rife with high recidivism rates and that is an entry into the criminal justice system.¹¹⁹

The failure of the immigration laws to require state and local uniformity in regards to the referral of immigrant youth to Immigration and Customs Enforcement facilitates arbitrary and unequal enforcement of immigration detainers on delinquent immigrant youth. Often, young Latino males bear the brunt of the ad hoc policies as they are the majority of youth offenders referred to Immigration and Customs Enforcement for removal from the United States.¹²⁰ Even though the

115. *Id.*

116. Roxanna Kopetman, *Orange County Sheriff's Department Ends All Immigration Holds*, ORANGE COUNTY REGISTER, June 23, 2014, <http://www.ocregister.com/articles/county-626924-department-ice.html>; Roxanna Kopetman, *O.C. Probation Department Ends ICE Holds*, ORANGE COUNTY REGISTER, June 3, 2014, <http://www.ocregister.com/articles/ice-616886-law-department.html>.

117. See, e.g., HEIDBRINK, *supra* note 56, at 159, 163.

118. Under 8 CFR § 287.7, there is no separate policy in instituting an immigration hold on a child—the same I-247 form is filled out by Immigration and Customs Enforcement for immigrant children. Once the child is in immigration custody, unlike adults, they are placed in the custody of the Department of Health and Human Services, Office of Refugee Resettlement, Division of Unaccompanied Children for detention under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. See generally William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008).

119. CHILD TRENDS DATA BANK, JUVENILE DETENTION: INDICATORS ON CHILDREN AND YOUTH 2 (2013), http://www.childtrends.org/wp-content/uploads/2012/05/88_Juvenile_Detention.pdf (“One estimate suggests that between 50 and 75 percent of adolescents who have spent time in juvenile detention centers are incarcerated later in life.”).

120. MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, DETENTION, DEPORTATION AND DEVASTATION: THE DISPROPORTIONATE EFFECT OF DEPORTATIONS ON THE LATINO COMMUNITY 1–4 (2014); see also Tanya Maria Golash-Boza, *Racial Profiling and Mass Deportation of Black and Latino Men*, RACISM REVIEW (May 15, 2012), <http://www.racismreview.com/blog/2012/05/15/racial-profiling-and-mass-deportation-of-black-and-latino-men/>

Federal Juvenile Justice and Delinquency Prevention Act expressly prohibits detaining a juvenile solely because he is undocumented, in practice, some jurisdictions have unlawfully detained children based upon their immigration status.¹²¹ Undocumented youth are deportable for not having the correct immigration status and the juvenile justice system is just an avenue for Immigration and Customs Enforcement to identify such youth for deportation.

The juvenile court referral of undocumented immigrant juveniles to Immigration and Customs Enforcement is a part of a model in which “[t]he juvenile court has shifted from a model based on the tutelary complex as a means of distributing social services to a more punitive mechanism of social control that ignores meditating conditions of structural poverty and racism, yet the conditions under which the court must operate also have changed.”¹²² As evidenced by the varied and ad hoc basis, strict referral policies, or to remain silent policies, states and localities can exercise a wide amount of discretion for referring immigrant juveniles to Immigration and Customs Enforcement to institute immigration proceedings for removal from the United States. The lack of uniformity and the amount of discretion local authorities can exercise over these decisions leaves room for a disproportionate number of Latino delinquent males to be targeted and referred to Immigration and Customs Enforcement for removal from the United States without regard for or consideration of the goals of rehabilitation that underlie the juvenile justice system or a complex legal analysis regarding the forms of immigration relief for which a delinquent immigrant child may be eligible.

CONCLUSION

The question becomes how to advocate for undocumented youth, like José, who are interfacing with these two systems where the goal has become exclusion—not rehabilitation of youthful behavior and a preference for family unity. The varied counter-narratives in which the immigrant youth are viewed present attorneys for undocumented youth in a precarious quandary. Attorneys are faced with constructing

(citing NEW YORK CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011, at 1–4 (2012), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf).

121. See 42 U.S.C. § 5633(a)(11) (2006) (“[J]uveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult . . . [and are aliens who have not charged with any offence] shall not be placed in secure detention facilities or secure correctional facilities.”).

122. HEIDBRINK, *supra* note 56, at 45.

narratives of their clients that conform to the constricting, stereotypical narratives that frame their clients as victims who are dependent in relation to the failed state and parental apparatus under which they may be able to successfully advocate and find relief for their clients or construct narratives of their clients that empower their client's stories and give them voice and agency in the direction of their lives and interactions with legal systems. The treatment of Latino delinquent males presents attorneys and advocates with an insurmountable task that must be addressed at a federal legislative level to promote uniformity, fairness and justice in the treatment of delinquent immigrant children who interface with actors within the juvenile justice and immigration systems.

