



DACA: Delinquent Aliens, Criminal Aliens

Many violent alien youths qualify for DACA, Many face few consequences

By George Fishman

We are the loved ones of those who were murdered by juveniles.

[T]here is such a well-funded advocacy effort underway to assist our loved ones' killers, with no regard to how their advocacy affects us.

[They] are getting tons of attention and sympathy, while we, our murdered loved ones, and our families are ignored. We are further re-traumatized by the actions taken by advocates for our loved ones' killers.

— [The National Organization of Victims of Juvenile Murderers](#)

Executive Summary

- Juveniles commit a large number of serious offenses. In 2020, there were 1,353 known juvenile homicide offenders. In 2019, juveniles constituted 21 percent of all arrests for robbery, 20 percent for arson, 17 percent for car theft, 12 percent for burglary, 10 percent for larceny-theft and weapons offenses, eight percent for murder, and seven percent for aggravated assault. In 2012, the last year for which data is available, juveniles accounted for 14 percent of all arrests for forcible rape.
- Despite the successful framing of DREAMers and DACA recipients as young people with no criminal records, it turns out that many were affiliated with gangs and many had arrest records when granted DACA benefits, and many others saw their DACA status terminated because of criminal activity. As USCIS has admitted, “[t]he truth is that we let those with criminal arrests for sexually assaulting a minor, kidnapping, human trafficking, child pornography, or even murder be provided protection from removal.”
- Juvenile perpetrators are much more likely to be processed through a juvenile justice system than a criminal court. The Los Angeles County District Attorney made the decision (still largely in effect) to not send *any* juveniles to criminal court, no matter the gravity of their crimes.
- Most juveniles adjudicated delinquent in juvenile court are not placed into any sort of out-of-home detention, including for such offenses as aggravated assault and robbery.
- Congress has determined that all aliens (regardless of their immigration status) are subject to removal upon conviction for a wide range of crimes. Congress has also determined that aliens are subject to mandatory detention and are ineligible for a wide range of immigration benefits and relief upon conviction for a wide range of crimes.

George Fishman is a senior legal fellow at the Center.

- However, aliens who are “adjudicated delinquent” in a juvenile court after having committed such offenses as minors are not subject to removal on this basis, or to mandatory detention or loss of eligibility for immigration benefits or relief on this basis.
- Regardless of one’s views as to the “deservingness” as a general matter of illegal aliens brought to the U.S. as minors by their parents, brought to the U.S. by smugglers paid for by their parents, or who simply came to the U.S. on their own accord, those who are criminals (whether convicted in criminal court or adjudicated delinquent in juvenile court) should surely face immigration consequences. The lasting devastation to the lives of crime victims and their families is not wiped away simply because a perpetrator is a minor, even if that minor was “brought to the U.S. through no fault of their own.”
- When a juvenile perpetrator is an alien, especially one not lawfully present, the consequences should not only entail “rehabilitation and treatment” through a federal or state juvenile court system, but also extend to the immigration realm. Congress should bar juveniles adjudicated delinquent from eligibility for any immigration benefit or relief, especially relief designed for those who arrived in the U.S. while minors. Congress should also give serious consideration to establishing a detention mandate and a ground of deportability for all aliens who have been adjudicated delinquent for the type of offense that would trigger mandatory detention or a ground of deportability had it resulted in a criminal conviction.

A Dream Deferred

In 2010, Secretary of Homeland Security Janet Napolitano [claimed](#) that:

*The DREAM Act fits into a larger strategy of immigration enforcement and would actually compliment [sic] the Department of Homeland Security’s efforts to prioritize our enforcement resources on removing dangerous criminal aliens from the country. What doesn’t make as much sense is the idea of spending our enforcement resources to prosecute **young people who have no criminal records**, who were brought here through no fault of their own, so they have no individual culpability and who now want to go to college or serve in our armed forces. [Emphasis added.]*

A year later, in 2011, Napolitano [stated](#) that “*only young people who are poised to contribute to our country and have met strict requirements regarding moral character and criminal history would be eligible [for the DREAM Act]. These individuals do not pose a risk to public safety.* They do not pose a risk to national security.” (Emphasis added.)

A year later, in 2012, Napolitano (and President Barack Obama) grew tired of waiting for Congress to pass a DREAM Act. Despite Obama having previously [declared](#) that “I’m not a king” and “[w]ith respect to the notion that I can just suspend deportations through executive order, that’s just not the case, because there are laws on the books that Congress has passed”, Napolitano [created](#) the Deferred Action for Childhood Arrivals (DACA) program with a stroke of her pen. Her memo explained to DHS employees “how, in the exercise of prosecutorial discretion, [they] should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home. ... to ensure that our enforcement resources are not expended on these low priority cases.” In DHS-speak, “enforce the Nation’s immigration laws” meant “don’t enforce the Nation’s immigration laws”, through the stratagem of deferred action. As U.S. Citizenship and Immigration Services (USCIS) [explains](#), “[d]eferred action is a discretionary determination to defer ... removal ... as an act of prosecutorial discretion[, ...] authoriz[ing an illegal or otherwise removable alien] to be present in the United States, [and thus] lawfully present ... [and] eligible to receive employment authorization”. Got that?

As demonstrated by Napolitano’s choice of words, the prime public selling points of the DREAM Act and the DACA program are that the alien beneficiaries “were brought to this country as children”, “through no fault of their own”, and do not have “criminal records”, “have met strict requirements regarding ... criminal history”, and “do not pose a risk to public safety.”

In actuality, the DACA program is more lenient. Napolitano’s memo [provided](#) that one of the “criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion” is that they have “not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety”. In 2014, Jeh Johnson, Secretary Napolitano’s successor, [stated](#) that under the criteria for the extension

of DACA status, “multiple misdemeanor offenses” would become “three or more misdemeanors”. The recently promulgated DACA final rule [requires](#) that:

*The requestor must not have been convicted ... of a felony, a misdemeanor [for which the maximum term of imprisonment is 1 year or less but greater than 5 days and either ... (1) regardless of the sentence imposed, is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or DUI or (2) if not such an offense, is one for which the individual was sentenced to and actually served more than 90 days], or three or more other misdemeanors ... or otherwise pose a threat to national security or public safety. ... [E]xpunged convictions, **juvenile delinquency adjudications**, and convictions under State ... laws for immigration-related offenses are not considered disqualifying convictions. [Emphasis added.]*

The DACA application [form](#) asks:

- *Have you EVER been arrested for, charged with, or convicted of a felony or misdemeanor, including incidents handled in juvenile court, in the United States?*
- *Are you now or have you ever been a member of a gang?*
- *Have you EVER engaged in ... [k]illing any person ... severely injuring any person ... [or] any kind of sexual contact or relations with any person who was being forced or threatened?*

However, the form’s [instructions](#) state that:

*USCIS may consider deferring action in your case even if you have been arrested or detained by any law enforcement officer and charges were filed, or if charges were filed against you without an arrest. USCIS will evaluate the totality of the circumstances in reaching a decision on deferred action. ... [I]f USCIS determines that you have been convicted of a felony, a significant misdemeanor, or three or more misdemeanors ..., or that you otherwise pose a threat to national security or public safety, USCIS is **unlikely** to defer action in your case. ... Even if you satisfy the threshold criteria ..., USCIS may deny your request if it determines, in its unreviewable discretion, that an exercise of prosecutorial discretion is not warranted in your case. [Emphasis added.]*

It is certainly comforting to know that, despite Secretary Napolitano’s assurances, USCIS reserves the right to grant DACA to an alien who poses a threat to national security or public safety, who has been convicted of a felony, a significant misdemeanor, or three or more misdemeanors.

In any event, DREAM and DACA were framed as relief for deserving non-criminal aliens by advocates both within and outside government, and within and outside the United States. To give just a few examples:

- In 2010, the National Immigration Law Center [stated](#) that:

*The DREAM Act provides for a rigorous application process for deserving youth and **does not provide safe harbor or amnesty for criminals.***

...

*Students **would not qualify for this relief if they had committed crimes**, were a security risk, or were inadmissible, ineligible, or removable on certain other grounds.*

*Despite rhetoric to the contrary, **the DREAM Act does not provide a safe harbor for criminals** [T]he immigrant student must prove that he or she meets the basic elements of eligibility, including good moral character since arrival in the U.S. **Criminals** and others who cannot prove they have good moral character **are ineligible for the DREAM Act relief***

Any claim that the DREAM Act offers a broad “amnesty” for “criminal aliens” is fear-mongering. ... [A]s part of the application process, [USCIS] officers will ... conduct criminal background checks. If an immigrant student has committed a crime—such as marriage fraud—he or she will not be able to prove good moral character, and therefore will not qualify for immigration relief. [Emphasis added.]

- In 2017, the Guardian (UK) [stated](#) that “Those applying [for DACA] are vetted for any criminal history or threat to national security.” (Emphasis added.)
- In 2018, House Minority Leader Nancy Pelosi [said](#) on the House floor that “Stephanie is the girlfriend of an unnamed DREAMer. ... I write to you today about DACA. My boyfriend is a DACA recipient. He is a building engineer. ... He has no criminal record.”
- In 2019, the BBC [claimed](#) that DACA recipients “must go through an FBI background check and *have a clean criminal background*”. (Emphasis added.)
- The Human Rights Campaign [argues](#) on its website that:
 - *The DACA program provided much needed relief for Dreamers who have **no criminal history**.* [Emphasis added.]
 - *The American Dream and Promise Act would provide Dreamers the opportunity to apply for permanent legal status. ... It would also cancel the removal of undocumented immigrants who ... were younger than 18 when they were first brought to the United States, and **have no criminal record**.* [Emphasis added.]
- Stilt, “a mission-driven fintech company focused on providing credit to immigrants and the underserved”, [claims](#) on its website that: “In order to be considered a Dreamer, an immigrant . . . *must have not had any sort of criminal history*” and “[h]as *not been involved in any terrorist or criminal acts*, and is thus not inadmissible on particular terrorism, criminal, security grounds, or other grounds.” (Emphasis added.)

As John Lennon once pleaded: “I’ve had enough of reading things by neurotic, psychotic, pig-headed politicians. All I want is the truth. Just give me some truth.” Well, what is the truth regarding DACA recipients and criminality?

In March 2015, Senate Judiciary Committee Chairman Chuck Grassley and Sen. Thom Tillis [wrote](#) to DHS Secretary Johnson, stating that:

Emmanuel Jesus Rangel-Hernandez has been charged with first degree murder in the death of four individuals in Charlotte, North Carolina.

...

[W]e have [since] received information that [he had been] approved for ... DACA. According to the ... Arrest Affidavit, [he] was arrested for misdemeanor possession of Marijuana. ... As a result of his arrest and unlawful status ... [he] was put into removal proceedings. ... Subsequently, [his] removal proceedings were dismissed ... due to his approved DACA application.

Furthermore, whistleblowers have alleged that [his] DACA application was approved although [USCIS] had full knowledge that he was a known gang member.

In January 2016, Sens. Grassley and Jeff Flake [wrote](#) to Secretary Johnson, stating that:

Francisco Rios-Covarrubias was arrested on suspicion of sex trafficking a 3-yr-old girl. ... Reports claim that [he] had apparently duct-taped the girl’s mouth, hands, arms and legs, and confined her to a closet, where she was found covered in human feces. Police rescued the girl after a man reported that Rios-Covarrubias offered the girl to him for sex. The girl has signs of sexual abuse, and remains in the hospital where she can neither walk nor talk due to her injuries and

trauma. ... [He] was charged with four felonies; kidnapping, sexual conduct with a minor, felony child abuse, and sex trafficking.

According to information received by the Committee ... Rios-Covarrubias was a recipient of ... [DACA]. ... For months the Committee has inquired into numerous incidents of DACA recipients enjoying DACA privileges after investigations, arrests, or convictions for violent or predatory crimes. The DACA recipients referenced ... are charged with various crimes including several counts of murder, suspicion of second-degree murder, possession of child pornography, and child molestation.

In February 2017, DHS [stated](#) that:

[A]liens granted deferred action from deportation who are subsequently found to pose a threat to national security or public safety may have their deferred action terminated at any time and DHS may seek their removal. ... This includes those who have been arrested or convicted of certain crimes, or those who are associated with criminal gangs.

In May 2017, U.S. Immigration and Customs Enforcement (ICE) [stated](#) that:

- *A six-week nationwide gang operation ... targeted gang members and associates involved in transnational criminal activity, including drug trafficking, weapons smuggling, human smuggling and sex trafficking, murder and racketeering.*
- *Three [of the] individuals arrested ... previously had deferred action under DACA.*

In August 2017, Paul Bedard [reported](#) that “USCIS said that 622 [DACA recipients] had their ... status pulled this year due to criminal activity[, and a total of 2,139 have been] revocat[ed] and terminat[ed from 2013-17].” According to [USCIS](#), “The ... terminations were due to one or more of the following: a felony criminal conviction; a significant misdemeanor conviction; multiple misdemeanor convictions; gang affiliation; or arrest of any crime in which there is deemed to be a public safety concern.”

My colleague Jessica Vaughan [noted](#) in reaction that:

[This] confirms that the DACA screening process was woefully inadequate. The eligibility bar was set very low, explicitly allowing people with multiple misdemeanor and certain felony convictions to be approved. Only a handful of the applicants were ever interviewed, and only rarely was the information on the application ever verified.

In January 2018, Vaughan [reported](#) that:

USCIS ... provided a list of more than 45 gang affiliations of the ex-DACA criminals. It includes some of the most violent and dangerous gangs in the United States, such as MS-13, 18th Street, the Latin Kings, and the Trinitarios. It includes some lesser-known gangs as well [including] Last Generation Korean Killers and Maniac Latin Disciples.

In June 2019, USCIS [released data](#) indicating that 7.8 percent of all approved DACA applicants had an arrest record — 59,786 individuals, of whom 53,792 had a record before approval and 7,814 had a later arrest. In addition, “about one percent of approved DACA requestors have an arrest in any given year” and 10 were approved who had an arrest for murder, 31 for rape, 15 for a gang offense, 23 for arson, 40 for car theft, 38 for organized criminal activity, two for child pornography, 95 for embezzlement, 187 for robbery, 454 for stolen property, 979 for weapons-related offenses, 1,173 for burglary, 2,378 for DUI, 6,629 for theft-larceny, and 6,276 had a total of three or more arrests. USCIS Director L. Francis Cissna [stated](#) that “[t]he truth is that we let those with criminal arrests for sexually assaulting a minor, kidnapping, human trafficking, child pornography, or even murder be provided protection from removal.”

Crimes by Juveniles and Crimes by Juvenile Aliens

Beyond the limited universe of DACA-eligible aliens ([who had to have been present in the U.S. since 2007](#)), what do we know about crime by juvenile aliens more broadly, and crime by juveniles more broadly?

Juveniles commit a significant and troubling proportion of serious crime in the United States. The Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) has released data revealing that in 2018, minors [committed](#) 11.5 percent of all serious violent victimizations (homicides, aggravated assaults, rapes, and robberies). And data from the FBI and OJJDP indicates that in [2019](#) and [2020](#), juveniles accounted for:

- 21 percent (in 2019) and 18 percent (in 2020) of all arrests for robbery (with juveniles under age 15 accounting, respectively, for 22 and 21 percent of these juvenile arrests);
- 20 and 12 percent of all arrests for arson (57 and 55 percent);
- 17 and 14 percent of all arrests for car theft (27 and 29 percent);
- 12 and 10 percent of all arrests for burglary (33 and 32 percent);
- 10 and 7 percent of all arrests for larceny-theft (30 and 27 percent);
- 10 and 7 percent of all arrests for weapons offenses (29 and 19 percent);
- 8 and 7 percent of all arrests for murder (14 and 10 percent); and
- 7 and 5 percent of all arrests for aggravated assault (35 and 29 percent).

In 2012 (the last year for which data is available), minors accounted for [14 percent of all arrests for forcible rape \(with juveniles under age 15 accounting for 5 percent of these juvenile arrests\)](#).

Keep in mind that minors aged 10-17 [compose](#) about 10 percent of the U.S. population. Also keep in mind, as OJJDP [notes](#), that “2020 was the peak of the coronavirus pandemic, which may have impacted policies, procedures, and data collection activities. Additionally, stay-at-home orders likely impacted the volume and type of law-violating behavior that came to the attention of law enforcement in 2020.”

OJJDP [reports](#) that the juvenile arrest rate (for minors age 10-17) in 2019 and 2020 was:

- For all crimes — 2,044.2 per 100,000 (2019)/1,269.8 (2020);
- Weapons offenses — 369.7/212.2;
- Larceny-theft — 244.4/140;
- Violent crimes — 130.3/96.1;
- Aggravated assault — 80/57.2;
- Burglary — 62.1/45.2;
- Robbery — 47.5/36;
- Car theft — 40.4/35;
- Arson — 5.1/3.5; and
- Murder — 2.8/2.8.

In 2012 (the last year for which data is available), the juvenile arrest rate for forcible rape was 7.6 per 100,000.

Shockingly, OJJDP reports that in 2019 and 2020, lone and multiple juveniles [murdered](#) an estimated 472 and 644 persons, and that in conjunction with adults, juveniles additionally murdered an estimated 306 and 478 persons. OJJDP also reports that of [known juvenile homicide offenders in 2020](#):

- 5 percent (61) were under the age of 14;
- 6 percent (81) were 14;
- 16 percent (222) were 15;
- 29 percent (393) were 16; and
- 44 percent (596) were 17.

It is thus not surprising that, as 26 “organizations dedicated to child and youth well-being and advocates for young people, families, community safety and justice” [note](#), “crimes peak around late adolescence[and] begin a steep decline into adulthood.”

Of those juveniles ultimately found to have committed such serious offenses, not all were convicted in federal and state criminal court. Many are instead “adjudicated” delinquent in the federal and state juvenile justice systems. In fact, Dr. Ashley Nellis, Co-Chair of the National Juvenile Justice and Delinquency Prevention Coalition, [finds](#) that the large majority are handled by juvenile courts, writing that “[j]uveniles are processed either in the juvenile court system (66 percent) or the criminal court system (10 percent). The remaining arrests are handled by the enforcement agencies and formal charges are not made.” The National Center for Juvenile Justice, the research division of the National Council of Juvenile and Family Court Judges, [reports](#) that in 2019, 203,600 youth were adjudicated delinquent in juvenile courts, including:

- 21,500 for larceny-theft (53 percent younger than 16 years old);
- 16,000 for burglary (55 percent);
- 10,200 for aggravated assault (52 percent);
- 9,900 for robbery (47 percent);
- 6,400 for car theft (55 percent);
- 6,100 for rape and other violent sex offenses (62 percent);
- 5,600 for a weapons offense (45 percent);
- 700 for arson (72 percent); and
- 500 for homicide (44 percent).

It is not clear what proportion of the juveniles dealt with in the juvenile justice system is made up of aliens. Beth Zilberman, now a professor at Willamette University College of Law, [concludes](#) that:

The exact number of noncitizen children who are involved in the juvenile justice system is hard to determine, primarily because of inadequate recordkeeping and the way that juvenile justice authorities gather information during ... intake. Intakes conducted by juvenile justice staff ... generally do not include questions about immigration status.

The Juvenile Detention Alternatives Initiative further [explains](#) that:

There are no reliable data on the number of noncitizen youth involved in the juvenile justice system. Most jurisdictions do not formally collect or analyze these data. ... In addition ... [:]

- *Due to budget constraints, local probation agencies are reluctant to implement new data collection requirements.*
- *Local systems do not have the means of reliably determining immigration status.*
- *The immigration status of young people is not directly relevant to culpability, accountability, rehabilitation or public safety.*
- *Tracking immigration status invites the use of the information to imperil youth and their families for circumstances that are unrelated to alleged delinquency.*

- *Because immigration is so politicized, juvenile justice personnel face challenges in creating formal systems to respond to noncitizen youth, opting for a case-by-case approach that evades public scrutiny.*

The Initiative concludes that “[d]espite the lack of formal data, juvenile justice professionals informally report a steep increase in the numbers of noncitizen youth involved in the delinquency system. It is impossible to verify this perception.”

Under Immigration Law, Juvenile “Adjudications” Are Not Treated as Deportable Convictions

In 1996, the one-two punch of the [Antiterrorism and Effective Death Penalty Act](#) (AEDPA) and the [Illegal Immigration Reform and Immigrant Responsibility Act](#) (IIRIRA), significantly enhanced the ability of the federal government to detain and deport criminal aliens, most notably by increasing the range of crimes constituting deportable offenses and eliminated most waivers for these grounds of deportability.

Shortly after the enactment of these landmark pieces of legislation, Lamar Smith, then Chair of the House Judiciary Committee’s Immigration Subcommittee and author of the House bill laying the foundation for IIRIRA, and Ed Grant (my then-colleague on the Subcommittee), explained in a [law review article](#) that:

- *The overall effect [of AEDPA and IIRIRA] should be to maximize the number of criminal aliens who remain in detention and to minimize the number who avoid removal through the granting of discretionary relief or through legal technicality.*
- *[T]he 1996 legislation expanded the categories of criminal aliens subject to removal. ... AEDPA expanded the definition of “aggravated felony,” while ... IIRIRA further expanded this definition by including convictions for serious crimes that are accompanied by a sentence of one year or longer.*
- *IIRIRA expanded the [Immigration and Nationality Act’s] INA’s definition of “conviction” to include all instances in which a judge or jury has found a defendant guilty, the alien has pleaded guilty or nolo contendere, or the alien has admitted sufficient facts to warrant a finding of guilt. ... Prior to this provision, criminals who were granted “deferred adjudication” in lieu of a conviction were able to escape deportation because the judgment against them did not meet the INA’s definition of a conviction.*
- *[T]he legislation limits the eligibility for relief from deportation that is available to criminal aliens who previously had been admitted as lawful permanent residents. ... IIRIRA ... prohibit[s] relief to all aggravated felons.*
- *Congress has [not] gone overboard, as some suggest, in getting tough. ... These measures are not driven by vindictiveness, but by idealism. When immigration is accompanied by ... crime, immigration comes to be seen not as a source of pride and renewal for all Americans but as a contributor to our problems. In the end, therefore, it is the immigrants themselves who pay for our failure to be decisive in our treatment of criminal aliens.*

In substantial measure because of the legislation, the number of criminal aliens removed increased from [36,909](#) in fiscal year 1996 to [170,112](#) in 2019.

However, as USCIS [states](#) in its policy manual for adjudicators, “(f)indings of juvenile delinquency are not considered criminal convictions for purposes of immigration law.” Kids In Need of Defense [explains](#) that “[i]f your client is facing charges in juvenile court it is imperative that you work with criminal defense counsel to avoid transfer of the case to adult court even if the potential charges and sentence are lesser in adult court.” Why? Because convictions in criminal court can trigger grounds of deportability based on specified criminal convictions, while juvenile adjudications do not.

This longstanding understanding predates the Immigration and Nationality Act of 1952. The Board of Immigration Appeals (BIA) [ruled](#) in 1944 that:

The California Juvenile Court Law ... in effect at the time the respondent committed the offense ... provides that the Juvenile Court have jurisdiction of persons under the age of 18 years. Since the respondent was only about 15 years of age at the time of the theft, at most, he could only have been found guilty of an act of juvenile delinquency. It therefore follows that the admission of the offense contained in the record was not admission of a crime, but an admission of juvenile delinquency for which he would not be deportable.

The BIA reaffirmed this rule in the wake of IIRIRA's enactment. In 2000, it [ruled](#) in *In re Devison-Charles*, an opinion authored by none other than Ed Grant, that:

- *[The BIA] ha[s] consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.*
- *The enactment of [IIRIRA] ... requires us to reconsider whether juvenile delinquency and youthful offender adjudications constitute convictions for a crime under the [INA].*
- *[The BIA held prior to IIRIRA] that a conviction exists where an alien has had a formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where the following three-pronged test has been met: (1) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; (2) the judge has ordered the imposition of some form of punishment, penalty, or restraint on the alien's liberty; and (3) a judgment or adjudication of guilt may be entered if the alien violates the terms of his or her probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the alien's guilt or innocence of the original charge.*

Congress determined [in IIRIRA] that [the BIA's] definition did not sufficiently address cases where a judgment of guilt or imposition of sentence is suspended, conditioned on the alien's future good behavior... For example, the third prong ... precluded a finding of conviction where an adjudication is "deferred" upon a finding or confession of guilt, and if the alien violates probation, a final judgment of guilt may not be imposed until there is an additional proceeding regarding the alien's guilt or innocence. In order to treat such deferred adjudications as convictions, Congress ... eliminated [the] third prong. ...

[IIRIRA's conference report states that the provision] "clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." ... Both the statutory language and the legislative history reveal Congress' clear intent to include deferred adjudications within the definition of the term "conviction."

- *However, there is no indication that Congress intended to include acts of juvenile delinquency within the meaning of the term "conviction." Congress is presumed to be aware of existing law ... [including the BIA's] long-established policy and of the [Federal Juvenile Delinquency Act] provisions that maintain a distinction between juvenile delinquencies and criminal convictions. There is no record of an effort or intention on the part of Congress to include acts of juvenile delinquency in this new definition of the term "conviction."*

We note that, in another section of the IIRIRA, Congress made a specific reference to juvenile delinquency adjudications that includes a recognition that such adjudications are not "convictions." [IIRIRA] amended ... the Immigration Act of 1990 ... to exclude from the family unity program aliens who have committed acts of juvenile delinquency that, if committed by an adult, would be classified as felony crimes of violence. In other words, if a juvenile commits a certain type of felony and is adjudicated a juvenile delinquent rather than convicted of the crime, the juvenile will be excluded from the family unity program as if he or she had been convicted as an adult.

Prior to this amendment ... the Immigration Act of 1990 excluded from the family unity program aliens who had been convicted of a felony or three or more misdemeanors. If the term "conviction" were meant to include

adjudications of juvenile delinquency, the amendment [in] IIRIRA would be superfluous: a juvenile adjudicated for any act constituting a felony would be excluded from the program. By enacting a specific disqualification for certain juvenile adjudications and limiting the scope of that disqualification to violent felonies, Congress has recognized, in the same statute containing a revised definition of a “conviction,” that adjudications for juvenile delinquency are separate and distinct from criminal convictions.

...

Although Congress included certain acts of juvenile delinquency in one section of the statute, it chose not to include such acts within the “conviction” definition.

- *We concur with the established view that juvenile delinquency adjudications are not criminal proceedings, but are adjudications that are civil in nature, wherein the applicable due process standard is fundamental fairness.*

The DACA final rule likewise [provides](#) that:

With respect to juvenile delinquency records ... USCIS does not consider a juvenile delinquency determination a conviction for immigration purposes, consistent with longstanding DACA policy and [BIA] precedent. Also consistent with longstanding DACA policy, USCIS does not consider juvenile delinquency adjudications as automatically disqualifying for DACA.

The Gaping Hole: The Lack of Immigration Consequences for Juvenile Offenders

The upshot of the INA’s not considering juvenile adjudications for serious crimes as convictions is a gaping hole in the levee Congress created in 1996 against criminal aliens. As Rebecca Phipps, an attorney at New York County Defender Services, [writes](#):

Given that the motivation for Congress’s creation of a statutory definition of conviction was to in part to create greater uniformity in the approach to convictions in the immigration context, this treatment of juveniles tried and convicted as adults seems to create a troubling lack of uniformity. A child who commits the same act in one state could be tried as a juvenile, while a similarly situated child in another state could be tried as an adult. The immigration consequences of these two adjudications would vary widely due to nothing more than a difference between the two states’ approaches to juvenile offenders.

Making matters worse is that some “progressive” jurisdictions have moved away from sending *any* juveniles to adult court, no matter the gravity of the crimes they are alleged to have committed. In such jurisdictions, no juveniles will fall under the grounds of deportability based on criminal convictions, for the simple reason that no juveniles will ever be tried in criminal court for having committed the relevant crimes. Not only does this outcome undermine the intent of Congress that convicted alien criminals be removed for the sake of public safety, but it facilitates the ability of Dreamer/DACA advocates to obfuscate the level of criminality among alien minors and DACA recipients.

In Los Angeles County, Calif., which has the nation’s largest county-run district attorney’s office, current D.A. George Gascón [promised](#) when running for office that “I will end the ineffective practice of sending youth to the adult court system to be sentenced to prison. Adult prisons are no place for youth as they are bereft of age appropriate treatment, education, or any other rehabilitative services.” Jeremy Loudonback [wrote](#) that after being elected:

[Gascón] stated that he would “immediately stop prosecuting children as adults.” ... Gascón’s pledge would represent a significant departure from past practice in Los Angeles by abandoning the practice altogether [Gascon stated] “A couple decades ago, I felt that if you committed an adult crime, you should pay adult consequences. I don’t believe that anymore.” Throughout the state, the number of youth prosecuted as adults has plunged from its high in 2008 of about 1,200 young people to just 64 last year.

The Los Angeles Times [reported](#) earlier this year that Gascón had been forced to grudgingly backtrack to a limited extent:

Los Angeles County prosecutors can now seek to try juveniles as adults ... in certain cases, according to memos issued Friday by ... Gascón, marking a major shift in his all-or-nothing stances on certain criminal justice reform issues. ... Gascón [had] made waves by ... ending the practice of trying juveniles as adults. [C]ritics have decried the so-called blanket policies and demanded he consider trying juveniles as adults ... when ... accused of especially heinous conduct. ... Committees will be created to evaluate “extraordinary” cases where a defendant’s conduct might require harsher penalties than those allowed under Gascón’s policies. ... In cases involving juvenile defendants, that could mean transferring their cases to adult court.

I wouldn’t hold my breath that these memos result in any meaningful change. The L.A. Times [notes](#) that:

The filings would still need to be approved by each committee, which will include high-ranking prosecutors and members of Gascón’s executive team. Gascón’s chief of staff ... will sit on both committees, and [a] former public defender ... who oversees the office’s policies on juvenile cases, will sit on the panel deciding the futures of teen defendants.

As to Gascón, the Times [reported](#) that:

The move comes as Gascón is facing increased criticism over his handling of juvenile cases and the political pressure of a second attempt to recall him from office. In January, 2022, a 26-year-old transgender woman was allowed to plead guilty in juvenile court for sexually assaulting a 10-year-old girl because the crime occurred when the defendant was a teenager[, which] drew widespread condemnation. ... “Over the past year, George Gascón and his policies have wreaked havoc on the criminal justice system and made all of us less safe,” said Eric Siddall, vice president of the union representing line prosecutors. “Now he’s abandoning his social experiment not because he’s learned anything or wants to make us safer, but because he knows that the politics aren’t in his favor.”

The recall effort [collected](#) 520,050 valid signatures, slightly less than the 566,857 needed to get the recall on the November ballot.

How Should Society Treat Underage Criminals?

It does not follow that to be treating a killer like a wounded bird we are somehow touching the heart of the killer and healing through love. We are simply opening the gates of hell and pushing their next victim in.

— [Daniel Horowitz](#), first president of the National Organization of Victims of Juvenile Murderers, whose wife, Pamela Vitale, was tortured and murdered by a teenager assailant.

Just how should society treat underage criminal aliens? Beth Zilberman, among many others, [posits](#) that society, and not the juveniles themselves, is at fault. Why? Because of the “the special vulnerabilities of noncitizen youth to delinquency involvement”, their “particular[] vulnerab[ility] to the main determinants of delinquency”, and their greater “susceptib[ility] to delinquency involvement.”

Purported Reason #1: Systemic Racism

Zilberman [writes](#) that:

Because of systemic racial bias, race is a significant contributor to noncitizen juvenile court involvement.

...

[I]mmigration enforcement and adjudication often acts as “bias amplification” of what many black and Latino youth are facing in their schools, communities, courts, and at the hands of the police: racial bias. ...

The use of information gathered by school resource officers and police officers, influenced by community members that may have racial underpinnings, and which is uninhibited by rules of evidence, has troubling implications.

Racial bias occurs at all levels of immigration. Immigration Judges, ICE agents, and adjudicators are far from immune to the racial bias that often leads to the very arrests of the youth standing before them.

In February 2021, over 270 organizations (including the American Civil Liberties Union and the American Immigration Lawyers Association) [sent](#) a letter to Congress regarding the “American Dream and Promise Act of 2021”, stating that:

We applaud President Biden’s ... acknowledgment that racial bias permeates our criminal legal system. ... When Congress imposes criminal bars to legalization, it also imposes the racially biased consequences of the criminal legal system twice over, and often on the communities most impacted by structural racism. ... Any criminal bars graft the racism of the criminal legal system onto the immigration system. ... Any criminal bars to legalization impose a harsh and often disproportionate penalty; import the inherent racial bias of the criminal legal system into the immigration system; and inflict a double punishment.

Purported Reason #2: Boys Will Be Boys

- Zilberman [contends](#) that “[n]oncitizen youth in the United States often face race-based systematic biases, including hyper-monitoring and over-policing of typical adolescent behavior.” (Emphasis added.)
- Karla McKanders, now a professor at Vanderbilt Law School, [argues](#) that:

*Every Latino boy born in 2001 has a one in six chance of going to prison. Further, through the juvenile justice system school officials identify many Latino boys as gang threats. The result is **hyper-surveillance and hyper-criminalization of Latino boys for common adolescent behavior.** [Emphasis added.]*

- The 26 “organizations dedicated to child and youth well-being” that I previously cited [explained](#) to Congress that “Engaging in reckless behavior during adolescence is socially normative behavior.” (Emphasis added.)

Typical adolescent behavior? Maybe in *Lord of the Flies*.

Purported Reason #3: We Don’t Give Illegal Alien Minors Enough Social Services

Zilberman [writes](#) that:

[B]arriers to social services and opportunities lead to heightened possibility for delinquency involvement. Many non-citizen youth in the United States are ineligible, due to their immigration status, to access services. They are also more likely to face obstacles to educational ... opportunities that would decrease the likelihood of delinquency involvement... .

Social services that minimize delinquency are often inaccessible to noncitizen families. Where a noncitizen youth is situated on the immigration status spectrum determines the youth’s ability to access many social services, including health insurance, housing, welfare, and educational benefits. Even if services are available ... fear of detection by immigration authorities may deter undocumented families from accessing these services... .

These barriers to services ... create a situation for many noncitizens that make them more susceptible to delinquency involvement.

Purported Reason #4: We Don't Let Illegal Alien Minors Work

Zilberman [writes](#) that “obstacles to employment also exist for noncitizen youth. Unemployment has been shown to be the highest predictor for recidivism in adults. ... These barriers to services and opportunities create a situation for many noncitizens that make them more susceptible to delinquency involvement.”

Purported Reason #5: They Have Been Exposed to Violence

Zilberman [writes](#) that:

- *The unavailability of social services, particularly mental health services, is amplified by the fact that many noncitizens have been exposed to violence, another determinate of delinquency.*
- *An additional factor that contributes to the susceptibility of noncitizens to the juvenile justice system is that many have significant traumatic histories or have been exposed to violence either in their home countries or in the United States. Exposure to violence impedes children's cognitive, emotional, and brain development, which puts them at an increased risk for delinquency.*

Purported Reason #6: Fear of Deportation

Zilberman [writes](#) that “[a]nother trauma factor affecting noncitizen youth is the fear of deportation. Child development experts explain that trauma, as a response to stressful experiences, limits an individual's coping abilities, particularly in youth.”

The Federal and State Juvenile Justice Systems

What is delinquency? The National Center for Juvenile Justice [explains](#) that “[d]elinquency offenses are acts committed by juveniles that, if committed by an adult, could result in criminal prosecution.” This is distinguished from “status offenses” that are “acts or types of conduct that are offenses only when committed or engaged in by a juvenile” – such as running away from home, truancy, curfew violations, ungovernability/incorrigibility, and status liquor law violations. Juvenile justice systems handle both delinquency and status offenses.

The Federal Juvenile Justice System

The Congressional Research Service [explains](#) that:

- *The ... basic premise of federal juvenile law is that juvenile matters, even those arising under federal law, should be handled by state authorities whenever possible. The remote second preference of federal law is treatment of the juvenile under the federal delinquency provisions. ... In a limited, but growing, number of instances involving drugs or violence, federal law permits the trial of juveniles as adults in federal court. For purposes of the Federal Juvenile Delinquency Act [FJDA] in its present form, a juvenile is an individual, under 21 years of age when the information is filed, alleged to have violated federal criminal law before reaching the age of 18.*
- *Federal law permits federal proceedings against a federal juvenile offender when there is no realistic state alternative or when the juvenile is accused of a serious federal crime. The government must certify ... that either: (1) the state courts are unwilling or unable to proceed against the juvenile for the misconduct in question; or (2) the juvenile programs of the state are unavailable or inadequate; or (3) the offense is a drug dealing or drug smuggling violation, possession of an undetectable firearm, or felony and crime of violence and that a substantial federal interest exists warranting the exercise of federal jurisdiction.*

- *If the government decides against federal proceedings, the juvenile must either be released or, under the appropriate conditions, turned over to state authorities. ... The government may proceed against a juvenile as an adult only if the child insists, or pursuant to a juvenile court transfer.*

There are two types of transfers, mandatory and discretionary. A transfer is mandatory in the case of a violent felony, drug trafficking, drug smuggling, or arson, allegedly committed by a juvenile 16 years of age or older who has previously been found to have committed comparable misconduct. ... Charges that would support a mandatory transfer if brought against a 16-year-old recidivist, may be used to trigger a discretionary transfer if the juvenile is 15 or older regardless of his or her prior record; discretionary transfers are also possible for juveniles 13 or older in some cases of assault, homicide or robbery.

- *When the transfer is discretionary, juvenile adjudication is presumed appropriate, unless the government can establish its case for a transfer by a preponderance of the evidence.*

State Juvenile Justice Systems

How does a typical state juvenile justice system work? The National Center for Juvenile Justice [explains](#) that: “[a]ny attempt to describe juvenile court caseloads at the national level must be based on a generic model of court processing to serve as a common framework”. Here is its model:

- *An intake department ... first screens referred cases ... [and] may decide to dismiss the case for lack of legal sufficiency or to resolve the matter formally or informally. Informal ... dispositions may include a voluntary referral to a social service agency, informal probation, or the payment of fines or some form of voluntary restitution. Formally handled cases are petitioned and scheduled in [juvenile] court for an adjudicatory or waiver hearing.*
- *The intake department may decide that a case should be removed from juvenile court and handled instead in [adult] criminal ... court. In such cases, a petition is usually filed in juvenile court asking the juvenile court judge to waive ... jurisdiction over the case. The juvenile court judge decides whether the case merits criminal prosecution.*
- *At the adjudicatory hearing, a juvenile may be adjudicated (judged) a delinquent ... offender, and the case would then proceed to a disposition hearing. Alternatively, a case can be dismissed ... In these cases, the court often recommends that the juvenile take some actions prior to the final adjudication decision, such as paying restitution or voluntarily attending drug counseling.*
- *At the disposition hearing, the juvenile court judge determines the most appropriate sanction The range of options available to a court typically includes commitment to an institution; placement in a group home or other residential facility or perhaps in a foster home; probation ..; referral to an outside agency, day treatment, or mental health program; or imposition of a fine, community service, or restitution.*

The National Center for Juvenile Justice [explains](#) that:

[I]n most states ... youth at or below the state’s upper age of jurisdiction can be placed under the original jurisdiction of the adult criminal court. For example, in most states, if a youth of a certain age is charged with an offense from a defined list of “excluded offenses,” the case must originate in the adult criminal court. In addition, in a number of states, the district attorney is given the discretion of filing certain cases in either the juvenile court or the criminal court.

The National Center for Juvenile Justice [reports](#) that in 2020, of those juveniles adjudicated delinquent — in essence convicted — 27 percent were placed in out-of-home placement (including 32 percent of juveniles adjudicated delinquent for aggravated assault and 43 percent of those adjudicated delinquent for robbery), 65 percent were given probation (including 64 percent of those adjudicated delinquent for aggravated assault and 54 percent of those adjudicated delinquent for robbery), and 8 percent (including four percent of those adjudicated delinquent for aggravated assault and three percent of those adjudicated delinquent for robbery) were given other sanctions.

Thus, only one-quarter of juveniles adjudicated delinquent are subject to any post-process detention — the rest are immediately returned to the streets. The National Organization of Victims of Juvenile Murderers [notes](#) that “[t]here are many cases of juvenile criminals being tried in juvenile court, released once juvenile court loses jurisdiction over them, and then committing more crimes”, and gives a number of examples:

- *Scott Darnell ... A 15-year-old violent sex offender raped and murdered 10-year-old Vicki Larson while on summer release.*
- *Jimmy Scales and Mical Thomas ... already had criminal histories involving robbery and murder were tried as juveniles and released early by juvenile supervisors. They then murdered a pregnant woman.*
- *Robert A. Williams ... was tried as a juvenile for attempted murder. He later kidnapped, tortured, raped, and attempted to murder a woman.*
- *Brian Granger ... had a juvenile adjudication for a criminal sexual assault on a seven-year-old. ... Less than a week after release [from detention], he raped and murdered Sandra Nestle as she jogged.*
- *Markus Evans ... assaulted a high school safety aide with an iron rod. He attacked another school aide ... [and] was arrested ... but was released. After his mother took his motorized toy car away, he ... tried to light [her] on fire. When he was 15, he shot his cousin in the back with a shotgun. The case was kept in juvenile court and he was incarcerated for 14 months. Upon release, he murdered 17-year-old Jonoshia Anderson.*
- *Dalton Prejean ... spent two and a half years in a reform school for a murder he committed at 14. Upon release, he murdered a Louisiana state trooper.*

How Does DHS Determine When a Juvenile Has Been Convicted for Immigration Purposes?

In 2007, the 9th Circuit Court of Appeals [ruled](#) in *Vargas-Hernandez v. Gonzales* that:

The circuit courts express deference to the decisions of the state courts ... stating that “neither we nor the BIA have jurisdiction to determine how a state court should adjudicate its defendants. Once adjudicated by the state court, as either a juvenile or an adult, we are bound by that determination.”

In [1966,] this court noted that the statute permitting deportation upon conviction of two crimes of moral turpitude did not allow for differentiation by age at the time of offense. Although Oregon could have treated the alien as a juvenile offender, it chose to treat him as an adult. ... This court refused to reclassify the alien’s adult conviction as a juvenile adjudication, concluding that “the Service was entitled to take the record as it found it, and neither it nor we are required to import separate juvenile proceedings which were not used by the Oregon court.”

...

In [2001,] the First Circuit ... rejected a petitioner’s argument that, although he was tried as an adult by Rhode Island, the FJDA should apply... . In rejecting the petitioner’s argument, the First Circuit concluded that “[n]either we nor the BIA have jurisdiction to determine how a state court should adjudicate its defendants. Once adjudicated by the state court, as either a juvenile or an adult, we are bound by that determination.”

What happens when it is not so clear whether the state proceedings were indeed juvenile court proceedings? The BIA further ruled in *In Re Devison* that:

- *We have ... held that the standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime. ... The FJDA makes it clear that a juvenile delinquency proceeding results in the adjudication of a status rather than conviction for a crime.*

...

We find that the New York youthful offender adjudication procedures ... are similar in nature and purpose to the juvenile delinquency provisions contained in the FJDA. ... [It] specifically states that a youthful offender adjudication is not a judgment of conviction for a crime or any other offense. Under the New York statute, the court first determines whether a youth ... is an “eligible youth[.]” ... Once the court determines that a youth is an “eligible youth,” it proceeds to a more specific determination whether the ... youth should receive youthful offender treatment.

If the eligible youth is not found to be a youthful offender, he or she remains convicted and is sentenced like any other criminal defendant. If the eligible youth is determined to be a youthful offender, however, the court immediately vacates the conviction. ... A mandatory vacation of a conviction subsequent to a youthful offender adjudication has the practical and legal effect of a reversal. ... A youthful offender finding is substituted for the conviction and the youthful offender is then sentenced. ... The youthful offender adjudication, comprised of the youthful offender finding and the youthful offender sentence, is then final. ... Once a ... determination has been made, that decision cannot be changed as a consequence of the offender’s subsequent behavior.

...

These procedures reflect the core criteria for a determination of juvenile delinquency under the FJDA.

- We find that the New York procedure ... is sufficiently analogous to the procedure under the FJDA to classify that adjudication as a determination of delinquency, rather than as a conviction for a crime. Both the state and the federal statutes apply similar definitions of youths and juveniles, and both specify that neither a youthful offender adjudication nor a determination of juvenile delinquency constitutes a conviction. Both the state and the federal courts consider similar criteria to determine whether an offender will be treated as a juvenile or as an adult, and, likewise, both mandate that, in certain circumstances, a youth must be treated as an adult. Once a determination is made to treat the offender as a youthful offender or as a juvenile, the federal and state court records are deemed confidential.

There are ... certain differences between the New York and the federal procedures. ... [T]he state court first convicts an offender and then adjudicates his or her status, whereas the federal court adjudicates an offender’s status and then initiates the appropriate proceedings, either delinquency proceedings or criminal prosecution.

Nevertheless, the central issue before both the state and federal courts is the offender’s status, not his guilt or innocence. Perhaps most importantly, under the New York procedures a conviction precedent to a youthful offender adjudication is vacated, rendering it a nullity. ... All that is left, as in the federal system, is a civil determination of status, which may not be treated as a conviction under governing law. Applying the FJDA as a benchmark, we find that a youthful offender adjudication [under New York law] corresponds to a determination of juvenile delinquency under the FJDA.

- [J]uvenile delinquency and youthful offender adjudications are not akin to expungement or deferred adjudication procedures. Under the former, proceedings are civil in nature and the adjudication of a person determined to be a juvenile delinquent or youthful offender is not a conviction *ab initio*, nor can it ripen into a conviction at a later date. In the case of an expungement or deferred adjudication, the judgment in the criminal proceeding either starts out as a “conviction” that can be “expunged” upon satisfactory completion of terms of punishment and petition to the court, or as a judgment that is deferred pending similar satisfaction of conditions of punishment. In either case, ... neither expungement nor deferral can be presumed, and the original judgment of guilt may remain, or ripen into, a “conviction” under state law. This is a dispositive difference, because a juvenile adjudication cannot become a conviction based on the occurrence or nonoccurrence of subsequent events. To eliminate these distinctions and overrule our well-established precedents on these issues, we would require clearer direction from Congress that it intended juvenile adjudications to be treated as convictions for immigration purposes.

Rebecca Phipps [writes](#) that:

- Some state statutes ... have elements of both juvenile delinquency and adult criminal convictions.
- [Some] youthful offender statutes ... treat the juvenile as convicted, but offer the opportunity for that conviction to be erased given the completion of certain requirements by the juvenile, or, alternatively, defer the conviction of the juvenile as long as the juvenile refrains from committing further offenses during a probationary period. Statutes of this sort will generally be considered convictions for purposes of immigration law, despite the misleading name of the statute as a “youthful” or “juvenile” offender statute.

Phipps then [discusses](#) two instances in which federal Courts of Appeal have found adjudications under youthful offender statutes to be the equivalent of criminal convictions:

[In the 2005 case of [Uritsky v. Gonzales](#) in the Sixth Circuit Court of Appeals,] the petitioner was designated a “youthful trainee” under Michigan’s Youthful Trainee Act. Michigan’s statute operates by assigning a status of youthful trainee to juveniles who plead guilty to certain criminal offenses. In so doing, the court does not enter a judgment of conviction, but retains discretion during the probationary period to “revoke that status at any time . . .” If the status is so revoked, “an adjudication of guilt is entered, and a sentence is imposed.”

Uritsky’s deportation depended on whether this statutory scheme was determined to be more like the juvenile delinquency scheme in the FJDA or more like an adult criminal conviction subject to expungement or deferred adjudication. [T]he Sixth Circuit found the above-named characteristics — namely that the criminal action is not vacated until the youthful trainee completes her probation, and that a judge can revoke the youthful trainee status at any time - sufficiently distinct from the FJDA. Therefore, Uritsky was considered “convicted” for purposes of the INA.

[In the 2007 case of [Badewa v. Attorney General of the United States](#) in the Third Circuit Court of Appeals,] Badewa was ordered removed after being adjudicated under Washington D.C.’s Youth Rehabilitation Act. Under that statute, a court may set aside ... the juvenile conviction if the “juvenile’s post-offense conduct has persuaded the court to terminate his sentence.” Likewise, the juvenile’s original sentence “may be reimposed if he or she fails to satisfy parole or sentence conditions.” These characteristics, the Third Circuit found, clearly distinguished the ... Youth Rehabilitation Act from ... the FJDA and placed it squarely in the same category as the Michigan statute at issue in Uritsky. Therefore, Badewa’s adjudication was considered a conviction for purposes of the INA.

Alien Juvenile Delinquents Do Face Some Immigration Consequences

It is not the case that there are no immigration consequences for alien juveniles adjudicated delinquent. As USCIS’s policy manual for adjudicators [states](#):

[While] findings of juvenile delinquency are not considered criminal convictions for purposes of immigration law ... certain grounds of inadmissibility do not require a conviction. In some cases, certain conduct alone may be sufficient to trigger an inadmissibility ground. Furthermore ... USCIS will consider findings of juvenile delinquency on a case-by-case basis based on the totality of the evidence to determine whether a favorable exercise of discretion is warranted.

Further, as Zilberman [notes](#):

Obtaining accurate numbers of noncitizen immigration cases affected by delinquency involvement is problematic. In practice, though a delinquency proceeding might be the motivation for [DHS] initiating removal proceedings, noncitizen youth who are apprehended by DHS may be charged with removability based on their lack of appropriate immigration status and unauthorized presence in the U.S., rather than something relating to their delinquency.

“Reason to Believe”

As the Immigrant Legal Resource Center [states](#): “[t]here are several conduct-based grounds [of removal] where juvenile court dispositions might provide the government with evidence that the person comes within the ground”:

- [\[INA § 212\(a\)\(2\)\(C\)\]](#) Any alien who the consular officer or the [Secretary of Homeland Security] **knows or has reason to believe** is or has been an illicit trafficker in any controlled substance ... is inadmissible. [Emphasis added.]
- [\[INA § 212\(a\)\(1\)\(A\)\(iv\)\]](#); Any alien ... who **is determined** ... to be a drug abuser or addict ... is inadmissible. [Emphasis added.]
- [\[INA § 237\(a\)\(2\)\(B\)\(ii\)\]](#) Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.
- [\[INA § 212\(a\)\(1\)\(A\)\(iii\)\]](#) Any alien ... who **is determined** ... to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others ... is inadmissible. [Emphasis added.]
- [\[INA § 237\(a\)\(2\)\(E\)\(ii\)\]](#) Any alien who at any time after admission is enjoined under a [domestic violence] protection order issued by a court and whom the court **determines** has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. [Emphasis added.]
- [\[INA § 212\(a\)\(2\)\(D\)\(i\)-\(iii\)\]](#) Any alien who ... is coming to the United States ... to engage in prostitution, or has engaged in prostitution within 10 years ... [or] to engage in any ... unlawful commercialized vice, whether or not related to prostitution ... is inadmissible.
- [\[INA § 212\(a\)\(6\)\(C\)\(ii\); INA § 237\(a\)\(3\)\(D\)\]](#) Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter ... or any other Federal or State law is inadmissible[/deportable].

In 2009, the Second Circuit Court of Appeals’ decision in [Neptune v. Holder](#) demonstrates the scope of the “reason to believe” standard:

- *The [Immigration Judge] IJ specifically found that Neptune’s status as a youthful offender was irrelevant to his eligibility for relief because a “reason to believe” that an alien has been involved in drug trafficking “does not require the existence of a conviction. In fact, [it] does not require that a conviction or even a criminal prosecution have ever commenced [or] occurred ...” Thus, the IJ continued, given his admittance of his involvement in drug trafficking, Neptune’s status as a youthful offender “is not sufficient to insulate [him] from the Federal immigration law requirements for a person seeking adjustment of status [to lawful permanent residence].” The IJ concluded that “because I believe the relief [of adjustment of status] is not available to the respondent as a matter of law, because of the reason to believe that he has been involved in drug trafficking, I do find that the application for adjustment must be denied.”*
- *Because of Neptune’s testimony ... to the effect that he had been involved in selling crack cocaine, let alone the fact of his arrest and guilty plea, there is no basis for arguing that “reason to believe” ... does not exist here. More importantly, it exists regardless of the fact that Neptune’s conviction ... was adjudicated pursuant to his status as a youthful offender. ... [T]he “reason to believe” language evidences a clear Congressional intent “not to limit inadmissibility ... to those who have been charged or convicted of [a drug trafficking] offense. Rather it ties inadmissibility to the act of drug trafficking, irrespective of whether that conduct was ever charged as a criminal offense or not.” Neptune has admitted to the act of drug trafficking; he is therefore subject to being held inadmissible and his petition for adjustment of status was therefore properly denied.*

Kids in Need of Defense, which “[envision\[s\] a world in which children’s rights and well-being are protected as they migrate alone in search of safety](#)”, [notes](#) that:

- *[A] delinquency adjudication or substantial underlying evidence showing a sale or a related drug trafficking offense will alert immigration officials and serve as a reason to believe. Because “reason to believe” does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports, or use a defendant’s out-of-court statements.*
- *The standard of what constitutes a “reason to believe” is lower than that required for an admission to an offense. For instance, someone whom USCIS suspected of dealing drugs in the past, even as a juvenile and without a conviction, could be found inadmissible. USCIS, however, must have more than a mere suspicion — it must have “reasonable, substantial, and probative evidence,” that the person engaged in drug trafficking.*

Discretionary Relief

Zilberman [writes](#) that:

[A] determination that a noncitizen merits a favorable exercise of discretion or meets eligibility requirements for certain applications for immigration relief is often influenced by delinquency records. One of the more ubiquitous issues facing noncitizens with delinquency involvement is immigration adjudicators’ use of delinquency records in discretionary decisions. There is little guidance as to what can and cannot enter into an adjudicator’s discretionary decision.

And the Immigrant Legal Resource Center [points out](#) that:

[E]ven though a delinquency record may not trigger a statutory ground of inadmissibility or deportability, it will be considered by [IJs] or officials as a significant negative discretionary factor in any discretionary application for lawful status and may be difficult to overcome.

Further, Elizabeth Frankel, who was the associate director of the Young Center for Immigrant Children’s Rights, [noted](#) that:

The BIA has held that judges may weigh negative factors such as past criminal activity — including activity adjudged to be juvenile delinquency - against positive factors such as evidence of rehabilitation and good moral character. As a result, a particular [IJ] or immigration officer has full discretion when deciding how to weigh a ... delinquency adjudication and whether to grant an immigration benefit.

In 2006, the Second Circuit Court of Appeals ruled in [Wallace v. Gonzales](#), in regards to an alien who had been adjudicated delinquent for armed robbery in the first degree, that:

- *[A]n IJ reviewing an application for adjustment of status considers whether to perform an act of administrative **grace**.*

...

Because the purpose of adjustments of status is to provide worthy aliens with special relief, we see no reason to prevent an IJ or the BIA from considering an applicant’s anti-social conduct — whether leading to a conviction, a Youthful Offender Adjudication, or no legal judgment whatsoever—as an adverse factor in evaluating an application for discretionary relief.

A Youthful Offender Adjudication would presumably count less heavily against an applicant than would an adult conviction; however, we have no authority to review the BIA’s weighing of matters relevant to the grant or denial of an adjustment of status, which is a decision committed to the discretion of the [Secretary of Homeland Security].

- *[W]e are prohibited by statute from second-guessing the BIA's determination that Wallace's criminal behavior outweighed the equities favoring a grant of relief.*

DACA

The DACA final rule [notes](#) that:

- *One [commenter] said that no conduct committed when under 18 should exclude someone from receiving DACA and that juvenile convictions should not be considered a negative factor, noting the inconsistency of saying that children lacked intent to violate the law in coming to the United States but then holding them responsible as a collateral consequence for other conduct while adolescents.*
- *Many commenters stated that the rule should clearly prohibit consideration of ... juvenile delinquency adjudications in DACA determinations.*

DHS responds that:

- *DHS agrees with commenters that the longstanding DACA policy of not considering ... juvenile delinquency adjudications as automatically disqualifying should be continued.*

...

However, DHS disagrees with commenters that case-by-case consideration of such criminal history should be eliminated and that the rule should prohibit entirely any consideration of ... juvenile delinquency adjudications.

...

[I]n the case of juvenile delinquency adjudications, DHS agrees that the rule should not depart from longstanding DACA policy and BIA precedent establishing that a juvenile delinquency determination is not a conviction for immigration purposes. Nonetheless ... DHS maintains that it is appropriate for adjudicators to still consider the underlying conduct as part of a case-by-case analysis of whether the individual presents a threat to public safety or national security and whether a favorable exercise of prosecutorial discretion is otherwise warranted.

Detention

It appears that aliens in state juvenile justice systems are detained more regularly than are U.S. citizen delinquents. The Juvenile Detention Alternatives Initiative [finds](#) that:

- *[M]any jurisdictions detain undocumented youth who are charged with a crime when they would not detain a U.S. citizen youth with comparable charges.*
- *Even when intake personnel or juvenile courts do not explicitly rely on a youth's immigration status as the basis for a detention decision, seemingly neutral grounds may produce the same result. For example, many jurisdictions assess flight risk, in part, by determining the youth's ties to the community, including the existence of a verifiable local address and the availability and capacity of the youth's parents or legal guardians to assume responsibility for him pending the initial court appearance. These criteria may unfairly prejudice noncitizen youth who may decline to disclose the identity or whereabouts of their parents or guardians if they believe that doing so will subject family members to risk of apprehension by immigration authorities.*

And Angie Junck, Charisse Domingo, and Helen Beasley [report](#) that:

According to juvenile defenders and other advocates, youth who are reported to immigration enforcement officials are detained when in comparable cases non-immigrant youth are diverted out of the juvenile system or released. Because

they are persons of interest to immigration authorities, they spend more time in detention, are less likely to be sentenced to alternatives to incarceration such as drug rehabilitation programs, and are less likely to be placed on probation.

It appears that alien delinquents may have been placed in DHS detention more frequently than other aliens in removal proceedings, though I am not certain whether this is still the case under the Biden administration (which demonstrates a noticeable aversion to placing any aliens in DHS detention). Zilberman [concludes](#) that:

[T]he determination of eligibility for bond lies with [I]s, who] often use delinquency information when deciding whether to continue detaining an individual or to release them on bond as they fight their deportation case. Granting bond requires that individuals show they are neither a danger to the community nor a flight risk. In these hearings, delinquency documents are regularly employed to show that a noncitizen is a danger to the community. As such, individuals with a history of involvement in the juvenile justice system, or even one brief encounter, particularly when gang membership allegations are also involved, may end up being held in immigration detention.

Is any of this a bad thing? It would seem that aliens potentially subject to deportation pose a greater flight risk than otherwise comparable U.S. citizens. And, in [Demore v. Kim](#) in 2003, the Supreme Court upheld the INA's detention mandate for certain criminal aliens in removal proceedings. The Court accepted the reasonableness of Congress's motivations:

- *[INA § 236(c)] mandates detention during removal proceedings for a limited class of deportable aliens — including those convicted of an aggravated felony. Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens.*

...

The agency's near-total inability to remove deportable criminal aliens imposed more than a monetary cost on the Nation. ... [D]eportable criminal aliens who remained in the United States often committed more crimes before being removed.

...

Congress ... had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings.

- *Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country.*

While Congress chose not to apply this detention mandate to juveniles adjudicated delinquent, the policy rationale for detaining convicted criminals would seemingly apply equally to juveniles adjudicated delinquent for analogous offenses.

However, some proclaim that the detention of juvenile delinquents, either by state juvenile justice systems or by DHS, is a bad thing. Angie Junck, Charisse Domingo and Helen Beasley [bemoan](#) the fact that:

Prolonged detention and the perceived betrayal by their probation officers can exacerbate underlying issues that caused youth to enter the juvenile justice system in the first place and may jeopardize their prospect for rehabilitation. Many youth in the juvenile justice system have suffered from some form of childhood trauma or unstable home environments. Detaining these youth for long periods of time can exacerbate underlying mental health and behavioral issues. In addition, multiple transfers and prolonged detention disrupt their education, increasing the likelihood of recidivism.

And Elizabeth Frankel [argued](#) that:

*[Youth] detention center[s]. ... often have many rules which youth are required to follow and failure to do so can result in a range of consequences. ... Step-down to less restrictive settings or admission into long-term group homes or foster care is often contingent on **sustained good behavior**, which can be exceptionally hard when the difficulties of being a teenager are compounded by the challenges of detention and constant scrutiny.* [Emphasis added.]

There Is Precedent for Congress to Treat Juvenile Delinquents as Convicted Criminals

The “Adam Walsh Child Protection and Safety Act”

In 2006, Congress passed the “Adam Walsh Child Protection and Safety Act”, a provision of which (now located at [34 U.S.C. § 20911\(8\)](#)) states that for purposes of sex offender registries nationwide:

The term “convicted” ... used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse .., or was an attempt or conspiracy to commit such an offense.

The bill as originally introduced contained an even broader definition, [providing](#) that “[t]he term ‘convicted’ .., used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense.”

As to Congress’ rationale, U.S. Representative Mark Green [stated](#) on the House floor that:

Amy [Zyla] is a young lady who has bravely crusaded to protect other potential victims. She herself was sexually assaulted by a young offender when she was just 8 years old. Her attacker was found guilty and was sentenced to a juvenile facility for this heinous act. Yet because he was a juvenile, his record was sealed. When he turned 18, he was released into the community, only to reoffend shortly after he got out. Law enforcement was not allowed to notify the community that a convicted, high-risk sex offender was back on the streets, because he had been a juvenile. As a result, he went on to portray himself as a youth minister and preyed upon others. ... These subsequent crimes were absolutely preventable. Under the Amy Zyla provision .., if a sex crime committed by a juvenile offender is serious enough that it would qualify reporting under the sex offender registry had he been an adult, law enforcement has the authority to notify the community when that sex offender is released.

Sen. Ted Kennedy supported the compromise, [stating](#) that:

It is important to make sure that information on offenders who pose a potential threat is available to the public at large ... At the same time ... [the registry] should be targeted toward those who present the highest risk to our communities. ... The Senate bill allowed each State to determine whether a juvenile should be included on the registry. This compromise allows some offenders over 14 to be included on registries, but only if they have been convicted of very serious offenses.

Of course, the National Juvenile Justice and Delinquency Prevention (JJDP) Coalition protested, [stating](#) that:

[We] strongly believes that juvenile offenders adjudicated delinquent of sex offenses should be excluded from ... sex offender registries Without the use of careful risk assessments and judicial review for each juvenile sex offender, youth who pose no future risk to public safety will have their own safety jeopardized and their futures inevitably compromised by their inclusion in the registry. We throw away these youth at great cost to our own public safety and future interests.

The “Illegal Immigration Reform and Immigrant Responsibility Act”

As discussed previously by the BIA in *In re Devison-Charles*, IIRIRA [provided](#) that:

An alien is not eligible for [Family Unity] benefits [[including a temporary stay of deportation as a spouse or minor child of an alien provided amnesty by the “Immigration Reform and Control Act of 1986”](#)] ... if ... the alien has committed an act of juvenile delinquency which if committed by an adult would be classified as ... a felony crime of violence that has an element the use or attempted use of physical force against another individual, or ... a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense.

The “American Dream and Promise Act”

The most extraordinary example of Congress treating juvenile delinquents as convicted criminals was not actually enacted into law. However, it passed the House of Representatives twice, in 2019 and again in 2021, and it was written and unani- mously supported by House Democrats despite vociferous opposition by progressive advocacy organizations. You do not see that very often.

On June 4, 2019, House Democrats voted unanimously in support (230-0) of [H.R. 6](#), the “American Dream and Promise Act of 2019”, providing permanent residence to illegal alien “DREAMERS”. Significantly, the bill provided that:

*Notwithstanding an alien’s eligibility for adjustment of status [pursuant to this legislation] ... the Secretary [of Home- land Security] may, as a matter of non-delegable discretion, provisionally deny an application for adjustment of status ... if the Secretary, based on clear and convincing evidence, which shall include credible law enforcement information, determines that the alien ... has been convicted of a misdemeanor ... punishable by ... imprisonment of more than 30 days or ... **has been adjudicated delinquent in a . . . juvenile court proceeding that resulted in a[n] . . . order[of] placement in a secure facility**; and ... poses a significant and continuing threat to public safety related to such convic- tion or adjudication[, or]*

has, within the [preceding] 5 years ... knowingly, willfully, and voluntarily participated in offenses committed by a crimi- nal street gang ... with the intent to promote or further the commission of such offenses. [Emphasis added.]

During House floor consideration, Zoe Lofgren, Chair of the House Judiciary Committee’s Immigration Subcommittee, [stated](#):

*[This provision] authorizes the Secretary to deny individuals who pose a threat to public safety based on a single misde- meanor conviction, **a juvenile delinquency adjudication**, or proof of gang-related activities. This is a very tough bill. Anyone who poses a threat to public safety is simply ineligible under this bill. [Emphasis added.]*

Yet, on May 21, the 26 “organizations dedicated to child and youth well-being and advocates for young people, families, com- munity safety and justice” [wrote](#) to House Judiciary Committee Chairman Jerry Nadler regarding an identical provision in another DREAM bill:

- *[W]e strongly urge you to oppose H.R. 2820, the Dream Act of 2019 ... unless the discretionary bars based on juvenile adjudications or alleged or actual gang affiliation are removed.*
- *Even though the bill limits the consideration of juvenile adjudications to those that result in a disposition order- ing placement in a secure facility, this does not mean it is limited to only the most serious offenses.*
- *[T]he applicant will be asked to disclose the conduct behind the disposition, which will either make the appli- cant vulnerable to more immigration charges or even criminal prosecution. Some of these admissions, depend- ing on the disclosures, could lead to mandatory detention under federal immigration law.*
- *[T]his bill may come into conflict with state sealing and confidentiality laws that are in place to protect youth from the stigma of criminality and help with their rehabilitation and treatment. When a case is sealed, the case is considered never to have occurred under state law. ... Under this [bill], applicants may be forced to “unseal” records protected under state law because there is no legal provision that supports the state’s interest in keeping the records sealed for federal immigration purposes.*
- *The many conduct-based triggers lead us to worry about the actual benefits for immigrant youth who come into contact with police and the criminal legal system. Rather than pitting kids against one another and promoting a narrative of the “good immigrant” versus the “bad immigrant,” Congress should be focused on ensuring all immigrant youth who have only known the United States as home no longer have to live in fear of an uncertain future.*

On March 18, 2021, House Democrats [voted unanimously in support](#) (219-0) of the subsequent Congress's version of H.R. 6, the "American Dream and Promise Act of 2021." The prior month, over 270 organizations [sent](#) a letter to Congress (which I quoted from previously) stating that:

- *[We] urge you to amend the criminal bars to eligibility in H.R. 6 ... to ensure that the bill is more inclusive and that a waiver is available for all grounds of exclusion. We believe these changes are necessary to bring the bill in line with principles of racial justice and fairness.*
- *Making these changes is critical to ensuring ... a unified vision of inclusive legalization. Eliminating the additional criminal bars to status will ensure that otherwise eligible people will not suffer double punishment.*
- *H.R. 6 would ... require a "secondary review" process that gives the government the ability to deny an application based on a "public safety risk" finding that can be triggered by any conviction; juvenile delinquency proceedings; and even unproven, alleged conduct that is deemed gang-related. These provisions would harm exactly the communities that H.R. 6 aims to help, and would further entrench the racial inequities of the criminal legal system. The "secondary review" process would inevitably discriminate against young people of color who are already targeted based on national origin, neighborhood, and appearance, and result in biased decision-making that relies on "gang databases" repeatedly proven to be unreliable and riddled with biases. ... [A] new legalization program offers the opportunity to move away from these shameful due process violations.*

House Democrats were certainly brave in including this "secondary review" provision. Whether they were acting out of admirable principle — to protect the American public from violent alien juveniles, even if such juveniles were "brought to the U.S. through no fault of their own" — or to provide their caucus with talking points that they were not indeed voting to grant DREAM Act benefits to violent alien juveniles is an open question. Whatever the answer, their actions demonstrate the political viability of Congress cutting off immigration benefits to violent alien juvenile delinquents.

What Can Be Done

What can Congress do to reform our immigration laws to protect the American public from violent alien juvenile delinquents? Let me set forth a number of options for consideration.

No Amnesty

First, should Congress ever enact another amnesty (not that I am recommending that it do so!), it should bar eligibility for aliens who have been adjudicated delinquent for serious offenses. Bob Goodlatte, Chairman of the House Judiciary Committee, proposed to do just this in 2018, as part of "Securing America's Future Act" ([H.R. 4760](#)), his omnibus legislation bolstering immigration enforcement at the border and in the interior of the U.S. and granting temporary but renewable legal status to certain illegal aliens who came to the U.S. as minors.

[Section 1102](#) of Mr. Goodlatte's bill barred from eligibility for such legal status aliens who have been "adjudicated delinquent in a State or local juvenile court proceeding for an offense equivalent to":

- *An offense relating to murder, manslaughter, homicide, rape . . . , statutory rape, or any offense of a sexual nature involving a victim ... under the age of 18 years [aggravated felon];*
- *A crime of violence . . . ; or*
- *An offense punishable under section 401 of the Controlled Substances Act [to knowingly or intentionally create, manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled or counterfeit substance].*

I should note that I was chief counsel of the House Judiciary Committee's Immigration Subcommittee at the time.

An alternative would be to substitute the offense criteria found in IIRIRA:

[A]n act of juvenile delinquency which if committed by an adult would be classified as ... a felony crime of violence that has an element the use or attempted use of physical force against another individual, or ... a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense.

Bar to Immigration Relief

Congress should give serious consideration to barring juveniles adjudicated delinquent from all types of immigration relief to the same extent that aliens convicted of analogous crimes are already barred. For instance:

- An alien is [ineligible for asylum](#) if “having been convicted by a final judgment of a particularly serious crime [including any aggravated felony], [they] constitute[] a danger to the community of the United States”.
- An alien is [ineligible for withholding of removal](#) if “having been convicted by a final judgment of a particularly serious crime [including an aggravated felony for which the alien has been sentenced to at least five years (without precluding DHS from determining that an aggravated felony with a lesser sentence is a particularly serious crime), they are] a danger to the community of the United States”.
- A lawful permanent resident [is ineligible for cancellation of removal](#) if they have been convicted of an aggravated felony.

Immigration Detention

Congress should give serious consideration to mandating the detention of juveniles adjudicated delinquent for offenses analogous to those crimes which already trigger mandatory detention. [Under the INA](#):

[DHS] shall take into custody any alien who is deportable by reason of having committed any [aggravated felony for which they have been convicted at any time after admission] ... when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

Ground of Deportation

Finally, Congress should give serious consideration to creating a ground of deportation for juveniles adjudicated delinquent as already exists for aliens convicted of analogous crimes. Under the INA, [“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”](#)

Confidentiality

But won't any congressional efforts be frustrated by the confidentiality, or even physical destruction, of juvenile court records? It turns out, as Andrea Coleman, a Senior Policy Advisor at OJJDP, [observes](#), that it is “a common misconception ... that states automatically expunge, seal, or keep juvenile records confidential when youth turn 18.” Ashley Nellis [states](#) that “[t]his is not the case [as t]he laws governing whether a juvenile record is sealed (not accessible by the general public) or expunged vary from state to state” and the University of California at Irvine School of Law’s Immigrant Rights Clinic [notes](#) that “juvenile justice systems vary widely ... in their approach to confidentiality.” Zilberman [writes](#) that “a majority of states have very porous confidentiality rules with many individuals or agencies able to access otherwise confidential materials. Sometimes this requires court permission, and other times access is explicitly permitted within the rules.” Joy Radice, professor at the University of Tennessee College of Law, [explains](#) that:

- *In reality, state statutes governing juvenile records vary dramatically in how permanent and public they make [the] records. Differences arise partly because the juvenile system became ever more punitive in the 1980s and 1990s, and thus the treatment of juvenile records now mirrors the treatment of adult criminal histories.*
- *After a delinquency case is closed and the juvenile turns eighteen, few states seal or expunge **all** juvenile records, and ... what is sealed may be very limited. Often violent offenses and sex offenses are never sealed or expunged, even if the juvenile commits no additional offenses as a child or adult. Many states wait to seal records until either the juvenile is twenty-one or it has been five years since the commission of the offense, which means the record information may be disclosed before it is eventually sealed or expunged. Very few states automatically seal or expunge [the] records, but rather place the burden on the juvenile to file a petition to request the sealing or expungement. This petitioning process generally gives the juvenile judge discretion to determine whether to order expungement or seal the records, which can create inconsistencies for similarly situated children as a result.*

Access to Juvenile Records by Law Enforcement Officials

The Juvenile Law Center [finds](#) that:

Almost all states permit law enforcement officers to have access to juvenile record[s]. ... Indeed, some states place no limits on access to juvenile records by law enforcement and only have general and vague provisions providing for such access. In Wisconsin, for example, the statute merely states that “confidentiality does not apply between law enforcement agencies.” A few states, though, have limited law enforcement’s access to records. West Virginia ... provides that records and information concerning a juvenile “shall not be released or disclosed to anyone, including any federal or state agency.” However, such records are available by a court order. Similarly, in Ohio, law enforcement officers may access confidential juvenile records only upon a court order and after a hearing has been held to demonstrate need. Rhode Island is the only state that completely prohibits access by law enforcement, with no exception made for court-ordered access. Additionally, some states permit access only when it is deemed necessary for law enforcement officials to fulfill their official duties. These include investigative purposes or determining eligibility for a first-time offender program. In Kansas, for example, if law enforcement officers want to access the confidential court file of a juvenile, they must show it is necessary to discharge their official duties. In Pennsylvania, juvenile records are generally available to law enforcement officers within the particular jurisdiction; however, law enforcement officers from other jurisdictions must show that access to the information is necessary for the discharge of their official duties.

Of course, there is always California. Zilberman [states](#) that:

California prohibits immigration authorities from having access to juvenile records, and it further prohibits disclosure without court approval, even if access is granted to an individual or entity. Going further, in 2016, the California Welfare and Institutions Code was amended to expressly limit disclosure of juvenile court information to immigration officials without court permission.

Under [§ 827](#) of the California Welfare and Institutions Code:

[A] case file may be inspected only [by] ... [c]ourt personnel[, t]he district attorney, a city attorney, or city prosecutor[, t]he minor who is the subject of the proceeding[, t]he minor’s parent or guardian[, t]he attorneys for the parties, judges[,] hearing officers, probation officers, and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor ..[, t]he superintendent or designee of the school district where the minor is enrolled or attending school[, m]embers of the child protective agencies[, and t]he State Department of Social Services, to carry out its duties.

Under [§ 831](#):

[J]uvenile court records should remain confidential regardless of the juvenile's immigration status. Confidentiality is integral to the operation of the juvenile justice system in order to avoid stigma and promote rehabilitation for all youth, regardless of immigration status.

Nothing in this article authorizes the disclosure [or dissemination] of juvenile information to [or by] federal officials absent a court order of the judge of the juvenile court upon filing a petition.

...

[The protected information includes] the “juvenile case file[.]” ... and information related to the juvenile, including, but not limited to, name, date or place of birth, and the immigration status of the juvenile ... and maintained by any government agency.

In addition, [rule 552](#) of the California Rules of Court provides that “[e]xcept as [otherwise authorized], all ... seeking to inspect or obtain information gathered and retained by a law enforcement agency regarding the taking of a child into custody must petition the juvenile court for authorization”.

How would a law enforcement agency obtain a court order? Under [rule 552](#):

- *With the exception of those persons permitted to inspect juvenile court records without court authorization ... every person or agency seeking to inspect or obtain juvenile court records must petition the court for authorization. ... The specific files sought must be identified based on knowledge, information, and belief that such records exist and are relevant to the purpose for which they are being sought. ... Petitioner must describe in detail the reasons the records are being sought and their relevancy to the proceeding or purpose for which petitioner wishes to inspect or obtain the records.*
- *The petitioner must personally or by first-class mail serve [the petition] ... on the child ..[, and t]he parents of the child if ... under 18 years of age. ... [I]f petitioner shows good cause, the court may set a hearing.*
- *[I]f the court determines that there may be information or documents in the records sought to which the petitioner may be entitled, the juvenile court judicial officer must conduct an in camera review of the juvenile case file and any objections and assume that all legal claims of privilege are asserted.*
- *In determining whether to authorize inspection or release of juvenile case files ... the court must balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public.*
- *If the court grants the petition, the court must find that the need for access outweighs the policy considerations favoring confidentiality of juvenile case files. The confidentiality of juvenile case files is intended to protect the privacy rights of the child.*
- *The court may permit access to juvenile case files only insofar as is necessary, and only if petitioner shows by a preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner.*
- *The court may issue protective orders to accompany authorized disclosure, discovery, or access.*

The Sealing and Expungement of Juvenile Records

Andrea Coleman [explains](#) that:

Even though the terms expungement, sealing, and confidentiality are sometimes used interchangeably, they are three legally distinct methods for handling juvenile records. [University of Tennessee College of Law professor Joy Radice] ... says, “expungement has been used to refer to both destroying records and sealing them.”]

...

Generally, expungement laws require states to permanently destroy records. ... Only 18 states require various methods of physically destroying juvenile records.

...

Sealing requires states to make juvenile records available to specific agencies and individuals but unavailable to the public. Thirty-one states require sealing under specific guidelines. For example, Nebraska prevents potential employers, landlords, and educational institutions from accessing records; however, the law excludes police. In Massachusetts, police cannot access records sealed for 3 years or more from the date of the initial request.

Finally, states’ confidentiality laws prevent dissemination, access, or use of juvenile records. Statutory exceptions allow access to specific information to assist with needed services or to enhance public safety. For instance, North Dakota keeps juvenile records confidential except if a youth escapes from a secure facility or if there is a threat to national security. Alaska’s law has a public safety exception that says local and state police may disclose information in the interest of public safety.

She then presents a survey of the states:

Currently, 13 states and the District of Columbia have limited provisions that expunge juvenile records; however, the juvenile court, prosecutor, probation, or other agency ... must initiate the process.

...

The laws of California, Illinois, Nebraska, Nevada, New Mexico, Oregon, and Texas require agencies to notify youth about the process to expunge or seal their juvenile records. South Dakota and Wyoming only allow expungement or sealing via a petition, and after a court finding of rehabilitation. Georgia and South Carolina also require courts to make a finding of rehabilitation before they seal juvenile records.

Arizona, California, and Nebraska “set aside” juvenile records, which allows youth to avoid the consequences of delinquency findings; however, a set-aside does not seal or prevent public access. ... New Hampshire, Oregon, and Washington recently added record sealing to their set-aside provisions.

Even though all state juvenile codes require confidentiality for juvenile court proceedings, Illinois, Montana, Nevada, and Virginia only seal records when youth turn 18 or 21, or if they have not committed a new offense within 5 years of the initial offense. Further, few states seal or expunge all juvenile records. The number of records eligible for sealing and expungement may be limited due to how state laws define “records.”

Radice [notes](#) that:

- *[E]ven when states enact expunging or sealing statutes ... they often cover only juvenile court files, not law enforcement, school, or other records that were created because of the juvenile court sharing the record information.*

- *Juvenile records that result from arresting, processing, and sentencing a juvenile do not live in a file in the courthouse alone. Parts of the record exist in the files of police departments, social services agencies, schools, housing authorities, and mental health facilities that even under the most stringent sealing and expungement laws do not go away. With every juvenile case, probation files and prosecution files are created, containing almost identical records as in the court files. But these types of files are not necessarily included in the definition of confidential juvenile records and may not be included for purposes of sealing and expungement.*

As to records not in the possession of the juvenile court, Andrea Coleman [finds](#) that:

15 states limit expungement to juvenile court records only, 25 states and the District of Columbia allow youth to petition to expunge both their police and court records under certain conditions. Idaho and Michigan allow expungement of fingerprints and DNA in addition to court records. Indiana youth can petition to expunge police and court records, as well as records from other agencies. Kansas has a similar law allowing youth to expunge all records.

...

In Oregon, expungement includes a fingerprint or photograph file, report, and any other pertinent law enforcement or court information in a juvenile's record. ... Although Washington permits expungement and physical destruction of police and court records, its law does not include photographs, fingerprints, palm prints, sole prints, or any other identifying information.

Kids In Need of Defense [explains](#) that:

DHS/ICE often uses FBI rap sheets as evidence to meet its burden of proof in establishing that a noncitizen is removable as charged ... and ineligible for any immigration benefits that would permit the judge to grant relief from removal.

Juvenile records, certainly including arrest records, do end up with the FBI.

Use by DHS

Juvenile court records, and other information regarding alien minors' placement in juvenile court proceedings, are extensively relied upon by DHS. Theo Liebmann, a professor at Hofstra University's Law School, [explains](#) that:

Juvenile adjudications or admissions generally can come to the attention of immigration officials in several ways. Some state jurisdictions, for example, have arrangements with federal immigration enforcement officials to directly report any undocumented immigrants that come into their court system. ...

In addition, if a child is in removal proceedings or seeking a specific form of immigration relief, the immigration judge or officer will inquire to determine eligibility, and many affirmative applications for immigration relief by immigrant children not in deportation proceedings include questions that will elicit information about delinquency adjudications.

And, according to [Zilberman](#):

- *Delinquency records, including those of expunged adjudications, and even delinquency records concerning cases that never arrived at the dispositional stage, are regularly used in immigration decisions. The sharing of delinquency records with immigration officials has a devastating impact on immigration cases.*

...

Delinquency records can affect every stage of an immigration case, including the decision to start deportation proceedings, immigration detention, and adjudicators' decisions on whether an individual can obtain or keep immigration status or must be deported.

...

Because immigration is administrative and civil in nature, any evidence, including all documents collected by juvenile courts or databases used by police, can be admitted in administrative adjudications and deportation proceedings, so long as it is relevant and does not breach notions of fundamental fairness. ... [I]mmigration agencies regularly permit decisions to be based on delinquency records and even demand them in many cases.

A fundamental aspect to understanding how delinquency records affect immigration cases is that the burden [of proof] generally falls on the noncitizen. ... [T]he expectation is that the noncitizen will produce the delinquency records ... to show eligibility, to assist the judge or adjudicator in making discretionary decisions, or to help the judge determine if the noncitizen is a danger to the community. As such, immigration adjudicators may order noncitizens to produce information from the juvenile delinquency file showing why the adjudicator should exercise favorable discretion, release the individual from detention, or grant relief from removal. The noncitizen's failure to produce may lead the judge to assume the worst.

- *[D]elinquency records shared with immigration officials often are fatal to a noncitizen's ability to remain in the United States.*

ICE

ICE regularly relies upon juvenile court records, and other information regarding alien minors' placement in juvenile court proceedings (Well, I guess I can't confidently make this statement with respect to the current administration.). Zilberman [writes](#) that:

- *ICE ... actively seeks out information from states on a child's involvement in the juvenile justice system to determine whom to take into custody and remove from the United States.*
- *[T]he most efficient way for ICE to get information about individuals who are removable is through information given by state criminal and juvenile justice actors, such as probation officers and court personnel. ... ICE may identify noncitizen youth through informal mechanisms, such as tips from probation officers and other juvenile justice actors. Some of these actors even enable ICE to enter juvenile facilities to interview children, often under the misconception that the facility is required to do so.*

Angie Junck, Charisse Domingo, and Helen Beasley [found](#) in 2013 that:

- *While juvenile probation officers in some jurisdictions routinely report immigrant youth to immigration authorities, others believe all youth should be treated equally regardless of their immigration status. ... These jurisdictions do not ask about the immigration status of defendants and generally do not interact with federal immigration officials. [S]everal jurisdictions including Santa Clara County, California, and Washington, D.C., have adopted public policies that specifically limit local assistance to immigration enforcement for both adults and juveniles. ... [with] Santa Clara ... adopt[ing] a countywide policy that no juvenile shall ever be turned over to ICE.*
- *[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 obligated to cooperate with federal immigration officials to facilitate apprehension of juveniles suspected of violating immigration laws.*

USCIS

As to USCIS, Zilberman [states](#) that:

- *[I]mmigration adjudicators request delinquency information to determine whether a noncitizen can receive an immigration status or benefit, merits discretion, must remain in detention, or must be deported.*
- *Any and all of this information related to delinquency, regardless of the final disposition of the case, can be harmful to a noncitizen's ability to stay in the United States when used in immigration determinations.*

In order to ensure that adjudicators consider the totality of the evidence, USCIS's policy manual [states](#) that:

[A]n adjustment [of status] applicant must disclose all arrests and charges. If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition. In the event that an applicant is unable to provide such records because the applicant's case was expunged or sealed, the applicant must provide information about the arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. USCIS evaluates sealed and expunged records according to the nature and severity of the criminal offense.

The DACA application [form](#) states that if an applicant has been arrested for, charged with, or convicted of a felony or misdemeanor, *including in juvenile court*, they “must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law.” However, the DACA final rule [provides](#) that:

If a requestor cannot provide the record because it is sealed or because State law prohibits even the individual to whom the record relates (i.e., the DACA requestor) from themselves disclosing the record, USCIS still may request information about the underlying conduct in order to perform a case-by-case analysis of whether the individual presents a threat to public safety or national security and whether a favorable exercise of prosecutorial discretion is otherwise warranted.

The Recommendations of Advocates for Juvenile Delinquents

Zilberman [concludes](#) that:

- *Because delinquency records can have such devastating immigration implications, confidentiality is a critical tool to ensure that documents intended to further a minor's rehabilitative effort are not used to harm a noncitizen.*
- *[I]t is essential that immigration agencies adopt a uniform policy of strict confidentiality of delinquency information. Judges, adjudicators, and ICE attorneys and officers should be given policy guidance that prohibits the requesting, requiring, or accepting of delinquency records. It should be standard policy for all immigration enforcement and adjudicating agencies ... to prohibit officers from requesting, requiring, or accepting delinquency records. ... [I]mmigration actors should be trained on how the use of delinquency information as the basis of decisions is misguided and unjust.*

...

At a minimum, immigration agencies must honor state confidentiality laws and, to create a uniform enforcement system, apply the confidentiality laws of those states offering the highest protections to all noncitizens. If a state has determined that a youth's act is such that the youth can be rehabilitated through the delinquency system rather than waived to adult court, the federal immigration system needs to respect that decision and act accordingly.

- Information about youth is also propagated by the use of databases; of primary concern for many noncitizens are gang databases. Police departments, whose main mission is public protection rather than child development and rehabilitation [God forbid!], keep track of contacts with juveniles and have discretion to disclose this information.
- [S]tate legislatures must ... proactively end the sharing of delinquency records and information with federal immigration officials. Doing so would safeguard the rehabilitative missions of state juvenile justice systems.
- [T]raining must be given to probation officers and other juvenile justice actors, defining for them what they are required to share and when they are prohibited from sharing records or information with immigration officials. In states where there is a duty to maintain confidentiality, often juvenile justice actors incorrectly assume that they are required to divulge information to immigration officials. Thus, training must be conducted so that these actors comply with state confidentiality laws.

...

Immigration officials must stop seeking out and forcing the self-disclosure of delinquency records... . The use of delinquency records in immigration adjudications perpetuates and amplifies systemic racial bias.

The UC Irvine School of Law Immigrant Rights Clinic [advocated](#) that:

[The Orange County Juvenile Court and the Orange County Police Department] should rescind OCPD's referral policy and adopt the following policies:

- No referral of juveniles to ICE.
- No investigation of juveniles' immigration status.
- No compliance with ICE detainers.

Finally, Rebecca Phipps [writes](#) that:

According to [some] statutes ..., juvenile noncitizens should not be required to divulge records of their juvenile delinquency proceedings in immigration court, nor should other individuals be able to share such records with immigration enforcement officials. Nonetheless, this is not the current practice. Rather, immigration enforcement efforts within the juvenile justice system have led to a practice of juvenile justice officials turning over court records to ICE for use in immigration proceedings. This is in clear violation of many state juvenile statutes that delineate precisely when and how records of juvenile proceedings may be shared with other officials or agencies. ... [T]his practice must end, and the contents of juvenile proceedings should not be admissible as evidence against a noncitizen in immigration proceedings.

What Obstacles Might Sealing, Expungement, and Confidentiality Laws Put in the Way of the Immigration Law?

Under [§ 781](#) of the California Welfare and Institutions Code:

Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed.

Nice try, but the State of California cannot dictate such a policy to the federal government. As Professor Liebmann [points out](#), “[t]here is no federal law that allows nondisclosure of sealed juvenile records when information about those records is requested for federal immigration purposes.” An alien who states or writes under penalty of perjury that they have not been processed through a California juvenile court on the basis of § 781 when indeed they have is committing a federal crime. I am

not aware of an alien ever doing so, or being prosecuted for doing so. But if and when it happens, it will make for a fascinating constitutional case (with California presumably raising Tenth Amendment issues).

While the 50 states and the District of Columbia present a crazy quilt of laws, policies, and practices regarding confidentiality, sealing, and expungement, many of them give DHS a large amount of leeway in terms of obtaining the necessary information about juvenile adjudications.

Of course, some — such as California — have tried to erect impregnable defenses. However, in terms of discretionary immigration benefits and relief, all these defenses are simply a Maginot Line that DHS can plot a route around. In order to ensure that DHS had the information necessary to implement bars to immigration benefits and relief, Congress can simply make as a condition for eligibility that alien applicants procure the information for DHS. Mr. Goodlatte did precisely this regarding the temporary legal status he offered in H.R. 4760:

An alien who was physically present in the United States at any time prior to the age of 18 may not apply for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence unless they have requested the release to [DHS] of all records regarding their being adjudicated delinquent in State or local juvenile court proceedings, and the Department has obtained all such records.

As to deportation proceedings, DHS would have to reconstruct the records to the best of its ability. Congress could establish a requirement that aliens in proceedings procure the relevant information. For those who refuse, Congress could create a negative inference, or even a rebuttable presumption, regarding deportability.

As to those jurisdictions that don't allow even the juvenile him or herself to request their juvenile records, Congress can simply state that that these jurisdictions' actions will preclude large numbers of aliens from eligibility for the relevant relief or benefits. The onus will be on the jurisdictions to change their laws. DHS will no longer be able to get away with excusing applicants who "cannot provide the record because it is sealed or because State law prohibits even the individual to whom the record relates ... from themselves disclosing the record".

Of course, should legislation such as I recommend ever be enacted into law, it is possible that some recalcitrant jurisdictions might attempt to truly expunge — physically and digitally destroy — as many juvenile records as possible. If they do so, Congress could respond by cutting off law enforcement grants to these jurisdictions, though such a bar would be challenged in court. The ultimate resolution of the issue would need to be decided at the ballot box. Jurisdictions could even simply decide to no longer "adjudicate" any violent alien juveniles. Here too, the ultimate resolution would seem to be at the ballot box.

Conclusion

Regardless of one's views as to the "deservingness" as a general matter of illegal aliens brought to the U.S. as minors by their parents, brought to the U.S. by smugglers paid for by their parents, or who simply came to the U.S. on their own accord, those who are criminals (whether convicted in criminal court or adjudicated delinquent in juvenile court) should surely face immigration consequences. The lasting devastation to the lives of crime victims and their families is not wiped away simply because the perpetrators are minors, even if those minors were "brought to the U.S. through no fault of their own."

As then House Judiciary Committee Chairman Bob Goodlatte and 192 other Republican members of the House of Representatives [determined](#) in 2018, alien perpetrators should be barred from any immigration relief designed for aliens who arrived in the U.S. while minors. At the very least, as House Democrats unanimously, and bravely, determined in [2019](#) and [2021](#) (to the dismay of "DREAMER" advocates), DHS should have the option to refuse them such immigration relief.

Congress should also give serious consideration to establishing a detention mandate and a ground of deportability for all aliens (regardless of their immigration status) who have been adjudicated delinquent for the commission of the types of offenses that would trigger mandatory detention or a ground of deportability if they had resulted in a criminal conviction, or at the very least for the most serious juvenile offenses as specified in Goodlatte's legislation.

When a juvenile perpetrator is an alien, especially one not lawfully present, the consequences should not only entail "rehabilitation and treatment" through a federal or state juvenile court system, but also extend to the immigration realm.