

2017

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### Recommended Citation

Elizabeth Rodriguez, *Juvenile Justice: Oppose H.R. 3697, The Criminal Alien Gang Member Removal Act*, 23 Pub. Interest L. Rptr. 50 (2017).

Available at: <https://lawcommons.luc.edu/pilr/vol23/iss1/9>

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## Juvenile Justice: Oppose H.R. 3697, The Criminal Alien Gang Member Removal Act

Elizabeth Rodriguez

### INTRODUCTION

Unaccompanied immigrant minors (unaccompanied minors) are defined as minors, ages 0-17 years old, who migrate to the United States without a parent or guardian.<sup>1</sup> These children are extremely vulnerable, having fled from violent countries.<sup>2</sup> It is impractical to believe unaccompanied minors are capable of navigating the complex immigration legal system.<sup>3</sup> Unaccompanied minors are especially vulnerable because they often attend their immigration hearings without legal representation or an adult who can assist with their understanding of the law.<sup>4</sup> Therefore, it is necessary for policy directed towards unaccompanied minors to be shaped in a way that is reflective of their needs and attributes.

H.R. 3697, the Criminal Alien Gang Member Removal Act, should not be passed by the United States Senate as it is currently written or as attached the DREAM Act. Most importantly, the Act will not increase public safety but instead decrease community participation with police enforcement essential to detain dangerous individuals.<sup>5</sup> Additionally, H.R. 3697 should not be passed by the U.S. Senate because it would result in the unjust incarceration and deportation of unaccompanied minors, and it contains ambiguous terms which will not provide police agencies adequate direction to enforce the policy.<sup>6</sup>

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<sup>1</sup> 8 U.S.C. 1101 (West 2017).

<sup>2</sup> Kelly Burke, *Down the Rabbit Hole: A Story of Unaccompanied Children Being Alone, Confused, and on Trial*, 7 Ala. C.R. & C.L.L. Rev. 331, 332 (2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Jonathon Blitzer, *The Gang MS-13 Is a Real Problem, But Does Trump Have Any Answers?*, THE NEW YORKER (May 9, 2017), <https://www.newyorker.com/news/news-desk/the-gang-ms-13-is-a-real-problem-but-does-trump-have-any-answers>.

<sup>6</sup> Telephone interview with Amanda Baron, freelance attorney for The Immigrant Legal Resource Center (October 20, 2017).

### What is a “gang”?

There is not one single universally accepted definition of a “gang.”<sup>7</sup> Federal, state, and local law enforcement agencies have different operational definitions for the terms “gang” (or “criminal street gang” in the federal context), “gang member,” and “gang crime” (or gang-related offense).<sup>8</sup> For example, the Department of Justice currently defines a ‘criminal street gang’ as an ongoing group, club, organization, or association of 5 or more persons— (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described; (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described; and (C) the activities of which affect interstate or foreign commerce.”<sup>9</sup>

The Department of Homeland Security (DHS) employs a sweeping definition of “gang” that only requires the association of three or more individuals, as opposed to the federal statute, which requires five or more persons.<sup>10</sup> According to the National Gang Center, forty-three states and Washington, D.C. have statutes that define “gang” or similar concepts.<sup>11</sup> For example, California defines “criminal street gangs” as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated, and having common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>12</sup>

### Leading up to the creation of H.R. 3697

To execute the crackdown on gang members, the Trump administration requested an additional 10,000 Immigration and Customs Enforcement (ICE) officers, a “substantial amount” of immigration judges, legislation to expedite

<sup>7</sup> *What is a Gang? Definitions*, NAT’L INST. OF JUSTICE, U. S. DEP’T. OF JUSTICE (Oct. 28, 2011), <http://www.nij.gov/topics/crime/gangs/pages/definitions.aspx>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 18 U.S.C.A. § 521(a) (West 2017).

<sup>11</sup> *Brief Review of Federal and State Definitions of the Terms “Gang,” “Gang Crime,” and “Gang Member”*, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE (Dec. 2016), available at <http://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf>.

<sup>12</sup> CAL. PENAL CODE § 186.22(f) (West 2017).

removal of undocumented Central Americans, and construction of Trump's proposed border wall.<sup>13</sup>

In April 2017, ICE launched "Operation Matador", a joint initiative with local law enforcements agencies in and around New York City.<sup>14</sup> ICE announced 45 individuals were arrested during this ongoing enforcement effort, all of which were confirmed as gang members and affiliates.<sup>15</sup> Individuals were "confirmed as gang members" if they met any of several criteria, including "if they admit membership in a gang" or have been "identified as a gang member by a reliable source."<sup>16</sup> This is proof that sufficient government programs already exist to combat gang members.

Some local law enforcement officials view ICE enforcement as a way to remove youth they view with suspicion, even in the absence of evidence sufficient to support a criminal arrest.<sup>17</sup> The Suffolk County Police Department (SCPD) is currently a party to an agreement with the U.S. Department of Justice that requires SCPD to implement "significant changes in how it engages the Latino community."<sup>18</sup> The agreement is a result of an investigation commenced by the U.S. Department of Justice in 2009, which arose from allegations of discriminatory policing directed against Latinos.<sup>19</sup> Despite this troubling history, ICE uncritically accepts allegations of suspected gang membership made by SCPD in deciding to issue arrest warrants for unaccompanied minors in Suffolk County.<sup>20</sup> For example, SCPD admitted in an interview, "There are times when we know someone is an MS-13 gang member. . .but we're not in a position to make a criminal arrest. So, another tool in our toolbox is to work with the Department of Homeland Security to target active known MS-13 gang members for violation of civil immigration laws, which is another way to remove dangerous individuals from our streets."<sup>21</sup>

<sup>13</sup> Rafael Bernal, *Trump to announce MS-13 gang crackdown in Long Island*, THE HILL (July 27, 2017), <http://thehill.com/homenews/administration/344243-trump-to-announce-ms-13-gang-crackdown-in-long-island>.

<sup>14</sup> *Operation Matador nets 39 MS-13 arrests in last 30 days*, U.S. DEP'T OF HOMELAND SECURITY (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> First Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief at 11-12, *ACLU v. Sessions*, Case No. 3:17-cv-03615-VC, (N.D. Cal. filed August 11, 2017) [hereinafter *ACLU v. Sessions*].

<sup>18</sup> *Id.*

<sup>19</sup> *ACLU v. Sessions*, *supra* note 17.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

There is a systematic problem with providing more tools to police departments at the state and federal level when they currently abuse the power they are provided by the law.<sup>22</sup> Therefore, any bill that expands the powers of discriminatory entities in the name of safety should not be approved by Congress.

#### H.R. 3697 CREATES A NEW DEFINITION OF “CRIMINAL GANG”

H.R. 3697 greatly expands the powers of police officers by allowing them to use their subjective judgment to categorize juveniles as “gang members” and making gang affiliation a crime that makes non-citizens deportable. First, H.R. 3697 amends the designation in Chapter 2 of Title II of the Immigration and Nationality Act by asserting the following: “The Secretary of Homeland Security, in consultation with the Attorney General, may designate a group, club, organization, or association of 5 or more persons as a criminal gang if the Secretary finds that their conduct is described in 101(a)(53).”<sup>23</sup> Second, H.R. 3697 amends Section 212(a)(2) of 8 USC 1101(a)(2) to include: “Aliens associated with criminal gangs – any alien is inadmissible who a consular officer, the Secretary of Homeland Security, or the Attorney General *knows or has reason to believe* or have been a member of a criminal gang or to have participated in the activities of a criminal gang, knowing or having reason to know that such activities will promote, further, aid, or support the illegal activity of the criminal gang.”<sup>24</sup> H.R. 3697 should not be passed by the U.S. Senate because it contains ambiguous terms which will not provide police agencies adequate direction to enforce the policy.<sup>25</sup>

#### HOW H.R. 3697 WILL IMPACT UNACCOMPANIED IMMIGRANT MINORS

H.R. 3697 allows police officers the ability to criminalize Latinos who have not committed illegal acts, but who are simply perceived as gang members by authorities.<sup>26</sup> By targeting Latinos, this bill criminalizes a whole popu-

<sup>22</sup> *Id.*

<sup>23</sup> Criminal Alien Gang Member Removal Act, H.R. 3697, 155th Congress § 2 (2017).

<sup>24</sup> Criminal Alien Gang Member Removal Act, H.R. 3697, 155th Congress § 2 (2017).

<sup>25</sup> Telephone interview with Amanda Baron, freelance attorney for The Immigrant Legal Resource Center (October 20, 2017).

<sup>26</sup> Telephone interview with Amanda Baran, freelance attorney for The Immigrant Legal Resource Center (October 20, 2017).

lation, a counterproductive strategy that alienates the victims whose trust is necessary to prevent crimes and protect public safety.<sup>27</sup>

The bill targets immigrant minors for detention and deportation even if they have not committed any crime or been suspected of committing a crime.<sup>28</sup> The bill imposes the weak and subjective standard of “reason to believe” on all people seeking admission.<sup>29</sup> These provisions impose a guilty by association standard by targeting people not for their own culpable conduct, but for their alleged associations with groups considered to be dangerous or otherwise disfavored by government entities.<sup>30</sup> In addition, these provisions enable any low-level government agent, without particularized training in criminal justice or gang sociology, to make legal findings with no oversight or review of his or her decision.<sup>31</sup> Minors seeking safety at U.S. borders or applying for admissions for lawful status will face these new grounds of deportations merely based upon immigration officers showing any “reason to believe” they are associated with a designated group.<sup>32</sup> Such new sweeping ground of removability will result in countless people, including lawful permanent residents, being ripped from their communities and deported on the basis of erroneous evidence that would not stand up in a criminal court.<sup>33</sup>

H.R. 3697 will encourage rampant racial profiling.<sup>34</sup> This bill hands DHS powerful tools to arrest, detain, and deport noncitizens including long-time green card holders for the “crime” of living in an immigrant neighborhood or showing pride in their cultural heritage.<sup>35</sup>

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<sup>27</sup> *The Immigrant Legal Resource Center (ILRC), National Immigrant Justice Center (NIJC) and National Immigration Project of the national Lawyers' Guild (NIP) Oppose H.R. 3607*, NAT'L IMMIGRANT JUSTICE CENT. (September 12, 2017), <http://immigrantjustice.org/research-items/immigrant-legal-resource-center-ilrc-national-immigrant-justice-center-nijc-and>. [hereinafter *ILRC*].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> ILRC, *supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> See Philip Desgranges, *Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation*, N.Y.C.L.U. (Aug. 2, 2017) available at <https://www.nyclu.org/en/news/trump-locking-and-threatening-deport-children-based-mer-suspicion-gang-affiliation>; Liz Robbins, *Teenagers' Arrests Are Unconstitutional, A.C.L.U. Lawsuit Says*, N.Y. TIMES (Aug. 11, 2017) available at <https://www.nytimes.com/2017/08/11/nyregion/aclu-lawsuit-ms-13-teenager-arrests-.html>.

<sup>34</sup> ILRC *supra* note 27.

<sup>35</sup> *Id.*

## CALL TO ACTION

350 undersigned local, state, and national immigrant, civil rights, human rights, faith-based, and anti-poverty organizations urge the opposition of the Criminal Alien Gang Member Act because of its over reaching scope, targeting of those who have never committed or supported a single criminal act for deportation.<sup>36</sup> The passage of the bill will put the United States in violation of its international obligations to protect asylum seekers, increase racial profiling and other unconstitutional police practices, and further undermine local law enforcement efforts to engage in smart gang prevention techniques.<sup>37</sup> Further, this bill gives ICE new tools to detain and deport immigrants at a time when all legislative efforts should be made to protect DACA recipients.<sup>38</sup>

There must be a national effort to educate the public on this bill to ensure it is not passed as is, or more realistically, attached to the DREAM Act.<sup>39</sup> This can be done by law students organizing panels on the matter, contacting Senators to show their strong opposition of the bill, and community organizing to ensure unaccompanied immigrant minors know their Constitutional rights.

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<sup>36</sup> *Id.*

<sup>37</sup> ILRC, *supra* note 25.

<sup>38</sup> *Id.*

<sup>39</sup> Telephone interview with Amanda Baran, freelance employee of The Immigrant Legal Resource Center (October 20, 2017).