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New Immigrant Policy Violates Due Process

The Recorder

Commentary By Angela Chan and Shannan Wilber

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San Francisco's new policy toward undocumented youths will have harsh and unintended consequences. Consider the case of 15-year-old Andre*, who engaged in an irresponsible adolescent prank. One day after school, Andre and his friends spray-painted the side of a bus. Andre was arrested and booked at San Francisco's juvenile hall on felony vandalism charges.

Pursuant to a new policy issued by Mayor Gavin Newsom, Andre's probation officer, while booking the boy, notified federal Immigration and Customs Enforcement authorities. Andre had not yet appeared for his initial juvenile court hearing, nor had the court appointed an attorney to represent him. Ultimately, the court placed Andre on probation and ordered him to make restitution — a common sanction for a first-time graffiti offense.

However, when Andre was released from juvenile hall, ICE was waiting for him. He was transferred to a detention center in another state where he awaited deportation to El Salvador. Having been raised in the United States since he was a toddler, he knew nothing about El Salvador and had no family there who could care for him.

SUDDEN TURNABOUT

For more than a decade, San Francisco's juvenile probation department has operated under a written policy that emphasized reunification of youths with their families — either in the United States or their home countries. The INS (the predecessor to ICE) worked cooperatively with juvenile justice personnel to lift immigration holds in order to accomplish repatriation where appropriate. Where there was no immigration hold, juvenile justice personnel only referred undocumented youths to immigration authorities after submitting a motion in juvenile court, identifying the specific reasons that notification was appropriate. The INS and the U.S. attorney's office were aware of this policy and had approved it, according to **a letter** from Public Defender Jeff Adachi recently published in the *San Francisco Chronicle*.

In July, Newsom rescinded this policy after the *Chronicle* released a **series of articles** under the misleading headline, "Sanctuary Shielding Immigrants." Citing a spokesperson for ICE and U.S. Attorney Joseph Russoniello, the *Chronicle* asserted that the probation department had "shielded" several undocumented youths from immigration authorities by returning them to their families in Honduras.

Within days, Newsom directed his administration to notify federal immigration authorities on all felony juvenile cases at the booking stage. In unilaterally issuing this new policy, the mayor circumvented the Juvenile Probation Commission, which is chartered to oversee changes to juvenile probation policies. The mayor's new policy drastically widens the net for referring youths to ICE and removes any individualized consideration of cases, such as Andre's. The new policy is unsound, unnecessary and unfair.

DUE PROCESS RISKS

The city's new policy is erroneously modeled after the adult criminal justice system, and violates well-established juvenile court law and procedure. The mayor's directive fails to recognize that a separate juvenile justice system was created for youths to allow them the opportunity to rehabilitate and to become contributing members of society. Whereas adult criminal court proceedings and records are open to the public, juvenile court proceedings and records are confidential so that the matter can later be sealed and not hinder a youth's chances at obtaining higher education and employment.

Contrary to popular belief, under federal law, the legal consequences of a "sustained petition" in juvenile court do not trigger the same consequences as a conviction in criminal court for immigration purposes. In fact, a finding of guilt in juvenile court, in contrast to some convictions in adult criminal court, are not grounds for deportation.

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The policy also violates basic concepts of fairness and due process. Notifying ICE at booking will result in reporting youths who may not have actually committed the charged offense and youths whose cases may be thrown out for lack of evidence. According to the most recent available statistics ([.pdf](#)) from San Francisco juvenile probation, in 2006, almost 30 percent or 361 of the 1,215 petitions filed by the district attorney's office did not result in a sustained petition. Automatic referral at booking to ICE will result in premature and erroneous referrals, and will effectively dismantle crucial protections against racial profiling and pretextual arrests.

Moreover, probation officers, who are currently charged with making the initial determination of a youth's immigration status, are not qualified to do so. Determination of immigration status is complex, and youths themselves are often unaware of their own status. As such, this new process subjects the city to potential liability because youths who have legal immigration status may be mistakenly referred to ICE. This happened in the 1999 Eastern District of California case *Soto-Torres v. Johnson*, CIV S-99-1695 WBS/DAD, wherein authorities paid \$100,000 to settle a case brought by a plaintiff who was wrongfully arrested and detained by immigration authorities after a probation officer erroneously referred the plaintiff to ICE.

Particularly with respect to youths who have family in the United States, the city's policy also runs counter to the family reunification goals of the juvenile system mandated by state law. Youths like Andre who have lived their entire lives in the U.S. will be orphaned by a blanket policy that refers all youths to ICE without consideration of their particular circumstances. Moreover, as ICE continues to aggressively crack down on enforcement by **raiding workplaces** and homes, notifying immigration agents will have dire consequences not just for the youth, but also the youth's entire family.

Finally, unless amended to provide youths with access to immigration legal services, the policy undermines the ability of undocumented youths to pursue immigration relief to which they may be entitled under federal law. Congress has created several means by which undocumented youths may apply to adjust their immigration status, including but not limited to Special Immigrant Juvenile Status for children who have been abused, abandoned or neglected; asylum for children who have been persecuted in their countries of origin; "T" visas for children who are the victims of trafficking; and "U" visas for children who are the victims of enumerated crimes.

Notifying ICE at the booking stage will effectively cut off these important avenues of federal immigration relief for a majority of eligible youth. The sole function of ICE is to enforce immigration laws by initiating deportation proceedings against individuals who are suspected of being undocumented. ICE neither screens youths for potential forms of relief nor provides them with immigration attorneys. ICE also may and often does transfer youths to detention facilities in remote areas nowhere near any immigration legal service agencies, making it virtually impossible for them to assert a viable claim for relief.

Ultimately, the issue of undocumented youths in our juvenile justice system is more complicated than sound bites and sensational headlines. Juvenile justice professionals must have the discretion to make individualized determinations based upon the real lives of the young people and communities affected. To ensure that youths like Andre will not be the unintended casualties of misguided and hasty policymaking, the city should revisit its approach. At a minimum, youths should not be turned over to immigration authorities unless:

1. The juvenile court has sustained the felony delinquency petition.
2. The youth has undergone immigration legal screening by an immigration attorney who determines that the youth is not eligible to pursue immigration relief or does not wish to pursue such relief.
3. The court adopts a recommendation that ICE should be notified based upon an individualized determination, which takes into account the seriousness of the offense, availability of suitable caregivers, offense history and other relevant factors.

* *Identifying details have been changed to protect confidentiality.*

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