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Noncitizen Youth in the Juvenile Justice System: The Serious Consequences of Failed Confidentiality by ICE Referral

I. INTRODUCTION

Due to an unresolved clash between federal and state law, there is no guarantee that the values of the juvenile justice system will apply to the one million undocumented youths currently living in the country¹ in the same way they apply to citizen juveniles. These values, including rehabilitation, confidentiality, and the best interests of the child,² might be turned on their heads when do-gooder law enforcement and probation officers take it upon themselves to report children they suspect of being illegal aliens to the United States Immigration and Customs Enforcement (ICE).

The federal-state clash begins with federal immigration law. Under Title 8 of the United States Code, no government entity, official, or person may prohibit or restrict a government entity or official from sending information about a person's citizenship or immigration status to the Immigration and Naturalization Service (INS).³ In other

1. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 13 (2011), <http://www.pewhispanic.org/files/reports/133.pdf> (indicating the estimated number of youth while noting that this number is down "from a peak of 1.6 million in 2005"); *see also* SHANNAN WILBER & ANGIE JUNCK, ANNIE E. CASEY FOUND., NONCITIZEN YOUTH IN THE JUVENILE JUSTICE SYSTEM: A GUIDE TO JUVENILE DETENTION REFORM 6 (2014), <http://youthjusticenc.org/download/juvenilejustice/disparities/Noncitizen%20Youth%20in%20the%20Juvenile%20Justice%20System%20.pdf> (noting that "juvenile justice professionals informally report a steep increase in the numbers of noncitizen youth involved in the delinquency system"). "Undocumented immigrant youth" for the purposes of this paper means foreign-born children who live in the United States but who are unauthorized to do so. However, many of the consequences noted in this paper also apply to immigrant youth who have achieved Legal Permanent Resident (LPR) status.

2. *See infra* Part II.

3. 8 U.S.C. § 1373(a)-(b) (2012) [hereinafter Title 8]. These sections of the statute read,

(a) In general. 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

words, federal law preempts all state and local law. Thus, government officials cannot be prohibited from sending information to INS.⁴ While no federal law affirmatively *requires* juvenile justice personnel to determine a minor's immigration status,⁵ and despite the fact that “the federal government [does]n’t classify minors as a deportation priority,”⁶ a 2013 report found:

[S]ome juvenile justice personnel report youth whom they suspect of lacking legal immigration status to immigration authorities and permit ICE officials to enter juvenile facilities to interview suspect youth. Even departments and staff that would prefer to stay out of immigration enforcement sometimes believe they are legally

Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

4. INS was reorganized after 9/11 to create the Department of Homeland Security (DHS) and ICE. ICE is a federal law enforcement agency under the umbrella of DHS (the largest “arm”) tasked with “promot[ing] homeland security and public safety.” NAT’L COLLABORATION FOR YOUTH & NAT’L JUVENILE JUSTICE NETWORK, BUILDING BRIDGES TO BENEFIT YOUTH, POLICY BRIEF NO. 2, at 15 (2006), <http://www.nationalassembly.org/uploads/publications/documents/immigrationbrief.pdf> [hereinafter POLICY BRIEF NO. 2]. It “protects the U.S. against terrorist attacks by targeting illegal immigrants.” *Id.* It also has the authority to arrest children who violate U.S. immigration law. *Id.* However, some have argued that ICE is not a law enforcement agency, but an administrative agency because immigration proceedings are civil, not criminal. Yliana Johansen, Note, *The Media, Politics, and Policy: Taking Another Look at the Development of San Francisco’s Policies on Immigrant Juvenile Offenders*, 15 U.C. DAVIS J. JUV. L. & POL’Y 125, 136 (2011) (arguing that the classification absolutely matters when a state’s confidentiality laws bar access to juvenile records by outside “law enforcement agencies”).

5. Yvette Cabrera, *Lost Boys: Undocumented Youth Face Perilous Journey Through Justice System*, VOICE OC (Aug. 25, 2015), <http://voiceofoc.org/2015/08/lost-boys-undocumented-juveniles-face-perilous-journey-through-justice-system/> [hereinafter Cabrera, *Undocumented Youth*].

6. *Id.*

obligated to cooperate with federal immigration officials to facilitate apprehension of juveniles suspected of violating immigration laws.⁷

Indeed, even though federal law is prohibited from requiring state or local law enforcement to communicate with ICE,⁸ the mere fact that Title 8 *allows* juvenile justice personnel to report suspected juveniles leads some to act on a perceived (but mistaken) duty to contact immigration officials. Such reporting, however, may be in direct violation of state confidentiality laws. Whether these personnel acts are based on a feeling of responsibility or a perceived (but mistaken) duty when they report youth to ICE, reporting youth to ICE may be in direct violation of state confidentiality laws.

Confidentiality is a core value of the juvenile justice system,⁹ and most states have laws that keep juvenile records private.¹⁰ The juvenile

7. FIRST FOCUS & THE SENTENCING PROJECT, CHILDREN IN HARM'S WAY: CRIMINAL JUSTICE, IMMIGRATION ENFORCEMENT, AND CHILD WELFARE 33 (Susan D. Phillips et al. eds., 2013), <https://firstfocus.org/wp-content/uploads/2013/02/Children-in-Harms-Way.pdf> [hereinafter CHILDREN IN HARM'S WAY]; see also Cabrera, *Undocumented Youth*, *supra* note 5.

8. Yvette Cabrera, *Lost Boys: Counties Now Less Likely to Refer Juveniles to Immigration Authorities*, VOICE OC (Aug. 26, 2015), <http://voiceofoc.org/2015/08/lost-boys-counties-less-likely-to-refer-juveniles-to-immigration-authorities/> [hereinafter Cabrera, *Counties*] (“[T]he federal government cannot require state or local law enforcement to use their resources to enforce federal laws.”); see LISA M. SEGHELLI, STEPHEN R. VINA & KARMA ESTER, CONG. RESEARCH SERV., RL32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT (2004), <http://trac.syr.edu/immigration/library/P48.pdf>.

9. See RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUVENILE LAW CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 13 (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf>. In these states, this information is available only “to court staff, law enforcement officials, and others directly involved in the proceedings, including attorneys, the juvenile, and the juvenile’s parent or guardian.” *Id.* Information about *ongoing* juvenile proceedings is usually treated more carefully than information from *adjudicated* cases: “Once juveniles are adjudicated delinquent, many states allow that information to be more widely disseminated.” *Id.*

10. California, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, and Vermont “completely prohibit public access to juvenile records, regardless of the seriousness of the offense, the number of offenses, or the age of the juvenile.” *Id.* North Dakota “allows juvenile record information to be released only in the very narrow circumstance of a juvenile escaping from a facility or where there is a threat to national security.” *Id.* Alaska has a “public safety” exception whereby law enforcement may disclose information “as may be necessary to protect the safety of the public.” *Id.* (internal citation omitted). Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin have established certain types of information that they make publicly available (e.g., records for a

justice system is a state construct that recognizes that “children who commit crimes are different from adults: as a class, they are less blameworthy, and they have a greater capacity for change.”¹¹ Thus, states established separate court systems for juveniles, with rehabilitation as the primary goal.¹² Confidentiality is an important part of this goal, so “juvenile court hearings are often closed to members of the public and records are often kept confidential, protecting children from carrying the burdens of their delinquent activity into adulthood.”¹³

When juvenile justice personnel report suspect youths to ICE, it not only flies in the face of rehabilitation goals, but it could also violate state confidentiality laws.¹⁴ And while it is harmful enough that California, Arizona, Florida, Pennsylvania, New York, and Texas routinely refer minors to the federal authorities,¹⁵ some probation departments go beyond simply reporting names and even hand over juvenile court documents (even, in one case, by providing a juvenile’s

juvenile arrested for or charged with a felony are not kept confidential in Connecticut; records for juveniles aged fourteen and older are not kept confidential in Kansas; records for juveniles fourteen to eighteen who have previously been adjudicated delinquent two or more times for more serious actions are not kept confidential in Massachusetts; information about juveniles charged with a felony who have previously been adjudicated for a serious felony or who have two prior felonies is not kept confidential in Nevada; records for juveniles charged with first or second degree murder, rape, aggravated robbery, and kidnapping are not kept confidential in Tennessee; records for juveniles charged with felonies or “violent offenses” are not kept confidential in West Virginia, Minnesota, and Louisiana, subject to some age restrictions; and records even for some misdemeanor cases are made public in Florida and Indiana; records for all juveniles fourteen and older are not kept confidential in Kansas). *Id.* at 14–15. Arizona, Idaho, Iowa, Michigan, Montana, Oregon, and Washington make all juvenile records public, subject to certain exceptions (e.g., Arizona allows for the issuance of a court order to protect individual records; Idaho also allows for protection by court order but severely limits protection for records of juveniles over age fourteen; Montana makes all juvenile records publicly available but automatically seals them when the juvenile turns eighteen; Oregon and Washington protect psychological evaluations and medical records, but do not keep confidential the juvenile’s name, birth date, or charges). *Id.* at 15.

11. *Youth in the Justice System: An Overview*, JUV. L. CTR., <http://jlc.org/newsroom/media-resources/youth-justice-system-overview> (last visited Apr. 29, 2017).

12. *Id.*

13. *Id.* In most cases, juveniles are not even entitled to a jury trial, since this would violate confidentiality. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

14. Whether reporting violates state confidentiality laws depends entirely upon the state in which the report is made—the states have varying confidentiality laws. See SHAH, FINE & GULLEN, *supra* note 9; WILBER & JUNCK, *supra* note 1.

15. Cabrera, *Counties*, *supra* note 8.

entire file).¹⁶ This can have devastating consequences for a child against whom government attorneys can use such information in deportation proceedings—which can prevent the child from being permitted to obtain a visa or a pathway to legal residency.¹⁷ Further, these documents remain in a child’s immigration file for the rest of his or her life.¹⁸

For Alex, a fourteen-year-old boy, this legal gray area has immeasurably altered his life.¹⁹ Alex lives in Orange County, but was born in Mexico to a seventeen-year-old mother who fled to the United States to escape her physically abusive boyfriend whose abuse nearly made her miscarry.²⁰ In the United States, Alex and his mother endured two more abusive relationships, and they ultimately found themselves in a homeless shelter.²¹ As a consequence of this tumultuous childhood, Alex began acting out in school.²² In 2012, he was put in juvenile detention for taking a pocket knife to school, although he said he never threatened anyone with the knife.²³ The knife was tucked into Alex’s waistband, and was spotted by another student only as they were undressing for Physical Education class.²⁴ He was charged with felony possession of a weapon on school grounds and misdemeanor brandishing of a deadly weapon.²⁵ Although the felony was reduced to a misdemeanor, he was ordered to serve sixty days of electronic home confinement and community service.²⁶

When Alex violated the terms of his probation, he was sent back to juvenile detention.²⁷ For a U.S. citizen, violation of probation

16. *Id.* This occurred in California, which has among the most stringent juvenile protections in the country and completely prohibits all public access to juvenile records. See SHAH, FINE & GULLEN, *supra* note 9.

17. Cabrera, *Counties*, *supra* note 8.

18. *Id.*

19. Cabrera, *Undocumented Youth*, *supra* note 5 (noting that regarding this legal gray area, it is “a conflict that places the minors on a precarious path to adulthood”).

20. *Id.*

21. Yvette Cabrera, *An OC Teen Teeters on the Edge of Deportation*, VOICE OC (Aug. 25, 2015), <http://voiceofoc.org/2015/08/an-oc-teen-teeters-on-the-edge-of-deportation/> [hereinafter Cabrera, *Deportation*].

22. *Id.*

23. *Id.*

24. Cabrera, *Undocumented Youth*, *supra* note 5.

25. *Id.*

26. *Id.*

27. *Id.*

presumably would result in either receiving a contempt charge, having probation revoked, or being placed in a secure facility.²⁸ Alex, on the other hand, was reported directly to the federal immigration authorities by the Orange County Probation Department per the department's long-standing practice of notifying ICE of suspected illegal juveniles.²⁹ Two ICE officials arrived at the Orange County detention center and interrogated Alex, asking him where he was born and whether he was a U.S. citizen.³⁰ Alex—handcuffed and alone without his mother or an attorney present—answered the questions, not realizing his right to remain silent.³¹ He was then taken into federal custody.³² His mother had no idea where he had been taken, could not find him, and was hesitant to try since any contact with immigration authorities could lead to her own deportation (as she was still undocumented and had no driver's license).³³

Why are children like Alex, who are among the most vulnerable people in the United States and who often come from turbulent circumstances,³⁴ turned over to immigration officials—seemingly in direct contradiction of the purposes of the juvenile justice system? Those who take a hard stance against immigration might answer that there are heavy costs associated with putting undocumented children through the juvenile justice system, or that these children—already here illegally—pose a threat to community safety.³⁵ However, the truth

28. *Violation of Probation*, NAT'L JUV. DEFENDER CTR., <http://njdc.info/violation-of-probation/> (last visited Apr. 29, 2017). It can be quite easy to violate probation: Probation rules may include checking in with the probation officer, attending court and other programs, keeping a curfew, passing drug tests, not being truant from school or work, or even not seeing certain people or wearing certain colors if there has been gang-related activity. *Violation of Probation—Juveniles*, L. OFF. MITESH PATEL (Apr. 6, 2011), <https://patellaw.wordpress.com/2011/04/06/violation-of-probation-juveniles/>.

29. Cabrera, *Undocumented Youth*, *supra* note 5.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See infra* notes 138–40. Alex's mother plans to file a petition for legal residence through the Violence Against Women Act, through which Alex likely has a strong case for legal residency. Cabrera, *Deportation*, *supra* note 21.

35. *See* JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO PENNSYLVANIANS 4 (2009), http://www.fairus.org/site/DocServer/pa_costs.pdf?docID=3041; AM. CIVIL LIBERTIES UNION, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS 4 (2010), <https://www.aclu.org/other/issue-brief->

is that immigration law is extremely complicated—many of the children who are being reported to ICE likely have grounds for immigration relief,³⁶ and these grounds are subverted if the juvenile’s confidentiality is breached. Juveniles who can gain such relief thus gain legal status or protection (such as special immigrant juvenile status, asylum, or a visa for being a victim of crime, violence, or trafficking) and are no longer considered “undocumented.” Hence, many of the children going through the juvenile system need not remain undocumented. Further, studies show that immigrants are less likely to commit crimes than U.S. citizens.³⁷ Consequently, not only are costs less heavy than some might expect due to the relatively low number of undocumented children in the system, but community safety fears should be alleviated as well.

Undocumented juveniles charged with crimes are often treated differently than citizen juveniles in both the frequency and the severity of breaches of confidentiality.³⁸ Of course, many of the policies that provide for disparate treatment between citizens and noncitizens are presumably put in place to protect our communities.³⁹ But there is a need for better balance between ensuring the safety of our communities and doing what is in the best interests of vulnerable youths. The differences in treatment may not only violate state privacy laws, but they may result in serious immigration consequences and, arguably, unconstitutional treatment for undocumented juveniles.⁴⁰

To counteract this disparate treatment, countrywide reform is necessary on both state and federal levels. Reform at the state level

criminalizing-undocumented-immigrants?redirect=immigrants-rights/issue-brief-criminalizing-undocumented-immigrants.

36. “Approximately 40 percent of children admitted into ORR custody are identified as eligible for a form of legal relief from removal (such as asylum, special immigrant juvenile status, or visas for victims of crime or trafficking).” OLGA BYRNE & ELISE MILLER, CTR. ON IMMIGRATION & JUSTICE, *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS* 4 (2012), https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf.

37. *Id.* at 4.

38. *See infra* Part IV.

39. *See, e.g., Toomey Continues Fight to Protect Our Communities; Reintroduces Stop Dangerous Sanctuary Cities Act*, PAT TOOMEY (Jan. 11, 2017), <http://www.toomey.senate.gov/?p=news&cid=1869>.

40. *See infra* Sections IV.B–C.

includes (a) enacting policies that ensure immigration status is not considered when youths enter the juvenile justice system; (b) strengthening and enforcing existing juvenile privacy laws, including sanctions for releasing confidential information; (c) explicitly requiring that ICE and other federal agencies provide a court order, based on probable cause, in order to access information about minors from the juvenile justice system; and (d) providing each youth a public defender who has immigration knowledge (or who has expert contacts who have immigration knowledge). Reform at the federal level includes amending Title 8 to say that it does not apply to communications violating generally applicable state confidentiality laws.

This Note explains in greater detail the need for such reform. Part II of this article will discuss the purposes and values of the juvenile justice system. Part III delves into the clash between federal and state law, and the resulting ease of exposure of undocumented juveniles to the immigration system. Part IV discusses the disparate treatment of undocumented juveniles and citizen juveniles and the consequences of this disparate treatment, including routine rights violations. Part V argues for countrywide reform at both the state and federal levels to counteract the disparate treatment and rights violations. Part VI concludes.

II. THE PURPOSES AND VALUES OF THE JUVENILE JUSTICE SYSTEM

Although state approaches to the legal position of children and juvenile offenses have changed drastically over the years, certain principles remain rooted in the system.⁴¹ Children are viewed, in the eyes of the law, as distinct from adults for three reasons:⁴²

First, juveniles lack maturity and have an underdeveloped sense of responsibility, resulting in impetuous and ill-considered actions and decisions. Second, juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure.

41. See Lahny R. Silva, *The Best Interest Is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. PUB. L. 415 (2014).

42. *United States Supreme Court Juvenile Justice Jurisprudence*, NAT'L JUV. DEFENDER CTR., <http://njdc.info/practice-policy-resources/united-states-supreme-court-jvenile-justice-jurisprudence/> (last visited Apr. 29, 2017).

Third, the character of a juvenile is not as well formed as that of an adult.⁴³

For these reasons, the “best interests of the child” standard is paramount, and rehabilitation is the primary goal of the juvenile justice system.⁴⁴ The juvenile justice system’s emphasis on confidentiality of juvenile records is a direct result of these considerations.

Even early in American history, children were considered “legally incompetent”: “children under the age of seven could assert ‘infancy’ as a defense while older children seven to fourteen were subject to a rebuttable presumption of lack of capacity.”⁴⁵ As the Industrial Revolution modernized family and societal structures, the first juvenile correctional facilities were created to care for wayward children, who were regarded as “a product of their bad environment and the failure of the family.”⁴⁶ Private reformers, followed by government reformers, began to establish Houses of Refuge to rescue children from crime and incarceration.⁴⁷ These Houses were established based on the idea that children are malleable, with a focus on protecting children rather than punishing them for taking part in criminal behavior.⁴⁸ Thus, responses to child delinquency were based on the best interests of the child, with reconstruction, rehabilitation, and treatment as the foci rather than the guilt of the child.⁴⁹

However, constitutional due process challenges accompanied the establishment of these Houses of Refuge.⁵⁰ In response to the lack of

43. *Id.* Social science research backs up the third proposition: children have a higher possibility of reform. SHAH, FINE & GULLEN, *supra* note 9, at 8.

44. *In re Gault*, 387 U.S. 1, 15 (1967); Silva, *supra* note 41, at 421.

45. Silva, *supra* note 41, at 420; *see also* C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 662–73 (2005).

46. Silva, *supra* note 41, at 420–21 (quoting Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 821–23 (1988)).

47. *Id.* at 421; *see also* BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 54 (1999); Clarke, *supra* note 45, at 662–73; John R. Sutton, *Social Structure, Institution, and the Legal Status of Children in the United States*, 88 AM J. SOC. 915, 915–19 (1983).

48. Silva, *supra* note 41, at 421.

49. *Id.* at 421–22.

50. *Id.* at 422.

formal processes for placing children in these facilities and the apparent lack of courts' legal authority to do so, courts asserted that the state had *parens patriae*, the due process power to intervene and act as the parent of any child in need of protection.⁵¹ The doctrine's objective "was to rehabilitate and reform children," not criminally adjudicate and punish them.⁵² This objective led to the establishment of an entirely separate juvenile court system.⁵³

In 1899, the first juvenile court was established, and by the 1940s, all fifty states had created their own juvenile court systems.⁵⁴ Still, the guiding principle remained the welfare of the child, and great efforts were made to treat children on an individual basis.⁵⁵ The approach was therapeutic rather than punitive, and juvenile records were kept confidential to further the goal of rehabilitation.⁵⁶ This court process was simply an informal conversation between the youth and the judge—no lawyer was present.⁵⁷ Juvenile proceedings did not result in criminal convictions; rather, youths were sent through a probation system.⁵⁸ These informal and probation-based processes reflected the therapeutic and rehabilitative posture of the time.

However, by the 1960s, juvenile courts were overburdened with cases, and many states responded by sending juveniles to correctional facilities rather than providing individualized treatment.⁵⁹ Recognizing the need for procedural protections, the Supreme Court began requiring the same constitutional criminal procedure

51. *Id.*; see also JAY L. HIMES, STATE PARENS PATRIAE AUTHORITY: THE EVOLUTION OF THE STATE ATTORNEY GENERAL'S AUTHORITY (2004), musicians4freedom.com/wp-content/uploads/2014/10/State-Parens-Patriae-by-the-ABA.pdf.

52. Silva, *supra* note 41, at 422.

53. *Id.*

54. *Id.* at 423. Juveniles can also be adjudicated delinquent in the federal criminal justice system, in cases where a state lacks (or declines to assume) jurisdiction over the child, where the state lacks adequate programs or services for the child, or where the child is being charged with a violent felony, a drug trafficking offense, or a firearms offense. 18 U.S.C. § 5032 (2012); see also JOHN SCALIA, U.S. DEP'T OF JUSTICE, JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1997), <http://www.bjs.gov/content/pub/pdf/Jdfcjs.pdf>.

55. Silva, *supra* note 41, at 423; see also JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES, COMMENTS 550–57 (Frederic Faust & Paul J. Brantingham eds., 1974); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 101–36 (2d ed. 1977).

56. SHAH, FINE & GULLEN, *supra* note 9, at 8.

57. See *Youth in the Justice System: An Overview*, *supra* note 11.

58. *Id.*

59. Silva, *supra* note 41, at 423–24.

protections for juveniles that adults already had, “including the right to counsel, the right to confront and cross-examine witness[es], the privilege against self-incrimination, and the right to notice of the charges.”⁶⁰ The Court unambiguously favored these adult procedures over the doctrine of *parens patriae* and its accompanying discretion.⁶¹

As time went on, courts continued to favor these adult procedures. In response to the 1960s civil rights movement and accompanying social upheaval, some groups blamed social welfare programs for rising crime rates.⁶² Conservatives demanded policies that encouraged personal responsibility and that were tough on crime, including in juvenile courts.⁶³ By the 1970s, crime rates had skyrocketed as the baby boomers reached their teenage years, and both liberals and conservatives responded with “tough on crime” rhetoric, backing retributive and punitive (rather than rehabilitative) penal policies.⁶⁴ With the war on drugs came fixed sentencing policies and harsh sentences for drug offenders.⁶⁵ By the 1990s, courts and legislatures were focused more on public safety, accountability, and punishment than they were on rehabilitation.⁶⁶ Accordingly, states started opening juvenile proceedings to the public and limiting their once-wide-scale confidentiality protections.⁶⁷ Despite the fact that juvenile crime has consistently decreased since the 1990s, many tough-on-crime state policies remain.⁶⁸

Notwithstanding these noteworthy changes in juvenile justice administration, rehabilitation remains the primary goal of today’s

60. *Id.* at 424; see *In re Gault*, 387 U.S. 1 (1967). Later, youth were given the right to proof beyond a reasonable doubt and the right against double jeopardy. *Youth in the Justice System: An Overview*, *supra* note 11.

61. Silva, *supra* note 41, at 424; see *Gault*, 387 U.S. at 18; *Kent v. United States*, 383 U.S. 541 (1966).

62. Silva, *supra* note 41, at 424–25; see also LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 495 (2000).

63. Silva, *supra* note 41, at 425; see also NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 200 (1991).

64. Silva, *supra* note 41, at 425. Juvenile crime rates continued to rise throughout the late 1980s and into the early 1990s. *Youth in the Justice System: An Overview*, *supra* note 11.

65. Silva, *supra* note 41, at 426.

66. SHAH, FINE & GULLEN, *supra* note 9, at 8–9.

67. *Id.* at 9.

68. See *Youth in the Justice System: An Overview*, *supra* note 11.

juvenile justice system.⁶⁹ Thus, juvenile courts focus on balancing treatment of youths (through therapy and education) with public safety.⁷⁰ Juvenile courts give weight to treatment because the best interests of the child and rehabilitation principles still apply today, based on the understanding that children are “less blameworthy” than adults and that they have a “greater capacity for change.”⁷¹ Indeed, most juvenile offenders are simply acting immaturely and do not mature into adult criminals.⁷²

One final, important premise of the juvenile justice system is to preserve family ties: “the presumption that family reunification is the main vehicle through which youths obtain the care and guidance to rehabilitate themselves.”⁷³ In fact, destabilizing a child’s family life can lead to greater crime.⁷⁴ Accordingly, many states require detained youth to be united with parents or other relatives whenever it is safe to do so.⁷⁵

Juvenile justice courts thus aspire to rehabilitate youths by acting in the best interests of the child, by providing them with permanency

69. *Id.* Some, though unoptimistic that rehabilitation remains the primary goal, still note that most states have not completely abandoned the rehabilitative ideal. Silva, *supra* note 41, at 427. This lack of optimism is justified by policies like juvenile waiver into adult court and the limiting of juvenile confidentiality laws, which reflect ideals like retribution and public safety over rehabilitation. Others laude the distinction between a “juvenile adjudication” and a “criminal conviction,” which allows for rehabilitation, but lament the fact that because juvenile records are becoming increasingly more public, “what was once a sharp distinction is now a blur.” SHAH, FINE & GULLEN, *supra* note 9, at 11.

70. *Youth in the Justice System: An Overview*, *supra* note 11.

71. *Id.*; see Silva, *supra* note 41, at 427–28, 444. Experts realize that keeping juveniles in “the least restrictive environment” is preferable. Cabrera, *Undocumented Youth*, *supra* note 5.

72. Silva, *supra* note 41, at 444; see also Cabrera, *Undocumented Youth*, *supra* note 5.

73. WILBER & JUNCK, *supra* note 1, at 27.

74. Yvette Cabrera, *Lost Boys: ‘Out of Sight, Out of Mind,’* VOICE OC (Aug. 28, 2015), <http://voiceofoc.org/2015/08/lost-boys-out-of-sight-out-of-mind/> [hereinafter Cabrera, *Out of Sight*].

75. See, e.g., IMMIGRANT RTS. COMM’N, RES. NO. 004-2008 (2008), <http://sfgov2.org/ftp/uploadedfiles/immigrant/Resolution%20regarding%20the%20treatment%20of%20immigrant%20youth.pdf> [hereinafter IRC RESOLUTION]. In 2012, California passed the Reuniting Immigrant Families Act, which states that there is a priority on maintaining immigrant children’s ties to their families. CAL. FAM. CODE § 3040 (West 2012).

and stability, and by reunifying them with their families.⁷⁶ Juvenile confidentiality laws⁷⁷ are based on these principles of rehabilitation.⁷⁸

III. THE CLASH BETWEEN STATE AND FEDERAL LAW

The rehabilitative ideals of the juvenile justice system can be subverted when state or local law enforcement or other juvenile justice personnel take it upon themselves to report to ICE youths they suspect are in the United States illegally. In some cases, localities even have policies whereby such reporting is the norm.⁷⁹ Federal immigration law prohibits local entities from restricting personnel from sending information about juveniles to ICE, but it does not affirmatively require personnel to send the information.⁸⁰ However, many states have enacted juvenile confidentiality laws, which prohibit the dissemination of juvenile records.⁸¹ When juvenile justice personnel in states with strong confidentiality laws report suspect juveniles to ICE, they could be violating these confidentiality laws.⁸²

Some argue that there is a clash between the two systems: between state juvenile justice systems, whose goals are to preserve family ties and act in the juvenile's best interests by protecting juvenile confidentiality, and federal laws that allow juvenile justice personnel to report children to ICE, effectively removing the juveniles from their communities, schools, and families.⁸³ Others argue that there is no true clash between the federal and state laws so long as juvenile confidentiality laws are complied with.⁸⁴ They assert that nothing in federal law prohibits juvenile confidentiality laws; indeed, federal law explicitly recognizes the importance of keeping juvenile records

76. See IRC RESOLUTION, *supra* note 75.

77. See *infra* Section III.A.

78. See *Youth in the Justice System: An Overview*, *supra* note 11.

79. See Cabrera, *Counties*, *supra* note 8.

80. See *supra* notes 3–7.

81. See *supra* notes 9–10.

82. See *supra* notes 10, 14.

83. See Cabrera, *Out of Sight*, *supra* note 74; Cabrera, *Undocumented Youth*, *supra* note 5.

84. IMMIGRANT LEGAL RES. CTR., LAW GOVERNING IMMIGRATION ENFORCEMENT AGAINST JUVENILES IN CALIFORNIA (2014), https://www.ilrc.org/sites/default/files/resources/trust_and_juveniles_final_jan_31_copy.pdf (“Nothing in 8 U.S.C. § 1373 or any other federal law [preempts], supersedes [or] conflicts with [state confidentiality laws], or attempts to regulate state juvenile affairs.”).

confidential, with no exception for federal agencies like ICE.⁸⁵ Thus, local law enforcement may be required to keep juvenile confidentiality laws even when considering federal immigration law.⁸⁶

Because the federal government prohibits states from forbidding communication with ICE, state confidentiality laws that disallow dissemination of juvenile record information to outside law enforcement and government agencies likely violate this federal law and thereby create a clash between the federal and state laws. However, the issue of a conflict of laws has never reached appeal, likely in great part due to the fact that there is very little legal representation in circumstances where confidentiality is breached.⁸⁷ Thus, the problem remains that many juvenile justice personnel continue to report juveniles to ICE notwithstanding state confidentiality laws that disallow such behavior.

A. State Confidentiality Laws

As previously discussed, confidentiality is a core standard of the juvenile justice system and is necessary to the goal of rehabilitation.⁸⁸ Children are less morally culpable and have a greater capacity for change, so, the reasoning goes, they should be protected from being encumbered throughout their adult lives with the foolish mistakes they made as inexperienced juveniles.⁸⁹ Accordingly, juvenile court hearings are almost always closed to the general public, and records are kept confidential.⁹⁰ This means that the court “prevent[s] access

85. See Cabrera, *Undocumented Youth*, *supra* note 5; see also Cabrera, *Counties*, *supra* note 8 (“Neither Congress nor the Supreme Court has ever recognized any broad exception that would allow state and local agencies to breach confidentiality to share information with federal immigration authorities, particularly when such information sharing would pose a detriment to the child.”).

86. See Cabrera, *Counties*, *supra* note 8.

87. See Yvette Cabrera, *Lost Boys: A Battle over the Constitutional Rights of Undocumented Minors*, VOICE OC (Aug. 27, 2015), <http://voiceofoc.org/2015/08/lost-boys-a-battle-over-the-constitutional-rights-of-undocumented-minors/> [hereinafter Cabrera, *Battle*] (“[I]f you had a public defender model and you had people filing these cases you would have decisions and you would have answers. But that’s not a model we have and so many of these claims go untested even though they may be legitimate and strong.”).

88. See *Youth in the Justice System: An Overview*, *supra* note 11.

89. See *supra* notes 11–13.

90. *Youth in the Justice System: An Overview*, *supra* note 11. However, note that juvenile records are usually not automatically sealed or expunged. *Id.* Also note that “[a] growing number of states no longer limit access to records or prohibit the use of juvenile adjudications

to, dissemination or use of a juvenile record outside the juvenile court, unless it is intended to further the youth's case planning and services."⁹¹

A juvenile's record includes all paper and electronic records from the outset of the case (arrest) through all proceedings.⁹² The record can include police reports; charging documents; witness and victim statements; court-ordered evaluations; fingerprints; DNA samples; personal information about the child's family, education, social history, and behavioral health history; and information about any prior entanglement with the law.⁹³ Public access to this sensitive information can make it more difficult to rehabilitate and reintegrate the youth into the community⁹⁴—for example, it can impact the youth's chances at opportunities for employment or higher education.⁹⁵

While most states keep juvenile records private from the general public to some degree,⁹⁶ the records are still accessible during ongoing proceedings to court staff, law enforcement, the juvenile, his or her parents or guardians, and his or her attorney.⁹⁷ Even so, confidentiality laws continue to vary greatly by state, and "many states have eroded the confidentiality protections provided to juveniles in adjudicatory proceedings."⁹⁸ For example, Iowa, Idaho, and Colorado have provisions asserting that a juvenile conviction is the same as an adult criminal conviction.⁹⁹ All other states, however, protect at least some juvenile record information, especially while court proceedings are ongoing; these states allow broader record access upon a delinquent

in subsequent proceedings." SHAH, FINE & GULLEN, *supra* note 9, at 6; *see supra* note 10 (for a state-by-state report).

91. SHAH, FINE & GULLEN, *supra* note 9, at 7.

92. *Id.* at 12.

93. *Id.*

94. *See id.*

95. Sarah Barr, *Juvenile Records Too Often Barriers to Education, Employment*, JUV. JUST. INFO. EXCH. (Mar. 4, 2016), <http://jjie.org/2016/03/04/juvenile-records-too-often-barriers-to-education-employment/> ("Some college campuses bar admission to applicants with juvenile records. Students who are accepted can be barred from federal financial aid. Employers may decide not to hire a young adult with a record.").

96. *See* SHAH, FINE & GULLEN, *supra* note 9.

97. *Id.* at 13 (discussing how many states allow juvenile records to be more widely available following a delinquent adjudication).

98. *Id.* at 12.

99. *Id.*

adjudication.¹⁰⁰ Many of these states protect juvenile records from being shared with law enforcement and outside government agencies such as ICE.¹⁰¹

However, even if a state does protect juvenile records, individual states may make exceptions in certain circumstances for law enforcement, government agencies, schools, victims, researchers, or the media.¹⁰² Law enforcement and government agencies are of special interest because the wording of a particular statute may dictate whether ICE is an acceptable law enforcement or government agency with which to share confidential information.¹⁰³ Thus, whether reporting a child to ICE is a violation of confidentiality is heavily dependent on the individual state statute.

Despite the shift from rehabilitative policies to tough-on-crime, punitive policies, “there has been a growing interest in providing greater protection to young people by limiting access to juvenile delinquency records.”¹⁰⁴ In 2010, the American Bar Association declared,

Laws, rules, regulations and policies that require disclosure of juvenile adjudications can lead to numerous individuals being denied opportunities as an adult based upon a mistake(s) made when they were a child. . . . Therefore, the ABA is recommending that the

100. See *supra* note 10.

101. See *supra* notes 4, 10.

102. SHAH, FINE & GULLEN, *supra* note 9, at 15–19.

103. California, for example, limits sharing to “law enforcement officers who are *actively participating in criminal or juvenile proceedings involving the child*,” which seems to leave out immigration proceedings, but may be vague. CAL. CT. R. 5.552 (emphasis added). Utah, on the other hand, does not even mention law enforcement in the list of entities with access to juvenile records. UTAH CODE ANN. § 78A-6-209 (West 2009). West Virginia is like Utah, but explicitly states that juvenile records and information “shall not be released or disclosed to anyone, including any federal or state agency,” but allows for access by court order. W. VA. CODE § 49-7-1(a) (2015). Rhode Island completely prohibits law enforcement access, and there is no court order exception.¹⁴ R.I. GEN. LAWS §14-1-64 (2016). On the other end of the spectrum is Wisconsin, whose code states that “confidentiality does not apply between law enforcement agencies. WIS. STAT. § 938.396(1)(b)(3) (2016). On the other hand, “[t]hirty-three states allow confidential juvenile record information to be accessed by other government agencies or individuals[, but t]hese agencies are allowed access to confidential juvenile record information solely for the purposes of supervising or providing care for the juvenile.” SHAH, FINE & GULLEN, *supra* note 9, at 18. “[S]ome states, like Texas, require confidentiality agreements when confidential juvenile record information is being shared with additional agencies.” *Id.*

104. *Id.* at 9 (discussing social science studies showing developmental differences between youth and adults).

collateral consequences of committing a crime as a youth be severely reduced by reducing barriers to . . . opportunities because of a juvenile incident.¹⁰⁵

Because undocumented children are no different from citizen children in regards to lack of maturity, susceptibility to negative peer pressure, and a malleable and rehabilitable character,¹⁰⁶ their best interests and rehabilitation should be the first priorities. As such, state confidentiality laws should be made more robust for both citizens and undocumented juveniles. However, any attempt to bolster juvenile confidentiality laws faces the risk of clashing with federal law, which prohibits states from forbidding communication with ICE, especially where states have (whether purposefully or not) forbidden such communication by not allowing juvenile justice personnel to share juvenile information with law enforcement or government agencies.

B. Federal Immigration Law and Procedure

Constitutional law delegates the area of immigration exclusively to the Federal Government, not to the states.¹⁰⁷ Under federal immigration law, no state may prohibit or restrict a government entity or official from sending information about a person's citizenship or immigration status to ICE.¹⁰⁸ In regards to immigration, federal law preempts state and local law and policy, so no state or local entity can be explicitly prohibited from sending information about someone they suspect is in the United States without documentation.¹⁰⁹ While the language of Title 8 clearly allows juvenile justice personnel to report suspect juveniles to ICE, it neither requires juvenile justice personnel to *investigate* a minor's immigration status nor requires them to *report*

105. *Id.* at 10.

106. *See United States Supreme Court Juvenile Justice Jurisprudence, supra* note 42.

107. *See, e.g.,* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (holding that the federal government has plenary power to exclude immigrants as an inherent sovereign right that predates the Constitution); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (holding that the federal government's plenary power over immigration includes the power to deport noncitizens already within US territorial borders); WILBER & JUNCK, *supra* note 1, at 22 ("These policies prohibit law enforcement officials from inquiring about an individual's immigration status, prohibit the use of local funds or resources for the purposes of enforcing federal immigration law, and/or prohibit disclosure of specific categories of information.").

108. *See* Title 8, *supra* note 3.

109. *See* SEGHETTI, VIÑA & ESTER, *supra* note 8.

suspect juveniles.¹¹⁰ In spite of the Title 8 provision, several state and local jurisdictions have embraced policies that limit their personnel from assisting in federal immigration enforcement.¹¹¹ Other jurisdictions, however, have interpreted the law to mean that they should or must report suspected undocumented juveniles to the immigration authorities.¹¹²

The federal government cannot require state or local law enforcement to use their resources to enforce federal laws, including immigration laws.¹¹³ Thus, it would be illegal for the federal government to affirmatively require state and local entities to report suspect juveniles. However, by allowing state and local entities to report suspect juveniles, and by prohibiting states and localities from forbidding such reports, the federal government tips the balance in its own favor so that it is more likely to receive help from state and local law enforcement. Indeed, many juvenile justice personnel are either unaware of or baffled by what they are and are not required to report and by what they are permitted or forbidden to report to immigration officials.¹¹⁴

However, policies have been enacted which allow ICE to increasingly rely on local law enforcement, including juvenile justice personnel, in enforcing immigration law.¹¹⁵ Many new immigration enforcement programs “rely exclusively on collaborations with local and state criminal justice systems.”¹¹⁶ Despite the fact that minors are

110. See WILBER & JUNCK, *supra* note 1, at 21.

111. *Id.* at 22.

112. Cabrera, *Counties*, *supra* note 8 (explaining how this is a misinterpretation of the law).

113. See, e.g., WILBER & JUNCK, *supra* note 1, at 21; SEGHETTI, VIÑA & ESTER, *supra* note 8; Cabrera, *Counties*, *supra* note 8.

114. See WILBER & JUNCK, *supra* note 1, at 21; CHILDREN IN HARM’S WAY, *supra* note 7; POLICY BRIEF NO. 2, *supra* note 4, at 10. This problem will be exacerbated if the Clear Law Enforcement for Criminal Alien Removal Act of 2015 passes, which gives state and local law enforcement authority to “assist in the enforcement of U.S. immigration laws”—with states who do not comply losing federal assistance. CLEAR Act of 2015, H.R. 2964, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2964/all-info>; see also Parastou Hassouri, *CLEAR Act Will Muddy Relationships Between Police and Immigrants*, AM. CIV. LIBERTIES UNION N.J., <https://www.aclu-nj.org/theissues/immigrantrights/clearactwillmuddyrelations/> (last visited May 5, 2017).

115. See WILBER & JUNCK, *supra* note 1, at 21.

116. *Id.* In 2008, an ICE initiative merged thirteen enforcement programs into one regime: ICE ACCESS (the Agreements of Cooperation in Communities to Enhance Safety and Security Initiative). *Id.* at 22. S-Comm (Secure Communications), one of these programs,

not a deportation priority,¹¹⁷ recent efforts by ICE to target “criminal aliens” have extended to youths,¹¹⁸ even those charged with non-violent offences like underage drinking and truancy.¹¹⁹ In these federal-state collaborations, juvenile justice personnel even contact ICE and allow ICE officials to come into juvenile facilities and interview youths whom the personnel suspect may be undocumented.¹²⁰ The process works as follows:

In some locations, probation officers and others within the juvenile justice system will call ICE to inform them of immigrant children in custody. The child’s information is provided to ICE without the child’s consent, in breach of the confidentiality protections afforded to youth in juvenile delinquency proceedings. Furthermore, in certain parts of the country, ICE officers are allowed access to juvenile detention centers where they question youth about their immigration status. In other areas, ICE officers are stationed at police precincts and local jails, such as Riker’s Island in New York

allowed juvenile fingerprints taken after arrest by state or local authorities to be checked against FBI and DHS databases. *Id.* (S-Comm ended in 2014.) Another program, CAP (the Criminal Alien Program), allows ICE agents to ask juvenile justice personnel about foreign-born arrestees (and receive information without asking); ICE officials interview youth who are in juvenile detention or issue immigration holds for deportation. *Id.* Both programs depend on state cooperation, and some states decline to cooperate. *Id.* Additionally, § 287(g) of the IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act) gives state and local law enforcement authority to enforce federal immigration laws if they enter into agreements with ICE. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1357(g) (1996); 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, 69 (2011) (explaining that although 287(g) agreements are purported to combat “terrorism and criminal activity,” ICE has used it to apprehend people for infractions as minor as speeding violations).

117. See Cabrera, *Undocumented Youth*, *supra* note 5.

118. Frankel, *supra* note 116, at 67. Even though ICE claims to focus on “serious criminal[s],” its programs end up apprehending even youth who are charged with non-violent offenses. *Id.* There has been no increase in the number of criminal aliens seized; only an increase in the number of non-criminal aliens. *Id.* at 67–68.

119. *Id.* at 65. This is in spite of the fact that the Obama Administration has requested that ICE focus on violent offenders. *Id.* ICE itself has clarified that cooperation does not require state and local agencies to investigate an individual’s immigration status, and has directed employees to focus on immigrants who are “a danger to national security, border security, or are a public safety risk, such as those convicted of serious crimes, including murder, rape, [and] drug trafficking,” which are “suspected terrorists and spies, felons, active gang members, including those 16 and older, and individuals apprehended at the border while trying to enter the country unlawfully.” Cabrera, *Counties*, *supra* note 8.

120. WILBER & JUNCK, *supra* note 1, at 21.

that holds many juveniles. The tactics used by ICE agents interviewing youth are often coercive.¹²¹

Once ICE has investigated or interviewed a juvenile and determined him or her to be removable, things may proceed in one of three ways. First, ICE may ask the local district attorney to drop all charges so that the minor is brought to immigration court more quickly¹²² unless the state suspends the case indefinitely until the immigration removal process is complete.¹²³ Second, ICE may use its discretion not to ask that the charges be immediately dropped, and the case continues through to adjudication during which the juvenile is placed in detention or a long-term confinement facility.¹²⁴ When the time is almost up, ICE issues a “hold” on the minor.¹²⁵ An ICE hold is a request that the authorities in charge of the youth notify ICE when he or she is about to be released from state custody.¹²⁶ The youth is then turned over to ICE custody and sent to immigration detention.¹²⁷ Unfortunately but routinely, youths with minor or dismissed delinquency charges are issued ICE holds.¹²⁸ Third, whether or not

121. Frankel, *supra* note 116, at 70.

122. *See id.* at 65. This results in different treatment between citizens and noncitizens—citizens would not have charges against them dropped.

123. WILBER & JUNCK, *supra* note 1, at 26.

124. This results in the same treatment between citizens and noncitizens—until ICE issues a hold.

125. Frankel, *supra* note 116, at 70.

126. *Id.* Although an ICE hold is just a request for notification, “state and local authorities are increasingly willing to cooperate with ICE.” *Id.* at 70–71. State and local authorities are only legally permitted to hold a minor for 48 hours (excluding weekends and holidays) for ICE; however, this rule is “routinely disregarded,” and minors are kept in custody for much longer. *Id.* at 71; *see also* *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *33 (D. Or. Apr. 11, 2014) (holding that it is unconstitutional to keep an undocumented immigrant in custody on an ICE detainer after she was eligible for release); WILBER & JUNCK, *supra* note 1, at 23–24 (arguing that a state holding a juvenile past release date on an ICE hold is unconstitutional).

127. Frankel, *supra* note 116, at 71. Alternatively, to detention, the youth may be released to family throughout immigration proceedings. *Id.* at 65.

128. *See* Cabrera, *Counties*, *supra* note 8. This includes an ICE hold for a thirteen-year-old boy who took forty-six cents from another child in a “first-time schoolyard bullying incident.” *Id.* A California four-year study showed that almost half of all ICE holds were for youth with no documented criminal history, and for those with a criminal history, half of those were “non-violent, non-serious crimes,” the top three of which were probation violations, vandalism, and petty theft. *Id.* However, ICE claimed to be “deliberate and judicious in determining whether to pursue the removal of a juvenile who engaged in criminal behavior.” *Id.* California remedied the problem by narrowing referral procedures and prohibiting local officials

charges are dropped or suspended, ICE may use its discretion to take the youth into custody.¹²⁹ In the latter case, delinquency proceedings continue even though the youth cannot attend, which often results in warrants for failure to appear or pronouncements that the youth has violated probation.¹³⁰ Often, as a result of these three routes, youths are diverted from getting the rehabilitation they need.¹³¹

Although immigration enforcement is a federal responsibility, and though the federal government cannot require states and localities to use their resources to aid in immigration enforcement, Title 8 blurs the lines between federal and state responsibility and confuses law enforcement and other juvenile justice personnel. However, juvenile justice personnel are neither required to investigate nor report suspect juveniles, and doing so might violate confidentiality laws. The question is whether state confidentiality laws that forbid communication with law enforcement agencies like ICE violate Title 8. This clash results in frequent violations of confidentiality, which can have disastrous effects on young lives.

C. Resulting Ease of Exposure to the Immigration System

One “primary source of detection and subsequent deportation” for undocumented youths is involvement with the criminal or juvenile justice system.¹³² Undocumented immigrant youths are among the most vulnerable groups in the United States, and those in trouble with the law are a high-risk subset of this group.¹³³ In many cases, there are numerous obstacles, such as language barriers, cultural and legal unfamiliarity, and a lack of access to resources.¹³⁴ “Immigration enforcement initiated by local juvenile justice officials punishes youths

from cooperating with ICE hold requests unless the youth had been charged with a serious crime; the next year, the majority of the state’s thirty-one ICE holds were for minors who had committed violent, serious crimes like robbery, assault with a deadly weapon, sodomy, and sexual battery. *Id.*

129. WILBER & JUNCK, *supra* note 1, at 26.

130. *Id.* at 26–27.

131. Cabrera, *Out of Sight*, *supra* note 74.

132. POLICY BRIEF NO. 2, *supra* note 4, at 2.

133. “[M]inors released to ICE often have mental health or developmental issues or a combination of both. Some come from unstable homes or have had troubled childhoods, including witnessing violence or experiencing other trauma. Others are neglected, abused or abandoned.” Cabrera, *Undocumented Youth*, *supra* note 5.

134. *See id.*

for a status over which they have no control. A youth's undocumented immigration status is rarely a result of his decisions."¹³⁵ These youths are often here with family (though they may be here by themselves).¹³⁶ If they are here with undocumented family, their family members might not show up to advocate for them in juvenile court out of fear that they will be turned over to immigration authorities.¹³⁷

Many immigrant youths who become involved with the juvenile justice system are victims of trauma, abuse, neglect, abandonment, or human trafficking.¹³⁸ Unfortunately, these vulnerable youths often go on to "spend extended periods of time trapped between the state and federal custodial and legal systems,"¹³⁹ where they lack legal counsel and where their young age makes them particularly susceptible to coercion by authorities.¹⁴⁰ When juvenile justice personnel break confidentiality and report suspect youths to ICE, the youths' lack of knowledge, family support, and resources make it difficult for them to combat this injustice.

Additionally, immigration law is complex, and determining an individual's immigration status can be complicated and difficult.¹⁴¹ In some cases, a juvenile may be a citizen or have legal status and not

135. WILBER & JUNCK, *supra* note 1, at 26.

136. *Id.* at 4. Children of immigrants may be citizens, may be without legal status but have grown up entirely in the United States, or may be more recent immigrants. *Id.*

137. *Id.* at 9; see also Linda A. Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. PUB. INT. L.J. 263, 274–75 (2006).

138. IRC RESOLUTION, *supra* note 75; see also WILBER & JUNCK, *supra* note 1, at 5 ("These youth have often endured unspeakably traumatic experiences in their countries of origin. They come to the United States fleeing violence, persecution and extreme poverty in their home countries. Many make the difficult trip to escape severe abuse or homelessness due to abandonment. Their trauma is compounded by separation from their families and communities. Some assume exorbitant debt to come to the United States in order to help their impoverished families. Often, these youth endure dangerous and exploitative work conditions in order to pay off these debts.").

139. Frankel, *supra* note 116, at 67. Many of these minors become so broken down by this system that they quit fighting their cases and simply accept removal orders or voluntary departure, even though they qualify for visas or other relief. Cabrera, *Out of Sight*, *supra* note 74.

140. See Cabrera, *Undocumented Youth*, *supra* note 5.

141. WILBER & JUNCK, *supra* note 1, at 28 ("[A]n individual's immigration status is not verifiable by simply checking a database.").

even know it.¹⁴² Only immigration experts are qualified to determine an individual's immigration status, and policies that allow or encourage law enforcement or other unqualified juvenile justice personnel (even judges) to determine a juvenile's legal status pose risks including racial profiling mistakes, which may lead to lawsuits.¹⁴³ These policies do a great disservice to youths who may be mistakenly reported to ICE, and they may even impact youths' access to immigration relief.¹⁴⁴ Youths who apply for immigration relief before (or without) being placed in deportation proceedings undergo only an administrative, rather than adversarial, process. On the other hand, youths who pursue immigration relief while in deportation proceedings must defend themselves in an adversarial process against the federal government's accusations of unlawful conduct.¹⁴⁵ Thus, youths who undergo the simpler administrative process have quite a legal advantage over those who must undergo the burdensome adversarial process.¹⁴⁶

IV. DISPARATE TREATMENT OF UNDOCUMENTED JUVENILES AND CITIZEN JUVENILES

Juvenile justice systems countrywide report that increasing numbers of undocumented or noncitizen youths are going through the system.¹⁴⁷ In many jurisdictions, inquiring about birth documentation is standard booking procedure for all youths, whether they appear to be citizens or not.¹⁴⁸ There are good reasons for this practice, including to prevent identity fraud and to confirm the

142. *Id.* at 10; *see also* IMMIGRANT LEGAL RESEARCH CTR., IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY (2015), https://www.ilrc.org/sites/default/files/resources/juvenile_delinquency_cheat_sheet_ilrc_feb_2015_final.pdf.

143. WILBER & JUNCK, *supra* note 1, at 10. Unqualified personnel are likely to make mistakes, which can lead to expensive lawsuits against government officials (e.g., for wrongful detention or deportation). *Id.* at 28. In many cases, juvenile justice personnel make immigration conclusions "without clear criteria or training in federal immigration enforcement." Cabrera, *Undocumented Youth*, *supra* note 5.

144. WILBER & JUNCK, *supra* note 1, at 15.

145. *Id.*

146. *Id.*

147. *Id.* at 2.

148. Cabrera, *Counties*, *supra* note 8.

minor's age for housing purposes.¹⁴⁹ However, policies like asking for a birth certificate during intake, when applied uniformly to all youths, often result in disparate treatment down the road if a youth's lack of documentation is treated as grounds for referral to ICE.

There are four approaches by which charged youths are connected to the immigration system, which vary based on how the jurisdiction treats the records of juveniles suspected of being undocumented. This Part examines each of these four approaches and the resulting consequences of youths' exposure to the immigration system. Ultimately, undocumented juveniles are treated differently than citizen juveniles in both frequency and severity of breached confidentiality, and this disparate treatment may result in serious immigration consequences and arguably unconstitutional treatment.

A. Four Approaches by Which Charged Youths Are Connected to the Immigration System

Approaches by which charged youths are connected to the immigration system vary widely from jurisdiction to jurisdiction and may even vary within jurisdictions.¹⁵⁰ On one extreme, there are jurisdictions that never report juveniles to federal immigration authorities. On the other extreme, there are jurisdictions that routinely report anyone they even suspect of being in the country illegally. In between there is a broad spectrum of jurisdictions with different practices of reporting or not reporting suspected aliens. The four main approaches are as follows.

First, some jurisdictions treat undocumented juveniles exactly the same as citizens by not checking immigration status at all.¹⁵¹ Many of these jurisdictions are "sanctuary cities," which prohibit inquiry into an individual's immigration status (and communication of that information) and prohibit use of city resources to assist federal immigration officials to enforce immigration laws.¹⁵² Second is the other extreme, whereby a jurisdiction routinely reports juveniles

149. *Id.* Some jurisdictions even require the juvenile's parent or guardian to show their driver's license or social security card to verify their identity; this can have the negative consequence of preventing undocumented parents who fear immigration repercussions from taking custody of their child. WILBER & JUNCK, *supra* note 1, at 12.

150. WILBER & JUNCK, *supra* note 1, at 2.

151. *Id.*

152. POLICY BRIEF NO. 2, *supra* note 4, at 11; *see, e.g.*, IRC RESOLUTION, *supra* note 75.

merely suspected of being undocumented to ICE.¹⁵³ Third is a middle-of-the-road approach, whereby only juveniles who are suspected of being undocumented but also (a) have repeatedly been charged with serious crimes, or (b) have no ties to the United States are reported.¹⁵⁴ Fourth, some jurisdictions take an ad hoc approach, where the decision to report a juvenile is left in the hands of each individual probation officer assigned to each case, who can decide whether or not to report the suspected juvenile to ICE.¹⁵⁵

Confidentiality is violated if any of the latter three routes are taken in a state that prohibits law enforcement and government agency access to juvenile records. Such action is clear disparate treatment of citizens and noncitizens. Citizens get to keep their juvenile records confidential, whereas noncitizens routinely have their confidentiality violated. This can especially be a problem in jurisdictions that treat deportation as another punishment that they can impose on a delinquent juvenile—or even one suspected of being delinquent¹⁵⁶—in spite of the rehabilitative goals of the juvenile justice system.

B. Consequences of Exposure to the Immigration System

For citizens, public access to juvenile records can create a barrier that blocks juveniles from obtaining employment, housing, and education, and from joining the military.¹⁵⁷ However, violations of undocumented juvenile confidentiality can have even more injurious effects since the violations can lead to immigration repercussions.¹⁵⁸ Reporting youths to immigration officials and allowing ICE interrogation provides a pathway for government attorneys to use the

153. WILBER & JUNCK, *supra* note 1, at 2. Orange County was one of these jurisdictions from 2008 until 2012, when opponents to the practice convinced the probation agency to revise their procedure and limit their reports. Cabrera, *Undocumented Youth*, *supra* note 5. The agency went from 849 referred juveniles in that time period to 38 in 2013, and only 2 in 2014. *Id.* By late August 2015, the agency had only referred one juvenile to ICE. *Id.* Additionally, the department went from reporting juveniles to ICE upon booking (and before a delinquent adjudication) to doing so after the juvenile's court hearing. *Id.*

154. WILBER & JUNCK, *supra* note 1, at 2.

155. *Id.*

156. See Cabrera, *Undocumented Youth*, *supra* note 5.

157. SHAH, FINE & GULLEN, *supra* note 9, at 6; *Youth in the Justice System: An Overview*, *supra* note 11.

158. Cabrera, *Counties*, *supra* note 8.

information against the juvenile in deportation proceedings.¹⁵⁹ In some cases, juvenile justice personnel report to ICE not only a suspected undocumented juvenile's name, but the juvenile's entire file.¹⁶⁰ Indeed, many immigration court files may be "chock full" of confidential juvenile records.¹⁶¹ These confidential documents will remain in the person's immigration file for life.¹⁶²

This can have devastating, long-term consequences for a child. Consequences include depriving the child of certain forms of immigration relief like a visa or a pathway to legal residency or citizenship;¹⁶³ removal or deportation;¹⁶⁴ prolonged or unnecessary detention;¹⁶⁵ and separation from family.¹⁶⁶ These consequences may happen even in the common occurrence that the case is dropped or dismissed¹⁶⁷ or if no crime is proven.¹⁶⁸

1. Removal or deportation

As long as a person is not a U.S. citizen, he or she is always subject to the possibility of deportation.¹⁶⁹ While criminal convictions often result in deportation, not all grounds of deportation require an actual conviction or delinquency adjudication; certain negative conduct can also constitute grounds triggering removal.¹⁷⁰ For youths taken into ICE custody, initiation of removal proceedings is an automatic

159. *See id.*

160. *See id.*

161. *Id.*

162. *Id.* In some cases, even sealed juvenile records will be admitted into immigration proceedings, sometimes contributing to deportation. Frankel, *supra* note 116, at 100.

163. *See* WILBER & JUNCK, *supra* note 1, at 2; POLICY BRIEF NO. 2, *supra* note 4, at 2; Cabrera, *Counties*, *supra* note 8.

164. WILBER & JUNCK, *supra* note 1, at 2. A child could even be removed or deported back into a life-threatening situation. *Id.*

165. *Id.*

166. *Id.*

167. A 2009 study showed that "only 56 percent of juvenile delinquency cases handled by probation departments nationwide . . . resulted in the filing of a petition against the youth. Of these, only 66 percent were sustained. Nearly 33 percent of juvenile cases . . . were dismissed, and another 20 percent . . . resulted in minor sanctions following diversion or dismissal." *Id.* at 26.

168. *See* POLICY BRIEF NO. 2, *supra* note 4, at 12.

169. WILBER & JUNCK, *supra* note 1, at 7.

170. *Id.* at 18. These include issues such as drug abuse or addiction, violations of protective orders, and false claims to U.S. citizenship. *Id.*

consequence.¹⁷¹ In these proceedings, it may be the unfortunate case that “information that is purportedly obtained by juvenile justice officials to help gauge the youth’s [sic] needs and circumstances is instead used against them in the deportation process.”¹⁷²

Additionally, reporting youths to ICE does not ensure that they will be immediately deported.¹⁷³ Instead, in most cases, ICE takes initial custody but then transfers the youths to the custody of the Office of Refugee Resettlement, which is required by federal law to reunify children with their families whenever possible.¹⁷⁴ In over ninety percent of cases, delinquent youths are reunified with family members and returned to their communities pending removal.¹⁷⁵ However, if a youth is deported, he or she may be removed without reuniting with parents or families, a practice that clearly contravenes the juvenile justice principle of family reunification.¹⁷⁶

2. Barriers to obtaining relief, legal immigration status, or citizenship (inadmissibility)

There are several avenues through which certain undocumented youths can obtain lawful immigration status, especially with the aid of juvenile justice personnel.¹⁷⁷ These include Special Immigrant Juvenile Status, S-Visas, T-Visas for victims of trafficking, U-Visas for victims of violent crime, relief under the Violence Against Women Act, asylum, relief under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, relief under Deferred Action

171. Frankel, *supra* note 116, at 66.

172. WILBER & JUNCK, *supra* note 1, at 27.

173. *Id.* at 29.

174. *Id.*

175. *Id.* Still, these youths are not unharmed: following this run-around, many returned youths feel separated from family and friends and displaced in their schools and communities. Cabrera, *Undocumented Youth*, *supra* note 5.

176. See ANGIE JUNCK, SALLY KINOSHITA & KATHERINE BRADY, IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES 77 (2010), https://www.ilrc.org/sites/default/files/resources/2010_sijs_benchbook.pdf (discussing that for felonies involving violence or threat of force, a youth is barred from eligibility for “Family Unity,” or becoming an LPR based on the LPR status of family members meeting certain requirements); see also CHILDREN IN HARM’S WAY, *supra* note 7, at 12.

177. WILBER & JUNCK, *supra* note 1, at 14 (“Some forms of immigration relief depend upon the assistance of the juvenile court or law enforcement to make specific findings and to issue orders or sign certifications.”).

for Childhood Arrivals, a Cancellation of Removal, and citizenship under family immigration laws.¹⁷⁸

Unfortunately, DHS “focuses on enforcement of immigration law, not on investigating relief for youth.”¹⁷⁹ And in some cases, DHS has even proactively blocked access to immigration relief for youths.¹⁸⁰ So if youths are referred to immigration authorities prior to being screened by a competent attorney for immigration relief eligibility, avenues to federal immigration relief will likely be cut off.¹⁸¹ Additionally, juvenile justice personnel may be unwilling to notify youths about pathways to legal residency insofar as they see it as “not their job.”¹⁸² Thus, many of these youths will never know whether or not they would have been entitled to immigration relief.

Further, even though only criminal convictions may be considered as evidence of criminal history in immigration proceedings (and a delinquency adjudication is generally not considered to be a criminal conviction¹⁸³), certain delinquency adjudications may still prevent the youths from obtaining immigration relief or legal status.¹⁸⁴ This is because, as with deportation, “bad acts” can be considered as a significantly negative factor and trigger penalties.¹⁸⁵ Here, offenses and reports contained in a juvenile’s record can be considered as evidence

178. See JUNCK, KINOSHITA & BRADY, *supra* note 176, at 14–17, 78–80; IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY, *supra* note 142.

179. POLICY BRIEF NO. 2, *supra* note 4, at 10.

180. Memorandum, Immigrant Legal Res. Ctr., Recent Federal Immigration Policy Developments Regarding Minors (Mar. 30, 2015) (on file with author) (“Recently, attorneys and practitioners reported that DHS was denying or delaying an increasing number of requests for DACA because of a failure to disclose juvenile adjudication records—even though many states have confidentiality laws protecting against the disclosure of those records and such disclosure contravenes USCIS’s existing policies. NCOS—led by the ILRC—elevated these issues to DHS. Consequently, on March 23, 2015 DHS agreed to conduct a nationwide review of its record request policies for juvenile adjudication and is currently seeking to remedy this issue.”).

181. WILBER & JUNCK, *supra* note 1, at 28–29.

182. Cabrera, *Counties*, *supra* note 8.

183. This is true in all but three states. See SHAH, FINE & GULLEN, *supra* note 9, at 10–11.

184. JUNCK, KINOSHITA & BRADY, *supra* note 176, at 72–77; WILBER & JUNCK, *supra* note 1, at 18.

185. WILBER & JUNCK, *supra* note 1, at 19. This is especially true in cases of gang activity or affiliation, sex offenses, or violence. *Id.*; see also IMMIGRATION CONSEQUENCES OF JUVENILE DELINQUENCY, *supra* note 142 (explaining that these include issues like drug trafficking, drug abuse or addiction, behavior showing a physical or mental condition that poses a current threat to self or others, prostitution, violations of protective orders, and false claims to U.S. citizenship).

for inadmissibility for citizenship or removal from the country under conduct-based grounds.¹⁸⁶ Youths who are “inadmissible” are ineligible to apply for certain immigration visas, and youths who are “removable” may have any legal status revoked and be subject to removal proceedings.¹⁸⁷

3. Prolonged or unnecessary detention

Reporting juveniles to ICE, especially if done at the booking stage, can result in prolonged detention or erroneous referrals both in juvenile and immigration custody.¹⁸⁸ For juveniles whose charges are dropped or whose cases are dismissed,¹⁸⁹ “[r]eferring youth to ICE prior to adjudication severely punishes youth who otherwise would have been released and triggers a series of potentially harmful consequences,” including prolonged juvenile detention or placement in an immigration detention facility thousands of miles from their families and communities for months on end.¹⁹⁰

Recent data show that immigrant youths are commonly held to be in violation of federal laws that require a certain degree of humanity in living conditions.¹⁹¹ For example, the data revealed that over 1300 children were held without access to legal counsel for more than three days in “overcrowded, low-temperature holding cells at adult detention facilities, at times denied blankets, adequate food, and showers.”¹⁹² Such law violations not only subject children to a lack of general humanity but also unnecessarily contravene the juvenile justice principle of family reunification.

186. POLICY BRIEF NO. 2, *supra* note 4, at 8.

187. *Id.* at 7. The underlying offenses making a juvenile “inadmissible” or “removable” do not have to be violent or otherwise serious. *Id.* A list of more than fifty crimes triggering deportation includes crimes that are simple misdemeanors in most states. *Id.*

188. WILBER & JUNCK, *supra* note 1, at 26.

189. This is a common occurrence. *See id.* at 2.

190. *Id.* at 26.

191. Odette Yousef, *Study: Undocumented Immigrant Youth Languish in Adult Jails*, WBEZ 91.5 CHI. (June 5, 2013), <https://www.wbez.org/shows/wbez-news/study-undocumented-immigrant-youth-languish-in-adult-jails/fae0f02b-2303-44b1-80d8-e07579aa9565>.

192. *Id.*

4. *Separation from family*

As a consequence of ICE referrals, youths may be unnecessarily separated from their families, either while they are in detention or by deportation. While in detention, fear may cause youths to be separated from family either because the youths themselves are afraid to bring in family members or because the family members are afraid to show up.¹⁹³ However, because family involvement is necessary to the feasibility of most case plans,¹⁹⁴ youths may be held for longer than necessary because their case plan cannot be worked out. This causes prolonged and unnecessary detention.

Youths may also be separated from their families by deportation.¹⁹⁵ If a youth is deported back to his or her home country and his or her family remains in the United States, they are almost always permanently separated. To put it lightly, “[t]o be permanently separated from your family because you painted graffiti on a wall is traumatic.”¹⁹⁶

5. *Effects of waiver into adult system*

The four aforementioned consequences of juvenile exposure to the immigration system are exacerbated if the juvenile commits certain crimes in states that allow for waiver into adult court. Such waiver may be mandatory and automatic, based on the seriousness of the crime, or follow a court hearing in which a magistrate sends the juvenile to the adult system.¹⁹⁷ In cases of waiver, the juvenile may end up with

193. WILBER & JUNCK, *supra* note 1, at 27–28; CHILDREN IN HARM’S WAY, *supra* note 7, at 33 (“The vast majority of youth turned over to ICE by the juvenile system are designated as unaccompanied minors because many have undocumented parents who are afraid to come forward to claim their children.”).

194. WILBER & JUNCK, *supra* note 1, at 27.

195. See Cabrera, *Battle*, *supra* note 87.

196. *Id.* (quoting the attorney from the article).

197. See SHAY BILCHIK ET AL., U.S. DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS (1998) <https://www.ojjdp.gov/pubs/tryingjuvasadult/transfer.html>; MELISSA SICKMUND, U.S. DEPT. OF JUSTICE, JUVENILES IN COURT (2003), <https://www.ncjrs.gov/pdffiles1/ojjdp/195420.pdf>. Examples of crimes that could, depending on the state, lead to waiver into adult court include violent felonies like murder and aggravated assault, burglary, and nonviolent drug offenses. See U.S. Dept. of Justice, *Juvenile Transfer to Criminal Court*, JUV. JUST. REFORM INITIATIVE, https://www.ojjdp.gov/pubs/reform/ch2_j.html (last visited May 2, 2017).

an actual criminal adjudication on his or her adult criminal record rather than just a juvenile delinquency adjudication. A criminal adjudication is much more likely to result in the minor's removal or inadmissibility.

In one case, a fifteen-year-old boy was charged with burglary and arson, for which he was waived into his state's adult criminal court before he could have a hearing on the waiver, and where he had criminal charges levied against him.¹⁹⁸ His attorney appealed to the juvenile court to reconsider the waiver and was told that the youth had grounds for reconsideration.¹⁹⁹ However, at that point the juvenile court could do nothing because it no longer had jurisdiction and the adult court had already filed criminal charges against the youth.²⁰⁰ This resulted in the youth having his legal permanent resident status revoked—he was then considered “stateless” and detained indeterminately.²⁰¹

C. Unconstitutionality of Illegal Treatment

ICE referrals result not only in negative immigration consequences, but also in the unconstitutional or illegal treatment of youths. Because these vulnerable youths often do not recognize what is detrimental to them,²⁰² routine rights violations result. These violations include due process issues regarding being questioned about citizenship or legal status upon intake, mistaken referrals to ICE, unconstitutional ICE interrogations, and unconstitutional ICE holds or detainers. Most of these issues have never reached appeal, leaving the aforementioned consequences²⁰³ firmly rooted in place.

First, there may be due process issues associated with questioning a person about their citizenship or legal status upon intake.²⁰⁴ Aside from the obvious profiling issues,²⁰⁵ this practice leads to due process issues:

198. POLICY BRIEF NO. 2, *supra* note 4, at 7.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Violation of Probation*, *supra* note 28.

203. *See infra* Section IV.B.

204. Cabrera, *Counties*, *supra* note 8.

205. WILBER & JUNCK, *supra* note 1, at 10.

The practice of reporting youth in the juvenile justice system to immigration authorities results in a two-tiered system of justice, in which immigrant youth may be denied a dismissal or release from the juvenile system, detained for longer periods, or disqualified from rehabilitative programs. Treating immigrant youth differently than U.S. citizens in the juvenile justice system subverts the constitutional principles underlying our criminal justice system: equal treatment under the law and due process protections for all.²⁰⁶

Thus, despite the helpful aspects of requiring a minor's driver's license or birth certificate, for instance, establishing the minor's correct birthdate,²⁰⁷ any further attempt to ascertain a minor's legal status upon intake results in arguably unconstitutional treatment.

Second, the referral to ICE may be a mistake. If juvenile justice personnel attempt to ascertain a juvenile's legal status, the complexity of this undertaking may result in a mistake regarding the status of the juvenile.²⁰⁸ Such mistakes could lead to wrongful detention or deportation.²⁰⁹ Some jurisdictions offer redress such as civil penalties for mistaken referrals.²¹⁰

Third, allowing ICE agents to enter a juvenile detention center to interrogate a youth suspected of being undocumented may be unconstitutional. Here, ICE agents are allowed to enter the juvenile detention center and interrogate youths without a parent or legal counsel present.²¹¹ The youth is given no notice of the right to counsel, the right to use a telephone to call a parent, or the right to a trial before a judge, until after interrogation has taken place.²¹² This is likely a violation of Fifth Amendment due process and the Fourth Amendment right against unreasonable search and seizure.²¹³

206. CHILDREN IN HARM'S WAY, *supra* note 7, at 35.

207. *Supra* notes 148–49.

208. *Supra* notes 141–44.

209. WILBER & JUNCK, *supra* note 1, at 10.

210. UNIV. CAL. IRVINE SCH. OF LAW, SECOND CHANCES FOR ALL: WHY ORANGE COUNTY PROBATION SHOULD STOP CHOOSING DEPORTATION OVER REHABILITATION FOR IMMIGRANT YOUTH 29 (2013) http://www.law.uci.edu/academics/real-life-learning/clinics/UCILaw_SecondChances_dec2013.pdf.

211. Cabrera, *Undocumented Youth*, *supra* note 5.

212. *Id.*

213. *Id.*

When ICE apprehends a minor, they are required to give a Notice of Rights and Request for Disposition (the “I-770 form”).²¹⁴ This notice informs the person to be interrogated of his or her rights, for example, to remain silent, to have an attorney present, to use the phone to contact family, to trial before a judge, and against self-incrimination.²¹⁵ The minor must voluntarily waive these rights before an interview. But sometimes minors are not informed of their rights until days, weeks, or even months after the interrogation.²¹⁶ This is due to a disagreement over when “apprehension” occurs,²¹⁷ which is outlined as follows.

ICE argues that “apprehension” occurs when legal status has been definitively determined and the juvenile has been served with a warrant of arrest and taken into ICE custody.²¹⁸ Juvenile advocates argue that “apprehension” is at first contact with the juvenile, because regardless of whether the juvenile is actually in ICE custody or not, he or she would not feel free to leave the interrogation due to the interrogation taking place while he or she is already in detention.²¹⁹ Rather, the juvenile would feel “intimidated and compelled to answer.”²²⁰ Further complicating the issue is the fact that some ICE forms “note[] the date of apprehension as the day . . . the agent first interviewed the minor.”²²¹

The problem is that admissions made by the minor during interrogation are later used in immigration removal proceedings.²²² However, this practice was successfully challenged in 2009, when a judge halted deportation proceedings due to immigration officials’ reliance upon ill-gotten admissions.²²³ The youth’s attorney argued

214. Cabrera, *Battle*, *supra* note 87; *see* U.S. DEP’T OF HOMELAND SEC., OIG-05-45, A REVIEW OF DHS’ RESPONSIBILITIES FOR JUVENILE ALIENS (2005), https://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf. Adults do not receive this form. *Id.* at 11.

215. Cabrera, *Battle*, *supra* note 87.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (“Kids are different [from adults] in their competence to exercise legal rights.”).

221. *Id.*

222. *Id.*

223. *Id.*

that the procedure used to gain admissions about legal status was unfair, and the judge deemed the evidence as inadmissible.²²⁴

Finally, the very practice of allowing ICE holds or detainers past the time a person may legally be held may be unconstitutional if the hold lasts longer than the state has legal custody of the child. With this practice, juvenile justice services often keep minors who should be released from custody for up to forty-eight hours to wait for ICE to take custody and detain them.²²⁵ This happens even for “young teens (some as young as twelve), for abused and neglected children in state foster care, for youth with minor delinquency cases, or in cases where no delinquency charges were brought or dismissed,” and even in one case where a thirteen-year-old boy took forty-six cents from another boy on the playground.²²⁶

However, a recent Oregon case has held that it is a “violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention.”²²⁷ In this case, an adult was detained even after she had posted bail and had been released from state charges.²²⁸ This holding likely applies to minors as well, especially based on the preferential treatment given to minors, and since there is no apparent reason to differentiate between adults and minors here.

V. THE NEED FOR COUNTRYWIDE REFORM ON TWO LEVELS

To counteract the disparate treatment between undocumented juveniles and citizen juveniles, countrywide reform is necessary on both state and federal levels. Waiting for courts to resolve the issue is likely futile, as undocumented juveniles typically do not have legal representation in these cases.²²⁹ Thus, a case in which a court resolves the disparate treatment issue is unlikely to be decided soon, since

224. *Id.* (“[W]ithout an understanding of their rights, the juveniles are unwitting participants in ICE interrogations, thus rendering the procedure itself unfair and the evidence inadmissible.”).

225. Cabrera, *Undocumented Youth*, *supra* note 5. Note that the California Trust Act prohibits detaining individuals on ICE holds, past time of release, unless convicted of a serious crime. Cabrera, *Counties*, *supra* note 8.

226. Cabrera, *Counties*, *supra* note 8.

227. *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *33 (D. Or. Apr. 11, 2014).

228. *Id.*

229. Cabrera, *Battle*, *supra* note 87.

unrepresented juveniles are less likely to argue their cases in a legally compelling way or to appeal to a higher court. Accordingly, states should ensure that immigration status will not be a consideration in the juvenile justice process, should strengthen and enforce current juvenile confidentiality laws, should require ICE to provide an immigration court order to access juvenile records, and should provide juveniles with public defenders who have immigration law experience. At the federal level, Congress should amend Title 8 to explain that reporting a juvenile is *never* admissible when confidentiality would be breached.

A. State Reform

There are four major actions states can take to counteract the disparate treatment of undocumented juveniles.²³⁰ First, states can enact policies that discourage juvenile justice personnel from requesting or attempting to discover the immigration status of youths entering the system. Second, states can strengthen and enforce existing juvenile privacy laws, and establish sanctions for those who release confidential information. Third, states can enact laws that require federal agencies, including ICE, to provide a court order based on probable cause before they can access information about minors in the juvenile justice system. Fourth, states can ensure the mandatory provision of all youth with a public defender who either has immigration knowledge or has access to immigration experts.

1. Not consider immigration status

States can enact policies that prohibit or discourage juvenile justice personnel from requesting or attempting to discover youths' immigration status. Because immigration status has no bearing on the purposes and values of the juvenile justice system, such policies would ensure that a youth's immigration status is not taken into account when determining punishment or other actions. Such policies comport with Title 8, since they would not explicitly ban personnel from reporting suspect juveniles to ICE, but they would greatly lessen the probability that a youth would be reported because personnel

230. Note that California has already enacted many of these protections. *See* LAW GOVERNING IMMIGRATION ENFORCEMENT AGAINST JUVENILES IN CALIFORNIA, *supra* note 84.

would have less reason to suspect an incoming youth of being undocumented.

Alternatively, states can enact policies like those of San Francisco: to address the problem that youths brought into the juvenile justice system on low-level offenses were being reported to ICE and then deported without even a hearing on the underlying charges, San Francisco implemented a new policy under which the city's Juvenile Probation Department officials may report a minor to ICE only when a felony charge is sustained by a judge.²³¹ This helps strike a balance between community safety and juvenile confidentiality.

2. Strengthen and enforce juvenile privacy laws

States can also strengthen existing juvenile privacy laws by (a) banning personnel from sharing juvenile records with outside agencies that are unrelated to the juvenile's case at hand; (b) creating sanctions for those who release a juvenile's confidential information; and (c) actively enforcing these laws.

As discussed previously, residual "tough-on-crime" laws are still on the books,²³² and not all states protect juvenile records to the extent required by rehabilitation goals.²³³ Accordingly, states should reexamine their current juvenile confidentiality laws to ensure that they comport with these rehabilitation goals and allow for successful reintegration into the community. As part of this reinforcement of confidentiality, and in response to the immigration issues laid out here, states should prohibit the sharing of juvenile records with any outside agency that is unrelated to the case at hand.²³⁴ Some states have enacted policies just shy of this. For example, Orange County procedures allow only the "ICE liaison deputy probation officer" to refer juveniles suspected of being undocumented, and references may be made based only on a set list of factors.²³⁵

231. Joel Streicker, *S.F. Victory for Undocumented-Minor Immigrants*, NEW AM. MEDIA (May 19, 2011), <http://newamericamedia.org/2011/05/local-victory-for-undocumented-minor-immigrants.php>.

232. *Supra* notes 62–68.

233. SHAH, FINE & GULLEN, *supra* note 9, at 12.

234. *Id.* at 20 (also arguing that this policy limit access of juvenile record information to "individuals connected to the case").

235. Cabrera, *Undocumented Youth*, *supra* note 5. A reference may be made only if the following four factors are appropriately considered: 1) the minor has another adjudication for an

Additionally, states can create or enforce already existing civil or criminal sanctions for those who release confidential juvenile records. While seventeen states and the District of Columbia already provide for criminal sanctions for violating juvenile confidentiality, and while two states provide civil remedies, the remaining thirty-three states do not have any laws that impose sanctions for violations of juvenile confidentiality.²³⁶ These thirty-three states should codify and impose sanctions on violators, and the remaining states should consider whether their existing sanctions are appropriate or if greater deterrence is necessary.²³⁷

Because “[c]onfidentiality provisions are only effective if they are enforced,” states must be vigilant in being informed about the problem and prosecuting violations.²³⁸ Even federal judicial enforcement of the problem has made a difference: in California, immigration courts are becoming more aware that breaches of juvenile confidentiality violate state law, and some immigration court judges will not accept juvenile records unless ICE accessed them via a juvenile court order.²³⁹ In that vein, if federal judges or other court officers report juvenile confidentiality violations to state officials, state prosecutors could quickly sanction perpetrators.

While state bolstering of juvenile confidentiality laws does nothing to alleviate the clash between state and federal law (and indeed may exacerbate it), such bolstering not only protects vulnerable youth, but may provide the grounds upon which Title 8 may be successfully challenged, because there will be a clearer divide between state and federal law and state stances will be more defined.

offense that is a serious or violent felony under state penal code; 2) the minor has a conviction or pending case in adult court for a serious or violent offense; 3) the minor endangers public safety; and 4) contacting ICE serves the best interest of the minor. *Id.*

236. SHAH, FINE & GULLEN, *supra* note 9, at 21. In most states providing for criminal sanctions, violating juvenile confidentiality is a misdemeanor; criminal sanctions include fines or being held in contempt of court. *Id.* Civil remedies include fines or allowing a cause of action. *Id.*

237. The Juvenile Law Center advises that a fine, not incarceration, is appropriate for persons or agencies who disclose confidential information found in juvenile court records or law enforcement reports. *Id.* at 21–22.

238. *Id.* at 21.

239. Cabrera, *Battle*, *supra* note 87.

3. Require federal agencies to provide a court order to access juvenile records

States should enact laws requiring federal agencies (including DHS and ICE) to provide a court order to access information about minors who are in the juvenile justice system.²⁴⁰ Under this protection, if ICE is already investigating a youth's immigration status and believes juvenile records are necessary to that investigation, ICE can show probable cause and receive an exception to juvenile confidentiality laws. This comports with Title 8 because it allows for the flow of necessary information while still protecting important confidentiality interests.

For example, California Code section 827 limits access to juvenile records to a specified group of individuals in the juvenile justice system—including the district attorney, child protective services, and law enforcement officers who are “actively participating in criminal or juvenile proceedings involving the [minor]”—unless the juvenile court grants special permission.²⁴¹ Anecdotal evidence shows that it is rare that DHS or ICE will request a court order to access juvenile records. For instance, in Orange County, which requires court orders, a cursory search turned up no such requests in any recent years.²⁴²

4. Provide youth with a public defender with immigration law knowledge or expert access

States should enact laws that require youth to be provided a public defender with immigration knowledge or with contacts who have immigration knowledge.²⁴³ This defender should be present from the initial detention hearing through the resolution of the case.²⁴⁴ The main purpose of such a provision is to ensure the juvenile is aware of potential immigration consequences:

240. This is also recommended in SHAH, FINE & GULLEN, *supra* note 9, at 20.

241. CAL. COURT R. 5.552(b)(1)(G); *see also* Cabrera, *Undocumented Youth*, *supra* note 5.

242. Cabrera, *Counties*, *supra* note 8.

243. See IRC RESOLUTION, *supra* note 75, for an example that provides “all immigrant minors in custody” with “access to an immigration legal screening by an immigration attorney.”

244. Because juvenile detention makes an ICE referral (and subsequent deportation proceedings) more likely, defense counsel should be present to ensure that the juvenile is not being unnecessarily detained in the first place. *See* WILBER & JUNCK, *supra* note 1, at 13.

Proper legal counsel during delinquency proceedings is important to prevent negative immigration consequences. Juveniles, regardless of their immigration status, have the right to a defense attorney. Therefore, defense attorneys need to have some knowledge of immigration consequences or access to attorneys with immigration expertise so that they can advise youth about the potential impact of certain pleas on their immigration status. Attorneys should also try to seek agreements with prosecutors to limit the charges that may have adverse immigration consequences for youth.²⁴⁵

Counsel or their experts should know of the types of immigration relief available, the bases upon which a youth receives relief, and any issues that might prevent a youth from receiving relief.²⁴⁶ Requiring this level of expertise allows the defense counsel to act to preserve a juvenile's ability to apply for relief.²⁴⁷

B. Federal Clarification of No Affirmative Obligation

In addition to state-level reform, Congress can amend Title 8 to ensure that states are aware that reporting is *never* admissible when existing state confidentiality laws would be breached. This would alleviate the clash between any state confidentiality laws and federal immigration law. This conflict exists not only between Title 8 and state confidentiality laws, but also conceivably between Title 8 and current state laws that prohibit (a) a public defender from violating attorney-client privilege, (b) state health service workers from violating HIPPA laws, (c) state-employed mental health workers from violating HIPPA laws, (d) state-employed chaplains from disclosing information given to them in confidence, and (e) a state university from violating FERPA laws pertaining to student records. Essentially, there could be a clash between federal law and any other state law that prohibits a state employee from sharing confidential information.

Currently, none of these issues have been litigated, and there is little scholarly work discussing the issue.²⁴⁸ However, one Second

245. POLICY BRIEF NO. 2, *supra* note 4, at 8; *see also* WILBER & JUNCK, *supra* note 1, at 18 (“Appropriate and fair resolution of delinquency charges against noncitizen youth necessarily includes analysis of the potential adverse immigration consequences.”).

246. WILBER & JUNCK, *supra* note 1, at 20.

247. *Id.*

248. Federal law already recognizes the importance of protecting juvenile privacy, *see* Cabrera, *Undocumented Youth*, *supra* note 5 (referencing 18 U.S.C. § 5038), so such a

Circuit case hinted at how a suit challenging Title 8 on the basis of general state confidentiality laws might come out. In *City of New York v. United States*, a New York executive order prohibited state and local governments from reporting information to federal immigration authorities regarding the suspected immigration status of any person.²⁴⁹ The circuit court did not reach the issue of resolving the conflict, but it strongly insinuated that if the city had argued the issue differently, the case might have come out differently. The Second Circuit noted that the city's concerns were "not insubstantial" and that without some expectation of confidentiality, it could become difficult, if not impossible, for the city to obtain information essential to performing government functions—that is, preserving confidentiality may require state and local regulation of employee use of confidential information.²⁵⁰ The court continued,

Nevertheless, the City has chosen to litigate this issue in a way that fails to demonstrate an *impermissible intrusion on state and local power to control information obtained in the course of official business* or to regulate the duties and responsibilities of state and local governmental employees

The court noted that it had asked the city to tell whether the information covered by the executive order might be subject to other confidentiality provisions preventing general dissemination but the city failed to do so.²⁵¹ Thus, the court stated,

Whether these Sections would survive a constitutional challenge in the context of *generalized confidentiality policies that are necessary to*

clarification comports with current federal standards. Additionally, when it was brought to DHS's attention that its practice of denying or delaying DACA requests (for failure to disclose juvenile records) conflicted with state confidentiality laws, DHS reviewed its practices in order to remedy the issue, *see* Memorandum, Immigrant Legal Res. Ctr., *supra* note 180, indicating that the federal agency acknowledges the problem and is amenable to alleviating any clash. This is especially the case where juveniles are not an immigration enforcement priority. Cabrera, *Undocumented Youth*, *supra* note 5; *cf. Doe v. Merten*, 219 F.R.D. 387, 388–90 (E.D. Va. 2004) (where five individuals wished to apply to college anonymously due to a state policy that all colleges report individuals suspected of being undocumented to the federal government under Title 8). The court upheld the state college policy and held that that the individuals could not apply anonymously, in part because the federal government already knew of their immigration status (two were LPRs and three had applied for LPR status. *Id.* at 393.

249. *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999).

250. *Id.* at 25.

251. *Id.* at 28.

the performance of legitimate municipal functions and that include federal immigration status is not before us and we offer no opinion on that question.²⁵²

Based on this commentary, it appears that courts deciding this issue might focus on the generality of the confidentiality policy and whether it is “necessary to the performance of legitimate municipal functions.”²⁵³ If it is general and necessary, the confidentiality law might stand up to Title 8, which could be held to be an “impermissible intrusion on state and local power to control information obtained in the course of official business.”²⁵⁴

Therefore, to avoid the time and expense involved in litigating the issue, on which it appears the federal government has good grounds to lose, Congress should preemptively amend Title 8 to state that reports violating generally applicable confidentiality laws are not acceptable.

VI. CONCLUSION

While states legally cannot be required to enforce federal immigration law, the federal government has increasingly used state and local law enforcement agencies as part of its immigration enforcement enterprise. This has created a conflict in laws between states and the federal government: many state confidentiality laws disallow sharing juvenile records with outside law enforcement or other government agencies, but federal immigration law appears to prohibit states from banning communication about a person’s legal status even if that information is confidential or based on confidential information.

Title 8 as currently applied unnecessarily exposes undocumented juveniles to the immigration system and subverts the rehabilitative purposes and values of the juvenile justice system. This in turn leads to due process issues, routine rights violations, and serious immigration consequences. Thus, countrywide reform on both state and federal levels is necessary. The clash between federal and state law should be resolved in favor of state confidentiality laws in order to minimize the negative consequences of undocumented juvenile delinquency.

252. *Id.* at 36–37 (emphasis added).

253. *See id.* at 37.

254. *See id.* at 30.

This conflict is complicated by the fact that it is rare for related legal questions to make it to appeal because juveniles lack resources such as counsel. However, as the Second Circuit case shows, such a case could be decided in favor of general confidentiality laws. In the meantime, the best solution is for Congress to explicitly state that passing information between agencies and persons should never be done in violation of juvenile (and other) confidentiality laws. While states can make their own determinations as to what level of confidentiality is necessary, strengthening state confidentiality laws better achieves the rehabilitative purposes of the juvenile justice system and the goal of keeping children with their families.

The five goals of the Juvenile Detention Alternatives Initiative are best met if the clash is resolved in favor of juvenile confidentiality laws. These goals are to minimize unnecessary detention or separation of noncitizen youth from their families and communities, to ensure that detention practices do not unfairly prejudice noncitizen youth, to promote responses aimed at rehabilitation and reintegration, to minimize the unnecessary and often devastating immigration consequences for noncitizen youth of their involvement in the juvenile justice system, and to preserve the ability of noncitizen youth to pursue immigration relief to which they may be entitled under federal law.²⁵⁵

Resolving the clash in favor of juvenile confidentiality laws allows states to act in the best interests of minors—to protect vulnerable youth no matter if they are undocumented or U.S. citizens—at one of the most crucial times in their lives.

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255. WILBER & JUNCK, *supra* note 1, at 3.

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