Child abuse: Is it a removable offense?

BY PATRICK M. KINNALLY

Safeguarding our children from abuse and harm by others should be at the apogee of our legal system. And, for the most part it is. Child abandonment (720 ILCS 5/12-21.50), as well as endangering the life or health of a child are crimes in Illinois (720 ILCS 5/12-21.6). Child abuse is broadly defined to include: inflicting, causing or allowing or creating a substantial risk of physical injury, other than by accidental means, causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function, or committing or allowing to be committed any sex offence, torture, excessive corporal punishment, female genital mutilation, or giving a child access to controlled substances. (See, generally, 325 ILCS 5/3). It arises in civil proceedings as well as criminal venues. It is a topic that has been left unsaid. In word, it is ugly.

Yet, sometimes in the rush to judgment to protect our most vulnerable, (See, *Matter of Soram* (BIA 2010) 25 I&N Dec 378, 382, fn 2 (*Soram*) the objective facts get overlooked, misapplied or forgotten. Of course, this spills over into the immigration arena since "crimes against children" (8 USC 1227 (a)(2)(A)-(F) can make an alien not only ineligible for discretionary relief from deportation but deportable upon conviction or the State Law offense. [See, *Ibarra v. Holder* (10th Cir. 2013) 736 F. 3d 903; (*Ibarra*) and compare with *Florez v. Holder* 779 F. 3d 207 (2d Cir. 2015)(*Florez*).

Too, context as well as historical perspective cannot be ignored. Corporal punishment of children just decades ago was common place. It has occurred in American homes as a part of parental authority. It is still a current practice. For example:

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> Minnesota Vikings star running back Adrian Peterson was indicted on charges of "injury to a child" for striking his 4-year-old son with a tree branch — what many African-Americans would call a whipping with a "switch." Beard, "Don't Rush to Judge Parents Who Use a Switch." (*Capital Times* 9/25/14).
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> Peterson cooperated with police, saying that he'd disciplined his son with a "whooping" and, when the event happened he texted the child's mother, who lives in Minnesota, saying he felt bad for overdoing it. Beard, "Don't Rush to Judge Parents Who Use a Switch". (*Capital Times* 9/25/14).
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> By way of an initial defense, Peterson's attorney issued a public statement stating that the former league MVP is a loving father who merely disciplined his son by using an approach that had been administered to him as a child. And while, clearly, no one condones child abuse, if Peterson's statements are to be believed, he seems to love his child. But parenting practices vary widely, and his are being judged by a media and public not known for being skilled in analyzing issues complicated by race, gender, culture or potential implicit (unconscious) racial bias, which most Americans have. Beard, "Don't Rush to Judge Parents Who Use a Switch". (*Capital Times* 9/25/14) (*Beard*).

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These all come into play when determining whether Peterson's actions arguably went beyond community standards for disciplining his child. (See also, Darcy, *The Plain Dealer* (2014), "Adrian Peterson Whips Open Corporal Punishment Debate" (2014)

Almost all American parents have used corporal punishment to some degree. In 2012, 77 percent of men and 64 percent of women reported that they believed "a good, hard spanking" was sometimes necessary. In general, the parents of boys or black children, Southerners, younger and poorer moms, and evangelical and conservative Protestants are more likely to spank. (*Beard*) Moreover, corporal punishment of minors is commonplace throughout the world (See, *www.corpum.com.archives/2015*).

If Adrian Peterson had been an alien, he may have been subject to deportation for what he did. Did Congress intend such a result in federal immigration proceedings? Let's see.

Condoning excessive corporal punishment is not acceptable. The problem is, how do our laws—and which ones, federal or state statutes—tell us when such discipline or abuse abrogates the line in the area of immigration law.

Elia Ibarra (Elia) came to the United States in 1985. She was four years old. Her father was a lawful permanent resident. He never became a United States citizen. She never became a lawful resident. All of her seven children are United States citizens. In 2004 she pled guilty to "child abuse-negligence-no injury," under a Colorado statute. The records seemed to show she left her children at home alone while she was working. None were injured. (*Ibarra*).

In 2008 the Department of Homeland Security (DHS) commenced removal proceedings against Elia. She admitted she was deportable, but asked for a discretionary remedy, called cancellation of removal (8 USC 1229 b (b)(1). Although she met the criteria for such relief, an administrative, immigration judge concluded she was categorically ineligible because her Colorado conviction was a crime of "child abuse" under federal immigration law (8 USC 1227(a)(2)(E)(i). The Board of Immigration Appeals (BIA) affirmed. Five years after the removal proceeding began the Circuit Court of Appeals declared Elia was eligible for such relief (*Ibarra*).

The court was asked to define what

Congress meant when it said the following provision was a deportable offense.

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> (E)(I) Domestic violence, stalking, and child abuse. Any alien who at any time after admission, is convicted of a crime of domestic violence, stalking, or a crime of child abuse, child neglect or child abandonment, is deportable. 8 USC 1227 (a)(2)(E)(I)

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The court held the BIA got it wrong since its definition was impermissibly broad when it applied to ciminally negligent omissions where no injury results to the child. (See, *Soram*, *supra*) and *Matter of Velazquez-Herrera* 24 I&N Dec 503 (BIA 2008). It found that a crime requires an abuser to be criminally culpable not merely negligent.

Employing the categorical approach to try and discern what "child abuse" denoted under federal law, The Circuit Court of Appeals, found Congress did not provide a definition of "crime of child abuse, child neglect or abandonment." (*Ibarra*) Thereafter, the court examined the criminal laws of all fifty states and the District of Columbia at the time the Congressional law was passed (1996). At that time, the court found the majority of states did not criminalize endangering children or exposing them to a risk of harm absent injury if there was not a culpable mental state or criminal negligence. It concluded Elia's conviction was of the latter ilk and not a deportable offense. It reversed the Board of Immigration Appeals. The *Ibarra* opinion is well researched and includes five appendices. Take a look at it. (Compare, *Ramirez v. Lynch* 810 F.3d 1127 (9th Cir. 2016)).

Undeterred, the Board of Immigration Appeals refuses to follow *Ibarra* adhering to its strained construction of what constitutes "child abuse" under the federal removal provision that does not say what that term means. *Matter of Mendoza Osorio*, 26 I&N Dec (BIA 2016) citing *Florez v. Holder* 779 F.3d 207 (2015)(pet. for cert.filed *sub nom Florez v. Lynch*, No. 15-590 2015 WL 677 4583).

Nilfor Florez was a lawful permanent resident. Twice he was convicted of child endangerment under New York Law. The latter related to a Driving Under the Influence when his two children were in the automobile he was operating. This statute, which was the predicate for his conviction and removal charge, stated an offense occurs where a person, "knowingly act[ing] in a manner likely to be injurious to the physical, mental, or moral welfare of a child less than 17 years old" (N.Y. Penal Law Sec. 260.10(1)(NYPL). The immigration court held this definition fit the generic federal definition of a "crime of child abuse" and ordered Florez removed. The Second Circuit Court of Appeals affirmed (779 F.3d 207 (2nd Cir. 2015)).

This court held that Florez's conviction under this New York law was categorically a crime of child abuse." To get there, it deferred to the administrative legal opinion of the BIA, since it was charged with interpretation of the Immigration and Nationality Act (INA) It found the federal phrase "a crime of child abuse" to be ambiguous, but yielded to the BIA in its adjudicatory role to establish whether a state criminal law met the federal definition. *Chevron U.S.A. Inc. vs. Natural Res. Defense Council Inc.* 467 U.S. 837 (1984) The court held that the BIA's decision was based upon reason even if the court would have read the statute differently. (Florez).

Florez is a curious precedent. First, the BIA does not have any special expertise interpreting state criminal laws. It may have some ability to interpret the INA but not the NYPL, or any state law for that matter. Finally, the *Florez* court ceded to the BIA its "reasonable" interpretation of state statutes in determining that the NYPL statute met the federal definition of "crime of child abuse." Respectfully, this was a mistake since *Florez* in relying on *Soram* largely relied on what constituted "child abuse" in civil contexts, not criminal ones. [*Ibarra*] This distinction is significant because civil infractions do not require a *mens rea* or culpable state of mind which is required, in this context, for a crime to have occurred.

More importantly the United States Supreme Court has stated clearly that in interpreting similar statutes with generic federal "crimes" the referent point is how the relevant term is used in the criminal law of most states. *Taylor v. United States* 495 U.S. 575 (1990) This make a great deal of common sense since, the federal reference, "a crime of child abuse" has no definition whatsoever.

Unfortunately, child abuse, as well as what is perceived as child abuse, does not provide a demarcation line that is clear. What it is to one person, it may not be to another. Corporal punishment is condoned throughout the world. When it becomes excessive, it crosses the line into child abuse. Again, the boundary's location is not easy to decipher. Our federal government failed to do so in telling decision makers what constitutes "crimes against children." Hopefully, our United States Supreme Court will take up this issue and provide some direction in an area where clear guidance is paramount, for decision makers, parents and those whom need it most, our children. ■

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