

Advocacy to End Immigration Detention:
A Role for Research and AASWSW

Luis H. Zayas

University of Texas at Austin

Keynote Speech at the

AASWSW Fellows' Induction Ceremony

San Francisco, CA

January 18, 2019

Good evening. Let me first thank Sarah Gehlert and the Academy Board for inviting me to speak to you tonight.

For the past decade and more, I have been working in the immigration arena. More specifically, I have been fighting against the way that immigration enforcement has been and is being conducted in the United States.

Immigration is a major battle ground in our country. While it is not the first time in our history that we have seen hateful vitriol and bad actions by the government and by groups of citizens, the difference at the present time is the scale of the mean-spirited approach to immigration enforcement. It is made larger by the immediacy of the 24-hour news cycle. Continuous video-news loops provide fodder for both the supporters of the current enforcement and those vehemently opposed to the manner in which it is implemented.

The immigration war has many battlefronts (e.g., visas for skilled and unskilled workers; undocumented immigrants; mixed-status families and U.S.citizen-children; DACA; refugees and asylum seekers at our borders; unaccompanied minors; just to name some). On any given day, we hear and see the brutality of enforcement efforts by the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) against immigrants and refugees—a failure of empathy and a callous disregard for human rights and human dignity.

Immigration is not one easy issue. Advocacy occurs on many fronts and must be very targeted to the specific issue. In our country, we have the courts to address injustices. But legal maneuvering can be very complex and even petty. Skirmishes and

battles are part of the process of advocacy for change. When you are inside those battles you see, first-hand, examples of commitment, gallantry, and humane efforts at delivering social justice to immigrants and refugees by legal advocates.

But effective legal advocacy on behalf of the rights of vulnerable groups cannot be done in alone. In the case of immigration, legal action requires the contribution of behavioral and social scientists, like social work scholars and practitioners, to make compelling arguments for preserving human rights.

In this presentation, I want to share with you a picture of what fighting for just immigration practices looks like. I want to show how we as social and behavioral scientists (and as practitioners) can bring our research, knowledge, and skills to bear heavily on this very consequential issue, perhaps the signature issue of our day.

I will use my experience over the past dozen years in the immigration arena to illustrate it. It's not to show great accomplishments but rather the process. I say that the succession of battles and skirmishes are an odyssey—a long, sometimes wandering but eventful and adventurous quest marked by many changes of fortune, both good and bad.

The other point I want to make is to encourage organizations like the Academy and other social work organizations to harness the firepower of its membership to advocate for complex social issues.

I will speak briefly about how social and behavioral science experts can join legal advocates in advocating for immigration justice. I'll speak about advocacy in (1) immigration court, (2) federal court, (3) state court, and (4) state and national

legislatures.

Immigration Court: Cancellation of Removal Hearings

Let's start with cancellation of removal cases. Removal is the legal term for deportation. In removal hearings, the issues include how U.S. citizen-children will be affected by the deportation of their undocumented immigrant parents. By law, they can petition immigration court to cancel their removal but must meet several criteria (i.e., continuous presence in the U.S. for ten or more years; no felonies or crimes; employment; members of a community; and good "moral" standing).

Typically, the presence of a U.S.-born offspring provides a starting point for asking for cancellation of removal. But the burden is on the parent to prove that the citizen-child will suffer "exceptional and extremely unusual hardship." Unlike family court, in immigration court there is no "best interest of the child" standard.

In order to prove exceptional and extremely unusual hardship, it is usually helpful to pull in two types of expert witnesses: country condition experts and child mental health experts.

The country conditions expert is one who knows the country to which the immigrant will be deported, usually their place of origin. It involves knowing the political, cultural, social, and economic landscapes, at the regional level, maybe even towns and hamlets. The country expert must have knowledge of public health issues; crime and violence; police and government functioning; and other issues germane to the potential situations that a U.S. citizen-child will face. Some of you here who do international work are able to be country experts.

The behavioral and mental health expert witness might conduct a psychosocial evaluation of the child or get to know the child and link this to what the child would encounter if moved to another country or left behind.

But it is not enough to give a profile of the child. It is necessary to invoke scientific findings to support the evaluation. For example, what are the effects on a child with ADHD who will not have access to medication, psychotherapeutic intervention, school programs for children with special needs, and adequate parental monitoring? There is ample research evidence to make the point in such a case. Our knowledge of the literature can be used to great effect.

Problem is, this advocacy, though worthwhile and gratifying, affects one family at a time rather than classes of people. It is slow going. The likelihood of getting an immigration judge to cancel a deportation is improved with good legal counsel and a good social work expert witness. We have lost only a few cases in the over 35 cases I've worked on.

What I found heartening is that immigration judges looked seriously at scientific findings when presented in forms understandable to them.

But, again, this is a case by case advocacy. It's very rewarding, but there are limits to that approach.

Federal Court: Fighting Immigration Detention of Children and Families

When the big "surge" of Central Americans arriving at the U.S.-Mexico border started in the summer of 2014, the government was caught flat-footed. Cities and non-profit service organizations jumped into action to help the refugees.

The Department of Homeland Security and ICE decided to detain the mothers and children. Although immigration detention is a civil matter, not intended as punishment, the Obama Administration wanted to deter more refugees from Central America.

So, ICE converted an unused county prison in Karnes City, Texas to house refugee mothers and children. Later, another one opened in Dilley, Texas. At that time, DHS and ICE under President Obama adopted a blanket policy to detain all female-headed families, including children, in secure, unlicensed facility for the duration of their asylum hearings.

These mothers and children had been found by an immigration officer or immigration judge to have a “credible fear” of persecution, meaning there would be a “significant possibility” of being granted asylum. A credible fear interview would determine whether they were entitled to remain in the United States.

Nonetheless, DHS and ICE held the policy of locking them up and refusing to consider them for release on bond, recognizance, or other conditions (the “No-Release Policy”). The policy was to deter other Central American migrants from coming to the United States.

The first class-action lawsuit that I was asked to be a part of challenged this policy. The case is known as *R.I.L.R. v Johnson* in 2014 and challenged the idea of detention as deterrence. The federal court ruled in our favor, noting that it was not a deterrent. The case was settled and went basically unchallenged.

My declaration focused on the known harm to children and families. It stated, in

part, that “Based on [my direct observation of detention, interviews, and knowledge of scientific literature], I can unequivocally state that children in Karnes are facing some of the most adverse childhood conditions [I have ever seen] . . . Detention is inflicting emotional and other harms on children . . . effects will be long lasting, and very likely permanent” (Zayas Declaration, 2014, §§ 35-36).

The next lawsuit that followed *R.I.L.R. v Johnson* later that year was one that would have more twists and turns than any other. That case was known as *Flores v Johnson*. It is still with us today and being fought in federal courts. The attorneys in the case used the same declaration I had written for *R.I.L.R v Johnson*.

This new lawsuit asserted that the government was in violation of the “Flores Agreement,” a longstanding consent decree re-affirmed during the Clinton Administration that said refugee children could not be held for prolonged periods in unlicensed detention. (Consent decrees have the attributes of both contracts and judicial acts, and in interpreting consent decrees, courts use the principles of contract law.)

That case was heard by Judge Dolly Gee in the U.S. District Court for the Central District of California which includes Los Angeles. Judge Gee ruled in our favor.

As an aside, an amicus brief, *Flores v Lynch* (2016), supporting the *Flores v Johnson* case was signed by 31 academics and researchers from a range of social science disciplines, including three or four social work faculty that I recognized, from universities across the United States. Another amicus brief was signed by NASW and the American Academy of Child and Adolescent Psychiatry.

But the challenges to this ruling continue today. It's not just the government and entrenched public attitudes that we are fighting against. We are also fighting with private prison companies that have deep pockets and scores of lawyers. They can challenge on lots of things, but not on the science that is presented.

This led to an invitation to address a Congressional Forum organized by progressive Democrats in the summer of 2015.

Federal Court: State Attorneys General on DACA

In September 2017, The Trump administration announced that it would end the Deferred Action for Childhood Arrivals program — DACA — putting an expiration date on the legal protections granted to roughly 800,000 people known as "DREAMers," who entered the country illegally as children. Within a month, 17 state attorneys general filed a joint lawsuit.

They laid out five different constitutional arguments against Trump's move, saying it was motivated by discriminatory reasons; violated due process by being "fundamentally unfair," and violated laws that dictate procedures for federal regulations. They also noted that DACA recipients are of Mexican origin and that is was particularly discriminatory to one group.

Within a matter of days, I had to put together a declaration summarizing the scientific literature applicable to DACA youth. In the declaration, I focused on research about the toxic effects on both mind and body of being undocumented but also on the protective value of DACA, such as opportunities for education and employment, and better mental health outcomes.

This was one of several cases heard by federal courts and all were upheld, thereby denying Trump a victory. But like I said, his administration continued to stall, threaten, appeal, and generally slow things down.

Federal Court: Challenging the Office of Refugee Resettlement

In the past year, I was part of a class action lawsuit that challenged the government's prolonged detention of immigrant children in New York State (mostly in therapeutic facilities). The lawsuit showed that Scott Lloyd, the director of the Office of Refugee Resettlement, had altered agency policy and practices in mid-2017 so that *he would review personally all cases of children held in highly restrictive government-controlled facilities*. All cases! He would review and approval ALL reunification decisions of the youth in the class action. Predictably, by early 2018, Lloyd had only approved the release of a handful of children. It caused long stays for these boys.

My job as the social work researcher and practitioner was to review the policy and the outcomes. I reviewed numerous case records. The conclusions that I reached based on the review of dozens of records was that the ORR director-level review of release decisions for children did not conform to best practices.

I found at least three problems with this new policy. First, Mr. Lloyd was unqualified to make such decisions, which has led to predictably poor outcomes. (Mr. Lloyd is a lawyer, and has no child welfare, mental health, residential treatment, or social work experience).

Second, the elimination of decision-making authority from the clinicians on the ground in New York State to a high-ranking agency official in Washington, DC, was

contrary to best practices and had led to delays that prolong both children's separation from family as well as time spent in highly restrictive custodial settings. (Mr. Lloyd overruled clinical teams on the ground who recommended release.)

Third, the delays were the cause of severe, potentially irreversible, harm for this population of already vulnerable immigrant children.

We won part of the case. The court issued an injunction against that practice. But it did not stop the government from detaining these boys in residential therapeutic facilities and holding them for much longer than they needed to be (albeit much shorter stays than when the decision was made in Washington). This past fall I worked on the second half with a group of graduate and undergraduate social work students at Texas. We are still at work on that part of the case and the declaration is due this month.

State Courts: Licensing Detention as Child Care

That brings me to state-level advocacy in which behavioral sciences helped. In September of 2015, the Texas Department of Family and Protective Services (DFPS), under pressure from the Obama Administration, pulled back on its rules governing the licensing of residential child welfare facilities. (It was based on the Flores Settlement I mentioned earlier that said government can only hold migrant children indefinitely in nonsecure, licensed facilities).

The rules that were waived to accommodate immigration detention centers were intended so that the private prisons could operate without specific state requirements that apply to all child care facilities.

At least four important requirements were waived for the detention centers. By

waiving state child-welfare rules

- A. minor children would be permitted to sleep in the same rooms with unrelated adults;
- B. more than four children could sleep in one room;
- C. the space for sleeping quarters mandated by state regulations did not apply; and
- D. boys and girls beyond young childhood could sleep in the same rooms.

Almost immediately, Grassroots Leadership, Inc., a local non-profit advocacy group, with the help of the Texas RioGrande Legal Aid, Inc., filed a class action lawsuit in state court challenging the emergency rule. A hearing was held in November 2015 at which I testified. The state district judge in Austin issued a temporary injunction preventing the rules from being implemented. The next hearing was held in June 2016, and I testified again about the problem of detaining children in unlicensed facilities. In December 2016, the judge invalidated the Texas regulation that allowed for the licensure of the detention centers as child care centers.

However, with their massive resources and contribution to election campaigns, the private prison companies resisted and appealed it. (We also fought in in the state legislative where many social workers testified).

Then, this past November, a state court of appeals issued a ruling that would allow jails to be licensed as child care centers, and unrelated adults to be assigned to children's bedrooms. What's worse, though, is that the appeals court basically ruled that *no one can ever challenge the rule*. The court basically decided that Texas courts

lack jurisdiction to protect children. The detained mothers did not have legal standing to sue.

What We Can Do

Immigration enforcement has morphed from the practices of the Bush Administration to the Obama Administration to the grotesque tactics instituted by the Trump Administration.

It's a long fight but there are ways for researchers and the Academy can harness its members' expertise. And there are ways that the Academy can pull that intellectual power together to take stances in important social issues.

- Issuing policy statements and joining other groups who publish them (e.g., American Academy of Pediatrics).
- Joining amicus briefs.
- Facilitating Academy Fellows in writing Op-Eds, speaking to the media
- Connecting with U.S. Senators and Congressional Representatives, their legislative aids; and speaking before legislative bodies.

Let me close by saying that it isn't easy or quick, but I have learned that, at least in the immigration arena, science can speak loudly.

Thank you.