

THE BREAKDOWN OF A SYSTEM: THE CONSEQUENCES OF PERMITTING DANGEROUS ILLEGAL JUVENILE ALIENS TO RESIDE IN YOUR COMMUNITY

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I. INTRODUCTION

When Doreen Landry said goodbye to her son, Matt Landry, she had no idea it would be the last time. Only a few hours later, Matt was kidnapped from a local restaurant and ultimately murdered by a single gunshot wound to the head.¹ His body was found four days later, discarded like a bag of trash in an abandoned house in Detroit.² One of his alleged killers, seventeen-year-old Ihab Maslamani, is an illegal alien

1. Christine Ferretti, *Teen Turns Himself in After Carjacking Death*, DETROIT NEWS, Aug. 25, 2009, at A3.

2. *Id.*

from Lebanon who was in and out of the Michigan foster care system for the past eight years.³

During his illegal stay in the United States, Maslamani acquired a long juvenile record and displayed increasingly aggressive behaviors.⁴ In fact, at the time of Matt Landry's murder, Ihab was an escapee from a juvenile detention facility located in Detroit.⁵ Unfortunately for the Landry family, Ihab remained in the United States despite his illegal status and long delinquency record. After listening to the tearful testimony of Landry's mother at Ihab's preliminary examination,⁶ the question asked by many was *why was this illegal juvenile delinquent allowed to remain in the United States for so many years, rather than being deported before he murdered an innocent human being?*

The answer to this question is not clear, nor will it bring back Matt Landry. However, a closer examination of current immigration law will demonstrate how it is possible that a dangerous illegal juvenile alien like Maslamani was allowed to remain in the United States for nine years, and further, the many problems the system creates. This Note argues that permitting serious or habitual juvenile delinquents to remain in the United States illegally is not only futile because it is unlikely that they will become legal residents, but it also places society in greater danger.

Part II of this paper discusses the ways in which an illegal juvenile alien may enter the court system in the United States but nevertheless is allowed to remain in the United States. Part II also provides a background of the immigration consequences of a delinquent and criminal act, and then differentiates between the two. Part III discusses the problems associated with permitting illegal juvenile aliens who commit serious offenses to remain in the United States, and then advocates several proposals for addressing the issue of illegal alien juvenile delinquents. In conclusion, Part IV applies the analysis to Maslamani's situation.

3. *Documents: Parents Sent Teen to U.S.*, CLICKONDETROIT.COM (Aug. 14, 2009), <http://www.clickondetroit.com/news/20400787/detail.html>. Ihab and his sister were sent to the United States to live with relatives over nine years ago by their mother, who remained in Lebanon. *Id.* Ihab and his sister entered the foster care system in 2001 as a result of a neglect petition. *Id.*

4. *Id.*

5. *Id.*

6. Melanie D. Scott, *Matt Landry's Mother Testifies in Tears*, DETROIT FREE PRESS, Nov. 13, 2009, at A5.

II. BACKGROUND

A. Retaining Jurisdiction Over an Illegal Juvenile Alien

In juvenile proceedings, the term “jurisdiction” has two meanings. The first relates to the court’s power over the parties and its authority to hear the subject matter of the controversy.⁷ Generally, a juvenile court has jurisdiction over minors, whether legal or illegal, who are found within its territory.⁸ Thus, if a minor is alleged to be abused, neglected, or abandoned and a petition is filed with a court, that minor comes within the jurisdiction of the juvenile court regardless of his illegal status.⁹ Similar to abused, neglected, or abandoned minors, a juvenile court has jurisdiction over juveniles who commit delinquent or criminal acts within its territory, despite their illegal status.¹⁰

7. See 14 AM. JUR. *Trials* § 619 (2009). In Michigan, for example, a juvenile court has jurisdiction over proceedings involving a minor under the age of 18 found within the county in which the court is located, and it is alleged that the minor has been abused, neglected, or abandoned by his or her parent. MICH. COMP. LAWS ANN. § 712A.2(b)(1) & (2) (2009). Further, a juvenile court has jurisdiction over juveniles under the age of 17 found within the county who violate an ordinance or law, run away from home, repeatedly disobey their parents, or truant from school. *Id.* § 712A.2(a)(1)-(4).

8. See *Gao v. Jenifer*, 185 F.3d 548, 554 (6th Cir. 1999) (“[S]tate juvenile courts generally have jurisdiction over immigrant juveniles within their territory, whether legally admitted into the United States or not.”).

9. There is a limit to this jurisdiction, but it only applies in cases where the juvenile is already in the custody of the Department of Health and Human Services (DHHS). See 8 U.S.C.A. § 1101(a)(27)(J)(iii)(I) (2009). If the juvenile is in the actual custody of DHHS and subsequent allegations of abuse, neglect, or abandonment are presented, the juvenile court does not have jurisdiction over the alien juvenile “unless the Secretary of Health and Human Services specifically consents to such jurisdiction.” *Id.*

10. See *Gao*, 185 F.3d at 554. It is important to note that a minor who commits an offense is not automatically charged as a juvenile. See Barry C. Field, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 11-13 (2008). Each state has its own procedure for determining whether the minor should be charged as a juvenile or as an adult. See *id.*; see also Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 520 (1995). Although traditionally the juvenile court had sole discretion to make this decision, state legislatures eventually became involved as a result of a sharp increase in violent juvenile offenses. *Id.* Some enacted statutes requiring a transfer to adult criminal court for very serious crimes, and others endorsed judicial waiver or prosecutorial waiver as the process for making the determination. *Id.* Today, many states use a combination of the three. *Id.* A minor charged with a federal offense is covered by the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C.A. § 5031-5037 (2009). If it is determined that the juvenile will be charged as an adult, jurisdiction will transfer from the juvenile court to the adult criminal court. 47 AM. JUR. 2D *Juvenile Courts* § 46 (2010).

Jurisdiction also refers to the power of the court to “retain” jurisdiction over the minor – meaning the “power to supervise the minor’s life to the extent necessary.”¹¹ This results from a factual determination made by the court that the minor’s “conduct constitutes delinquency or incorrigibility, or because the[] facts establish that the minor is dependent or neglected.”¹² Regardless of whether jurisdiction is established through delinquency or dependency proceedings, entering the court system increases the possibility of bringing the juvenile’s illegal status to the attention of Immigration and Customs Enforcement (ICE).¹³

B. Ways a Juvenile Alien is Allowed to Remain in the United States Despite His Illegal Status

Generally, an illegal alien can be removed based solely on his illegal presence in the United States.¹⁴ However, the alien must actually be brought to the attention of ICE before removal proceedings are initiated. Whether local authorities report the illegal status of an alien juvenile to ICE generally depends on local and/or state policy.¹⁵ Moreover, even if the alien is brought to the attention of ICE, there are several factors which could avert deportation proceedings.¹⁶

11. 14 AM. JUR. *Trials* § 619 (2009).

12. *Id.*

13. Cf. C. Kevin Morrison, *At the Immigration of Law and Juvenile Justice*, 38 JUNE PROSC. 16, 17 (2004) (“[M]any juvenile prosecutors from time to time will receive requests from defense counsel to dismiss or defer a case because the respondent or a family member is undocumented.”).

14. Compare 8 U.S.C.A. § 1227(a)(1)(A) (2008) (“Any alien who at the time of entry . . . was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”), and 8 U.S.C.A. § 1227(a)(1)(B) (2008) (“Any alien who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable.”), with 8 U.S.C.A. § 1182(a)(6)(A)(i) (2009) (“Any alien present in the United States without being admitted or paroled . . . is inadmissible.”).

15. Some cities have enacted “sanctuary policies,” while others have enacted policies requiring city officials to report the illegal presence of aliens in their community. See Corrie Bilke, *Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities’ Role in the “Illegal Immigration” Debate*, 42 IND. L. REV. 165, 178-81 (2009); see also Morrison, *supra* note 13, at 17 (“The question . . . is whether there is a legal or ethical obligation to report the presence of an undocumented alien to the Bureau of Citizenship and Immigration Services (CIS), and that is largely a matter of local practice and policy.”) (internal citations omitted).

16. See discussion *infra* Part II.B.2-3.

1. Sanctuary Cities

Some cities have policies which prohibit city employees from inquiring into an individual's immigration status, or even notifying immigration authorities as to the presence of illegal aliens in their community.¹⁷ In these so called "sanctuary cities," the juvenile alien would not be removed because ICE would never become aware of his illegal presence.¹⁸

Although Congress prohibited these types of "sanctuary" policies in 1996 when it passed both the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)¹⁹ and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),²⁰ numerous cities continue to enact and abide by such policies.²¹ The rationale behind these policies was to encourage illegal aliens to report criminal activity in their communities without fear of deportation.²² Today, unfortunately, many cities are using such policies to shield illegal juveniles who commit serious crimes from deportation.²³

17. See Susan M. Bartlett, *Grass Roots Immigration Reform*, 69 L.A. L. Rev. 989, n. 55 (2009). A partial list of the big cities that have some sort of a sanctuary policy: Detroit; Chicago; New York City; Washington D.C.; Miami; Houston; Austin; Seattle; Denver; Los Angeles; San Diego; and San Francisco. OJJAPAC: "Sanctuary Cities, USA", OHIO JOBS & JUSTICE PAC, <http://www.ojjpac.org/sanctuary.asp> (last visited Jan. 5, 2010). For further discussion of the various forms of sanctuary policies, see Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1474-75 (2006).

18. See sources cited *supra* note 17.

19. 8 U.S.C.A. § 1373(a) (1996):

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

8 U.S.C.A. § 1373(a) (1996).

20. 8 U.S.C.A. § 1644 (1996):

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

8 U.S.C.A. § 1644 (1996).

21. See *supra* text accompanying note 17.

22. Lauren Smiley, *Sanctuary Sellout*, SFWEEKLY.COM (Nov. 18, 2009), <http://www.sfweekly.com/2009-11-18/news/sanctuary-sellout/2>.

23. R. Cort Kirkwood, *Sanctuary in San Francisco*, THE NEW AMERICAN, (Oct. 27, 2009), <http://www.thenewamerican.com/index.php/usnews/immigration/2174-sanctuary-in-san-francisco>.

There are strong opinions on both sides of the sanctuary debate. Supporters of such policies argue that these juveniles should be treated as victims rather than criminals, and thus “should be treated within the social welfare system.”²⁴ Those opposing sanctuary policies argue that such policies violate federal law and places society as a whole at risk.²⁵

2. “Lost” in Foster Care

Many times an illegal juvenile will enter foster care as a result of being brought under the jurisdiction of a court.²⁶ This is true even when ICE is notified and deportation proceedings are initiated. As a result of the 1997 settlement agreement in *Reno v. Flores*, an illegal juvenile is afforded the least restrictive setting depending on their age and any special needs.²⁷ This means that if there is no parent or other willing relative to whom the juvenile may safely be released, he may be placed in foster care as opposed to being locked up in an INS detention facility.²⁸ The juvenile may, however, be placed in a minimum security juvenile detention facility if he has committed a delinquent or criminal act, poses a threat to safety, or is a flight risk.²⁹ If the juvenile is placed in

24. Jaxon Van Derbeken, *S.F. Court Lets Teenager in Drug Case Stay in U.S.*, SAN FRANCISCO CHRON., Aug. 26, 2008, at A1. Opponents of sanctuary policies concede that when a juvenile is truly a victim of abuse, neglect, or abandonment, he would be a low-priority for deportation. *Id.* However, they also note that the police are catching these so-called “victims” dealing crack and other hard drugs. *Id.*

25. See, e.g., Douglas R. Sahmel, *How Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149, 152 (2006).

26. See generally Van Derbeken, *supra* note 24, at A1.

27. See Stipulated Settlement Agreement at 7, *Reno v. Flores*, 507 U.S. 292 (1993) [hereinafter *Flores Settlement Agreement*], available at http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf (last visited Jan. 6, 2011).

28. One particular foster program, run by the nonprofit agency International Education Services, reimburses foster parents for costs of ensuring the illegal juveniles experience the “environment”, which could include trips to parks and malls. See Lynn Brezosky, *Foster Program for Immigrants Criticized*, WASH. POST (July 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/21/AR2007072100678.html>. It also equips all foster homes with cribs “for the many teenage girls arriving with babies or in advanced pregnancy.” *Id.* The agency receives substantial amounts of federal funding to pay for this – from January 2007 to July 2007, it received over \$5 million in federal money. *Id.*

29. *Unaccompanied Juveniles in INS Custody*, USDOJ (Sep. 28, 2001), <http://www.justice.gov/oig/reports/INS/e0109/chapter1.htm>.

foster care, it is then up to his “sponsor” to make sure he attends all immigration hearings.³⁰

Sometimes ICE is notified of the juvenile’s illegal status but decides not to initiate deportation proceedings. The main reason for such a decision is that ICE does not have the resources to deport every illegal alien who is brought to its attention.³¹ Like most agencies, ICE prioritizes its enforcement of the law in order to maximize its effectiveness. According to United States District Attorney Joseph Russoniello, “enforcement priority is directed toward those persons whose arrests evidence probable cause to believe they pose a threat to their communities.”³² If ICE determines that the juvenile is truly dependent and does not pose a risk to the community, the juvenile is considered to be a lower priority for deportation than those who commit dangerous crimes.³³

3. Path to Legal Status

Even if ICE is notified of the juvenile’s illegal presence, special circumstances may prevent the juvenile alien from being deported. For instance, if the juvenile cannot return to his home country due to abuse, neglect, or abandonment by his parents, then the juvenile may be saved from deportation and placed on the path to legal status.³⁴

A juvenile alien who is brought under the jurisdiction of a juvenile court may become eligible for legal status if there is evidence of abuse,

30. See Brezovsky, *supra* note 28. Many times, however, illegal juveniles who enter foster care “eventually fade into the nation’s illegal immigrant subculture, easily becoming lost in a maze of homeland security and social service agencies.” *Id.* One study estimates that 68 percent never show up to the immigration hearings. *Id.*

31. Joe Vazquez, *U.S. Attorney Maintains SF Sanctuary City Threats*, CBS.COM (Dec. 4, 2009), <http://cbs5.com/local/sanctuary.city.veto.2.1304580.html>.

32. *Id.*

33. See Van Derbeken, *supra* note 24, at A1.

34. See 8 U.S.C.A. § 1101(a)(27)(J) (2009). Special Immigrant Juvenile Status not only protects the juvenile from deportation, but it also assists him in obtaining legal status. Generally, an alien must have entered the United States legally to become eligible for a visa and adjustment of status to permanent resident. 8 U.S.C.A. § 1182(a)(6) (2009). However, a juvenile granted SIJS will not be deemed ineligible for a visa based solely on illegal entry. 8 U.S.C.A. § 1255(h)(1) (2009). Furthermore, SIJS provides for an automatic waiver of certain categories that would otherwise deem an alien inadmissible. *Id.* § 1255(h)(2)(A) (2009). Some of the waivable categories include a likelihood of becoming a public charge, 8 U.S.C.A. § 1182(a)(4) (2009), being present without admission or parole, *Id.* § 1182(a)(6)(A), seeking a visa or admission by fraud or willful misrepresentation, *Id.* § 1182(a)(6)(C), being a stowaway, *Id.* § 1182(a)(6)(D), and failing to be in possession of a valid immigration documents *Id.* § 1182(a)(7)(A).

neglect, or abandonment by a parent.³⁵ Congress recognized the importance of protecting these juveniles by affording them a special status to assist them in obtaining permanent residency.³⁶ Special Immigrant Juvenile Status (SIJS) is available not only to a juvenile alien in a dependency proceeding, but also to one in a delinquency proceeding.³⁷ The juvenile court must determine that “reunification with 1 or both parents is not viable due to abuse, neglect, [or] abandonment,”³⁸ and further, that it is not in the best interests of the alien to return to his home country.³⁹

C. Immigration Consequences of an Illegal Juvenile Alien’s Delinquent or Criminal Act

First and foremost, any person who is not a United States citizen by virtue of birth is subject to deportation.⁴⁰ Even naturalized citizens can have their citizenship stripped and subsequently subjected to removal.⁴¹ Further, an alien who has *entered* the United States is deportable, whereas an alien *seeking* to enter the United States is excludable.⁴²

35. 8 U.S.C.A. § 1101(a)(27)(J)(i) (2009).

36. Because SIJS is an avenue for permanent residency, the potential for abuse was recognized. In an effort to deter abuse of SIJS, Congress added a provision in 1997 requiring the consent of the attorney general (now the secretary of homeland security) to the dependency order, and also requiring the attorney general’s consent (now the secretary of health and human services) prior to a juvenile court even taking *jurisdiction* over a juvenile who is in the custody of Immigration and Naturalization Services (now Department of Health and Human Services). See Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 448-49 (2001). Furthermore, Congress included a provision barring a recipient of SIJS from ever sponsoring a parent. 8 U.S.C.A. § 1101(a)(27)(J)(iii)(II).

37. See Morrison, *supra* note 13, at 19 (noting that the SIJS statute does not expressly limit the jurisdiction to a dependency proceeding, and further, that the language of the statute is broad enough to include a delinquency proceeding).

38. 8 U.S.C.A. § 1101(a)(27)(J)(i) (2009).

39. *Id.* § 1101(a)(27)(J)(ii). Further, the Secretary of Homeland Security must consent to the granting of such status. *Id.* § 1101(a)(27)(J)(iii).

40. See Jolley v. INS, 441 F.2d 1245, 1248 (5th Cir. 1971) (holding that a United States citizen by virtue of birth is subject to deportation only by voluntary relinquishment of citizenship, “and not by legislative fiat.”).

41. See Vinineath Nuon Gopal, *From Judicial to Administrative Denaturalization: For Better or For Worse?*, 72 U. COLO. L. REV. 779, 780 (2001). The process by which a naturalized citizen has his citizenship stripped is called denaturalization. *Id.* Reasons a naturalized citizen may face denaturalization include, but are not limited to, “if the citizenship was granted by mistake” or obtained through fraud or misrepresentation. *Id.* at 801.

42. 3B AM. JUR. 2D *Aliens & Citizens* § 1513 (2009)

When an alien commits an offense, it can have various consequences on his immigration status. First, an illegal alien, that is, an alien present in the United States without authorization, may be deported at any time.⁴³ Second, an alien present in the United States may be denied adjustment of status to permanent resident for committing certain criminal offenses.⁴⁴ Lastly, an alien in lawful permanent resident status may face deportation for a criminal conviction.⁴⁵ Whether an offense renders an alien deportable as opposed to inadmissible depends on his age, and more specifically whether he was tried as a juvenile or an adult.⁴⁶

1. Deportation vs. Inadmissibility

If an alien is in lawful permanent resident status (LPR), convictions for certain crimes may result in the alien's deportation.⁴⁷ For example, an alien is deportable if convicted of a crime involving moral turpitude,⁴⁸ an aggravated felony,⁴⁹ a violation of a controlled substance law,⁵⁰ certain firearm offenses,⁵¹ or crimes of domestic violence, stalking or child abuse.⁵²

In contrast, an alien who is seeking entry into the United States or adjustment of status to a LPR may be deemed inadmissible, and thus removable, on several additional grounds. In addition to a conviction of certain crimes rendering an alien inadmissible, the mere *admission* of committing such crimes, or the acts which constitute the elements of such crimes, will render the alien inadmissible.⁵³ Further, an alien is inadmissible if the attorney general merely has "reason to believe" that the alien is involved in drug trafficking or money laundering.⁵⁴

2. Delinquent vs. Criminal Act

It is well established that juvenile offenses are not considered "crimes" in the United States, and thus juvenile delinquency

43. 8 U.S.C.A. § 1227(a) (2008).

44. See 8 U.S.C.A. § 1255(a) (2009); 8 U.S.C.A. § 1182(a)(2) (2009).

45. 8 U.S.C.A. § 1227(a)(2) (2008).

46. See *infra* Part II.C.2.

47. *Id.*

48. 8 U.S.C.A. § 1227(a)(2)(A)(i) (2008).

49. *Id.* § 1227(a)(2)(A)(iii).

50. *Id.* § 1227(a)(2)(B).

51. *Id.* § 1227(a)(2)(C).

52. *Id.* § 1227(a)(2)(E).

53. 8 U.S.C.A. § 1182(a)(2)(A)(i) (2009).

54. 8 U.S.C.A. § 1182(a)(2)(C), (I) (2009).

adjudications are not “convictions” of a crime for immigration purposes.⁵⁵ Therefore, an alien is not deportable based solely on an adjudication of juvenile delinquency. Furthermore, an illegal alien is not inadmissible for admitting to conduct which would have resulted in a juvenile delinquency adjudication because the alien would merely be admitting to an act of juvenile delinquency, which is not a crime in the United States.⁵⁶

There are, however, several types of conduct which could render a juvenile alien inadmissible, regardless of whether he was treated as a juvenile or as an adult in the proceedings. Some examples are engaging in prostitution,⁵⁷ being or previously being a drug trafficker,⁵⁸ drug addict, or drug abuser,⁵⁹ or lying or using false documents for immigration benefits.⁶⁰

55. See *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135, 137 (B.I.A. 1981). The Federal Juvenile Delinquency Act (FJDA), 18 U.S.C.A. §§ 5031-5042 (2009), defines a “juvenile” as a person under the age of 18, or a person under the age of 21 for purposes of proceedings under the act for an alleged act of juvenile delinquency, and defines “juvenile delinquency” as “the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult” The FJDA applies to juveniles who commit offenses in the United States and are tried in federal court, and also to juveniles who committed offenses in another country and seek admission to the United States. See Jean M. Radler, Annotation, *Treatment, Under Federal Juvenile Delinquency Act (18 U.S.C.A. §§ 5031-5042) of Juvenile Alleged to Have Violated Law of United States*, 137 A.L.R. FED. 481 (1997). More often than not, a juvenile who commits an offense is tried in state court, and thus it is up to the individual state to determine whether to try the minor as a juvenile or as an adult. See U.S. Citizenship and Naturalization Handbook § 8:4; see also *supra* Part II.A.2. If a state court transfers a juvenile to adult court and the juvenile is convicted as an adult, it is unsettled whether the disposition is a conviction for immigration purposes, especially where the conduct would require juvenile treatment under the FJDA. See U.S. Citizenship and Naturalization Handbook § 8:4. At least two circuits have ruled that these dispositions are convictions for immigration purposes, despite the fact that the FJDA would require the same conduct be given juvenile treatment. *Id.* The other circuits are silent on the issue. *Id.*

56. *In re C.M.*, 51 I. & N. Dec. 327, Interim Decision 481 (B.I.A. 1953).

57. 8 U.S.C.A. § 1182(a)(2)(D) (2009).

58. *Id.* § 1182(a)(2)(C).

59. *Id.* § 1182(a)(1)(A)(iv).

60. *Id.* § 1182(a)(6)(C).

III. ANALYSIS

A. The Problems Associated With Permitting Serious or Habitual Juvenile Delinquent Aliens to Remain in the United States Illegally

The rationale behind treating juvenile offenders differently from adult offenders is “to provide for the care, discipline, education, and reform of juvenile delinquents, in order to rehabilitate them and restore them to a higher grade of character and a better quality of citizenship.”⁶¹ Thus, the focus for juvenile offenders is more on rehabilitation, and less on punishment. This rationale is understood and well accepted in the United States.⁶² Although it encompasses most juvenile offenders, it does not support treating serious or habitual illegal juvenile delinquents differently from adult offenders because the likelihood of them becoming productive members of society, and thereby rehabilitated, is low.

1. Low Probability of Obtaining Legal Status

An alien seeking adjustment of status to that of permanent resident must be admissible to the United States and eligible to receive an immigrant visa.⁶³ Further, such visa must be immediately available to the alien at the time of application.⁶⁴ If the alien meets these three requirements, then the alien is statutorily eligible for adjustment of status.⁶⁵ However, because “[a]djustment of status is a matter of grace, not of right,” the attorney general (or his designee) has the discretion to grant or deny the application.⁶⁶

There are several ways in which a juvenile delinquency adjudication can render a juvenile ineligible for LPR status. First, if the juvenile falls into one of the categories of inadmissible aliens that does not require a “conviction,” he may be statutorily ineligible for adjustment of status.⁶⁷ Second, even if the juvenile does not fall into one of the statutory categories of inadmissibility, he may still be found undesirable as a

61. 14 AM. JUR. *Trials* § 619 (2009).

62. *Id.*

63. 8 U.S.C.A. § 1255(a) (2009).

64. *Id.*

65. *See* Che-Li Shen v. Immigration & Naturalization Serv., 749 F.2d 1469 (10th Cir. 1984).

66. *See* Wallace v. Gonzales, 463 F.3d 135, 137 (2d Cir. 2006).

67. Examples of categories that do not require a “conviction” are engaging in prostitution, being or previously being a drug trafficker, drug addict or drug abuser, or lying or using false documents for immigration benefits. *See* sources cited *supra* notes 57-60.

permanent resident based on the delinquent acts and consequently denied adjustment of status.⁶⁸ Thus, even if the alien's delinquency adjudications do not render him statutorily ineligible for adjustment of status, he may still be denied discretionary relief based on those same adjudications.

Although delinquency adjudications "presumably count less heavily against an applicant than would an adult conviction," an alien can still be denied adjustment of status absent any convictions on his record.⁶⁹ Courts generally look to the seriousness of the offenses and the extent of the juvenile's delinquent history.⁷⁰ Thus, serious and/or habitual juvenile offenders are at a much higher risk of being denied adjustment of status to LPR. There are many consequences for not obtaining legal status. For example, an illegal alien in the United States is not permitted to work legally, access the majority of public benefits, receive federal financial aid for college or in-state tuition in some states, or obtain a driver's license in many states.⁷¹

Permitting a juvenile who has a low probability of obtaining legal status to remain in the United States illegally is not only futile, but it also sets the juvenile up for failure in adulthood. A young adult does not have many options if he or she is prohibited from working legally or obtaining financial aid for college. If that same young adult has a lengthy juvenile record with serious offenses, his options become even more limited. A prime example is that of Milagro Cunningham, an illegal juvenile alien charged with the kidnapping, rape, and attempted murder of an eight-year-old girl.⁷² Without proper documentation, Cunningham could not get a job or continue attending school. As a result, "he played video games and basketball, spending his nights on the sofa of a sympathetic

68. See *Wallace*, 463 F.3d at 139. When the Board of Immigration Appeals makes the determination whether to grant an application for adjustment of status to a lawful permanent resident, "juvenile offenses not counting as 'convictions' under the immigration law may nonetheless be considered when determining whether an alien merits discretionary relief." *Id.*

69. See *id.* ("Because the purpose of adjustments of status is to provide worthy aliens with special relief, we see no reason to prevent [a court] from considering an applicant's anti-social conduct – whether leading to a conviction, a Youthful Offender Adjudication, or no legal judgment whatsoever . . .").

70. *In re Michael Terrance Wallace*, 2005 WL 952488 (B.I.A. 2005), *appeal denied in part and dismissed in part* by 463 F.3d 135 (2nd Cir. 2006).

71. Amy Meselson, *Immigration Issues of Juveniles*, 198 PLI CRIM 207, 211 (2004).

72. See Michelle Malkin, *Milagro Cunningham is an Illegal Alien*, (May 24, 2007) <http://michellemalkin.com/2005/05/24/milagro-cunningham-is-an-illegal-alien/>. For further discussion of the Milagro Cunningham story, see *infra* Part III.B.

neighbor.”⁷³ Cunningham’s illegal entry and juvenile record would have made it very difficult for him to have obtained permanent residency. Thus, it appears that his future involved nothing more than playing video games, committing crimes, and floating from couch to couch.

Proponents of permitting illegal juvenile delinquents to remain in the United States argue that many are victims themselves, and thus should be treated within the social welfare system.⁷⁴ However, the federal government, specifically Congress, has the plenary power over immigration matters.⁷⁵ If it is true that an illegal juvenile is the victim of abuse, neglect, or abandonment, Congress has already provided a means for the juvenile to avoid deportation and possibly obtain legal status.⁷⁶ It is not for the state to decide which illegal aliens stay and which go.⁷⁷

The state court can determine that the juvenile is eligible for SIJS by declaring the juvenile a victim of abuse, neglect, or abandonment, but it is ultimately up to the secretary of homeland security to decide whether to grant such status.⁷⁸ By declaring an illegal juvenile to be a “victim” and then subsequently making the determination that the illegal juvenile should be treated in the foster care system rather than deported, state and local authorities have essentially usurped a power that is exclusive to the federal government.⁷⁹

2. Places Society in Greater Danger

Permitting serious or habitual juvenile delinquents to remain in the United States illegally also places society as a whole at risk. Whether or not ICE is notified of the juvenile’s illegal status, an illegal juvenile offender, in most instances, is placed in an unlocked foster home or a minimum security juvenile detention facility.⁸⁰ Many times these

73. See *Malkin*, *supra* note 72. That neighbor, who described Cunningham as a floater, was the godmother of the eight-year-old he raped and left for dead. *Id.*

74. See *Van Derbeken*, *supra* note 24, at A1.

75. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972); *Adams v. Howerton*, 673 F.2d 1036, 1041 (9th Cir. 1982).

76. See *supra* notes 34-39 and accompanying text.

77. See *Kleindienst*, 408 U.S. at 769.

78. See 8 U.S.C.A. § 1101(a)(27)(J)(iii) (2009).

79. See cases cited *supra* note 75; see also *Sahmel*, *supra* note 25, at 157-58.

80. See *Van Derbeken*, *supra* note 24, at A1. See also *Flores Settlement Agreement*, *supra* note 27, at 7-14 (setting forth requirement that illegal juvenile aliens in the custody of INS (now DHHS) must be afforded the least restrictive setting, which would include a licensed (foster) program, or, in special circumstances, a juvenile detention facility). Although releasing a juvenile to a parent or relative is preferred over foster care or a juvenile detention facility, many illegal juveniles cannot be turned over to relatives

juveniles run away from their foster placement or even escape from the detention facility.⁸¹

In addition to Ihab Maslamani's most recent crime spree, there have been other incidents of brutal crimes committed by illegal aliens with delinquency records. One such devastating crime was the murder of Tony Bologna and his two sons, Matthew and Michael, in San Francisco.⁸² The three family members were gunned down by a Salvadoran illegal alien, Edwin Ramos, after their car unintentionally blocked Ramos's car from making a left turn.⁸³ Ramos had two felonies on his juvenile record and was an alleged member of the dangerous MS-13 gang.⁸⁴ Despite his illegal presence in the United States and his criminal activity, Ramos was shielded from deportation as a juvenile by the city's notorious sanctuary policy.⁸⁵

Another illegal alien, Eric Antonio Uc-Cahun, was arrested for nearly stabbing a man to death in San Mateo County, Cal.⁸⁶ The vicious stabbing left the victim "gutted, like you gut a pig."⁸⁷ Like Ramos, Uc-Cahun had been arrested at least twice as a juvenile, but was never reported to immigration authorities.⁸⁸

A most disturbing crime was committed by Milagro Cunningham, a 17-year-old illegal alien who had previous juvenile arrests for burglary and vandalism, yet was never deported.⁸⁹ Cunningham kidnapped, raped, and then buried alive an eight-year-old girl in Lake Worth, Fla.⁹⁰

because their relatives are also illegal aliens who fear being deported if they come forward. See Brezosky, *supra* note 28.

81. There have been several incidents of illegal juveniles running from group home or foster care placements. A shocking example is that of a San Francisco group home, which had eight illegal juveniles run away within ten days of being sent to the home. Jaxon Van Derbeken, *S.F. Mayor Reverses Policy on Illegal Offenders*, SAN FRANCISCO CHRON., July 03, 2008, at A1. All eight had been convicted of dealing crack cocaine, but were sent to a group home rather than turned over to immigration authorities. *Id.* Another example is that of Ihab Maslamani, who was an escapee from a juvenile detention facility at the time of his crime spree. See *Documents: Parents Sent Teen to U.S.*, *supra* note 3.

82. Jaxon Van Derbeken, *Slaying Suspect Once Found Sanctuary in S.F.*, SAN FRANCISCO CHRON., July 20, 2008, at A1.

83. *Id.*

84. *Id.*

85. *Id.*

86. Jaxon Van Derbeken, *Protected Immigrant Faces Charges in Stabbing*, SAN FRANCISCO CHRON., Aug. 21, 2008, at A1.

87. *Id.*

88. *Id.*

89. See Malkin, *supra* note 72.

90. *Fla. Girl Recalls Being Buried Alive*, FOXNEWS.COM, (May 23, 2005), <http://www.foxnews.com/story/0,2933,157306,00.html>.

Luckily, police found her alive inside of a large trash bin, her body covered with large cement and concrete blocks.⁹¹

The common denominator in the outrage over these three deplorable incidents was the fact that all three perpetrators were illegal aliens with juvenile records, yet they were never deported. It is clear that Edwin Ramos and Eric Antonio Uc-Cahun were shielded from immigration authorities by city officials after numerous juvenile arrests.⁹² However, it is unclear why Cunningham was not removed after his juvenile arrests.⁹³ Regardless of whether police failed to ascertain their legal status or ICE decided not to deport them, the system failed these three victims and their families.

B. Proposed Solutions

1. State Prohibitions on Sanctuary Cities

Despite the fact that the federal government enacted two laws which prohibit a state or other local entity from prohibiting or restricting its employees from cooperating and communicating with immigration authorities, many states and cities continue to ignore these laws.⁹⁴ Maybe the entities continue to “brazenly violat[e] statutory and Constitutional law and defy[] Congress’s will”⁹⁵ because the federal government has yet to hold these entities liable for such policies.⁹⁶

A possible solution is for more states to adopt legislation that either expressly prohibits sanctuary policies within the state, or conversely, requires local authorities to cooperate and communicate with federal immigration authorities. It is possible that a local government agency

91. *Id.*

92. See Heather Knight, *Mayor to Ignore Sanctuary Bill*, SAN FRANCISCO CHRON., Oct. 21, 2009, at A1; Amstrong Williams, *Refugees of Crime and Terror: How Sanctuary Cities Endanger National Security*, THE WASH. TIMES, Oct. 6, 2008, at A21; Carolyn Hileman, *Illegal Alien Ramos Indicted for Slaying Bologna Family Father & 2 Sons*, JUDICIALWATCH.COM, <http://www.judicialwatch.org/news/2008/aug/judicial-watch-uncovers-triple-murder-suspect-edwin-ramos-s-san-francisco-police-record>; Van Derbeken, *supra* note 86, at A1.

93. Cf. Malkin, *supra* note 72 (noting that Cunningham had several juvenile arrests yet was never deported, but failing to list the reason why he was never deported).

94. See Sahmel, *supra* note 25, at 150.

95. *Id.* at 152.

96. See Laura Sullivan, Comment, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 576 (2009) (“[W]ith no apparent threat of litigation, cities have had little incentive to revise their policies.”).

may feel more pressured to avoid sanctuary policies if both the federal and state government prohibits them.

However, as one commentator points out, a local entity “may still have some flexibility to enact sanctuary policies” by prohibiting local authorities “from using local funds or resources in the enforcement of immigration law.”⁹⁷ Such a policy would essentially impede law enforcement from enforcing immigration law. In spite of this possibility, prohibitions on sanctuary policies could effectively deny protection from deportation to those juveniles who do not deserve such protection.

2. Withhold Federal Funds from Cities and States that Shield Illegal Juveniles From Immigration Authorities

Another possible solution to the problem of state and local governments that refuse to report illegal juveniles is to withhold federal funds to those entities. In fact, there have been several attempts to get legislation of this sort passed; however, all have proven unsuccessful.⁹⁸ This could be an effective way to punish those localities that obviously do not understand the old saying “don’t bite the hand that feeds you.” By withholding desperately needed funds, the federal government could deter sanctuary policies, and modify existing policies.⁹⁹

Some critics argue that withholding federal money from state and local governments for not enforcing federal immigration law is coercive¹⁰⁰ and dangerous.¹⁰¹ They claim that the federal government is

97. *Id.* at 576-77.

98. The first unsuccessful attempt was the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act) of 2003. H.R. 2671, 108th Cong. (2003). The CLEAR Act proposed to, first, authorize state and local law enforcement officers to enforce federal immigration laws by investigating, apprehending or removing aliens in the United States, and, second, withhold federal incarceration assistance to those states that did not enact a statute permitting the enforcement of federal immigration laws within two years of enactment of the act. *Id.* The bill died in committee. *Id.* The CLEAR Act met the same demise at the conclusion of 2006 (H.R. 3137, 109th Cong. (2005)), 2008 (H.R. 842, 110th Cong. (2007)) and 2010 (H.R. 2406, 111th Cong. (2009)). The most recent version is sitting in the Subcommittee on Immigration Policy and Enforcement as of the date of this writing. H.R. 100, 112th Cong. (2011). Another unsuccessful attempt was the No Sanctuary for Illegals Act of 2007. H.R. 3549, 110th Cong. (2007). This bill’s purpose was to prohibit the distribution of federal funds to a state or local government that interferes with federal immigration enforcement. *Id.* The bill died in committee at the conclusion of the 110th Congress. *Id.* The 2009 version met a similar fate at the end of the 111th Congress. H.R. 5002, 111th Cong. (2009).

99. See Sahmel, *supra* note 25, at 162-63.

100. See Bilke, *supra* note 15, at 191 (“To premise the distribution of these funds solely on a local government’s willingness to cooperate in immigration enforcement is overly coercive.”).

aware that state and local governments rely on federal funding. The denial of such funding essentially compels state and local governments to enforce federal immigration laws.¹⁰² For that reason they believe it is an overly coercive and unacceptable approach to federal immigration policy.¹⁰³ In spite of this concern, withholding desperately needed funds would most likely provide the strongest incentive for state and local officials to rethink their dangerous sanctuary policies.¹⁰⁴

3. Increase Grants to State and Local Governments for the Incarceration of Illegal Juvenile Aliens

Another argument against mandatory local and state enforcement of immigration laws is that states and localities lack the resources to screen all persons apprehended by law enforcement for immigration status, and to detain all illegal aliens found within their jurisdiction.¹⁰⁵ One solution to this problem is for the federal government to increase the amount of grants given to state and local governments to house illegal juvenile aliens pending deportation.

However, the federal government has already appropriated \$950 million a year for the reimbursement of costs incurred by state and local governments for the incarceration of illegal aliens.¹⁰⁶ Currently, it is estimated that there are over 400,000 illegal aliens incarcerated in the United States, costing taxpayers over \$1 billion since 2001.¹⁰⁷ These staggering amounts are hard for taxpayers to swallow, especially in today's economy. Without strong public support, it is unlikely that Congress will approve more money for the incarceration of illegal juvenile aliens.

101. See Sahmel, *supra* note 25, at 162-63 (“[S]uch a policy might endanger citizens by depriving a locality of needed homeland security funding that later experienced a terrorist attack.”).

102. See Bilke, *supra* note 15, at 191.

103. *Id.* Persons on this side of the argument believe a better approach would be to leave the decision to the state and locality: “Police chiefs know what is best for their communities and should be the ones to decide whether or not their agencies will be involved in enforcing federal immigration laws” *Id.* at 191-92 (quoting Press Release, Int’l Ass’n of Chiefs of Police, Police Chiefs Announce Immigration Enforcement Policy (Dec. 1, 2004)).

104. See Sahmel, *supra* note 25, at 162-63 (“Congressional withholding of funds to sanctuary cities and counties could provide the strongest ‘stick’ to modify these localities’ conduct. By depriving these cities of money, a local government’s shrinking coffers might cause officials to rethink what is primarily political opposition to enforcing immigration law.”).

105. See Bilke, *supra* note 15, at 182.

106. 8 U.S.C.A. § 1231(i)(4)(B) (2009).

107. See IMMIGRATIONCOUNTERS.COM, <http://www.immigrationcounters.com> (last visited Jan. 6, 2010).

Another option is for states to create a position for someone to conduct citizenship background checks of all juveniles arrested in the state. That is exactly what Florida did in 2006. In response to Milagro Cunningham's horrific crime,¹⁰⁸ the Florida Department of Juvenile Justice received \$49,000 to hire additional staff to conduct citizen background checks of every child arrested and referred to it.¹⁰⁹ The state senator behind the funding effort maintained that if only Cunningham had been screened after his first arrest, "he might have been deported and the 'horrible tragedy that has befallen a little girl might have been avoided.'"¹¹⁰

IV. CONCLUSION

Prior to his most recent crime spree, Ihab Maslamani's juvenile record included charges of assault and battery, carjacking, and several drug charges,¹¹¹ yet he was never deported. The system tried to rehabilitate him by placing him in foster care and juvenile detention facilities, from which he escaped.¹¹² However, the likelihood of Ihab obtaining legal status with such a serious and lengthy juvenile record was very low. Without legal status, Ihab would have had minimal opportunities to become a productive, law-abiding member of society after aging out of the foster care system.

Also, his pattern of behavior grew increasingly dangerous over the years. His troubles started with school suspensions, then assault and drug charges, and ultimately carjacking, bank robbery, and murder.¹¹³ This is not a sign of rehabilitation, but rather the exact opposite. Thus, permitting Ihab to remain in the United States illegally after acquiring numerous delinquency charges was futile, disadvantageous to Ihab, and a danger to society. Hopefully this tragic ending can be avoided in the future by enacting legislation prohibiting sanctuary policies, withholding funds to cities and states who abide by such policies, and increasing grants to those entities which incarcerate illegal juvenile aliens.

SHANNON M. RAY

108. For further discussion of the Cunningham story, see *supra* notes 89-93 and accompanying text.

109. Josh Politlove, *State to Scrutinize Young Offenders*, TAMPA TRIBUNE, July 3, 2006, at 1.

110. *Id.*

111. See *Documents: Parents Sent Teen to U.S.*, *supra* note 3.

112. *Id.*

113. See Ben Schmitt, *A Troubled Life To a Violent Turn*, DETROIT FREE PRESS, Aug. 15, 2009, at A5.