



Maintaining Parental Rights During Immigration Enforcement Actions and Detention

Summary Report

**Meeting Organized by
The Florence Immigrant and Refugee Rights Project,
The Women's Refugee Commission and
The Applied Research Center**

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Washington, D.C.

Background

While researching detention conditions for female immigrants, the Women's Refugee Commission uncovered an alarming trend: women detainees did not know where their children were. Upon further inquiry, Women's Refugee Commission staff learned that many parents are not given an opportunity to make decisions about care for their children before they are placed in immigration custody. All of these parents live with the fear that they will not be able to reunite with their children when they are released from detention or deported from the United States.

In many of these cases, permanent family separation occurs because it is simply too difficult or too expensive to reunite in a parent's home country after the parent is deported, or because a parent makes the difficult choice to leave a child behind in the United States. In the worst cases, parents actually have their parental rights terminated, often because they cannot participate in custody proceedings while they are in detention or because of a bias against immigrant parents in the family courts and child welfare system.

Since the Women's Refugee Commission began to formally focus on this issue in 2007, it has confirmed that this is a significant problem and one that has not improved. Millions of families in the United States have at least one parent who is an undocumented immigrant and one child who is a U.S. citizen. Such families are uniquely situated in relation to federal immigration law because immigration enforcement activities against the parents can have a particularly dramatic and disproportionate effect on the children. According to a report by the Department of Homeland Security, Office of the Inspector General, over 108,000 alien parents of U.S. citizen children were removed from the United States between 1998 and 2007. Many of these families are forced to make heart-wrenching decisions about who will leave the country and who will stay. For other families, however, there is no opportunity to make such a decision. When a parent is taken into immigration custody and a child is placed into the state child welfare system a complex series of events is triggered that can lead to permanent family separation and even termination of parental rights.

On November 3, 2010, the Florence Immigrant and Refugee Rights Project, the Women's Refugee Commission and the Applied Research Center convened 25 experts to discuss the issue of maintaining parental rights during immigration enforcement actions and detention.¹ The urgent need for this meeting was identified as a result of two smaller panel discussions on parental rights that occurred as part of the Detention Watch Network (DWN) national conference in Washington, D.C., in September 2009 and the national conference on unaccompanied alien children in Washington, D.C., in October 2009.

The convening organizations' goals were:

1. to identify and examine challenges immigration enforcement creates for the child welfare system and family courts;
2. to identify concrete policy and practice changes that could minimize infringement of parental rights;

¹ The term "parental rights" as used in this report encompasses the broader rights of *de facto* parents, such as legal guardians and other caregivers.

3. to share best practices and identify cross-discipline educational and/or training opportunities among the key players; and
4. to identify gaps in information and research needs to better address the issue.

Recognizing the need for experts from several disciplines, the conveners invited individuals with backgrounds in family law and policy; immigration law and policy; and child welfare law and policy. Participants included a family court judge; a *guardian ad litem*; immigration attorneys with relevant experience; the director of the American Bar Association's Center on Children and the Law; consultants in the field of child welfare; religious organizations; and national immigration and children's rights organizations. The participants came from Arizona, Illinois, Florida, Massachusetts, Michigan and New York.

The conveners made a conscious decision not to invite federal government officials. As this was the first time experts from these varied disciplines were coming together, the conveners determined that the absence of government officials would allow for a freer exchange of ideas and formation of consistent policy requests across disciplines. The conveners noted the absence of an affected family from the conversation; this was due in part to recognition of the emotional difficulty that could be created for an affected individual in this particular setting.

Overview of the Meeting

The Systems

During the first substantive session, experts from the three primary "systems" that impact parental rights during immigration enforcement and detention provided brief overviews of each system and identified existing problems that undermine parental rights. The systems that were outlined were immigration, the family court and child welfare. The goal of this session was to ensure that all participants started with the same basic knowledge about each system, recognizing that some participants would know more than others.

The experts discussing the **immigration system** focused on Immigration and Customs Enforcement (ICE), which is the agency in the Department of Homeland Security that carries out enforcement actions, detention and deportation. Experts provided an overview of how the expedited removal, immigration detention, deportation and court process work and how parents' due process rights could be negatively impacted. It was noted that:

- Experts were not aware of any consistent risk assessment being undertaken by ICE prior to detention that took into account parental rights and/ or family separation issues.
- Detained parents often have difficulty maintaining communication because phone systems are expensive; it is hard to locate individuals in the detention system; visitation is compromised by location and logistics; it is hard for parents to comply with reunification plans due to a lack of parenting classes and other classes offered in immigration detention facilities; and it is difficult for detained individuals to access legal counsel.

- Other bars to family unity include statutory three- and ten-year bars to reentry to the U.S. after deportation and stipulated orders of removal.
- It is often difficult for parents who want to take their U.S. citizen children with them when they are deported to arrange for this from detention; it is particularly difficult to obtain passports and other travel documents.

The expert on the **family court process** explained the strict timeline for dependency proceedings. The expert noted that it is often difficult for a family court judge to know if a parent is in immigration custody or has been removed from the country. From a family court perspective, other issues for a parent in immigration detention include:

- For parents who cannot be served with a notice of dependency proceedings because their whereabouts are unknown, there is a publication requirement. Child Protective Services (CPS) must make a reasonable effort to find parents. This can include posting a notice in a local newspaper. A detained or deported parent will not see such a posting.
- If a child is found to be dependent, there must be a reasonable effort to put reunification services in place. Unfortunately, in immigration detention there are no available services.
- Usually within six months to one year of removal from the parent, there is a permanency hearing. Next is a severance hearing followed by a termination trial. If the parent does not appear, severance can happen at the permanency hearing.

The expert noted that cases with parents incarcerated in immigration detention do not show up routinely and thus judges may not be familiar with the limitations on the parents. The National Council of Family Court Judges is working on providing consistent guidelines across family courts.

During the session on **child welfare**, several key principles were shared, including:

- No child welfare agency would want to remove a child from his or her family. However, it is often difficult, especially in immigrant communities with a high number of undocumented persons, to find the parents.
- In some states, undocumented individuals can serve as foster parents and receive state government funds at the non-licensed relative rate. They cannot receive a federal subsidy.
- In theory, pursuant to the Adoption and Safe Families Act (ASFA), a judge should not terminate parental rights solely because the parents are in administrative detention or are undocumented.
- While criminality may be an acceptable reason to terminate parental rights, it should be considered that criminal convictions may sound worse in immigration terms (e.g., “aggravated felony” could be a theft offense). In addition, immigration offenses are civil offenses, though they are often viewed as criminal offenses.

- There is a rising rate of females incarcerated for longer than the ASFA timeline. Several jurisdictions have passed legislation to address this phenomenon. These bills will be helpful in addressing parental rights issues in immigration detention.
- It is extremely important for child welfare workers to do a quality job at the beginning of the process. It is difficult to fill in missing information at the back end of the process. For example, in assessing identity, the worker must get the parent's full name. If they only get part of it (for example, Juan Gonzales) they will never find the parent.
- In states that do not have the unified family court model, the court that hears custody cases is not the same as that which hears dependency cases. In many cases, since there are two different agencies involved, this keeps the children out of the Department of Child and Family Services (DCFS), which can be a positive outcome as then there is no DCFS referral and no record of abuse.²
- Several states have language prohibiting social workers from calling immigration enforcement officers.

Ideal Policies and Principles to Protect Parents' Rights

In the next session, participants from each system discussed the various ideal policies and governing principles that should be implemented to protect parents' rights along a timeline from when an undocumented parent first encounters an enforcement official or an immigration hold until a parent is deported. The discussion assumed that the enforcement action included children under 10 and fewer than 25 undocumented individuals, so that the DHS arrest protocols for large enforcement actions did not apply. Conveners expected to find and discuss where the systems have conflicting practices. Instead, they found that over all the systems have complementary ideals. These included recognition that:

- release of the parent is the ideal outcome;
- improved time of arrest protocols for children and parents needed to be developed, disseminated and enforced;
- detained parents require improved conditions of detention, location, visitation and access to immigration and family court. They also require assistance with logistics to take their children with them if they are deported and if desired and appropriate.

There were several areas where the different systems' perspectives did not diverge, but where further discussion and brainstorming were useful. Thus, the participants discussed the following issues in greater detail:

Suitability of caregiver

Participants had earlier raised the perspective that informal placements with relatives or friends following an ICE enforcement action were effective in many instances as they would prevent a

² Department of Child and Family Services (DCFS) was the example used frequently during the conference to refer to the organization with jurisdiction over dependency issues in a state. Please note there is no standard name for this organization across states.

child from entering the child welfare system and therefore away from parental termination procedures. Experts explained that community-based service providers, in particular those who are already serving immigrant populations, could provide assistance to these caregivers and children.

In particular, community-based service providers could keep the children in the community and out of the public child welfare system by assisting the informal caregiver with family preservation services. They could assist with connecting the children with their parents in detention (as well as any parental advocates discussed in the next section of this report). They could also provide a safety net for these children by assisting them and their caregivers with community-based resources that they may need. For example, children often require counseling after such sudden and often traumatic separation from their parents. Finally, in those situations where necessary, community-based service providers could connect children with public child welfare. One example is where the informal caregiver abandons a child.

Thus, assistance of the community-based service providers was viewed as a way to ameliorate some of the difficulties presented by these informal care arrangements which include lack of information regarding the full consequences of being asked suddenly to take a child and need for increased resources for the sheltering family.

Parental guidance and resources

Participants discussed the need for detained parents to have an advocate to help them navigate the system and maintain communications with the child and the courts. While the group discussed the possibility of relying on individuals who already come into contact with detained parents, such as the chaplain, the deportation officer and the detention services manager,³ none was considered ideal. Several parameters did emerge. The person should offer guidance and resources. The person should be neutral (e.g., while they could be employed within the detention center already they should not be part of the deportation and removal system). One idea was that there be a designated advocate who is like a social worker. However, it was noted that in order for such an advocate to have enough authority to assist parents in attending family court hearings, the individual would have to be in a more senior position or have access to senior levels within DHS. Participants also discussed the possibility of using a model based on the ICE Victim Assistance program.⁴

Communication between systems

The group discussed how to increase communication between the systems and include all vital players in protecting parental rights. One suggestion was to capitalize on a recent Supreme Court decision, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney must accurately inform his or her client of the risk of deportation stemming from a guilty plea. The idea was to include information on the issue of parental rights during any trainings that resulted from the *Padilla* decision as a way to raise awareness of this problem with defense attorneys who

³ Detention services managers are ICE employees who are responsible for ensuring that the conditions of detention facilities that house ICE detainees are safe, secure and humane. They serve as a liaison for the agency, evaluating and ensuring that ICE detention facilities are administered and operated according to ICE requirements, expectations and the terms of operating agreements.

⁴ The Victim Assistance Program at ICE employs victim assistance specialists who have experience in social work, child welfare, human rights and counseling. Their primary goals are to ensure that crime victims' rights are protected, that they receive immigration relief when necessary and that they have access to services.

might come into contact with immigrant parents who have parental rights concerns. In addition, participants suggested that child defenders and others who may not be within the purview of *Padilla* need similar education on the issue of crimes and how they affect parental rights for the undocumented population.

In addition to this training, immigration attorneys need to know how to communicate with the family court and whom to notify. Some other possibilities for increasing communications are through legal orientation programs, know-your-rights presentations⁵ and children’s advocacy centers. Children’s advocacy centers such as the National Children’s Alliance are multidisciplinary and would be good partners for this issue, though funding is a concern.

Participants suggested creating a separate bar for representation of parents who have U.S. citizen children in court. They pointed out that court-appointed attorneys have overwhelmingly large caseloads. This results in the appearance of representation more than actual advocacy. In addition, there is a need for funding to enhance skill sets of judges, lawyers, court-appointed special advocates and others.

Legislative and administrative policies

Participants reviewed the current legislative and administrative policy initiatives from both the immigration and child welfare perspective. It was noted that very little is currently being done on this issue from the child welfare and family law perspectives.

In the 111th Congress,⁶ there were two bills—both named the Humane Enforcement & Legal Protections (HELP) for Separated Children Act—that addressed these issues. The House bill (HR 3531) was more progressive and set out the ideal. Both bills’ general approach was that release is the best way to protect parents’ rights. They operated from the assumption that programs such as Secure Communities will continue to exist. The legislation was written to fill the gaps not covered in the worksite raid regulations.⁷ The Senate bill (S 3522) did not go as far as the House bill, but did apply at the point of detention and prohibited transferring a parent from the initial area of apprehension until care arrangements could be made and parents and children know how to communicate. Of particular note, with the exception of minor amendments to the Social Security Act, all HELP provisions could be accomplished without passing new legislation if the administrative agencies changed their policies and procedures.

Regarding child welfare legislation, while there is currently no child welfare legislation directly addressing these issues, there are several pieces of legislation that could be helpful. The Child Abuse Prevention and Treatment Act, which is reauthorized every five years, includes provisions

⁵ The Legal Orientation Program (LOP) and Know Your Rights programs are innovative efforts to inform immigrant detainees about their rights, immigration court and the detention process through on-site presentations and discussions.

⁶ The 111th Congress met from January 3, 2009 through January 3, 2011.

⁷ The regulations referred to are the ICE “Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations.” These guidelines instruct ICE officers to plan in advance for the humanitarian screening of all individuals identified in worksite raids involving 150 or more people to ensure that vulnerable persons are identified and considered for release shortly after they are apprehended. In 2009, these guidelines were expanded to apply to worksite raids involving 25 or more people. While these guidelines have been helpful in reducing cases of family separation during large worksite raids, the guidelines do not apply to the majority of immigration apprehensions. Most family separation cases arise out of small-scale immigration enforcement actions, such as home raids, fugitive operations, traffic stops or jail screening programs.

that address family decision-making and differential response as alternatives to investigation. Title IV-E of the Social Security Act funds the costs of foster care for eligible children, adoptions for special needs children and guardianship assistance programs. It affects state practice because there are currently 33 requirements for state plans to receive Title IV-E funding. The experts suggested that in order to increase protections for immigrant children with parents in immigration detention, a requirement could be designed and added to the list of 33 requirements.

With regard to State-based considerations, experts suggested that participants continue to watch and evaluate so-called “copycat” laws based on the Arizona law SB 1070⁸ for implications and unexpected interpretations. Another strategy for dealing with some of the child welfare issues is to work to reconcile practices among states. The Uniform State Code system is one way to get standardized practices across States. It takes about five to seven years to implement. It was also noted that the Uniform State Code has the potential to erode parental rights if the wrong standardized practices are adopted. Therefore, the group should work to get out in front with good practices.

Regarding administrative initiatives, advocates have been meeting with ICE on detention reform. The main relevant outcomes of reform have been an on-line detainee locator system, a forthcoming risk-assessment tool to determine who needs to be detained and meetings on detention standards.

The on-line detainee locator system is in the pilot stage. Having seen this system, advocates have asked for a phone hotline or a more comprehensive and accessible alternative. The risk-assessment tool is still being developed and will be used to screen individuals coming into the immigration detention system. There are several concerns with this tool. First, it is limited to taking into account whether the individual is a sole caretaker, but not other care or custody situations. Also, because the ICE officers who are administering this screening are not specifically trained and sensitive to these issues, the officers may not elicit reliable information. In addition, because it would not be applied until a person comes into ICE custody, it could take days for the screening to occur and by then the children could be lost in the system.

Detention standards are not enforceable by law, but rather are at the discretion of ICE and contracting agencies. Nonetheless, advocates had been working for the standards to include improved provisions that allow detainees to exercise certain “rights,” such as access to family courts. ICE had included some very weak language in draft standards and told advocates that enforcing this language should not be a problem. Unfortunately, in 2011 (after this experts meeting convened), advocates were informed that due to internal issues within ICE, discussions with the nongovernmental community on the detention standards were on hold.

It was noted that most family separation cases arise out of small-scale immigration enforcement actions, such as home raids, fugitive operations, traffic stops or jail screening programs. Experts expect these methods of apprehension will increase as local law enforcement’s cooperation with ICE increases. Unfortunately, the one administrative protocol that offers ICE agents guidance on what to do when children are impacted by a small-scale enforcement action is not consistently followed across ICE field offices and participants felt universally that it is not consistent with

⁸ In Arizona, the Support Our Law Enforcement and Safe Neighborhoods Act was introduced as Arizona Senate Bill 1070 and is therefore often referred to as SB 1070. This broad anti-immigrant measure has received national and international attention and has spurred considerable controversy.

maintaining family unity and does not respect a parent's right to make decisions involving the best interest of his or her child. Under this protocol, ICE should first call the local child welfare agency. If this is not sufficient, then ICE should call the police and only as a last option should ICE allow parents to make the determination of where the child/ren should be placed.

Next Steps

Data and Research

At various points throughout the meeting, it became clear that effective advocacy would require credible data and stories. Seth Wessler from the Applied Research Center (ARC) in New York stated that ARC is researching the extent to which immigration enforcement produces parental rights issues. ARC plans to release a report of its findings in the next year.

Media

With regard to media and messaging, participants suggested that the most sympathetic focus may be on a particular child, such as a U.S. citizen child who has been "bounced around" the child welfare system. While non-immigration advocates might not be sympathetic to parents in detention, all sides tend to agree that children should not suffer this way. To deal with any confidentiality issues, it would be useful to find an older child who can speak about his or her past experience. Contacts to find such a child include national foster care alumni groups, reporters, social workers and pro bono networks. Another option would be placing an ad in migrant shelters across the border.

It was determined that other effective messages include focusing on the importance of family unity, rights such as due process and the cost savings of keeping children out of the foster care system. It was suggested that ways to spread the message include social networks such as Twitter and blogs such as Deported Diaspora and Mom's Rising.

Short-term projects and commitments

Participants agreed to take the lead on several short-term projects which were identified as ways to make a large impact in the near future. They are as follows:

- Tweak arrest protocols to comply with the ideal from a child welfare/family court perspective.
- Slightly revise the HELP Act to enhance child welfare principles and also to help move the legislation forward.
- Inventory existing trainings and other materials to see what exists that can be shared, and where the gaps exist. American Humane, Immigrant Advocates Network and Bridging Refugee Youth and Children's Services are places to look for these trainings, perhaps just creating a map of where to find materials and uploading materials that are not on any of these three websites.

- Other organizations and websites with materials include Center for Public Policy Studies (training material for judges), National Center for State Courts and The National Association for Counsel of Children.
- Publications where the group might consider adding materials related to this topic include The National Association for Counsel of Children's Child Welfare Law and Practice (Red Book), ABA Child Law Practice, Benders Immigration Bulletin and Interpreter Releases.
- Strategize on Uniform State Code and other broad-reaching policy statements such as an ABA policy statement on this issue.
- Create informational pamphlets that are an easy resource for judges. It should be short, credible and neutral, and frame the issues clearly. One place to disseminate it is through the Family Court Judge newsletter.
- Incorporate Parental Rights Issues into the legal orientation program.

Longer-term considerations

Participants recognized that funding is critical for organizations to move forward with this initiative. Participants suggested that the Department of Health and Human Services may provide funding for a pilot program and thought that the multi-disciplinary nature of the group would be attractive. Other points of interest to foundations that may be interested in funding work on this issue are that this is an international human rights issue, that the Inter-American Commission on Human Rights found that the United States practice violates international law and that the International Covenant on Civil and Political Rights also has relevant language on the respect for family life.

Participants agreed that they would continue to answer each others' questions and raise this issue at their forums. For example, immigration issues will be raised at child welfare conferences and there was another session on parental rights issues at the Detention Watch Network conference (March 31 to April 2, 2011).

Participants discussed that it would be helpful to have a follow-up meeting in nine to twelve months and to discuss a forward-looking goal. This timeframe would allow enough time for the ARC report to be finalized and short-term goals to be accomplished. In the short term, members of the group can work with each other through a Wiki site, the parental rights listserv and monthly check-in emails organized by the Women's Refugee Commission staff.

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