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**GIVE ME YOUR TIRED, YOUR POOR . . . AND YOUR
CONVICTED?
TEACHING “JUSTICE” TO LAW STUDENTS BY
DEFENDING CRIMINAL IMMIGRANTS IN REMOVAL
PROCEEDINGS**

BY MICHAEL S. VASTINE*

PROLOGUE: THE INTERVIEW

“Why do you want to participate in the immigration clinic?” I asked the student, the fifth of twelve interviews I was conducting that spring day, as my teaching fellow and I sought to choose the incoming class of eight students for the next academic year.

“I am just totally committed to human rights,” she replied. Her earnestness did not leave any margin of doubt for any of us in the room. “The last two years in law school I have been looking forward to this and I am sure I am going to be a professional advocate for human rights once I graduate next year.”

We talked for a few minutes about her experiences abroad, her familiarity with the asylum application process and her interest in representing victims of persecution.

“Well, how would you feel if I told you that one of your three clients next year is a non-citizen in danger of being deported because of multiple criminal convictions?” I asked.

If she was surprised, she did not show it. Her intense, yet upbeat expression did not change. She paused thoughtfully for a moment.

“Well, everyone has rights. I am sure they do, too.”

The “criminal immigrant” question was a regular part of my interviews. Sometimes I asked it a little bit differently, perhaps less directly, so the students would be less likely to know that I was not going to budge from assigning them a criminal immigrant client. We

would then likely have some discussion about why I like them to represent this type of case. I always considered this portion of the interview to be a bit of “truth in advertising” and that it was better for the students to be sure of what type of work they would be committing to if they worked with the clinic (and were rewarded with twelve law school credits) during their final year in school. Our clinic offers a range of services to our clients. Our docket is evenly balanced with asylum applicants, immigrant victims of domestic violence and other crimes, and deportable immigrants with criminal convictions. Before I became director of the clinic, criminal cases were a less significant component of the caseload, which is why I stress the range of cases during the interview.

Our law students usually have gained a bit of interview experience by the time they are wrapping up their second years. They also know that we always have a few too many applicants for our Immigration Clinic, so the interviews are part of a somewhat competitive selection process. Like candidates for any job, they are trying to get an offer. They need to earn our invitation, and then they can mull over whether the clinic is a good fit for them and accept or decline their seat. If they decline, I move on to the waiting list.

It happens sometimes that the “criminal” question seems to be a turning point in the interview. Each of the last three years an applicant declined a spot in the clinic. Two of those three I predicted, based largely on their negative reactions to the prospect of having a convicted criminal on their roster of clients.

REFLECTION

For weeks after the interviews, I had recurring thoughts of my interaction with the student who was committed to “human rights.” The semester ended and with it the cyclical pressure of teaching, supervising, meeting, planning, filing, and advocating. The school year has a life of its own. I have a finite amount of time to pass on a large amount of skills and information and to prepare and supervise the students in their initial forays into litigation. The students have a large caseload, but with the pressure of court deadlines and our high expectations, they are almost always able to close out their cases or meet their expected progress by the end of the year. Entering the summer, I can decompress from the final flurry of activity and stress, discuss teaching points with peers at professional conferences, and prepare for the next go-around with the new students in the clinic.

This year, somehow, felt different to me. I sensed that I needed to better give voice to my reasons for committing my students' limited time and my clinic's limited resources to the representation of criminal immigrants. I do have reasons for this choice. I personally find the cases and clients interesting. The students regularly have very meaningful relationships with the criminal clients, if not initially, then certainly once they fully engage in the cases. I admit that I enjoy the tension of teaching in a setting where students represent innocent victims—of foreign persecution or domestic violence—and also represent perpetrators of wrongdoing.

Ultimately, I thought I needed to develop a better answer for my pedagogical choices for developing capable lawyers and consider the goals of the clinic in serving our community. I needed to consider my methodology, goals, and identifiable ulterior motives. I hoped I could see some truth or at least bestow myself with some transparency about why I emphasize the need for students to defend both innocent victims and convicted criminal immigrants.

STRUCTURE

Teaching immigration defense to clinical law students is usually a very fact-intensive experience, and it is easy to get caught up in details, rather than dedicate time to considering our motivations for undertaking the work. The details can be overwhelming: students must understand, appreciate, and comply with various evidentiary requirements that differ depending on the nature of the relief sought. Each academic year brings a new group of students needing to master the legal framework and tackle the evidentiary challenges of their cases. Asylum applicants must meet strict corroboration requirements, and the cases turn on the issue of credibility.¹ Victims of domestic violence have similar criteria for showing the good faith nature of the abusive marriage.² This is interesting and gratifying work, but the legal issues of discretionary standards and asylum eligibility are largely settled, so there is less of an opportunity for clinical students to present

1. See, e.g., *In re S-M-J*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997) (holding that an applicant may establish eligibility for asylum through credible testimony alone, but readily available corroborative evidence must be presented); *In re S-A-*, 22 I. & N. Dec. 1328, 1331–32 (B.I.A. 2000) (holding that credibility determinations must be supported by the evidentiary record); Immigration and Nationality Act §§ 240(c)(4)(B)–(C), 8 U.S.C. § 1229a(c)(4)(B)–(C) (2010) [Hereinafter INA].

2. See INA § 204(a)(1)(A)(iii)(I)–(II)(aa)(BB), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)–(II)(aa)(BB) (2010); 8 C.F.R. § 204.2(c)(2)(vii) (2010).

novel legal arguments.³ Advocacy for non-citizens with criminal convictions turns on issues of facts supporting a favorable exercise of discretion by the immigration judge. Standards for properly gauging the potential for discretion have been pronounced in precedent decisions from the Board of Immigration Appeals.⁴

I am interested in challenging criminal grounds of deportability and thus widening the scope of clients who are eligible for immigration relief. As a result, the immigration clinic I supervise litigates cases challenging whether the underlying convictions properly support charges in removal proceedings. This paper addresses the experiences of clinical students pursuing these tasks. Students confront unique legal challenges and also unearth ethical dilemmas when participating in the clinic. Playing off the themes of the article *Can You Be a Good Person and a Good Prosecutor?*, by Professor Abbe Smith,⁵ incorporating examples from recent clinical experience, and providing commentary from the Critical Race Theory movement, I address my role as a clinical teacher training advocates whose clients may be socially vulnerable, but whose cases are, on the surface, less attractive than clients in a clinic that only serves refugees and other immigrant clients who are more readily identifiable as victims.⁶

3. Some may object to this generalization, particularly in light of recent litigation on issues of social group theories in asylum cases and on the role of supporting evidence such as mental health assessments. However, in my experience, I encounter (and expect to continue to do so) criminal statutes that may be challenged regarding their basis for a ground of removal much more frequently than truly novel legal concepts in other genres of immigrant defense.

4. See, e.g., *In re Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978); *In re C-V-T*, 22 I. & N. Dec. 7, 11 (BIA 1998). An Immigration Judge, upon review of the record as a whole, “must balance the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country.” *Id.* “Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country’s armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent’s good character.” *Marin*, 16 I. & N. Dec. at 584–85. “Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent’s bad character or undesirability as a permanent resident of this country.” *Id.* at 584. See also *In re C-V-T*, 22 I. & N. Dec. at 11.

5. See generally Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

6. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (explaining that changes in immigration law make noncitizen criminal defendants more vulnerable within the criminal

I further seek to establish pedagogical and social merits that are distinct to criminal immigration work and reflect on my own assumptions about the importance of teaching this work to students in a clinical setting. Finally, in my writing process, if not my words, I will try to objectively confront whether my attitude and approach is indicative of the “liberalism” allegedly embodied in clinical programs or if other theoretical or philosophical labels serve as more accurate monikers for our advocacy.

THE PROBLEM WITH THE IMMIGRATION STATUTE

“Preserving the [criminal] client’s right to remain in the United States may be more important to the client than any potential jail sentence.”
-Justice John Paul Stevens⁷

Removing immigrants with criminal convictions has become one of the Department of Homeland Security’s (DHS, formerly INS) highest enforcement priorities, along with protection of borders against terrorism.⁸ In the post-9/11 years, DHS has received more funding and information technology than was available to its predecessor agency, the Immigration & Naturalization Service (INS).⁹ Consequently, DHS is better prepared to identify non-citizens with criminal convictions and institute removal proceedings against them.¹⁰ The agency is thus able to broadly enforce the criminal grounds of removal established in the Immigration and Nationality Act (INA).¹¹

The INA underwent significant changes in 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)¹² and the Antiterrorism and Effective

justice system, as their immigration consequences may be more severe than the punishment for the criminal infraction itself).

7. *Id.* at 1483.

8. Press Release, Dep’t of Homeland Security, Office of the Press Sec’y, Secretary Napolitano Announces Fiscal Year 2010 Budget Request (May 7, 2009), available at http://www.dhs.gov/ynews/releases/pr_1241715252729.shtm.

9. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-03-660T, HOMELAND SECURITY: CHALLENGES TO IMPLEMENTING THE IMMIGRATION INTERIOR ENFORCEMENT 11 (2003), available at www.gao.gov/new.items/d03660t.pdf.

10. *Id.*

11. INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2010).

12. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, §§ 321–22, 110 Stat. 3009 (1996).

Death Penalty Act (AEDPA).¹³ Among the salient changes were an expansion of the list of criminal acts that were considered “aggravated felonies,” elimination of the discretionary relief from deportation under INA section 212(c), and replacement of section 212(c) relief with a more limited discretionary waiver called Cancellation of Removal, codified at INA section 240A(a).¹⁴ Importantly, a conviction for any “aggravated felony” now constitutes a bar to Cancellation of Removal, whereas previously immigrants were only barred from section 212(c) discretionary relief if they served more than five years in jail for their aggravated felony conviction.¹⁵

As a result of the 1996 legislation, many long-term residents of the United States became deportable without recourse to a discretionary waiver.¹⁶ Litigation ensued for the preservation of section 212(c) relief on the grounds that due process was violated in cases where defendants had entered guilty pleas or gone to trial in reliance on the former INA, so that they knew that either they were not deportable at all or at least were not barred from pursuing discretionary relief if immigration proceedings were later commenced against them.¹⁷ Ultimately, the U.S. Supreme Court agreed with the position that guilty or *nolo contendere* pleas entered prior to April 24, 1996, could rightly be considered to have been made in reliance on the existence of the section 212(c) waiver.¹⁸ Thus, older aggravated felony convictions could still be waived in the discretion of an immigration judge.

The situation is compounded for those non-citizens who have both a pre-1996 aggravated felony conviction and a post-1996 conviction for any offense that could lead to removal. In these cases, relief is barred, as Cancellation of Removal is not available for any person with an aggravated felony, and section 212(c) does not excuse the later offense.¹⁹ With no relief available, the non-citizen is ordered

13. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214 (1996).

14. INA § 240A(a), 8 U.S.C. § 1229b(a) (2010).

15. 8 C.F.R. § 1212.3(f)(4)(i) (2010).

16. The number of formal removals jumped from 69,317 in 1996 to 114,060 in 1997. U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 176 (1999). In addition, “the 1997 removal of 51,141 criminals is the largest total ever, and an increase of 37% over 1996.” *Id.* at 178.

17. *INS v. St. Cyr*, 533 U.S. 289, 292–93 (2001).

18. *Id.* at 326.

19. *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082, 1086 (9th Cir. 2007); 8 U.S.C. § 1229b(c)(6) (2006).

deported from their adopted country with no consideration of their countervailing positive contributions to U.S. society.²⁰

Legal work in criminal-immigrant defense centers on two main issues: analyzing and contesting whether the conviction necessarily constitutes a deportable offense, and advocating for a favorable exercise of discretion in those cases that are statutorily eligible for relief. The U.S. Supreme Court, the U.S. Courts of Appeals and the Board of Immigration Appeals have issued voluminous decisions analyzing criminal statutes and records of conviction in order to determine whether the non-citizen is convicted of an aggravated felony or any deportable offense.²¹

In the preliminary stages of Removal Proceedings, deportability is solely determined based on an analysis of the “record of conviction,” comprised of a limited set of documents from the criminal court including the charging documents, plea agreement, judgment, and sentencing sheets.²² The immigration judge is barred from looking “behind” the conviction to determine the actual facts of the case or what conduct the non-citizen engaged in when they violated the criminal statute.²³ In a close case, perhaps involving a conviction for violating a “divisible” statute that broadly prohibits both

20. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(c) (2010); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2010).

21. See, e.g., *Taylor v. United States*, 495 U.S. 575, 600–02 (1990); *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Jaggernauth v. U.S. Att’y Gen.*, 432 F.3d 1346, 1353–55 (11th Cir. 2005); *In re Pichardo*, 21 I. & N. Dec. 330, 334 (B.I.A. 1996); *In re Sweetser*, 22 I. & N. Dec. 709, 713–15 (B.I.A. 1999). In criminal sentencing context, “courts apply the ‘categorical’ and ‘modified categorical’ approaches.” Michael Vastine, *Being Careful What You Wish For: Divisible Statutes—Identifying a Non-Deportable Solution to a Non-Citizen’s Criminal Problem*, 29 CAMPBELL L. REV. 203, 208 (2007). See also *Taylor v. United States*, 495 U.S. 575, 600–02 (1990); *Shepard v. United States*, 544 U.S. 13, 17 (2005). The categorical approach looks only to the structure of the statute of conviction and establishes whether a respondent convicted under that statute must be subject to an immigration consequence. *Id.* at 600–02. If the statute of conviction criminalizes conduct that both is and is not considered an enumerated offense, the court employs a modified categorical approach by conducting a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over inclusive. *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Jaggernauth v. U.S. Att’y Gen.*, 432 F.3d 1346, 1353–55 (11th Cir. 2005); *In re Pichardo*, 21 I. & N. Dec. 330, 334 (B.I.A. 1996); *In re Sweetser*, 22 I. & N. Dec. 709, 713–15 (B.I.A. 1999).

Jaggernauth, *In re Pichardo*, and *In re Sweetser* are discussed at length in Michael Vastine, *Being Careful What You Wish For: Divisible Statutes—Identifying a Non-Deportable Solution to a Non-Citizen’s Criminal Problem*, 29 CAMPBELL L. REV. 203, 209–17 (2007).

22. INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2010).

23. *Id.*

deportable and non-deportable acts, the non-citizen either gets the benefit of a well-crafted plea or they are similarly doomed by it.

If the respondent is eligible to progress to the discretionary phase of a hearing, DHS and the immigration judges examine the non-citizen regarding the facts of his or her life in the United States and, in particular, the criminal case in order to determine if, through their candor and remorse, they demonstrate the necessary amount of contrition and responsibility to be deemed “rehabilitated.”²⁴ In this phase of a hearing, the DHS typically relies on the narrative of the police report, in order to attempt to impeach the non-citizen, or at least minimize the respondent’s efforts to show true rehabilitation.²⁵ DHS frequently attempts to impeach by introducing documentation, such as police reports from all arrests in the non-citizen’s life, including those that did not result in convictions.²⁶ Any excuses or justifications for their actions, or decision to enter a plea, other than an outright, contrite admission of absolute guilt with no minimizing factors, provides fodder for attack by DHS.

BUT WHAT ABOUT HUMAN RIGHTS?

“Injustice anywhere is a threat to justice everywhere.”
-Dr. Martin Luther King, Jr.²⁷

In the framework of Removal Proceedings, the details of a non-citizen’s life may be completely ignored if the non-citizen is statutorily barred from relief.²⁸ In the setting of a clinic interview room, the

24. *Matter of Marin*, 16 I. & N. Dec. 581, 585 (B.I.A. 1978); *In re C-V-T-*, 22 I. & N. Dec 7, 14 (B.I.A. 1998); *In re Arreguin*, 21 I. & N. Dec. 38, 40 (B.I.A. 1995) (holding that a person can establish rehabilitation even when still confined in punishment for the offense if they express culpability).

25. *Matter of Roberts*, 20 I. & N. Dec. 294, 299 (B.I.A. 1991).

26. In the author’s experience, this practice is indulged by most judges despite BIA precedent holding that denying a case on the basis of arrests that do not lead to convictions may be reversible error. *In re Arreguin*, 21 I. & N. Dec. at 42.

27. “Moreover, I am cognizant of the interrelatedness of all communities and states . . . Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial “outside agitator” idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.” Martin Luther King, Jr., *Letter from Birmingham Jail*, (April 16, 1963), available at http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/annotated_letter_from_birmingham/.

28. See INA § 240A(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2010). “An alien applying for relief or protection from removal has the burden of proof to establish that the alien...satisfies

opposite is true and the students are charged with fully exploring the details of the clients' lives. By the time the client comes to the clinic, they usually have already been convicted, sometimes many years previously. In some cases, they have possible remedies to injustice in the criminal proceedings such as reopening or vacating the conviction, but more often than not, the clinic is working with a criminal history that cannot be altered.

This does not stop us from discussing, speculating about, or being motivated by, the underlying facts of the conviction. Many clients clearly convey that they did, in fact, commit their offenses and are contrite and remorseful. Others present tales of confusion, misunderstanding, non-zealous or incompetent representation, or a compelling alibi that shakes any confidence that they received due process in the criminal courts.²⁹

Ours is a society where objective data supports conclusions that factors of race, education, and wealth are directly relevant to arrests and convictions. My clinic's client pool is of the demographic that these factors are most likely to affect. Present immigrants are primarily non-whites, fifty-two percent are from Latin America, twenty-six percent are from Asia, and sixteen percent are from Europe.³⁰ The educational level of the first generation immigrant is typically lower-than-average³¹ and a look at the wealth disparity of most first generation immigrants relative to the general population reveals a population more socio-economically vulnerable to both heavy policing and poor legal representation.³²

It is a reality that in many criminal cases, the underlying facts do not support some or even any of the charges, but in "prosecutorial

the applicable eligibility requirements." *Id.* § 240A(c)(4)(A)(i). If the alien does not meet this burden, they do not progress to an individual hearing to determine, under INA § 240A(c)(4)(A)(ii), if they merit a favorable exercise of discretion. *Id.* § 240A(c)(4)(A)(ii).

29. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482–83 (2010) (concluding that non-citizens and even immigrants with no legal status are entitled to due process in criminal proceedings, with rights including, but not limited to, the right of effective assistance of counsel, now construed to include the right to have criminal counsel accurately convey the immigration consequences that will result from a plea of guilty).

30. U.S. CENSUS BUREAU, THE FOREIGN BORN POPULATION 2000—CENSUS 2000 BRIEF 2 (2003), available at www.census.gov/prod/2003pubs/c2kbr-34.pdf.

31. "In 2006, 36% of immigrants ages 25 to 64 in California had not graduated from high school, compared to 30% of immigrants in the United States and 8% of U.S. born residents in California." *Immigrants and Education*, PUB. POL'Y INST. CAL. (2008), available at http://www.ppic.org/content/pubs/jtf/JTF_ImmigrantsEducationJTF.pdf.

32. On the latter topic, see Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising in the Eleventh Circuit*, 62 U. MIAMI L. REV. 1063, 1075–76 (2008).

discretion,” clients are offered deals to take the charge with the least significant penalty, even though the most appropriate action would be to drop all charges.³³ This is not necessarily the intentional conduct of the assistant state attorneys who prosecute cases, but is the product of a flawed, entrenched political model in which prosecutorial and legislative pressures coincide to over-criminalize and disproportionately prosecute cases and extract pleas.³⁴

CRIMINALIZATION

“With so many of our citizens in prison compared with the rest of the world . . . [e]ither we are home to the most evil people on earth or we are doing something different—and vastly counterproductive. Obviously, the answer is the latter.”
-Senator Jim Webb³⁵

The concept of criminalization and selective enforcement is problematic in that there is a disparate impact on communities who are subject to prosecution. The randomness of enforcement of certain crimes implies that justice is not in step with the “lawlessness.” A mundane, yet worthwhile illustration of this is speeding violations. I can attest that despite a lifetime in which I have violated speed restrictions constantly, consistently, and sometimes flagrantly, I have only been cited as such two times despite driving (and speeding) for hundreds of thousands of miles.³⁶ Simultaneously, I likely was also driving without current proof of insurance. Our poor, indigent clients report that they could never escape detection by police if they engaged in similar reckless driving in their socio-economically depressed neighborhoods, where steady, even weekly, seemingly pretextual police stops and searches would reveal their document infractions and invite even closer scrutiny.

For another example, historically, possession of marijuana has been a criminal act throughout the United States, although fourteen states (and the District of Columbia) presently permit marijuana to be used for medical purposes, and the thirteen states that have

33. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534–37 (2001).

34. Smith, *supra* note 5, at 390.

35. James Webb, *Why We Must Fix Our Prisons*, PARADE MAGAZINE, March 29, 2009, available at <http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html>.

36. See Stuntz, *supra* note 33, at 578–79. (Professor Stuntz fully develops this “lawlessness” argument, illustrating it with a driving example as well.)

“decriminalized” minor possessory offenses, so that they result in fines rather than jail sanctions.³⁷ Despite this fact, experimentation with marijuana use is widespread, with a recent survey showing that thirty-eight to fifty-five percent of the United States population self-reports that they have in fact criminally possessed and consumed marijuana.³⁸ In order to possess, they likely have also committed the act of purchase. If they have purchased, then they know someone guilty of drug trafficking. If they smoked their marijuana with a friend, then they are guilty of delivery, possession with intent to distribute, or drug trafficking, themselves. They are likely guilty of all three and could be charged and convicted as such. Yet, only 6.6 percent of the United States population has a criminal record,³⁹ and of course many of these offenders do not have marijuana convictions.⁴⁰ This leads to the inevitable conclusion that the vast majority of low-level marijuana use, purchase and distribution goes unchecked, or even ignored. In fact, legendary examples such as the annual Seattle Hempfest, or the Annual Great Midwest Marijuana Harvest Festival in Madison, Wisconsin, combined with average college graduates’ recollections of their dorm lives, must lead to the conclusion that enforcement is impossible, and frequently ignored. Anecdotally, readers must know from their own experience that the vast majority of low-level marijuana offenses do not lead to detection and enforcement by law enforcement or even a parental scolding. In fact, some municipalities are reluctant to enforce marijuana possession criminal statutes at all.⁴¹

37. See ProCon.org, 14 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Oct. 29, 2010); States That Have Decriminalized, The National Organization for the Reform of Marijuana Laws, http://norml.org/index.cfm?Group_ID=6331

38. According to the Executive Office of The President, Office of the National Drug Control Policy, in 2002, the most recent year published, 22.4 percent of high school seniors reported marijuana use within the past month. See Office of National Drug Control Policy, Drug Use Trends (Oct. 2002), available at <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse>. In the March 2003 Drug Data Survey, 55.6 percent of those aged 18-25 and 38.4 percent of those age 35 and over self-reported marijuana use in their lifetimes. See Office of National Drug Control Policy, Drug Data Summary (March 2003), available at www.whitehousedrugpolicy.gov/publications/factsht/drugdata/index.html.

39. BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1, 7 (2003), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=836>.

40. Drug and violent crimes combined account for fifty percent of incarcerations. See BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 4 (2006), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=778>.

41. Editorial, *Madison and Marijuana*, CAP. TIMES, Apr. 11, 2007, at A6. “Dane County District Attorney Brian Blanchard’s office no longer files criminal charges against individuals possessing less than 25 grams of marijuana....” *Id.*

Not all examples are so glib, and others perhaps better demonstrate serious criminality and the implications of the current coercive legislative and prosecutorial scheme. In Florida, former governor Jeb Bush was elected on a campaign platform that included a “tough on crime” stance including a pledge to push for the toughest gun law in the country.⁴² In 1999, the Florida Legislature, in a wildly popular and politically expedient decision, passed a 10-20-Life statute mandating minimum ten-year sentences for possession of a firearm during the commission of a felony.⁴³ Penalties increased for discharge of the weapon or death.⁴⁴ Significantly, these 10-20-Life penalties are served consecutively to any imprisonment for the underlying offense.⁴⁵ In passing this type of statute, the legislature has the benefit of looking “tough on crime” and sympathetic to the victim. In a society where jails are geared towards punishment and deterrence, the public can be assured that these goals are met and that no loopholes exist for this type of offense. Interestingly, despite published statistics that violent crime has decreased thirty percent, which Florida argues substantiates the deterrent effect, the number of 10-20-Life convictions has remained fairly constant during the life of the program.⁴⁶

Although democratic and not wholly illogical, this methodology has serious flaws. A comprehensive criminal code serves a social function and does, arguably, inform potential violators of the consequences of their actions.⁴⁷ However, it is arguable that in practice the creation of “designer” offenses, such as 10-20-Life, does not deter the behavior any more than before the enactment of the new prohibited act or sentencing scheme.⁴⁸ Further, the pressure exerted on a

42. *Legislative Briefing*, FLA. TIMES UNION, Mar. 5, 1999, at B3.

43. INMATE INFO. & ANALYSIS SECTION, FLA. DEP'T OF CORR., 10-20-LIFE CRIMINALS SENTENCED TO FLORIDA PRISONS 2 (2007), available at <http://www.dc.state.fl.us/pub/10-20-life/10-20-LIFE-Report.pdf>.

44. *Id.*

45. FLA. STA. § 775.0872(d) (2010).

46. INMATE INFO. & ANALYSIS SECTION, FLA. DEP'T OF CORR., 10-20-LIFE CRIMINALS SENTENCED TO FLORIDA PRISONS, *supra* note 43.

47. In much the same way that the Federal Register informs all citizens of the inner workings of the Federal Government, or publication of a notice of suspension of an unethical attorney in a volume of the state reporter gives notice to the unwary client base, the minutia of the criminal code is utterly lost on the vast majority of the public.

48. See Stuntz, *supra* note 33, at 519–20. “[C]riminal law’s depth . . . cover[s] the same conduct many times over. Suppose a given criminal episode can be charged as assault, robbery, kidnapping, auto theft, or any combination of the four. By threatening all four charges, prosecutors can, even in discretionary sentencing systems, significantly raise the defendant’s maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty. The odds of conviction are therefore higher if the four charges can be brought together. . . . Charge-

defendant by the 10-20-Life sentencing scheme greatly increases the possibility of accepting a plea agreement to any alternative charges that do not trigger the devastating consecutive enhanced sentencing provisions.

The statute does not impact all communities equally. National data reveals that forty-one percent of violent felons were black, non-Hispanic, thirty percent were Hispanic, and twenty-six percent were white, non-Hispanic,⁴⁹ numbers that are highly disproportionate to the national population.⁵⁰ While acknowledging that violent crime is an affront to the dignity of society, one cannot help but consider whether, in drafting a law that has disparate impact on one community, our leadership is affected, at a minimum subconsciously, by racism and, through its legislation, is targeting the crime they fear the most: violent black crime.⁵¹

The concern of unequal justice is compounded one degree further when one considers factors that affect immigrants, who are largely constituted of minority groups. It is well established that eyewitness identification is perceived by juries to be reliable, but

stacking, the process of charging defendants with several crimes for a single criminal episode, likewise induces guilty pleas, not by raising the odds of conviction at trial but by raising the threatened sentence." *Id.*

49. BUREAU OF JUSTICE STATISTICS, VIOLENT FELONS IN LARGE URBAN COUNTIES 3 (2006), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=596>.

50. According to a July 2007 estimate, the total U.S. population is white 79.96%, black 12.85%, Asian 4.43%, (note: a separate listing for Hispanic is not included because the US Census Bureau considers Hispanic to mean persons of Spanish/Hispanic/Latino origin including those of Mexican, Cuban, Puerto Rican, Dominican Republic, Spanish, and Central or South American origin living in the US who may be of any race or ethnic group (white, black, Asian, etc.); about 15.1% of the total US population is Hispanic. CIA: THE WORLD FACTBOOK, UNITED STATES, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Oct. 30, 2010).

51. Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 962 (2008). In his article addressing the evolution of the themes of his seminal 1987 work (on the inherent racism of a white-dominated multi-racial society historically rooted in institutionalized inequality) Lawrence observes that while overtly offensive racist language is less prevalent, the legal implications and outcomes of (perhaps) unconsciously racist attitudes remain the same:

"Cognitive behavior research focuses on individual bias. We take the Implicit Association Test as individuals and it proves that each of us harbors racial bias. Although the researchers count tens of thousands of our responses and offer this as evidence that this racial bias is widespread, many of my students and as many of my colleagues in the bar and legal academy do not think this proves that what we do collectively through the state has been infected by bias. For that, they say, we must prove conscious intent. *I have heard no logic to support the argument that eighty-eight percent of white people and almost half of blacks may be proved to harbor unconscious anti-black bias, but that this racism does not infect those elected to represent us.*" (Emphasis added).

minority groups are victimized by factors including cross-racial identification bias.⁵²

The legislative schemes produce serious coercive effects once the laws are in the hands of the attorneys employed by the elected local prosecutor. Election is dependent on successful (i.e. improving rates of) convictions.⁵³ High conviction rates require high rates of plea bargains. Plea bargains require leverage. Leverage can be in any number of forms, including catching a defendant “red-handed” or having credible eyewitnesses or surveillance footage of a crime. In many cases, leverage is achieved by charging a defendant with multiple offenses comprising the same conduct.⁵⁴ In this way, the prosecutor can threaten the consequences of conviction for the more serious offense in order to leverage the defendant into accepting a plea offer for a lesser included offense.

Some may see this arrangement as a very satisfactory, free-market arrangement for those charged with crimes, where defendants are able to make a deal depending on their own tolerance for risk at trial. However, this arrangement is troubling in that the prosecutor holds a great deal of power and the judiciary is largely eliminated in both its fact-finding and sentencing functions. Further, the defendant would not be arrested without police action, subsequently memorialized in a police statement or arrest report. Going to trial would likely mean contesting the accuracy of the impressions of law enforcement officers. The prevalence of over-charging and pressuring

52. See *State v. Cromedy*, 727 A.2d 457, 459–60 (N.J. 1999) (requiring necessity of jury instruction in case turning on eyewitness “identification” of witness several months after a rape and robbery, despite fingerprint and semen analysis eliminating defendant from spectrum of possible assailants. Further discussing the social science research revealing that white witnesses are more susceptible to the cross-racial mistakes in identification than vice versa). Misidentification is made even more likely by questionable profiling practices such as the “gang books” made notorious in Los Angeles and Riverside, California and group targeting like Florida’s crackdown, given the acronym “T.H.U.G.S.”

53. See, e.g., Catherine Jun, *Leyton Slammed as Soft on Crime*, DETROIT NEWS, Sept. 16, 2010, at A13, available at <http://detnews.com/article/20100916/POLITICS02/9160394/Election-ad-watch--Leyton-slammed-as-soft-on-crime#ixzz11EXbjOoS> (last visited Oct. 30, 2010); Gene Trainor, *GOP Primary Challenger Accuses Denton County DA of Being “Soft on Crime,”* STAR-TELEGRAM, Feb. 23, 2010, available at <http://www.star-telegram.com/2010/02/23/1992099/gop-primary-challenger-accuses.html#ixzz11EYe7rRt>.

54. See Stuntz, *supra* note 33, at 509. “As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law [or judges], determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments.” *Id.*

for guilty pleas has, in essence, transformed the police into the final fact-finders and the prosecutors into the role of sentencing judge.

This arrangement turns on the unfettered discretion of the prosecutor's office to both allege crimes and make deals. Others have written convincingly on the real impact, or lack thereof, of well-intentioned former students, sympathetic to the plight of indigent defendants, who nonetheless enlist in a prosecutor's office in order to use their new authority to do "good" or "justice."⁵⁵ In the culture of a prosecutor's office, being "soft" is an unwanted label, and second-guessing or confronting police officers can lead to a very difficult tenure, as the prosecutor cannot function without the cooperation of the police.⁵⁶ The result is an inherent institutional culture that is inclined to convict or make deals. I agree with Professor Smith and Professor Stuntz that the criminal justice system lacks its intended checks and balances if fear and lack of leverage in a negotiation session prevents a defendant from having meaningful access to the judiciary.

TRAINING DEFENDERS OF IMMIGRANTS OF QUESTIONABLE GUILT

"I hear and I forget. I see and I remember. I do and I understand."⁵⁷
-Confucius

If indeed over-criminalization by legislators and the subsequent pressure on, and ability of, prosecutors to extract convictions (i.e. guilty pleas), leads to questionable convictions, then this leads to my conclusion that a certain percentage of my students' clients are likely either wrongly convicted, or perhaps convicted of more severe crimes than they deserved. In the clinical environment, the students may be immersed into the world of victims of injustice and confront the inequalities they superficially discuss in other courses.

My students face the challenge of bifurcating their approach to the case, first balancing the legal analysis, of not "looking behind the

55. See Smith, *supra* note 5, at 391–93. "For the idealistic would-be prosecutor who intends to do things differently and resist the corrupting influences, the road ahead may be hard...But a prosecutor cannot really stand *alone* and effectively prosecute...The prosecutor who becomes known for questioning police officers' honesty, or worse, for dismissing cases or seeking sanctions against lying cops is not going to get a lot of police cooperation in his or her other cases." *Id.* at 391–92.

56. *Id.*

57. The Quotations Page, Quotations by Author – Confucius, <http://www.quotationspage.com/quotes/Confucius/> (last visited Nov. 21, 2010).

conviction,” and second, advocating for their clients in the discretionary phase of the application for relief from removal. In the discretionary phase, they face pressure from the client, who may want to tell their version, or “real” story of the underlying facts of the conviction, and pressure from the DHS prosecuting attorneys, whose view is likely limited to the unfavorable facts in the police report, and the judge, who likely will find that the client cannot show remorse and hence, the requisite “rehabilitation” without owning up to the facts in the police report.

To illustrate the preceding conundrum, consider two typical cases:

Mr. Aristotle, pro se in Removal Proceedings, defended himself when charged as deportable for two recent drug possession convictions, an older assault conviction and a recent conviction for resisting arrest and aggravated assault on a police officer (all Pennsylvania assaults involving police officers are considered “aggravated”).⁵⁸ In criminal proceedings, he was charged “in the aggregate,” resulting in eight (8) distinct charges relating to the incident with a police officer. He accepted a plea agreement for a lesser charge requiring a minimal sentence.

As a pro se litigant before the immigration judge, Aristotle was limited in controlling the direction and thoroughness of the examination. However, to the extent that the judge conducted his own examination, Aristotle took ownership of, and responsibility for, his criminal record. When confusion ensued during the testimony, and DHS counsel explained to the immigration judge that Aristotle was accused of attacking a police officer, Aristotle did not contest this fact, but actually thanked DHS counsel for assisting with the clarification. The only fact that Aristotle contested was whether it was plausible for him to attack and strike a police officer fifty (50) times as listed in an arrest report, when such officer was accompanied by other officers who could have intervened.

Neither the judge nor DHS counsel asked Aristotle why he might have engaged in a confrontation with the

58. Transcript on file with author, name changed on account of litigation.

police. Aristotle's history as a victim of extensive, repeated violence played a role in his reaction to what he perceived to be a threatening situation. Testimony on this issue would have been revealing to his acceptance of responsibility, remorse and potential for rehabilitation.

The Immigration Judge granted relief in the case, noting positive and sympathetic factors including Respondent's long residence, family ties and work history, as well as his sad physical state, including being permanently tethered to a colostomy bag as a result of being a repeat victim of multiple gunshot wounds during robberies of his workplace.

Unfortunately, the Board of Immigration Appeals (BIA) reversed the discretionary decision as being unsupported by the record. The BIA noted that Mr. Aristotle conceded to his recent habitual drug use, partially attributable to his chronic pain. However, when questioned about "all" of his criminal activities, he did not accept responsibility for his conduct (ostensibly by not conceding to all of the exaggerated facts of the police assault case), which the BIA found to not be indicative of genuine rehabilitation.

...
Mr. Roberts, 40,⁵⁹ native of Jamaica and permanent resident since age 21, has had four arrests. The first, for possession of marijuana, he contested, resulting in an entry of nolle prosequi, when the state declined to proceed to trial. The second, also for possession of marijuana, resulted in charges that he took to trial, where he won an acquittal. Regarding the third arrest, he was charged with criminal possession of a concealed firearm, despite possessing and showing the arresting officer his permit. He contested the charge, which was dismissed. He later sued the police department for wrongful arrest, resulting in a \$10,000 settlement. The fourth arrest occurred as he was travelling from Miami to Nashville with a friend. While crossing rural Georgia, the friend was driving and the men were stopped for a speeding violation. The friend also had no

59. The facts of a real clinic case.

proof of insurance. The police searched the car and located one marijuana cigarette. Both men were charged with possession, transportation and importation of a controlled substance. All of the crimes, including possession of marijuana, are felonies in Georgia.

After spending two nights in jail in Georgia, Roberts posted a bond and returned to Miami. He returned to Georgia for two subsequent hearings, at the latter of which he pled guilty to simple possession of marijuana in exchange for a sentence of time served and 60 days of probation which he could complete in Miami.

He contended that he was, in fact, innocent of possessing marijuana and that the plea was entered solely for convenience and out of fear of going to trial in Georgia for marijuana importation, not only as a black man, but as a Jamaican man.

On one hand, Roberts' explanation made no sense. He was a person who denied charges each time he was wrongly arrested, and had the wherewithal and sense of justice to sue a police department over a malicious arrest. Even with his life experiences, he entered a plea of guilty for possession of marijuana that belonged to someone else.

On the other hand, his plea was perfectly logical. He was a man highly inconvenienced by having to travel inter-state in order to defend himself, who faced a maximum sentence of two years in jail, was charged in the aggregate, and had a sense, based on his prior experiences, that law enforcement cannot be trusted and society is inherently racist.⁶⁰ To him, the indignity of entering a wrongful plea

60. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1559–60 (1989). Professor Davis explains findings that minorities are more likely than other Americans to doubt the fairness of the court system and regularly report that the law will work to their disadvantage. Although this overtly racist ideology has become socially unacceptable, more minor, but still negative, cultural cues affect the minority individual. *Id.*

See also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991); Blair Taylor, *Mel Gibson and America's Hidden Racism*, CNN (July 15, 2010), <http://www.cnn.com/2010/OPINION/07/14/taylor.gibson.race/index.html?iref=allsearch> (“Th[e] 21st-century form of racism is running rampant in our society and it is more difficult to combat than its 20th-century cousin....In the past there was something liberating in at least being able to identify those who were the real racists.”). *But see* R. Banks, J. Eberhardt and L. Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169,

was nothing compared to the possible threat to his freedom. He was unaware that a conviction of marijuana possession was going to compromise his future in the United States and render him removable after he traveled abroad to visit his mother.⁶¹

My students had to confront the issue of how to present his testimony regarding the Georgia conviction. Roberts was, quite plausibly, an innocent convict. Fortunately, he was statutorily eligible for relief under Cancellation of Removal.⁶² We were confident that he would likely receive the waiver, due to the *de minimis* nature of the offense, but we were concerned that the only obstacle would be a perceived lack of “rehabilitation” if Roberts testified to the true facts of the case.⁶³ The judge would be bound by the facts in the record of conviction, so if the testimony was inconsistent, this would be a very negative factor.⁶⁴ Hours of counseling over two months did nothing to dissuade Roberts from his view of the actual events in Georgia. Assured of his testimony, the students prepared their arguments so that he could attempt to show his rehabilitation despite disclaiming any actual involvement in the marijuana offense that led to his conviction.

In court, on direct examination, the student asked Roberts to recount his perspective on the crime and his reflection on his involvement in the offense. In a lengthy and heartfelt response, Roberts proceeded to (I suspect, but do not know) perjure himself.

The judge granted his case. Afterwards, Roberts apologized to us, thanked the students for their hard work, and said that after a lot of thought, he had decided to take justice into his own hands and tell the judge what he (the judge) “needed to hear” in order to grant the case. He made this choice rather than asserting his dignity, fighting for the truth of the matter and potentially risking losing his residency and life in the United States with his U.S. citizen daughter. We were left to wonder at our impressions of his honor and to wonder about which potential version of the facts was more shrouded by Roberts’ sense of denial.

1170 (2006) (“It is often extraordinarily difficult to identify individual instances of discriminatory decisionmaking by, say, police officers, in part because of the discretion they exercise. Thus, claims about discrimination will tend to focus on racially disparate outcomes, which may be interpreted as evidence of discriminatory decisionmaking.”)

61. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1490–93 (2010) (Roberts, C.J. and Alito, J., concurring) (noting that under recent Supreme Court precedent, defense counsel now has an affirmative obligation to research the immigration consequences of pleas and to counsel defendants accordingly).

62. *Mayers v. INS*, 175 F.3d 1289 n.3 (11th Cir. 1999); 8 U.S.C. § 1229b (2005).

63. *See In re Marin*, 16 I. & N. Dec. 581, 585–86 (B.I.A. 1978).

64. *United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1226 (9th Cir. 2005).

Immigration judges have precedent decisions to provide them with guidance on the issue of granting discretionary relief.⁶⁵ The DHS Assistant Chief Counsel has internal guidance on cases in which they may consider exercising prosecutorial discretion.⁶⁶ Respondents may request that the DHS counsel do just that but, in essence, the request is for DHS to drop the case rather than amend charges or make any sort of “deal.” As a result, it is rare that discretion is exercised in this form.

Discretion is much more often illustrated in the attitude of the DHS counsel or the intensity of their cross-examination of the client. Many Assistant Chief Counsel are reasonable in this regard, while others treat the administrative hearing as a true adversarial situation.⁶⁷ Those in the latter category can compound the injustice meted out in the criminal courts. For example, they use police reports to attempt to destroy the applicant’s credibility or impose their own value judgments to discredit the decisions of the immigrant.

A major part of the problem with the lack of exercise of immigration prosecutorial discretion lies in the Immigration and Nationality Act itself. The list of offenses that can cause mandatory deportation is extraordinary.⁶⁸ For example, if a lawfully admitted non-citizen has any drug possession offense within their first seven years in the United States and ever leaves the United States, he is inadmissible upon his return.⁶⁹ Any possessory offense other than 30

65. *In re Marin*, I. & N. Dec. at 583.

66. See Memorandum from the Immigration & Naturalization Service, U.S. Dep’t of Justice, HQOPP 50/4, Exercising Prosecutorial Discretion (Nov. 17, 2000), available at <http://www.callyourlawyers.com/pdfcaselaw/discretion.pdf>.

67. Although more care is perhaps mandated in the area of refugee and asylum determinations, in that context, the Board of Immigration Appeals has instructed that “immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done. In that regard, the handbook for trial attorneys states that “[t]he respondent should be aided in obtaining any procedural rights or benefits required by the statute, regulation and controlling court decision, of the requirements of fairness.” Handbook for Trial Attorneys § 1.3 (1964). See generally *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992) (finding astonishing that counsel for a federal administrative agency denied that the A.B.A. Code of Professional Responsibility holds government lawyers to a higher standard and has obligations that ‘might sometimes trump the desire to pound an opponent into submission’); *Reid v. INS*, 949 F.2d 287 (9th Cir. 1991) (noting that government counsel has an interest only in the law being observed, not in victory or defeat.” *In Re S-M-J*, 21 I. & N. Dec. 722, 727 (B.I.A. 1997).

68. See INA § 237(a) (2010).

69. INA § 212(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2010); INA § 240(A)(a), 8 U.S.C. § 1229b(a) (2010) (“The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has been an alien lawfully admitted for permanent residence for not less than 5 years, has resided in the United States

grams or less of marijuana is a ground for deportation even if the alien never travels abroad.⁷⁰ Similarly, an immigrant can plead guilty to a felony theft offense where a sentence of one year is suspended by the criminal judge, never serve a day in jail and yet be permanently barred from all forms of relief, regardless of when the offense occurred.⁷¹ Both family members of citizens and professionals seeking to immigrate are barred from entry if they have any drug convictions in their past.⁷² In fact, they are expected to disclose not only arrests and convictions, but other violations that went undetected, thus self-reporting contributes to their own inadmissibility.

CONFRONTING THE CRISIS AS PEDAGOGICAL TOOL

As part of my reflection regarding the goals of my program, I have tried to analyze whether my emotional reactions to what I perceive as injustice (or potential injustice) coincide with relevant teaching goals. As a laboratory of experiential learning, clinical legal education has a variety of learning opportunities ranging from the pragmatic to the philosophical. Students learn a range of skills as simple as file maintenance and note-taking in court, and as complicated as nuanced, novel legal research and argument, all against the backdrop of the mission of the individual clinic and its service of its clients.

I have touched upon the outrage that I feel regarding over-criminalization and the frustration I feel with many prosecutorial

continuously for 7 years after having been admitted in any status, and has not been convicted of any aggravated felony.”).

70. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2010).

71. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2010) (stating that “any alien who is convicted of an aggravated felony at any time after admission is deportable”); INA § 101(a)(43)(G), 8 U.S.C. § 1101(43)(G) (2010) (stating that “the term “aggravated felony” means—a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year”); INA § 101(a)(48)(B), 8 U.S.C. § 1101(48)(B) (2010) (stating that “any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part”).

72. This phenomenon is addressed at length in Nancy Morawetz’s article, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 166–67, 170, 202, 207 (2008). Professor Morawetz utilizes widely known examples of drug use to make her point. For example, she argues that there should be a consistency in attitudes and legal treatment of past drug use, which is neither a bar to serving in the FBI nor as the President of the United States. *Id.* at 165, 169, 198–200. “84 percent of voters (polled) said that they did not think that proof of cocaine use in his twenties should disqualify Bush from the presidency.” *Id.* at 165.

priorities, choices and methodologies. Fighting for “justice,” in the form of legal remedies such as avoiding deportation is, on the surface, what I do with my students. I have ulterior motives in the selection of this practice area, and my philosophical roots will be tested in the subsequent pages of this article.

COURSE DESIGN

In assessing my program, and in seeking to implement some of the methodology of leading educational theorists, I look at the ultimate goals that I have for my students to achieve through participation in the clinic.⁷³ I then look at the steps necessary to implement my goals and determine whether my investment of my most scarce resource—time—is effectively coinciding with achieving my stated goals. I then must consider whether my plan and syllabus effectively implement my goals. Finally, I must consider whether I simply have too many goals, or if there are more effective means to accomplish my goals in an efficient manner.

I have concluded that my primary goals for my students are for them to be able to effectively solve problems, be able to successfully interact with clients with goals similar and dissimilar to their own, and to be able to have a reflective practice that gives them the self-awareness to subjectively determine whether they are pursuing their own ambitions and finding self-satisfaction in their work. My primary goal for the clinic as an institution is to serve vulnerable members of society with empathy. By doing so, the clinic can advance an understanding of human rights that is broad enough to encompass the needs of families and communities, with particular attention given to those who are marginalized by being on the weak end of a power dynamic.

In order to synthesize these two goals, the clinic represents cases that may initially bring the institutional ideology into question but, I believe, will ultimately strengthen and support my thesis for case selection. To illustrate the paradox, due to geography, the clinic historically represents many asylum seekers from Haiti. In recent years, sometimes simultaneously, we advocated for clients who were part of the overthrown Aristide regimes and for clients who were victimized by the same Aristide regimes. This arrangement has led to animated discussions on factual, legal, and ethical issues. In my

73. See GRANT WIGGINS & JAY MCTIGUE, UNDERSTANDING BY DESIGN 13–18 (ASCD 2d ed. 2005).

experience, discussing and developing the cases of clients who appear to have disparate interests forces the students to challenge their assumptions and to maintain a heightened sense of objectivity and client-centered-ness.

Another primary type of case that the clinic deals with is advocacy for victims of domestic violence eligible for relief under the Violence Against Women Act (VAWA).⁷⁴ These cases are at once socially visible and invisible. Their problems and “victimhood” are unassailable, so much so that Congress ratified protection for these immigrant victims who can, under VAWA, take advantage of the family-based immigration system without the assistance of the sponsoring (abusive) family member.⁷⁵ Yet, our clients frequently have experienced so much cultural and familial marginalization that they cannot function in society without the support of the student advocates.

In marked contrast with the asylum and VAWA cases, the clinic also accepts cases of immigrants with criminal convictions, as discussed previously. In fact, students have represented cases of clients who have been convicted of offenses involving domestic violence. It is in cases such as this, cases that appear on their face to possibly be at odds with our mission, that I argue that the virtues of the clinical experience are fundamentally extolled.

It is an illuminating experience to work with students serving clients easily identifiable as victims, as our asylum and VAWA clients are. In the course of developing the cases, we address the roles of counsel in interviewing a victim of trauma. The students gain confidence and competency in dealing with emotionally volatile situations. More often than not, the students are actively involved in facilitating clients’ assessment and treatment by a counselor, psychologist, or other mental health specialist. Working with a counselor helps the client deal with their personal trauma and also prepares them to be able to present the painful facts of their lives so that the students may corroborate the harm and substantiate the claim of past abuse or persecution for the sake of the case. More than just winning or losing cases, I see the importance of this work as an opportunity for students to reflect on who their clients are, and realize the interdisciplinary need for thorough representation of real clients, whose needs and priorities typically exceed the particular legal problem that the students are responsible for addressing in the clinic. I

74. See INA § 204(a)(1)(A)(iii)(I)–(II), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)–(II) (2010).

75. *Id.*

also want the students to confront their own feelings about working with victims and recognize their own susceptibility to transference and secondary trauma.⁷⁶

It is another matter altogether to have a discussion about accepting the case in which the client is the perpetrator of harm, through commission of an offense leading to their conviction.⁷⁷ We cannot accept every client that applies for our assistance and we frequently have discussions about the values and mission of the clinic. Over the course of time, the students tend to realize that their advocacy for criminal clients involves concerns similar, if not identical, to those that they confront in their advocacy for their other, more “victim-like,” clients.⁷⁸ They quickly ascertain that the criminal clients usually have deep fears and have likely been traumatized, on some level, by their interaction with the criminal justice system.⁷⁹ Typically these clients are profoundly affected by the insecurity of their status in their adopted country. They very well may be experiencing immobilizing effects of their stress, similar to that of many of our victims of physical or psychological trauma,⁸⁰ making them dependent on the students for strict guidance for completion of seemingly routine tasks to build their cases. Many, through embarrassment or pride, have crafted profound senses of denial that students can only pierce through months of conscious effort to build a trusting relationship. Other clients are factually innocent and must deal with their regrets of entering an

76. See Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 *PACE L. REV.* 245, 245–46 (2003).

77. See Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 *WM. & MARY L. REV.* 1843, 1845 (2002) (Addressing the modern implementation of victim-centered domestic violence laws, Epstein, director of a clinic serving victims of domestic violence, remarks that “it is hardly surprising that most scholars, policymakers, and activists have been relatively unconcerned that most recent reforms have reduced the level of procedural justice accorded to batterers.”).

78. See *id.* at 1904–05 (“The legal achievements of the battered women’s movement—including mandatory arrest (policies), no-drop prosecution, and the Model Code on Domestic and Family Violence—have dramatically improved victims’ access to justice and the likelihood that perpetrators will be held accountable. At the same time, however, each of these reforms has contributed to a substantial reduction in the procedural justice accorded to batterers....The procedural justice data indicate the existence of a close connection between batterers’ sense of fair treatment and victim safety.”).

79. See generally Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 *CLINICAL L. REV.* 605, 607 (2006) (“Therapeutic jurisprudence explicitly values the psychological wellbeing of the client, and recognizes that the legal interaction will produce inevitable psychological consequences for him or her.”).

80. See Epstein, *supra* note 77, at 1902–03.

improvident plea of convenience rather than confronting the “system.”⁸¹

Returning to my concern regarding course design, I must consider how to teach and monitor the implementation of the skills that students need to effectively navigate the legal, factual and emotional complexity of their client’s cases. Fortunately, I have myriad tools, if not time, at my disposal for accomplishing the technical side of this process. Our clinic, like most, makes use of a three-pronged course structure including a weekly classroom seminar, weekly individual case team meetings, and mandatory office hours. The seminar is a combination of “case method” interactive lectures, trial skills practice sessions and case rounds discussions. I incorporate guest speakers for topics beyond my expertise, most notably presentations on the role of mental health experts and working with victims of trauma. I monitor students’ implementation of instruction by requiring both planning and reporting memoranda, use of video and peer review and feedback. I also model behavior by representing some clinic cases that for pedagogical and practical reasons may not be conducive to passing on to a team of students. In short, based on my experience, I am fairly confident that my current practice of skills training is evidence that my goals are relevant and appropriate and my technique and actual implementation leads to a satisfactory achievement of my goals.⁸²

Addressing my goals and achievements when it comes to passing on my philosophy and ideology regarding client selection and the role of the attorney is another matter altogether. The next section will deal with my major legal and philosophical influences and what I have deemed to be the easiest ways to challenge students with them.

CRITICAL RACE THEORY IN MOTION

Teaching in an immigration clinic serves as a laboratory for intercultural exchange. Because we are a free legal services provider serving low-income immigrants, the students are often separated from their clients by their educational level, wealth, nationality, race, and privilege. They are charged with becoming engaged in the cases and

81. See Smith, *supra* note 5, at 391; Stuntz, *supra* note 33, at 537.

82. I am distinguishing the accomplishment of developing competence in discrete lawyering tasks from the “aim to develop competence ... in resolving legal problems effectively and responsibly,” the overarching goal of lawyering, as detailed in Roy Stuckey & Others’ work, *BEST PRACTICES FOR LEGAL EDUCATION* 59 (2007). I suggest that this pursuit is one without end.

lives of their clients and through their advocacy, giving voice to the need for justice that contemplates the realities of their clients' difficult lives. Their success in their client relationship is judged in their effectiveness in humanizing this story. Their success in trial will turn on being able to help the client express and contextualize their experiences.

Our mission is one that is parallel to those of scholars of Critical Race Theory, in that we are trying, on an individual basis, to give voice to particular clients who are subordinated in society by their race, immigrant status, and poverty.⁸³ I believe that it is essential to my mission for students to question the role of power dynamics, class, and race in order to fully comprehend and express the equities of their client's case. In doing so, I am preparing them to be fully engaged advocates for a humanitarian practice of law, one rooted in their personal experiences and those of their clients.⁸⁴

The beauty of the clinical experience is that students learn from their clients as much as they do from me. I desperately want them to be aware of their position of power, one likely born of their own privilege and opportunity. Only once they realize the extent of their power and privilege can I hope that they make well-advised, sensitive, and responsible decisions on behalf of clients from disparate experiences. Even my less well-off students, or those from socially vulnerable minorities, can see that they are permitted the luxury of seeking higher education. They are juxtaposed against the reality of their clients, likely working for hourly wages, home ownership a distant dream, freedoms and dreams suppressed by the realities of the working poor. Students must consider aspects of difference in their relationships with their clients, employing their active cognizance of their identity and acknowledge fundamental differences or look for similarities that bind them with their clients. They are then prepared to purposefully engage in the inquisitive methods of "parallel universe thinking" and conceive of ways of bridging any gaps in

83. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329, 1331 n.7 (1991) ("Critical Race Theory...refers to the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination.").

84. See *id.* at 1331 (discussing the "eclectic," "post-modern" self-awareness of Critical Race Theory scholarship, relying equally on personal experience, story-telling and legal sources in order to fully express a concern for justice).

understanding.⁸⁵ Participating in this exercise with clients prepares them for their ultimate challenge: conveying a client's story and facilitating understanding in the courtroom.

INCORPORATING RELIGIOUS SOCIAL TEACHING

I am the product of both the liberal arts and Catholic educational institutions and have spent the majority of my professional life working for, or teaching at, Catholic institutions. Consequently, I have been influenced by the concept of Catholic social teachings, an external pronouncement of ideals and goals that, even to a secular practitioner like myself, provides affirmation of commonly held principles of decency toward other members of humanity. I also look at the mission of the university where I teach and must consider if our work is consistent with institutional goals.

Within the doctrine of Catholic Social Teaching there are several guiding principles including respecting the life and dignity of the human person, placing high regard on the common welfare of the family and community, showing solidarity in the pursuit of justice and peace for all, the prioritization on work to serve the collective, the fundamental right to live a decent life (including family life, food and shelter, education and employment, health care, and housing), and that a fundamental measure of our society is how we care for and stand with the poor and vulnerable.⁸⁶

It strikes me that our criminal clients' outsider status as both non-citizens and criminals make them uniquely socially undesirable. Even advocates for a more generous immigration policy are generally in favor of tough sanctions for the criminal non-citizen.⁸⁷ The challenge in representing these cases lies in part in convincing a judge

85. Susan Bryant & Jean K. Peters, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 70–72 (2001).

86. See United States Conference of Catholic Bishops, *The Seven Themes of Catholic Social Teaching*, <http://www.usccb.org/sdwp/projects/socialteaching/excerpt.shtml> (last visited Nov. 21, 2010).

87. At the highest levels, President Obama spoke in favor of a comprehensive immigration reform that would lead to legalization of productive undocumented immigrants on July 1, 2010. President Barack Obama, *Remarks by the President on Comprehensive Immigration Reform* (Jul. 1, 2010) (transcript available at The White House Blog, <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform>). He gave a separate, enforcement-minded speech six weeks later. President Barack Obama, *Statement by the President on the Passage of the Southwest Border Security Bill* (Aug. 13, 2010) (transcript available at The White House Blog, <http://www.whitehouse.gov/the-press-office/2010/08/12/statement-president-passage-southwest-border-security-bill>).

that such a low status individual is worthy of being reintegrated into the larger society, essentially receiving a second chance in the United States. Typically, through reflection in team meetings, I lead the students in a discussion regarding our ultimate goals in representing a client. We likely will end up in a discussion of what is “justice.” Justice in our cases extends to deep social ramifications that implicate the priorities of Catholic Social Teaching. If our clients do not prevail, the students realize that the social affects are profound, children are made more vulnerable, and spouses are financially destroyed. Deportation could lead to families defaulting on homes or moving to less-desirable areas, children losing the support and security of parental involvement and the family becoming reliant on government support systems. If the family moves abroad with the deported relative, chances are high that they will suffer a loss of many opportunities that they otherwise would have enjoyed in the United States.

SYNTHESIS: THE STORY - GIVING VOICE

The older brother became angry and . . . answered his father, “. . .But when this son of yours who has squandered your property with prostitutes comes home, you kill the fattened calf for him!”

“‘My son,’ the father said, ‘you are always with me, and everything I have is yours. But we had to celebrate and be glad, because this brother of yours was dead and is alive again; he was lost and is found.’”

- Luke 15:11-32 The Parable of the Lost (Prodigal) Son

The Prodigal Son encapsulates the challenge of advocating for the criminal immigrant. They have been given the gift of a trial membership in our national community, have compromised themselves, and face the challenge of trying to make another understand why they deserve more generosity, despite their transgressions.

The Department of Homeland Security plays the role of the furious older brother, indignant in their righteousness, sometimes belligerent, but almost always highly skeptical of any potential charity on the part of the court. Although they seek justice in the name of the government, all too frequently, justice seems to be confused with certain deportation. Attitudes, of course, vary widely, and I do not seek to paint with too broad a brush. However, the aspirational language

“the government wins when justice is done” is highly dependent on the individual DHS counsel’s definition of “justice.”⁸⁸

DHS and the judges only hear the client’s story in those cases where the immigrant establishes eligibility for relief.⁸⁹ Those who are statutorily barred from relief are simply deported without regard to whether it is equitable given, for instance, their ties to the United States.⁹⁰ Serious offenses are deemed aggravated felonies and bar relief.⁹¹ Consequently, the court can only provide relief in cases involving a limited range of somewhat less serious offenses.⁹² Despite this, a win-at-all-costs attitude characterizes some DHS attorneys.⁹³ The possibility of drawing this type of opposing counsel forces the students to deeply understand and empathize with their client’s cases and the social and cultural backdrop of their stories.

Consider the following scenarios:

A young Asian man is in mandatory custody at an immigration detention center. His family appears in court for support and to testify on his behalf. They have hired an attorney, who seems to have been diligent in preparing the case. Testimony is extensive. The attorney

88. *In re S-M-J-*, 21 I. & N. Dec. 722, 727 (B.I.A. 1997).

89. INA § 240(a)(1)–(b)(1), 8 U.S.C. § 1229b(a)(1)–(b)(1) (2010); *See In re Marin*, 16 I. & N. Dec. 581, 582–85 (B.I.A. 1978).

90. 8 C.F.R. § 1212.3(f) (2010).

91. 8 C.F.R. § 1212.3(f)(4) (“An application for relief under former section 212(c) of the Act shall be denied if: the alien has been charged and found to be deportable or removable on the basis of a crime that is an aggravated felony.”); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2010) (“The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien...has not been convicted of any aggravated felony.”); INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2010).

92. *See* INA § 240(a)(1)–(3) 8 U.S.C. § 1229b(a)(1)–(3) (2010); INA § 237(a), 8 U.S.C. § 1227(a) (2010).

93. Professor Smith makes some compelling remarks on the interplay of clients, prosecutors and defense attorneys:

“Most prosecutors believe that if someone breaks the law, he or she ought to be prosecuted. Individual accountability is everything. Individual circumstances, the forces that cause an event to happen, and the broad context of the matter only clutters things up. If the law is sometimes harsh, this is the responsibility of those who make the law, not those who enforce it. This tendency to see things in black and white may be related to prosecutors not having clients. Prosecutors represent the government, not a flesh-and-blood client. They represent an abstract entity, not someone with frailties, weaknesses, vulnerabilities. Although some prosecutors claim to be ‘representing victims’—and some prosecutors may develop close bonds with some victims—the relationship between prosecutors and alleged victims is a complicated one, not fairly analogized to the lawyer-client relationship. The reality is that alleged victims are prosecution *witnesses*, not clients.” Smith, *supra* note 5, at 381.

Defenders, on the other hand, undertake the representation of *people* in all their ugliness and splendor...[E]mpathy...requires acknowledging the random nature of good and bad fortune in life.” *Id.* at 380–82.

introduces psychological assessments and elicits testimony regarding how, a few years previously, the young man suddenly transitioned from honors classes to nearly failing in his last year of high school, how he did not go to college despite being accepted, had a string of meaningless employment and fell in with new friends who succeeded in helping him find trouble.

As emotional testimony revealed, the turning point in his life was in the fall semester of his senior year of high school when one day after school he went to help his father at his family's store. Soon after he arrived, the store was robbed and his father was shot and killed in front of him.

The defense rests its case after presenting an argument that severe emotional trauma could have lasting impact on the young man's judgment, as reflected in his subsequent criminal problems, regarding which he testified that "at the time I didn't really care what happened to me."

DHS went into attack mode:

So you are saying that your father's death had a major impact on you?

-Yes

So this is why you started using drugs?

-Yes

OK, so the first time you bought drugs it was missing your dad that made you do it?

-(Objection overruled)

-That's not it.

So when you brandished a weapon at that gang-banger that cut you off in your car, it was your absent dad that made you do that too?

-(Objection)

Judge, he can't show rehabilitation if he can't take responsibility and he is still making excuses.

(Judge) You have a point.⁹⁴

In a similar case discussed above, of Mr. Roberts, DHS used a more common tactic, in a moment when Roberts waived in his contrition:

Sir, tell me again why you were pulled over in Georgia?

-My friend was speeding.

And why were you arrested?

94. Paraphrased from a hearing witnessed by the author while clerking at the Lancaster Immigration Court, June 2000. Relief was granted at the conclusion of the hearing. No transcript exists.

-They found marijuana.

And why did you plead guilty?

-I had to take responsibility, and it was Georgia.

What do mean by that?

-I mean, what does an out-of-state black man do in this case, I had to take responsibility.

Sir, are you saying this happened because you are black?

-It is not that, but it might not have happened if I wasn't.

Sir, the police report says that they arrested you because they found marijuana in the car. It doesn't say they arrested you because you were black.

-Well of course not.

Sir, if you are contesting this now, I am going to bring the police officer in to challenge your attack on his integrity.

-(Objection, this whole line of questioning is a series of mischaracterizations of the preceding testimony and answers)

Judge, he is making excuses, pointing fingers, placing blame, and not taking responsibility!⁹⁵

CONCLUSION

It is against the backdrop of these worst-case scenarios that I work with my students, teaching skills, expecting them to develop empathy and show thoughtful diligence. In exchange for their dedication, I must always consider my role in guiding them in their cases, thinking how my leadership in the few cases that I share with them can best serve as a template for their approach to client service in their future years. It is at this stage of analysis that I can best synthesize my belief that schools of thought such as Critical Race Theory, can leave the instructive, yet perhaps not pragmatic world of law journals,⁹⁶ and play a concrete role in case development.

95. Paraphrased from a student-represented hearing witnessed by the author at Miami Immigration Court, December 2007. Relief was granted at the conclusion of the hearing. No transcript exists.

96. See generally Richard A. Posner, *Comment: Duncan Kennedy on Affirmative Action*, 1990 DUKE L. J. 1157 (1990) (critiquing Professor Kennedy's assertions regarding the need for race-based quotas and the contributions of minority-themed scholarship in general and Critical Race Theory in particular); Roy L. Brooks & Mary J. Newborn, *Critical Race Theory and Classical-Liberal Scholarship: A Distinction Without a Difference?*, 82 CALIF. L. REV. 787 (1994) (considering the "macro- and microtheoretical" differences between Critical Race Theory and "classical-liberal civil rights scholarship").

Critical Race Theory presents a useful model in the frequent use of narrative to compel the reader to grasp the author's view on a niche of inequality.⁹⁷ Through narrative, subscribers to the movement must illustrate the most difficult social problems that they can detect.⁹⁸ By giving voice to these problems, the rest of us can see flaws in the systems that give rise to an intractable social condition.⁹⁹

This approach has everything in common with the ideals that I espouse in teaching my students to represent their criminal immigrant clients. Not only are our clients doubly marginalized, but they are, in my opinion, a human rights crisis in and of themselves. The United States is legitimately and actively seeking to rid itself of its non-citizen criminal population as a first priority of the Department of Homeland Security.¹⁰⁰ Those that are eligible or arguably eligible to stay are in desperate need of the best representation.

I remain troubled by the nature of many clients' underlying convictions that lead to their immigration problems. Our law enforcement scheme, legislative structure and the plea-oriented coercive premise of prosecution gives me legitimate concerns that in some of our clients' cases, we are defending innocent convicts. At the same time, I am well aware that in many cases those who are properly convicted are just the proverbial "tip of the iceberg" of the offending population and that our client is just unlucky to have been subject to enforcement. I am confounded as to why our immigration code is so unforgiving and unrealistic that my clinic is defending potential deportations of individuals with very old crimes and minor infractions such as single convictions for marijuana possession. I am greatly concerned that our nationally entrenched inequality in race, poverty, and crime is further compounded by deportation.

The full effects of our prosecutorial scheme and punitive immigration system are borne out by family left behind and the stressed social support structures that must compensate for deported parents, spouses and caregivers. This is a human rights problem, one without an easy solution. Achieving meaningful "reform" that creates

97. See Matsuda, *supra* note 83, at 1331, 1346–48, 1392, 1394; Brooks & Newborn, *supra* note 96, at 844–45.

98. See Matsuda, *supra* note 83, at 1331, 1348, 1392, 1394.

99. See Brooks & Newborn, *supra* note 96, at 844–45.

100. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, FACT SHEET: CRIMINAL ALIEN PROGRAM (2008), *available at* <http://www.ice.gov/doclib/news/library/factsheets/pdf/cap.pdf> ("U.S. Immigration and Customs Enforcement (ICE), the largest investigative agency in the Department of Homeland Security, places a high priority on combating illegal immigration, including targeting illegal aliens with criminal records who pose a threat to public safety.").

a system that is less self-righteous and more tolerant of individual's flaws may come at a high political cost. However, those teaching the leaders of tomorrow have no choice but to expose our students to the complex realities and consequences of our domestic policies. By deeply contemplating how we treat our foreign residents, we actually are turning a mirror to ourselves.

